

(2015) 03 CAL CK 0024

In the Calcutta High Court

Case No : A.P.D. No. 138 of 2014 and C.S. No. 141 of 2009

Shyama Saran Bhalotia and Others

APPELLANT

Vs

Fortune Enterprises Private Limited and Others

RESPONDENT

Date of Decision : 31-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 2 Rule 2, Order 7 Rule 11
Companies Act, 1956 — Section 397, 398
Court Fees Act, 1870 — Section 10, 11

Citation : (2015) 5 CHN 427

Hon'ble Judges : Samapti Chatterjee, J.; Ashim Kumar Banerjee, J.

Bench : Division Bench

Advocate : Jayanta Kumar Mitra, Senior Advocate, Sarvapriya Mukherjee, Aniruddh Poddan and Anurag Bagaria, for the Appellant; S.N. Mookherjee, Senior Advocate, Ratnanko Banerjee, Krishnaraj Thakkan, R. Sarkar and B. Israil, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Ashim Kumar Banerjee, J.

BACKDROP

1. 6, Wood Street, Kolkata is an immovable property comprising of two-storied building with an adjoining open space. M/s. Tarini Infrastructure Pvt. Ltd. was the tenant in respect of the open space, whereas the building was let out to various tenants who would be described hereinafter as "Mahensarias".

2. One Nirmal Chandra Dhur was the owner of the said premises in question. In 1992, Dhur granted a lease of the building in favour of Essem Enterprises Pvt. Ltd. subject to the existing tenancies. By a separate lease the open space was let out to Fortune Enterprises Pvt. Ltd. for a period of 50 years. Fortune was controlled by Mahensarias. Thus, Mahensarias became the lessee of the building whereas Fortune became the lessee of the open space. In 1998, Shyam Sunder Shah, the defendant No. 2, approached Mahensarias and Kankani, the plaintiff

No. 2 for development of the said property. The parties agreed Kankani, Mahensarias and Shah would jointly develop the property in partnership. It was agreed Mahensarias and Kankani would jointly hold 50% shares in Fortune whereas the rest 50% would be retained by Shah. The parties entered into a subsequent agreement wherein the shareholding ratio was changed. Mahensarias and Kankani, the plaintiff No. 2 became the owner of 69.15% share and balance 30.85% would belong to Shah and his associates. The parties had fallen out. In 2002, Mahensarias wanted to leave. Mahensarias sold their shares in favour of Shyama Saran Bhalotia, the plaintiff No. 1. Although the defendant No. 1 was a limited Company it was closely held by two groups. In terms of the agreement dated September 23, 1998 Bhalotia and Kankani jointly held 69.15% whereas the other group held 30.85%. There were series of litigations between the parties on the development of the property. We need not deliberate on the same.

PRESENT LIS

3. The present suit being C.S. No. 141 of 2009 was filed by Bhalotia and Kankani as against Fortune Enterprises Pvt. Ltd. and its controlling shareholders inter alia praying for the following reliefs:-

"The plaintiffs pray for leave under Order I and Rule 8 and Order II Rule 2 and under Clause 12 of the Letters Patent, 1865 and seek:

- a) Decree for Rs. 7,71,250/- as pleaded in paragraph 24 against the defendants No. 1.
- b) Scheme for administration of all the assets of defendant No. 1 be framed ensuring fair and equitable representation of the plaintiffs in the management of defendant No. 1.
- c) Investigation into dealings and conduct of defendant Nos. 3 to 6 in relation to the assets and management of defendant No. 1.
- d) Decree for accounts of the dealings with the assets and properties of defendant No. 1 and decree for such sum against defendant Nos. 3 to 6.
- e) Declaration that the plaintiff No. 1 and 2 at all material times were and still are directors of the defendant No. 1 and members of the Board of Directors of the defendant No. 1.
- f) Declaration that the issued, subscribed and paid-up share capital of the defendant No. 1 is Rs. 36,15,000/- divided into 36150 equity shares of Rs. 100/- each.
- g) Declaration that the shareholders of the defendant No. 1 were and are as mentioned in Paragraph 14 herein.
- h) Declaration that the purported shareholding shown to have been allotted to the defendant Nos. 18 to 22 are null and void, bad, illegal and of no effect.
- i) Declaration that no Annual General Meeting or General Meeting of the

defendant No. 1 had been convened or held on September 28, 2006 and March 8, 2007 respectively.

