

**(1999) 02 CAL CK 0010**

**In the Calcutta High Court**

**Case No :** Civil Appellate Jurisdiction, A.C.O. No. 167 of 1998

Rajendra Kumar Malhotra and Others

APPELLANT

Vs

Harbanslal Malhotra and Sons Ltd. and Others

RESPONDENT

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**Date of Decision :** 01-02-1999

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 7, 100, 151  
Companies Act, 1956 — Section 10E(5), 10F, 10F, 397, 398  
Company Law Board Regulations, 1991 — Regulation 44  
Constitution of India, 1950 — Article 226

**Citation :** (1999) 2 CALLT 13

**Hon'ble Judges :** Ruma Pal, J;Mahemmad Habeen Shams Ansari, J

**Bench :** Division Bench

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## **Judgement**

Ruma Pal, J.—M/s. Harbanslal Malhotra & Sons Ltd. (referred to as the Company) carries on business Inter alia as manufacturer and dealer in safety razor blades, razor blades, safety razors, electrical shavers, and cosmetics. The share holding of the company is divided equally between the appellant No. 1 and his group, the respondent No. 2 and his group and the respondent No. 3 and his group. The appellant No. 1, the respondent No. 2 and the respondent No. 3 are brothers,

2. On 30th September, 1992 the appellants filed an application under sections 397 and 398 of the Companies Act. 1956 (referred to as the Act) against the respondents alleging that the respondents had totally excluded the appellant from the management of the company and were keeping the appellant in the dark about the management and business affairs of the company. It is not necessary to go into all the particulars pleaded in support of this case for the purpose of this appeal. The relevant allegation in the petition made is that the respondents Nos. 2 and 3 and their group were intending to sell their share holding in the company and pass on the control of the company to certain outsiders. According to the appellant's petition, transfer of shares would tantamount to selling of assets of the company which Included valuable immovable properties and that the transfer was being made surreptitiously in

violation of the Articles of Association. It was alleged :

"The respondent Nos. 2 and 3 are holding regular meetings with Mr. G.S. Gill the Managing Director of M/s. Indian Shaving Products Limited an Indian subsidiary of M/s. Gillette and Mr. J.C.Ribera, Group Vice President of M/s. Gillette in charge of operations in Africa, Middle East and East European countries. The petitioners are not aware as to what transpired in such meetings."

3. M/s. Gillette International (referred to as Gillette) is a foreign multinational company which also manufactures and trades in inter alia the same products as the company.

4. According to the appellants the appellant No. 1 protested against sale or transfer of shares to Gillette but without any response from the respondents.

5. An applications was made by the appellant for Interim relief inter alia praying for orders to restrain the respondent Nos. 2 and 3 and their groups from transferring, selling or disposing of, alienating, dealing with and/or creating any third party rights in any of the shares belonged to them. An affidavit in opposition was filed by the company denying the allegations regarding negotiations with Gillette.

6. In 1993 the appellants filed an application specifically praying for an order restraining the company from entering into any collaboration agreement or further agreement with Gillette or any of its subsidiaries/ associates. When the application came up before the Company Law Board, a statement was made on behalf of the company that "there is no intention to transfer those shares nor the company has authorised anybody to negotiate for alienation of the properties of the company". This was recorded by the Company Law Board in its order dated 9th February, 1993, who in view of this categorical statement made by the respondent did not find it necessary to issue at that stage any direction on the company as prayed for by the appellants.

7. The appellants filed another application (C.A. No. 258 of 1993) and sought to bring on record an application dated 18th August, 1993 from Gillette International Limited Co.-am Group as well as a letter dated 17th August, 1993 from the Company to the Chairman, Foreign Investment Promotion Board (FIPB) for permission in connection with a collaboration between the company and Gillette. The Company Law Board expressed its displeasure about the respondents' failure to disclose the full details of the development with regard to Gillette the collaboration with Gillette and by an order dated 20th October, 1993 the Company Law Board restrained the company from issuing any further shares in the company without the approval of the general meeting after giving 25 day's clear notice to the appellants. Directions were also given on the company to disclose full particulars of the collaboration with Gillette.

8. The company challenged the order dater 20th October 1993 by way of an application under Article 226. An ex parte ad-interim order was obtained on 8th

December, 1993 staying the operation of the order dated 20th October, 1993.

9. The appellants sought special leave to appeal before the Supreme Court from the order dated 8th December, 1993 passed by the writ court. The Supreme Court disposed of the SLP by setting aside the order of the writ court on the basis that the Company Law Board had not interdicted preparatory before the actual Issuance of shares. The Supreme Court, accordingly, disposed of the SLP as well as the writ application filed clarifying that the direction of the Company Law Board in the order dated 20th October, 1993 could not be construed as coming in the way of the respondents taking preparatory steps for Issuing shares to the collaborators.

