(2004) 01 KL CK 0012

In the High Court Of Kerala

Case No : MFA No. 1200 of 2002 (D)

Kanthimathy Plantations (P) Ltd. and Others APPELLANT

Vs

S. Veera Subramonia Sarma and Others RESPONDENT

Date of Decision : 15-01-2004

Acts Referred:
Companies Act, 1956 — Section 108, 397, 398

Citation : (2006) 129 CompCas 406 : (2004) 2 CompLJ 183 : (2004) 54 SCL 360

Hon'ble Judges : K. Thankappan, J;J.B. Koshy, J

Bench : Division Bench

Advocate : Praveen Vyasan, Anil Thomas and Jose Abraham, for the Appellant; K.L. Narasimhan, for Respondents 1 to 12 and K.B. Pradeep, for Respondent 14, for the Respondent

Judgement

J.B. Koshy, J.—This appeal is filed against the order of the Company Law Board in a petition filed under Sections 397 and 398 of the Companies Act, 1956. In this judgment, the parties are referred to as per the ranking in the company petition filed before the Company Law Board. Appellants in this case are respondents 1 and 2 in the above company petition. First respondent (hereinafter referred to as ''Kanthimathy company'') is the company whose affairs are the subject matter of the company petition. The abovesaid company owned plantations and controlling shares in respondents 5 and 6 companies. Petitioners and the appellants herein belong to the same , family of late S. Sivaramkrishna Iyer. Appellant company as well as respondents 5 to 6 companies were acquired by late Sivaramkrishna Iyer. Petitioners 1 to 5 and second respondent are children of Sivaramkrishna Iyer. 7th petitioner is the wife of the second petitioner and other petitioners are grandchildren. Respondents 3 and 4 were the directors of the first appellant company. The Kanthimathy company was formed in 1968 and all the shares of the said company were acquired by Sivaramkrishna Iyer. During the lifetime of Sivaramkrishna Iyer, second appellant (second respondent) was managing the first appellant company. Ramakrishna Sharma, another son, and five sisters were managing one Travancore Rubber and Tea Company Limited owned by

Sivaramkrishna Iyer. 5th respondent company was managed by second petitioner. Sixth and seventh respondent companies were managed by first petitioner and they were all designated as General Managers. On 14 October, 1985, director Board of Kanthimathy Company decided to sell the shares held by it in Peermade Tea Company Ltd. (5 respondent). On 24 May, 1988, 20,000 shares were sold to Peninsular Plantations Ltd. (7th respondent). On 19 May, 1990, petitioners 3 to 5 resigned from the director Board of the Kanthimathy Company. On 14 February, 1998, wife of Sivaramkrishna Iyer died. On 30 August, 1999, the director Board decided to sell their shares in Peermade estate, Breamore Estates Ltd. and Peninsular Plantations Ltd. (respondents 5 to 7 companies). At that time, second respondent (second appellant) was not a director of the Kanthimathy Company. On 28 June, 2000, second respondent, made an offer to purchase 7,081 shares in Peermade for Rs. 15 per share and 40,800 shares of Breamore at Rs. 20 per share and 3,300 shares of Peninsular at Rs. 35 per share. On 4 July, 2000, the above offer was accepted. So, the offer of the sale of share and acceptance were done when second appellant was not a member of the director board and when Sivaramkrishna Iyer was alive and was the Chairman of the Board. Respondents 3 and 4 were at that time independent members of the director Board. On 17 July, 2000, Sivaramkrishna Iyer resigned from the board of Kanthimathy and second appellant was inducted as director and he was appointed as managing director of Kanthimathy for five years from 17 July, 2000. On 26 July, 2000, shares were presented for transfer and transfer deeds were sent to respondents 5 to 7. On 4 September, 2000, petitioner filed O.S. No. 430 of 2000 before the Sub-Court, Trivandrum, for injunction, restraining Kanthimathy Company from transferring its shares in respondents 5 to 7 companies to second respondent. On 14 September, 2000, shares in Peninsular Plantations Ltd were transferred. On 19 September, 2000, Sivaramkrishna Iyer died. Annual general body meeting of Kanthimathy scheduled to be held on 29 September, 2000, was postponed due to the death of Sivaramkrishna Iyer and on the request of certain Board members, and it was adjourned to 29 November, 2000. In view of the order of injunction granted in O.S. No. 534 of 2000, the annual general body meeting was not held on 29 November, 2000. The present company petition was filed before the Company Law Board on 20 January, 2001, mainly questioning the transfer of shares in the three companies (respondents 5 to 7) to 2 respondent (2 appellant).

2. The Company Law Board ordered status quo on 2.2.2001 and thereafter, it ordered to convene the meeting of the shareholders to elect five directors on the basis of consent. The order of the Company Law Board dated 7.6.2001 is as follows:

"As agreed to by the Counsel/parties, the following order is passed.

