

(2005) 02 OHC CK 0003

In the Orissa High Court

Case No : Miscellaneous No"s. 8 and 10 of 2004

Sachikanta Routray

APPELLANT

Vs

Pyari Mohan Routray

RESPONDENT

Date of Decision : 25-02-2005

Acts Referred:

Companies Act, 1956 — Section 10F, 169, 190, 284, 284(4)
Constitution of India, 1950 — Article 136, 27

Citation : (2005) OLR 632 Supp : (2006) 68 SCL 233

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : Bijayananda Mohanty, I. Mohanty, A.C. Swain, D.P. Dash, R.B. Mishra and A.K. Das, for the Appellant; B.R. Das, K. Behera and D. Tripathy, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Patnaik, J.—The relevant facts briefly are that the respondents filed Company Petition No. 62 of 2003 before the Company Law Board ("CLB"), Principal Bench, New Delhi under Sections 397, 398, 403 and 404 of the Companies Act, 1956 ("the Act") alleging mismanagement and oppression of the minority shareholders by the majority shareholder, appellant No. 1, in the affairs of the company Utkal Motors (P.) Ltd., appellant No. 5 in the said Company petition No. 62 of 2003 the respondents also prayed for some interim reliefs in paragraph 51 of the petition. On 2-7-2003, the CLB passed an ex parte order granting interim reliefs as prayed in paragraphs 51(i), (ii) and (v) of the company petition. The appellants herein filed their reply before the CLB on 31-7-2003 and made a prayer before the CLB to recall/ vacate the ad interim ex parte order dated 2-7-2003. Thereafter, the CLB passed orders on 11-9-2003 and 1-10-2003. Aggrieved by the said orders passed by the CLB on 11-9-2003 and 1-10-2003, the appellants filed COAPL No. 2 of 2003 u/s 10F of the Act. Along with the said appeal, the appellants also filed Misc. Case No. 3 of 2003 praying for stay of the impugned orders dated 11-9-2003 and MO-2003 passed by the

CLB till disposal of the appeal. On 3-11-2003, the Court after holding that question of law arises for determination in this case admitted the appeal and directed as an interim measure that the operation of the impugned orders dated 11-9-2003 and 1-10-2003 of the CLB shall remain stayed until further orders. Thereafter, Misc. Case No. 5 of 2003 was filed by the appellants herein with a prayer to the Court to pass an appropriate order staying the ad interim order of stay dated 2-7-2003 of the CLB, After hearing the learned Counsel for the parties, the Court passed orders on 14-5-2004 in the said Misc. Case No. 5 of 2003. Against the said orders passed by this Court on 14-5-2004 in Misc. Case No. 5 of 2003, the respondents filed SLP No. 10533 of 2004 before the Supreme Court but on 28-5-2004, the Supreme Court dismissed the said Special Leave Petition. Thereafter the present Misc. Case Nos. 8 and 10 of 2004 have been filed by the respondents in COAPL No. 2 of 2003.

2. In Misc. Case No. 8 of 2004, the respondents have prayed for modification of the aforesaid order dated 14-5-2004 so as to restore the interim orders passed by the CLB in terms of paragraphs 51 (ii) and (v) of the Company Petition No. 62 of 2003 of the respondents before the CLB.

3. Mr. Bijayananda Mohanty, learned Counsel for the appellants, submitted that since the respondents had challenged the order dated 14-5-2004 before the Supreme Court in SLP No. 10533 of 2004 and the Supreme Court has dismissed the said SLP on 28-5-2004, any modification of the said order dated 14-5-2004 after dismissal of the SLP by the Supreme Court would constitute an affront to the Supreme Court and, therefore, this Court should not entertain the Misc. Case Petition No. 8 of 2004 for modification of the order dated 14-5-2004 of this Court. In support of this submission, he cited the observations of the Supreme Court in *Abbai Maligai Partnership Firm and Another Vs. K. Santhakumaran and Others*, .

