
(1985) 08 AHC CK 0030

In the Allahabad High Court

Case No : Special Appeal No"s. 7 and 9 of 1985

Naini Oxyzen and Acetylene Gas Ltd.

APPELLANT

Vs

Bisheshwar Nath and Others

RESPONDENT

Date of Decision : 19-08-1985

Acts Referred:

Companies Act, 1956 — Section 391, 397, 398, 402

Citation : (1986) 60 CompCas 990

Hon'ble Judges : R.K. Shukla, J;N.D. Ojha, J

Bench : Division Bench

Advocate : Ravi Kant Agarwal, for the Appellant;

Final Decision : Dismissed

Judgement

N.D. Ojha, J.—This special appeal and the connected Special Appeal No. 7 of 1985 have been preferred against the judgment of a learned single judge of this court dated April 30, 1985, whereby two applications for execution of decree passed in Company Petition No. 23 of 1981 on January 9, 1984, were allowed. A direction was issued that the decree dated January 9, 1984, shall be transmitted to the court of the Civil Judge, Allahabad, for execution in accordance with law.

2. Naini Oxygen and Acetylene Gas Ltd., Allahabad (hereinafter referred to as "the company"), was incorporated as a public company limited by shares under the provisions of the Companies Act, 1956 (hereinafter referred to as "the Act"). It appears that there were four groups of directors managing the affairs of the company, namely, (1) Group of Basheshwar Nath, (2) Group of Anil Saran, (3) Group of Durga Prasad Agarwal and (4) Group of P. L. Gupta. Basheshwar Nath and Anil Saran's groups were in the majority and were consequently the dominant group. An application was made by the group represented by Durga Prasad Agarwal being Company Petition No. 23 of 1981 in this court under Sections 397 and 398 of the Act on the ground of oppression on the part of the dominant group. The application, it appears, was heard by the learned company judge on various dates and during the course of hearing the parties brought it to

the notice of the court that they had come to terms and a compromise had been arrived at which was in the best interest of all concerned including the company. The learned company judge, after scrutinising the terms of the compromise, came to the conclusion that passing of a decree in the terms of the compromise arrived at between the parties would be in the interest of the company and accordingly, he passed the decree dated January 9, 1984, referred to above. All the parties to Company Case No. 23 of 1981 appear to have been satisfied with the judgment and decree passed by the learned company judge on January 9, 1984, as no one preferred any appeal against the decree. The said decree has thus become final.

3. As a result of the decree dated January 9, 1984, the shares were transferred by the dominant group in favour of the group represented by Sri Durga Prasad Agarwal who had made the application under Sections 397 and 398 of the Act, with the result that the group represented by Sri Durga Prasad Agarwal now becomes the dominant group. Under the terms of the compromise, certain payments were to be made within the time specified therein by the company to certain persons mentioned in the compromise application. The payment not having been made to them within the specified time, the persons concerned made two sets of applications for execution of the decree dated January 9, 1984, and as already pointed out above, it is on these applications that the order appealed against dated April 30, 1985, was passed.

4. A preliminary objection was raised by Sri Jagdish Swamp, counsel for the respondents, that the order dated April 30, 1985, passed by the learned company judge could not be termed as " judgment" within the meaning of Chapter VIII, Rule 5 of the Rules of Court. According to Sri Jagdish Swarup, the order dated April 30, 1985, was an interlocutory order not appeal able under Chapter VIII, Rule 5. In *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , it was held in para 115 of the report that every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. In para 119 of the report it was emphasised that the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the question in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings. On the facts of the instant case we are of the opinion that even if the order dated April 30, 1985, is treated as an interlocutory order in the sense that it only directs the decree to be transmitted to the civil court for execution, it does fall within the term " judgment" inasmuch as certain points raised before the learned company judge and which have been reiterated before us in this appeal were finally decided by the company judge and could not be raked up by the appellants before the civil judge during the course of execution of the decree. We accordingly find no substance in the preliminary objection that the appeal is not maintainable.

