
(2005) 07 DEL CK 0135

In the Delhi High Court

Case No : Co. A. (B) 8/98

Shri A.P. Jain

APPELLANT

Vs

Faridabad Metal Udyog

RESPONDENT

Date of Decision : 04-07-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Companies (Amendment) Act, 1988 — Section 68
Companies Act, 1956 — Section 10F, 397, 398

Citation : (2006) 3 BC 262 : (2005) 123 DLT 114 : (2005) 83 DRJ 389

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

Bench : Single Bench

Advocate : U.K. Chaudhary and Rajat Bhalla, for the Appellant; P. Aggarwal and A. Mishra, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, J.—This appeal is preferred against the order dated 27th July 1998 passed by the Company Law Board (in short the "CLB") in CP No. 5/1997. Vide the impugned order, the company petition of the appellants herein has been dismissed sustaining the preliminary submissions of the respondent to the maintainability of the petition and thus, without going into the merits thereof. The the CLB, agreed with the twin submission of the respondents, namely, that by filing the said petition the petitioner indulged in form shopping and the petition suffered from abnormal delay as well. For appreciating the order of the CLB it would be necessary to have some background of the litigation between the parties.

2. The appellant, Sh. A.P. Jain, holds 15% shares of M/s. Faridabad Metal Udyog Pvt. Ltd. (hereinafter referred to as the "Company"). His family members also hold certain shares and the total shareholding of his family, inclusive of his shareholding, is 46.56%.

3. The appellant had, in the year 1990, filed a petition u/s 397/398 of the

Companies Act (for short the "Act") alleging oppression and mismanagement on the part of the respondents. That petition was filed in this Court as at that time jurisdiction to deal with such petitions was with the High Courts. With effect from 31st May 1991, the Act was amended conferring jurisdiction to entertain such petitions on the CLB. However, petitions already filed and pending with the High Courts were to be continued and disposed of by the High Courts. Therefore, this Court retained the jurisdiction over the petition filed by the petitioner in the year 1999, which was pending as on 31st May 1990. While this petition was still pending, the appellant moved application therein for withdrawal of that petition. Granting this liberty, petition was dismissed as withdrawn.

4. Thereafter, the appellant filed CP 5/97 before the CLB on 16th October 1996. The respondents challenged the maintainability of this petition by raising various preliminary objections, which can be summarised as under:

i) the appellant had no locus standi to file the objection as he had agreed to sell the shares and, Therefore, he was no more a member of the company.

ii) CLB had no jurisdiction to deal with the petition in view of section 68 of the Amendment Act, 1988 as, as per the said provisions, pending matters were to be continued with the High Court. Withdrawal of the petition from the High Court and filing of the petition in the CLB on same allegations amounted to transfer of the petition from the High Court to CLB and was not permissible.

iii) Withdrawal of the petition from the High Court and filing the petition on the same ground in the CLB also amounted to forum shopping.

iv) The petition was time barred and in any case there was abnormal delay of six years in bringing the matter before the CLB.

5. By impugned order dated 27th July 1998 the CLB though rejected first two submissions, it accepted the other two preliminary objections and, Therefore, dismissed the petition. The reasons in support are contained in paras 17 and 18, which are reproduced below:-

"17. Shri Dhawan gave us a 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/jurisdiction 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 bringing a matter before CLB, in this case 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 finding 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 arguments 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 over 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."

6. Mr. Chaudhary, learned senior counsel appearing for the appellant, contended that both the ground for dismissing the petition as not maintainable were erroneous and the findings of the CLB perverse. His submission was that the appellant did not indulge in any forum shopping. He explained that when the appellant's petition being CP No. 174/90 was pending before the High Court, at that time parties had moved joint application (CA No. 807/92) and in that application, consent order dated 20th October 1992 was passed appointing Mr. Justice Rajinder Sachhar (Retd.) as the Referee. Parties had also agreed that the decision of Justice Sachhar would be final and binding on them and the same shall not be challenged by either parties in any manner. Matter was heard by the learned Referee. However, before him the respondent used dilatory tactics and sought adjournments on one ground or the other. On several occasions the learned Referee granted the adjournments. However, when he was about to pass final order, the respondent filed an application stating that they had lost confidence in him and the matter be referred back to the High Court. In these circumstances, vide order dated July 22, 1995, Mr. Justice Sachhar referred the matter back to this Court and did not pass any order. In the process the respondent wasted more than three years. By that time jurisdiction u/s 397/398 had been transferred to the CLB as per the Companies (Amendment) Act, 1988, which was enforced with effect from 31st May 1991. The petitioner, in these

