

(2003) 10 BOM CK 0009

In the Bombay High Court

Case No : Appeal (L) No. 798 of 2003 in Company Appeal (L) No. 04 of 2003 and Company Appeal (L) No. 06 of 2003 in Company Petition No. 45 of 2002

Maharashtra Power Development Corporation Limited

APPELLANT

Vs

Dabhol Power Company and Others

RESPONDENT

Date of Decision : 10-10-2003

Acts Referred:

Arbitration Act, 1940 — Section 39(1), 39(2)
Bombay Municipal Corporation Act, 1888 — Section 217(1), 218D
Civil Procedure Code, 1908 (CPC) — Section 100, 100A, 104, 4(1), 96
Companies Act, 1913 — Section 202
Companies Act, 1956 — Section 10, 10F, 111, 2(11), 2(14)
Trade and Merchandise Marks Act, 1958 — Section 109(5)

Citation : AIR 2004 Bom 38(1) : (2003) 117 CompCas 651 : (2004) 50 SCL 440

Hon'ble Judges : R.S. Mohite, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : T.R. Andhyarujina, N.H. Seervai, Rahul Chitnis, S.H. Merchant, Chakranani Misra, Shailesh Dalvi and Rifat Merchant, instructed by M and M Legal Venture, for the Appellant; J. Dwarkadas, instructed by B.K. Girdharlal, for Respondent No. 1, Kapil Sibal, Manmohan, Abhinav Vashishta, C.D. Mehta, Rashmi Kapthalia, Vinita Honbalkar, instructed by D. Liladhar, for Respondent Nos. 2 to 5 and S.H. Doctor, instructed by Mahimtura and Co. for Respondent Nos. 6 to 9, for the Respondent

Judgement

H.L. Gokhale, J.—Heard Mr. Andhyarujina for the Appellants and Mr. Sibal for Respondents Nos. 2 to 5.

2. We have gone through the impugned order. Mr. Andhyarujina submits that it is erroneous on facts as well as on law. Mr. Sibal, learned counsel appearing for Respondents Nos. 2 to 5, submits that the impugned order is primarily on facts and correct one. We are, however, of the view that there are important questions of law which are as well involved in this matter.

3. Mr. Sibal has raised a question with respect to maintainability of this Appeal.

4. This Appeal u/s 483 of the Companies Act seeks to challenge the order dated 2nd September 2003 passed by a learned Single Judge u/s 10-F of the Companies Act in an appeal arising out of the order passed by the Company Law Board and petition initiated by the Appellants u/s 397 and 398 of the Companies Act.

5. Mr. Sibal and Mr. Dwarkadas, learned counsel appearing for the respective Respondents, submit that Section 100A of the CPC abolishing further appeals in certain cases has come into force with effect from 1st July 2002 and thereafter the appeals of the present kind would not lie. Mr. Sibal submits that a Division Bench of this Court in an unreported judgment in the case of Bnenoy G. Dembla and Anr. v. Prem Kutir Pvt. Ltd. (Appeal No. 354 of 2003 decided on 30th June 2003), has taken the view that against the decision of a Single Judge u/s 10-F of the Companies Act, there is no express conferment of a further right of appeal. He referred to para 13 of this judgment in that behalf. The Division Bench has observed in paragraph 8 of the said judgment, that as per the object behind introducing Section 100A of the Code of Civil Procedure, where an appeal from original or appellate decree is decided, by a Single Judge after 1st July 2002, no further appeal would be maintainable.

6. The Division Bench referred to and relied upon a Full Bench judgment of the Gujarat High Court in Nasik Hing Supplying Company v. Annapurna Gruh Udyog Bhandar reported in 2003 (2) Vol. 44 Gujarat Law Reporters 926. The Full bench of the Gujarat High Court was concerned with the right of appeal u/s 109(5) of the Trade and Merchandise Act, 1958 whereunder a further appeal is available to a Bench of High Court against an appellate decision of a Single Judge. The Full Bench held that the non-obstante clause u/s 100A of the CPC is not in derogation of the express provisions of a special law conferring a substantive right of appeal against the decision of a Single Judge. Mr. Sibal submits that as observed in Bnenoy Dembla's case (supra), after the introduction of Section 100A of the Code of Civil Procedure, unless a special statute confers a right of appeal, no such appeal would lie. He points out that the Division Bench has held in paragraph 13 of its order that there was no appeal specifically provided against an order of a Single Judge passed u/s 10-F of the companies Act, and, therefore, the present appeal would also not be maintainable.

7. Mr. Sibal drew our attention to the judgment of the Apex Court in Salem Advocate Bar Association Vs. Union of India (UOI), , and particularly paragraph 15 hereof, and submitted that the idea in introducing Section 100A of the CPC was to reduce the intra-court appeals and that unless there is specific statutory appeal, such construction to increase the number of appeals is not expected. He therefore submitted that the appeal ought to be dismissed in limini.