5. Coming to the merits of these appeals, it may be pointed out that Special Appeal No. 9 of 1985 filed by the company has been argued by Sri Ravi Kant at some length. Counsel for the appellant in Special Appeal No. 7 of 1985 which has been preferred on behalf of two of the shareholders of the company who were not even parties in Company Case No. 23 of 1981 has adopted the arguments made by Sri Ravi Kant. In other words, he has challenged the order dated April 30, 1985, on those very grounds alone which have been urged by Sri Ravi Kant in Special Appeal No. 9 of 1985. The first submission which has been made by Sri Ravi Kant, counsel for the appellant company, is that Clauses 9.1 and 9.2 of the compromise filed before the learned company judge on the basis of which the decree dated January 9, 1984, was passed were beyond the scope of Sections 397 and 398 of the Act and consequently were without jurisdiction. As already seen above, the decree dated January 9, 1984, has become final. In the order dated April 30, 1985, it has been specifically mentioned by the learned company judge repelling the submission made in this regard on behalf of the appellant that the company had not entered into the compromise. Nothing has been brought to our notice to justify the taking of a contrary view.

6. A perusal of the record of Company Petition No. 23 of 1981 indicates that a joint affidavit was filed by Ashok Agarwal, son of Sri D. P. Agarwal, Bisheshwar Nath, son of late Lala Beni Prasad, and Anil Saran, son of Sri K. M. Saran, bringing to the notice of the court the terms of the compromise. In para 2 of this affidavit it was, inter alia, stated that the compromise was in the best interests of the company. The counter-affidavits which have been filed on behalf of the company opposing the applications on which the order appealed against was passed for execution of the decree dated January 9, 1984, have also been filed by the same Ashok Agarwal who was one of the persons who had filed the joint affidavit mentioned above. Not only was no appeal filed against the decree dated January 9, 1984, but on a question being put by us to the counsel for the appellant as to whether the appellant was prepared to have the entire decree dated January 9, 1984, recalled and the status quo as it obtained before the said decree restored, the counsel expressed his reluctance to accept that position. It was asserted in this behalf by him that since the group represented by Sri Durga Prasad Agarwal has become the dominant group by virtue of the decree dated January 9, 1984, passed on the basis of the compromise, there was no question of status quo being restored so as to make the group represented by Sri Bisheshwar Nath and Anil Saran the dominant group. It thus appears that the company now under the control of the group represented by Sri Durga Prasad Agarwal is satisfied with the compromise excepting Clauses 9.1 and 9.2 thereof, the validity of which alone has been challenged before us. It may be pointed out that under these clauses some outstanding dues of either the outgoing group of directors or of their friends or relatives were to be paid. A direction in regard to its payments could be made in proceedings under Sections 397 and 398 of the Act. Even a bare perusal of the plain language of Sections 397 and 398 makes it clear that they confer a very wide power on the court to pass such orders as

deemed fit in the interest of the company to remove the oppression contemplated by Section 397 and the mismanagement contemplated by Section 398 of the Act.

7. In *Debi Jhora Tea Co. Ltd. v. Barendra Krishna Bhowmick* [1980] 50 Comp Cas 771, it was pointed out by a Division Bench of the Calcutta High Court that there can be no limitation on the court's power while acting under Sections 397, 398 and 402 of the Companies Act, 1956. Instead of winding up a company, the court has been vested with ample power to continue the corporate existence of a company by passing such orders as it thinks fit in order to achieve the objective by removing any member or members of a company or to prevent the company's affairs from being conducted in a manner prejudicial to public interest. The court u/s 398 read with Section 402 of the Act has the power to supplant the entire corporate management. Under these provisions, the court can give appropriate directions which are contrary to the provisions of the Articles of the company or the provisions of the Act. On a reading of Section 402(a) and Section 402(g), there can be no doubt that the intention of the Legislature was to confer wide and ample powers upon the court for the regulation of the conduct of the company's affairs and to provide for any other matter which the court thinks just and equitable to provide for, in the interests of the corporate body and the general public.

