

(2005) 08 SHI CK 0018

In the High Court Of Himachal Pradesh

Case No : Company Appeal No's. 8 of 2004 and 2 of 2005

Ramesh Chand Goyal and Another

APPELLANT

Vs

Himalaya Communications Ltd. and Others
 Satish
Chand Jain and Others Vs Ramesh Chand Goyal and Others

RESPONDENT

Date of Decision : 23-08-2005

Acts Referred:

Companies Act, 1956 — Section 397, 398
Company Law Board Regulations, 1991 — Regulation 44

Citation : (2006) 129 CompCas 297 : (2006) 1 ShimLC 10

Hon'ble Judges : V.K. Gupta, C.J.;Deepak Gupta, J

Bench : Division Bench

Advocate : P.K. Jain, A. Jain and Dalip Sharma, in Company Appeal No. 8 of 2004 and Ankush Dass Sood, in Company Appeal No. 2 of 2005, for the Appellant; P.K. Jain, A. Jain and Dalip Sharma for respondent Nos. 1 and 2 in Company Appeal No. 2 of 2005, Ankush Sood, for respondent Nos. 1 to 4 in Company Appeal No. 8 of 2004, K.D. Sood, for respondent Nos. 6 and 7 in Company Appeal No. 8 of 2004 and for respondent Nos. 5 and 6 in Company Appeal No. 2 of 2005, G.C. Gupta and Mohinder Gautam for respondent No. 8 in Company Appeal No. 8 of 2004 and for respondent No. 7 in Company Appeal No. 2 of 2005, for the Respondent

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—M/s. Himalaya Communications Ltd. is a company duly incorporated under the Indian Companies Act, 1956, having its registered office at Village Katha, Baddi, District Solan, H.P. The original promoters of the company were Mr. Ramesh Chand Goyal and Smt. Manorama Goyal (hereinafter referred to as the "Goyal group") and M/s. Satish Chand Jain, Darpan Jain and Smt. Meenu Jain (hereinafter referred to as the "Jain group"). The company was incorporated in the year 2000.

2. The undisputed facts are that differences arose between the two groups with regard to the control and management of the company. According to the Goyal

group the Jain group on May 6, 2002, forcibly took over the physical control and possession of the company. Thereafter, the Jain group filed a company petition under Sections 397 and 398 of the Companies Act, 1956, before the Company Law Board (hereinafter referred to as the "Board") in May, 2002. Since the parties were closely related efforts were made to arrive at an amicable settlement between the two groups. On September 18, 2002, some understanding was reached between the two parties and a memorandum of understanding was drawn up. According to this memorandum of understanding the Goyal group agreed to walk out from the company and transfer their share holding to the Jain group. Rupees 4.5 crores was payable to the Goyal group for transfer of the shares. Another sum of Rs. fifty lakhs was payable subject to the company succeeding in a sales tax case. Rupees 2.5 crores was to be paid immediately and the balance in eight quarterly instalments of Rs. 25 lakhs each. The parties were to withdraw all litigations and complaints made against each other. The book value of the equity shares as on March 31, 2002, was to be taken into account for transfer of the shares. There were other conditions also which are not relevant for decision of the present appeals.

3. On October 28, 2002, the Company Law Board passed the following order on the petition pending before it :

C. P. No. 30 of 2002 :

Order dated October 20, 2002 :

None present on behalf of the defendant in spite of having noted the hearing today.

Since the defendant has agreed to go out of the company on a valuation to be made by an independent valuer and that the petitioners are willing to release the defendant from his personal guarantees within a period of three months, the petitioners are at liberty to take control of the company and manage the same with immediate effect. None of the liabilities created from today shall bind the defendants.

Both the sides will appear on November 1, 2002, at 4.30 p. m. with suitable names for appointment as a valuer. Petitioner to forward a copy of this order to the defendant forthwith.

