
(2009) 08 KAR CK 0004
In the Karnataka High Court
Case No : Company Appeal No. 12 of 2005

Mr. Vijayan Rajes and Mrs. Madhumathi, V. Rajes	APPELLANT
Vs	
M.S.P. Plantations Private Limited	RESPONDENT

Date of Decision : 12-08-2009

Acts Referred:

Companies Act, 1956 — Section 397, 398

Citation : (2009) 151 CompCas 413 : (2009) ILR (Kar) 3576 : (2010) 7 RCR(Civil) 2250

Hon'ble Judges : D.V. Shylendra Kumar, J;Aravind Kumar, J

Bench : Division Bench

Advocate : A. Murali, for the Appellant; Vivek Holla, Holla, Holla, Patil and Nettar, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—This appeal u/s 10P of the Companies Act, 1956 [for short, the Act] by the persons who were petitioners in Company Petition No. 51 of 1996, on the file of the Company Law Board, Principal Bench, Chennai, who had presented the petition under Sections 397 and 398 of the Act seeking for the relief in respect of the acts and oppressions complained against the management and majority shareholders of M/s MSP Plantations Private Limited, Bangalore, as the petition came to be dismissed in terms of the impugned order dated 30-9-1998 and being aggrieved by the dismissal of the petition.

2. It is urged in the memorandum of appeal that the Company Law Board has not. taken into consideration the relevant aspects and materials which had been placed by the appellants-petitioners before the Company Law Board; that even without any worthwhile opposition to the company petition on the part of the respondents in the petition, Company Law Board has erroneously dismissed the petition, that the board has failed in its function in not taking into account and examining the various acts of mismanagement and oppression which had been committed by the majority shareholders of the respondent-company and against

which the appellant had complained of; that even without a proper intimation and notice to the appellants, they had been virtually thrown out of the company by the differential treatment meted out to them as preference shareholders, more so when, apart from the preference shareholders, the only other shareholder of the company was M/s MSP Investments Ltd., and therefore the uneven treatment meted out to the appellants-petitioners did constitute an act of oppression and the Company Law Board holding otherwise is not tenable in law. Various other grounds have also been urged in support of the appeal.

3. The appeal, which had been originally filed and numbered as MFA No. 5457 of 1998 [filed on 5-12-1998], has been subsequently renumbered as Company Appeal No. 12 of 2005.

4. Brief facts leading to the above appeal are that: The first respondent M/s MSP Plantations Pvt. Ltd., is a company was incorporated under the provisions of the Act on 18-12-1981 as a private limited company; that the company incorporated in the year 1981 with the second and the third respondents as its initial shareholders with established object of carrying on the business of coffee plantation and export of coffee and spices; that it did not transact any business during the initial years of formation of the company and the first appellant, who had completed his post graduation in the United States of America, was requested by the second respondent, his father, to return to India and to manage the affairs of the company; that the first appellant, on such request, returned to India and started managing the affairs of the company and began the business activity of the company and was thereafter appointed managing director of the company; that the company was being run more as a family concern, first appellant-son and the second respondent-father virtually carrying on the business of the company, that the second appellant is the wife of first appellant and both of them held equity shares of 100 numbers each, the face value of which is Rs. 1,000/- in the first respondent company.

5. The authorized share capital of the first respondent company, was if the company had an authorized share capital, was Rs. 50.00 lakh, comprising of 2500, 4% cumulative preference shares of Rs. 1,000/- each and 2500 equity shares of Rs. 1,000/- each. The promoters of the company i.e. respondents 2 and 3 had subscribed 10 equity shares each. It appears, later the second respondent had subscribed a further 250 equity shares and the first appellant was allotted 100 equity shares, the face value of which was Rs. 1,000/-, as per the resolution dated 21-6-1987 and the second appellant, with whom was married in September 1987, was allotted 100 equity shares of Rs. 1,000/- each as per the resolution of the board meeting held on 25-1-1988.

6. it is the further averments before the Company Law Board and before this Court that as a measure of tax planning, out of the 460 subscribed equity shares, as many as 455 equity shares were converted into 4% redeemable preference shares as per the resolution at the extraordinary general body meeting of the company held on 30-3-1992 and thereafter the only equity

shareholder of the company was M/s MSP Investments Ltd.,, which held 5 equity shares of Rs. 1,,000/-; fully paid up, which were the five equity shares that had been transferred by the second respondent in favour of this company prior to the resolution of the extraordinary general body meeting held on 30-3-1992 and though in terms of the resolution, the preference shares were redeemable by 1998, the understanding was that it was to be treated for all practical purpose as equity shares only; that the preference shareholders will continue to have voting rights on par with the equity shareholders and ultimately instead of redeeming the shares, it should be reconverted into equity shares etc.