8. In *Cosmosteels Private Ltd. and Others Vs. Jairam Das Gupta and Others*, a question arose as to whether, when a direction is given by the court while granting relief against oppression to the minority shareholders of the company u/s 397 of the Act to the company to purchase the shares of some of its members which would ipso facto bring about reduction of the share capital because a company cannot be its own member, it is obligatory to serve a notice upon all the creditors of the company as was the procedure contemplated u/s 100 or 104 of the Act. It was held that undoubtedly, where the company has passed a resolution for reduction of its share capital and has submitted it to the court for confirmation, the procedure prescribed by Sections 100 to 104 will have to be followed, if they are attracted. On the other hand, where the court, while disposing of a petition under Sections 397 and 398, gives a direction to the company to purchase shares of its own members, a consequent reduction of the share capital is bound to ensue, but before granting such a direction, it is not necessary to give notice of the consequent reduction of the share capital to the creditors of the company. No such requirement is laid down by the Act. The two procedures ultimately bringing about reduction of the share capital are distinct and separate and stand apart from each other and one or the other may be resorted to according to the situation.

9. Coming to the facts of the instant case, it would be seen that the charge made by the group of Durga Prasad Agarwal against the dominant group represented by Bisheshwar Nath and Anil Saran was about their oppression. By the decree dated January 9, 1984, the oppression stands removed so much so that now the

group represented by Durga Prasad Agarwal has become the dominant group and has come in control over the affairs of the company. If in order to achieve this purpose, the payment of the amounts contemplated by Clauses 9.1 and 9.2 of the compromise was necessary, that would certainly be in the interest of the company and such an order could, therefore, be passed under Sections 397 and 398 of the Act, Indeed it was a case there that in substance the dominant group was being deprived of the control of the company and the dues payable to the directors of that group or to its friends and relatives for achieving this purpose were to be paid. Consequently, we find it difficult to agree with the submission made by the learned counsel for the appellant that the provision contained in Clauses 9.1 and 9.2 of the compromise was beyond the scope of Sections 397 and 398 of the Act.

10. It was then urged by learned counsel for the appellant that no resolution of the board of directors giving permission to acknowledge the liability contemplated by Clauses 9.1 and 9.2 having been passed, these two clauses could not be given effect to. Reliance in support of this submission was placed by counsel for the appellant on Section 292 of the Act. Sub-section (1) of the said Section contemplates that the board of directors of a company shall exercise powers referred to in Clauses (a) to (e) thereof on behalf of the company, and it shall do so only by means of resolutions passed at meetings of the board. However, the counsel for the appellant was unable to point out that what is contained in Clauses 9.1 and 9.2 falls under any of the Clauses (a) to (e) of Sub-section (1) of Section 292. Learned counsel for the appellant then placed reliance on Section 46 of the Act which deals with the form of contracts.

11. Sub-section (1) of Section 46 of the Act on which reliance has been placed by counsel for the appellant, inter alia, contemplates that contracts on behalf of the company may be made in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged. Sub-section (2) of Section 46 contemplates that a contract made according to Section 46 of the Act shall be binding on the company. It was urged by counsel for the appellant that before Clauses 9.1 and 9.2 of the compromise could be given effect to, it was essential to establish that the compromise had been signed by some person under the authority of the company. According to him, the authority contemplated by Section 46 of the Act by the company could have been given only by the directors of the company by a resolution and since no such resolution was filed along with the compromise, Clauses 9.1 and 9.2 thereof could not be binding on the company. Even if it may be accepted for the sake of argument without expressing any final opinion on the point that Section 46 was attracted even to the compromise in the proceedings under Sections 397 and 398 of the Act, it would be seen that Section 46 would in that case apply to the entire compromise and not to Clauses 9.1 and 9.2 alone. As seen above, it is really the group represented by Durga Prasad Agarwal which is speaking through the company as its spokesman in the present appeal. As already pointed out above, the counter-affidavits in these proceedings have been filed by Ashok

