

(2005) 03 CAL CK 0072

In the Calcutta High Court

Case No : A.P.O. No. 687 of 2003, A.C.O. No. 104 of 2003 with C.P. No. 56 of 1998

Rekha Mitra and Others

APPELLANT

Vs

Shyamal Kumar Mitra

RESPONDENT

Date of Decision : 10-03-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10
Companies Act, 1956 — Section 10, 100, 101, 102, 103
Securities Contracts (Regulation) Act, 1956 — Section 16, 16(1), 6
Stamp Act, 1899 — Section 12, 2(12)

Citation : (2005) 3 CALLT 353 : (2005) 1 ILR (Cal) 263

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Indira Banerjee, J.—This appeal u/s 10(f) of Companies Act, 1956 is against an order dated 25th August, 2002 passed by the learned Company Law Board in Company Petition No.56 of 1998 filed by the respondent against tile Appellants under sections 397 398 403 and 409 of the Companies Act, 1956.

2. In the said company petition, the Respondent complained of various alleged acts of mismanagement and oppression on the part of the appellants including transfer of property of the Appellant No. 7 (hereinafter referred to as the company) at Gharsuguda, in the name of the Appellant Nos. 3 and 4, failure to submit balance sheets of the company with the Registrar of Companies, failure to deposit Employees State Insurance and Provident Fund contributions of the workers, siphoning of assets of the company, fraudulent transfer of the immovable properties of the company to one D.N. Mehta in flagrant disregard of the terms of settlement submitted in this Court in Suit No. 261 of 1974 and Company Petition No. 263 of 1973 and also entering negotiations for transfer of shares to the said D.N. Mehta in contravention of the said Terms of Settlement.

3. The appellants appear to have filed an Affidavit-in-Opposition denying the allegations of mismanagement and oppression. The appellants contended that the company petition filed by the Respondent was liable to be dismissed since the respondent had also filed a suit before the learned City Civil Court at Calcutta being TS No. 2278 of 1996 against the same parties involving matters which are directly and substantially in issue in the company petition.

4. The appellants further contended that no order was passed on the application of the petitioner for "interim injunction filed in the said suit and an appeal in this Court against refusal of interim injunction had been dismissed. The company petition was for the same reliefs.

5. According to the appellants the Gharsuguda property transferred to the Appellant Nos. 3 and 4 never belonged to the company. Negotiations for transfer of shares in contravention of the Terms of Settlement filed in this Court, is virtually admitted. It is, however, alleged that the respondent consented to the same.

6. The appellants alleged that the respondent resigned from the Company and removed various important books, papers and documents of the company with the ill motive of putting the company into trouble. Delay in filing of accounts was alleged to be by reason of wrongful acts of the respondent in removing books, papers and documents.

7. In course of hearing of the said Company Petition, the learned Company Law Board suggested that the parties settle their disputes. On 13th March, 2001 the learned Company Law Board passed the following Order:

"Pursuant to last order 14.1.2000 the counsel for Respondent has made a statement that his client desires to dispose of his client's shares @Rs. 510.00. The petitioner agreed to purchase the share at the same rate. However, counsel for petitioner has submitted that there are some arrears of payment due for payment since 11.8.1999 which the Respondent should pay as they were in Management, counsel for petitioner prays for filing an affidavit quantifying the heads of the amount by 22.3.2000 and the Respondent is directed to file reply thereto by 29.3.2000. Counsel for petitioner prays for maintaining status quo with regard to assets of the factory as on 11.8.99 to which the counsel for Respondent has got no objection ordered accordingly Fresh notice to be issued."

8. As rightly pointed out on behalf of the appellants, the learned Company Law Board had, by its order dated 21st July, 2001 recorded that compromise efforts had failed, and directed that the petition be heard on merits.

9. Subsequently, however, a consent order was passed on 14th September, 2001, which is extracted herein below:

"It has been agreed by the counsel for the parties that the petitioner will purchase the shares of the respondents for a consideration of Rs. 510/- per share, subject to the following:

i) All the liabilities as on 11-08-1999 shall be taken over by the petitioner and any addition to the liabilities after that date shall be the responsibility of the respondents, and shall be reduced from the consideration. If the present liabilities is less than as on 11-08-1999, the difference will be added to the consideration.

ii) All the fixed assets of the company as on 31-03-1998 are in tact. In case any fixed asset has been sold after that date, corresponding reduction will be made from the consideration.

iii) The balance sheet of the company indicates advance against sale of land and advance against leasehold land from 31-03-1995 onwards. It has to be checked with reference to documents, if any, as to when the agreement of sale or lease was entered into, when the advance was received, whether the same is reflected in the books of accounts of the company and how the same was utilized for the purpose of the company".

