

**(1990) 07 MAD CK 0048**

**In the Madras High Court**

**Case No : O.S.A. No. 61 of 1983 and 39 of 1984**

M. Moorthy

APPELLANT

Vs

Drivers and Conductors Bus Service P. Ltd

RESPONDENT

**Date of Decision : 11-07-1990**

**Acts Referred:**

Companies Act, 1956 — Regulation 75, 255(2), 290, 397, 398

**Citation :** (1991) 71 CompCas 136 : (1990) 2 LW 123

**Hon'ble Judges :** V. Ratnam, J;Abdul Hadi, J

**Bench :** Division Bench

**Advocate :** T. Raghavan, Dulip Singh for A.S. Venkatachalamoorthy and Vedantham Srinivasanfor J. Krishnamurthy, for the Appellant;

## **Judgement**

Abdul Hadi, J.—These two appeals are directed against the order dated April 26, 1983, in C.P.No.18 of 1979. While O.S.A.No.61 of

1983 has been preferred by the sixth respondent in C.P.No.18 of 1979, O.S.A.No.39of 1984 is at the instance of respondents Nos.1,2,4 and 5

therein. The petitioners in C.P.No.18 of 1979 figure as respondents Nos.6 and 7 in O.S.A.No.61 of 1983 and as respondents NOs.1 and 2 in

O.S.A.No.39 of 1984. In the course of this judgment, the parties will be referred to according to their array in the said company petition.

2. The petitioners filed C.P.No.18 of 1979 u/s 397 and 398 of the Companies Act, 1956 (hereinafter referred to as ""the Act""), alleging oppression

and mismanagement and praying for a declaration that respondents Nos. 2,4 and 5 (appellants Nos.2 to 4 in O.S.No.39 of 1984) in C.P.No.18

of 1979 are not shareholders or directors of the first respondent compnay, that the second respondent is not the managing director thereof and that

the purported transfer of the two buses, MDE 5902 and MDH 2209, belonging to

the company with their respective route permits to the sixth respondent (appellant in O.S.A.No.61 of 1983) is illegal and for a direction to the sixth respondent to redeliver the same to the first respondent company and for the appointment of an administrator to carry on the business of the company. The grounds on which C.P.No.18 of 1979 was resisted by the appellants need not be set out in extenso and it would suffice to refer the same in the course of this judgment, while dealing with the contentions of the parties urged in these appeals.

3. On a consideration of the materials placed before the court, the learned company judge found, inter alia, that though the records of the company prior to May 20, 1978, were in the possession of respondents Nos.2 and 3, they had suppressed them, that the alleged sale of two buses and the route permits belonging to the company to the sixth respondent is no transfer at all and that there is a total absence of evidence regarding the manner in which the third respondent was appointed as managing director of the company and in fact there is no director at all for the company.

On the aforesaid findings, the learned company judge granted the reliefs prayed for in C.P.No.18 of 1979 and that is how these appeals have arisen.

4. We may now proceed to make a brief reference to the undisputed facts and findings recorded by the company judge. The first respondent company was incorporated in February 13, 1967, and its original shareholders and directors were the first petitioner, the third respondent and two others, who left the shortly after incorporation, transferring their shares to the second petitioner. Thereafter, there were only three shareholders, viz., the two petitioners and the third respondent and all the three of them were directors of the company. As per the articles of association of the company, the term of office of the directors of the company is three years and of the managing director five years. The two buses along with their route permits were virtually the only assets of the company. Even as indicated by its name, the company was founded by drivers and conductors and the second respondent is a money-lender carrying on his business with his son-in-law, the fourth respondent, in hire-purchase agreements on motor vehicles, etc., for the purpose of securing the advances made. The fifth respondent is the son of the second respondent and the sixth

respondent is his brother's son. The first petitioner filed C.P.No.8 of 1976 in this court for winding up the company on the ground that it is just and

equitable to do so. By an order dated April 22, 1977, in C.A.No.102 of 1976, this court directed the Official Receiver, Erode, to take possession

of the two buses belonging to the company and run them. On November 17, 1977, this court, by its order, dismissed C.P.No.8 of 1976 with a

direction to the Official Receiver, Erode, to hand over the buses to the company. By yet another order asked for by the third respondent, on

December 9, 1977, this court directed the Official Receiver, Erode, to hand over the buses to the "managing director" of the company.