7. In so far as the management of the company is concerned, it is averred that the initial directors of the company were the second and the third respondents; that the first appellant, who had returned from USA after acquiring a masters degree in international management, was appointed as managing director of the company on 11-2-1987; that the second appellant was appointed as chairman of the company; that the third respondent, who was a director, resigned from the directorship in the year 1987; that in the same year, as per the further resolution of the board dated 24-10-1987, while the second respondent MSP Rajes was re-appointed as chairman and managing director of the company from that date, the first appellant was asked to continue as executive director of the company. It is further averred that the second respondent resigned from his post as managing director with effect from 6-12-1991.

8. It was the further case of the appellants-petitioners that in terms of a further board resolution of the company passed on 28-12-1995, it was resolved to appoint the third and the fourth respondents as directors of the company and the first appellant was removed from the position as director of the company, all with immediate effect, and the minutes also recorded the protest of the first appellant; that it was done with a mala fide intention and it was being done in contravention of the injunction order dated 19-12-1995, passed in OS No. 8382 of 1995, on the file of the City Civil Judge, Bangalore City [CCH 15] and also that it was not in conformity with the provisions of the Act and also not in consonance with the Articles of Association of the company.

9. It is the version of the appellants that the background to such resolution dated 20-12-1995 was the discovery of several acts of mismanagement of the affairs of the company by the second respondent and the second respondent being called upon to explain his conduct, particularly in misusing the funds of the company, by making investment of the company in other private companies at his sole discretion and acting in a manner prejudicial to the interest of the company by taking decisions regarding diversion of the funds of the company, totally unilaterally and not taking the board of management into confidence.

10. It is also the version of the appellants that the conduct and action on the part of the respondents was only to eliminate the appellants from the membership of the company; that it was only a prelude for further highhanded and oppressive activities on the part of the respondents 2 and 3, constituting

majority shareholders of the company; that the further meeting dated 9-3-1996 of the newly constituted board of management of the company as per its earlier resolution dated 20-12-1995 was proof of this mala fide intention, as in terms of the resolution dated 9-3-1996, it was indicated that while 455 numbers of preference shares in the company are to be redeemed and 245 numbers of equity shares of Rs. 1,000/- each were to be allotted in favour of the second respondent and 10 such equity shares were to be allotted in favour of the third respondent; that these shares were allotted in place of same number of preference shares by redeeming them with effect from 9-3-1996 by redeeming 245 preference shares held by the second respondent, 100 preference shares held by the first appellant, 100 preference shares held by the second appellant and 10 preference shares held by the third respondent.

11. It is the further version of the appellants-petitioners that the removal of the first appellant from the directorship of the company and the subsequent redemption of their preference shares and throwing them out of the company, while allotting an equal number of equity shares in favour of respondents 2 and 3, in lieu of the preference shares which they had also held in the company earlier, are all part of the same sinister scheme not only to oust the appellants-petitioners from the company but also to take full control of the company at the cost of the appellants-petitioners and all these acts constitute not only acts of grave mismanagement of the affairs of the company, but were also to the great disadvantage of the appellants-petitioners and to affect their rights as shareholders and therefore also constitute acts of oppression and mismanagement and on such premise had approached the Company Law Board seeking for the following reliefs:

(i) Compulsory conversion of 200 4% cumulative preference shares of Rs. 1,000/- each fully paid up held by the petitioners in the company into 200 equity shares of Rs. 1,000/- each credited as fully paid up.

(ii) Declare as null and void all resolutions passed at the purported Extra-Ordinary General meeting of the company convened by the respondent No. 2 and held on 20-12-1995.

(iii) Declare as null and void all resolutions purportedly passed by the Board of Directors and general body of the company on and from 20-12-1995.

(iv) Direct the respondent No. 2 to take steps to recover all monies belonging to the company which have been invested by him or jointly with respondent Nos. 3 & 4 holding themselves out as directors in any company or concern.

