

(2013) 04 MAD CK 0156
In the Madras High Court
Case No : Comp. Appeal No. 19 of 2009

S.P. Nachiappan and N. Murugappan

APPELLANT

Vs

M/s. AEE Castings Limited, S. Venkatesan and Mrs. V.
Jayashankari

RESPONDENT

Date of Decision : 10-04-2013

Acts Referred:

Companies Act, 1956 — Section 397, 398, 402

Citation : (2013) 115 CLA 394 : (2013) 179 CompCas 1

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Advocate : S. Satish, for the Appellant; N.S. Sivakumar, for the Respondent

Final Decision : Dismissed

Judgement

Vinod K. Sharma, J.—This appeal is directed against the order dated 24.12.2012 passed by the learned Company Law Board, Additional Principal Bench, Chennai in C.P. No. 45 of 2007 filed under Sections 397, 398 and 402 of the Companies Act, 1956. M/s. AEE Castings Limited was incorporated on 05.11.1942 under the name and style M/s. The English Cycle and Motor Importing Company Limited and its name was subsequently changed to Associated Engineering Enterprises and Castings Limited and thereafter to M/s. AEE Castings Limited on 12.04.2006.

2. The appellant no. 1 owned 2100 equity shares out of issued, subscribed and paid up capital of 4200 of equity shares of Rs. 500/- each. The appellant no. 2 is the son of appellant no. 1 in whose favour endorsement has been made to transfer 40 equity shares, but transaction has not yet been completed. The respondent no. 2 also holds 2100 equity shares and has endorsed transfer of 274 equity shares in favour of respondent no. 3, his wife. All the four constituted Board of Directors of the company.

3. The case of the appellants before the Company Law Board was, that inspite of holding half of the equity share capital of the Company, they were sidelined by

the respondent nos. 2 and 3 and did not allow the appellants to exercise their rights as shareholders.

4. It was pleaded, that 2nd and 3rd respondents have been using facilities of respondent company for undertaking job works for their own personal gain to the total detrimental of respondent company and appellants, inspite of the repeated protest and warnings by the appellants.

5. That the receipts from the job work undertaken by respondent nos. 2 & 3 by using the facilities of respondent no. 1, were diverted and misappropriated by respondent nos. 2 and 3 directly or through the Bank account of concerns owned by 2nd and 3rd respondents, and their family members.

6. It was the case before the learned Company Law Board of the appellants, that the electricity bill of respondent no. 1 was running into lakhs each month, but there is no corresponding credit. The allegations of misappropriation and diversion of funds of the company were levelled against respondent nos. 2 and 3, though repayment of loans from Company was guaranteed by personal guarantee of appellants.

7. The Bankers of respondent no. 1 had lodged a complaint with the Deputy Superintendent of Police, against 2nd respondent for this illegal conduct. On these allegations, it was alleged that respondent nos. 2 and 3 have failed to manage the 1st respondent company and were conducting the affairs of the 1st respondent company in a manner, which is prejudicial to the interest of the 1st respondent company and oppressive to the interest of the appellants, who are members and directors of the 1st respondent company.

8. It was submitted, that 2nd and 3rd respondents also stalled the appellants from participating in the management of the 1st respondent company and that the 1st respondent is exposed to demands from various statutory authorities and labour claims.

9. The 2nd respondent even tried to induct his mother as Director without the consent of the appellants. The other apprehension of the appellants was that respondent no. 2 may try to misuse the unused blank cheques of the 1st respondent company, which have been signed by the appellants as joint signatory.

10. The Bankers of respondent no. 1 have also recalled the credit facilities and advances made to the respondent company and issued a notice under SARFAESI Act, 2002.

11. The stand of the appellants before the learned Company Law Board was, that on receipt of notices from Bank, it came to their notices, that the respondents were taking steps to buy out the respondent company at throw away price.

12. Legal notice issued by the appellants was not even replied to. It is admitted by the appellants, that on 06.02.2007, the Bankers took over the possession of

the properties of the company and were taking steps to auction it to recover the amount due.

13. The appellants have also been included in the list of chronic defaulters along with the respondents. Allegations are also that 2nd respondent created bogus lease agreement in respect of properties of the 1st respondent in favour of his proprietary concern S.V. Forgings.

14. It was also pleaded, that before the learned Debt Recovery Tribunal, it was revealed that 2nd respondent filed Form-32, showing that the appellant no. 1 had resigned as Director. The signatures of appellants were forged, therefore, a legal notice was issued to respondent no. 2. The resignation was forged, as the resignation is dated 11th December, 2006, whereas notice was issued to the appellants on 14th December 2006, to convene meeting of Board of Directors on 23rd December 2006. In the agenda of the meeting, there was no whisper about the resignation.

15. Therefore, a legal notice was issued to respondent nos. 2 & 3 on 18th December, 2006 prior to receipt of noticed dated 14th December 2006 with a request to postpone the meeting to 10.01.2007. The appellants were never allowed to exercise their rights as shareholders and Directors in true spirit, and have been used by the 2nd and 3rd respondents only to guarantee the borrowings of the 1st respondent company from the banks, though the funds have been siphoned away by the 2nd and 3rd respondents.

