(1994) 02 SC CK 0038

In the Supreme Court Of India

Case No : Civil Appeal No. 854 of 1994 (Arising out of SLP (C) No. 9345of 1990)

Shailesh Prabhudas Mehta and Others APPELLANT

Vs

Calico Dying and Printing Mills Ltd. RESPONDENT

Date of Decision : 15-02-1994

Acts Referred:

Companies Act, 1956 — Section 111(1), 111(2), 111(4)

Citation : (1994) 80 CompCas 64 : (1994) 2 CompLJ 58 : (1994) 1 JT 671 : (1994) 2 LW 181 : (1994) 1 SCALE 624 : (1994) 3 SCC 339 : (1994) 1 SCR 968 : (1994) 1 UJ 427

Hon'ble Judges : K. Jayachandra Reddy, J;G. N. Ray, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

K. Jayachandra Reddy, J.—Special leave granted.

2. This appeal arises out of Company Petition No. 39/85 which was dismissed by a learned single Judge of the Bombay High Court by his order dated 27.2.87 and an appeal filed against the said order was also dismissed by a Division Bench. The order of the Division Bench is impugned in this appeal.

3. The appellants are the son, widow and married daughter of one late Shri Prabhudas V. Mehta who was holding 100 equity shares of the respondent - Calico Dying & Printing Mills Ltd. ('Company' for short) of the face value of Rs. 100/- each. Shri Prabhudas V. Mehta died on 26.8.74 without leaving any will. The appellants are the only legal heirs and representatives of Shri Prabhudas Mehta and they filed a company petition for rectification of the register of members of the Company by deleting the name of Shri Prabhudas V. Mehta and substituting in its place the names of the appellants in respect of those 100 shares in the Company bearing Distinctive Nos. 9101 to 9200. Prior to his death the deceased Shri Prabhudas V. Mehta was holding these shares and was working as an employee of the Company. It appears that there were certain disputes between Shri Prabhudas V. Mehta and the Directors of the Company who made

efforts to purchase the said shares. The negotiations in this regard could not be completed in view of the sudden death of Shri Prabhudas V. Mehta. It is also alleged that the appellants entered into negotiations for sale of shares which were carried on for several years. Extensive correspondence ensued between the appellants and the Company. However, as no positive reply was forthcoming for the transmission of shares, the appellants sent a letter to the Company on 28.5.77 for transmission of shares and for the notice of the annual general meeting stating that they were entitled to the same even in the absence of their names being taken on the register of members by virtue of Articles of Association and the provisions of the Companies Act. On 27.6.77 a reminder was sent to the Company. On 9.7.77 a reply was given by the Company stating inter alia that the appellants were not entitled to exercise any voting right in any of the meetings of the Company. On 21.9.77 the then existing Articles of Association were replaced by a new set of Articles of Association wherein new articles were introduced conferring power on the Company to reject any application for transfer or transmission without assigning any reason in that behalf. According to the appellants this was done mainly with an intention of defeating the appellants' rights as shareholders-cum-beneficiaries of the said shares. In the month of March, 1984 the Company closed down its operations and by arriving at a settlement with the workers retrenched all the workmen obtaining voluntary resignations from them. It is alleged by the appellants that this was done with the motive of making huge profits by the Directors and their related shareholders by disposing of the plants, machinery etc. On or about 23.6.84 the Company requested the appellants to approach the Company for transmission of shares after obtaining the succession certificate in respect of the estate of the deceased Shri Prabhudas V. Mehta. on 21.8.84 the appellants received the heirship certificate in which 100 shares were mentioned s one of the assets standing in the name of Shri Prabhudas V. Mehta in the Company. On 31.8.84 the appellants sent a letter to the Company intimating that heirship certificate-cum-letter of administration has been received by them and therefore the Company should give to them the details about the formalities to be complied with for the purpose of effecting the transmission of the said shares in their favour. On 16.9.84 since there was no response from the Company a reminder was sent. On 19.9.84 the Company requested the appellants to send certified true coy of the heirship certificate to do the needful. On 21.9.84 the appellants addressed a letter to the Company requesting to furnish the details of the procedure so as to comply with the pre-requisites of transmission of shares. On 21.11.84 the appellants forwarded a true copy of the heirship certificate and requested the company to do the needful. A reminder also was sent on 29.12.84. Since there was no reply from the Company, Company Petition No. 39/85 was filed in the High Court of Bombay praying for rectification of the register of members. The Company filed an affidavit opposing the grant of the relief prayed for, stating that the Directors of the Company have decided to refuse to register the appellants as members of the Company in exercise of the powers conferred under the Articles of Association of the Company. The appellants filed a rejoinder. On 17.4.85 the