12. The respondents resisted the petition filed invoking Sections 397 and 398 of the Act, and had contended that the averments are all false and untenable and without any merit and was only to be dismissed. It had been averred in the statement of objections filed by the second respondent, who alone contested the petition, that the company petition is nothing but a wavered action of an ungrateful and disobedient son; that the second respondent had acted all along

in accordance with the provisions of the Act in managing the affairs of the company; that the second respondent had to remove the first appellant from the directorship of the company, as he had failed in proper supervision and taking care of the affairs of the company; that the first appellant was more interested in indulging in petty, frivolous litigation with his father - second respondent - than to ventilate any legitimate grievance or for seeking any relief tenable in law; that the company petition was a result of misadventure of an ill advised, arrogant, immature person; that the second respondent all along carried on the affairs of the company in a truly professional way and in conformity with the provisions of the Act and if the second respondent and other shareholders of the company had used their majority shareholding for their benefit and to the detriment of the appellants, which is a well recognised right of majority shareholders even under the Act and if the appellants-petitioners had lost their position and directorship of the company due to the permitted legal methods adopted by the respondents, they neither can complain of it before the court of law or the tribunal like Company Law Board nor can get any relief in law, more so as sought for in the company petition and prayed for dismissal of the petition.

13. The appellants-petitioners, in fact, had filed a rejoinder statement. It was sought to be asserted in the rejoinder that the company itself was started essentially to manage it as a family business in developing coffee estates and export of coffee, which, in fact, was a family tradition and the brand name "MSP", having a great brand value and the initials "MSP" representing the name of the father of the second respondent Sri MS Periyasamy Nadar and that it was run only as a family business and involvement of the third respondent, both during the formation of the company and briefly its management was only due to personal reasons of the second respondent and for his own convenience; that the company neither could be put in the hands of third parties nor the first appellant can be ousted from the company; that the first appellant and second respondent alone should have equal rights in the company was the understanding and the basis for which purpose the company itself had been brought into existence etc.

14. The parties had attached to their pleadings various annexures leading to the developments as viewed from their angle. The Company Law Board examined the matter in the background of these pleadings and materials and on hearing the learned Counsel for the parties, dismissed the petition as not maintainable.

15. The Company Law Board was of the opinion that the preliminary objection raised on behalf of the respondents was tenable; that the appellants-petitioners had no locus standi to maintain the petition, having been removed from the membership of the company and being not shareholders of the company on the date of presentation of the company petition; that even in the process of redemption of preference shares as per the resolution of the board of management of the company dated 9-3-1996, there being no violation of the provisions of the Act, the petitioners in any view of the matter were not entitled to maintain the petition being not members of the company in any capacity on

the date of presentation of the company petition; that the resolution of the majority shareholders of the company at its general body meeting cannot be made subject matter for invalidation before the Company Law Board by filing a petition under Sections 397 and 398 of the Act; that the board resolution dated 9-3-1996 had not been in any way shown to be bad in law by the petitioners; that even the contention that by the so-called redemption of preference shares as per the resolution dated 9-3-1996 is not valid in law, as the company would have been left with only one shareholder and therefore the company could not have been continued in law, was not tenable factually, as in terms of the very resolution of even date, the board of management had decided to allot 255 equity shares of the company in favour of the second and the third respondents; that even the resolution of the shareholders at an extraordinary general body meeting of the company held on 20-12-1995, which, in fact, had been attended by the appellants-petitioners, cannot be faulted in a petition filed u/s 399 of the Act on the grounds available under Sections 397 and 398 of the Act, unless the principles of partnership were applied to the company and as the principle of partnership being not attracted to the present company, with the petitioners having become shareholders or by subsequent to the incorporation of the company and there being nothing on record to indicate that the earlier conversion of 455 equity shares to preference shares was with an intention to reconvert them into equity shares redemption of the 455 preference shares on 9-3-1996 was a valid action being in conformity with the provisions of Section 80 of the Act; that the mere factum of second respondent and the first petitioner-appellant - being father and son - cannot by itself attract the principles of partnership for the management of the company, particularly as while in the partnership, there should be utmost goodwill, cooperation and understanding between the partners, whereas the first appellant-petitioner was only indulging in litigation against his own father, the second respondent, and in such state of affairs, there was no way of applying the principles of partnership to the first respondent company and as the Company Law Board was of the view that the company petition itself was more for an oblique object of pressurizing the second respondent to transfer the property owned by the company in the form of one of the flats in Madras and not for ventilating any legitimate grievance of minority shareholders and there was no question of encouraging a petition of the present nature and in spite of the efforts on the part of the Company Law Board to ensure an amicable settlement between the parties due to the relationship of father and son, even that being not successful, as the parties did not cooperate, there was no other way for the Company Law Board but to dismiss the petition and accordingly dismissed the company petition. It is aggrieved by this order, the present appeal.