j) Declaration that all business alleged to have been transacted in the general meeting of the defendant No. 1 allegedly held on March 8, 2007 are sham, bad, illegal, null and void.

k) Decree directing the defendants to deliver up the minutes and records in respect of the annual general meeting claimed to have been held from September 28, 2006 so that the same be adjudged void and be cancelled.

l) Declaration that the purported meetings of the Board of Directors of the defendant No. 1 held on March 8, 2007 is bad, illegal and null and void.

m) Perpetual injunction restraining the defendant Nos. 3, 4, 5 and 6 and each of them from holding themselves out or representing themselves to be or acting or functioning as directors of the defendant No. 1 and/or taking any part of any kind or manner in the business of the defendant No. 1.

n) Perpetual injunction restraining the defendant Nos. 18 to 22 from holding themselves out or representing themselves as shareholders of the defendant No. 1 and exercising any right as shareholders of the defendant No. 1.

o) Perpetual injunction restraining the defendants and each of them from giving any or further effect to any resolution of the Board of Directors of the defendant No. 1 claimed to have been held from September 28, 2006.

p) Perpetual injunction restraining the defendants and each of them from giving any effect or further effect to any resolution of any meeting of any members of the defendant No. 1 held from September 28, 2006.

q) Perpetual injunction restraining the defendants either by themselves or through their respective men, servants, agents, assigns or howsoever otherwise from obstructing and/or preventing and/or interfering with the rights of the plaintiffs and/or their nominees from participating in the day-to-day business and management of the defendant No. 1 and/or from having any access to the assets and properties including the registered office of the defendant No. 1.

r) Mandatory injunction direction the defendant No. 2 to 22 and each of them to deliver up and/or hand over possession of all and any records and papers and documents concerning and/or relating to the defendant No. 1 so that the same may be delivered up and cancelled.

s) Perpetual injunction restraining the defendants from opening or operating any new bank account or operating any existing bank account of the defendant No. 1 in any manner whatsoever.

t) Perpetual injunction restraining the defendants from acting up or giving any effect to the purported forms and all other papers or documents and/or returns filed with the Registrar of Companies, West Bengal from September 28, 2006.

u) Perpetual injunction restraining the defendants either by themselves or through their servants, agents, assigns or howsoever otherwise from in any way selling or transferring or dealing with or disposing of or encumbering or parting with possession of any asset or property of the defendant No. 1 or in favour of any party whatsoever.

v) Perpetual injunction restraining the defendants, each of them by themselves or otherwise howsoever from convening and/or holding or conducting any General meeting or Board meeting of the defendant No. 1 or from increasing or altering the authorized and/or paid-up share capital of the defendant No. 1 in any manner whatsoever.

w) If necessary, the statutory books of accounts and other papers, documents and records of the defendant No. 1 be suitably rectified to show a true and correct affairs of the defendant No. 1.

x) Declaration that the defendants are guilty of misfeasance and breach of trust in relation to conduct and affairs of the defendant No. 1 and an enquiry be made into the damages suffered by the plaintiffs on account of such wrongful acts and a decree for such sum against the defendants as may be determined upon appropriate enquiries.

y) For the purposes aforesaid, all necessary accounts, enquires and directions be made as to this Hon''ble Court may deem fit and proper.

z) Interim interest and interest on judgement.

aa) Injunction

bb) Attachment

cc) Costs

dd) Further and other reliefs."

4. Simultaneously with the filing of the suit several interlocutory applications were made. We are concerned with the application for rejection of the plaint filed by the defendant No. 1 under Order VII Rule 11 of the Code of Civil Procedure, 1908.

