

(2023) 04 CAL CK 0049
In the Calcutta High Court
Case No : C.O. No. 1658 Of 2021

Kashi Nath Sett &Anr.

APPELLANT

Vs

Sadhu Charansett (Grocery) &Ors.

RESPONDENT

Date of Decision : 19-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 227
Code of Civil Procedure, 1908 — Section 9, Order 7 Rule 11, Order 7 Rule 11(d)
National Company Law Tribunal Rules, 2016 — Rule 11, 146, 150
Companies Act, 2013 — Section 128, 146, 152, 153, 155, 159, 166, 197, 213, 216,
241, 241(1)(a), 241(1)(b), 242, 242(4), 245, 420, 424(3), 430, 450, 452, 452(2)
Specific Relief Act, 1963 — Section 34

Citation : (2023) 04 CAL CK 0049

Hon'ble Judges : Ajoy Kumar Mukherjee, J

Bench : Single Bench

Advocate : NilanjanBhattacharjee, Subhasis Dey, Siddhartha Banerjee, Victor Mukherjee

Final Decision : Dismissed

Judgement

Ajoy Kumar Mukherjee, J

1. The present application under Article 227 of the constitution of India is directed against the order dated 17thApril 2021passed by the Learned Civil Judge (Senior Division), 1st Court at Howrah in Title Suit No. 254 of 2015 whereby andwhereunder the Court below was pleased to reject defendant/ Petitioner's application under order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC).

2. The said Suit was institutedby the plaintiffs/oppositeparty no 2 &3 claiming inter-alia a decree for declaration to the effect that the plaintiffs are entitled to have an access to and enter into the premises no 327, N.S. road, Howrah wherefrom the business is being carried on in the name of the opposite party no. 1. In the said suit, the plaintiffs/Opposites parties also claimed interalia a decree

for declaration to the effect that the defendants are obliged to disclose to the plaintiffs, the day to day cash balances in relation to the business run in the name of the opposite party no. 1 along with a decree for disclosure of accounts and a decree for perpetual injunction.

3. The defendants /petitioners had filed written statement in the said suit denying all material allegations. Long after filing the written statement the defendants/ petitioner took out said application under order VII Rule 11 on the allegation that the court below had no jurisdiction to entertain the suit since the said suit is barred under section 430 of the Companies Act, 2013. The plaintiffs/opposite parties filed written objection against the said application and it was heard by Learned Court below in presence of both the parties and upon hearing the said prayer was rejected by the order impugned.

4. Mr. Nilanjan Bhattacharjee learned counsel appearing on behalf of the petitioner submits that the court below failed to appreciate that if there are disputes between the directors of a company, said disputes should be referred to the Tribunal and the Tribunal only has the jurisdiction to decide such dispute between the directors of the company. Learned court below was erred in holding that the plaintiffs / opposite parties can file a suit in a civil court even though the Companies Act, 2013 specifically states that in case of dispute between the directors which is a company issue, the said dispute should be tried by tribunal or a law board.

5. Mr. Bhattacharjee further submits that plaintiffs' prayer for declaration of his right to enter into the premises of the company can very well be dealt with by the National company Law Tribunal, Kolkata bench (here in after called as NCLT) who has every power to execute the same under section 424(3) of the Companies Act 2013. He further submits that plaintiffs prayer regarding declaration of disclosure of day to day cash balance, Cash book or bank reconciliation statements to enable the plaintiffs to check the day to day sells of the company can be dealt with under section 241 (1)(a) of the Companies Act read with Rule 11 of the NCLT Rules. The plaintiff's prayer regarding decree for accounts for non-payment of the remuneration to the opposite party no. 2 and 3 can also be dealt with under the provision of the Companies Act 2013. Section 450 of the Companies Act read with Rule 11 and Rule 146 of the NCLT rules, expressly deals with such situation and prescribes punishment for non-payment of remuneration to the members and other directors in compliance of the Article of Association of the company. Similarly the prayer regarding decree for permanent injunction restraining the defendant from dealing with the business as well as from the cash and turn over vested with them can be dealt with under section 242(4) of the Companies Act which deals with action and or restraining order which may have been prayed for by way of filing application under the said act. The plaintiff/opposite parties' prayer for passing decree for account commissioner and for appointment of receiver can also be dealt with rule 11 read with Rule 146 and 150 of the NCLT Rules, 2016 which gives the Tribunal

inherent power to make such order or orders for the ends of justice and to prevent abuse of the process of the Tribunal and to pronounce order under rule 150 of the NCLT Rules. In this connection he also referred section 166, Section 152, Section 159, Section 452, Section 241, Section 128 read with rule 11, rule 146, rule 150 and other relevant rules which are appropriate to deal with paragraph wise allegations leveled in the plaint.