16. The principal contention urged on behalf of the appellants-petitioners are that: The impugned order is totally a perverse order; that the Company Law Board has not adverted its attention to the issues raised by the petitioners and the grounds urged in support of the petition; that the Company Law Board has

totally misapplied the legal principle and the judgments which were not attracted to the facts of the present case; that the decision of the Company Law Board while is not based on the material on record and the Company Law Board has also not applied the relevant law to the petition and the material; that it is also vitiated being influenced by irrelevant considerations such as the Company Law Board being of the view that the first petitioner-appellant was more interested in getting the property of the company through the second respondent rather than ventilating any bona fide rights of minority shareholders by the oppressive conduct of the majority shareholders; that the Company Law Board has totally given a go-by to the actual relief sought for by the petitioners and has paid attention to discussion with reference to which no relief was sought for by the petitioners by unnecessarily making reference to any property of the company; that the relief claimed was only to preserve their rights as shareholders of the company; that the Company Law Board has not only totally misunderstood the scope and application of the law laid down by the Company Law Board itself in the case of *Vijay Krishan Jaidka v. Jaidka Motors Co. Ltd.* (1996) 23 CLA 289 (CLB), but also has failed to follow its own earlier ruling in the said case; that the Company Law Board has also not properly applied its earlier ruling in the case of *A Ajit Singh v. DSS Enterprises Pvt. Ltd.* (2002) 109 COM CAS 597, which squarely covered the case of the appellants-petitioners in so far as the mismanagement and oppression of minority shareholders is concerned, but also failed to appreciate and apply the ratio of the judgment of the Supreme Court in the case of *Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others*, particularly to test the legality of the resolution of the general body held on 20-12-1995 and the board meeting held on 9-3-1996 in the matter of non-allotment of equity shares to the appellants-petitioners with a view to oust them and on the other hand allot equity shares in favour of respondents 2 and 3 in lieu of preference shares, which was a mala fide and uneven action only with an intention to oust the appellants-petitioners from the company by utilizing the majority shareholding by the second and the third respondents, which had been pressed into service for bringing about the resolution at the extraordinary general body meeting of the company held on 20-12-1995; that the 9-3-1996 resolution of the board of management of the company was only a follow-up action of 20-12-1995 resolution of the extraordinary general body meeting, which had all the sinister motive of ousting the appellants-petitioners from the membership of the company; that all these developments being only to cover up the mismanagement of the company by second respondent, particularly when the first appellant had questioned the wisdom of the second respondent in diverting the funds of the company for investment in Sanco Trans Ltd. and which constituted an act of mismanagement on the part of the second respondent; that that the acts of mismanagement and oppression were writ large on the face of such activities and therefore by correctly applying the legal principles laid down in the case referred to above, the company petition should have been allowed.

17. It is also pointed out by Sri Murali, learned Counsel for the appellants-

petitioners that the significance of the resolution of the company while converting the equity shareholding of its shareholders i.e. shareholding of the appellants-petitioners and the respondents 2 and 3 into equal number of preference shares [455] with all the shareholders having voting rights on par with the equity shareholder viz., M/s MSP Investment Company, with shareholding of five shares, which had been transferred from the shareholding of the second respondent prior to the resolution, has being lost sight of by the Company Law Board and the board has committed a grave error in proceeding under the premise that the appellants-petitioners had only the rights of preference shareholders as understood under the Act and nothing more.

18. It is also the submission of the learned Counsel for the appellants-petitioners that the acts of mismanagement and oppression in terms of Sections 398 and 397 of the Act can exist and can be made good, notwithstanding the company adhering to the statutory provisions and the requirements of law; that it involved more to the manner in which the majority shareholders and the persons in management of the affairs of the company have made use of their majority shareholding power and managerial position arid as to whether it resulted in either oppression of the minority shareholders or mismanagement of the affairs of the company; that in the instant case, both sections were very much attracted and while the Company Law Board could have granted the relief under either sections and in the instant case, both the statutory provisions being attracted, the Company Law Board should have allowed the petition for the relief sought for in the petition and therefore submits this appeal should be allowed, impugned order of the Company Law Board set aside and the company petition allowed in terms of the prayer.

19. Appearing on behalf of the respondents, submission of Sri Vivek Holla, learned Counsel is that the preliminary objection raised on behalf of the respondents is very tenable and the Company Law Board has rightly dismissed the petition. The conduct of the appellants-petitioners, who had earlier questioned the legality of the resolution of the extraordinary general body meeting held on 20-12-1995 by filing OS No. 8382 of 1995 and the suit having been dismissed on 1-J 0-1996, not only disentitled them to seek for any relief before the Company Law Board by filing a petition u/s 399 of the Act due to the conduct but also the principle of res judicata.