10. Counsel for the parties have agreed that M/s. Maskara & Associates, Chartered Accountants, be engaged to examine the above three points. The remuneration of the Chartered Accounts will be negotiated by the Chartered Accountants with the petitioner and the same will be paid by the petitioner.

11. Both the parties are at liberty to represent before the Chartered Accountants with prior initiation and they will exchange information/ particulars furnished to the Chartered Accountants.

"Report of the Chartered Accountants should be submitted by 31-10-2001 with copies to the parties."

12. The relevant portion of the impugned order dated 25th August, 2002 is extracted herein below for convenience:

"I agree with the submissions of Shri Mukherjee, counsel for the petitioner. The order dated 14/09/2001 was a consent order and as such it is binding on both the parties. The verification, as envisaged in the order dated 14/09/2001 is taking time. Since, during the intervening period the respondents have been managing the affairs of the company, any delay in this matter would create further complications especially in view of the fact that the price of Rs. 510/- was agreed on the basis of the situation prevailing at that time. Since the petitioner is willing to deposit the amount, it is but natural that the management of the affairs of the company should be handed over them. Accordingly, I direct the petitioner to deposit the consideration in the form of a Demand Draft with Shri Amitava Ghosh, Advocate, who is appointed as escrow agent. On the date of deposit of the draft, the management of the company will vest in the petitioner and the respondents should handover all assets etc. of the company intact to the petitioner. The petitioner should get the verification done as envisaged in the order dated 14.9.2001, within a month of taking over the management and submit report for consideration of this Bench and for issuing directions for

payment of the consideration to the respondents by the escrow agent."

13. Mr. Ghosh appearing on behalf of the appellants submitted that the respondent being the applicant in the Company Petition before the Company Law Board has in the meanwhile, transferred his shares and has, therefore, no locus standi to contest this appeal.

14. It is alleged that the Company has received an application for transfer of the shares held by the respondent in favour of one Piyarelal & Sons of Gauhati.

15. The signature of the respondent on the transfer documents is disputed. A prima facie perusal of the transfer documents reveals that the signature of the respondent does not tally with the signature of the respondent in other admitted documents.

16. In any event, Section 108 of the Companies Act, 1956 clearly prohibits registration of transfer of shares of a company unless a proper instrument of transfer, duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee is delivered to the company along with the share certificates.

17. In view of Section 2(12) read with Section 12 of the Stamp Act, 1899 the stamps affixed to the transfer deed are required to be cancelled at the time of execution. In the instant case, the stamps affixed to the transfer deed have admittedly not been cancelled.

18. In the case of Nuddea Tea Co. Ltd. v. Asok Kumar Saha reported in 64 Comp Cas 775 cited by Mr. Mukherjee, a Division Bench of this Court held as follows:

"Reading the two sections, namely, Section 108 of the Companies Act, 1956, and Section 12 of the Indian Stamp Act, 1899, it comes to this that the instrument should bear the requisite stamps and that the adhesive stamps should be cancelled at the time of affixation of such stamps and execution of the document. If such requirements are not complied with, then the instrument, although bearing an adhesive stamp but not cancelled in the manner as contemplated in the Indian Stamp Act, 1899, cannot be said to be an instrument "duly stamped".

Section 108 of the Companies Act, 1956, provides that the Company shall not register unless it proper instrument of transfer duly stamped and executed by an on behalf of the transferee has been delivered to the company....

It is provided by Section 12 of the Indian Stamp Act that an adhesive stamp must be cancelled at the time of affixation of the stamp and also at the time of execution of the instrument. Therefore, such cancellation, in our view, cannot be made subsequent to the execution of the instrument. If such stamp was not cancelled before the execution of the document, then such instrument and/or document would be deemed to be an unstamped document and such cancellation made at a later stage will not be taken as proper cancellation within the meaning of Section 12 of the Indian Stamp Act, 1899."