8. Mr. Sibal further pointed out that prior to 31st May 1991, the jurisdiction under Sections 397 and 398 of the Companies Act used to be with the Company Court. After 31st May 1991, the jurisdiction is now vested with the Company Law Board and appeal against its decision is made available u/s 10-F of the

Companies Act to a Single Judge of the High Court. In his submission, even under the dicta of the Division Bench in *Bnenoy Dembla's* case (supra), there has to be an express provision providing for a second appeal against the order of a Single Judge in the statute itself. An appeal specifically provided could alone be saved after introduction of Section 100A of the CPC and not otherwise.

9. Mr. Andhyarujina, learned counsel appearing for the Appellants, on the other hand, pointed out that the present appeal was u/s 483 of the Companies Act. It provides for an appeal from an order made by a court in the matter of winding up of a company to the same Court. He emphasized the clause # in the matter of winding up # as occurring in this section and then submitted that such an order of the Single Judge covered the orders passed under Sections 397 and 398 of the Companies Act. He particularly emphasized the provision of Section 397(2)(b) of the Act. Section 397(1) provides that if any member of a company complains that the affairs of the company are being conducted in a manner prejudicial to public interest, or in a manner oppressive to the member, such member may apply to the Company Law Board for an appropriate order. Sub-section (2) provides that (a) if the Company Law Board forms an opinion that the affairs of the company are being conducted in a manner prejudicial to public interest or in the manner oppressive to the members, (b) and to wind up the company would unfairly prejudice such members but otherwise facts would justify that such an order was just and equitable, then the Company Law Board may make such an order as it deems fit. Thus an application drawing attention to the case of oppression u/s 397 of the Companies Act based on facts which would justify the making of a winding up order on the ground of being just and equitable could lead to an appropriate order in lieu of a winding up. The order of an application u/s 397 would be an order made or decision given in the matter of winding up of a company and appealable u/s 483 of the Companies Act. Therefore, an appeal would lie from such an order of a Single Judge to a Division Bench. Now, even if the jurisdiction u/s 397 and 398 is given to the Company Law Board, and even if an appeal is provided to a judge u/s 10-F of the Companies Act, that would not take away the remedy u/s 483 of the Companies Act.

10. Mr. Andhyarujina referred to a decision of the Apex Court in the case of *Arati Dutta Vs. Eastern Tea Estate (P) Ltd.*, . This judgment in turn referred to an earlier judgment in the case of *Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others*, , with approval. In *Aggarwal's* case, the Apex Court had held overruled the preliminary objections and held that the order passed by the Company Judge u/s 397 or Section 398 was one which was passed in lieu of winding up and hence it was in the matter of winding up and, therefore, it was appealable u/s 483 of the Companies Act. In the particular case of *Arati Dutta* (supra), the matter came from Guahati High Court where there was no procedure to file an appeal from the decision of a Single Judge. Still the Apex Court held that # the absence of the procedure rules do not take away the litigant's right to file such appeals when the statute confers such a right specifically (end of paragraph 8 of the judgment). Mr. Andhyarujina drew our attention to a

judgment of a Division Bench of Kerala High Court in the case of Rev. C.S. Joseph v. T.J. Thomas # 62 Company Cases 504, where also the Division Bench (Per Balakrishnan J., as His Lordship then was in that Court) took the similar view.

11. When we consider the rival submissions, we have to note that Section 100A in the Code of Civil Procedure, has now provided that no further appeal is available notwithstanding anything contained in any Letters Patent or any other law for the time being in force. However, Section 4(1) of the CPC provides as under:-

In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed by or any other law for the time being in force.#

It is seen that section 483 of the Companies Act has been interpreted by the Apex court as providing an appeal against the order of a Single Judge to the Division Bench. This has been done by reading Sections 397 and 398 along therewith. The question is whether Section 4(1) of the CPC saves this further appeal u/s 483 of the Companies Act in the teeth of Section 100-A of the CPC introduced from 1 st July 2002. A straight reading of Section 100A prohibits any further appeal in certain cases, whereas Section 4(1) saves the remedies under special laws. This Section 4(1), however, has a clause at the beginning, which provides that it is in the absence of any specific provision to the contrary. Thus, in the absence of any specific provision to the contrary, the provision in the special laws will survive. What is the effect of joint reading of Section 100-A and Section 4(1) of the CPC on the provisions of Section 483 read with Sections 397 and 398 of the Companies Act? A decision on this question becomes crucial for deciding the maintainability of this appeal.

