

(1995) 11 DEL CK 0034

In the Delhi High Court

Case No : Company Petition No. 51 of 1991

Prem Seth and Others

APPELLANT

Vs

National Industrial Corporation Ltd.

RESPONDENT

Date of Decision : 01-11-1995

Acts Referred:

Companies Act, 1956 — Section 397

Citation : (2001) 103 CompCas 1011 : (1995) 35 DRJ 642

Hon'ble Judges : Dalveer Bhandari, J

Bench : Single Bench

Advocate : P.C. Khanna, Ruchi Sindhwani, Daljit Singh and K.C. Dua, for the Appellant;

Judgement

Dalveer Bhandari, J.

(1) The petitioners have filed a petition under Sections 397-398 read with Section 155 of the Companies Act for the grant of relief against oppression and prejudicial activities of the respondents and in the alternative, for winding up of the respondent-company under Sections 434 and 439 of the Companies Act, 1956.

(2) Looking to the background of this case, I deem it appropriate to set out the prayers of the petition filed by the petitioner. @SUBPARA = "It is Therefore, prayed that this Court may be pleased to:

A) PASS such order or orders as may be necessary for relieving the petitioners of the oppressive activities of the respondent S.P. Seth Group and the Respondent Company of the prejudicial activities of the said Group:

B) SET aside all allotments of shares made in favor of S.P. Seth Group which exceeds 30% of the share capital which was originally held by them and they be directed to transfer the remaining shares to the Petitioners and their nominees against payment on the basis of the face value of the shares.

C) THE Respondents be directed to transfer to the petitioners the share-holding of Lakshmiji Sugar Mills Company Limited which they had acquired for themselves;

D) REMOVE the Respondent no.3, Shri G.P. Seth and Respondent no.4, Shri Rakesh Seth from the office of Director for a period of 5 years.

E) DIRECT convening of the Extraordinary General meeting of the Respondent company after the S.P. Seth Group has been divested of its holding set out in paragraphs (a) and (b) above for election of directors and in the meantime an Administrator be appointed to manage the affairs of the Company.

F) RESTRAIN the respondents from issuing any right shares:

G) DIRECT the amendment of the Articles of Association by deleting clause 40(a) of the Articles of Association;

H) DIRECT an inquiry u/s 543 of the Companies Act against Shri S.P. Seth Group and compel them to restore to the Company all funds diverted by them and the value of all wrongful advantages received by them;

I) SUCH other order or orders may be passed as may be just and necessary;

IN the Alternative

THE Company National Industrial Corporation Limited may be wound up by the Court under the provisions of the Companies Act, 1956 and such other orders may be made as in the premises may be just.

(3) During the pendency of this petition in the court, the Company application no.719/91 was filed by the respondent u/s 9 of the Company (Courts) Rules, 1959, inter alia, alleging that the shares held by the petitioners do not constitute 10 per cent capital of the company and the petitioners cannot rely upon share-holdings of any other person as they have not obtained the consent, in writing, of any such person nor have they filed any schedule as required by the Rules. The company has prayed in this application that the petition is incomplete and is liable to be dismissed as the petitioners do not fulfill the qualification required for maintaining a petition u/s 399 of the Act. On 10th December, 1991, the counsel for the petitioner made a statement that he did not wish to file reply of the application. The application came up for disposal before Y.K. Sabharwal, J. on 2nd February, 1993.

(4) Sabharwal, J. in his said order came to a definite finding that the petitioners do not hold 1/10th of the issued share capital of the company. They do not claim that they have a right to apply under any other category contemplated by Sections 399(1) or under 399(4) of the Act. No consent in writing of any member has been obtained. Sabharwal, J. discussed various judgments cited at the Bar and came to the conclusion that compliance of Section 399 is a condition precedent for maintaining a petition under Sections 397-398 of the Act and it is a matter of jurisdiction of the court. Sabharwal, J. also came to a definite

conclusion that the petitioner has not complied with Section 399 of the Act and after a lapse of 5 months, an application seeking amendment of the petition was filed. The amendment sought for, does not relate to procedural matter. The court also observed that the petitioners have not been able to show any special considerations or equities in their favor.

(5) The court further observed that obtaining and filing of consent in writing goes to the root of the matter in issue. Jurisdiction of the court to entertain a petition under Sections 397-398 w.e.f. the amendment of 1st May, 1991 vests not with this court but with the Company Law Board. The court rejected the amendment sought by the petitioner and for the foregoing reasons, the court held that petition under Sections 397-398 is not maintainable. However, while disposing of the petition under Sections 397-398 as not maintainable, the court observed that the petition for winding up would continue.

(6) The petitioner aggrieved by the order of learned Single Judge filed a Company appeal before the Division bench, which was dismissed on 18th March, 1993. Thereafter, the petitioner moved an application Ca 562/94, with the prayer that the respondent be restrained from issuing 20,50,000 right shares. While dismissing the application, the Court observed that there is no mala fide act on the part of the company in trying to raise the funds by issuance of right shares in question. The mere fact that the Company had earlier tried to raise funds by issuance of right shares in the year 1993, does not mean that the present decision of the company in issuing the right shares is actuated by any ulterior motives and is not a bona fide exercise of discretion in the interest of the company. The petitioner aggrieved by the said judgment had filed the Company appeal. By a detailed judgment, the Division Bench dismissed the Appeal filed by the appellant and affirmed the judgment of the Single Judge.