Company filed an additional affidavit purporting to enclose therewith a resolution of the Company dated 9.4.85 by which the Board of Directors declined to register the shares of the appellants as the owners thereof and to admit them as members. On 17.4.85 the learned Single Judge of the High Court dismissed the petition on the ground that alternative remedy was available u/s 111 of the Companies Act. Questioning the same the appellants preferred an appeal which was admitted. Pending the disposal of the appeal, the appellants took out notice of motion and the interim order was passed directing the Company not to dispose of its assets and that the Company should give notice of each and every general meeting to the appellants. The Division Bench ultimately allowed the appeal and the matter was remanded back to the learned Single Judge to decide the same afresh. Further affidavits were filed. The Company Petition again after remand came up for hearing before the learned Single Judge and the same was again dismissed on the ground that the appellants should file either an appeal u/s 111 of the Companies Act or file a separate suit to agitate the issues involved in view of the diverse disputes raised between the appellants and the Company. Being aggrieved by the said order the appellants again filed an appeal No. 516/87. Pending the said appeal various applications were made for diverse interim reliefs. In respect of some of the reliefs that were refused the appellants filed a SLP (Civil) No. 13605 of 1988 in this Court but before the same came up for hearing, the Division Bench of the High Court completed the hearing of the main appeal and dismissed the appeal on 22.12.89. Questioning the same the present appeal is filed.

4. The Division Bench of the High Court mainly considered two questions namely 1) whether the Board of Directors lost its powers to refuse to transmit the shares to the names of the appellants after a lapse of two months and 2) whether the Board's failure to register the transmission within the period of two months and the subsequent decision taken on 9.4.85 was malafide and not taken in the interest of the Company. The Division Bench observed that the first contention is obviously based on the provisions of the English Companies Act and cases decided thereunder and after referring to some decided cases held that they do not lay down that on the expiry of period of two months the power would be lost and the whole question would be exercise of discretion rather than any alleged loss of power and for that purpose the factual position in the case has to be examined. Relying on Section 111 of the Companies Act, the Division Bench observed as under:

Certainly, if there is inaction beyond the period of two months the delay, if unexplained, may influence the Appellate Authority or the Court whilst considering the question whether discretion has been exercised bonafide or not but cannot imply, in our opinion, loss of power in the Board of DirectOrs. If that was to be the consequence, then, in our opinion, it was obligatory for the legislature to have provided the same specifically by enacting a specific deeming provision to that effect and not leaving it for argument or a fiction to be implied by reading of the provisions.

Having thus disposed of the first issue, the Division Bench adverted to the second question namely whether the action of the Directors was malafide? The Division Bench also considered the question whether the Directors have acted in the interest of the Company? Having examined the materials on record and the ratio laid down in several cases, the Division Bench ultimately held that "It is not possible on the material shown to us to characterise the decision as capricious or perverse or malafide and that it is a commercial decision taken honestly by businessmen in the interest of the Company and its shareholders." The Division Bench concluded that subject to the rights of the petitioners to adopt such appropriate proceedings as may be available to them, the appeal was dismissed.

5. Shri A.M. Singhvi, learned senior counsel appearing for the appellants submitted that the Company has no power to refuse registration or transmission in absence of specific provision in the Articles of Association empowering the Company for the same and that transmission of shares is by operation of law and was completed in 1974 itself i.e. on the death of Shri Prabhudas V. Mehta and that the subsequent amendment of Article 29 to deny registration of transmission is invalid and ineffective. His further submission is that in any event non refusal within the statutory period of two months renders such power ineffective and exhausted. But even otherwise, according to the learned Counsel, the refusal of registration by the Board was wrongful and malafide exercise of discretion. Shri Ashok Desai, learned senior counsel appearing for the respondent-Company, on the other hand, submitted that there are concurrent findings of fact that the refusal was not a malafide action and it was a proper exercise of discretion in the interest of the Company and that the Company in the instant case is only a Private Company in the nature of partnership and that the appellants can not force themselves to be partners.