4. Thereafter, one of the members of the Goyal group filed a company application before the Company Law Board seeking directions to the Jain group to honour the memorandum of understanding signed between the parties. Disputes arose with regard to the valuation and method of valuation of the shares. The Company Law Board vide order dated November 7, 2003, on the said application passed a detailed order, relevant portion of which reads as follows :

71 have considered the pleadings and arguments of counsel. Neither of the parties desire to adjudicate the petition on merits as is evident from their applications. It is not in dispute that the respondents have agreed to go out of

the company as recorded in order of this Bench dated October 18, 2002 and October 23, 2002 and still they are willing to do so. The only issue for consideration is whether the respondents should go out of the company in terms of the memorandum of understanding or on a valuation to be made by an independent valuer. The memorandum of understanding was entered into by the parties on their own and not in terms of any direction given by this Bench. It is an admitted position, as recorded in the order of this Bench October 23, 2002, that the second respondent, who was present in person, made a voluntary statement that the respondents were willing to go out of the company by selling the shares to the petitioners at a value to be determined by an independent valuer. He even expressed his willingness to hand over the entire management of the company to the petitioners on the stipulation that his guarantees to the banks should be released. At that time, he did not make any reference to the memorandum of understanding. Any statement before the court--in the present case this Bench--is binding on the party making such a statement. As a matter of fact, on the basis of the statement made by the second respondent, this Bench had passed a further ex parte order on October 28, 2002, directing the petitioners to release the respondent from his personal guarantee within a period of three months. Therefore, the second respondent is bound by the statement made on October 23, 2002 and he will have to go out of the company on receipt of the consideration for his shares at a value determined by an independent valuer. This Bench cannot enforce the memorandum of understanding as sought for by him, as other than noting the existence of the memorandum of understanding, this Bench had not passed any order in regard to the same nor recorded anything to the effect that both the parties were willing to abide by the terms of the memorandum of understanding. The memorandum of understanding was privately entered into by the parties, the enforcement of specific performance of which lies in a civil court.

8. Since I have held that the respondents are bound by the statement made by the second respondent, the matter is posted on November 24, 2003, at 4.30 p.m. at which time both the parties will suggest the name of a mutually acceptable valuer to value the shares failing which this Bench itself will appoint a valuer.

5. The Goyal group was aggrieved against the order since the Board had refused to enforce the memorandum of understanding entered into between the parties and challenged the same by filing an appeal in this Court. The appeal being Company Appeal No. 1 of 2004 on April 22, 2004, was dismissed with the following directions :

We find ourselves in complete agreement with the views expressed by the Company Law Board and the approach adopted by it with respect to the non-enforceability of the memorandum of understanding because admittedly the memorandum of understanding, if at all was not entered into between the parties, as a result of any direction by the Company Law Board. No interference

accordingly is called for from this Court as far as the impugned order dated November 7, 2003, is concerned. Mr. Sanjay Karol, learned senior counsel appearing for the respondents has submitted that as a consequence of, and after the passing of the order dated October 28, 2002, the respondents have been in control of the management of the company. If that is the position, we direct that the Company Law Board shall proceed to dispose of C. P. No. 30 of 2002 very expeditiously because we feel gravely concerned about the inordinate delay already having occurred in the disposal of the aforesaid petition, which has unnecessarily given rise to various complications in the matter between the parties. The Company Law Board, therefore, is directed to take all urgent steps to dispose of C. P. No. 30 of 2002 very expeditiously and latest by June 30, 2004. If need be, proceedings on day-to-day basis may be held. Parties before us undertaken not to seek any adjournment in the proceedings and to render all possible assistance between before the Board to facilitate the disposal of C. P. No. 30 of 2002 before June 30, 2004. Till C. P. No. 30 of 2002 is disposed of, status quo as existing on date with respect to the management and control of the company shall be mentioned. If the respondents feel any difficulty with respect to operation of bank accounts, they would be at liberty to approach the Company Law Board for appropriate directions.