19. The Supreme Court in its Judgment in the case of Mannalal v. Kedarnath reported in AIR 1976 SC 1536 cited by Mr. Mukherjee, held that the provisions of Section 108 of the Companies Act, 1956 were mandatory and not just directory. A transfer of shares by a transfer deed not duly stamped and executed is, therefore a void transfer and of no effect.

20. Mr. Ghosh does not dispute the proposition that unless there is a transfer deed duly stamped and executed, the transfer of shares cannot be registered by the Company.

21. Mr. Ghosh, however, submitted that the fact that the stamps affixed to the transfer deed have not been cancelled does not mean that the respondent did not transfer his share holding. According to Mr. Ghosh the company may not be obliged to register a transfer if the transfer deed is not properly stamped and executed, but a fresh transfer deed duly stamped and executed can always be lodged.

22. The locus standi of the share holder to prosecute proceedings does not depend on future eventualities. The Supreme Court has in the case of Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others, held that the validity of a petition must be judged on the facts as they were at the time of presentation and a petition which was valid when it was presented cannot cease to be maintainable by reason of events subsequent to its presentation, in the absence of a provision to that effect in the statute.

23. Relying upon the aforesaid decision of the Supreme Court, a learned single Judge of this Court has taken a similar view in the case of Sayedabad Tea Company and Ors. v. Samarendra Nath Ghattak and Ors. reported in 83 Comp Cas 504.

24. It is immaterial that the aforesaid Judgments were rendered in a slightly different factual context. The Judgments clearly lay down the proposition of law that the validity of a petition must be judged on the facts at the time of presentation.

25. The shares in question are admittedly registered in the name of the petitioner till today. It is also not in dispute that transfer of shares cannot be registered on the basis of the transfer deed produced in Court, which is not duly stamped in as much as the stamps affixed thereto have not been cancelled.

26. It is difficult to accept the contention of the appellant that the respondent would not be entitled to prosecute proceedings initiated by him under inter alia Section 397 of the Companies Act notwithstanding the fact that he continues to remain registered as the owner of the shares in question in the Register of Members of the company.

27. This Court is, therefore, not inclined to hold that the respondent has no locus standi to prosecute the proceedings under sections 397 and 398 of the Companies Act, 1956.

28. Mr. Ghosh next argued that by way of an application before the Company Law Board the respondent has sought the same reliefs as in the suit being Title Suit No. 2278 of 1996 in the learned City Civil Court at Calcutta. However, as pointed out by Mr. Mukherjee the prayers in the suit are not identical to the reliefs sought in the company proceedings Mr. D.N Mehta, one of the appellants herein was not a party to the suit filed in the learned City Civil Court at Calcutta. Moreover, prayers (a) to (e) and (m) to (q) of the application under sections 397 and 398 of the Companies Act had not been made in the suit.

29. Mr. Mukherjee pointed out that in the proceedings before the learned Company Board the transfer of shares has not only been challenged on the ground of violation of the terms of settlement in Suit No. 261 of 1974 and Company Petition No. 2G9 of 1973 but also as being oppressive. There were allegations of mismanagement and disposal of assets and also allegations of non-compliance with provisions of the Companies Act, 1956 in calling Annual General Meetings and the like.

30. Mr. Mukherjee relying on a Division Bench Judgment of this Court in the case of Piyush Kanti Guha Vs. West Bengal Pharmaceutical and Phytochemical Development Corporation Ltd. and Others, , submitted and rightly so that principles of Section 10 of the Code of Civil Proceedings would not apply to proceedings under sections 397 and 398 of the Companies Act, 1956.

31. As held by an Hon''ble Division Bench of this Court in the case of Calcutta Cosmopolitan Club Ltd. Vs. Bhanwarlal Bhandari and Others, , the City Civil Court has no jurisdiction in respect of matters forming the subject matter of proceedings under sections 397 and 398 of the Companies Act, 1956.

32. On merits Mr. Ghosh appearing on behalf of the appellant strenuously argued that implementation of the order of the learned Company Law Board would result in violation of section 16 of the Securities Contract Regulation Act, 1956 hereinafter referred to as the SCRA.

Section 16 of the SCRA is set out below for convenience.