20. Sri Holla would submit that the redemption of preference share was fully in consonance with the requirement of Section 80 of the Act; that it was wrong to contend that the provisions of Section 81 of the Act were attracted to the present case or it has been violated; that while on facts the membership of the company was never reduced to one at any point of time, even assuming that to tie so, it would not constitute an impediment for the redemption of the preference shares by the company and therefore the argument based on this ground would not invalidate the order of the Company Law Board. It is emphatically urged that while the petition was not tenable before the Company Law Board, as the

petitioners were not members of the company on the date of presentation of the company petition, it not as though the Company Law Board dismissed the petition only on this ground, but has also examined the complaint of both oppression and mismanagement and only after being satisfied that neither exists, having dismissed the petition, there is no merit in this appeal and that in fact neither any mismanagement nor any oppression; that the facts prevailing in the case never supported the contention of the appellants that the company was a family concern and that from the inception of the company, neither of the petitioners was on the scene; that the company itself was started with an outsider of the family namely third respondent and the second respondent and therefore, there is no question of treating the company either as a family concern or applying the principles of partnership firm to examine the conduct and affairs of the company.

21. It is also pointed that the provisions of Section 397 can be invoked only when the petitioners are able to make good that the situation as developed is to inevitably leading to winding up the company and if so done, it would unfairly prejudicial to the complaining members and not otherwise; that the appellants-petitioners have never made good the case that the situation fully justified for passing an order for winding up of the company, as it was just and equitable to wind up the company.

22. In support of his submissions, Sri Vivek Holla, learned Counsel for the respondents has relied upon the following:

1. V.M. Rao and Others Vs. Rajeswari Ramakrishnan and Others,
2. Hanuman Prasad Baori v. Baorbs Cereals Pvt. Ltd. (2001) SCC 420
3. Maharani Lalita Rajya Lakshmi M.P. Vs. Indian Motor Co., (Hazaribagh) Ltd. and Others,
4. Shanti Prasad Jain v. Kalinga Tubes Ltd. AIR 1968 SC 135.

23. In reply, Sri A Murali, learned Counsel for the appellants-petitioners has sought to distinguish the ratio of the case in Hanuman Prasad Bargi [supra], relied on by Sri Vivek Holla, learned Counsel for the respondents and by referring to para-3 of the very judgment, submits that the question of the court examining the oppressive conduct of the other shareholders or the affairs of the company being conducted in a manner prejudicial to public interest arose in that case and was entirely on the sole premise that the shifting of the registered office of the company to another place and bring it back to the earlier place, while in fact did not amount to any demonstrable financial loss to the company and even cannot be characterized as an act of mismanagement and therefore no case of oppression had been made out on facts; that the other observation made in the judgment is not an issue in this appeal. Learned Counsel would submit that the series of acts leading to removal of a member of the company and such acts utilized as device to oust the complaining members from the company itself

would certainly constitute an act of oppression and therefore submits that the ratio of the judgment of the Supreme Court in the case of Hanuman Prasad Bargi [supra] does not apply to the present case.

24. It is also the submission of Sri Murali that on facts, the appellants-petitioners have demonstrated that there was not only mismanagement of the company by hazarding the funds of the company in the form of investment in other companies but also acts of oppression and at any rate the company having not taken up the defence that the appellants-petitioners had not made out a ground for winding up of the company, that defence cannot be set up now for the first time in this appeal and therefore the arguments on behalf of the respondents in the appeal cannot succeed. It is also pointed out that the complaint of the appellants-petitioners was not of any single incident but it is a series of acts involving removal of the first appellant from the directorship, induction of third party and third respondent as directors., uneven way of treating appellants vis-a-vis respondents 2 and 3 at the time of redemption of preference shares while only respondents 2 and 3 were allotted equal number of equity shares, same treatment being denied to the appellants-petitioners and therefore it is not as though the complaint is of any single incident but as against a scheme and series of acts on the part of the respondents, particularly second respondent.

25. The next submission of Sri Murali, learned Counsel for the appellants-petitioners is that the Act does not provide for conversion of equity shares into preference shares and if it is to be the case of reduction of share capital, it is only through the process of Section 100(2) of the Act and at any rate the conversion of equity shares in the year 1992 being only for claiming some tax benefits and not for altering the status of the members, as same members continued to hold the very equity shares, but called as preference shares, coupled with voting rights. It is submitted that preference shares in fact and in reality remained equity shares and therefore the so-called redemption/conversion of preference shares in the year 1996 was only a method adopted by the second respondent to throw out the appellants-petitioners from the membership of the company.