12. Mr. Andhyarujina, learned counsel appearing for the Appellant, referred to paragraph 20 of the above-referred Full Bench judgment of the Gujarat High Court. The Full Bench has observed that the settled legal position is that a prior particular or special law is not readily held to be repealed to a latter general enactment. This paragraph quotes with approval the observation of Lord Philimore in *Nicolle v. Nicolle* # 1922 (1) AC 284 to the following effect:

Where general words in a latter Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.#

13. The judgment of the Division Bench in *Bnenoy Dembla's* case (supra) is concerning the original proceedings u/s 111 of the Companies Act which provides for an application to the Company Law Board against refusal of company to register transfer of shares. Against the decision of the Company Law Board in such a matter an appeal is available u/s 10-F of the Companies Act to a single

judge of the High Court. However, there is no specific appeal provided thereafter unlike the one u/s 483 of the Companies Act with which we are concerned in the present matter. It is material to note that this right of appeal u/s 483 against the order of a Single Judge was specifically noted by the Apex Court in the above-referred Arati Dutta's case (supra) to observe that if there is an appeal under the statute, it has got to be made available, even though under the rules, there is no provision for the same.

14. If the submissions of Mr. Sibal are accepted, it will lead to repealing of special provisions such as Section 109(5) of the Trade and Merchandise Act merely because of the bringing into force of Section 100-A of the Code of Civil Procedure. This will be so inspite of the provision u/s 4(1) of the CPC which protects the jurisdiction, powers and special forms of procedure under the special law and although there is no specific contrary provision in any manner as required by the first part of Section 4(1) of Code of Civil Procedure. It is also material to note that though Section 100-A was brought into the statute book and brought into force, Section 4(1) has been left undisturbed. Therefore, there has to be a specific provision to remove the appeal provision, which is otherwise available under the special law. It is also necessary to note that an appeal is a substantive right and not merely a procedural one.

15. As an example of case where there is a specific curtailing provision, Mr. Andhyarujina referred to the judgment in the case of Union of India (UOI) Vs. Mohindra Supply Company, . This judgment dealt with the provisions of Section 39(1) and (2) of the Arbitration Act, 1940, Sub-section (1) conferred a right of appeal before a Single Judge of the High Court, but Sub-section (2) expressly prohibited second appeal from an order under Sub-section (1). It was contended before the Apex court that what was prohibited was a second appeal u/s 100 of CPC and not the appeal under Clause 10 of the Letters Patent. The Apex Court negated the contention by noting that the legislature had plainly expressed itself that the right of appeal against the orders passed under the Arbitration Act may be exercised only in respect of certain orders. The judgment is referred and quoted with approval in paragraph 16 of the above referred judgment of the Gujarat High Court.

16. Mr. Andhyarujina then referred us to a Division Bench judgment of this Court in Bachharaj Factories Ltd. Vs. Hirjee Mills Ltd., . The Court was concerned with Section 202 of the Companies Act, 1913 in that matter which is by and large *pari materia* with Section 483 of the Companies Act, 1956. This Section 202 read as follows:-

#202. Appeals from orders. Rehearings of, and appeals from, any order or decision made of given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in end subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction. #

The Division Bench interpreted this Section 202 as follows in para 5:

#Therefore, in our opinion, the proper construction to put upon Section 202 is this. The first part of that section confers a substantive right upon a party aggrieved by an order made or a decision given by a Company Judge in winding up. The second part of Section 202 does not in any way cut down or impair the substantive right already conferred by the first part of Section 202. The second part which deals with the manner and the conditions in which an appeal may be preferred only refers to the procedural aspect of an appeal and the forum to which the appeal would lie. #

Thus, the Division Bench noted that the section was in two parts; first part provided a substantive right of appeal whereas the second part provided the procedural aspect of the matter. Mr. Andhyarujina pointed out that this judgment and approach to Section 202 therein has been specifically approved by the Apex Court in the above referred case of Shankar Lal Aggarwal (*supra*). The Apex Court in terms held that the orders passed by the District Court or by a Single Judge in the matter of winding up petition are appealable u/s 202 independently of the provisions of Sections 96 and 104 of Code of Civil Procedure, 1908 or that of Clause 15 of Letters Patent. Mr. Andhyarujina, therefore, submitted that it was a right granted by special statute and not governed under the Code of Civil Procedure, it could not be reduced by any such provision like Section 100A introduced in Code of Civil Procedure. He further pointed out that the provision of Section 4(1) of CPC has been as it is although out and it was so in any case at the time when Aggarwal's case was decided.

17. Mr. Andhyarujina further submitted that the word # Court# u/s 483 of the Companies Act will have to be read in the context in which it is defined u/s 2(11) and Section 10 of the Companies Act. It includes the District Court or the High Court on its Original Side exercising company jurisdiction. Section 483 provides for an appeal from order made by the Court to the same Court. May be, the jurisdiction under Sections 397 and 398 is now vested with the Company Law Board, the order passed in an appeal u/s 10-F is the order passed by the Court which is appealable u/s 483.