5. The defendant No. 1 Fortune Enterprises Pvt. Ltd. filed the said application inter alia contending, the plaint did not disclose any cause of action as against them. According to defendant No. 1, they were not party to the joint venture agreement that would give right to the plaintiffs in the property in question. The defendant No. 1 had nothing to do with the same.

6. The plaintiffs objected to the said prayer by contending, it was nothing but a joint venture agreement where two groups of share holders agreed to have the joint venture through the defendant No. 1. They would contend, the suit was in effect for management, administration and control of the defendant No. 1 that the minority shareholders wrongfully held to the exclusion of the majority. It was

in effect a suit against the delinquent shareholders and not the company itself. Hence the suit was maintainable.

7. In reply, the defendants would contend, the agreement would relate to interest in the asset of the Company and not on its shares. Hence, it cannot be said to be derivative action of the shareholders.

JUDGEMENT AND ORDER IMPUGNED

8. The learned Judge observed, the suit was for formation of a scheme to administer the assets as well as cancellation of increase of share capital by which the majority became the minority. His Lordship observed, in the guise of framing of scheme of administration of assets the plaintiffs wanted to bypass the provisions of the Companies Act. Hence the plaintiffs ought to have restricted themselves to a derivative action. This would tantamount to dealing with the asset of the Company without it being a party to the agreement under which the plaintiffs would claim. His Lordship observed, the plaintiffs sought to set aside some of the Board resolutions but the prayer for administration in the light of the prayer for declaration was misdirected. Both prayers could not be allowed at a time. The plaintiffs did not abandon the inconsistent relief that they claimed. Moreover, the suit would suffer from misjoinder of different causes of action. Hence the suit in its present form could not be entertained.

9. Being aggrieved, the appellant Bhalotia and Kankani preferred the instant appeal that we heard on the above mentioned date.

CONTENTIONS

10. Mr. Jayanta Kumar Mitra, learned Advocate General, appearing for the appellant would contend, the learned Judge misconstrued the suit. His Lordship misunderstood the contention of the plaintiffs/appellants to the effect, the suit was for having the control of the Company. Two groups of share holders were fighting for the control of the Company. The Companies Act did not create any bar in filing a civil suit for such action. He would rely upon three decisions of this Court:-

1. The Asansol Electric Supply Company and Others Vs. Chunilal Daw and Others reported in 75 Calcutta Weekly Notes Page-704,

2. Pradip Kumar Sarkar and others Vs. Luxmi Tea Company Limited and others reported in (1990) 67 Company Case Page-491,

3. Castron Mining Ltd. and Ors. Vs. Parameshwar Kumar Agarwalla and Ors. in F.M.A.T. No. 2462 of 2005 With C.O. No. 2672 of 2005,

to support his contention.

11. On derivative action, he would rely upon a decision in the case of Dr. Satya Charan Law and others v. Rameshwar Prosad Bajoria and others reported in All India Reporter (37) 1950 Federal Court 133. The decision would suggest, when

there was a wrong done to the Company the action should prima facie be brought by the Company itself. It also observed that ordinarily the Company would be a proper plaintiff in a case where the wrong was done to the Company.

12. He would contend, it was not in that sense a derivative action. It was a fight between two groups for having the control of the Company without disturbing the Company.

13. Hence, the suit could not be dismissed on the ground, the Company not being a party to the agreement plaintiff would have no cause of action as against the said defendant.

14. Par contra, Mr. S.N. Mookherjee, learned Senior Advocate, would submit, plaintiff did not disclose any cause of action as the Company was not a party to the agreement. He would agree with the learned Advocate General, the Learned Judge erred in holding the suit not maintainable as barred by the Company law. He would however contend, the defendant No. 1 was admittedly not a party. Hence the suit should be dismissed, at least, as against the defendant No. 1. He would distinguish the Federal Court decision by contending, the defendant No. 1 did not cause any breach to the agreement. Hence, the suit as against it should be dismissed. He would rely upon the Apex Court decision in the case of Shanti Prasad Jain Vs. Kalinga Tubes Ltd., and this Court decision in the case of Narendra Kumar Berlia and others Vs. Om Prakash Berlia and others reported in 2011 Volume-III Calcutta High Court Notes Page-147.