10. The appellants then made an application for amendment of the section 397 and 398 application. The appellants sought to bring on record the apprehended collaboration agreement of the company with Gillette. It was also alleged that in fact Gillette had concluded a deal with the company for equity participation by Gillette and that FIPB had cleared the proposal of the respondents Nos. 2 and 3 for such equity participation in NVI Engineering Private Limited which holds shares in the company. It was also stated that the induction of Gillette would change the structure of the company. It was stated that the agreement between Gillette and the company was contrary to the orders passed by the Company Law Board, the submissions made to the Board, the Articles of Association of the company as well as the provisions of the Companies Act Without prejudice to this submission it was stated that the company was already in possession of requisite knowledge for manufacture of blades and that any collaboration between the company and Gillette would not be in the Interest of the company. It was alleged that Gillette was seeking to pass on old machinery and out dated technology to the company. It was also stated that a collaboration with Gillette would result in loss of royalty to the company, loss of marketing shares and loss of the Indian brands. It was alleged that the chief competitor of Gillette in India was the company and that the object of the agreement was to destroy the company so that Gillette's business in India could profit. An apprehension was expressed that the respondent Nos. 2, 3 and 5 would transfer their entire share holding to Gillette. Apart from seeking to Incorporate this allegation by way of amendment, the appellant also prayed that Gillette should be added as a party to the application under sections 397 and 398.

11. The respondent resisted the prayer for impleading Gillette contending that Gillette was neither a necessary nor a proper party as there was no subsisting agreement between the company and Gillette. By an order dated 25th May, 1995 the Company Law Board allowed the prayer for amendment and rejected the submission of the respondents. The Company Law Board was the view that it could not adjudicate on the allegations without the presence of Gillette and accordingly allowed the prayer to implead Gillette as a party.

12. On 2nd September, 1995 an application was made by Gillette to the Board for recalling the order dated 25th May, 1995 on the ground, inter alia, that no

opportunity had been given to it of being heard before it was added as a party.

13. Accepting the submission of Gillette the application was allowed on 11th November, 1996 in exercise of the inherent powers in Regulation 44 of the Company Law Board Regulations, 1991.

14. Gillette was thereafter heard. It was contended before the Company Law Board by Gillette that it was not a necessary or proper party as there was no existing agreement between the company and Gillette. After considering the submissions of the parties at great length the Board held that the facts clearly showed an Intention of the company and Gillette to enter into a collaboration. Whether the allegations regarding the nature of the technology as made in the amended petition were correct or not was to be examined and that the Board could not pass an effective order on this question in the petition without a proper affidavit from Gillette through impleadment.

15. Gillette challenged the decision of the Company Law Board to implead it as the party before the High Court u/s 10F of the Act. The appeal was dismissed by a Judgment dated 4th September, 1997.

16. In November, 1997, Gillette again made an application before the Company Law Board. This time for striking out its name from the petition on the ground that :

"There is no current or pending arrangement regarding supply of technology to the respondent company as had been alleged while Impleadment of the application as a party respondent was being sought, since there is no commitment and no further interest on the part of the applicant to that effect and since the validity of the approval by FIPB had lapsed and the matter of any extension of any such approval is not being proceeded with."

17. The application of Gillette was allowed on 18th February, 1998 by the Company Law Board as:

"The grounds on which we decided to direct M/s. Gillette to be impleaded no longer subsist. Further we also note that the applicant has no further intention of either seeking further extension of the FIPB approval nor it has any interest to enter into any collaboration with the company. In view of this we do not consider it necessary to continue the applicant as a respondent as such we direct that its name be struck off from the array of respondents. This is however without prejudice to the rights of the petitioner to move us in future should any occasion arise needing to implead M/s. Gillette."

18. According to the appellants no appeal was preferred from this order by the appellants in view of the categorical statement of Gillette that it had no interest in collaborating with the company any further.

19. On 10th June, 1998 however, a fax message from Mr. D. Gill of Gillette, U.K. to the respondent No. 3 was obtained by the appellants which showed that a

discussion had been held regarding a joint venture between Gillette and inter alia the company and enclosing a proposal outlining the concept of such joint venture. According to the appellants under this proposal the shares of various holding companies of the company were sought to be purchased by Gillette thus giving it effective control in the company. An application was accordingly made to the Company Law Board stating that the Board has been misled to pass the order dated 18th February, 1998 as the statement of Gillette that it was not interested in entering into any agreement with the company was false. It was accordingly prayed that in view of the facts, the order dated 18th February, 1998 should be recalled and the direction to delete Gillette as respondent should be recalled.