6. Mr. Bhattacharjee further submits that NCLT has every power to determine each and every issue alleged in the plaint and to pass orders under section 242(2), 420, 450 of the Companies Act. The Companies Act 2013 is a code under which the execution provision i.e. section 424(3) is there for execution of the order passed by the Tribunal as has been prayed by the plaintiff in the said plaint before the court below in the said suit. In this context he further contended that section 241 of the Act cannot be given a restricted meaning. It is essential to apply the doctrine of "reading down" to make the provisions under chapter XVI of the Act purposeful. Under the new act of 2013, the intention of the legislature is to vest the power of adjudication to the Tribunal under section 242 read with section 241. He further contended that the phrase "member of the company" in section 241 means and include person not only member of the company in strict sense but also person who bears the character of a member or have substantial interest in the internal affairs of the company and it comes under the jurisdiction of section 241 of the Companies Act, 2013. In this context he relied upon judgment in

(i) Needle Industries (India) Ltd. & others Vs. Needle Industries Neway (India) Holding Ltd. & others reported in (1981) 3 SCC 333,

(ii) Kamal Kumar Dutta & another Vs. Ruby General Hospital Ltd. & others reported in (2006) 7 SCC 613,

(iii) V.S. Krishnan Vs. Westfort Hi-Tech Hospital Ltd. reported in (2008) 3 SCC 363.

7. In order to support his aforesaid contention and that the term "oppression" has been expanded by the apex court, he also relied upon judgments passed in :-

(i) Saleem Bhai and others Vs. State of Maharashtra and others reported in AIR 2003 SC 759,

(ii) In SAS Hospitality Pvt. Ltd. & Anr. Vs Surya Constructions Pvt. Ltd. & Ors. reported in (2018) SCC Online Del 11909,

(iii) In Vikram Jairath and Another Vs Middleton Hotels Private Limited and Others reported in (2019) (4) CHN 107.

8. Mr. Subasish Dey learned counsel appearing on the behalf of the opposite party submits that the provision of the Companies Act as relied by the petitioner in support of his contention that the Suit is barred under order VII Rule 11 (d) of the code is completely misplaced and misconceived. Section 166 of the Act of 2013 does not say anything as regards the jurisdiction of a forum to entertain a

dispute even in case of breach of his duties by a director. Section 152 and 153 equally misplaced. Section 152 deals with mode of appointment of directors in a company and section 155 provides a restriction for obtaining more than one director identification number. Accordingly he submits neither section 152 nor section 155 of the Companies Act has nothing to do with the jurisdiction of a forum to address the issues raised by the plaintiffs. Similarly section 146 could not have been an impediment for the court below to entertain the said suit. He further submits section 146 does not suggest that for adjudication of the issues involved in connection with convening the general meeting of a company, one has to necessarily approach before NCLT. Section 197 of the Act has also not taken away the jurisdiction of the learned court below to entertain the suit. In fact section 197 of the Act provides for overall maximum managerial remuneration payable by a public company and as such section 197 also has nothing to do with the jurisdiction of a civil court.