4. Mr. S.S. Das, learned Counsel for the respondents, on the other hand, submitted that the said judgment of the Supreme Court in *Abbai Maligai Partnership Firm's* case (supra) cited by Mr. Mohanty is not applicable to the facts of the present case. He sought to explain that in that case the Supreme Court held that the exercise of power of review by, the High Court after dismissal of the special leave petitions against the self same order is improper. He pointed out that in that case an order of eviction was under challenge before the Supreme Court in SLP Nos. 4039 and 4040 of 1987 and the same were dismissed on 16-9-1987 and after dismissal of the special leave petitions, the respondents in the said case filed review petition before the High Court seeking review of the order against which special leave petitions were dismissed. Mr. Das submitted that it will, thus, be clear that in that case the respondents approached the High Court against the final order of eviction which ultimately went to the Supreme Court whereas, in the instant case, the SLP was against the interim order passed on 14-5-2004 and the said SLP was dismissed and the respondents have now applied for modification of the said order dated 14-5-2004. He cited the decision

of the Supreme Court in Bhaskaran Vs. Sreedharan, in support of his submission that mere dismissal of a SLP by the Supreme Court does not amount to confirmation of the judgment of the High Court against which the SLP was filed.

5. The operative part of the interim order passed by this Court on 14-5-2004 is quoted herein below :

...For this reason, I direct that the interim order passed by the CLB on 2-7-2003 insofar as it stays the purported appointment of appellant Nos. 2, 3 and 4 as directors of the appellant No. 5-company and directs that the said appellant Nos. 2, 3 and 4 shall not exercise any right as directors of the appellant No. 5-company shall continue to be in force until further orders. The interim reliefs claimed in paragraphs 51(ii) and 51(v) of Company Petition No. 62 of 2003 restrain the Board of directors or shareholders of the appellant No. 5-company to effect any change in the present constitution of the Board of directors or the shareholding pattern in the respondent No. 5-company without the leave of the Court and restrain the Board of directors of the appellant No. 5-company to hold any meeting without the consent of all the directors. Any interim relief in terms of the said paragraphs 51(ii) and 51(v) of the Company Petition No. 62 of 2003 interferes with the rights of the Board of directors and the shareholders under the Companies Act, 1956 as well as the articles of association of the appellant No. 5-company. I, therefore, direct that the interim order dated 2-7-2003 of the CLB insofar as it has granted interim relief in terms of said paragraphs 51(ii) and 51 (v) of the Company Petition No. 62 of 2003 filed by the respondents before the CLB shall remain stayed.

Against the aforesaid orders passed on 14-5-2004, the respondents filed SLP No. 10533 of 2004 but the Supreme Court dismissed the said SLP on 28-5-2004. After the said dismissal of the special leave petition, Misc. Case No. 8 of 2004 has been filed on 15-7-2004. In different paragraphs of the miscellaneous case petition up to paragraph 15, various errors in the orders passed by the Court on 14-5-2004 have been alleged and in the prayer portion of the miscellaneous case petition a prayer has been made to the Court for an order :

Modifying its orders dated 14-5-2004 by directing that the ad interim orders passed by the CLB pursuant to paragraphs 51(ii) and 51(v) of the Company Petition No. 62 of 2003 stand restored till the petition is disposed of by the CLB.

It will be clear that by order dated 14-5-2004 this Court had clearly held that the interim reliefs claimed in paragraphs 51(ii) and 51(v) in Company Petition No. 62 of 2003 interferes with the rights of the Board of directors in the shareholders under the Act, as well as the articles of association of the appellant No. 5-company and accordingly directed that the interim order dated 2-7-2003 of the CLB insofar as it granted interim relief in terms of said paragraphs 51(ii) and 51 (v) of the Company Petition No. 62 of 2003 filed by the respondents before the CLB shall remain stayed. The SLP filed by the respondents against the aforesaid order dated 14-5-2004 passed by this Court was dismissed by the Supreme

Court on 28-5-2004. Any modification of the said order dated 14-5-2004 on the ground of error apparent on the face of the record would amount to a review and such a review is not permissible after dismissal of the SLP against the said order dated 14-5-2004 by the Supreme Court. In Abbai Maligai Partnership Firm's case (supra), the Supreme Court has deprecated in very strong words the High Court reviewing any order after a SLP against such order is dismissed by the Supreme Court. Paragraph 4 of the said judgment of the Supreme Court in Abbai Maligai Partnership Firm's case (supra), is quoted herein below:

The manner in which the learned Single Judge of the High Court exercised the review jurisdiction, after the special leave petitions against the self-same order had been dismissed by this Court after hearing learned Counsel for the parties, to say that least, was not proper. Interference by the learned Single Judge at the stage is subversive of judicial discipline. The High Court was aware that SLPs against the orders dated 7-1-1987 had already been dismissed by this Court. The High Court, therefore, had no power or jurisdiction to review the self-same order, which was the subject-matter of challenge in the SLPs in this Court after the challenge had failed. By passing the impugned order on 7-4-1994, judicial propriety has been sacrificed. After the dismissal of the special leave petitions by this Court, on contest, no review petitions could be entertained by the High Court against the same order. The very entertainment of the review petitions, in the facts and circumstances of the case was an affront to the order of this Court. We express our strong disapproval and hope there would be no occasion in the future when we may have to say so. The jurisdiction exercised by the High Court under the circumstances, was palpably erroneous. The respondents who approached the High Court after the dismissal of their SLPs by this Court, abused the process of the court and indulged in vexatious litigation. We strongly deprecate the manner in which the review petitions were filed and heard in the High Court after the dismissal of the SLPs by this Court. The appeals deserve to succeed on that short ground. The appeals are, consequently, allowed and the impugned order dated 7-4-1994 passed in the review petitions is hereby set aside. The respondents shall pay Rs. 10,000 as costs.

The aforesaid judgment of the Supreme Court will equally apply to a case where review of an interim order is sought on the ground of error in the interim order after dismissal of a SLP by the Supreme Court against such interim order. Variation of such an interim order, however, could only be sought because of some change of circumstances which have arisen after the interim order was passed.

6. In Bhaskaran 's case (supra) cited by Mr. Das, the Supreme Court held :

...It cannot be said that by merely filing the SLP in this Court the period of limitation which stood extended till disposal of the SLP which was dismissed in limine. This Court has from time to time clarified that dismissal of a SLP does not amount to confirmation of the judgment/ order of the High Court on merits. It only means that this Court did not consider the case to be fit for grant of leave

under Article 136 of the Constitution. Therefore, the High Court was clearly in error in holding that the period of limitation for filing the execution petition in the case stood extended till disposal of the SLP by this Court and on that basis holding that the execution petition filed by the respondent was not barred by limitation. The order is clearly unsustainable.

In the aforesaid judgment, the Supreme Court has held that dismissal of SLP does not amount to confirmation of the judgment/ order of the High Court on merits but has not held that the High Court can review its own order on the ground of errors apparent on the face of the records after the SLP against the order passed by the High Court is dismissed by the Supreme Court.

7. In Miscellaneous Case No. 10 of 2004 it is also alleged in paragraph 16 onwards of the miscellaneous case petition that appellant No. 1 has already initiated a requisition for extraordinary general meeting ("EGM") to pass resolutions to remove respondent No. 1 from the Board of directors of the appellant No. 5-company and has prayed that the appellant No. 5-company be restrained from passing any resolution removing any of the directors of the company till disposal of Company Petition No. 62 of 2003 by the CLB. Miscellaneous case No. 10 of 2004 has also been filed by the respondent No. 1 stating therein that on 26-8-2004 Form No. 32 was filed with the Registrar of Companies reporting the purported removal of respondent No. 1 in the EGM held on 25-8-2004 pursuant to the provisions of Section 169 read with Section 284 of the Act. In the said Misc. Case No. 10 of 2004, it is stated that the so-called EGM in which the respondent No. 1 is alleged to have been removed suffers from the following defects:

(a) The so-called requisition on behalf of S.K. Exports (P.) Ltd. was signed by S.K. Routray, and addressed to the Board of directors of appellant No. 5-company, which was received by the self-same S.K. Routray In his capacity as managing director of appellant No. 5-company.

(b) Having received the requisition, the said S.K. Routray failed to call the Board meeting of the company to enable it to take a decision on the requisition, thus, deliberately engineering a default on the part of the Board in convening the EGM, so that the power of calling the EGM would pass to the requisitionists themselves, in terms of Section 169(6).

(c) Once the Board meeting was called by the petitioner No. 1 on getting information about the requisition, the appellants have approached this Court in Misc. Case No. 8 of 2004, seeking directions to restrain the Board from taking a decision on the requisition.

(d) Even assuming that the power to call the EGM passed on to the requisitionists themselves, no proper notice was given to the shareholders for the EGM. Instead, an attempt was made to create ostensible evidence that the notice was sent for the EGM, by sending some speed post envelopes to different shareholders, which in fact contained some other documents. Some of the

unopened speed post envelopes have already been filed with this Hon'ble Court.

(e) It may not be out of place to mention that in terms of Section 284(4) of the Act, the director sought to be removed is entitled to make a representation, and be heard at the meeting. However, since no notice of the EGM was sent to him, he was denied the opportunity to make such representations.

