

(2003) 03 DEL CK 0080
In the Delhi High Court
Case No : Co. A. (B) 8 of 1998

Shri A.P. Jain

APPELLANT

Vs

Faridabad Metal Udyog (P) Ltd.

RESPONDENT

Date of Decision : 10-03-2003

Acts Referred:

Citation : (2003) 3 AD 624 : (2005) 123 CompCas 785 : (2003) 104 DLT 909 : (2003) 71 DRJ 523 : (2003) 1 ILR Delhi 228 : (2004) 50 SCL 268

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : U.K. Chaudhary and Himalika Khanna, for the Appellant; Nemo, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—This company appeal has been filed against the order dated 27th July, 1998 by which while holding other pleas in favor of the appellant, the Company Law Board has dismissed the petition on the ground of laches of seven years and the indulgence in forum shopping by the appellant.

2. The dispute which relates to the present appeal originated on a petition filed in this Court u/s 397 and 398 of the Companies Act in the year 1990 by the appellant herein A.P. Jain alleging oppression and mismanagement which was numbered as CP 174/1990. The matter remained pending in this Court and on 10th September, 1996, a prayer was made on account of the change of jurisdiction pursuant to the 1988 amendment in the Companies Act which came into force with effect from 31.5.91. By the said amendment, the petitions under Sections 397 and 398 relating to oppression and mismanagement under Chapter VI were required to be heard by the Company Law Board. The proceedings in this Court were transferred to Company Law Board on 10th September, 1996 by the following order :

"Counsel for the petitioners prays for leave to withdraw this petition with liberty

to move the Company Law Board under Sections 397 and 398. Subsequent to the amendment, all such matters are being filed there although the petitions filed prior to amendment are especially saved by the amending act. I allow the request of the counsel, which is not opposed by the opposite counsel to withdraw this petition as stated above. Dismissed as withdrawn without prejudice to right, if any, and with liberty to move the Company Law Board who if approached may deal with such petition in accordance with law. This is without prejudice to the rights of the respondents to raise any plea that may be available to them under law.

Both the C.A. and C.P. are disposed of in the above terms with no order as to costs."

3. This order was passed in the presence of the counsel for the respondent who reserved his right to raise such pleas as available in law. However, the request to withdraw the petition and refile it in Company Law Board was not opposed by the respondent's counsel.

4. In view of the relationship between the appellant A.P. Jain and the respondents 2 and 7, at one stage the Company Law Board even suggested an amicable settlement to enable the petitioner to sell their shares to respondent but the dispute could not be settled.

The Company Law Board recorded the following findings in favor of the appellant/petitioner:

a) That the petitioner satisfied the condition of being a member since he owns more than 10% shares and has locus standi to present the winding up petition.

b) Upon withdrawal of the petition from the High Court and refileing it in Company Law Board, the Company Law Board was not dealing with the matter pending in High Court and consequently there was no violation of Section 68 of the Companies Amendment Act, 1998.

5. The entire portion of the judgment which is against the appellant is contained in paragraphs 17, 18 and 19 and reads as follows:-

"17. Shri Dhawan gave us comparative statement of the allegations in both the petitions, from which it is seen that practically all the allegations in the present petition are similar to the ones in the earlier petitions, save for some changes in the language and figures. Thus taking into consideration the contents of this petition, comparing the same with the contents of the petition before the High Court where the matter was pending for over six years, and that by withdrawing the same and in filing the present petition, we are of the firm view that the petitioner has definitely indulged in forum shopping/jurisdictional shopping. We also note that the High Court had even appointed an Arbitrator with a view to get the disputes sorted out but the Arbitrator had, for some reasons withdrawn from the assignment. In other words, the petition in the High Court was actively pursued. Under these circumstances, the reason adduced by Shri Chowdhary for

withdrawal of petition from the High Court and filing of this petition before the CLB that in the CLB, quick disposal is possible does not seem to be an acceptable plea. Further, we are unable to convince ourselves on this reasoning, especially when the jurisdiction was transferred to the CLB as early as in 1991 the matter was pursued in the High Court for over five years afterwards. Thus, we concur with Shri Dhawan that the petitioner is indulging in forum shopping and this petition is an abuse of process of law.