6. The first and second submissions can be dealt with together as they arc very much based on the provisions of the Companies Act and Articles of Association. Articles 26 and 34 of the Articles of Association of the respondent Company are relevant in this regard. Article 26 lays down that subject to the provisions of Section 111 of the Companies Act, the Directors may in their absolute discretion and without assigning any reason decline to register any transfer of any share and if the Directors decline to register a transfer of any share, they shall, within two months after the date on which the transfer was lodged with the company, send to the transferee and the transferor notice of the refusal. Article 34 is to the effect that any person becoming entitled to a share in consequence of the death or insolvency of a member may, upon such evidence as may be produced and as required from time to time by the Directors may elect either to be registered himself as holder of the share or to make such transfer of share as the deceased or insolvent member could have made and that the Directors shall, in either case, have the same right to decline or suspend registration as they would have had, if the deceased or insolvent member had transferred the share before his death or insolvency. Section 111 of the Companies Act gives the power to refuse registration and also provides for an appeal against such refusal. Section 111(1)

lays down that Nothing in Sections 108, 109 and 110 shall prejudice any power of the Company under its articles to refuse to register the transfer of, or the , transmission by operation of law of the right to, any shares or interest of a member in, or debentures of, the Company. Sub-section (2) is to the effect that if the Company refuses, whether in pursuance of any power under its articles or. otherwise, to register any such transfer or transmission of rights, it shall within two months from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the Company, send notice of the refusal to the transferee and the transferor. The later part of this Sub-section reads as under:

If default is made in complying with this sub-section, the Company, and every officer of the Company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

Then Sub-section 4 provides for ah appeal against such refusal to the Central Government. Relying on these provisions Shri Singhvi submitted that the appellants are the persons entitled to the shares and that since a notice of intimation of refusal has to be compulsorily sent within a period of two months, it automatically follows that the right o£ refusal must be exercised within the period of two months and since the Directors have not exercised this right of refusal within the prescribed period of two months, then the said right is lost forever and therefore the appellants get an absolute and unrestricted right to have the shares transferred in their names and accordingly correct the shares register. In this context reliance is placed on Re Swaledale Cleaners Ltd. 1968 (1) AELR 1132 and some of the observations made by Penny quick LJ. thereunder. In that case it was held that:

(i) The period of two months mentioned in Clause 19 of Table A under the Act of 1929 and specified in Section 78 of the Act of 1948, may safely be taken as the outside limit after which there is unnecessary delay.

(ii) The power of veto is a restriction on the right of alienation and as such must be exercised at the proper time for its exercise, if it is to be exercised at all. For this purpose the proper time is the occasion on which the transfers are placed before the board for confirmation if - and it seems only if - they are so placed without unnecessary delay. If them is unnecessary delay in placing the transfers before the board, the power of veto must be regarded as lost, so that the right of transfer becomes unrestricted. It cannot be the law that the Board of the Company can improperly delay considering a transfer and then when driven to do so, as for instance here, by the launching of a motion, exercise the power of veti.

Learned counsel placed strong reliance on these observations.

7. But the observations made in this case were later considered in Re Swaledale Cleaners Ltd., 1968(3) All Eng LR 619 and they have been diluted and it was held by the Court of Appeal as under:

As to unreasonable delay, I take the view of the judge (and it seems to me merely, if I may say so, common sense), and that, as there is an obligation on directors who refuse to register a transfer to inform the persons who are aggrieved within two months of such a refusal, the Act of 1948 quite clearly indicates that a reasonable time, other things being equal, within which directors must make up their minds either to accept the transfer or to refuse it must be the two months within which they have to make an answer. Therefore, it does seem to me that waiting four months without any decision at all was an unreasonable delay. One has, however, to go one step further then that: one has to say that unreasonable delay has destroyed the right so that when, in December, 1967, the new board purported to refuse, they were no longer in a position to exercise that discretion which, if they had acted promptly, undoubtedly would have been theirs, to consider and, if they thought fit in the interests of the company, to refuse registration of the transfers.

These observations make it clear that the Appellate Court did not confirm the opinion of Penny quick, LJ. that on the expiry of the period of two months, the power would be lost. In this case the scope of Section 78 of the English Companies Act was being considered and the said provision reads as follows:

(1) If a company refuses to register a transfer of any shares or debentures the company shall, within two months after the date on which the transfer was lodged with the company, send to the transferee notice of the refusal.