Subsequently, the first petitioner instituted O.S.No.252 of 1978 in the Sub-court, Erode, against the company, the third respondent as well as the

second petitioner for a declaration that the third respondent ceased to be the managing director of the company. In the course of the order in

C.P.No.18 of 1979, the learned company judge found that since the incorporation of the company, with the exception of the annual general

meeting held within six months after its incorporation, no other annual general meeting was ever held and this finding was also not challenged in the

course of these appeals.

5. In O.S.A.No.61 of 1983, the principal submission of learned counsel for the sixth respondent (the appellant in O.S.A.No.61 of 1983) is that

the company court has no power, in a petition under sections 397 and 398 of the Act, to set aside the transfer of the buses and the route permits

and the learned judge fell into an error in concluding that such a power is available u/s 402(a) of the Act or at any rate under the residuary clause

(g) of section 402 of the Act. Referring to *Sheth Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. Ltd.* [1964] 34 Comp Cas 777

(Guj), it was further submitted that the principle of that decision, which was cited before the learned judge but was not referred to or noticed, ought

to have been applied. On the other hand, learned counsel for the contesting respondents in these appeals submitted that there was neither a transfer

of the buses of the company to the appellant in O.S.A.No.61 of 1983 nor was he really a third party and that the decision in *Sheth Mohanlal*

*Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. Ltd.* [1964] 34 Comp Cas 777 (Guj), has no application whatever.

6. We may now proceed to refer to the prayer in the company petition and that is to the effect that the ""purported transfer"" of the buses belonging to the company is illegal. Even in the body of the petition, the said transfer has been referred to only as ""purported sale"". If the alleged transfer or sale of the buses and the route permits is non est in law, then , there is no need whatever to set aside the sale, for, the title to the buses and the route permits would have continued to remain with the company itself. Therefore, the question whether the sixth respondent, in relation to the alleged transfer, is a third party or not, and the further question whether the company court would have the power to set aside the alleged transfer in a petition under sections 397 and 398 of the Act, would not arise at all, Before dealing with the question as to how the transaction in the present case relating to the buses and the route permits is not a transfer at all and is non est in law, we would make a reference to the decision in Sheth Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. Ltd. [1964] 34 Comp Cas 777, strongly relied upon by learned counsel for the appellant in O.S.A.No.61 of 1983. In that case, the company was promoted for the purposes of running a textile mill and had entered into an agreement with a firm whereunder the firm agreed to supply working capital to the company for re-running the mill and to purchase yarn for the company on commission basis. Owing to sustaining of losses by the mill for some years and the machinery of the mill having become old and obsolete, the mill had to be closed down and all its assets were sold and the agreement was also terminated. After the conclusion of the sale, a minority of the shareholders of the company took out proceedings under sections 397 and 398 of the Act alleging that the termination of the agreement and the sale of the assets of the mill were acts of oppression and mismanagement, prejudicial to the interest of the company and claimed that the sale should be set aside. It was in that context, after referring to sections 397 , 398 and 402 of the Act, it was held that though the power of the court under sections 397 and 398 of the Act was very wide, it was conditioned by the purpose for which it could be exercised, viz., with a view to bringing to an end the matters complained of in a case u/s 397 of the Act and ""with a view to bringing to an end or preventing the matters complained of or apprehended"" u/s 398 of the Act and that sections 397 and 398 of the Act postulate that on the date of the application,

there must be a continuing course of conduct of the affairs of the company, which was oppressive to any shareholder or prejudicial to the interest of the company. It was also further held that a past and concluded contract between the company and a third party could not be set aside on an application under 397 or 398 of the Act that section 402(f) of the Act was not a provision which derogates from the general power of the under sections 397 and 398 of the Act and was not illustrative of any general power in the court to set aside or interfere with a past and concluded transaction between a company and third parties, which were no longer continuing wrongs. In the course of the judgment, the court observed as follows, which was strongly relied on by learned counsel for the appellant in O.S.A.No. 61 of 1983 (p.805):

