

(2013) 09 MAD CK 0209

In the Madras High Court

Case No : Company Appeal No. 18 of 2011

State Bank of India

APPELLANT

Vs

P. Narayanasamy and Others

RESPONDENT

Date of Decision : 17-09-2013

Acts Referred:

Citation : (2013) 5 LW 333 : (2014) 3 MLJ 442

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : Vijay Narayan, for M/s. Ramalingam and Associates, for the Appellant; T.K. Seshadri, for Mr. T.S. Baskar for Respondents-1 to 4, Mr. A.K. Mysamy for Respondents-5 to 8, Ms. T. Surekha for Respondent-10 and Mr. A. Saravanan for Respondent-11, for the Respondent

Final Decision : Allowed

Judgement

V. Ramasubramanian, J.—This is an appeal filed by the State Bank of India, challenging an order passed by the Additional Principal Bench of the Company Law Board in a proceeding u/s 397 read with Section 402 of the Companies Act, 1956, setting aside the sale of certain properties of the Company in question. I have heard Mr. Vijay Narayan, learned Senior Counsel appearing for the appellant, Mr. T.K. Seshadri, learned Senior Counsel appearing for respondents 1 to 4, Mr. A.K. Mysamy, learned counsel appearing for respondents 5 to 8, Ms. T. Surekha, learned counsel appearing for the 10th respondent and Mr. A. Saravanan, learned counsel appearing for the 11th respondent.

2. The brief facts leading to the above appeal, are as follows:-

(a) M/s. Neela Spinning Mills Pvt. Ltd., which is the 5th respondent herein, is a Company which is closely held by the members of the same family.

(b) The respondents 1, 3 and 6 are the sons of one late Palanisamy Naidu. The second respondent is the wife of the first respondent. The fourth respondent is the wife of the third respondent. The 7th and 8th respondents are the wife and

son of the sixth respondent.

(c) In other words, 3 brothers viz., P. Narayanasamy (R-1), P. Govindarajan (R-3) and P. Swathanthirarajan (R-6), jointly have a controlling interest in the affairs of the said Company.

(d) But it appears that family disputes between 2 brothers on the one hand (R-1 & R-3) and the third brother (R-6) on the other hand, led to the respondents 1 to 4 herein, filing a petition in C.P. No. 8 of 2003 on the file of the Company Law Board, alleging oppression and mismanagement.

(e) The said petition C.P. No. 8 of 2003 was filed somewhere in the beginning of the year 2003. But before it was filed, the Board of Directors of M/s. Neela Spinning Mills Pvt. Ltd., which is the fifth respondent herein, passed a resolution on 6.10.2002 to sell a land measuring an extent of acres 9.45 comprised in S.F. No. 311/2 of Veerapandi Village, Tirupur Taluk. Pursuant to the said resolution, a Sale Deed was executed on 22.10.2002, selling the land in favour of a Company by name M/s. Sullur Spinners Pvt. Ltd., which is the 11th respondent herein.

(f) The 11th respondent, in turn, mortgaged the property in favour of the Indian Bank in November 2004, as security for the credit facility availed by a completely different Company by name M/s. Pioneer Feeds and Poultry Products.

(g) Upon coming to know of the sale in favour of the 11th respondent, the respondents 1 to 4, who were the petitioners before the Company Law Board in C.P. No. 8 of 2003, sought the permission of the Company Law Board to challenge the sale by way of a separate suit. The Company Law Board, by its order dated 23.11.2005, granted permission to the respondents 1 to 4 herein, to file a suit challenging the sale. Accordingly, the respondents 1 to 4 herein, filed a suit in O.S. No. 416 of 2006, on the file of the District Court, Tirupur, seeking to declare the Sale Deed executed in favour of the 11th respondent as null and void.

(h) During the pendency of the said suit, the loan due by M/s. Pioneer Feeds and Poultry Products, to the Indian Bank, in respect of which the 11th respondent had offered the property in question as security, was taken over by the State Bank of India from the Indian Bank. Therefore, the 11th respondent passed a resolution on 18.12.2007, creating a mortgage in favour of the State Bank of India, for the credit facility availed by M/s. Pioneer Feeds and Poultry Products. The 11th respondent also gave corporate guarantee and deposited all original title deeds in respect of the aforesaid property with the appellant herein on 25.3.2008.