(7) Mr. Daljit Singh, learned counsel for the respondent submitted that if the entire company petition is carefully and closely examined, along with its prayer, then the conclusion is irresistible that the petition was filed primarily u/s 397-398 of the Companies Act. All allegations and averments in the petition are to that effect but in the alternative, the petitioner has prayed that the company, National Industrial Corporation be wound up by the court under the Companies Act, 1956.

(8) When the petitioner was confronted with this situation then all averments in the petition are directed towards the relief u/s 397, 398 of the Companies Act and there are no averments to support the case of winding up. Mr. Khanna, learned counsel for the petitioner in reply to this query submitted that the company's production is falling in some years though there is increase of business activity, Therefore, the company should be wound up. As a matter of fact, this particular averment also, even on scrutiny found to be correct, relates to mismanagement of the company and can be effectively agitated u/s 397/398 of the Companies Act. P.K. Bahri, J. who had disposed of Ca 562/94, (in which it is prayed by the petitioner that the respondent be restrained from issuing 20,50,000 shares) arrived at the conclusion that there is no mala fide on the part

of the company in trying to raise funds by issuance of right shares of the company.

(9) According to the conclusion arrived at by Bahri, J. the Company is doing well and any coercive method used against the Company shall prove counter-productive.

MR. Khanna, learned counsel for the petitioner also submitted that in a petition for winding up, the court can grant any relief. Mr. Khanna placed reliance on National Conduits (P) Ltd. vs. S.S. Arora 37 Comp Cas 786. This judgment was cited to highlight the proposition that the Court has inherent powers to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.

(10) Mr. Khanna canvassed that the Court is not bound to grant relief which is incorporated in the prayer clause but in the interest of justice the court can pass any appropriate orders. There cannot be any controversy as far as this proposition is concerned. But this case has no bearing on the controversy involved in this case.

(11) Mr. Daljit Singh, learned counsel for the respondent submitted that this petition has been filed to obtain relief u/s 397-398 and after the amendment in the Act, this petition ought to be filed in the Company Law Board. In his judgment, Mr. Sabharwal, J. dismissed the petitioner's petition u/s 397-398 as not maintainable, but kept the winding up petition alive.

IT is submitted by Mr. Daljit Singh that the Company is in a very sound financial position and is continuously giving bonus to all its shareholders and by no stretch of imagination, this Company cannot be placed in the category of those companies which ought to be wound up.

(12) According to Mr. Daljit Singh, the proper course for the petitioner ought to have been to file this petition before the Company Law Board. He placed reliance on Hind Overseas Pvt. Ltd. vs. Raghunath Prasad Jhunjhunwalla and another, 46, Company Cases, 91.

IN this case, their Lordships of the Supreme Court have held that relief u/s 433(f) of the Companies Act, 1956 based on the just and equitable clause is in the nature of a last resort when other remedies are efficacious enough to protect the general interests of the company. It is not a proper principle to encourage hasty petitions for winding up of the company without first attempting to sort out the dispute and controversy between the members in the domestic forum in conformity with the articles of association. There must be materials to show when the "just and equitable" clause is invoked that it is just and equitable not only to the person applying for winding up but also to the Company and all its shareholders. The company court will have to keep in mind the position of the Company as a whole and the interests of the shareholders and see that they do not suffer in a fight for power that ensues between two groups.

(13) Mr. Singh, learned counsel for the respondent submitted that there is no material on record by which this company can be wound up. The only allegation that in some years, the production has fallen, can be no ground for winding up, particularly that the company is continuously giving bonus to its shareholders. Grant of bonus prima facie reflects sound financial position of the company.

(14) He also cited Atul Drug House Ltd 1941 Comp Cas 352. In this case, the Court observed as under:

"AS regards the last ground, it should be kept in mind that when a winding-up petition is made u/s 433(f) on the cause of just and equitable ground, the petition to exercise such jurisdiction must be filed with absolute candour. Section 443(2) in terms enacts that where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. In the context of section 443(2) that it is just and equitable to do so, it would be the bounden duty of the petitioners to disclose the material facts as to the alternative remedies which they have availed of or which are available to them. It is only this disclosure which would enable the court to exercise its discretion u/s 443(2) and when such a petition is presented on this ground u/s 433(f), to make up its mind as to whether the other remedy is available to the petitioners and they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

(15) He also placed reliance on Jose J. Kadavil vs. The Malabar Industrial Co. Ltd., reported in 1983 (2) Comp L J 359 (Ker). When the petitioner has an alternative remedy, in this case, the Court has taken the view that winding up must be a last resort. When other alternative remedies are available, the Court ought not to resort to winding up.

(16) I have heard learned counsel appearing for the petitioner and the respondent at great length. I have also perused all the pleadings and documents filed by the petitioner carefully. For the detailed reasons stated above, it is concluded that the petitioner has not been able to make out any case of winding up of the respondent company. The petition is accordingly dismissed, with no order as to costs.