"Power of prohibit contracts in certain cases.--(1) If the Central Government is of opinion that it is necessary to prevent undesirable speculation in specified securities in any State or area, it may, by notification in the Official Gazette, declare that no person in the State or area specified in the notification, shall, save with tile permission of the Central Government, enter into any contract for the sale or purchase of any security specified in the notification except to the extent and in the manger, if any, specified therein, (2) all contracts in contravention of the provision of Sub-section (1) entered into after the date of the notification issued thereunder shall be illegal."

33. A perusal of the said section reveals that the same is applicable to marketable securities Reference may be made to the Judgment of tile Bombay High Court in the case of Norman J. Hamilton v. Umedbahv S. Patel and Ors.

reported in 49 Company Cases I, cited by Mr. Mukherjee, where Sujata Manohar, J. held that the word security in Section 16 of the SCRA would have to be construed as marketable security.

34. The aforesaid decision of the Bombay High Court has been referred to and approved by this Court in the case of B.K. Holdings (Private) Ltd. v. Prem Chand Jute Mills and Anr. reported in 1980 (2) CHN 205.

35. Mr. Ghosh argued that in the case of Prem Chand Jute Mills (supra) this Court held the decision of the Sujata Manohar, J. in Hamilton's case (supra) had no application to the shares of a public limited company, as in the instant case.

36. The securities in the instant case are not marketable in view of the terms of the settlement in the suit and company petition referred to above which have fructified into an order of Court.

37. The terms of settlement referred to above on the basis of which the consent decree had been passed restricts the right of the share holders to transfer the shares held by them.

38. Mr. Mukherjee argued that there was no challenge to the terms of settlement on the part of the appellants. Mr. Ghosh on the other hand argued that the respondent had himself been a party to violation of the Terms of Settlement on the basis of which consent decree had been passed.

39. This Court is not inclined to enter into the dispute as to whether the slip of paper claimed to have been signed by the respondent had actually been signed by the respondent or not or whether anything was written by the respondent in his own handwriting in the said slip. The fact, however, remains that the terms of settlement on the basis of which the suit was decreed cannot be varied by the parties by mutual agreement without reference to the Court. Any such variation is of no effect.

40. Mr. Ghosh argued that the company was no longer a family concern. The company being a public limited company its shares were marketable Mr. Mukherjee argued that the company continued to be a family concern. The majority of the outsiders were associates of the outsiders were associates of the Mitras and there was preponderance of voting powers with the Mitra family. In this context, reliance was placed on the Judgment in the case of Lock v. J. Blackwood Ltd. reported in 1924 All ER 200 where the Privy Council held that inclusion of some outsiders would not change the nature of the company as a family company.

41. Be that as it may, as already observed above the marketability of all the shares have been restricted by a consent decree. The terms of the consent decree cannot be varied without reference to the Court. The shares of the company cannot be said to be marketable and hence would not attract Section 16 of the SCRA.

42. In any event a transfer in compliance of orders under sections 397 and 398 of the Companies Act, 1956 would not be hit by compliance of section 16 of the SCRA.

43. In the case of *Bennet Coleman v. Union of India* reported in 47 Company Cases 92, a Division Bench of Bombay High Court held as follows:

"In our view, the submissions made by Mr. Sen on the point of legality or otherwise of the impugned orders will have to be appreciated in the context of the principal question as to what are the powers of the Court when it is acting in proceedings instituted under sections 397 and 398 read with section 402 of the Companies Act. The questions whether a board of directors of the type indicated in the impugned order could be reconstituted by the Court or not and whether the Court had power to frame an article inconsistent with the provisions of Section 255 of the Act or not must in the ultimate analysis depend upon the true ambit of the powers of the Court u/s 397 and 398 read with section 402, for, if these sections, confer upon the Court jurisdiction and powers of the widest amplitude to pass appropriate orders which the circumstances of the case may require, it would be difficult to accept Mr. Sen's submissions that the impugned orders and directions are liable to be set aside on the basis that the reconstituted board of modified article 95 was not in consonance with Section 255 of the Act."

44. In the case of *Cosmosteels P. Ltd v. Jairam Das Gupta* reported in 48 Company Cases 312 the Supreme Court held as follows:

"The scheme of Section 397 and 402 appears to constitute a code by itself for granting relief to oppressed minority shareholders and for granting appropriate relief, a power of widest amplitude, inter alia, lifting the ban on a company purchasing its shares under Court's direction, is conferred on the Court....