The language of sections 397 and 398 leaves no doubt as to the true intendment of the Legislature and it is transparent that the remedy provided by these sections is of a preventive nature so as to bring to an end oppression and mismanagement on the part of controlling shareholders and not to allow its continuance to the detriment of the aggrieved shareholders of the company. The remedy is not intended to enable the aggrieved shareholders to set at naught what has already been done by the controlling shareholders in the management of the affairs of the company.

7. After so observing, the court finally held that the sale of the assets of the mill could not be said to be a continuing wrong and hence was not liable

to be sent aside in proceedings under sections 397 and 398 of the Act. We may now refer to certain facts in the decision referred to above relating

to the sale of the assets so that the marked differences between that case and the present may be brought out and appreciated. Admittedly, in the

case of *Sheth Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. Ltd.* [1964] 34 Comp Cas 777 (Guj), there was a genuine sale of

the assets of the company in 1961 by the company to one Bharat Kala Bhandar Ltd. and the sale was also effected after due advertisement inviting

offers, though there was an earlier agreement for sale of the assets to a third party, which did not materialise. Further, the mill had to sell all its

assets because it continued to sustain losses for a long number of years, i.e., from 1949 to 1961, except the year 1955 in which the company

made a small profit. In addition, the person to whom the assets of the mill were sold was admittedly a genuine third party. It was under those

circumstances the plea was raised in that case to set aside the sale and not on the basis that there was no transfer at all of the assets. Only in the

context of the aforesaid factual background, the decision in *Sheth Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. Ltd.* [1964] 34

Comp Cas 777 (Guj) proceeded to lay emphasis on the following clauses found in sections 397(2) and 398(2) of the Act respectively:

With a view to bringing to an end the matters complained of"" and ""with a view to bringing to an end or preventing the matters complained of or apprehended"";

8. and on what is contained in section 402(f) of the Act to hold that the company court had no power to set aside such a sale that took place in the

circumstances referred to earlier. We are of the view that the factual background presented in this case is totally different from that in *Sheth*

*Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. Ltd.* [1964] 34 Comp Cas 777 (Guj) and we are of the view that the decision

cannot have any application. With reference to most of the factual findings rendered by the company judge, there was no serious attack by learned

counsel for the appellant in O.S.A.No.61 of 1983, but the attack was confined to a point of law based on the principle laid down in the decision in

*Sheth Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co.Ltd.* [1964] 34 Comp Cas 777 referred to earlier and also the

interpretation to be placed on section 290 of the Act and the applicability of regulation 75 of Table `A' under the Act, which we shall presently

advert to, after drawing attention to certain factual aspects which would lead to an irresistible conclusion that there was no transfer at all of the

buses or the route permits in the present case.

9. In the counters of respondents Nos.2 and 3, it has not been stated when actually the alleged transfer took place or who effected the alleged

transfer on behalf of the company or whether for effecting the alleged transfer, any resolution was passed by the board of directors of the

company. It has to be borne in mind that the two buses and the route permits alone were the assets of the company. Though the appellant in

O.S.A.No.61 of 1983 stated in his counter that the alleged transfer became final on December 3, 1978, it has not been stated as to who acted on

behalf of the company for the alleged transfer or whether any resolution in that

regard was passed by the board of directors of the company. The second respondent as RW-1 deposed that he was the managing director of the company from May 20, 1978, he having been co-opted as director and subsequently made the managing director on the same date. To the question, ""only on May 20, 1978, you became a director, why you were asked to attend the meeting on May 20, 1978, by Ramasamy"" (the third respondent) his answer was as follows:

I demanded return of the money due by the company from Ramasamy on two or three occasions. He told me that he had called for a meeting and sent notice to the other two directors and that I might attend the meeting. He said, if you come there, we will see that you are appointed as managing director so that you could take over the management of the company.