circumstances, moved the application for withdrawal of the proceedings with liberty to file fresh proceedings before the CLB for expeditious disposal as procedure adopted by the CLB is of summary nature. This permission was granted by this Court vide order dated September 10, 1996, while allowing the appellant to withdraw the petition. At that time, no objection was raised by the respondents and no appeal was also filed by the appellant against order dated September 10, 1996. Immediately thereafter CP No. 5/97 was filed before the CLB. Learned counsel, Therefore, argued that it would not amount to forum shopping inasmuch as the appellant moved the CLB with due permission of the High Court. He also argued that the acts on oppression and mismanagement are always factual and cannot undergo a change on account of change in the forum. However, whatever new allegations were available, they were also incorporated in the fresh petition such as not giving the notice for the meeting of the Board of Directors and shareholders during the intervening period. Hence, the ground of forum shopping was completely erroneous for the dismissal of the petition.

7. He further submitted that the CLB did not appreciate the case in proper perspective while discussing the petition on the ground of delay and laches. While admitting that there was no limitation, the CLB failed to appreciate that the acts of oppression and mismanagement were continuing in the nature and were continuing up to the date of filing of the petition before the CLB. Further delay has been caused, if any, due to the mala fide and dishonest conduct of the respondent in delaying the proceeding before the Hon"ble Referee appointed by the Court and withdrawing on dishonest ground that the respondent had no confidence in the said Referee. Therefore, according to the appellants, the CLB could not dismiss the petition on the ground that delay and laches. It was also submitted that the petition filed by the appellants in this court was not transferred to the CLB and the CLB had specifically, in the impugned order, opined that such a petition before the CLB was permissible and maintainable u/s 68 of the Companies Amendment Act, 1988. In view of this specific finding of the CLB, it could not have dismissed the petition on the ground of delay and the two conclusions were apparently in conflict with each other.

8. Learned counsel for the respondent sought to justify both the conclusion of the CLB. In addition, he submitted that such a petition before the CLB was not maintainable after withdrawal of the petition from the High Court as the petitioner could not maintain the petition on the same cause of action before the CLB once it was withdrawn. He emphasised that although this Court, while allowing the appellants to withdraw the petition, gave him the liberty to file the petition before the CLB, at the same time this court, in the said order, reserved the right of the respondent as well to contest the petition before the CLB on any ground available with it. It was also submitted that the appellant is not a shareholder and, Therefore, on this ground also the appellant was not entitled to file any petition before the CLB and the finding arrived at by the CLB on this ground in favor of the appellant was challenged by the respondent.

9. Before coming to the rival contentions, let me first recapitulate, from the impugned order passed by the CLB, findings which have been arrived at in favor of the appellant herein:-

(i) The CLB decided that the appellant had the locus standi to file the petition as names of the appellants were still in the Register of the Members and they were holding more than 10% shares in the company. The relevant observations are as follows:-

"It is admitted by the company that the petitioner's name is in the Register of Members and the parties agree that the agreement to sell was not implemented in the sense no consideration was paid for the shares nor the share certificate together with transfer instruments were lodged with the company for registration of transfer. The argument of Shri Dhawan is that the petitioners gave up their participation in the company after the agreement was entered into thus exhibiting the lack of interest in the affairs of the company and Therefore, even if their names continue in the Register of Members, they cannot be treated as members of the company. We are unable to accept this proposition. It is an admitted position that no consideration has been paid for the sale of shares and that the share certificates are still in possession of these petitioners. The position would have been different if only the registration is pending while all other pre acts like payment and receipt of consideration and handing over the necessary documents including the share certificate had taken place. In such a situation, we may have to examine about the locus standi of the petition even if his name continues in the Register of Members. In the present case, except an agreement itself, no further action in pursuant to the same has been taken. Under these circumstances, we have no hesitation to hold that the petitioner satisfies the condition of being a member of the company and since he owns more than 10% shares in the company, he has locus standi to present this petition."

(ii) The CLB held that it had the jurisdiction to entertain the petition in view of the provisions of Section 68 of the Amendment Act and the relevant observations have already been quoted above. Argument of the counsel for the respondent filing of the petition before the CLB amounted to withdrawal of the petition before the High Court and refiling the same before the CLB was rejected as it was not a case of transfer but filing of fresh petition by the appellants herein. This discussion is contained in para 16 and relevant portion thereof is as under:-

"From a reading of this order we are not in a position to come to a conclusion that the High Court had conferred any jurisdiction on the CLB as it has very specifically stated in that order that CLB would deal with this matter in accordance with law. In any petition filed after 31st May, 1991 u/s 397/398, CLB has jurisdiction and the present petition being a petition filed in 1996, we feel that we have the jurisdiction to deal with the same. Once a petition has been withdrawn, it can never treated as a pending proceedings. On withdrawal, it comes to a close. Therefore, the argument that by filing the present petition, the petitioner is seeking the CLB to deal with the matter pending in the High Court,

does not arise. Under these circumstances, we do not consider that there has been any violation of the provisions of Section 68."

