

(2013) 07 DEL CK 0558

In the Delhi High Court

Case No : CO. Application (SB) 12 of 2013 and CO. Application 432 of 2013

Rockman Project Ltd. and Others

APPELLANT

Vs

Devinder Kumar Jain and Another

RESPONDENT

Date of Decision : 22-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Companies Act, 1956 — Section 10F, 397, 398, 399(1)(a)

Citation : (2013) 116 CLA 351 : (2013) 180 CompCas 45 : (2013) 204 DLT 234

Hon'ble Judges : R.V. Easwar, J

Bench : Single Bench

Advocate : Sudhir Nandrajog, Mr. Inderjeet Singh and Mr. Kamal Ahuja, for the Appellant; Sakal Bhushan, for the Respondent

Final Decision : Dismissed

Judgement

R.V. Easwar, J.—The appeal is directed against the order dated 15-2-2013 passed by the Company Law Board ("CLB") in the CA No. 89/2012 filed by the appellant herein, rejecting its plea for amendment of the written statement. The application is for stay of the order impugned. Shorn of unnecessary details and company law jargon, the facts are these. C.S. Agarwal and his associates/family members on the one hand and D.K. Jain and his wife Nirmal Jain on the other, joined together and formed a company by name Rockman Projects Limited ("RPL" or "the company"). It was a closely-held company, the shares being held only by these two groups. The company was to do business in an SEZ. Soon disputes arose between the two groups. D.K. Jain filed a petition (CP No. 2/(ND)/2011) before the CLB under sections 397 and 398 of the Companies Act, 1956 ("the Act") alleging oppression and mismanagement against C.S. Agarwal and his associates. The petition was admitted and some interim orders were passed. RPL objected to the maintainability of the petition on the ground that D.K. Jain did not hold the requisite number of shares for filing the petition. It was the case of RPL that D.K. Jain had transferred 23800 shares out of 23900 shares which he held in RPL in favour of C.S. Agarwal on 28-3-2008 and had signed the

transfer deed. This was of course denied by D.K. Jain who alleged that his signature in the transfer deed was forged and that he in fact did not execute it and did not transfer the shares. In fact, he stated in his petition that the shares were never physically delivered to him since RPL was a closely-held company.

2. The CLB appointed its Bench Officer to examine the records of RPL. It was stated by RPL in defence that the Bench Officer was shown the transfer deed in original and he had also affixed his signature on the reverse of the transfer deed in proof of its authenticity. The CLB was asked to look into the report given by the Bench Officer. The CLB could not find any report, or any record of such authentication. It therefore called upon RPL to produce the original share transfer deed. It placed the burden of proving the share transfer to C.S. Aggarwal on RPL by a detailed order passed on 9-1-2013. The matter was listed for final hearing on 15.02.2013.

3. At that stage, RPL came up with an application in CA No. 89/2013 before the CLB, seeking permission to amend its written statement. It claimed that now that the burden is placed on it by the CLB, it had every right to rely upon facts and circumstances leading to the transfer of shares by D.K. Jain in favour of C.S. Aggarwal and thus lead secondary evidence. The written statement was sought to be amended by including those facts and circumstances as secondary evidence.

4. The CLB, by order dated 15-2-2013 rejected the application. The reasons given in paragraph 8 are as under: -

8. After considering the arguments advanced on either side and perusing the case law I am of the considered opinion that Application CA 89/2013 deserves outright rejection with costs for the following reasons: -

a) That the factual averments sought to be amended are wholly irrelevant for deciding the core issue relating to the transfer of 23,800 equity shares held by P-1 to R-2 and thus were unnecessary for deciding the real controversy in the petition.

b) The Application CA No. 89/2013 was neither filed by the Respondents No. 2 to 6 nor supported by any affidavits on their behalf.

c) The burden of proving the transfer of 23,800 equity shares by P-1 to R-2 could not be discharged by leading circumstantial evidence of the nature sought to be introduced by the amendment but could only be discharged by proving that the Petitioner No. 1 did execute a Transfer Deed on 28.03.2008 in favour of Respondent No. 2 for adequate consideration.

d) Annexure R-3, i.e. the Agreement to Sell dated 05.02.2007 is between private individuals and does not show that R-1 company was a confirming party to the said Agreement.