10. The reference to the other two directors is to the two petitioners. But their grievance is that they did not receive the notices at all, for they had been deliberately sent to wrong addresses. To the next question, ""For the said meeting on May 20, 1978, who were present at that meeting?

RW-1 replied:

Myself and Ramasamy were alone present at the meeting held on May 20, 1978. The other two directors were not present. I was co-opted as director.

11. He also further admitted that he was not a shareholder when he became a director. There is no reference in his chief- examination to any resolution having been passed by the board of directors having been passed by the board of directors of the company for the sale of the buses.

RW-1 in his chief-examination merely stated that he decided to sell the buses and in cross- examination also he reiterated that he had sold away the company buses. It has also to be borne in mind that while the plea of the appellant in O.S.A.No.61 of 1983, in his counter was that the sale

became final on December 3, 1978, RW-1 (the second respondent) deposed that the sale took place on December 4, 1978. To a further

question, ""for selling the buses of the company, did you advertise in any paper?"" , he replied: ""I had intimated the brokers at Erode. No

advertisement was made in any newspaper."" He also answered subsequently that he did not receive offers in writing. To another question, ""Did

you consult the board for selling the buses of the company?"" , he answered:

""We held a meeting and decided to sell the buses."" , but he did not give the particulars of the alleged meeting. RW-2 (the third respondent) desposed that Senniappan, the second respondent, and himself and others sold away the buses. This is inconsistent with what RW-1 had stated regarding the person who brought about the alleged sale. Even so, RW-2 also did not refer to the passing of any resolution by the board of directors for the sale of the buses. To a specific question, ""For the sale of the buses, have you got any records in the company?"" , he stated, ""There are no records."" It is also a little difficult to understand how the two buses and their route permits, which were the only assets of the company, had been sold for just Rs.35,000. Even according to exhibit P-27, the counter filed by the third respondent in C.P.No.18 of 1979, the buses were earning not less than Rs.1,000 per day on the average. RW-1, the second respondent, stated in his evidence that the daily collections in 1978 was Rs.350 per day in the case of one of the buses (Erode Town Service route) and Rs.450 per day in the case of the other bus (Erode to Vellakoil route). PW-1 in his chief-examination stated that the daily collections in one route was Rs.1,000 and in the other Rs.1,200 and there has been no effective cross-examination to whittle down the effect of his evidence. The route permits by themselves are very valuable ad the company judge had also taken note note of this and we may also point out that in G. Vijayaranga Mudaliar Vs. Commissioner of Income Tax, Madras, , a Division Bench of this court valued, even several years back, a route permit at Rs.40,000. Further, with the ownership of the two permits, the company would have been enabled tp secure further permits, the company would have been enabled to secure further permits also. We thus find that there is absolutely no plea or acceptable evidence to show how the transfer was effected by the company to the appellant in O.S.A.No.61 of 1983. It is well-settled that if there is no plea, no amount of evidence could be looked into on a plea not put forward. It is significant that there is no plea as to how and when the third respondent became the director or managing director from 1967 to 1970 as per article 21 of the articles of association of the company or even assuming that he was originally a managing director from 1967 to 1972, as per article 29 of the articles of association of the company, how actually he became a director or