16. The company petition was contested by the respondents before the learned Company Law Board, on the plea, that 1st appellant was not a shareholder of the company, therefore, not entitled to maintain the petition. However, this preliminary objection was rejected by the learned Company Law Board vide order dated 20.04.2009.

17. The learned Company Law Board however held, that the act of oppression and mismanagement set out in the petition was not made out.

18. The prayers made by the appellants before the learned Company Law Board were as under:

i. To appoint an Inspector/Investigator to investigate into the affairs of the Company;

ii. To appoint a Chartered Accountant to scrutinize the books of accounts maintained at the factory premises and the affairs of the Company and submit their report to this Hon"ble Board;

iii. To hold the 2nd and 3rd Respondents liable for the losses suffered by the 1st Respondent Company as ascertained by the persons appointed by this Board and consequently direct the 2nd & 3rd Respondent to pay the said sums to the 1st Respondent Company;

iv. To hold the 2nd and 3rd Respondent liable for all violations of the 1st

Respondent Company under the Companies Act 1956;

v. To grant permanent injunction restraining the 2nd and 3rd Respondent from alienating the immovable and movable assets of the 1st Respondent Company;

vi. To grant permanent injunction restraining the 2nd and 3rd Respondent from obtaining the title documents in respect of the immovable property of the 1st Respondent Company from the bankers namely Indian Overseas Bank, Maraimalai Nagar Branch;

vii. To grant permanent injunction restraining the 2nd & 3rd Respondent from creating leasehold rights/mortgages or any sort of encumbrances in respect of the immovable and movable assets of the 1st Respondent Company;

viii. To hold the 2nd & 3rd Respondent personally liable for the losses suffered by the 1st Respondent Company and for the funds siphoned off by them from the 1st Respondent Company and direct them to make good the loss;

ix. To declare as null and void the Form No. 32 filed vide SRN No. A09505512 dated 31.01.2007 for the alleged resignation of the 1st Petitioner using forged signature.

19. On consideration of the pleadings and the argument raised before the learned Company Law Board, the objection of the respondent nos. 2 and 3 with regard to the maintainability of the petition was decided against the respondents.

20. It was held by the learned Company Law Board, that appellant no. 1 prima facie holds 2100 shares, therefore, was entitled to maintain the petition. But the 2nd respondent was not the shareholder of the company.

21. Similarly, finding was recorded that respondent no. 2 holds 50% shareholding. After holding that the appellant no. 1 was entitled to maintain the petition, learned Company Law Board examined the following issues:

I. The proceeds of the job work undertaken by the 2nd and 3rd Respondents using the facilities of the 1st Respondent Company were swindled by the 2nd and 3rd Respondents;

II. The electricity bill of Respondent No. 1 Company is running into lakhs of rupees each month;

III. The Respondent No. 2 & 3 swindled and diverted the funds of Respondent 1 Company and the Bankers of the Respondent No. 1 Company have lodged a complaint with the Deputy Superintendent of Police against the 2nd Respondent for his illegal conduct;

IV. The Respondent No. 2 & 3 stalled the petitioners from participating in the management of the 1st Respondent Company;

V. The 2nd Respondent with malafide intentions of having majority in the Board of the 1st Respondent Company tried to induct his mother without the consent of

the petitioners;

VI. The Bankers of the 1st Respondent Company had taken possession of the properties of the Company and taking further steps to auction the properties;

VII. The Respondent No. 2 had filed Form No. 32 for alleged resignation of the 1st Petitioner by forging the signature of the Petitioner;

VIII. The Respondent No. 2 and Respondent No. 3 are trying to sell the assets of the Company and planning to divert the funds to their sister concern;

IX. The 2nd and 3rd Respondents are not at all maintaining any records properly.

22. On question no. 1, the learned Company Law Board recorded a positive finding, that the job work undertaken by the 2nd and 3rd respondents by using the facilities of the 1st respondent company was utilized for paying the bank's dues to comply with the conditional orders passed by the Debt Recovery Tribunal and the appellate Tribunal.

23. It was further held, that proceeds were not sufficient to comply with the said orders, therefore, the 2nd respondent had pooled in his personal money to safeguard the interests of the company. It was held, that though the respondents had used the facilities of respondent company, the proceeds of the job work were paid to the Bank and not transferred to their personal accounts. Allegations against respondents therefore were rejected.

24. Learned counsel for the appellants vehemently contended, that once finding was recorded, that the facilities of the Company was utilized to do the job work, then the allegations stood proved. It was not open to the learned Company Law Board to dismiss the petition, as it was proved on record, that the 2nd and 3rd respondents were acting in a manner prejudicial to the interest of the company.

25. This contention of the learned counsel for the appellants cannot be accepted. There is nothing on record to show that receipts from job work by using the facilities of the 1st respondent company were not utilized for the benefit of the company, nor the appellants were able to prove whether this amount was shown as debt against the company to claim oppression or mismanagement.