26. Sri Murali would also submit that the dismissal of the civil suit is of no consequence, for the reason that the suit was not dismissed on its merit, but on technicalities and as the plaintiff had not pursued the matter further.

27. We have perused the order impugned, looked into the records and bestowed our attention to the submissions made at the Bar and the authorities relied upon by the learned Counsel for the parties.

28. The main grievance of the appellants-petitioners is that their grievance and the grounds raised in support of the petition before the Company Law Board u/s 399 of the Act complaining both oppression and mismanagement in terms of Sections 397 and 398 of the Act have not received proper attention at the hands of the Company Law Board; that the Company Law Board has thrown out the

petition on irrelevant consideration and by calling in aid authorities which are not applicable to the facts of the present case.

29. The questions that arise for examination in this appeal are:

1. As to whether the appellants-petitioners had a right to complain u/s 399 of the Act?
2. As to whether the appellants-petitioners have made out a case of either oppression or mismanagement or both?
3. Whether, in the facts and circumstances of the case and on the application of governing authorities, dismissal of the petition filed by the appellants-petitioners is justified?

30. In so far as the question of maintainability of the petition is concerned, the preliminary objection raised is that on the date of presentation of the petition, the appellants-petitioners being not members of the company in question, they have no locus to maintain the petition and therefore the very position is not tenable and it has to be dismissed.

31. Though the Company Law Board did dismiss the petition, it is not precisely on the ground that the petition itself was not tenable, but only after examining the questions relating to the validity of the redemption process and as a consequence the petitioners being no more members thereafter i.e. on and after 9-3-1996, they ceased to be members and therefore a petition presented u/s 399 of the Act was held not maintainable at the instance of the petitioners.

32. The reasoning given by the Company Law Board does not appeal to us. If the finding is to be that the persons presenting the petition do not qualify for presenting a petition u/s 399 of the Act, no further question arises and the petition was to be dismissed at the threshold. But the Company Law Board has viewed the working of the Section 399 of the Act in the converse way, which is not a proper understanding of the provisions of Section 399. But, on authority, it has been established that for the purpose of examining as to whether the petitioning members qualify for maintaining a petition u/s 399 of the Act, the question to be looked into is as to whether the petitioners constitute the requisite number of members or they had the requisite shareholding in the company prior to the acts complained of. If the date of presentation of the petition should be looked into in a technical way, it could defeat the very purpose of the legislative enactment of Sections 397 and 398 of the Act, as the overbearing majority shareholders can simply by highhanded action or even for other purpose and by oppressive methods, dismember minority shareholders and leave them with no remedies, as the dismembered minority shareholders technically do not qualify for maintaining a petition u/s 399 of the Act, being not member at all. As the minority shareholders will be complaining only after the acts occurred and when they have been removed from the membership of the company, the understanding and interpretation to be given to Section 399 is only so as to

Author the object of relief to be given in a situation governed by Sections 397 and 398 of the Act and not to foreclose the options to an aggrieved person and to deny the very relief sought to be extended to a complaining minority shareholder/s envisaged under Sections 397 and 398 of the Act.

33. The Company Law Board has also proceeded on the premise that appellants-petitioners were not able to make out a case that the company being carried on as a family concern to invoke the principles of partnership and to examine the activities of the company on such basis about the manner of management of the affairs of the company. Here again, the Company Law Board has totally misconceived the circumstances and situations which necessitate applying provisions governing the Partnership Act being artificially made applicable to test the manner of management of the company. The company remains a company, not a partnership firm.

34. But, the nature of the scrutiny depends upon the intention of the parties, manner in which the company has been managed/conducted all along and in which direction the company is moving. In the present situation, the manner in which the shareholding of the company has been regulated, particularly by issue of shares in favour of second respondent-father and the first appellant-son and the additional shares in favour of second appellant-wife of first appellant after the marriage, while the issue of 10 shares in the company in favour of third respondent has all along remained the same is only an indicator that the company was intended to be run as a family concern of the second respondent. To this extent, the version of the appellants-petitioners merits acceptance.