9. Mr. Dey further argued that the provision laid down in section 213 of the Companies Act apply within a very restricted zone upon fulfillment of the conditions as are prescribed under clause (b) of the said section which contemplates certain eventualities that may entitle a specific class of people to approach NCLT and present suit was not triggered by any of such eventualities. Mr. Dey further submits that section 216 provides for investigation into the ownership of a company when it appears to the Central Government that there is a reason so to do and it does not have any connection with the case made out by the plaintiffs or with the adjudication of the issues involved. Similarly section 241 deals with prevention of oppression and mismanagement in a company. The provision laid down therein can be taken resort to by a member of a company only in those cases that may come within the ambit of sub clauses (a) and (b) of subsection (1) of section 241. The case made out in the plaint pertaining to the said suit is not contemplated under sub section (1) of section 241 nor had the plaintiffs fulfilled the qualification to approach the NCLT under the said section. The reliefs contemplated in sub section (1) of section 245 of the Companies Act are clearly distinct and separate from the reliefs claimed by the plaintiffs in the said suit. He further submits that petitioner has referred section 452 of the Act but it does not confer exclusive jurisdiction upon the NCLT debarring a civil court to entertain a suit involving civil disputes. According to Mr. Dey subsection (2) of section 452 of the Act rather recognizes the jurisdiction of other forums to entertain disputes concerning the affairs of a company. According to Mr. Dey the disputes involved in the said suit is purely civil in nature and as such there is no express or explicit exclusion of the jurisdiction of the learned court to entertain the suit, and there was no plausible reason available to the learned court below to reject the plaint on account of alleged lack of jurisdiction.

10. In this connection Mr. Dey referred section 9 of the Code of Civil Procedure which mandates the civil court to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. The Companies Act, 2013 has neither explicitly nor by necessary implication debarred the court

below to entertain the said suit as the principal reliefs claimed in the said suit are all declaratory in nature under the Specific Relief Act, 1963 and the court below is the sole and appropriate forum to entertain the suit. He further argued it is trite law that the exclusion of the jurisdiction of a civil court can never be readily inferred. The courts have repeatedly held that a provision of law taking away the jurisdiction of a civil court must be strictly construed and the onus lies on the party seeking to oust the jurisdiction to establish his right to do so. In this context he relied upon judgment in Sahebgouda (dead) by LRS & others Vs. Ogeppa & others reported in (2003) 6SCC 151 and in Swamy Atmananda and others Vs. Sri Ramkrishna Tapovanam and others reported in (2005) 10SCC 51. In this context he also contended that in Dwarka Prasad Agarwal and another Vs. Ramesh Chander Agarwal and others reported in (2003) 6SCC 220 it was held that the civil suit is maintainable since apart from general law such suit was also covered under the Specific Relief Act 1963. He further relied in Panipat Woollen and General Mills Company Limited Vs. R.L Kaushik and others reported in (1969) 39 Comp Cas 249 (PH) where the validity and regularity of the general meeting of a company and election of the directors were challenged and question arose as to whether civil courts had jurisdiction to try such suit and the answer given by the court was in the affirmative. He also referred Marikar (Motors) and another Vs. M.I. Ravi Kumar and others, reported in 1981 SCC Online Ker 283: (1982) 52 Comp Cas 362 where question arose whether an annual general meeting of a company convened in violation of section 166 of the Companies Act can be tried by a civil court on the ground that the Companies Act is complete and self-contained code and only the Tribunal is competent to resolve the dispute between a company and its members and the Act excludes the jurisdiction of the ordinary courts in such matters. Kerala High court was pleased to reject such contention and did not accept the contention that the Companies Act is a complete and self-contained code and held, the Act does not oust the jurisdiction of civil courts to deal with the disputes raised by the plaintiffs.

11. In this context his further argument is that it is well settled that the Tribunal can entertain proceedings/application only in respect of matters for which the jurisdiction specifically conferred by the Companies Act or by any other law in force and all residuary claims for which an express provision has not been made in the Companies Act conferring exclusive jurisdiction on NCLT, Civil court can exercise jurisdiction. In this context he placed reliance upon Prakash Timbers private Limited & others Vs. Smt. Sushma Shingla & another reported in (1997) 89 comp Cas 770 (All):1995 SCC Online All 427, Minno H. Mody, Vs. Hemand D Vakil & others reported in (1997) 89 comp cases 456 (Bom): 1993 SCC Online Bom 237, Tin Plates dealers association Pvt. Ltd. Vs. Satish Chandra Sanwelka & others reported in (2002) 108 comp cas 295: 2001 SCC Online Cal 675. He accordingly contended that the Tribunal does not have power to deal with the issues where declaration has sought for or where payment of remuneration has been claimed by a director or appointment of receiver etc. In this context he also relied upon the explanation given in Wolverhampton New Water works company

Vs. Hawkesford reported in (1859) 6 C.B. (NS) 336 case. And The Secretary of State Vs. Mask and Company reported in AIR 1940 PC 105.