6. The Goyal group thereafter challenged the order of this Court before the Supreme Court of India by filing a petition for special leave to appeal. The Supreme Court dismissed the same by passing the following order :

Heard Learned Counsel for the parties

We are not inclined to interfere with the impugned order as the Company Law Board has directed to dispose of the main matter finally. Counsel for the petitioner apprehends that in case respondents Nos. 1 to 4 are allowed to carry on the affairs of the company, the petitioner shall be relieved of the bank guarantee furnished. The petitioner would be at liberty to raise such contentions before the Company Law Board.

The SLP is disposed of.

7. After the Supreme Court passed the order the Goyal group filed an application before the Company Law Board with a prayer that the Jain group be directed to comply with the orders dated October 28, 2002 and to release the personal guarantees of the Goyal group. They also informed the Board that they had filed a civil suit for enforcement of the memorandum of understanding. The Company Law Board thereafter heard the matter on June 28, 2004 and disposed of Company Petition No. 30 of 2002, vide order dated July 26, 2004. The petition was disposed of by observing as follows :

Therefore, the only manner by which this petition can be disposed of is by directing the respondents to sell their shares to the petitioners as agreed to by the second respondent before this Bench and I accordingly do so. This direction will not in any way prejudice the respondents in the proceeding before the court

in respect of the memorandum of understanding as any consideration received in pursuant to this order can always be adjusted against any decree passed by the court. Since the fair value of the shares is to be determined, both the sides will be present before this Bench on August 18, 2004, at 4 p. m. to suggest a mutually acceptable valuer for determination of the fair value of the shares failing which this Bench itself will appoint a valuer. Even though in terms of the order of the Supreme Court, the respondents are to seek direction from this Bench regarding release of their personal guarantees given to the banks, no such prayer has been made. Yet in the order dated October 28, 2002, I have recorded the statement of learned counsel for the petitioners that his clients would release the respondents from their personal guarantees within 3 months which period has already expired. Therefore, I direct that the petitioners should release the respondents from their personal guarantees within a month from the date of this order. I further direct that the second respondent or his group shall not interfere with the management of the company in any manner and the banks will recognize only the petitioners as being in full control of the company with immediate effect.

The petition is disposed of in the above terms, reserving a right to appoint a valuer and given consequential directions.

8. It would be pertinent to mention that the Board wrongly recorded that the respondents (Goyal group) had not sought directions for release of their guarantees. In fact, as noted above, they had done so. In terms of the orders both the parties proposed the names of the valuer. The Goyal group also moved an application for initiating proceedings of contempt/disobedience of orders dated July 26, 2004, against the members of the Jain group on the ground that the said order had not been complied with and the personal guarantees of the Goyal group had not been got released. In the meantime the Jain group also filed an application for review of the order dated July 26, 2004. Basically what they challenged was the directions to release the Goyal group from their personal guarantees within a month from the date of the order. The plea taken up was that the release of the guarantees would have to be approved by the banks and the Jain group itself could not get the Goyal group relieved of the personal guarantees. The Company Law Board passed a detailed order on October 5, 2004, the relevant portion of which is reproduced as under :

7. I have considered the matter carefully. My observation relating to memorandum of understanding proceedings does not call for any modification or deletion as the said observation was made only to ensure that the direction to the respondents to sell their shares did not prejudice their interests in the memorandum of understanding proceedings and not for any other purpose. In so far as the direction relating to releasing of the respondents from their personal guarantee is concerned, the same was made taking into consideration the undertaking given by the petitioners before this Bench on October 28, 2002. However, when the order dated July 26, 2004, was passed, the petitioners had

not brought to my notice, either the DRT proceedings or the steps taken by the bankers in terms of the Securitisation Act. I find merit in the contention of the petitioners, that in such circumstances, the consent of the bankers, would be required. Therefore, pending determination of the fair price for the shares, the petitioners should initiate action to have the respondents released of their personal guarantees and should release them as soon as the consideration for their shares is paid.