(i) Thereafter, the borrower viz., M/s. Pioneer Feeds and Poultry Products committed default and became a non-performing asset. Therefore, the appellant initiated measures under the SARFAESI Act, on 15.5.2009 and the 11th respondent sent their objections. Immediately thereafter, the Company Law Board passed an order in C.P. No. 8 of 2003, filed by the respondents 1 to 4 herein, against the other respondents, holding that the respondents 6 to 8 are

guilty of acts of oppression and that therefore, even the sale by the 5th respondent in favour of the 11th respondent was liable to be set aside.

(j) The respondents 10 and 11, who were parties to the proceedings before the Company Law Board, filed an appeal on the file of this Court in Company Appeal No. 30 of 2009. But the same came to be dismissed by the Company Court by the order dated 8.1.2010, on the ground that there was no question of law, requiring adjudication by this Court.

(k) Thereafter, the appellant herein filed an appeal in Company Appeal SR No. 108540 of 2009. But by the time the appeal was filed, the limitation for filing the same was already over. Therefore, the appellant took out an application in M.P. No. 2 of 2010 for condoning the delay of 56 days. But by an order dated 1.12.2010 this court dismissed the condone delay petition.

(l) Challenging the order refusing to condone the delay in filing the appeal, the appellant filed a SLP in SLP(Civil) No. 8636 of 2011. The Supreme Court granted leave and allowed the appeal in Civil Appeal No. 6361 of 2011, by an order dated 5.8.2011. The result is that the delay in filing the appeal was condoned. Thus, the appeal filed by the State Bank of India, which was not a party to the main petition before the Company Law Board, was taken on file.

3. Before proceeding further, it should be pointed out that the respondents 1 to 4 herein allowed the civil suit, seeking to set aside the Sale Deed, dismissed. This is perhaps due to the fact that the relief that they sought in the said suit, was granted by the Company Law Board, by the order which is now under appeal.

4. The grievance of the appellant as against the order of the Company Law Board lies in a very narrow campus. According to the appellant, they had advanced huge monies to the borrower, M/s. Pioneer Feeds and Poultry Products, on the strength of the mortgage created by the 11th respondent herein, which also granted a corporate guarantee. The appellant was not aware of the dispute between the families of two brothers on the one hand and the third brother on the other hand, pending before the Company Law Board. Therefore, it is the contention of the appellant that if they had been impleaded as a party to the proceedings before the Company Law Board, they could have been in a position to convince the Company Law Board that they were bona fide mortgagees, who had no notice of the claim that the respondents 1 to 4 had on the other respondents.

5. Apart from the above, it is the contention of the appellant that in the absence of a prayer for setting aside the sale and in the light of the leave obtained by the respondents 1 to 4 for filing a separate suit for setting aside the Sale Deed, it was not open to the Company Law Board to pass an order, setting aside the sale in favour of the 11th respondent.

6. In response to the above contentions, Mr. T.K. Seshadri, learned Senior Counsel appearing for respondents 1 to 4 submitted (i) that the order of the

Company Law Board had already attained finality with the dismissal of an appeal in C.A. No. 30 of 2009 filed by the respondents 10 and 11 and hence the present appeal is barred by law; (ii) that in a petition u/s 397 read with Section 402 of the Companies Act, 1956, the Company Law Board has ample powers to pass any order that would restore the balance between the majority and the minority; (iii) that once the resolution of the Board of Directors of the 11th respondent dated 22.10.2002 was under challenge before the Company Law Board, all actions taken in pursuance of the resolutions, would follow the very same fate as that of the resolution; and (iv) that in any case, the petitioner has very valuable properties offered as mortgage by the original borrower and hence the Bank will not be left in the lurch.

7. I have carefully considered the rival submissions. The scope of an appeal u/s 10-F of the Companies Act, 1956, is circumscribed only to questions of law. Therefore, I am obliged only to see if there are any questions of law to be decided in this appeal.