20. This application was rejected by the Company Law Board on 27th August, 1998. The Board held that the addition of Gillette had been made on the allegation of the collaboration for which the FIPB's approval had been obtained and under which Gillette was alleged to pass out-dated technology. According to the Board the facts did not show that Gillette intended to revive the old collaboration. According to the Company Law Board the facsimile message only recorded the terms of a discussion between an "alleged executive" of Gillette and the respondent No. 3 that the same was entirely a different proposal, which was only at a conceptual stage. However, the Company Law Board said :

"On the basis of this fax, without any other material, it would not be proper to order impleadment of M/s. Gillette as a party and as such we dismiss the application with liberty to the petitioners to approach us with full and proper particulars."

21. This order is the subject matter of appeal before us.

22. The arguments of the parties can be resolved into the following broad questions.

a) Whether the application of the appellant for recall of the order dated 18th February, 1998 was maintainable?

b) Whether the impugned order was appealable?

c) Whether any question of law had been raised u/s 10F?

d) Whether the discretion of the Company Law Board warranted interference particularly in view of the order of the Supreme Court dated 20th October, 1993?

23. At the outset we note that the respondents conceded that the appellants could have made a fresh application for impleading Gillette as a respondent but could not apply for review of the order deleting Gillette as a respondent. In essence a prayer for recalling the order deleting Gillette as a respondent is a prayer that Gillette should be a respondent. Besides the appellants did not contend that the Board has the power to review its earlier order. Therefore the several decisions on Order 47 of the CPC cited by the respondents in support of

their submission that the Board did not have the competence to review its earlier order, or that even if it did, the power could not be exercised in the facts of the case, are not considered.

24. The appellants submitted that their application for recall was maintainable under the Board's Inherent powers under Regulation 44 of the 1991 Regulations. Regulation 44 reads :

"44. Saving of Inherent power of the Bench.--Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the Bench to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Bench."

25. The Board acted in exercise of the power under Regulation 44 to recall the order dated 25th May, 1995 by which Gillette was originally impleaded as a party. Then the roles were reversed. The appellants had contended that Gillette's application would amount to review of the earlier order and relied on the very same decisions relied upon by the respondents before us to submit that the application fell outside the scope of Order 47 of the Code of Civil Procedure. Gillette justified the application for recall under Regulation 44. The Company Law Board rejected the submissions of the appellants and said :

"As a quasi judicial body we are not bound by the CPC and we have the power to regulate our own procedures. The procedure to be followed by us is spelt out in sub-section 6 (of section 10E) which provides that the CLB shall have the power to regulate its own procedure. Sub-section (5) lays down the two guiding principles for the CLB namely (a) principle of natural justice and (b) acting on discretion."

26. The Board noted that it would be guided by the provisions of the CPC but were not bound by it. Significantly even while considering the appellants last application, the Company Law Board did not reject the appellant's application on the ground that it was not maintainable.

27. The provisions of section 151 of the CPC has been reproduced mutatis mutandis in Regulation 44. There are two separate bases for exercise of these inherent powers namely the ends of Justice and the prevention of abuse of process. The appellants argued that Gillette had made a false statement that it had no interest to collaborate with the company on the basis of which the Board was misled into deleting the name of Gillette as a respondent. It claimed that Gillette still had the intention to enter into collaboration with the company.

28. The order dated 18th February, 1998 speaks for itself whatever may be the construction put on it by the Company Law Board on 27th August, 1998. It must be observed in passing that as long as the allegations against Gillette remain on the record then it is debatable whether the truth or falsity of that allegation can be decided at an interim stage of the proceeding. However, the parties did not question the order dated 18th February, 1998 by way of appeal and we refrain

from determining the propriety of that order in this proceeding. But the fact remains that the grounds on which Gillette was Impleaded as a party continue to remain on record namely an apprehended collaboration between Gillette and the company to the detriment of the company. The Board deleted Gillette's name as respondent not only on the finding that there was no collaboration agreement but also that Gillette had no further intention nor any interest to enter into any collaboration agreement with the company. That was also the basis on which Gillette's addition was upheld by the appeal court. In dismissing Gillette's appeal from the order impleading it as a party this is what the appellate court said :

"The matter in issue before the Board pertains to affairs of Harbans Lal Malhotra & Sons and a definite case has been made out that the affairs and conduct of the company has gone in such a way so as to create prejudice to the interest of the minority group of share-holders and in the event the minority group comes up before the board and informs that there is a existing collaboration agreement or likelihood of there being a collaboration agreement which would undoubtedly prejudice the interest of the company, in our view, question of declaring the order of impleadment as perverse does and cannot arise."