35. The manner in which almost the entire equity shareholding of the company was converted into preference shares in the year 1992, except for the five snares, which had been transferred to a limited company, in which the second respondent has substantial interest and control, from out of the holdings of the second respondent and even thereafter the preference shares nevertheless having voting rights, only indicates that the so-called conversion of equity shares into preference shares was not the real intention and in this regard, Sri Murali, learned Counsel for the appellants is also right in submitting that the Act does not provide for such a conversion and actually it is only the preference shareholders who managed the affairs of the company even subsequent to the year 1992. The company did not treat preference share holders as is understood under the provisions of the Act, but only on par with the equity shareholders and therefore selective redemption of some part of the preference shares without reconverting the rest into equity shares as in the case of the appellants-petitioners and acting otherwise in the case of respondents 2 and 3, definitely leads to an inference that the so-called redemption of preference shares is used as a device to throw out the appellants-petitioners from the membership of the company. This coupled with the circumstance leading to this development being the complaint on the part of the first appellant that the funds of the company have not been properly managed; that the second respondent has been taking

unilateral decisions in the matter of investment of funds of the company in other private concerns and such information being obtained by the first appellant through the bank in which the company had its transactions and immediately thereafter the second and third respondents calling for a general body meeting, wherein the initiate the change of directorship in removing the first appellant from the directorship of the company and induct the respondents 3 and 4 as directors, which, in turn, would lead to the board of directors taking a decision to redeem the shares and in an uneven manner, only indicates the tendency of oppressive acts on the part of the respondents 2 and 3. We are of the clear view that the Company Law Board has not examined the real grievance of the appellants-petitioners as envisaged in the petition, but has declined to examine the same on incorrect and erroneous presumptions; that the conduct and developments with reference to which the petitioners have complained of cannot be examined on the principles of partnership and therefore petitioners cannot be given relief under Sections 397 and 398 of the Act, is a finding not based on the facts of the case nor in the context of the complaint and grounds of the petitioners, but only on the assumptions made by the Company Law Board itself.

36. The concept of piercing of corporate veil in examining the true nature of transactions in any private company is a principle too well recognized even under the Act and the Company Law Board could not have overlooked this requirement by merely mentioning either that the principles of partnership cannot be made applicable or that the appellants-petitioners were not able to make good their case that the company was more a family concern.

37. In the circumstance of the present case, we are of the clear view that as the acts of removal of first appellant from the board of directors, though is an act permitted in law, and in consonance with the provisions of the Act followed by a resolution on this reconstituted board to redeem all preference shares and for the very purpose allotting equity shares of an equal number in favour of only two of the preference shareholders and utilizing the very amount for redeeming the shareholding of the petitioners, all necessarily leading to an inference that the transaction are being used as a device to throw out the appellants-petitioners from the membership of the company. To constitute an act of oppression, the question is not so much as to whether the affairs of the company are being conducted in consonance with the provisions of the Act or not, but even while so doing, the power and advantage of holding majority shares in the company is used by the majority shareholders for the purpose of causing prejudice to the minority shareholders.

38. From the sequence of events about which the appellants had complained in their petition before the Company Law Board, it is obvious that the origin of the development leading to the ouster of the appellants from the membership of the company was when the appellants, particularly the first appellant, as a director of the company, objected to the manner in which the second respondent, the then managing director of the company, was acting in a unilateral manner, was

taking decisions independently even without bringing the matters to the notice of the board of management, particularly in making an investment of Rs. 18.00 lakh in a private company by name M/s Sanco Trans Ltd by raising loan for such investment on the security of the fixed deposit of the company with M/s Tamilnadu Mercantile Cooperative Credit Bank; that the investment was in a company where one of the personal friends of the second respondent was a director, that it was more to appease and in consideration of the friendship of the second respondent, and the particular director of M/s Sanco Trans Ltd, the investment was made and not keeping in view the interest of the company; that as the second respondent was unable to explain such acts which clearly amounted to mismanagement of the affairs of the company, had resorted to offensive conduct to cover up his act of mismanagement by first requisitioning a special general body meeting on the strength of the majority shareholding and in the general body, again using his majority shareholding, to get a resolution passed not only to remove the first appellant from the directorship of the company but also for nominating the third respondent, who held only 10 shares as a director and also a non-member like the fourth respondent as director of the company; that such management power is further misused by convening a meeting of the board of management on 9-3-1996, in which meeting, the board decides not only to redeem the so-called preference shares which had been issued not by subscription, but which had been earlier converted into preference shares in lieu of their holding of equity shares,, but also decided in the very meeting that the respondents 2 and 3 alone should be allotted an equal number of equity shares on redeeming their shareholding in the company, whereas it is not so allotted in the case of appellants, but they were asked to collect back the amount.

