(2009) 11 BOM CK 0052

In the Bombay High Court

Case No : Company Appeal No. 51 of 2009 in Company Application No. 102 of 2007 in Company Petition No. 55 of 2006

Ravi Kiran Agarwal and Another — APPELLANT

Vs

Moolchand Shah and Others — RESPONDENT

Date of Decision : 12-11-2009

Acts Referred:
Companies Act, 1956 — Section 10F, 397, 397(1), 398, 398(2)

Citation : (2009) 152 CompCas 637 : (2010) 97 SCL 182

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Atul Rajyadhyaksha, Pankaj Vernekar and Kirtida Chandarana, instructed by Mehernosh Humranwala, for the Appellant; Aspi Chinoy, Mohit Arora, Pinky Patel and Mahesh Shukla, instructed by Desai and Diwanji for Respondent No. 5, Janak Dwarakadas and Sharan Jagtiani, instructe by Desai and Diwanji for Respondent Nos. 6 to 16, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Admit.

2. With the consent of counsel, the appeal is taken up for hearing and final disposal. It has been stated before the court that, respondents Nos. 1 to 4 have been duly served. An affidavit of service shall be filed within a period of one week from today.

3. The appeal seeks to impugn the correctness of an order passed by the Company Law Board on December 10, 2008, by which, an application filed by the appellants for impleadment in proceedings under Sections 397 and 398 of the Companies Act, 1956, was dismissed.

4. The fifth respondent was incorporated on December 9, 1987. On April 18, 1995, a memorandum of understanding was entered into between the appellants and respondents Nos. 6 to 16, who are the shareholders of the fifth respondent.

Under the memorandum of understanding, the appellants agreed to purchase 1,200 equity shares of the fifth respondent held by respondents Nos. 6 to 16, representing 60 per cent, of the equity share capital of the company for a consideration of Rs. 48 crores. Each share was valued at Rs. 4 lakhs. Under the memorandum of understanding, the appellants paid an amount of Rs. 5.13 crores to respondents Nos. 6 to 16 towards the first installment of the purchase price. According to the appellants, the original share certificates along with the share transfer forms were handed over to them and 525 shares were transferred in the name of the appellants.

5. Respondents Nos. 1 to 4 instituted a company petition under Sections 397 and 398 of the Companies Act, 1956, to which the fifth respondent and respondents Nos. 6 to 16, have been impleaded as parties. The appellants filed an application on March 8, 2007, for being impleaded as respondents to the petition. The application for impleadment records that the appellants are majority shareholders of the company and that in pursuance of the memorandum of understanding entered into by them with respondents Nos. 6 to 16, an amount of Rs. 5.13 crores has been paid. The appellants claim to have a right, title and interest in 1,200 equity shares of the company representing 60 per cent, of the equity capital and in the property owned by the company, pursuant to and in terms of the memorandum of understanding. It was on this basis that an order of impleadment was sought.

6. The Company Law Board held by its order dated April 13, 2009 (Mool Chand Shah v. Chetan Consultants P. Ltd. [2009] 149 Comp Cas 510), that the appellants were not entitled to be impleaded u/s 405 of the Companies Act. According to the Company Law Board, the expression "any other person" u/s 405 must be read ejusdem generis with the expression "any person" in Section 402(e) of the Companies Act, 1956.

7. Counsel appearing on behalf of the appellants urged that the Company Law Board was fundamentally in error in circumscribing the power of the Board to implead "any person" u/s 405 to only those categories of persons stipulated u/s 402(e) of the Act. It was urged that the Company Law Board, misapplied the principle of ejusdem generis when, as a matter of first principle, it cannot be attracted.

8. Section 397 provides that any member of a company who complains that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member, is entitled to apply to the Board. If the Company Law Board finds substance in the allegations and comes to the conclusion that to wind up a company would unfairly prejudice the members, it is empowered to make such orders as it thinks fit with a view to bringing to an end the matters complained of. Section 398 entitles a member of a company who complains of the affairs being conducted in a manner prejudicial to public interest or to the interest of the company to apply for an order. The Company Law Board is empowered to pass such order as it thinks fit with a view

to bringing to an end or preventing the matters complained of or apprehended. Under Clause (b) of Sub-section (1) one of the grounds on which, the Board can be moved is that a material change has taken place in the management or control of the company, whether by an alteration in its board of directors, manager or in the ownership of the company''s shares, or if it has no share capital, in its membership and that by reason of such change, there should be a likelihood that the affairs of the company will be conducted in a manner prejudicial to the public interest or in a manner prejudicial to the interest of the company. These provisions elucidate the basis and foundation of a petition filed by a member of a company complaining of mismanagement or oppression as the case may be. Wide powers are conferred upon the Company Law Board to deal with the situation. The Company Law Board is entitled to make such orders as it thinks fit in order to bring to an end the matters complained of u/s 397(1) or under Sub-section (2) of Section 398, to prevent the matter complained of or apprehended.