8. From the grounds of appeal raised by the appellant in the Memorandum of Appeal, I think the following substantial questions of law arise for the consideration of this Court:-

(i) Whether the Company Law Board, after having granted leave to the parties to the proceedings to institute a civil suit, could have usurped the powers of the Civil Court to find out whether the transfer of right in an immovable property was right or wrong?

(ii) Whether the Company Law Board could have decided the question whether the purchaser was a bona fide purchaser for valuable consideration without notice, in a proceeding that was summary in nature?

9. There are no disputes on facts that I have narrated in paragraph-3 above. Therefore, I can straightaway take up for consideration the two questions of law which I have framed. But before doing so, it is necessary to consider one important issue relating to the maintainability of the appeal, raised by the respondents 1 to 4 herein. The issue of maintainability raised by the learned Senior Counsel for the respondents 1 to 4, revolves around the fact that the very same order of the Company Law Board was confirmed by this Court in an appeal filed by the respondents 10 and 11 in C.A. No. 30 of 2009. Therefore, it is contended by the respondents 10 and 11 that the above appeal is barred by law or at least covered by the decision rendered in the said appeal.

10. It is true that the respondents 10 and 11 came up with an appeal in C.A. No. 30 of 2009 as against the very same order of the Company Law Board. It is also true that the said appeal was dismissed in limine by this Court, by an order dated 8.1.2010.

11. A careful perusal of the order dated 8.1.2010 passed by this Court, dismissing the appeal would show that the respondents 10 and 11 raised only

two questions of law viz., (i) whether the Company Law Board had power to set aside the sale after a lapse of 3 months as contemplated u/s 402; and (ii) whether the Company Law Board was justified in setting aside the sale when an identical issue was pending consideration in a suit.

12. The fact that the above two questions of law were raised in Company Appeal No. 30 of 2009 is recorded in the first paragraph of the judgment of this Court dated 8.1.2010.

13. After recording the questions of law, the learned Judge, who dismissed the Company Appeal, proceeded to narrate the facts leading to the above appeal, in paragraphs 2 to 7. After extracting the facts, the learned Judge chose to dismiss the appeal for the reasons contained in paragraphs 8 and 9. It will be useful to extract those two paragraphs, to see if the dismissal of the above appeal is a bar for entertaining the present one or not. Paragraphs 8 and 9 of the decision dated 8.1.2010, reads as follows:-

8. At the time of argument, learned counsel appearing for the appellants could not make any submission to substantiate any of the allegations raised before this Court. Going through the order passed by the Company Law Board, findings based on material and being pure questions of fact, I do not find any ground to interfere with the order of the Company Law Board.

9. In the absence of any material placed before this Court to sustain the claim made before this Court that the vendors had the necessary authority to effect the sale, I do not find there exists any ground for this Court to interfere with the order of the Company Law Board.

14. From the operative portion of the order of this Court, dismissing the previous appeal, it is seen that this Court did not reject the appeal as devoid of any questions of law worth consideration by this Court. As a matter of fact, this Court did not answer both the questions of law raised in the above appeal, one way or the other. The dismissal of the appeal was substantially on the facts of the case and not on any finding with regard to the questions of law raised.

15. The appellant herein was not a party to the appeal C.A. No. 30 of 2009. The questions of law raised by the respondents 10 and 11 in their appeal, were not answered one way or the other by this Court. Therefore, at the most, the order passed by this Court in the said appeal, would be taken to have put the lid of finality to litigation as against the respondents 10 and 11. It would not either operate as *res judicata* or operate as a decision that could be elevated to the level of *stare decisis* on the points of law raised in that appeal. Hence, the objection to the maintainability of the appeal is rejected. The rejection of the appeal on facts, is also not binding on me, in view of the fact that an appeal u/s 10-F is to be considered only on any questions of law. Since the rejection of the previous appeal was not on the questions of law raised, there is no bar for the appellant herein, who was not a party to the previous proceeding, to maintain the above appeal.