39. Significance of these sequence of events, which constitute the material for a petition u/s 398 of the Act, which is one of complaint of mismanagement and which in turn led to an act of oppression or suppression to cover up his mismanagement, which is virtually to oust the appellants from the membership of the company, is a series of actions with the sole object of removing the appellants from the membership of the company and therefore in a situation of this nature, the requirement of the provisions of Section 397 of the Act, particularly the act of oppression being examined only in the context of a situation where it is inevitable to wind up the company, but so ordering the winding up of the company, acts to the disadvantage of the minority shareholders is precisely not attracted and the act of oppression being in turn linked to the act of mismanagement if the act of mismanagement when once has been made good, the petition could not have been thrown out as one either not maintainable u/s 399 of the Act or on the premise that the series of acts of redeeming preference shares and allotting further equity shares in favour of the respondents 2 and 3 is in no way in violation of the statutory provisions under Sections 80 and 81.

40. While the provisions of Section 80 may not even be attracted, as in the first

instance, no preference shares as such had been issued by the company, but the preference shares were only as a result of conversion of earlier equity shareholding of the appellants and the respondents 2 and 3 and so converted for some strategic reasons of the company's business management and questions of non-violation of provisions of Section 81 in issue of capital and therefore the act being held not either as an oppressive act or not as a mismanagement also does not arise for the reason that a mere compliance with the requirement of Section 81 of the Act in itself is not an issue, but the manner in which even the power u/s 81 for issue of capital is utilized.

41. The complaint was precisely that even if the issue of equity shares in favour of respondents 2 and 3 was in compliance with the requirement of Section 81, even then it amounts to an act of oppression for the reason that the series of acts leading to redemption of preference shares attributable to Section 80 of the Act and issue of capital attributable to Section 81 of the Act, have all been used only for the purpose of ousting the appellants from the membership of the company. Such acts of oppression having its origin to the complaint of mismanagement levelled by the first appellant against the second respondent, the complaint of oppression is not, one which is required to be examined in isolation or independently, but in combination of the complaint in terms of Section 398 and the series of actions are to be viewed in its entirety.

42. While it is true that one of the requirements for application of Section 397 of the Act is that the complaint of oppression can only be examined in a situation where even otherwise the company is required to be wound up, this question having not been examined as an issue before the Company Law Board, but in the instant case, the act of oppression was being one of totally dismembering the complaining members, in so far as the complaining persons are concerned, it is as good as winding up of the company, as the board of the company has avoided sharing the assets of the company with the appellants-petitioners pari passu with other shareholders proportionately to the shareholding, but being asked to go out, with a fixed amount leaving all the assets in the hands of the remaining members, who, in reality, are only two, as the third member company with shareholding of a mere five shares was again a company in the control of the second respondent, and ultimately revealing that the entire development was only due to the difference between the Drat, appellant and the second respondent-son and father duo - ironically due to internal family relationship between these two persons being strained and leading to difference due to the entry of third respondent to the family of the second respondent.

43. Be that as it may, if the entire set of circumstances are to be examined on the touchstone of statutory provisions of Sections 397 and 398 of the Act, we are of the clear view that the petitioners had made out not only a case of oppression in terms of Section 397 of the Act but also a case of mismanagement in terms of Section 398 of the Act, particularly with the second respondent acting unilaterally in managing the events of the company and at the moment noticing a complaint

of first appellant-son, action adverse to the interest of the appellants-petitioners having been taken, in the circumstance, we are of the view that the authorities relied upon by Sri Vivek Holla, learned Counsel for the respondents while do not advance the case of the respondents does not nor lend support to the order passed by the Company Law Board.

44. We are of the clear view that in the present facts and circumstances, the appellants-petitioners have made out a case of oppression and mismanagement attracting the provisions of Sections 397 and 398 of the Act, notwithstanding the respondents being able to demonstrate that they had not violated or transgressed any of the provisions of the Act including Sections 80 and 81 of the Act.

45. While all acts beginning from the extraordinary general body meeting of the company convened on 20-12-1995, are all declared to be null and void and that the redemption of preference share's of the appellants-petitioners is also to be held bad in law for the very reason of mismanagement leading to oppressive acts with the real intention of the parties being not to convert the equity shareholding into preference shareholding in the year 1993 and as demonstrated by the conduct of the respondents in the year 1996, when in place of the preference shareholding of the respondents 2 and 3 they having been allotted an equal number of equity shares, are also bad in law, a direction is issued to allot 100 number each of equity shares of the value of Rs. 1,000/- per share, fully paid up, in terms of the relief No. (1) as claimed before the Company Law Board.

46. In the result, this appeal is allowed as indicated above, the order of the Company Law Board, impugned in this appeal, is set aside and the company petition presented before the Company Law Board is allowed, leaving the parties to bear their own costs.