15. On the maintainability of the appeal, Mr. Mookherjee would contend, the appeal was initially filed as appeal from order whereas it should be appeal from decree and appropriate stamp duty should be paid. After being pointed out, the appellants did not rectify their mistake. Subsequently, the Division Bench permitted them to continue with the appeal upon deposit of a sum of Rs. 30,000/- reserving the liberty to the respondents to urge the issue of maintainability. Accordingly, he would be entitled to pray for dismissal of the appeal. In this regard, he would rely upon the Apex Court decision in the case of Buta Singh (Dead) by L. Rs. Vs. Union of India, and this Court decision in the case of Srimati Saidunnessa Vs. Tejendra Chandra Dhar and Ors. reported in 44 Indian Cases Page 398.

16. In reply, Mr. Mitra would contend, the learned Judge misread the plaintiff and misunderstood the same. It was a dispute simpliciter between two groups. Company was a necessary party. Hence, the Company was made party. No relief was directly prayed for as against the said defendant. He would admit, prayer (a) of the plaintiff asking for money decree would be as against the defendant No. 2 and not the defendant No. 1. It was a typographical mistake. He would distinguish the Calcutta decision cited by Mr. Mookherjee by contending, it was not a case of continued oppression. Hence, proceeding under Sections 397 and 398 of the Companies Act would not be apt. It was, in effect, a breach of a contract and two groups of individuals and corporates would be fighting for

control of the defendant No. 1.

17. On the issue of court fees, he would rely upon Sections 10 and 11 of the Court Fees Act to suggest, any omission par se would not be fatal as the Court could always direct to pay the requisite court fees. He already deposited a sum of Rs. 30,000/- in terms of the order of the Division Bench. The department would value the appeal and appropriate the said sum towards court fees. He would undertake to pay the balance, if any, found to be due and payable in this regard.

18. He would pray for setting aside of the judgement and order of the learned Single Judge.

OUR VIEW

19. We have considered the rival contentions and the precedence cited at the Bar. Mr. Mookherjee would make our task easier when he would concede, the suit was not barred by the Company Law as erroneously held by His Lordship. Hence we need not deliberate on the issue.

20. On the question of derivative action we would rather fall back on the Federal Court decision.

21. It is true that the defendant No. 1 was not a party to the agreement. Hence the prayer (a) cannot be granted as against the defendant No. 1. Mr. Mitra, in his usual fairness, would admit so, he would be at liberty to correct the mistake in accordance with law.

22. Question would remain, whether the suit could be proceeded with keeping the defendant No. 1 a party to it. A defendant can be brought as a necessary party although no relief is claimed as against the said defendant. It is a fight between two groups for having the control over the Company and in effect the property in question. Which group would succeed in the fight, would depend upon the final adjudication. The defendant No. 1 filed the application for under Order VII Rule 11 that would only relate to the said defendant. It is an admitted position, the said defendant was not a party to the agreement. However, it would still be a necessary party as its control is in question. We have examined the prayers of the plaintiffs. Except the first prayer, no other prayer would hurt the defendant No. 1. We make it clear, the prayer (a) cannot be granted as against the defendant No. 1. The other prayers could only be allowed as against the other defendants without touching upon the interest of the defendant No. 1. We abundantly make it clear, the other prayers, if granted, would only be restricted to the share holding and control of the defendant No. 1 and not the defendant No. 1 itself. We say so as the defendant No. 1 was never a party to the agreement.

23. With the above observations, we allow the appeal and set aside the judgement and order of the learned Single Judge impugned herein.

24. The appeal is disposed of without any order as to costs.

Samapti Chatterjee, J:

I agree.