(f) In the absence of proper notice to the shareholders, and in the absence of a proper requisition the so-called EGM of the company in which the petitioner No. 1 is claimed to have been removed has no legal validity.

Accordingly, in the said miscellaneous case, a prayer has been made to declare the alleged EGM said to have been held on 25-8-2004 and the alleged resolution said to have been passed on the said EGM removing the respondent No. 1 as director of the appellant No. 5-company as null and void and restraining the appellant No. 5-company from passing any resolution removing any of the existing directors of the company till disposal of the Company Petition No. 62 of 2003 by the CLB.

8. Mr. Das, learned Counsel for the respondents, submitted that these are facts and circumstances which have arisen after passing of the order dated 14-5-2004 by this Court and the court can always pass an interim order declaring the EGM of the appellant No. 1 held on 25-8-2004 and the resolution allegedly adopted therein removing the respondent No. 1 from the Board of directors of the appellant No. 1 -company as null and void and restraining the appellants from passing any other resolution removing any existing directors of the company.

9. Mr. Das vehemently submitted that the aforesaid EGM is a direct consequence of the order dated 14-5-2004 vacating the interim reliefs granted by the CLB and, therefore, this Court has got full jurisdiction to adjudicate on the said matter. He further submitted that appellants themselves have filed Misc. Case No. 7 of 2004 seeking some directions from this Court to the Board of directors of the company in respect of an EGM and having submitted to the jurisdiction of the court, the appellants cannot be permitted to question the jurisdiction of this Court to pass an interim order with regard to another EGM. He submitted that the appellants have invoked the jurisdiction of this Court relating to several matters concerning holding of the annual general meeting ("AGM"), adjourned AGM and the court has pronounced orders on matters relating to the change in the constitution of the Board of directors and at this stage again the appellants cannot be allowed to challenge the jurisdiction of this Court to adjudicate on the validity of an EGM or the resolutions passed therein. Mr. Das submitted that the case of the respondents before the CLB in Company Petition No. 62 of 2003 was that the appellant No. 1 fraudulently attempted to effect the change in the constitution of the Board of directors of appellant No. 5-company by concocting resolutions appointing new directors which were never, in fact, passed and by wrongfully holding on to shares in the company which he was obliged to transfer to the respondent No. 1 herein and was misutilising the voting rights in respect

of such shares to appoint new directors and gain majority control of the company with a view to siphon off the funds of the company to pay the creditors of another family company which the appellant No. 1 has mismanaged. He submitted that this Court as an appellate Court in respect of the said proceedings of the Company Petition No. 62 of 2003 before the CLB can pass interim orders restraining the appellants from removing the respondent No. 1 as director of appellant No. 1 -company. In support of the aforesaid contentions, he has relied on the decisions reported in *Karedla Suryanarayan v. Sri Ram Doss Motor Transport (P.) Ltd.* [1998] 92 Comp. Cas. 275 :15 SCL 411 (CLB-Delhi), *Jer Rutton Kawasmaneck v. Gharda Chemicals Ltd.* [2000] 36 CLA 124 (Bom.) : 23 SCL 71, *Clive Milts Co. Ltd., In re* [1964] 34 Comp. Cas. 731 (Cal.) and *Promode Kumar Mittal v. Southern Steel Ltd.* [1980] 50 Comp. Cas. 555 (Cal.).

10. Mr. B.A. Mohanty, learned Counsel for the appellants, on the other hand, submitted that once the court passed orders on 14-5-2004 in Misc. Case No. 5 of 2003 staying the interim reliefs granted by the CLB in terms of Paragraphs 51(ii) and 51(v) in Company Petition No. 62 of 2003 saying that the said interim reliefs granted by the CLB interferes with the rights of the Board of directors and the shareholders under the Act, as well as the articles of association of the appellant No. 5-company, it was open for the shareholders of the appellant No. 1-company to appoint or remove any director in the interest of the company in exercise of their rights under the Act, as well as the articles of association of the company and if in exercise of such rights, the shareholders of the company in the EGM held on 25-8-2004 removed the respondent No. 1 from the post of director, the court should not interfere with such removal. He further submitted that in any case, the jurisdiction of this Court u/s 10F of the Act, is limited to question of law arising out of the impugned orders passed by the CLB and the removal of the respondent No. 1 in the EGM of the company held on 25-8-2004 is a fresh cause of action for which the respondent No. 1 has to file a separate suit or application before the CLB for relief and no relief, interim or final, can be granted by this Court in the present appeal.