We find that the language of Section 78 of the English Companies Act is not the same as Section 111 of our Companies Act and Section 78 does not provide for any penalty or for any appeal. It is necessary to note that if the right to refuse was to come to an end, as contended by the learned Counsel, after the expiry of two months and that an absolute right was created in favour of transferee then the Legislature would have so categorically provided. But, on the other hand, the Section provides for penalty if" there is failure on the part of the Company to send such an intimation within two months and that itself shows that no absolute right was to be created in favour of the transferee. Further Section 111 of the Act provides 1 for a right of appeal to the Central Government and if as contended by the learned Counsel that on a mere failure to send an intimation within two months an absolute right came to be vested in transferee then the question of transferee filing an appeal would not arise at all. Thus this Section mainly deals with right to receive a notice and the consequence of non-sending of such a notice results in penalty. These provisions would go to show that what was intended was to provide for a notice of refusal to be sent and that failure thereof only resulting in levying penalty.

8. The submission that the Company had no power to refuse registration or transmission of shares in the absence of a specific provision in the Articles of Association is also untenable. According to the learned Counsel, the Articles of Association at the time of death of deceased did not provide for such a refusal and that even if there is an amendment later the same can not empower the

Board to refuse the registration of the shares. In our view particularly in view of the facts of this case, the Board had such power when the registration and transfer was sought in 1984. Even otherwise the facts show that the registration and transmission was sought only in 1984 as mentioned above. By then the Articles were amended and the Board was given power to refuse registration or transmission. Therefore we are not able to see any irregularity or lack of bonafide action, as contended, in bringing about those amendments. However we notice that before the learned Single Judge as well as before the Division Bench of the High Court, the main question urged was that of limitation of two months and for the aforesaid reasons, we are of the view that the High Court has rightly held that the right to refuse is not lost.

9. At this stage we may refer to the factual background in the instant case. Initially the Company Petition was dismissed by the Company Judge on 17.4.85 on the preliminary ground. As against that the appellants went in appeal and in that appeal the order of dismissal of the Company Petition was set aside and a remand was ordered for disposal on merits and that the Appellate Court also permitted for filing further affidavits and they were in fact filed before the matter came up for re-hearing before the Company Judge on remand. It must further be remembered that the appellants moved, the High Court even before the expiry of the period of two months and from the dates mentioned above it can be seen that the appellants complied with the requirements namely sending the heirship certificate etc. only after 6 or 7 years from the date of their letter to the company seeking transmission. Therefore it has to be concluded that some time after 21.11.84 when the appellants' letter with necessary enclosures was received by the Company, necessary formalities to become heirs had been completed. The appellants without waiting for the expiry of period of two months filed the Company Petition on 14.1.85 for rectifying the shares register by bringing them on record. From these facts it can broadly be accepted that the power or discretion vests in the Board of Directors for two months after submission of the proper application supported by the necessary documents. However, that does not mean that right would be lost after the expiry of two months and what all that is necessary to see is whether the Board has acted in a benefice manner in rejecting the transmission of these shares.

10. We shall now therefore deal with the other submission namely whether the action of the Board of Directors was malafide. In Bajaj Auto Ltd. Vs. N.K. Firodia and Another etc., , it was laid down that the Court can consider whether the Directors acted in the interest of the Company. This case was cited in Life Insurance Corporation of India Vs. Escorts Ltd. and Others, with approval and in that case the nature of the power of the Directors and scope of scrutiny by the court were explained and it was observed as under:

Discretion implies just and proper consideration of the proposal in the facts and circumstances of the case. In the exercise of that discretion, the Directors will act for the general interest of the shareholders because the Directors are in a fiduciary position both towards the Company and towards every shareholder. The Directors, are therefore required to act bonafide and not arbitrarily and not for any collateral motive.

Keeping these principles in mind we shall examine the reasons that weighed with the Board of Directors for refusing transmission. The Board of Directors have stated in the affidavits and also appended the copies of the earlier correspondence including the proceedings of the mediator and the history of the disputes originally between late Shri Prabhudas V. Mehta and the management of the Company and subsequently between the heirs of Shri Prabhudas V. Mehta and the management of the Company. The learned Single Judge as well as the Division Bench have exhaustively examined the correspondence and the affidavits and have given a concurrent finding that there is animosity between the parties and that the decision of the management was a proper and commercial decision keeping in view the interest of the management of the Company. Therefore it can not be said that there was dishonest intention. In any event this is a concurrent finding of fact based on the affidavits and records in which we need not interfere.

11. We have already held that the decision of the Directors was a commercial decision made in the interest of the management of the Company. It is also significant to note that the appellants have only 100 shares which are very insignificant as compared to the total shares and the contention that the relevant articles were amended only to defeat the rights of the appellants in respect of those 100 shares, is wholly untenable.

12. For all these reasons, the appeal is dismissed. In the circumstances of the case, there will be no order as to costs.