16. Now that the question of maintainability of the appeal is disposed of, let me take up the questions of law arising for consideration. But before doing so, I must deal with one preliminary contention raised by the learned Senior Counsel for the appellant. It is his contention that in the main Company petition, the respondents 1 to 4 did not pray for setting aside any Sale Deed. The reliefs sought by the respondents 1 to 4, who were the petitioners before the Company Law Board, were as follows:-

(a) To declare that the alleged appointment of the fourth respondent as a Director of the Company in the Board Meeting said to have been held on 29.9.2001 is non est. and not binding on the Company and declare that any action taken pursuant to the said alleged meeting should be illegal and in contravention of the provisions of the Act.

(b) To declare that the alleged appointment of the third respondent as a Director of the Company in the Board Meeting said to have been held on 8.3.2002 is non est. and not binding on the Company and declare that any action taken pursuant to the said alleged meeting should be illegal and in contravention of the provisions of the Act.

(c) To declare that the alleged issue of shares of the Company to the third respondent on 8.3.2002 is void and not binding on the Company.

(d) To direct the Company to rectify its register of members correcting the particulars of shares held by the third respondent as a member of the Company.

(e) To declare that the removal of the petitioners 1 & 3 from Directorship of the Company is void, illegal and not binding on the Company.

(f) To declare that the petitioners 3 & 4 (should be 1 & 3) continue to be Directors of the Company.

(g) To declare that the alleged borrowing made by the respondents 2 to 4 from the fifth respondent is not binding on the Company.

(h) To declare that the alleged charge created in favour of the fifth respondent is void ab initio and not binding on the Company; and

(i) To remove the second respondent from the Board of Directors of the Company and consequently from the post of the Managing Director of the Company.

17. Therefore, it was contended by the learned Senior Counsel for the appellant that the Company Law Board ought not to have set aside the sale, when there was not even a prayer to the said effect.

18. But I do not think that the said contention can be upheld. The power of the Company Law Board in a proceeding u/s 398 read with Section 402, are wide enough to mould the relief. As held by a Division Bench of this Court in Syed Mahomed Ali Vs. M.R. Sundaramurthy and Others, , the proceedings under Sections 397 and 398 are not like suits between private parties. The interests of

the Company are paramount in those proceedings and the Court has jurisdiction to pass an order to protect the interests of the Company.

19. In *Bennet Coleman and Co. vs. Union of India* {1977 (47) CC 92}, the Supreme Court also pointed out that the powers of this Court under Sections 398 and 402 are wide enough to enable the Court to appoint an Administrator or a Special Officer or a Committee of Advisers and thereby supplant the corporate management.

20. Again in *Cosmosteels Private Ltd. and Others Vs. Jairam Das Gupta and Others*, , the Supreme Court held that Section 402 confers power upon the Court to grant relief against oppression, inter alia, by providing for the purchase of shares of any of the members by other members. While coming to the said conclusion, the Supreme Court pointed out that the scheme of Sections 397 and 402 constitute a complete Code by itself for granting appropriate relief and that the power conferred thereon is of widest amplitude.

21. Therefore, the fact that the respondents 1 to 4 did not make a prayer before the Company Law Board for setting aside the sale, did not prevent the Company Law Board from setting aside the sale. We may also look at the issue from another angle. Section 397(2) empowers the Company Law Board "to make such order as it thinks fit", in order to bring to an end the matters relating to oppression complained of in an application under sub-section (1). Similarly, Section 398(2) empowers the Company Law Board "to make such order as it thinks fit", to bring to an end the acts of mismanagement.

22. The powers of the Company Law Board while dealing with an application u/s 397 or 398, are enumerated in Section 402. While Clause (g) of Section 402 confers residual powers upon the Company Law Board, Clauses (d) empowers the Company Law Board to terminate, set aside or modify any agreement entered into between the Company on the one hand and the Managing Director or any other Director and the Manager on the other hand.

23. Clause (e) empowers the Company Law Board to terminate, set aside or modify any agreement between the Company on the one hand and any person other than the Managing Director, Director or Manager referred to in Clause (d) on the other hand. Clause (f) of Section 402 specifically empowers the Company Law Board to set aside any transfer, delivery of goods, payment, execution or other act relating to the property made or done by or against the Company, within three months before the date of application u/s 397 or 398, which would, if made or done by or against an individual be deemed in his insolvency to be a fraudulent preference.