26. Once the benefit of job work was utilized for the benefit of company to discharge its liability, it cannot be said, that the respondents acted in a manner prejudicial to the interest of the company or that it amounts to oppression of the minority shareholders.

27. As regards the allegations of electricity bill, learned Company Law Board has held, that the electricity bill dated 31.12.2005 showed, the net total of Rs. 2,70,495/- (Rupees Two Lakhs Seventy Thousand Four Hundred and Ninety Five only). The learned Company Law Board held, that the appellants produced only one bill, but they have not produced the bill prior to December, 2005 or for the subsequent period to show, if any loss was caused to the company by using the electricity. The learned Company Law Board therefore held, that in absence of

any material to show, that there was any loss to the respondent company, these allegations also deserved to be rejected.

28. The contention of the learned counsel for the appellants was, that this finding cannot be accepted, as no explanation is forthcoming with regard to the bill dated 31.12.2005, which showed the net total of Rs. 2,70,495/-(Rupees Two Lakhs Seventy Thousand Four Hundred and Ninety Five only), therefore, merely because other bills were not produced could not be the ground to reject the stand of the appellants.

29. On consideration, I find no force in this contention of the learned counsel for the appellants. Merely because the bill for Rs. 2,70,495/-(Rupees Two Lakhs Seventy Thousand Four Hundred and Ninety Five only) was raised, cannot lead to conclusion, that the electricity was misused, in absence of any substantial documentary proof of its misuse. It may be noticed here, that a positive finding of fact has been recorded, that the money earned by job work was paid to discharge debts of the company. This shows, that the funds were utilized for the company, thus, cannot be said that the electricity of respondent company was misused by the respondent nos. 2 and 3.

30. The third allegation of the appellants was, that respondent nos. 2 and 3 diverted the funds of respondent no. 1, and a complaint in this regard was made to the Deputy Superintendent of Police.

31. This contention was rightly rejected, as it was found to be baseless and filed at the instance of appellants therefore, no action was taken on the complaint. Rather it was the 1st appellant, who had given the contract of factory building to his wife, and paid a sum of Rs. 42 Lakhs as advance. But no construction was commenced by the wife of appellant no. 1, nor the advance was returned to the company. The company had lodged a complaint against appellant no. 1 and his wife.

32. Furthermore, these allegations were also subject matter of DRT, therefore could not be the ground to maintain the petition under Sections 397 and 398 of the Act. In the rejoinder, the allegation, that sum of Rs. 42 lakhs given as advance to the wife of appellant no. 1 was not controverted.

33. Therefore, the finding of learned Company Law Board, holding that the allegation of appellants were not proved, does not call for any interference by this Court.

34. As regards the allegation of appellants regarding non participation in the management is concerned, the stand of the respondents was that respondent no. 2 was holding 3541 shares out of 4200 shares in the 1st respondent company and he had also paid the entire sale consideration for the total shares held by the appellant no. 1. It was also pleaded, that appellants continued as Directors of the company till 23.12.2006, when the appellant no. 1 resigned from the Board of Directors and his resignation was accepted. It was proved on record, that the

Board accepted the resignation. The appellant has also not denied receipt of information from the Board, about the acceptance of his resignation.

35. As regards induction of mother of respondent in the Board without the consent of the appellants is concerned, it was held, that this was subject to approval by the Bank. Since the Banks had not accepted the proposal, Mrs. Rajammal was not inducted as Director, therefore, this allegation was also held to be baseless.

36. As regards the allegation of forgery is concerned, finding has been recorded by the learned Company Law Board, that no substantial evidence was led to prove, that the signature was forged. Furthermore, these were presumed to be genuine, for want of rebuttal. In support of this finding, reliance was placed on the judgment of the Hon"ble High Court of Karnataka reported in Mother Care (India) Ltd. Vs. Prof. Ramaswamy P. Aiyar,

37. Even otherwise, this allegation cannot be looked into, as the remedy with the appellants is to challenge this action in appropriate proceedings before the Civil or Criminal Courts.

38. The submission of appellant no. 1 itself shows, that he himself authorized the Bank to take necessary steps for sale of property. The learned Company Law Board did not accept the contention in view of the fact, that respondents took a positive stand, that they did not have intention to sell the assets of the company, therefore, this allegation of the appellants was also not accepted.

39. The stand was also taken that all records of the company were handed over to appellant no. 1, and that the appellant no. 1 did not disclose as to which record was with the respondents. The learned Company Law Board, taking note of reply to the legal notice dated 24.04.2007, recorded a positive finding of fact, that the records were not with the 2nd respondent, therefore, held that the appellants had failed to prove any case for grant of relief.

40. The contention of learned counsel for the appellants, that the finding was recorded in favour of appellants, but the decision has been wrongly given against them, is totally misconceived. The finding of fact recorded by the learned Company Law Board was, that the appellants had failed to prove the allegations, which could entitle them the relief under Sections 397 and 398 of the Companies Act, r/w Section 402.

41. The well reasoned order passed by the learned Company Law Board, does not call for any interference by this Court. No merits. Dismissed. No costs. M.Ps. are closed