8. As far as determination of the fair market value of the shares is concerned, both the parties have agreed that M/s. L. C. Kailash and Associates, Chartered Accountants to determine the fair value. Accordingly, I appoint them to determine the fair value. The company will negotiate the remuneration payable to them and pay the same. Both the parties are at liberty to make both oral and written submissions before the valuer who will take them into consideration in determining the fair value. The date of valuation would be the balance sheet as on March 31, 2002 being the proximate date to the date of the petition. The valuation should be completed by November 15, 2004.

9. Thereafter, the Jain group filed another application under Regulation 44 of the Company Law Board Regulations, 1991, for partial modification/ amendment of the order dated October 5, 2004, asking for a change in the date of valuation of the shares so that the same is changed to March 31, 2004, instead of March 31, 2002.

10. The Board in terms of the agreement of the parties appointed M/s. L. C. Kailash and Associates, Chartered Accountants to determine the fair value. It also held that the date of valuation should be as on March 31, 2002, and the valuation should be completed by November 15, 2004.

11. Thereafter, the Jain group moved another application for modifying/ amendment of the order dated October 5, 2004. In the meantime the Goyal group filed Company Appeal No. 8 of 2004 before this Court challenging the order dated October 5, 2004, passed by the Board whereby it had modified the order dated July 26, 2004. The main ground of challenge is that the Board had no power to review its earlier order and further that even on the merits there was no justification for reviewing the order dated July 26, 2004. A stay application was also filed for staying further proceedings before the Board. This Court directed that further proceedings before the Board shall remain stayed. However, it was directed that the valuation process would go on.

12. The Jain group thereafter filed Company Appeal No. 2 of 2005 and prayed that the order dated October 5, 2004, be modified and the date of valuation be changed to March 31, 2004.

13. We have heard Mr. P. K. Jain, counsel for the Goyal group, Mr. Ankush Sood, counsel for the Jain group and Mr. K. D. Sood and Mr. G. C. Gupta, appearing on behalf of some of the banks.

14. The main contention of Mr. P. K. Jain, Learned Counsel is that the Board had no jurisdiction to review its earlier order. He submits that the Board in its order dated July 26, 2004, had directed the Jain group that they should release the Goyal group from the personal guarantees within a month from the date of the order. He submits that the Board could not have recalled this order especially when the Goyal group had filed a contempt petition for taking action against the Jain group for disobeying the orders. He submits that the Board acted illegally in passing the order dated October 5, 2004. Mr. Jain submits that the Jain group have taken over the assets of the company and are running the company which fact is even clear from the statement of Mr. Sanjay Karol, learned senior counsel recorded in the order of this Court dated April 22, 2004, in which he has stated that the Jain group have taken over the control of the management of the company in pursuance of the order dated October 28, 2002. According to him the Jain group taking advantage of the said order have taken over the control of the assets of the company but have neither paid the amount due and payable to the Goyal group nor have taken any steps to release the members of the Goyal group from the personal guarantees submitted by them to the bankers.

15. On the other hand Mr. Ankush Sood, Learned Counsel submits that though the possession may have been taken over, the Goyal group is putting impediments in the smooth functioning of the company and have at all times made efforts to stall the transfer process. He submits that due to the uncooperative attitude of the Goyal group the company had gone into losses and therefore, the date of valuation of the shares should be as on March 31, 2004.