12. Mr.Dey in this context also contended that the powers exercised by a Tribunal are in respect of corporate right and not individual rights. In this context he relied upon Poonam Chand Kothari Vs. Rajasthan tube manufacturing company Ltd. reported in (1996) 87 comp cas 842 (Raj): 1995 SCC Online Raj 88. Accordingly Mr.Dey concluded that it would be absolutely incorrect to suggest that the suit instituted by the plaintiff in the case in hand is barred by the section 430 of the companies act or that court below had no jurisdiction to entertain the Suit and as such there was no occasion for the court below to reject the plaint at the instance of the defendant. Accordingly the order impugned is quite justified and does not call for interference by this court.

13. I have carefully considered submission made by the parties. Before going to further details let me reproduce order VII Rule 11 of the code.

"11. Rejection of plaint.----The plaint shall be rejected in the following cases-

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law:
- (e) Where it is not filed in duplicate;
- (f) where the plaintiff fails to comply with the provisions of rule 9: Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

14. Needless to say that clause (d) of Rule 11 of order VII applies only when the Suit appears from the statement in the plaint to be barred by any law. It is only where on the face of the plaint a suit appears to be barred by any law that the court shall dismiss the suit. But where it does not so appear but requires further consideration or, in other words, if there be any doubt or if the court is not sure and certain that the suit is barred by some law, the court can not reject the plaint and the ground as embodied in clause (d) & (a) of Order VII Rule 11 must

appear on the face of the plaint. It is settled law that for the purpose of disposal of an application for rejection of plaint under Order VII Rule 11 (d) of the Code, the Court must treat all the averments made in the plaint to be true and if it appears that the statements so made if treated to be true, the suit is barred by any law for the time being in force, the court can reject the plaint. In short the statements made in the plaint without addition or subtraction must show that it is barred by any law to attract Order VII Rule 11 (d) and court can reject only on the basis of the pleadings in the plaint and not by referring to materials placed on record by the defendant in answer to the plaint.

15. In the light of aforesaid settled proposition of law, let me consider the present dispute between the parties. On Perusal of the plaint of Title Suit no. 254 of 2015 it appears that in paragraph 3 of plaint, plaintiffs have specifically averred "That Monoj Seth, the Defendant no. 2 has become appointed as the director of plaintiff no. 1 company without following the norms of the Companies Act 1956 amended thereon 2013, hence his appointment is put on hold by the Hon'ble Company Law Board Bench, Kolkata."

16. Accordingly it is quite clear, if the statements made in the plaint are treated to be true then the defendant no. 2 Manoj Sett is not the director of the plaintiff no. 1 company. If that be *soprima facie* it appears that the dispute is in-between director and a person who is not a director. Learned counsel on behalf of the petitioner in this context argued that the golden rule of statutory construction is that the phrases or sentences should be interpreted according to the intention of the legislature and section 241 and 242 should be read together and as such under the Act of 2013 the intention of the legislature is to vest the power of adjudication of the matter referred in section 242, to the Tribunal. He further submits that applying the doctoring of "Reading Down", an internal aid to construct the word in a statute to give reasonable meaning, the word "member" refers in section 241 of the Act should not be read in isolation or in strict meaning and it should be read down along with section 242 of the Act. Accordingly he further submits that the phrase "member of a company" in section 241 means and includes person not only member of the company in strict sense but also who bears the character of a member or have substantial interest in the internal affairs of the company.

17. Even for the time being if the aforesaid argument of the petitioner is accepted, then also the question as to whether defendant no. 2 comes within the definition of the member of a company under section 241 can only be adjudicated on perusal of documentary or oral evidence to be adduced by the parties and the plaint cannot be thrown away at the threshold construing that defendant no. 2 comes within the definition of 'member' of the company under section 241 of the Act.