9. Section 402 of the Act, provides as follows:

Without prejudice to the generality of the powers of the Tribunal u/s 397 or 398, any order under either section may provide for--

(a) the regulation of the conduct of the company''s affairs in future;

(b) the purchase of the shares or interest of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(d) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely:--

(i) the managing director,

(ii) any other director,...

(v) the manager,

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in Clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned ;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application u/s 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(g) any other matter for which in the opinion of the Tribunal it is just and equitable that provision should be made.

10. Section 402 is without prejudice to the generality of the powers of the Board u/s 397 or 398. Section 402 describes the nature of the reliefs that can be granted in a petition u/s 397 or 398. The illustrations which are contained in Clauses (a) to (g) of Section 402, are, but examples of the nature of the reliefs that can be granted in a petition under Sections 397 and 398. Clauses (a) to (g) of Section 402 are not exhaustive of the reliefs that can be granted by the Board but are only illustrative of the wide powers that are granted upon the Board with a view to ameliorating a situation of oppression and mismanagement.

11. Clause (d) of Section 402, inter alia, provides for, the termination or modification of an agreement between the company and one of the following persons, namely, the managing director, director or manager. Clause (e) similarly provides for the termination or modification of an agreement between the company and any person not referred to in Clause (d). The proviso to Clause (e) however, stipulates that such relief shall not be granted except after due notice to the party which will be affected.

12. Section 405 then provides as follows:

If the managing director or any other director or the manager, of a company, or any other person, who has not been impleaded as a respondent to any application u/s 397 or 398 applied to be added as a respondent thereto, the Tribunal shall, if it is satisfied that there is sufficient cause for doing so, direct that he may be added as a respondent accordingly.

13. Section 405 of the Act, deals with the power of the Company Law Board to implead additional respondents to an application u/s 397 or 398. u/s 405, if the managing director or any director or a manager of a company or any other person, has not been impleaded and such person applies to be added as a respondent, the Company Law Board is empowered to pass an order adding him as a respondent, if sufficient cause for doing so is established to the satisfaction of the Board. The Company Law Board in the present case inferred that the power to add or implead a party as a respondent to an application u/s 397 or 398 is to add only those parties who are referred to in Clauses (d) and (e) of Section 402. The Board applied the interpretative tool of ejusdem generis. The principle of ejusdem generis would have no application, where the court is required to construe, two separate statutory provisions which operate in different fields. Section 402 illustrates the powers which can be exercised by the Company Law Board on an application under Sections 397 and 398. Section 402 is not an exhaustive catalogue of the powers of the Board. Section 405 deals with the addition of parties. There is no reason or justification for confining the words "any other person" u/s 405 to those categories of persons who are elucidated in Clause (e) of Section 402. As a matter of first principle, it would be impermissible to do so. On an application under Sections 397 and 398 the Board has, as

already noted earlier, wide powers to pass orders as it thinks fit to bring to an end the matters complained of and, u/s 398(2), to even prevent the matters complained of or apprehended. The exercise of those wide powers, may in a given situation affect the interest of third parties. To hold that a third party liable to be affected by an order under Sections 397 and 398, would not be entitled to be heard on the ground that, it does not fall within the description of "a person" in Clause (e) of Section 402 who has an agreement with the company would be fundamentally violative of the basic postulate of natural justice. Nothing, except a clear statutory provision to that effect should lead the court to adopt such a construction. If Parliament intended to contemplate the addition of only those persons who had agreements with the company, there was nothing to prevent the addition of those words. The words "any other person" in Section 405 are not restricted by a stipulation that such person must have an agreement with the company. Hence, the words "any other person" must be given their plain and natural meaning so as to include any person whose interest would be affected by an order that is sought in the application under Sections 397 and 398. The Board misapplied the principle of ejusdem generis. The principle of ejusdem generis is that when particular words pertaining to a class category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. The rule applies when (i) The statute contends an enumeration of specific words; (ii) The subject of enumeration constitutes a class or category; (iii) The class or category is not exhausted by the enumeration; (iv) General terms follow upon the enumeration; and (v) there is no indication of a different legislative intent (G.P. Singh on the Principles of Statutory Interpretation, 9th edition, page 420). This principle can have no application in construing word "any other person" in Section 405 which operates in a field untrammelled by Section 402.