29. "No further Interest" on the part of Gillette to collaborate in plain English means "for all times to come". The statements contained in the appellants' petition certainly be lies this. If the statements contained in the appellants' application are correct at least this basis for deleting Gillette as a respondent would disappear and the order dated 18th February, 1998 would have been obtained in abuse of process.

30. Gillette however argued that subsequent events could not be taken note of. This may be so if the Board were exercising a power of review on the principles of Order 47 of the Code. But it was not. It was considering the exercise of its power for recall under its Inherent powers.

31. In R.M. Subramaniam Vs. N. Sundaram Iyer, the Full Bench of the Madras High Court in construing the ambit of section 151 said :

"The discretion of the court, under its Inherent powers, to adjust the right of parties on the basis of events happening after the starting of the action, is well recognised and accepted as a rule of justice, equity and good conscience. In some cases, it is almost the duty of the court to avert to the subsequent events brought to its notice lest it should fail to do substantial Justice between the parties."

32. That the Board could consider the subsequent events was assumed by the Board itself. It considered and rejected the facts stated in the petition.

33. Undoubtedly, a court u/s 10F cannot go into a pure question of fact as found by the Board (See : Goppulal Vs. Thakurji Shriji Shriji Dwarakadheeshji and Another, but where the finding is erroneous or perverse, it can. Accepting the submission of the respondents that the power of this court u/s 10F is similar to

the power of the High Court u/s 100 of the Code of Civil Procedure, the following observations of the Supreme Court in *Mattulal Vs. Radhe Lal*, are apposite :

"It is only an error of law which can be corrected by the High Court in exercise of its jurisdiction in second appeal. If the finding recorded by the lower appellate court is one of law or of mixed question of law and fact, the High Court can certainly examine its correctness, but if it is purely one of fact, the Jurisdiction of the High Court would be barred and it would be beyond the ken of the High Court unless it can be shown that there was an error of law in arriving at it or that it was based on no evidence at all or was arbitrary, unreasonable or perverse"

34. The allegations against Gillette by the appellants in their main application under sections 397 and 398 are still in record. Their grievance was in respect of any collaboration between the company and Gillette. The earlier agreement was evidence of the intention of the Company and Gillette to collaborate. In the last application by the appellants, they have reiterated the stand. No affidavit has been filed controverting the statements in the appellants' petition. We have therefore an uncontroverted statement in the petition of the company's and Gillette's Intention to collaborate. The fax has been relied as evidence of such intention. The Board was under a duty to find out the truth. It was Incumbent upon it to ascertain the truth after the filing of affidavits. No case could be argued by Gillette either that Gill was not an executive of Gillette or that there was no Intention to collaborate in the absence of any pleading to that effect by Gillette. The CLB came to such finding on its own. The CLB erred in law in coming to a finding of fact in the absence of any pleading. [See : *Gappulal v. Shriji Dwarkadheeshji* (supra)].

35. Gillette's submission that it was not necessary to add Gillette as a party because sufficient protection had been given to the appellants by the Supreme Court's order dated 20.10.93 appears to be concluded against the respondents and Gillette. The Supreme Court order passed on 20.10.93 was operative when Gillette was added as a party by the Board firstly on 25.5.95 and again on 19.2.97. The Board clearly did not consider the existence of the order dated 20.10.93 material to the issue of impleadment of Gillette.

36. The submission of the respondents that the order having been passed on an application for review is not appealable by virtue of the provisions of Order 47 sub-rule (7) is misconceived for the reasons stated earlier. Furthermore, the question of appeal from an order of the Company Law Board to this High Court is governed by section 10F which allows :

"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."

37. We have already held that the Company Law Board erred in law in finding facts not pleaded and in rejecting the uncontroverted statements of the

appellants. This is one of the questions of law which arises out of the order under appeal. Besides, when Gillette had preferred an appeal from the order adding it as a respondent, the appellant then raised a question as to the appealability of the order u/s 10F on the ground that no question of law was involved. The appeal court negated this submission and held that the "point as to the addition of party--is a question of law". It was also held that the language of section 10F should not be given a restrictive meaning to defeat the purpose and concept of Justice. The question as to the construction of order dated 18.2.98 to determine the bases for deleting Gillette's name as respondent is also a question of law.

38. In the circumstances we answer the questions framed by us at the outset in the manner following :

Question (a) - in the affirmative

Question (b) - in the affirmative

Question (c) - in the affirmative

Question (d) - in the affirmative

The appeal is accordingly allowed and the order under appeal is set aside. The matter is remanded back to the Company Law Board for being decided on the basis of affidavits filed. There will be no order as to costs.

M.H.S. Ansari J.

39. I agree.

40. Appeal allowed