11. Mr. B.S. Tripathy, learned Counsel for the intervenor - S.K Exports (P.) Ltd., submitted that S.K. Exports (P.) Ltd. holds 65,500 equity shares constituting 65 per cent of the shares of Utkal Motors (P.) Ltd. and S.K. Exports (P.) Ltd. sent a requisition for an EGM of Utkal Motors (P.) Ltd. u/s 169 of the Act, to consider the resolution for removal of the respondent No. 1 from the office of the director of the company. The said requisition was communicated to Utkal Motors (P.) Ltd. through special/ registered post with AD on 25-6-2004 with a request to take steps in accordance with the Act, to call an EGM to consider the said resolution and, accordingly, the EGM of Utkal Motors (P.) Ltd. was convened on 25-8-2004 and a resolution was adopted in the said EGM pursuant to Section 284 read with Section 190 of the Act, and article 27 of the article of association of Utkal Motors (P.) Ltd. removing the respondent No. 1 from the office of director of Utkal Motors (P.) Ltd. and thereafter, Form No. 32 was filed along with the said resolution before the Registrar of Companies and a copy of the resolution was

communicated to the respondent No. 1 vide letter dated 4-9-2004 of the managing director of Utkal Motors (P.) Ltd. with a request to hand over all the documents, records including the books of account, etc., of the company without any delay. He submitted that since the resolution removing the respondent No. 1 from the office of the director of the company was passed on the requisition of S.K. Exports (P.) Ltd., any prayer to declare the said resolution as void can only be granted after making S.K. Exports (P.) Ltd. a party in the miscellaneous case and yet S.K. Exports (P.) Ltd. has not been made party in the miscellaneous case. He submitted that in any case removal of respondent No. 1 from the office of the director of the company Utkal Motors (P.) Ltd. by a resolution adopted at the EGM held on 25th August, 2004 on the requisition of S.K. Exports (P.) Ltd. constitutes a fresh cause of action for which the respondent No. 1 may approach the appropriate forum for appropriate relief and this Court in exercise of its appellate jurisdiction cannot declare the said resolution as null and void. Mr. Tripathy prayed that Miscellaneous Case No. 10 of 2004 be dismissed and the interim order passed by this Court on 19-11-2004 staying the resolution adopted at the EGM on 25-8-2004 be vacated.

12. Miscellaneous Case Nos. 8 and 10 of 2004 have been filed in COAPL No. 2 of 2003 which is an appeal u/s 10F of the Companies Act, 1956 against the orders passed by the CLB on 11-9-2003 and 1-10-2003. Section 10F of the Companies Act, 1956 is quoted herein below :

10F. Appeals against the orders of the CLB.--Any person aggrieved by any decision or order of the CLB may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the CLB to him on any question of law arising out of such Order. Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

A plain reading of the language of Section 10F of the Act, quoted above would show that an appeal to the High Court can lie only against a decision or order of the CLB on any question of law arising out of such order. The High Court, therefore, cannot directly entertain any prayer for declaring a resolution said to have been adopted in the EGM of the appellant No. 5 on 25th August, 2004 for removal of the respondent No. 1 from the office of director of Utkal Motors (P.) Ltd. as void. Moreover, for declaring the said resolution to be void, the Court will have to determine various questions of fact which relate to requisition for EGM and adoption of resolution for removal of the respondent No. 1 from the office of the director of the said company. As an appellate Court having jurisdiction to entertain only question of law arising out of orders of the CLB, this Court cannot decide such disputed questions of fact. Thus, even if the resolution allegedly adopted at the EGM of the appellant No. 5-company, on 25-8-2004 removing the respondent No. 1 is a circumstance which has arisen after the interim order was passed by the court on 14-5-2004, this Court does not have the jurisdiction u/s

10F, to either stay the said resolution or declare the said resolution as void. The remedy of the respondents is to move any forum, the civil court or the CLB, which has original jurisdiction to declare such resolution as null and void and to pass any interim order in relation to the said resolution.

13. In the result, the Miscellaneous Cases are dismissed and the interim orders passed by this Court on 1-11-2003 staying operation of the resolution adopted in the EGM of the company Utkal Motors (P.) Ltd. said to have been held on 25-8-2004 removing the respondent No. 1 as director of the said company is vacated.