

**(2013) 03 CAL CK 0003**

**In the Calcutta High Court**

**Case No :** A.C.O. No. 55 of 2012 with A.P.O. No. 104 of 2012

Murlidhar Ratanlal Exports Ltd.

APPELLANT

Vs

Bijay Kumar Kajaria and Others

RESPONDENT

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**Date of Decision :** 22-03-2013

**Acts Referred:**

Companies Act, 1956 — Section 397, 398

**Citation :** (2013) 2 CALLT 333 : (2013) 3 WBLR 114

**Hon'ble Judges :** I.P. Mukerji, J

**Bench :** Single Bench

**Advocate :** Pratap Chatterjee, Mr. Abhrajit Mitra, Mr. S.S. Bose, Mr. S.S. Banerjee, Mr. S. Bhattacharjee and Mr. Sanjay Bose, for the Appellant; Jishnu Saha, Ms. Sulagna Mukherjee, Ms. Suravi Banerjee and Mr. S.S. Kundu for the Respondent Nos. 1 to 4/Group, for the Respondent

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## **Judgement**

I.P. Mukerji, J.—In this appeal the parties will be described in the same way as in the Company petition (C.P. 7/2009) before the Company Law Board, which is under sections 397 and 398 of the Companies Act, 1956. The reference to petitioners means Bijay Kumar Kajaria and his group, whereas the reference to Respondents means Ajay Kumar Kajaria, Sanjay Kajaria and their group. It appears that at quite a mature stage of hearing of the company petition before the Board, the first respondent made an application (C.A. No. 366 of 2011) before it. They wanted dismissal of the petition on the ground of maintainability. To be more specific, according to them the disputes which were before the Board were purely private disputes between shareholders. They did not involve any act of the company or of mismanagement or oppression of shareholders or a body of them. They also wanted, in the alternative, vacation of the status quo order passed by the Company Law Board on 24th March, 2009. The status quo order was with regard to the share capital, shareholding, composition of the board and fixed assets of the company Murlidhar Ratanlal Exports Ltd. (MREL).

Grounds:

2. There were several grounds urged to seek this order.

First, comes the point of maintainability. In the application (C.A. No. 366 of 2011) before the Company Law Board by the first Respondent, they pleaded as follows in paragraph 35:

35. The subject matter of the main 397 petition is also beyond the scope of the proceedings u/s 397 and 398 of the Companies Act, 1956. Issues raised in the said petition cannot be decided in exercise of powers under sections 397 and 398 of the Companies Act, 1956. This Hon"ble Board does not have jurisdiction to entertain the said petition. For this purpose the petitioners crave leave to refer to section 397 petition at the time of hearing. On this ground C.P. No. 7 of 2009 should be dismissed and the interim orders passed therein vacated.

3. During the time of hearing of this application I asked the learned counsel for the respondents whether the point of maintainability had been taken in the rejoinder or counter affidavit to the main company petition. The answer was in the affirmative. I was shown passages from the rejoinder.

4. It is an undisputed position that the Company Law Board made a mistake in the order dated 29th February, 2012 which is before me in appeal. It recorded that it was not deciding the point of maintainability because it was decided before. The point of maintainability was never decided before.

5. Mr. Mitra for the respondents urged that I should decide the question of maintainability.

6. On the other hand Mr. Mookerji, learned Senior Advocate appearing for the petitioners said that for 2 1/2 years since they approached the Company Law Board by way of the above petition, the respondents had not asked the Board to decide the question of maintainability, as a preliminary decision, by making an application before it or otherwise. Of course, the point had been taken in the counter affidavit. Quite lengthy arguments on merits were made as to why the point of maintainability had no substance and equally lengthy arguments in aid of the contention.

7. The submissions on the merits of the dispute in the above application C.A. 366 of 2011 were as follows:

The debt equity ratio of the company was going up. Unsecured loan liability rose from Rs. 14 crores as on 31st March, 2009 to Rs. 34.58 crores as on 31st March, 2011. Secured loan liability went up from Rs. 27.7 crores to Rs. 48.2 crores in the same period. The sales of the company were increasing. The turnover rose from Rs. 230 crores in 2008-2009 to Rs. 556.8 crores in 2010-2011. The company needed more working capital to manufacture goods and sell them. The debt servicing charge in the shape of interest payable on loans obtained by the Company was Rs. 3 crores in 2010-2011.

8. The credit rating agency (CRISIL) had downgraded the credit rating of the

company.

9. There was another justification for this proposed issue, as pleaded. Bank of Baroda on 4th February, 2009 had written to the Company. It was required to raise unsecured loans of Rs. 13 crores and issue fresh capital of Rs. 2 crores within 31st March, 2008. The company was advised to apprise the bank regarding this. Incidentally, this letter was written prior to the said order of the Company Law Board. Another letter was written by the same bank on 12th March, 2011. It stated that:

the total net worth of the Company as on 31.03.2010 was Rs. 24.50 crore and unsecured borrowing was Rs. 30.58 crore as against Investment in Fixed Assets of Rs. 70.91 crore and outside investment of Rs. 8.21 crore which Implies negative Net Working Capital. You are therefore advised to bring adequate fresh equity to improve the position.