Therefore, it is not conceivable that when a direction for purchase of shares is given by the Court u/s 402 and consequent reduction in share capital is to be effected, the procedure prescribed for reduction of share capital in Sections 100 to 104 should be required to be followed in order to make the direction effective."

In the case of *Debi Jhora Tea Co. Ltd. v. Barendra Krishna Bhowmick and Ors.*, reported in 50 Company Cases 771 a Division Bench of this Court held as follows:

"Under Sections 397 and 398 read with section 402 power has been conferred upon the Court to make such orders" as it thinks fit. The power conferred upon the Court by the above-mentioned sections is very wide and object or objects sought to be achieved by the exercise of such power have been stated in Sections 397 and 398. As we read Sub-clauses (a) and (g) of Section 402 of the Act we have no doubt in our mind that the intention of the Legislature under the above-mentioned sections was to confer wide and ample powers upon the Court for the regulations of the conducting of a company's affairs and to provide for any other matter which the Court thinks just and equitable to provide for in the interest of the corporate body and the general public. Reference in this

connection may be made to the case of *Bennet Coleman and Company v. Union of India* (1977) 47 Comp Cas 92 (Bom).

By reason of what has been stated hereinabove, it appears to us that the Court had power to make the order in regard to convening and holding of the meeting, filing of proxies or nominations or any other matter for the purpose of conducting the affairs of a company which might be contrary to the provisions of the articles of the company or the Companies Act, by virtue of the provisions of sections 397 and 398 read with Section 402 of the said Act."

45. The jurisdiction of the Company Law Board under sections 397 and 398 of the Companies Act is wide. The Company Law Board can pass such orders as might deem fit and proper for the ends of justice. In the instant case, as recorded in the impugned order of the learned Company Law Board in course of hearing of the application, the Bench had suggested that the disputes be resolved amicably. The respondent made an offer to sell his shares to the appellants or to purchase the shares held by the appellants at Rs. 510/-per share. Counsel for respondents i.e. the appellants herein sought time to consult clients in the hearing held on 13th March, 2000. Counsel for the respondents made a statement to the effect that the respondents were willing to sell their shares to the petitioner i.e. the respondent herein at Rs. 510/- per share and also accepted the offer subject to verification for certain issues.

46. Mr. Mukherjee rightly argued that no substantial question of law was involved in the instant case. The impugned order is based on consent of the parties as recorded in the order dated 14th September, 2001. The order dated 14th September, 2001 having been accepted no appeal can lie from the impugned order. As held by the Supreme Court in the case of *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another*, the consent as recorded by a Judge in the Judgment/order is conclusive and cannot be assailed in appeal.

47. As observed above, the Company Law Board has power under sections 397 and 398 of the Companies Act to pass such order as might render complete justice. The order has been passed as a sequel to an earlier consent order. It is true that the consent order dated September 14, 2001 envisaged verification of issues, for which M/s. Maskara & Associates Chartered Accountants had been appointed. The assets and liabilities of the company on the dates stipulated were to be determined.

48. The Company Law Board found that the report of M/s. Maskara & Associates was not conclusive for want of particulars from the company. The delay in the verification was likely to further complicate matters. There were allegations against the appellants of diverting the business of the company to the detriment of the respondent.

49. In the aforesaid circumstances, it was open to the Company Law Board, in exercise of its wide power under sections 397 and 398 of the Companies Act, 1956, to waive the requirement for earlier verification of the assets and liabilities

of the company as on the stipulated dates and direct immediate. handing over of the shares to the respondent upon deposit of Rs. 510/- per share with the Escrow Agent.

50. The order under appeal does not call for interference with the impugned order.

51. The contention of the appellant that payment was not in terms of the order impugned, is a subsequent event and does not affect the validity of the order. If the consideration as directed has not been paid and/or the order impugned has not been complied with by the respondent, the remedy lies by way of initiation of appropriate proceedings. The impugned order cannot be set aside on that ground.

52. For the reasons discussed above, the appeal fails and the same is dismissed without any order as to costs.

Mr. Ghosh prays for stay of operation of this order for a period of six weeks. Stay is, however, granted for a period of three weeks from date.

All parties are to act on a signed copy of the minutes of the operative portion of this judgment and order on the usual undertakings.