

(1993) 12 MAD CK 0019
In the Madras High Court
Case No : L.P.A. No. 197 of 1993

Mrs. Saroj Goenka and others

APPELLANT

Vs

Nariman Point Building Services and Trading Private Ltd. and
others

RESPONDENT

Date of Decision : 10-12-1993

Acts Referred:

COMPANIES ACT, 1956 — Section 397, 398, 399, 41, 87
Constitution of India, 1950 — Article 10F, 136, 226, 368

Citation : (1994) 2 LW 342 : (1994) 1 MLJ 583

Hon'ble Judges : Somasundaram, J;K.A. Swami, J

Bench : Division Bench

Advocate : T.S. Krishnamoorthy Iyer, N. Yash Varadhan and K. Kannan, for the Appellant; P. Chidambaram and S.B. Mukherjee, Senior Advs., T. Poornam, P.S. Raman, R. Raman and K.S. Viswanathan Advs., for the Respondent

Judgement

K.A. Swami, C.J.—This Letters Patent Appeal is preferred against the order dated October 15, 1993, passed by the learned single judge

in A.A.O. No. 1017 of 1993 which was preferred against the order dated July 14, 1993, passed by the Company Law Board, Principal Bench,

New Delhi, in C.P. No. 40 of 1993. The Company Law Board, by the aforesaid order, restrained all the respondents in Company Petition No. 40

of 1993 from giving effect to any transfer or any transmission of shares in the said companies and also from increasing the issued and paid-up share

capital in any manner whatsoever. They were also further restrained from disposing of or encumbering their fixed assets or investment except in the

normal course of business. The company, in which petitioner No. 1 was a director, was also restrained from holding any board meetings till the

date of the next hearing, without giving at least three days notice to the first

petitioner either by registered A.D. post or through courier service

under receipt along with a copy of the agenda for the board meeting. The petitioners and respondents were also permitted to approach the Bench

at any time with proper application and copies served on the other parties in the event of any need for intervention. In addition to that, it was also

further directed in paragraph 2 of the order as follows :

All the applicants will serve copies of their applications on others before July 23, 1993, and these parties will file their replies before September 7,

1993, and counter-replies, if any, will be filed by October 7, 1993. As far as the main petition is concerned, the petition has already been served

on all the parties, as per the affidavit of service filed by the petitioners. The respondents will file their replies on the main petition by September 7,

1993, and the petitioners will file their rejoinders, if any, by October 7, 1993. The case will come up for hearing on October 29, 1993, at 11 a.m.

for continuing the arguments on maintainability and the main petition along with all other applications will be taken up for hearing on November 2,

1993, at 11 a.m. and the hearing will continue till November 5.

2. The learned single judge has held that as the maintainability of the petition was raised, the Company Law Board should have heard that question

first before proceeding to decide the other questions involved in the petition. The learned single judge has also further held that it was also

unnecessary to have called upon the respondents to file their replies to the main petition by September 7, 1993, and the petitioners to file their

rejoinders by October 7, 1993, without deciding the question of maintainability. In addition to this, the learned single judge has further directed that

the maintainability of the company petition be decided expeditiously, preferably within a fortnight from the date of the order.

3. Aggrieved by the aforesaid order, the Letters Patent Appeal is preferred.

4. In the light of the contentions urged on both the sides, the following points arise for consideration :

(1) Whether the learned single judge should have entertained the appeal u/s 10F of the Companies Act (hereinafter referred to as ""the Act"") ?

(2) Whether this is a case in which the question of maintainability should have been decided as a preliminary issue ? and

(3) Whether the order under appeal requires to be interfered with ?

5. The appellants have filed Company Petition No. 40 of 1993 under sections 397 and 398 of the Act for the various reliefs set out in paragraph 8

of the petition. As the reliefs sought for run into several pages, we do not consider it necessary to incorporate the same. The respondents have not

yet filed their objections. When the interim order was passed, some of the respondents raised an objection as to the maintainability of the petition

itself and requested that the same should be decided as a preliminary issue. As already pointed out, the Company Law Board has negatived the

contention and directed that the question of maintainability shall also be decided along with the other issues arising in the petition.

6. It is contended by Sri Krishnamoorthy Iyer, learned senior counsel appearing for the appellants, that an appeal against the order of the

Company Law Board u/s 10F of the Act would lie only on a question of law. The question as to whether the maintainability of the petition should

be tried and decided as a preliminary issue or not is not a pure question of law, as the determination of the said question involves and calls for

determination of several facts also. Therefore, the issue not being a pure issue of law, the appeal could not have been entertained u/s 10F of the

Act. Section 10F of the Act reads as follows :

10F. Appeals against the orders of the Company Law Board.- Any person aggrieved by any decision or order of the Company Law Board may

file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on

any question of law arising out of such order :

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period,

allow it to be filed within a further period not exceeding sixty days.