Agarwal, son of Durga Prasad Agarwal. It is the same Ashok Agarwal who had filed the joint affidavit giving the terms of the compromise. This group is satisfied and indeed is anxious to adhere to the other terms of the compromise as already noticed above. What in substance it says is that the rights conferred by the compromise on it are sweet, but the liabilities are sour. If the other terms of the compromise whereby the minority group became the dominant group and gained control over the affairs of the company and the dominant group led by Bisheshwar Nath and Anil Saran washed its hands off the affairs of the company by selling its shares in favour of the group represented by Durga Prasad Agarwal are valid according to the appellant notwithstanding what is contained in Section 46, we find no justification in not applying the same principle even in regard to Clauses 9.1 and 9.2. It is settled law that a person cannot be permitted to approbate and reprobate or to blow hot and cold in the same breath.

12. There is another reason why Clauses 9.1 and 9.2 cannot be given the go-by on account of what is contained in Section 46 of the Act. An affidavit was filed by Durga Prasad Agarwal on March 24, 1982 (paper No. A6/16-30), in Company Petition No. 23 of 1981, along with an application presented on the same date, namely, March 24, 1982, In para 5 of the said affidavit, it has been stated that the company is managed by a board of directors which consists of Sarvasri Bisheshwar Nath, Mohan Lal Agarwal, S. S. Agarwal, Smt. Shakuntala Devi, Smt. Sushila Bansal, Smt. Sneha Agarwal, Anil Saran and Lakshmi Chand. In regard to Lakshmi Chand, it was stated that he was a nominee director of the Uttar Pradesh Finance Corporation, Kanpur, who was arrayed as opposite party No. 10 in the company case. The record of the case indicates that the compromise has been arrived at by all the aforesaid directors except Lakshmi Chand, the nominee-director of the Uttar Pradesh Finance Corporation. We have been informed by counsel for the parties that the Uttar Pradesh Finance Corporation was represented in the proceedings before the learned company judge by Shri K. P. Misra, advocate, and he had been looking after the interests of the finance corporation during those proceedings. The Uttar Pradesh Finance Corporation does not seem to be aggrieved by the decree dated January 9, 1984. It is not the case even of the appellant that any objection was raised on behalf of the U. P. Finance Corporation before the learned company judge against the decree dated January 9, 1984, being passed. Suppose a meeting as contemplated by Section 46 was held to authorise the signing of the compromise and it may be accepted for the sake of argument that Lakshmi Chand, the nominee-director of the finance corporation, had not agreed to Clauses 9.1 and 9.2. Yet the resolution to include these clauses could apparently have been carried out with a majority of 7 to 1. Looking at the problem from any angle, we are of the opinion that Clauses 9.1 and 9.2 cannot be said to be unenforceable on the basis of anything contained in Section 46 of the Act.

13. It was then urged by counsel for the appellant that since the procedure for compromise contemplated by Section 391 of the Act was not followed before entering into the compromise containing Clauses 9.1 and 9.2 in question, these

two clauses were not binding on the company. We find it difficult to agree with this submission either. The purpose of Section 391 of the Act is to confer power to compromise or make arrangements with creditors and members. This purpose is entirely different from the purpose of Sections 397 and 398 of the Act. The purpose of these Sections is to put an end to acts of oppression and mismanagement promptly and speedily by taking recourse to such action as the court considers expedient in the interest of the company. Here, admittedly, no proceedings were initiated u/s 391 of the Act. The question which, however, as canvassed by counsel for the appellant, was that since the proceedings under Sections 397 and 398 were being decided on the basis of a compromise, the requirements of Section 391 automatically got attracted and unless recourse was taken to the procedures contemplated by Section 391, the compromise, even though arrived at in proceedings under Sections 397 and 398, could not be given effect to. Keeping in view the nature and the purpose of Section 391 on the one hand and Sections 397 and 398 on the other, we find no substance in this submission. The dominant purpose of proceedings under Sections 397 and 398 is to remove oppression and mismanagement, as the case may be. For removing this oppression or mismanagement, the court can take recourse to any action, of course which is not unlawful and which may be in the interests of the company. In the instant case, the complaint made by the minority group represented by Durga Prasad Agarwal in proceedings under Sections 397 and 398 was about oppression by the dominant group. It was this purpose which was to be achieved by passing orders in those proceedings. The purpose was achieved by ousting the dominant group completely from the affairs of the company. That group sold its shares to the minority group with the result that the minority group became the dominant group and gained control over the affairs of the company. For achieving this purpose, it was also considered expedient that the directors of the outgoing dominant group as well as their friends and relatives should be paid off their dues. For aught we know, in the absence of Clauses 9,1 and 9.2, the main purpose of ousting the dominant group and giving control over the affairs of the company to the group represented by Durga Prasad Agarwal may not have been achieved. As seen above, the learned company judge was of the view while passing the decree dated January 9, 1984, that the compromise was in the interest of the company.