The company will convene a general body meeting of the company 27.6.2001 at the registered office of the company at 11.00 a.m. to elect five directors for which nominations will be filed before the starting of the meeting. Shri A.M.

Sridharan, Bench Officer, CLB, will preside over the meeting; all arrangements for his travel and lodging will be made by the company. Once the new Board is constituted, the old Board will cease to function."

2.1 Second appellant was not elected in the general body meeting held as per consent of the directions of the Company Law Board. Petitioners 1 to 5 were elected as Board members. The report of the observer appointed by the Company Law Board to chair the meeting shows that votes polled for five directors (petitioners 1 to 5) were 67,610, whereas votes polled by second appellant (second respondent) was 52,670. The Company Law Board passed the following order on 6.7.2001.

"Heard counsel for the petitioners as well as respondents. It is observed that in terms of the consent order, dated 7.6.2001, the company convened a general body meeting on 27.6.2001, wherein the petitioners 1 to 5 were elected as directors of the company. In the light of the consent order, dated 7.6.2001 with the constitution of the new Board of directors, the old Board consisting of respondents 2, 3 and 4 ceased to function. In the circumstances, the respondents shall abide by the order dated 7.6.2001, which was passed with the consent of the parties as well as their counsel. The respondents are at liberty to file their replies."

2.2 The Company Law Board advised the petitioners to take second appellant also as a director, and that was also agreed upon and the following order was passed on 10.7.2001 by the Company Law Board.

"In our advise, it has been agreed to by the parties/counsel that the second respondent will be taken on the Board as a director. The Board should meet on 20.7.2001 at the registered office of the company at 10.00 a.m. at which time the second respondent will place before the Board all statutory records, and all other relevant documents alongwith a statement of the affairs of the company. Shri Sridharan, Bench Officer, will attend the meeting as an observer. To report on 10.8.2001 at 10.30 a.m."

3. The petitioners together with the consenting shareholders filed the said petition before the Company Law Board under Sections 397 and 398 alleging oppression and mismanagement. Their main allegation was that Kanthimathy Company had controlling shares in respondents 5 to 7 companies and that was sold to the appellants fraudulently, that too, without proper consideration. According to the petitioners, these shares constitute major assets of the company. Fifth respondent company owns a tea plantation of 2,500 shares. Sixth respondent is having 750 acres of planted area. The consideration does not represent the true value of the impugned shares and, therefore, there is mismanagement and affairs of the company are done in a manner prejudicial to the interest of the company. In the impugned order, the Company Law Board referred to the election of the new Board members in the general body meeting held as per the directions on consent and supervision of the Company Law Board

and found that after the constitution of the new Board, the company is duly functioning and, therefore, the only dispute to be considered is regarding the remaining act of oppression and mismanagement regarding transfer of 77,081 equity shares of M/s Peermade Tea Company Ltd. (respondent No. 5), 40,800 equity shares of M/s Breamore Estates Ltd. (respondent No. 6) and 3,300 equity shares of M/s the Peninsular Plantations Ltd. (respondent No. 7) held by the Kanthimathy Company in favour of the second respondent. We agree with the view of the Company Law Board that in view of the holding of shareholders meeting as per the consent and election of five directors after their election, it cannot be contended by the second appellant now that he continues to be the managing director. The old Board ceased to exist when the new Board was elected in the general body meeting convened for the election of directors itself and second appellant was not elected, and he was only inducted into the Board as per the advice and as per the consent as can be seen from the order of the Board dated 7.6.2001 and 17.8.2001.

4. The only contested question is regarding the allegations with respect to transfer of shares. The Company Law Hoard found as follows:

"Therefore, the consideration paid by the second respondent for the shares does not appear to represent the true value of the impugned shares. Admittedly, the company has enormous bank deposits. The respondents have not established any necessity for sale of the shares. There is also no record to show that any offer made to any member before sale of the impugned shares or invited offers from others. We do not find transparency in transfer of the impugned shares."

4.1 In view, of the above finding, the following reliefs were ordered by the [Company Law] Board:

"Since we are convinced that the sale of these shares had been effected at a consideration prejudicial to the interests of the company and in favour of the second respondent, we set aside the transfer of the impugned shares. Accordingly, the company will refund the consideration received by the company from the second respondent, in respect of these shares, under authority of this order. On proof of having refunded consideration to the second respondent is produced before the Board of directors of fifth respondent, sixth respondent and seventh respondent, they will rectify the register of members of these three companies by removing the name of the second respondent and inserting therein the name of the first respondent company. The second respondent on receipt of refund of consideration shall, hand over the said share certificate to the company, failing which the respondents 5, 6 and 7 shall issue duplicate certificates in respect of these shares to the company".