7. Thus, an appeal u/s 10F of the Act can be entertained only if the appeal involved a question of law. The maintainability of the petition by the

appellant has been raised on the ground that the appellants/petitioners are not the members of the company and they do not hold the requisite

number of shares. For the purpose of maintaining a petition under sections 397 and 398 of the Act, there is no doubt that the petitioners must

satisfy the conditions laid down in section 399 of the Act, which provides that the member of a company shall have the right to apply u/s 397 or

398 of the Act, in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of

the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the

company, provided that the applicant or applicants have paid all calls and other sums due on their shares and in the case of a company not having a

share capital, not less than one-fifth of the total number of its members. The section further provides that where any share or shares are held by

two or more persons jointly, they shall be counted only as one member. Sub-section (3) thereof further provides that where members of a

company are entitled to make an application by virtue of sub-section (1), any one or more of them having obtained the consent in writing of the

rest, may make the application on behalf and for the benefit of all of them. Section 41 of the Act further defines the expression ""member"" as follows

:

(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its

registration, shall be entered as members in its register of members.

(2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a

member of the company.

8. The contention of the respondents is that the petitioners are not shareholders and their names are not entered in the register of members and they

are not the subscribers of the memorandum of the company. As such, they cannot be either held to hold the requisite number of shares, nor can be

held to be the members of the company. According to the case of the petitioners, the late Shri Ramnath Goenka was a registered shareholder of

9,280 equity shares and 4,000 cumulative redeemable preference shares and one-third of the same has devolved upon the petitioners, who are no

other than the widow and daughter of the pre-deceased son of Ramnath Goenka. As such their one-third share would come to 3,093.33 shares

and 1,666.67 of the preference shares with voting rights u/s 87 of the Companies Act. As such, they have the right to file the petition under

sections 397 and 398 of the Act. At this stage, it may be mentioned that there is also a suit, namely, C.S. No. 1246 of 1992, filed on the original

side of this court for a declaration that the shares held by the late Shri Ramnath Goenka were, in fact, the shares of the plaintiff. There is also

another suit filed by the first-appellant being C.S. No. 1123 of 1992, on the original side of this court for various reliefs pertaining to the shares

held by the late Shri Ramnath Goenka. Therefore, it is contended by learned counsel that the issue relating to the maintainability cannot be held to

be a pure question of law, as it depends upon the determination of the aforesaid several facts. As such, it could not have been decided as a

preliminary issue. Hence, the Company Law Board was justified in deciding that the said issue will also be decided along with the other issues.

From the respective case of the parties, referred to above, it is clear that the issue relating to maintainability cannot be held to be a pure question of

law. That being so, the Company Law Board cannot be held to have committed any error of law in holding that the issue relating to the

maintainability of the petition shall also be decided along with the other issues. That being so, it shall have to be held that there was no question of

law involved for entertaining the appeal u/s 10F of the Act. However, in the light of the facts and circumstances of the case, we do not consider it

necessary to answer point No. 1 at this stage itself. We would now take up point No. 2.

9. Point No. 2. - The question as to maintainability of the petition or the lack of jurisdiction of the court, if it involves a pure question of law, as per

the provisions contained in Order XIV, rule 2 of the CPC shall have to be tried as a preliminary issue. But, if it involves mixed questions of law and

fact, it would again depend upon the facts and circumstances of each case, whether such an issue could be tried as a preliminary issue. However, it

cannot be laid down as a strict proposition of law that no such issue can be tried as a preliminary issue, because there may be cases in which a

large number of issues may arise, such as the case on hand, wherein the petition itself runs into several hundreds of pages and involves several

issues. If in such a case, the maintainability question has to be decided along with the other several issues arising in the case, and ultimately if it is

held that the petition is not maintainable, the parties would have been unnecessarily compelled to go through the mill of the trial. Therefore, as we

have already pointed out even in cases where the issue as to maintainability or lack of jurisdiction involves a mixed question of law and fact, it can

also be decided as a preliminary issue, depending upon the facts and circumstances of each case. No doubt, learned counsel for the appellants has

placed reliance on a decision of the Supreme Court in D.P. Maheshwari Vs. Delhi Administration and Others, and also Saurashtra Cement and

Chemicals Industries Ltd. v. Esma Industries P. Ltd. [1990] 69 Comp Cas 372. D.P. Maheshwari v. Delhi Administration [1983] 63 FJR 333

related to a dispute arising under the Industrial Disputes Act. It was held that neither the jurisdiction of the High Court under article 226 of the

Constitution nor the jurisdiction of the Supreme Court under article 136 may be allowed to be exploited by those who can well afford to wait, to

the detriment of those who can ill-afford to wait, by dragging the latter from court to court for adjudication of peripheral issues, avoiding decision

on issues more vital to them. Tribunals and courts, which are requested to decide preliminary questions must, therefore, ask themselves whether

such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. After all, tribunals like Industrial

Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of

preliminary objections and journeyings up and down. It is also further observed that the nature of the jurisdiction under article 226 is supervisory

and not appellate while that under article 136 is primarily supervisory, but the court may exercise all necessary appellate powers to do substantial

justice. Thus, in the aforesaid decision also, it has been pointed out that the court which has to decide preliminary questions must ask itself whether

such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. Therefore, the said decision also

does not exclude the possibility of deciding the issue relating to maintainability as a preliminary issue. In Saurashtra Cement and Chemicals

Industries Ltd. v. Esma Industries P. Ltd. [1990] 69 Comp Cas 372 a learned single judge of the Gujarat High Court has held that the preliminary

objections raised by the applicants to the maintainability of the petition required at least affidavit evidence to be led, and involved mixed questions

of law and fact. Moreover, it did not touch upon the jurisdiction of the court nor raise any question regarding the main proceedings being barred by

any express provisions of law. The alleged non-maintainability of the petition u/s 399 of the Act on account of the personal disability of the

concerned petitioners for moving the petition could not be equated to bar the proceedings under any express provisions of law. But, even assuming that such bar did exist, the objection could not be decided without going into the factual controversy as to whether, on the date of the petition, the petitioners commanded shares worth 10 per cent. of the issued capital. None of the other preliminary objections raised by the applicants could also be tried as preliminary issues. The question as to whether the company petition was maintainable in law and in fact had to be decided ultimately on the merits while considering the main petition.

10. As pointed out by us earlier, it cannot be laid down as a strict proposition of law that even in cases where the point as to maintainability involved mixed questions of law and fact, it cannot be tried as a preliminary issue. The Supreme Court in the aforesaid decision also has pointed out that the court has to consider in each case whether such an issue should be tried as a preliminary issue. We may also point out that in the normal circumstances, where the case does not involve pleadings running into hundreds of pages and several issues, the issue relating to maintainability can be tried along with the other issues, because trial of such a case would not occupy a longer time and would not subject the parties to long trial. But, in cases, where, as already pointed out, the pleadings run into several hundreds of pages and several issues arise, it would not be just and proper to subject the parties to the trial of the entire case for the purpose of deciding the issue of maintainability. If in such cases, the maintainability issue is decided as a preliminary issue, it would be convenient for both the parties because in the event it is held that the petition is not maintainable, several other issues involved in the case need not be tried and the evidence need not be adduced. In a case like this, there will be a large volume of evidence which will have to be adduced and several issues are to be raised. Therefore, we are of the view that the proposition laid down in *Saurashtra Cement and Chemicals Industries Ltd. v. Esma Industries Pvt. Ltd.* [1990] 69 Comp Cas 372, cannot at all be applied.

As far as the decision of the Supreme Court is concerned, we have pointed out that the said decision does not state in categorical terms that it is not permissible to try an issue relating to the maintainability as a preliminary issue. Hence, we are of the view that the direction issued by the learned

single judge that the issue as to the maintainability should be tried as a preliminary issue does not call for interference.

11. There is also one more reason why we are not persuaded to interfere with the direction given by the learned single judge as to trying the issue

regarding maintainability as a preliminary issue. That reason is that pursuant to the order under appeal, the Company Law Board has proceeded to

decide the maintainability issue as a preliminary issue. The case has now been posted on January 11 and 12, 1994, for hearing the issue relating to

the maintainability of the petition. We are also informed that the pleadings necessary for deciding the issue of maintainability are also complete

inasmuch as an affidavit is filed by the respondents, who have raised the issue of maintainability. A counter-affidavit is also filed by the petitioners in

Company Petition No. 40 of 1993. The Company Law Board also has fixed the case for hearing on the question of maintainability. If at this stage,

the order of the learned single judge is interfered with and the respondents are directed to file their written statement and to raise the issues and

thereafter to try the issue as to maintainability as a preliminary issue, it would only result in further delay of the proceedings. Therefore, even though

on point No. 1 we have taken the view that the question of law does not arise out of the order passed by the Tribunal, we have held, in the facts

and circumstances of the case, that it is just and appropriate to try the issue relating to the maintainability of the petition as a preliminary issue.

Therefore, we do not consider it necessary, in the interest of avoiding delay in the proceedings and in the interests of the parties, to interfere with

the direction of the learned single judge to try the issue of maintainability as a preliminary issue.

12. Point No. 3. - Both the sides made concerted efforts on this point. It is contended on behalf of the appellants that the learned single judge is

not at all justified in directing that until the question of maintainability is decided, no other interim application should be taken up for consideration.