managing director of the company after 1972. RW-2 claimed in the course of his evidence that he became the managing director of the company in 1972, but no documentary evidence was placed before the court show how he became the managing director in 1972 and even in the course of his oral evidence, he had not referred to the mode by which he could have legally become the managing director of the company, but that he had stated that the other director, Rasool (the second petitioner), asked him to take over the bus service as managing director, but he in turn told him that he was an illiterate and unable to run the buses, to which Rasool told him that in running the buses, he would assist him. It is further significant to note that no general meeting of the company was held after the incorporation of the company in 1967. As per section 255(2) of the Act, in the case of a private company, as the present one, the directors generally shall, in default of and subject to any regulations in the articles of the company, be appointed by the company in the general meeting and in the present case, the articles of the company do not say anything contra. In the face of the abovesaid admission by the third respondent that there was no general meeting of the company at all after the incorporation of the company and in the absence of evidence to show how the third respondent actually became the managing director of the company, at least subsequent to 1972 and prior to the alleged meeting on May 20, 1978, he could not be treated as having acted as a director or managing director of the company at all.

12. From the facts and evidence referred to earlier, it is clear that the third respondent is only an usurper of the office and that he was not a director or managing director of the company at least after 1972. Then, the alleged meeting of the board of directors of the company on May 20, 1978, when the second respondent is stated to have co-opted as a director, is non-est, even assuming that such a meeting took place. It follows that the so-called co-option of the second respondent as a director of the company and his subsequent election as managing director of the company as well as the alleged co-option of respondents Nos.4 and 5 as directors of the company are absolutely null and void and all of them would not be in a better position than mere usurpers of the office and there could, therefore, be no scope at all for the application of regulation 75

of Table "A" of the Companies Act, 1956, which was relied on by learned counsel for the sixth respondent, and which runs as follows:

The continuing directors may act notwithstanding any vacancy in the board, but, if and so long as their number is reduced below the quorum fixed

by the Act for a meeting of the board, the continuing directors or director may act for the purpose of increasing the number of directors to that fixed

for the quorum, or of summoning a general meeting of the company, but for no other purpose.

13. On May 20, 1978, there were no continuing directors or vacancies in the board or their number being reduced below the quorum within the

meaning of the aforesaid regulation. According to RW- 1, for the meeting held on May 20, 1970, the third respondent and himself alone were

present and the other two directors were not present. The other two directors admittedly were the petitioners and their grievance was that they

were not served with notices and the absence of the other two directors did not lead to a vacancy in board nor were the other two the continuing

directors. Therefore, no importance could be attached to the alleged resolution of the board of directors of the company as found in page 10 in

exhibit P-18 dated December 4, 1978, to the effect that the transfer effected by the managing director (the second respondent) was approved and

the learned company judge rightly did not give any credence to this. There is, therefore, no difficulty in coming to the conclusion that there was no

transfer at all of the buses and the route permits and that the title to the buses and the route permits continued to remain only with the company.

14. We agree with the learned company judge that a careful consideration of the evidence of RW-3 leaves the court with the impression that he

does not know anything about the transfer or even about the transfer or even about the buses and that he also did not care to know whether there

was any resolution of the board of directors authorising the sale of the buses, at least before the finalisation of the alleged transfer. Even according

to RW-3, there was no written offer for the purchase of the buses. He was also unaware whether their sale was ever advertised. The learned

company judge was, therefore, right in inferring that the alleged sale was nothing but a pure adjustment between the two relatives, viz., the second

respondent and his brother's son, the sixth respondent, to subserve their own interest, unmindful of the interest of the company. RW-3 desposed

that he came to know of the sale of the buses through a broker and this cannot be accepted in view of the relationship between RWs-1 and 3.