e) The facts sought to be amended by CA No. 89/2013 were in the knowledge of all the Respondents much prior to the filing of the petition and ought not to be

allowed to be incorporated at such a late stage in the counter filed by the Respondents.

f) The crux of the amendment sought to be incorporated already finds place in reply para 1.4 of the response and therefore elaboration thereof is wholly unnecessary.

g) The amendment is solely introduced as a time gaining device on the date of final hearing and therefore ought not to be permitted.

h) The facts sought to be amended by CA 89/2013 are completely beyond the scope of a Company Petition u/s. 397 & 398 of the Companies Act.

i) The conduct of P-1 as an individual and representative of the land owning companies is completely irrelevant and wholly unnecessary for deciding the core controversy arising in the petition.

j) No affidavit in support of the Application CA 89/2013 has been filed by R-2 to R-6, and lastly

k) The Application is nothing but another attempt to delay the final hearing.

It is against this order that RPL is in appeal before this court.

5. The contention put forward on behalf of the appellant is that since RPL is to discharge the burden of proving the transfer of shares in favour of C.S. Agarwal, and given the fact that RPL could not produce the original share transfer deed, the only other way the transfer could be proved was by reference to the chronology of events leading up to the formation of the company, the mutual discussions and arrangements between the parties, the genesis of the disputes between them and the surrounding facts and circumstances and in order to enable it to do so, the written statement ought to have been permitted to be amended under Regulation 46 of the CLB Rules. It was pointed out that the original share transfer form was produced before the Bench Officer appointed by the CLB who had even signed on the reverse of the original transfer deed form in proof of having seen it. It is contended that Regulation 46 is wider than Order VI, Rule 17 of the CPC ("CPC") and the amendment sought to be made was well within the scope of the former and ought to have been allowed. It is further argued that only the facts that are already stated by D.K. Jain in his petition before the CLB are sought to be elaborated by the amendment, and thereby no prejudice would be caused to him.

6. On behalf of the respondent, it is contended that the application filed before the CLB was only to delay the proceedings which was seen through by the CLB; that the appellant had taken advantage of the position that the share certificates were never physically handed over to the respondent; that the amendment was neither supported by affidavits from C.S. Agarwal and his family members/associates who were respondents before the CLB nor was the application for amendment moved within reasonable time; and that in these circumstances, the

CLB was right in rejecting the application. It was submitted that Regulation 46 was restrictive and after the insertion of the proviso, even Order VI Rule 17 of the CPC became restrictive by introducing the concept of due diligence.

7. I am convinced that there is no merit in the appeal. The objection of the appellant herein to the maintainability of the company petition filed by the respondent before the CLB was solely on the footing that the respondent did not have the requisite percentage of shareholding u/s 399(1)(a) of the Act. In that case, it was for him to adduce evidence in support of its objection. The primary evidence would naturally be the fact that the shares were transferred by D.K. Jain in favour of C.S. Agarwal. This plea was raised in the objection, but RPL could not substantiate it. It was merely its claim that the Bench Officer appointed by the CLB had been shown the original share transfer form and that the said officer had also subscribed his signature on the reverse of the transfer deed form to authenticate it. There was no report submitted by the said officer to the CLB which noted this fact in its order dated 09-01-2013 and also noted that he had retired on 31-12-2010. Faced with this situation, it was for RPL to have produced the original transfer deed form before the CLB; that should not have been difficult at all, if it really had it in its possession. But when called upon to do so, it failed to produce it on the ground that it was lost or misplaced. The CLB had directed the production of the original transfer deed form on 22.11.2011, but an affidavit was filed by Mrs. Anjali Bharadwaj, one of the respondents before the CLB, only on 21.11.2012, i.e., one year later, that the original transfer form was lost/misplaced. I should have thought that some more care would have been taken to keep the original transfer form safe, considering the fact that the transfer of the shares by D.K. Jain to C.S. Agarwal was the bedrock of the objection to the maintainability of the company petition filed before the CLB u/s 397-398 of the Act. RPL also did not deny the claim of the petitioner before the CLB that the share certificates were never physically delivered to him by RPL and this has been specifically noted and put against RPL by the CLB in its order dated 09.01.2013, and rightly so. The letter dated 02.04.2008 said to have been written by C.S. Agarwal to the company, to which my attention was drawn on behalf of the appellant herein, requesting the company to split the shares of D.K. Jain into two parts - one for 23800 shares to be transferred in the name of C.S. Agarwal, and the other for 100 shares to be given to D.K. Jain - does not carry the matter further as it is self-serving, without any evidentiary value.