On the contrary, it is contended on behalf of the respondents that when the question as to the maintainability of the very petition is involved, the

petitioners in the company petition are not entitled to seek any interim direction, nor can the Company Law Board consider the interim applications

filed by them. We find it very difficult to agree with the contention of learned counsel for the respondents. It is not a case in which it can be held

that the Company Law Board has no jurisdiction to entertain the petition under sections 397 and 398 of the Act. No doubt the persons who have

invoked the jurisdiction, whether they are entitled to the relief u/s 397 or 398 of the Act or are entitled to maintain such a petition, are the questions

which are required to be decided by the Company Law Board, but this does not take away the jurisdiction, nor does it affect the jurisdiction of the

Company Law Board to pass such interim orders or to entertain such interim applications as are necessary in the interests of the subject-matter of

the proceedings and also of the parties. We may point out at this stage itself the object with which interim orders are passed. In *Shri Kihota*

Hollohon Vs. Mr. Zachilhu and others, , it has been held thus (at page 717) :

The purpose of interlocutory orders is to preserve in status quo the rights of the parties, so that the proceedings do not become infructuous by any

unilateral overt acts by one side or the other during its pendency. One of the contentions urged was as to the invalidity of the amendment for non-

compliance with the proviso to article 368(2) of the Constitution. It has now been unanimously held that paragraph 7 attracted the proviso to

article 368(2). The interlocutory orders in this case were necessarily justified so that no landslide changes were allowed to occur rendering the

proceedings ineffective and infructuous.

13. No doubt, learned counsel for the respondents has placed reliance on a decision of the High Court of Calcutta in *Bengal Luxmi Cotton Mills*

Ltd., In re [1965] 35 Comp Cas 187. There is no doubt that in that case, it has been held that without deciding the maintainability issue, no interim

application need be entertained, nor an interim order need be passed. We find it difficult to agree with the view expressed by the learned single

judge of the Calcutta High Court. As pointed out by us, it is not the jurisdiction of the Company Law Board to entertain a petition under sections

397 and 398 of the Act that is under doubt, it is only the capacity or the competency of the petitioners to maintain the petition under sections 397

and 398 of the Act that is in question. As long as the decision or the determination of such a question lies within the jurisdiction of the Company

Law Board, it cannot be held that pending determination of such issue, the Company Law Board cannot or is not competent to entertain interim

applications or pass interim orders, which are necessary for ensuring the final

reliefs, which the petitioners may be entitled to get, failing which it may be possible in a given case that the ultimate success in the case may become futile when the very subject-matter of the proceedings may not be available or it may become impossible to realise the fruits of the proceedings. Therefore, as pointed out by the Supreme Court in *Shri Kihota Hollohon Vs. Mr. Zachilhu and others*, , the interim orders are passed only to ensure that in the ultimate analysis, to the parties succeeding, relief should be available. Hence, we are of the view that the Company Law Board cannot be restrained from entertaining an interim application or passing an interim order if it is found necessary in the interests of the subject-matter of the proceedings and of the parties. Therefore, we are of the view that the order of the learned single judge in so far as it restrains the Company Law Board from entertaining and considering the interim applications requires to be interfered with. We also make it clear that we should not be understood as having laid down that the Company Law Board should entertain an interim application and pass an interim order. It is open to it to consider any such application that is filed whether the relief sought for requires to be granted in the facts and circumstances of the case as it is a matter for decision by the Board. We should not be taken to have interfered with the discretion which the Company Law Board enjoys in the matter of passing the interim orders.

14. Several decisions were cited at the Bar, namely, *Ved Parkash and Others Vs. Iron Traders (Private) Ltd. and Others*, , *Raza Textiles Ltd. Vs.*

Income Tax Officer, Rampur, ; *Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others*, and *M/s. World Wide*

Agencies Pvt. Ltd. and another Vs. Mrs. Margarat T. Desor and others, . We have not referred to those decisions as they relate to the merits of

the case, with which we are not concerned at this stage.

15. Accordingly, the points raised for determination are answered as follows :

Point No. 1. - Answered in the affirmative in the light of the finding recorded on point No. 2.

Point No. 2. - Answered in the affirmative, in the light of the facts and circumstances of the case, as pointed out while discussing point No. 2.

Point No. 3. - The order under appeal in so far as it restrains the Company Law Board from entertaining and considering the interim applications is

liable to be interfered with.

16. For the reasons stated above, the appeal is allowed in part; the order dated October 15, 1993, passed by the learned single judge in C.M.A.

No. 1017 of 1993 in so far as it directs the Company Law Board not to entertain the interim applications and consider the same, pending decision

on the question of maintainability is set aside. Consequently, the Company Law Board is at liberty to entertain the interim applications and consider

them in accordance with law. In other respects, the order of the learned single judge is maintained. However, it is directed that the Company Law

Board shall decide the question of maintainability on or before the end of March, 1994. In the facts and circumstances of the case, there will be no

order as to costs.