24. But Clause (e) of Section 402 makes it clear that no agreement can be terminated, set aside or modified under the said Clause, except after due notice to the party concerned. Therefore, the principles of natural justice appears to be in-built in Section 402(e). That it is so, is confirmed by Section 405, which enables "any other person" who has not been impleaded as a respondent to any

application u/s 397/398, to be impleaded to such a proceeding.

25. Therefore, it is clear that the Company Law Board is entitled to set aside a transfer or agreement, but only after hearing a party concerned. Hence, the fact that there was no prayer for setting aside the transaction, is no ground to conclude that the Company Law Board could not have set aside the transaction. As I have pointed out earlier, applications under Sections 397 and 398 are only in the nature of complaints about oppression and mismanagement. Consequently, the power conferred under Sections 397 and 398 are for "making such order as the Court thinks fit". Therefore, it is not necessary for the Company Law Board to confine itself to the reliefs prayed for and to reject a complaint of oppression and mismanagement on the sole ground that there was no prayer of a specific nature.

26. Having disposed of the question of maintainability and the preliminary contention raised by the appellant, let me now take up the two questions of law raised. The first question of law is as to whether the Company Law Board could have usurped the powers of the Civil Court, to find out whether the transfer of right in the immovable property was correct, especially after having granted leave to the parties to institute a civil suit. The second question of law is as to whether the Company Law Board could have decided the question whether the purchaser was a bona fide purchaser for valuable consideration, without notice in a proceeding that was summary in nature. Since both these questions are inter related, they can be conveniently dealt with together.

27. As I have pointed out earlier, the powers of the Company Law Board u/s 402 are wide enough to set aside a transaction. Since the powers are wide enough to set aside even a transfer that was made within 3 months before the date of filing of an application and since such a power is compared by Section 402(f) to a power conferred upon a Court in insolvency proceedings to set aside a fraudulent preference, there can be no doubt that the Company Law Board would have the power to determine whether a transaction is a bona fide one, entered into in the course of ordinary business, without notice of any internal squabbles. Despite the fact that the procedure adopted by the Company Law Board is summary in nature, it has the power to decide the validity of a transaction in terms of Section 402. Once a Tribunal or a Quasi Judicial Body is conferred with the powers to determine whether a transaction is valid or not, it follows as a necessary corollary that such a Tribunal would also have the jurisdiction to adjudicate upon every defence raised in such proceedings, including the one that the transferee was a bona fide transferee for valuable consideration without notice.

28. It is to be noted that the Company Law Board is constituted in terms of Section 10-E of the Act, to exercise and discharge such powers and actions conferred upon the Central Government by or under the Act. Sub-section (4-C) of Section 10-E confers upon the Company Law Board, the same powers as are vested in a Court under the Code of Civil Procedure, while trying a suit, in respect of the following matters viz.,(i) discovery and inspection of documents or other material objects produceable as evidence; (ii) enforcing the attendance of

witnesses and requiring the deposit of their expenses; (iii) compelling the production of documents or other material objects produceable as evidence and mounting the same; (iv) examining witnesses on oath; (v) granting adjournments; and (vi) reception of evidence on affidavits. It will be of interest to note that in every enactment under which a Tribunal is constituted, such a Tribunal would normally be vested with only 4 types of powers. But Section 10-E(4-C) of the Act, confers more powers upon the Company Law Board than what is normally conferred upon similar Tribunals in relation to the Code of Civil Procedure.

29. Moreover, sub-section (4-D) of Section 10-E states that the Company Law Board shall be deemed to be a Civil Court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure and also declares that every proceeding before the Bench shall be deemed to be a judicial proceeding, within the meaning of Sections 193 and 228 of IPC.