16. From the facts narrated above it is clear that the Jain group had agreed to take over the company and the Goyal group had agreed to transfer its shares to the Jain group. As per the memorandum of understanding Rs. 4.5 crores was payable to the Goyal group on this account. The personal guarantees furnished by the Goyal group were to be got released by the Jain group. The Jain group did not accept this and took up the plea that the terms of the memorandum of understanding were not enforceable by the Board. On October 20, 2002, the Board had passed an order asking the Jain group to take over the control of the company and to release the members of the Goyal group from their personal guarantees. In the said order it was clearly mentioned that none of the liabilities created after October 20, 2002, would bind the defendants, i.e., the Goyal group. This order was not challenged by any party and attained finality. On November 7, 2003, the Board passed another order holding that the memorandum of understanding was not enforceable. However, the Goyal group was held bound by its statement made earlier and asked to go out of the company. This order was upheld both by this Court as well as by the apex court. Thereafter, the Board passed an order on July 26, 2004. The Goyal group was asked to sell its shares to the Jain group. It was further directed that the Jain group would take steps to get the Goyal group discharged from their personal guarantees within three months. Vide order dated October 5, 2004, the Board reviewed its earlier order and directed that the guarantees could not be replaced without the consent of

the bankers and therefore pending determination of the fair price of the shares the Jain group was directed to start the process for having the Goyal group released of their personal guarantees and should release them as soon as consideration of their shares is made. It was also further directed that the valuation of the shares should be as per balance sheet as on March 31, 2002, being the proximate date to the date of petition.

17. The first point that arises for consideration is whether the Board had the jurisdiction to review its earlier order. It is well-settled law that no court or Tribunal has the power of reviewing its orders unless such power is conferred upon it by law.

18. Mr. Ankush Sood, Learned Counsel relies upon a judgment of the apex court in *Kapra Mazdoor Ekta Union v. Management of Birla Cotton Spinning and Weaving Mills Ltd.* [2005] 3 Scale 218, and submits that this was a case of procedural review only. He submits that under the inherent powers vested in the Tribunal it had the jurisdiction to review its earlier order on procedural grounds. He submits that earlier it could not be brought to the notice of the Board that the proceedings were pending before the Debts Recovery Tribunal and that the consent of the banks was required before the guarantees could be released.

19. The apex court in *Grindlays Bank Ltd. v. Central Government Industrial Tribunal* [1980] Sup SCC 420 considered this point and held as follows (page 425) :

Furthermore, different considerations arise on review. The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in *Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji*, held that no review lies on merits unless a statute specifically provides for it Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse Of its process, and such power inheres in every court or Tribunal.

20. What is the ambit and scope of procedural review was explained by the apex court in *Kapra Mazdoor Ekta Union v. Management of Ms. Birla Cotton Spinning and Weaving Mills Ltd.* [2005] 3 Sca 218. After applying the principles laid down in *Grindlays Bank's* case [1980] Supl. SCC 420 it held thus :

19. Applying these principles it is apparent that where a court or quasi-judicial authority having jurisdiction to adjudicate on merits proceeds to do so, its judgment or order can be reviewed on merit only if the court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the court or quasi-judicial authority having jurisdiction to adjudicate

proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Case where a decision is rendered by the court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be reheard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In *Grindlays Bank Ltd. v. Central Government Industrial Tribunal* [1980] Suppl. SCC 420, it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be reheard and decided again.

21. One cannot accept the contention of Mr. Ankush Sood, that the present case was only a case of procedural review. The apex court has given examples of cases falling under procedural review. It has held that procedural review can be invoked in cases where the procedure has not been followed. Examples have been given of cases where notice has not been sent to a party or a matter is heard and decided under the mistaken impression that notice has been sent or where a matter is taken up for hearing on a date other than the date fixed the power of procedural review can be invoked. All these are cases where a party has been deprived of a hearing due to no fault on its part. It is quite apparent that the powers of procedural review can only be invoked where the procedure followed by the court or judicial authority is such that it has committed a procedural illegality or mistake which vitiates the proceeding itself. Review cannot be sought on the merits of the case.

22. In the present case the review was not on any ground or procedural irregularity but solely on the ground that some facts were not brought to the notice of the Board when it passed the earlier order. This is a review on the merits of the case. In our opinion, the Board had no authority to review its earlier order on these grounds. Therefore, the order dated October 5, 2004, has to be set aside in so far as it reviewed the earlier order dated July 26, 2004.