10. I may also note at this stage that the respondents No. 1 and 3 to 7 had also filed appeal challenging the aforesaid findings. The said appeal being Co. A. (B) No. 5/95 was barred by time but was not accompanied by any application for condensation of delay. When that appeal came up for hearing, the counsel expressed his desire to withdraw the same and the appeal was dismissed as withdrawn. Thereafter the respondents filed CA No. 1224/99 in these proceedings making a prayer to the effect that contents of Co. A. (B) No. 5/95 be treated as cross-objections in this appeal filed by the appellants herein. After hearing the arguments on this application at length, vide detailed order dated 7th November 2003 application was dismissed on the ground that no such cross-objections were maintainable as the company appeal filed u/s 10F of the Companies Act is governed by the express provisions of the CPC including Order 41 Rule 22 and, Therefore, the cross-objections were not maintainable. While dismissing the application, this Court also observed that "it is also held that in the absence of specific rules governing practice and procedure for hearing of this appeal, the same shall be guided by suitable and appropriate practice and procedure prescribed for hearing appeals in the High Court which shall be devised at the time of hearing of the appeal". The respondents herein filed appeal against the aforesaid order before the Division Bench which was also dismissed. At the time of hearing I was told that SLP had been filed. Although leave was granted but there was no stay of the proceedings. Therefore, this appeal was heard.

11. It may also be mentioned that this appeal had earlier come up for hearing on 10th March 2003 when nobody appeared on behalf of the respondents. After hearing the counsel for the appellant order was passed remitting back the matter to the CLB. This order was however recalled on 6th August 2003 on application filed by the respondents giving reason for non-appearance on 10th March 2003. On 24th November 2004 again when the matter was called out for hearing nobody appeared for the respondents and order dated 10th March 2003 was reiterated. Again on application filed by the respondents the aforesaid order was recalled on 3rd May 2005 and appeal was heard afresh on merits when both the counsel made their submissions and also filed written submissions.

Therefore, uninfluenced by the earlier order dated 10th March 2003 as well as the order dated 24th November 2004 on the basis of submissions made by the parties I am deciding this appeal.

12. It is apparent from the factual narration recorded above, that the order dated 10th September 1996 passed by this court permitting the appellants herein to withdraw the company petition filed in this Court, is the bone of contention. This order reads as under:-

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

to move the Company Law Board u/s 397 and 398. Subsequent to the amendment, all such matters are being filed there although the petition filed prior to amendment are especially save by the amending act. I allow the request of the counsel, which is not opposed by the opposite counsel for 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."

13. It is clear from the aforesaid order that appellants wanted to move the CLB in view of subsequent amendment in the Companies Act. This request was allowed as the counsel for the respondent did not oppose the prayer of the appellants to withdraw the petition. However, at the same time the respondents reserved their right to contest the petition, when filed before the CLB, by raising any plea that may be available to them under law. Therefore, while on the one hand this Court allowed the appellant to file the petition before the CLB and Therefore, appellants were entitled to file such a petition before the CLB, it was also open for the respondents to contest the same on whatever grounds available to them under law. The observations of the CLB in the impugned order, Therefore, to the extent that it was not a petition transferred from the High Court to the CLB but was a fresh petition before the CLB which was maintainable in view of the provisions of Section 68 of the Amendment Act is correct. Once his position is accepted, I am afraid that the findings of the CLB that the appellants indulged in forum shopping would not be a proper finding. The appellant, while seeking permission to withdraw the petition filed in this Court, had specifically expressed his intention to approach the CLB and on this ground the appellant wanted to withdraw the petition filed in the High Court. The petition was dismissed as withdrawn giving specific liberty to the appellants to move the CLB. The respondents had no objection also for withdrawal of the petition. If, in these circumstances, petition is filed before the CLB, same could not be dubbed as "forum shopping". No doubt, on filing such a petition the respondents were within their rights to contest the same by raising any plea that was available to them under law. Therefore, they could have taken up the plea of limitation, non-maintainability of the petition on the ground that such a petition is not maintainable on the same cause of action after its withdrawal etc. However, by no stretch of imagination it could be dismissed on the ground that move of the appellant amounted to "forum shopping." The CLB as, it seems, totally misunderstood the phrase "forum shopping/jurisdiction shopping."