8. In the application seeking amendment of the written statement, the appellant herein has referred to facts which are not necessary for the purpose of determining the real question. The CLB has stated in paragraph 5 of the impugned order that the core issue to be decided in the application was whether there was a transfer of the 23800 equity shares out of 23900 equity shares held by D.K. Jain in favour of C.S. Aggarwal on 28.03.2008. The burden to show the transfer was squarely on RPL as per the order of the CLB passed on 09.01.2013 and it has not been shown that this order was set aside or modified. In these circumstances the CLB held that the factual averments sought to be amended

were irrelevant for deciding the core issue. It has also been held that the burden of proving the transfer cannot be discharged by leading circumstantial evidence of the nature sought to be introduced by the amendment but could only be discharged by adducing direct evidence to prove that D.K. Jain did execute a transfer deed on 28.03.2008 in favour of C.S. Aggarwal for adequate consideration. The reference to an agreement to sell dated 05.02.2007 in the amendment petition has been rightly held to be irrelevant as it was between certain land-owning companies and private individuals and RPL was not a party to the said agreement. The said agreement was between several companies on the one hand and Anjali Bhardwaj and C.S. Agarwal, on the other. The amendment petition also sought to refer to facts which were noticed by the CLB to be in the knowledge of all the respondents much prior to the filing of the petition and therefore cannot be allowed to be incorporated at such a late stage in the counter filed by them to the main petition. The CLB has also characterised the move as a time-gaining device. I am inclined to agree.

9. Regulation 46 of the CLB Regulations, 1991 refers to the general power of the CLB to "amend any defect or error" in any proceeding before it and all necessary amendments shall be made only for the purpose of determining the real question or issue raised by or depending on such proceeding. The amendments sought to be made by RPL to its written statement do not fall in the category of any defect or error. It needs repetition that it was RPL, the appellant herein, which raised a preliminary objection to the maintainability of the petition filed by D.K. Jain before the CLB u/s 397 and 398 of the Act, on the ground that D.K. Jain did not have the requisite percentage of shareholding to file the petition. RPL could not substantiate the ground on which it objected to the maintainability of the petition i.e. D.K. Jain had transferred 23800 shares to C.S. Aggarwal, thus bringing his shareholding to less than the prescribed percentage for filing the petition. Its inability or failure to produce the original transfer deed despite being called upon to do so by the CLB cannot fall within the scope of the expression "any defect or error" in any proceeding before the CLB. The facts and circumstances which are sought to be introduced as amendments to the written statement are not necessary for determining the real question or issue, which is whether the transfer of shares to C.S. Aggarwal stood proved. The amendments sought to be made by the company to the written statement are, therefore, not amendments made to any defect or error in the proceedings before the CLB, nor were they necessary for the purpose of determining the real issue or question. This has been brought out clearly in paragraph 8 of the impugned order with which I concur.

10. The comparison of Regulation 46 with Order VI, Rule 17 of the CPC may not be appropriate as the CPC was amended in the year 2002 and a proviso was inserted to the aforesaid rule which reads as under: -

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due

diligence, the party could not have raised the matter before the commencement of trial.

It cannot be said that RPL had acted with due diligence. It was on 22.11.2011 that directions were given by the CLB for production of the original transfer deed. However, it is only in the affidavit dated 21.11.2012 of Mrs. Anjali Bhardwaj, the director of the company, that it was stated that the original transfer deed was lost or misplaced. The application for amending the written statement (C.A. No. 89/2013) was filed only in February, 2013. There was thus lack of due diligence on the part of RPL.

11. I further hold that a decision of the CLB that the amendments sought to be made to the written statement are irrelevant to the main controversy and that the facts and circumstances stated in the application and which are sought to be incorporated in the written statement as "brief background" were already known to both the parties, are findings of facts from which no question of law arose. It is a pre-requisite for the adjudication of an appeal u/s 10F of the Act that the appeal should involve a question of law. The finding of fact cannot also be termed perverse. For the above reasons I agree with the impugned order passed by the CLB in C.A. No. 89/2013 on 15.02.2013. The appeal and the application are accordingly dismissed with costs which I assess at Rs. 25,000/-. All interim orders stand vacated.

Dasti under signature of the Court Master.