14. The Company Law Board has in the present case diluted its rending that the expression "any other person" u/s 405 must be construed with reference to Section 402(e) by holding that occasions may arise to implead other persons on the facts of each case. The Board noted that the shareholders who are not parties may apply on the apprehension that, any relief granted would affect their interest or the employees or creditors may also apply on the same ground. The Board held that notwithstanding the "strict" provisions of Section 405, it may have to use it discretion in deciding on the basis of the facts of each case, where the application for impleadment has shown sufficient cause to be impleaded as a respondent. The residual discretion which the Board assumes to it, would itself indicate that the provisions of Section 405 cannot be construed in the manner in which they were construed in the earlier part of the judgment. The interpretation that has been placed by the Board on the provisions of Section 405 is erroneous and has to be disapproved. The power of the Board u/s 405 to implead any other person, is a wide power which is conditioned, only by the satisfaction of the Board, that there is sufficient cause for doing so. Where the relief that is sought in the application u/s 397 or 398 is liable to affect the interest of a third party, an

order of impleadment would be warranted. The impleadment of the party may be considered necessary, or in the facts of a case, proper in order to enable the Board to render a full, final and complete adjudication of the dispute. By its very nature, the power cannot be restricted to predefined categories and must be exercised in order to advance the underlying purpose and object of the provisions of Sections 397 and 398.

15. After laying down the interpretation of Section 405, the Board has proceeded to deal with the application for impleadment on facts. In the present case, it has been stated before the court that an arbitration proceeding has been initiated by the appellants for specific performance of the memorandum of understanding dated April 18, 1995. The arbitral proceeding is pending. The Board was of the view that the entitlement of the appellants to the shares covered by the memorandum of understanding is yet to be established and consequently, the appellants cannot seek any benefits arising out of the shares, until that entitlement is adjudicated upon. The Board was of the view that no dispute has been raised in the petition relating to any shareholding.

16. On behalf of the appellants, it has been submitted that the view which has found favour with the Board overlooks the reliefs that have been sought in the petition under Sections 397 and 398. The grievance of the original petitioners in the petition under Sections 397 and 398 is that the company has failed to file its balance-sheet and returns'' after April, 1990 and the petitioners have not received any notice for a board meeting or of the annual general meeting. Among the reliefs that have been sought in the petition, apart from a direction for holding a meeting of the board of directors, finalisation of the accounts and the holding of the annual general meeting, is a restraint on the alienation of the immovable properties of the company. Prayer (e) of the petition reads as follows:

(e) The respondent be directed to maintain the status quo qua the shareholding pattern of the respondent-company as it stood on April 1, 1990, as also the composition of the Board as it stood on April 1, 1990.

17. According to the appellants the relief that has been sought in prayer (e) for the maintenance of the status quo qua the shareholding pattern of the company, as it stood on April 1, 1990 and the composition of the Board as on that date would directly impinge upon the rights which the appellants claim for specific performance of the memorandum of understanding dated April 18, 2005. According to the appellants, respondents Nos. 6 to 16 hold 1,220 shares, whereas respondents Nos. 1 to 4 hold 650 shares. Out of the 1,220 shares held by respondents Nos. 6 to 16, the memorandum of understanding requires the transfer of 1,200 shares to the appellants. In pursuance of the memorandum of understanding, the appellants claim to have paid an amount of Rs. 5.13 crores. According to the appellants, the grant of reliefs in terms of prayer (e) of the petition for the maintenance of the status quo qua the shareholding pattern would effect the entitlement of the appellants to seek specific performance of the memorandum of understanding, inasmuch as, the performance of the

memorandum of understanding is liable to affect the shareholding pattern. On the other hand, it was submitted on behalf of respondents Nos. 6 to 16 that the memorandum of understanding shall not alter the shareholding pattern per se. The Company Law Board noted in paragraph 13 of its judgment, the submission that some of the prayers in the petition, if granted, would affect the interest of the appellants. The Board however, has not specifically considered prayer (e).

18. The appeal before this Court arises u/s 10F of the Companies Act, 1956, and is confined to a question of law. For the reasons already indicated, this Court has come to the conclusion that the interpretation that has been by the Board on the provisions of Section 405 is erroneous. Having decided the question of law relating to the interpretation of the Section 405, it would be, but appropriate for this Court to remit the proceedings back to the Company Law Board for a decision afresh, on the application for impleadment. The Board is a primary fact finding authority and should be left to determine the question of impleadment in the light of the interpretation that has been placed by this Court on the provisions of Section 405. Before concluding, it would be necessary to observe that in adverting to the rival submissions, which have been urged on behalf of the parties in regard to the effect of the memorandum of understanding, this Court has had no occasion to render any finding of fact on the effect of the memorandum of understanding or on the entitlement of the appellants thereunder. In order to facilitate a fresh determination, the impugned order of the Company Law Board dated April 13, 2009 (Mod Chand Shah v. Chetan Consultants P. Ltd. [2009] 149 Comp Cas 510) is set aside.

19. The proceedings are remitted back to the Company Law Board, which shall pass an order upon remand after hearing the parties. All the rights and contentions of the parties are kept open.

20. The appeal is allowed in these terms. There shall be no order as to costs.