RW-3 also accepted that he was not a motor mechanic and he was not familiar with bus operations. Yet, he claimed that he alone inspected the

buses before purchase, which is also rather strange. The learned company judge has also referred to the discrepancy in the evidence of RWs-1

and 3 to the effect that while the evidence of RW-1 was that he gave a certified copy of the resolution authorising the managing director of the

company to sell the buses to the sixth respondent, as for RW-3 he desposed that he was unaware of the resolution of the board of directors. All

the aforesaid circumstances clearly point to the conclusion that there was no transfer at all of the buses and the route permits of the company to the

appellant in O.S.A.No.61 of 1983 in a manner recognised by law and merely on the basis of the approval of the transfer by the Regional

Transport Authority under the provisions of the Motor Vehicles Act on a joint application by the second and the sixth respondents, despite

objection by the petitioners, it cannot be held that the title to the buses and the route permits passed on to the appellant in O.S.A.No.61 of 1983

from the first respondent-company.

15. In view of what has been stated earlier, the question of applicability of clauses (e), (f) or (g) of section 402 of the Act would not arise at all and

it is unnecessary, therefore, to examine the correctness of the finding of the learned company judge that clause (e) or at any rate clause (g) of

section 402 of the Act would apply to the present case. Further in the light of the earlier discussion, if the prayer asked for is granted by the

company court, it would only be to revive and reactivate the company and such a relief would only be in furtherance of the object with which

the power under sections 397 and 398 of the Act has to be exercised, viz., with a view to bring to an end the matters complained of.

16. We may now consider how far the reliance placed upon section 290 of the Act by learned counsel for the appellant in O.S.A.No.61 of 1983

would be of assistance in advancing the case of the appellant. Section 290 of the Act confers validity upon the acts done by a person as a director,

notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated

by virtue of any provision in this Act or in the articles. That section, however, will have no application to the present case where, as per the earlier

discussion, there had been a usurpation of the office of director and managing director. Section 290 of the Act would not cover cases where there

is a total absence of appointment or a fraudulent usurpation of authority. Our attention has not been drawn to any provision in the Act or any

decision holding that even in the absence of appointments or usurpation of the office of director or managing director, the provisions of section 290

of the Act would apply. Viewed in the light of the facts and circumstances referred to earlier, the decision relied on by learned counsel for the

appellant in O.S.A.No.61 of 1983 in Sheth Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. Ltd. [1964] 34 Comp Cas 777

cannot have any application at all and also cannot enable the appellant to claim that the transfer of the buses and the route permits is valid and

cannot be questioned in proceedings arising under sections 397 and 398 of the Act.

17. We have already noticed the factual features in this case and therefrom it is clear that certainly there was oppression and mismanagement as

envisaged under sections 397 and 398 of the Act. The third respondent as Rw-2 accepted that the second respondent and himself were not

attending to the affairs of the company after the sale of the vehicles and this explains in clear and unmistakable terms their attitude as well conduct in

that, having manoeuvred to lose the only assets of the company along with the route permits, they had virtually abandoned the company. The gross

neglect of the interest of the company by the sale of its only assets and the total inattention thereafter to the affairs of the company clearly justify

affording of the relief under sections 397 and 398 of the Act. We may in this connection refer to the observations of the learned company judge

that if the substratum of the company was manoeuvred to be lost to it by the scheme evolved by respondents Nos.2 and 3, it is easy to find that a

clear case has been made out that it is just and equitable that the company should be wound up. We had earlier noticed that the buses of the

company were earning substantial income in their respective routes and it would not be in the interest of the shareholders to wind up the company

and in order to rid the company of mismanagement, the reliefs prayed for under sections 397 and 398 of the Act have to be made available. We are

unable to accept the contention of learned counsel for the appellant in O.S.A.No.39 of 1984 that C.P.No.18 of 1979 is not maintainable since there is no plea or proof of the ingredients of section 397(2)(b) of the Act. From paragraphs 53, 54 and 57 of the petition, such a plea can be spelt out and, as for proof, there is overwhelming evidence to fulfil the requirements of sections 397 and 398 of the Act as referred to earlier. Thus, on a due consideration of the facts and circumstances of the case and the available materials, we hold that no case is made out to interfere with the order of the learned company judge. We, therefore, dismiss these appeals with costs. Counsel's fee one set.