4.2 The above findings are questioned by the appellants as illegal, perverse or not based on any evidence. According to them, legal issues for coming to such a finding were not decided properly. It is also contended that the reliefs granted are consequentially liable to be set aside.

5. We have perused the records. It has come out in evidence that in 1985, when Sivaramkrishna Iyer was the Chairman of the Board itself, the Kanthimathy company decided to sell its shares in these companies. The company was not able to get purchasers in view of the conditions of these assets. The bankers had initiated recovery proceedings for recovery of its dues before the Debt Recovery Tribunal, etc., against the fifth respondent company. In fact, part of the shares were sold on 24.5.1988 as a lot of 20,000 shares of Peermade were sold to Peninsular at Rs. 26 per share. The decision to sell the shares taken in 1985 was reiterated in the Board''s decision, dated 30.8.1999 when second appellant was not a Board member and when Sivaramkrishna Iyer was alive. Final decision to sell these shares was taken on 28.6.2000 when second appellant was not a member of the Board. According to the petitioners, there was no necessity to sell the shares of these companies by Kanthimathy, because Kanthimathy was running on profit. But, the accounts show that income from the estate operations was not sufficient to pay the dividend. According to the second respondent, major income of the company was from interest on fixed deposit; and the company was not earning any dividend from these three companies. If the shares are sold, the money also can be invested in a profitable manner. It is an admitted fact that all the three companies (respondent Nos. 5 to 7) were not paying any dividend for the last five years and as decided by the Board on 28.6.2000 when Sivaramkrishna Iyer was alive, the Board meeting decided to sell the shares in Peermade Tea Company and Breamore to the second respondent for the following reasons. We extract the above minutes of the above Board meeting here.

"Tabled the files relating to the purchase and sales. The same was perused and the transaction approved. The Chairman referred to the minutes of the Board meeting held on 30 August, 1999, authorising the sale of shares held in the capital of the following companies:

1. The Breamnore Estates Ltd.

2. The Peninsular Plantations Ltd.

3. The Peermade Tea Company Ltd.

4. The Woodland Estates Ltd.

5. Harrisons Malayalam Ltd."

He said that the same offers have been received for the purchase of 40,800 equity shares of Breamore Estate Ltd, 77,081 equity shares of the Peermade Tea Company Ltd. and 3,300 equity shares of the Peninsular Plantations Ltd, 840 equity shares of Harrisons Malayalam Ltd.

Tabled the letters of offer. The same was perused.

The offer of Dr. S Krishna Sarma was the highest. Letters of offer received from Dr. S Krishna Sarma for the purchase of 40,800 (forty thousand eight hundred only) equity shares of the Breamore Estate Ltd. at Rs. 20 per share, 77,081 (seventy seven thousand eighty one only) equity shares of the Peermade Tea Company Ltd at Rs. 15 per share, and 3,300 (three thousand three hundred only) equity shares of the Peninsular Plantations Ltd. at Rs. 35 per share were perused.

The matter was discussed in detail. The Chairman said that the working of the M/s Breamore Estate Ltd. and M/s The Peermade Tea Company Ltd. was not satisfactory and these companies have not been declaring any dividend in the last several years. The Chairman said that valuation of the shares of M/s The Breamore Estates Ltd. and M/s The Peermade Tea Company Ltd. were done and the valuation report of Mr. Rajagopalan, Chartered Accountant, Trivaridrum, and Mr. A.G. Krishnan, Chartered Accountant, 124, Rathinam Nagar, Thiruvamiyur, Chennai 600041, were tabled. The same was perused.

Tabled balance sheet of M/s The Breamore Estates Ltd. and The Peermade Tea Company Ltd. for the year ending 31 March, 1999. The same was perused.

After a detailed discussion, it was unanimously decided to accept the offer of Dr. S. Krishna Sarma.

"RESOLVED that the offer of Dr. S. Krishna Sarma for the purchase of 40,800 (forty thousand eight hundred only) equity shares of the Breamore Estates Ltd. at the rate of Rs. 20 (twenty only) per share, 77,081 (seventy seven thousand eighty one only) equity shares held in the capital of M/s The Peermade Tea Company Ltd. at the rate of Rs. 15 (rupees fifteen only) per share and 3,300 (three thousand three hundred only) equity shares of M/s The Peninsular Plantations Ltd at the rate of Rs. 35 (rupees thirty five only) per share be accepted.

ALSO RESOLVED that Sri. T.P. Nair and Sri D Parmeswaran, Directors, be and hereby authorised to arrange for the sale of the said shares and do all that is necessary in furtherance of the above resolution including signing of the transfer deed on behalf of the company under the common seal of the company."