14. Similarly, the view of the CLB that petition suffered from delays and latches is misconceived and erroneous. It is pointed out at the cost of repetition that the CLB had itself held that law of limitation is not applicable to proceedings u/s

397/398 of the Companies Act. Thus, no limitation period is prescribed for filing such petitions. However, that does not mean that the petitioner should approach after long delay. If there are inexplicable delay and latches in approaching the CLB be fling such petition and alleging acts of oppression and mismanagement at a belated stage, the CLB can refuse to entertain such a petition on the ground of delays and latches. While there is no quarrel on this principle, the CLB, it appears, has again not understood the scope and import of "delays and latches" as a ground to dismiss the petition. It is not merely approaching the Court/CLB after inordinate delay that such a petition has to be dismissed. It is only when the petitioner has not been able to satisfactorily explain the delay that the Court would refuse to interfere. It is a self-imposed limitation on the exercise of discretionary powers, namely, even when there is no specific limitation, the Court may refuse to exercise its discretionally powers where the petitioner is guilty of latches or undue delay for which there is no satisfactory Explanation. Delay is not an absolute bar for dismissing the petition. Petitioner is not to be dismissed where the delay is explained (See *The State of Rajasthan and Another Vs. Karamchand Thappar and Bros.,*). Petition is also not required to be dismissed where the delay has been explained by the party raising the ground of delay (See *Santosh De Vs. Archana Guha and others,*).

Thus, delay implicate would not be a ground to dis-entitle the petitioner to have his petition decided on merits. It is only when there is unexplained and unreasonable delay that would entitle the CLB not to exercise its jurisdiction. In the present case, the CLB has not considered this aspect at all. Merely on the ground that the petition is filed after few years from the alleged acts of oppression and mismanagement (if one is to ignore the pendency of the petition in the High Court), the CLB clearly erred in straightaway dismissing the petition on the supposition that delay was inordinate.

15. When we discuss the question of delay and latches what is to be examined is as to whether the person approaching the Court was sleeping over his right and was negligent in pursuing the remedy the real test to determine delay is that the lapse of time is not attributable to any latches or negligence on the part of the petitioner. The test is not the physical running of time. Where the circumstances justifying the conduct exist, petition cannot be dismissed on the sole ground of latches. In the present case the CLB glossed over this important factor while considering this question. It was a case where the appellants had filed a petition in this Court in the year 1990 complaining of the acts of oppression and mismanagement. This petition was pending till 1996 when it was allowed to be withdrawn vide order dated 10th September 1996 with specific permission to the appellants to file the petition before the CLB. One has also to bear in mind the contentions of the appellants herein that in the said petition this Court had appointed a Referee on the joint request of the parties. As per the petitioners, the respondents used dilatory tactics and on one pretext or another requested for adjournments and further that when the Hon"ble Referee was about to pass final order, the respondent filed an application that they did not have any

confidence in the said Referee which led the Referee to pass order dated 22nd July 1995 referring the matter to the High Court and in the process the respondent wasted more than three years. The delay is caused on account of the respondent and, Therefore, the appellants could not be blamed for delay. The dismissal of the petition filed by the petitioner on the ground of delay and laches, in the circumstances of this case, also cannot be sustained.

17. These are the only two grounds on which the CLB dismissed the petition filed by the appellants herein. When both the grounds are unsustainable the consequence is to set aside the impugned order and remand the case back to the CLB for fresh disposal. I may point out that the respondents herein challenged the maintainability of the petition on some other grounds, namely,:

(A) After withdrawal of the petition from this Court, no such petition is maintainable before the CLB on the same cause of action (even when permission was granted by the High Court as the respondents are also given right to contest the petition by raising any plea available to them under law);

(B) Petition was also not maintainable in view of Suit No. 398/90 filed by Sh. A.P. Jain, which is pending in this court and the said suit seeks enforcement of family arrangements dated 26th September 1983, 21st September 1983 and 22nd July 1984.

(C) In the family settlement dated 2nd July 1984 A.P. Jain group has transferred his entire group shareholding and management to B.R. Jain group. If the decree is passed in favor of the appellants herein in the said suit, nothing would survive in the present petition.

As these issues are not decided by the CLB, it would be open for the respondents to press these issues and get the determination thereon.

17. This appeal is accordingly allowed. The impugned order dated 27th July 1998 is hereby set aside and the matter is remanded back to the Company Law Board for disposal in accordance with law. No costs.

18. Parties shall appear before the Company Law Board on 8th August 2005.