18. As far as limitation is concerned, no doubt provisions of Limitation Act are not applicable to proceedings before the CLB, yet if there is abnormal delay in bring a matter before CLB, in this case of over 6 years, we do take into consideration the limitation. May be the stand of the petitioner is that he was not keeping quiet and that had agitated the matter well in time before the High Court. But having withdrawn a long pending matter from the High Court where in all probability, the matter could have ended in the near future, the petitioner cannot have the excuse that he had been vigilant in protecting his interest as a shareholder. We are coming to this conclusion only on comparing the various allegations in the earlier petition and this petition and filing that except for some marginal changes in language or figures, the allegations in the petition are practically the same as in the earlier petition and the present petition is nothing but repetition of the earlier petition. Further, on the argument of Shri Chowdhary that the effects of the alleged acts of oppression and mismanagement committed earlier still continues, we are of the view that having waited for 7 years, even assuming that the effects are continuing even now, we cannot consider this as a ground to proceed with the petition by shutting our eyes to the plea of the respondents that there is gross delay and laches.

19. Accordingly, considering the fact that through this petition the petitioner has indulged in forum shopping and that the petition suffers gravely on account of limitation, without going through the respective contentions of the parties on the merits of the allegations, we dismiss this petition."

6. In my view the Company Law Board has completely erred in terming the refiling of Section 397 and 398 petition pursuant to the permission given by this Court, as forum shopping. In my view the Company Law Board has totally misunderstood the concept of the phrase forum shopping/jurisdiction shopping. In the present case, the winding up petition was filed in the year 1990 in this Court which thereafter remained pending in this Court until it was permitted to be withdrawn in 1996 pursuant to the permission given by this Court to refile the proceedings before the Company Law Board. Action taken pursuant to a Court order cannot be termed as forum shopping and such a plea indeed seeks to question the merits of the order of the High Court dated 10th September, 1996 which was assented to and indeed not challenged any further by the counsel for the respondent. Accordingly the finding of the Company Law Board that the period of pendency of the matter before this Court amounts to laches attributable to the petitioner/appellant is wholly erroneous and indeed uncalled

for and cannot be sustained at all.

7. Furthermore, in spite of the finding that limitation was not applicable, the Company Law Board nevertheless in the concluding paragraph 19 recorded that the petition suffers gravely on the ground on limitation.

8. An even more startling facet of the judgment of the Company Law Board is its finding that the averments in the petition before the High Court and the Company Law Board in the refiled petition were practically the same and hence the petitioner (appellant) was not vigilant in protecting his interest as a shareholder. This finding is totally irrational and demonstrates eloquently the non-application of mind by the Company Law Board. Even though the Company Law Board has extracted the order of this Court dated 10th September, 1996 yet it has totally misunderstood the said order which clearly permitted the withdrawal of the Section 397/398 petition from this Court and permission to move such a petition before the Company Law Board. The contents of the petition withdrawn from this Court and that filed before the Company Law Board naturally had to be similar and to draw an adverse inference qua laches against the appellant from such similar pleas in both the petitions is quixotic to say the least.

9. Thus the ground given by the Company Law Board that the respondent was guilty of laches by waiting for seven years cannot be sustained in view of the aforesaid discussion. Accordingly the order dated 27th July, 1998 passed by the Company Law board in CP 5/1997 is set aside with costs quantified at Rs.25,000/- payable within eight weeks from today.

10. The matter be listed before the Company Law Board on 13th May, 2003. Since the matter has been pending since 1990, the Company Law Board is directed to dispose of the petition not later than 31st August, 2003. The parties to appear before the Company Law Board on 13th May, 2003.

11. The Appeal stands disposed of in the above terms.