23. The next important question is that what should be the date of valuation of shares. Mr. Ankush Dass Sood, in support of his appeal has contended that financial condition of the company has worsened and therefore, the shares should be evaluated as on March 31, 2004, instead of March 31, 2002. This contention of the Jain group cannot be accepted. The Jain group despite holding majority of shares in the company filed a petition alleging mismanagement on the part of the Goyal group. This petition was filed on May 27, 2002. Thereafter, as per the terms of the memorandum of understanding the Jain group was to take over the company and to pay a sum of Rs. 4.5 crores to the Goyal group. Only Rs. 1.5 crores were paid but the Jain group under the orders of the Board took over the possession of the company. It has now been urged that the banks never recognised the control and management of the Jain group. There is no material placed on the record in this behalf. However, this was a situation which they should have visualised when they took over the control of the company.

24. In fact the Jain group took advantage of the original orders of the Board dated October 20, 2002 and took over the possession of the company. This order also stated that none of the liabilities created with effect from October 20, 2002, would bind the defendants, i.e., the Goyal group. The Jain group in fact did not pay the amount for the shares of the Goyal group. It was they who are in charge of the company. If the financial position of the company has worsened the Goyal group cannot be put at disadvantage. Mr. Ankush Sood has argued that the Goyal group were a stumbling block in running a company. No material has been placed on record to prove this fact. In fact what we find from the material placed on record is that after taking over control of the company the Jain group on one pretext or the other kept trying to delay the valuation of the shares. It did not first agree to pay the valuation as agreed in the memorandum of understanding. Thereafter, also it never offered to pay the amount due for the shares to the Goyal group. The company was admittedly taken over by the Jain group sometime in October 2002, and the Goyal group cannot be put to any disadvantage after October 20, 2002. Therefore, it is the valuation as on March 31, 2002, which is relevant.

25. When the appeal filed by the Goyal group was admitted though further proceedings before the Board were stayed, this Court had in clear terms directed that the valuation process can go on. M/s. L.C. Kailash and Associates who were the agreed valuers have submitted the report with regard to the fair valuation of the shares as on March 31, 2002. This report has been submitted by the valuers in May 2005 to the Board. A copy of this report was also sent by the valuers to this Court. As such it is clear that the valuation of the shares has also been done. The Jain group cannot on one hand taken over the assets of the company and on the other hand refuse to pay the fair valuation of the shares. There was no occasion for the Goyal group to delay the matter. The Goyal group was admittedly out of management and control of the company. The Jain group took over the management on the basis of the memorandum of understanding and the statement made on behalf of the Goyal group before the Board in the year

2002. They however, on one pretext or the other avoided to pay the value of the shares. The Goyal group had not been paid the fair value of its shares. The advantage, if any, was of the Jain group and not of the Goyal group. It was they who had the management, control and possession of the company without paying the fair value of the shares of the Goyal group.

26. In view of the above discussion, we are of the considered opinion that the proper date for valuation of the shares is March 31, 2002, as fixed by the Board. We further direct that in terms of the order of the Board the Jain group should take immediate steps to release the bank guarantees of the members of the Goyal group. The members of the Jain group are directed to substitute the personal guarantees of the Goyal group by furnishing their own personal guarantees with adequate security to the banks within one month from today. The banks are only interested in securing their loans and in case members of the Jain group provides adequate security the banks should have no objection in releasing the bank guarantees. In this behalf it is pertinent to mention that though the banks were parties to the proceedings before the Board they have never objected to the orders for release being passed by the Board on various occasions and as such they cannot be allowed to object at this stage also.

27. In view of the above discussion, Company Appeal No. 8 of 2004 is allowed and the order dated October 5, 2004, passed by the Company Law Board in so far as it modifies the order dated July 26, 2004, is set aside. Company Appeal No. 2 of 2005 is dismissed. No order as to costs.