
(1973) 02 DEL CK 0034

In the Delhi High Court

Case No : Company Appeal No. 16 of 1972

Jawahar Singh Bikram Singh Pvt. Ltd., Delhi

APPELLANT

Vs

Sharda Talwar

RESPONDENT

Date of Decision : 13-02-1973

Acts Referred:

Citation : (1974) 44 CompCas 552 : (1973) 9 DLT 524 : (1973) 2 ILR Delhi 772 : (1973) RLR 222

Hon'ble Judges : M.R.A Ansari, J;D.K. Kapur, J

Bench : Division Bench

Advocate : R.C. Beri and Satish Chander, for the Appellant;

Judgement

D.K. Kapur, J.

(1) The late Shri Krishan Talwar had instituted proceedings u/s 397 and 398 of the Companies Act, 1956, in respect of M/s. Jawahar Singh Bikram Singh (Private) Ltd. In those proceedings, which were filed before the Companies Tribunal, New Delhi, Shrimati Sharda Talwar the petitioner's wife as well as "Darshan Singh Pheruman and Jaswant Singh were shown as persons consenting to the petition. Of these, Darshan Singh Pheruman and Shrimati Sharda Talwar had been joined as proforma respondents. The petition was transferred to this High Court from the Companies Tribunal on 29th October, 1966. During the pendency of the proceedings, Shri Kishan Talwar, petitioner died on 22nd February, 1972. It may be mentioned that the original petitioner, Shri Kishan Talwar together with the consenting parties already mentioned, were stated to hold more than one-tenth of the issued share capital of the company. There was an order passed by S. K. Kapur J. on 26th November, 1968 accepting that these persons held the requisite share holdings and thus. the requirements of Section 399 of the Companies Act, 1956 were complied with and the petition was maintainable.

(2) After the death of the petitioner, his widow Shrimati Sharda Talwar who was

shown as a pro-jorina respondent applied to be transposed as a petitioner. No application was made by the legal representatives of the deceased petitioner to be joined as parties. Although Shrimati Sharda Talwar was one of these legal representatives, there is no dispute that there are other legal representatives who are not on record. The application for transposition was contested by the company, but Rangarajan J. passed the order under appeal on 24th November, 1972, rejecting the opposition and permitting the applicant, Shrimati Sharda Talwar to be transposed as petitioner in the proceedings. Against that decision the company has appealed u/s 483 of the Companies Act, 1956.

(3) It is contended on behalf of the company that the petition under Sections 397 and 398 of the Act had abated by the death of the petitioner, Shri Kishan Talwar and proceedings could not be revived by transposing Shrimati Sharda Talwar. It is submitted that only the legal representatives of the deceased petitioner could have continued the proceedings. It is further submitted that Shrimati Sharda Talwar did not obtain the consent of one-tenth of the shareholders of the company or holders of one-tenth of the share capital of the company. It is, therefore, submitted that Shrimati Sharda Talwar could not have herself brought a petition under Sections 397 and 398 of the Companies Act, 1956 on the date on which she was transposed. Consequently, it is submitted that the transposition order in effect allows Shrimati Sharda Talwar to avoid the effect of Section 399 of the Companies Act, 1956, in as much as she does not fulfill its requirements, the petition has become incompetent and the transposition is ineffective. Thus, on these contentions we have to decide whether the petition under Sections 397 and 398 of the Companies Act, 1956 abated at the death of the original petitioner and, secondly, whether the order of transposition could be passed in relation to these proceedings. In respect of these contentions, it is contended by the learned counsel for the respondent-applicant, i.e., Shrimati Sharda Talwar that the petition was originally brought for the benefit of all the consenting shareholders and, therefore, all of them were constructively petitioners even though some of them were mentioned as respondents and one of them was not shown as a party at all. It is also submitted that the learned Single Judge rightly decided that the maintainability of the petition has to be determined on the facts substituting at the time the petition was instituted and not at a subsequent date. For this purpose, the decision of the Supreme Court in *Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others*, which was also relied upon in the judgment under appeal has been referred to.

(4) The matter before us has certain peculiar difficulties. Firstly, the question is whether a petition like the present abates on the death of the petitioner and if it does not, who are the persons who are competent to prosecute the same after the death of the original petitioner. One of the questions which has to be determined is whether the consenting shareholders are constructively petitioners competent to continue the petition on the death of the original petitioner.

(5) It is first necessary to refer to the provisions of Section 397, 398 and 399 of the Companies Act, 1956. It is provided in sub-section (1) of Section 397 that any member or members may apply to the Court for an order under this Section if they have a right to apply. "in virtue of Section 399". A similar provisions is to be found in Section 398. Now turning to Section 399, it is provided by sub-section (1) that the following members have a right to make an application:-

"(A)in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued "share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares; (b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members."

(6) Thus, the holders of one-tenth of the issued share capital of a company have the right to make an application. It is not necessary that a! I these members should be petitioners because it is provided in sub-section (3) of Section 399 as follows :-

" WHERE any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them."

(7) Thus, even a single member of a company can make an application even if he does not hold one-tenth of the share capital if he obtains the consent in writing of other members who together with the applicant hold one-tenth of the share-capital. The application, however, is to be made on behalf of and for the benefit of all these members. On the facts of the present case, when the deceased petitioner applied under Sections 397 and 398 of the Act, he did so, not only for himself, but also on behalf of and for the benefit of all the members who had given written consent. It is this part of the Section which is relied upon by the applicant, Shrimati Sharda Talwar for the purpose of continuing the petition.