Please also note that the current ratio of the Company is at a lower side and fresh infusion of capital is required to Improve the ratio.

10. Yet another was written by the bank to the company on 2nd February, 2012 to the following effect:

This is further to our letter bearing No. IBB:KOL:ADV:2010-11 dated 12.03.2011. By the said letter, we had advised you to bring adequate fresh capital to improve the debt equity ratio of your company. Almost one year has passed but you have not infused any fresh capital In the company. Our Bank is concerned and you are requested to bring in fresh capital and give us a status report on the steps being taken by you in this regard within 15 days.

11. Hence, it wanted to increase its share capital by issuing equity shares of Rs. 10 each at a premium of Rs. 10 per share by way of Rights Issue. The issue would be in proportion to shareholding subject to approval obtained from the Company Law Board. It was expected that the Rights Issue would fetch funds of Rs. 9,53,75,000/-.

12. According to the petitioners the application was made before the Board when it was in the midst of hearing the Company Board was most mischievous. The letter of the bank dated 4th February, 2009 was after the letter dated 14th January, 2008. In that letter in Clause 22 in Annexure "D", the company was asked to inter alia introduce fresh capital of Rs. 2 crores. That was before the application on which the order dated 24th March, 2009 was passed. In fact, the letter of 4th February, 2009 was also before the Company Law Board proceedings. Of course, the letters of 12th March, 2011 and 2nd February, 2012 were written after the Company Law Board proceedings and after the above order of status quo passed by it. According to the petitioners there was no threat contained In those letters.

13. In addition, the following arguments were also made. The first respondent was a family company. This is mentioned in the company's website and in the

project report of Shaktigarh Jute Park.

14. The business was started by Bijay, the eldest brother, Ajay, the younger brother came in later and Sanjay, the youngest even later than Ajay. Their shareholdings in 2005 were 21.29%, 23.29% and 21.65% respectively of the paid up capital. Their respective group shareholding at the point of time was 31.33%, 30.52% and 27.82%. Now, the Bijay group holds only 17.11%.

15. Issuance of rights shares will further diluted the shareholding of the petitioners.

16. There was no need for immediate funds.

17. Even if the statement of the Company was taken to be true, it had to pay only 10% interest on secured loans which is lower than the interest charged by bankers on commercial loans and advances.

18. The installed capacity of the company had increased from 52950 M.T. in 2005-2006 to 142965 M.T. in 2009-2010. But, whereas production was 84% of the installed capacity in 2005-2006, it was now, only 53.25%. It was for this reason that the company's borrowing had increased and profits reduced.

19. MREL was founded in the sixties. It was a company controlled by three brothers, Ajay, Bijay and Sanjay. Bijay claimed that at the starting point, the control of the Company was equally shared by these three brothers and each of whom had roughly the same percentage of shares in the Company. Hence, it was a family Company. Bijay like the brothers had an equitable right and a legitimate expectation to participate in the affairs of the company. This arose out of the underlying obligations and understanding on which the company was formed and run like an quasi partnership. Learned Counsel for the petitioners relied on *Ebrahimi v. Westbourne Galleries Ltd. & Ors.* reported in (1972)2 ALL ER 492 , *Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others*, and *Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others*, (paragraphs 225, 227, 230 and 231), *O Neil's Case* 1992 All ER 961 and *Probir Kumar Misra Vs. Ramani Ramaswamy and Others*, to support this argument.

20. The allegation is that Bijay trusted his brothers. The brothers had defrauded him. Shares have been transferred out of his or his family members' account, as a result of which his shareholding in the company is diminished. Bijay has been removed from directorship, not been paid the agreed salary. Neither has he been paid any dividend.

21. I was shown the case of *Re a Company* reported in (1985) BGLC 80. It was said that at this point of time taking into account the vulnerable position of the petitioners, the rights issue had been announced. If Bijay was in a better position in the Company, he would have had a far greater advantage in participation in the rights issue.

Decision:

22. I will decide the point of maintainability first. Many things were argued. It was said on behalf of the respondents that since the grievance of the petitioners was alleged wrongful transfer of shares by Ajay and Sanjay, it was a private dispute and the Company Law Board could not decide it u/s 397 and section 398, relying on the case of Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others, and Murat Viniyog Ltd. Vs. Bijay Kumar Kajaria, .

23. My views are as follows. First of all, it was rightly pointed out by Mr. Mookerji that this point of maintainability of the Company petition was sought to be raised about 2 1/2 years after its filing. It was open to the respondents to file an application, much before, to get the Company petition dismissed. They did not do so. Now, the Company petition has reached the stage of final hearing. Taking this point now by an application was not very proper.

24. For whatever reason the Company Law Board did not decide the point of maintainability raised before it.

25. Now, the question is: should this Court decide this point at this stage?

26. This point of maintainability, as raised, is very delicate. It is not so easy to decide it. It is not a point of demurrer. It is not a pure question of law. It is a mixed question of law and facts. The question to be answered, in determining this issue may be whether or not the disputes between the parties are purely private or not? Or is one part of the disputes purely private and another part of it not purely private?