18. Mr. Manmohan, learned counsel appearing with Mr. Sibal, submitted in rejoinder that the provision in the first part of Section 4(1) will have to be read as referring to a provision to the contrary in the CPC only and Section 100-A was this contrary provision which has been brought in to reduce further appeal. He submitted that in any case the wording in Section 4(1) required a specific provision. Even the Division Bench of this Court in its judgment in *Bnenoy Dembla's* case had stated so in paragraph 12 of the judgment. An interpretation given by a Division Bench would not be overlooked by this Court. He submitted that when *Arati Dutta's* case was decided, the jurisdiction u/s 397 was not transferred to the Company Law Board, CPC is the special law for the purposes of intra-court appeals and Section 100-A was the contrary provision reducing the further appeals.

19. Mr. Dwarkadas, learned counsel appearing for some of the Respondents, submitted that the Gujarat High Court had not considered the provisions of first part of Section 4(1) of CPC and, therefore, according to him, its decision on Section 109(5) of the Trade & Merchandise Act was not a correct one. He referred to a judgment of the Apex Court in *Municipal Corporation of Brihan mumbai v. States Bank of India* # AIR 1999 SC 380, where the Apex Court held that the Bombay Municipal Corporation Act itself provided for two appeals under the concerned provisions. One was u/s 217(1) of the Bombay Municipal Corporation Act, 1888 in the matter of ratable value or tax to the Chief Judge of the Small Causes Court and the second one was to the High Court u/s 218-D of the Act. The Apex Court held that there could not be any further appeal in view of Section 100-A of Code of Civil Procedure.

20. Mr. Doctor, learned counsel appearing for some of the Respondents, submitted that the question of maintainability be decided as a preliminary issue before deciding the admission of the appeal on merits. He referred to two judgments of the Apex Court in this behalf. Firstly, he drew our attention in the case of *Abdul Rahman Vs. Prasony Bai and Another*, wherein in paragraph 21, the Court observed that when the facts are admitted in a matter, and particularly when the suit can be disposed of on a preliminary issue, the maintainability of the suit can be adjudicated upon as preliminary issue. The observations in paragraph 9 in the case of *T.K. Lathika Vs. Seth Karsandas Jamnadas*, were also shown to us where the Apex Court observed that the High Court should have first decided the question of maintainability and only when said question was found in the affirmative, the merits could have been gone into.

21. Now, as far as the submission of Mr. Doctor is concerned, we will be and are giving our reasons in this order while considering the admission of the appeal. Hence, no separate order on this objection itself is required. The authority relied upon by Mr. Dwarkadas, viz. *Municipal Corporation v. State Bank* (supra) does not help him much because there is no specific second appeal against the order of the single judge passed u/s 218-D of the Bombay Municipal Corporation Act unlike Section 483 of the Companies Act. The submission of Mr. Dwarkadas on Trade & Merchandise Act is contrary to Section 4(1) of the Code of Civil Procedure. With reference to submission of Mr. Manmohan, it is not possible to accept that Section 100A of the CPC itself is the contrary provision. Besides, as explained by us, the view being taken by us is not contrary to the ratio of the Division Bench in *Bnenoy Dembla's* case.

22. We are also not inclined to accept that Section 100A of the CPC is the specific provision to the contrary within the meaning of Section 4(1) of the said Code with limits or otherwise affects the right of appeal provided u/s 483 of the Companies Act which would be the special law applicable. Firstly, what Section 100A bars is an appeal from the judgment and decree of a single judge. In the present case, the Company Court exercising power u/s 10F, passes no judgment and decree. The Company Court exercising jurisdiction u/s 10F, in the first place,

is not sitting in appeal from an original decree and order as is the first requirement of Section 100A. The term order in this context must mean an order defined u/s 2(14) of the Code which requires it to be that of the Civil Court. The Company Law Board exercising jurisdiction under Sections 397 and 398 of the Companies Act is not a Civil Court. Secondly, the order of the Company Judge in a 10-F Appeal is not a judgment and decree within the meaning of the Code of Civil Procedure. No other provision to limit or affect the rights u/s 483 is shown to us.

23. For the reasons stated above, we do not find any merit on the objection to the maintainability of this Appeal on the points raised by Mr. Sibal. On the other hand, on the merits of the appeal we find arguable points. Hence, the Appeal is admitted.

24. All the necessary papers are already filed and hence, no further separate paper-book is required. Printing of paper-book is dispensed with.

25. Advocates instructing the Counsel appearing for all the Respondents waive service on behalf of respective parties.

26. Hearing expedited.

27. All the Counsel request that considering the important questions of law involved in this matter, the same be heard early. The request will be considered by the concerned Bench.

28. Appeal to be listed before the concerned Bench on 5th November 2003 for direction for considering fixing a date of hearing.