(8) There are no reported cases which have been brought to our notice concerning the abatement of applications under Sections 397 or 398 of the Companies Act, 1956, and we had to turn to the provisions of Order 1, Rule 8 of the CPC relating to representative suits for the purpose of ascertaining the law applicable to the present case. It has been held in a number of cases, that representative suits do not abate if the plaintiffs happen to die. For example, in Ponniathakathoot Parameshwarem Munpa and others V. Moothedath Mallseri Illah Narayanan Namboodri and another Air 1917 Mad 389, when a plaintiff died it was held that the Court had ample power to add other worshippers (the suit being u/s 92 of. the Code of Civil Procedure) as parties under Order I, Rule 10 of the CPC as the suit did not abate. In Krishnaswami Iyer V. Seethalakshmi Ammul

and others Air 1919 Mad 479, a reversioner had instituted a suit to challenge an alienation made by a widow. On his death the next reversioner was permitted to continue the suit. The order of abatement passed in the suit was treated as a nullity and it was held that the next reversioner could continue the proceedings and an application in this behalf was governed by Article 181 of the Limitation Act. These cases are representative of a large body of case-law governing cases brought under Order I, Rule 8 of the CPC as representative suits. Although the actual plaintiffs before the Court may be very few in number, they in fact represent a much larger body of persons. On the death of one or more of the parties before the Court other persons who are not on record are permitted to continue the proceedings. This procedure is permissible on account of the fact that even originally the suit had been brought on their behalf and not for the individual benefit of the actual plaintiff. The same position should on principle be applicable to proceedings under Sections 397 and 398 of the Companies Act, 1956, because here also the proceedings are instituted not only for the individual benefit of the actual petitioner but also for and for the benefit of the consenting members of the company. Thus, on a Party of reasoning the contention of Shrimati Sharda Talwar that she was in actual fact a petitioner in the original petition, although shown as a proforma respondent has to be accepted. It is not necessary to deal with other cases in which it has been held that proceedings in representative suits do not abate on the death of the plaintiff, but reference may be made to AIR 1921 123 (Privy Council) , where it was held u/s 539 of the Code of Civil Procedure, 1882 that if a person who had obtained permission to file a representative suit died during the pendency of the suit, other members of the public were entitled to continue the suit. This principle was extended by the Rajasthan High Court to a suit under the Fatal Accidents Act (1855) in State of Rajasthan V. Mst. Parwati Devi AIR 1966 Raj 210.

(9) In that case, suit for damages was brought by a widow for compensation. Section 1-A of the Act provided that such suits "shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused.. ." It was held that such a suit did not abate as it was for the benefit of others who were not on record. A number of judgments were referred to of the type that have already been referred to, where it had been held that representative suits do not abate. It was held by the Court :-

" THE principle ,which seems to us to have been informally accepted in these decisions, is that a suit like this is not brought by or against a person in his personal capacity but is brought by or against him as a representative of a class of persons and even if the representative or representatives who has or have so brought the suit, or against whom a suit is so brought, happens to die, then the other person or persons whom the deceased represented would still be interested in the litigation in the very nature of things and cannot but be held constructively to be parties to the "suit, and in this type of case the question of abatement cannot properly arise."

(10) There does not seem to be any reason why this reasoning should not be equally applicable to the proceedings before the Court under Sections 397 and 398 of the Companies Act, 1956. It must, Therefore, be held that Shrimati Sharda Talwar was constructively a petitioner, to the original petition and she was Therefore, entitled to continue the proceedings as a petitioner. It equally follows that when proceedings have been brought under Sections 397 and 398 of the Companies Act, 1956, it is not necessary that the ordinary legal representatives should be brought on record. The normal legal representatives are the heirs of the estate of the deceased. However, for the purpose of petitions under Sections 397 and 398 of the Companies Act, 1956, it is only necessary that members who are already constructively before the Court should continue the proceedings. This will not of course debar the legal representatives from themselves wanting to continue the proceedings as heirs of the deceased petitioner provided they also fulfill the requirements of being members of the company.

(11) It is now necessary to deal with the alternative case of the company, which is that the transposed petitioner should also fulfill the requirements of Section 399 of the Companies Act, 1956 and must also get the consent of the requisite members of the company as provided by Section 399. This contention cannot be accepted firstly on the basis of the decision of the Supreme Court in *Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others*, . In that case the petition originally brought had the necessary consent as required by Section 153-C of the Companies Act, 1913. During the course of the petition, the consent was withdrawn but it was held by the Supreme Court that the validity of a petition must be judged on the facts as they were at the time of its presentation. This authority" is fully applicable to the situation in the present case and the petition cannot be held to be non-maintainable merely because the petitioner has died and one of the constructive petitioners has been transposed. Secondly, the transposed petitioner was always constructively a petitioner and, Therefore, it is not necessary for her to satisfy the same conditions as would be necessary if a new petition were to be filed. The contention on behalf of the company that the transposed party must also satisfy the same conditions as the original petitioner does not seem to be justified on any principle. If she was constructively a petitioner initially, then she continues to be a petitioner and on the application of the aforementioned decision of the Supreme Court, a change in the situation vis-a-vis the provisions of Section 399 of the Companies Act, 1956 will not make the petition non-maintainable. It would, Therefore, follow that the decision of the Single Judge has to be affirmed and this appeal has to be dismissed. As the question involved in this appeal appears to have arisen for the first time, we leave the parties to bear their own costs.