5.1 Reasons are stated in the Board resolutions which show that the shares were sold with good intention on business consideration by unanimous decision of the then existing Board, and when second respondent (second appellant) was not a member of the Board. Further, before finding the value of shares, accounts of the three companies have to be perused. A perusal of the accounts and evidence show that Peermade Tea Company was running on a heavy loss and net assets are minus. But, the particulars relied on the valuation report made by PKR and Company, Chartered Accountants, according to which valuation of each share of the fifth respondent company is Rs. 755.44 and sixth respondent is Rs. 643.84. A perusal of that report would show that PKR and Co. valued the land and no scientific assessment was given and the worth of the company was taken into account by the land valuation. According to appellant, net asset value per share of the fifth respondent company as on 31.3.1999 is only Rs. 98.08 as per the certificate issued by Sri. A.G. Krishnan, Chartered Accountant. Worth was Rs. 2,08,28,952 whereas net asset value per share of the sixth respondent company was only Rs. 6.70. The Company Law Board did not consider the valuation certificate produced by appellant No. 2 which is prepared by A.G. Krishnan, B. Com., FCA. It referred only to the certificate produced by respondents 1 to 5. It is submitted that fifth respondent company is a sick industrial company under the consideration of BIFR. Even wages of the workers were not paid and workers moved the Government and the court for taking over the company. Bankers are also seeking to sell assets of the company through Debt Recovery Tribunal. On going through the impugned order, we find that the Company Law Board did not even look into the balance sheet of Peermade Tea Company Ltd. or Breamore (5th and 6th respondent companies). The Company Law Board also set aside the sale of shares in Peninsular Plantations Ltd. (7th respondent) even though not even a whisper is made out in the order regarding the value of the shares of Peninsular Plantations Ltd. The Company Law Board should have perused the above balance sheets and should have considered that which of the certificates are more reliable or should have referred to an independent Chartered Accountant for proper valuation of the share value of the companies. Shares value of the company has to be assessed not by valuing the land, but considering the fixed assets, loss, liabilities like loans, interest, amount payable to workers, etc. Before giving a finding that the consideration paid by the second appellant does not appear to represent the true value of those shares, market value of those shares ought to have been assessed by the boards. It is true that appeal to the High Court will lie u/s 108 of the Companies Act only on a question of law. It is evident from the order that the Company Law Board misdirected the question of law regarding the circumstances under which the Board can set aside the unanimous decision taken by the Board especially when the decision was taken by the Kanthimathy Company in this case to sell the shares, when Sri. Sivaram Krishna Iyer was alive. There was no dispute regarding the constitution of the Board or correctness of the decision taken by the Board on 30.8.1999. Second respondent was not a member of the Board at that time. How shares of a limited company can be valued was also not considered and finding regarding under-valuation of these shares without considering the balance sheet and profit and loss account of the three companies, is clearly illegal and it is a mixed question of law and fact. But, no relevant materials were considered by the Company Law Board for coming to the opinion that there is gross under-valuation of shares. The Company Law Board also did not consider the fact that the decision to sell the shares Was taken at a time when the second appellant was not a member of the Board. No dividend was received by the company from the above fifth, sixth and seventh respondent companies. What is the operating profit of Kanthimathy, the nature of profit earned by it from those companies, etc., also have to be considered while setting aside the decision of the director Board to sell the shares of the company, especially, when the decision to sell the shares was taken before second respondent was inducted as a director. The decision of the director Board to sell the shares on business consideration cannot be interfered lightly merely because another view is possible. Can the Company Law Board interfere with the decision taken purely on business consideration by the director Board, whose constitution is not challenged is a question of law. Petitioner has no case that when Sivaram Krishna Iyer was the Chairman of the Board, affairs of the company were done [run ?] in a manner prejudicial to the company or there was mismanagement ? The relevant factors necessary for setting aside the sale of shares in the three companies were not considered by the Company Law Board. There is total absence of finding regarding the valuation of shares in seventh respondent company. We are of the opinion that the Company Law Board should have appointed an independent chartered accountant for valuation of shares of respondents 5, 6 and 7 before coming to the conclusion that those shares were grossly undervalued. Before holding that the value offered and accepted was not adequate, relevant legal consideration ought to have been made. In this connection, we also refer to the submission made before the Company Law Board and recorded by the Company Law Board that second appellant was willing for valuation of the shares afresh, and in case the value is found to be higher, he was prepared to pay the higher price so fixed. Whatever may be that the Company Law Board did not consider the relevant aspects while setting aside the sale of shares in the three companies. It is submitted by the learned counsel for the appellant that the market value of the shares of these three companies were almost nil. These matters are to be considered by the Company Law Board. The Company Law Board decided the question regarding correctness of the director Board decision to sell the shares not in a legal manner, and without considering the relevant materials placed before it. Therefore, we set aside the decision of the Company Law Board regarding the cancellation of the transfer of shares in those three companies to second respondent (second appellant) and remand the matter to the Company Law Board to decide that question alone afresh.

6. The appeal is partly allowed.