18. Apart from that plaintiff in paragraph 7 has alleged specifically that Kasinath Seth and aforesaid defendant no. 2 Manoj Seth are running a parallel business just siphoning of funds as well as private personal withdrawer from the suit

business for their own selfish gain irrespective of considering of rights responsibilities and benefits of the plaintiff. Paragraph 9 of the plaint further discloses that taking advantage of ownership of the funds, the defendant now taking as well as creating pressure for hostile taking over the entire administrative control with a situation of not allowing the head directors namely plaintiff and others to enter and interfere the business against the norms of Companies Act. Cause of action of the suit as it appears also arose due to dead lock situation of the alleged attempt being taken by the principal defendant along with said Manoj Seth and Mainak Seth. Now section 245 as referred by the opposite party deals with the restraining order to be passed against company and not against a person whose appointment has been put on hold by the company Law Board Bench, Kolkata as averred in the plaint. Moreover in the plaint beside declaration and injunction plaintiff has also prayed for payment of their remuneration. Admittedly there is no direct provision controlling payment of remuneration to be paid to the director in a Private Ltd. Company. Section 197 of the Companies Act deals with over all maximum managerial remuneration, which has got no application in the present context. The Act also does not deal with the provision for execution of an individual's right and Companies Act is practically silent about granting decree for declaration as there is no specific provision in the Act for granting declaration. As averment made in the plaint which is considered to be true for the present purpose, discloses conflict of two individuals alleging that the plaintiffs' personal right got affected by a person whose membership in the company is not beyond doubt, suit under section 34 of the specific relief act is not barred in the present context specially when plaintiff averred in the plaint that they are not allowed to enter into the premises of the company and thereby they prayed for enforcement of their civil right rather than right as director. In view of settled proposition of law that ouster of civil court jurisdiction cannot be readily inferred and consolidating all previous judgments, apex court in *Church of North India Vs. Lavji bhai Ratanji bhai and others* reported in (2005) 10 SCC 760 has laid down the principles relating to the exclusion of jurisdiction of civil court which are as follows :-

"40.. In *Dhulabhai v. State of M.P.* [(1968) 3 SCR 662 : AIR 1969 SC 78] Hidayatullah, C.J. summarised the following principles relating to the exclusion of jurisdiction of civil courts: (SCR pp. 682 B-H-683 A-C)

"(1) Where the statute gives a finality to the orders of the special tribunals, the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

"(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to

sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

"(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals."

"(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit."

"(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies."

"(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry."

"(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply." (See also *Rajasthan SRTC v. Krishna Kant* [(1995) 5 SCC 75 : 1995 SCC (L&S) 1207 : (1995) 31 ATC 110] , *Dwarka Prasad Agarwal v. Ramesh Chander Agarwal* [(2003) 6 SCC 220] , *Sahebgouda v. Ogeppa* [(2003) 6 SCC 151] , *Dhruv Green Field Ltd. v. Hukam Singh* [(2002) 6 SCC 416] and *Swamy Atmananda v. Sri Ramakrishna Tapovanam* [(2005) 10 SCC 51 : (2005) 4 Scale 117] .)"

19. As the question about ouster of jurisdiction of a civil court must be constructed having regard to the schemes of the act, it can be said that the preamble of the act of 2013 have not taken away the jurisdiction of a civil court in each and every matter connected with company affairs. The preamble speaks that this is an act to consolidate and amend the law relating to companies. The normal civil remedies associated with action lies in civil courts. If not prescribed in the act, plea of bar to jurisdiction of a civil court may not be considered having regards to the contentions raised in the plaint and for this purpose reliefs sought in the plaint must be considered in their entirety on the basis of factual averment made in the plaint. In fact what was observed in the judgment as the main guiding factor is that the court has to consider in substance and not merely in form about the nature of the claim made in the suit and the underline object in

seeking the real relief therein. In view of above and considering the averments made in the plaint, it appears that the suit is apparently in between director and a person whose appointment is put on hold by the Company Law Bench, Kolkata and as relief relates to decree for declaration of right of plaintiffs as individual and for decree for account for non-payment of remuneration along with injunction, an appointment of accounts commissioner and receiver, I find that the suit is not barred under section 430 of the companies act 2013.

In view of above C.O 1658 of 2021 is dismissed but considering the fact of the circumstances of the case without cost.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.