14. The matter can be looked at from another angle. In our opinion, making the provisions of Section 391 of the Act automatically applicable to proceedings under Sections 397 and 398 if those proceedings are contemplated to be decided on the basis of a compromise would indeed in many cases serve no purpose. Take for example the instant case itself. Suppose a meeting as contemplated by Section 391 of the Act was called and all other requirements of Section 391 including its proviso were fulfilled but the court was of the view that acceptance of the resolution passed in the said meeting would be of no avail for removing the oppression complained of by the group represented by Durga Prasad Agarwal and that that purpose could be achieved only by taking recourse to the

procedure followed in the instant case, the learned company judge in view of the wide power conferred on him by Sections 397 and 398 could pass such order as was considered fit in the interest of the company. He would have been justified in not giving effect to the resolution passed in the meeting held as contemplated by Section 391 and in passing the same order which has been passed in the instant case. At this place, it may also be pointed out that no authority has been brought to our notice taking the view that Section 391 of the Act automatically gets attracted to the proceedings under Sections 397 and 398 if those proceedings are sought to be decided on the basis of a compromise.

15. Lastly, it was urged by counsel for the appellant that the amounts contemplated by Clauses 9.1 and 9.2 being in respect of contracts by certain directors or their relatives or friends could not be required to be paid by the company in the absence of the consent of the board of directors as contemplated by Section 297 and also on the ground that those contracts were not disclosed as contemplated by Section 299. Suffice it to say so far as this submission is concerned, that those pleas do not appear to have been pressed before the learned company judge. There is not even a ground in the memorandum of appeal by the company that these pleas were pressed before the learned company judge but were not considered by him. These pleas do not raise pure questions of law which could be raised in appeal even for the first time. They essentially raise questions of fact and cannot be decided unless fresh evidence is permitted to be adduced. In our opinion, the appellant is not entitled to raise these pleas at this stage. As regards non-disclosure u/s 299, it may further be pointed out that the consequence of non-disclosure is contained in subsection (4) thereof which contemplates punishment with fine up to the extent mentioned therein. Nothing has been brought to our notice which may render the contract void and unenforceable for failure to make disclosure u/s 299.

16 As regards the appeal filed by two of the shareholders, it may be pointed out that the learned company judge has, in the order appealed against, stated that they appeared to have been set up by the group represented by Durga Prasad Agarwal. Before us also counsel for these two shareholders has only adopted the submissions made by counsel for the company. The decree dated January 9, 1984, has not been challenged even by these two shareholders on the ground that they are persons aggrieved by the said decree. A perusal of Section 399 of the Act indicates that proceedings under Sections 397 and 398 are really in the nature of representative proceedings where the interests of the shareholders are represented by the concerned directors. For all these reasons, we are unable to take a view contrary to the view taken by the learned company judge in regard to the nature of the objection filed by these two shareholders.

17. No other point has been pressed. Indeed, several of the grounds taken in the memorandum of appeal are such which cannot be raised in the execution proceedings and could be raised only in an appeal against the decree dated January 9, 1984.

18. In the result, we find no merit in these appeals. They are accordingly dismissed but, in the circumstances of the case, there shall be no order as to costs. The interim order of stay is vacated.