27. After all it is a family Company. Two brothers are fighting against the third. The third one complains that the other two brothers have oppressed him and his family by inter alia deceiving him to purportedly transfer shares in their favour. They had also allegedly committed acts of forgery.

28. It is not so easy to draw a line separating an impersonal company from the disputes of persons who control or want control of the company, regarding shares, management, and so on. It may be the case of wrongdoers purpose acting through the Company. It may also well be that the wrongdoers are the Company for all practical purpose. It may well turn out to be a purely private dispute.

29. Therefore, the question of maintainability is also to be decided along with the merits of the disputes between the parties, in accordance with any existing order of Court in this behalf or in any manner thought fit by the Company Law Board. I order accordingly.

30. Now, the rights issue.

31. The Company proposes to raise about Rs. 10 crores by rights issue. It was said that with the inflow of this capital the company would be able to overcome

its interest debt of Rs. 3 crores and substantial interest payment liability per year to lenders. Furthermore, by this exercise the credit rating made by CRISIL would turn positive from negative.

32. It was pleaded in paragraph 20 of the stay petition in connection with this appeal that the Board meeting of the Company was held on 22nd March, 2012. A resolution was proposed for raising the share capital by issuing 47,68,750 equity shares of Rs. 10 each at a premium of Rs. 10 per share by way of rights issue. The issue would be in the ratio of 1:1 and was expected to bring funds of Rs. 9,53,75,000 to the company.

33. The first letter of Bank of Baroda to the company in this behalf was dated 14th January, 2008. It contained the terms and conditions for enhancement of credit facilities to the company. They were inter alia that the company was to raise unsecured loans to the tune of Rs. 13 crores and introduce fresh capital of Rs. 2 crores within 31st March, 2008. There is no denial of this position. On 4th February, 2009 the same bank wrote to the Company asking them whether they had fulfilled this obligation. The Company was once again reminded by the letter of the bank dated 12th March, 2011 which was reiterated by their letter of 2nd February, 2012. The letter of 12th March, 2011 stated that the Company had "negative net working capital". The 2nd February, 2012 letter was an advice to the company to improve its "Debt Equity Ratio".

34. The financial condition of a company, its improvement and in general the management of a company are very technical matters. It requires professional expertise. When the bank had written these letters to the company asking it to improve its "debt equity ratio" and suggesting that "net working capital" was negative, its advice is to be taken as true. Moreover, the Board of Directors of the Company on 22nd March, 2011 took the decision to go ahead with the rights issue on the terms and conditions mentioned above. It is to be assumed, at this point of time, that the Board was duly constituted and knew what was going wrong with the company and what was to be done for its benefit, subject to the contrary being established before the Board. On the same premises, the Court should presume, for the time being, that those who are in control of the company know best how to run it. At least at this stage when there is no adverse finding against anybody the decision of the Board of Directors has to be respected. This is of course subject to the result of the Company petition.

35. But this rights issue should not be working as an engine of oppression against the petitioners (See *Re a Company* reported in (1985) BCLC 80). Furthermore, this rights issue should not have any adverse effect on the rights of members of a family company like this one, when the company petition is pending, following the dicta in the case of *Ebrahimi v. Westbourne Galleries Ltd. & Ors.* reported in (1972) 2 ALL ER 492 followed in *Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others*, para 44 to 52 and *Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others*, (paragraphs 225, 227, 230, 231). In fact at this

stage it is to be assumed that the platform of this family Company resting on a pivot is to be kept in equilibrium. This platform is kept in equilibrium by recognition of rights, obligations, expectations of every family member who constitutes a small family company which resembles a partnership, as recognised in the above case and in O Neil's case and in the Madras decision (supra) following it.

36. Therefore, permission is granted to the first respondent to go ahead with the rights issue.

37. However, Bijay and his group have to be offered rights shares as if their claim for 9,66,638 shares was true, subject to the results of the Company Law Board petition. Furthermore, Bijay and his group will be able to exercise the option of provisionally taking the rights shares without making any payment for them, for the time being. The rights shares will be allotted to them, subject to the stipulations below. If Bijay loses before the Company Law Board, the rights issue with regard to the shares claimed, i.e., 9,66,638 and the shares actually held, that is, 8,14,938 will be cancelled. In that event he and his group will have the final option of availing of the rights issue of 8,14,938 shares only. If they succeed before the Company Law Board they will have the final option of taking 9,66,638 shares. Upto this time they will not have any voting right in 9,66,638-814938 shares. Only, after disposal of the Company Law Board petition the said group will be obliged to exercise the final option to take and pay for the rights shares. The rights shares should be strictly in the ratio of 1:1. Therefore, even if the rights shares are allotted, the said group will not be prejudiced by dilution of their shares or by being put to financial burden as envisaged in the case of *Re: A Company* 1985 BCLC 80. Therefore, the Company Law Board should not have dismissed the application (C.A. 366 of 2011) by its order of 29th February, 2012.

This appeal is disposed of with the above directions. The Company Law Board is directed to dispose of the Company Law Board petition within six months from date positively.

Urgent certified photocopy of this judgment/order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.