30. In exercise of the powers conferred by Section 10-E(6), the Company Law Board framed the Company Law Board Regulations, 1991 for regulating the procedure to be followed by the Board, while discharging its quasi judicial functions. Under these Regulations, a Bench of the Company Law Board is conferred with various powers, including the power to grant enlargement of time and even a general power to amend. Regulation 47 makes it clear that the Bench shall be deemed to be a Court for the purpose of prosecution or punishment of a person who willfully disobeys any direction. Regulation 44 saves the inherent power of the Bench. Interestingly Regulation 38 accords a special place to proceedings under Sections 397 and 398, by prohibiting the withdrawal of such petitions without the leave of the Board. This is perhaps due to the fact that these proceedings are akin to proceedings of a representative character under Order I, Rule 8 of the Code of Civil Procedure.

31. Therefore, it is clear that the Company Law Board has power to decide even the question as to whether a transferee of a right, title and interest in an immovable property, is a bona fide transferee for a valuable consideration, without notice or not. Though the proceedings before the Company Law Board appear to be summary in nature, the power conferred upon the Board is very wide, enabling the Board even to take evidence. Hence, the answer to question No. 2 would be that the Company Law Board was entitled to decide the question whether the transferee was a bona fide transferee for valuable consideration, without notice or not.

32. In so far as the first question is concerned, the main grievance of the appellant is that after having granted leave to respondents 1 to 4 to go to the Civil Court to agitate this issue, the Company Law Board ought not to have taken up the same for consideration.

33. But it appears that the Company Law Board granted leave to respondents 1 to 4 to go to the Civil Court, in the early stages of the hearing of the petition. But

once it was found by the Company Law Board that the Board Resolution which authorised the sale of the property to respondents 11 and 12, was invalid, the Board could not have left the consequential issue alone to be decided by the Civil Court. The Resolution passed by the Board of Directors of the Company in question (R-5), was the cause and the transfer was its effect. Therefore, I cannot expect the Company Law Board to have decided the validity of the cause and to leave the question relating to the validity of its effect, to be decided in a civil suit.

34. To the above extent, the Company Law Board is right. But neither the fifth respondent nor respondents 10 and 11 brought to the notice of the Company Law Board, the fact that the property had already been offered as security to the appellant herein. If the same had been brought to the notice of the Company Law Board, the Company Law Board could have impleaded the appellant as a party and allowed them to contend that the mortgage was bona fide secured. Since the principles of natural justice form an integral part of the scheme of Sections 397, 398, 402 and 405, the failure of the Company Law Board to hear the appellant herein, before passing the order in question, is fatal.

35. Therefore, the answer to the first question of law is that though the Company Law Board was entitled to decide the validity of the transfer, despite granting leave to the parties to go to the Civil Court, it should not have decided the same, without impleading the appellant as a party. It is true that none of the parties brought to the notice of the Company Law Board, the creation of the mortgage. But today, respondents 1 to 4 on the one hand and respondents 6 to 8 on the other hand, appear to have cemented tiles. It must be remembered that respondents 1 to 4 went to the Company Law Board, complaining of oppression and mismanagement by respondents 6 to 8. In other words, respondents 1 to 4 were at war with respondents 6 to 8 before the Company Law Board. But after the Company Law Board set aside the sale in favour of the 11th respondent, made at the instance of respondents 6 to 8, the respondents 6 to 8 have accepted the result. Today, in the above company appeal, respondents 6 to 8 are sailing with respondents 1 to 4, as strange bed fellows. In other words, the benefit of the order of the Company Law Board has enured to both respondents 1 to 4 and respondents 6 to 8 alike. This is why, respondents 6 to 8 have supported the stand taken by respondents 1 to 4 in the above appeal. In this process, a Public Financial Institution viz., the State Bank of India, has become the casualty. Since this cannot be allowed to happen, I am of the view that the opportunity given to respondents 10 and 11, cannot be considered as sufficient to protect the interests of the appellant herein. The appellant, by itself, is entitled to have an opportunity to satisfy the Company Law Board that they have bona fide entered into a transaction. The opportunity given to respondents 10 and 11, has been now demonstrated to be an empty formality, in view of the weak defence put up by respondents 6 to 8 and respondents 10 and 11. In view of the above and in the light of my answer to the first question of law, I allow this appeal and set aside the impugned order of the Company Law Board. The matter is remitted back to the Company Law Board for a fresh disposal, after giving an

opportunity of hearing to the appellant. No costs.