
(2009) 05 GAU CK 0043
In the Gauhati High Court

Suresh Singh and Others

APPELLANT

Vs

Shillong Club Ltd.

RESPONDENT

Date of Decision : 29-05-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, Order 43 Rule 1, 115
Companies Act, 1956 — Section 10G, 10GB, 25, 397, 83
Constitution of India, 1950 — Article 221, 226, 227

Citation : (2010) 2 GLR 759 : (2009) 3 GLT 474

Hon'ble Judges : H. Baruah, J

Bench : Single Bench

Judgement

H. Baruah, J.—Challenging the legality and propriety of order dated 12.5.2009 passed by the learned Asstt. District Judge, Shillong in Misc. Case No. 13(H) of 2009 arising out of Title Suit No. 8(H) of 2009, this civil revision under Article 227 of the constitution has been preferred by the petitioners, who are permanent Members of the respondent-company.

2. The petitioners herein are the permanent Members of the respondent-company, namely, Shillong Club Ltd., a registered company incorporated u/s 25 of the Companies Act, 1956 ("the Act"). The affairs of the company as aforesaid is vested in the Managing Committee consisting of seven members who are deemed to be the directors of the said company within the meaning of Section 83(a) of the Act. The legal relationship between the petitioners and the respondent-company is governed by the provisions of the Act and the articles and memorandum of association of the respondent-company. The petitioners and other members of the respondent-company submitted a requisition dated 4.5.2009 for convening an extraordinary general meeting ("EGM") per provision of the Article 54 of the articles of association read with provision of the Act for discussion of the matters incorporated therein. When the said requisition was before the Executive Committee, the respondent-company instituted a Title Suit No. 8(H) of 2009 in the court of Asstt. District Judge, Shillong praying for a

decree for the reliefs as claimed therein along with an application under Order 39 Rule 1 and 2 of CPC for grant of ad-interim injunction against the petitioners. The learned Assistant District Judge, Shillong having been filed this application, without issuing notice to the petitioners-opposite parties, vide impugned order granted ad-interim injunction restraining and preventing the petitioners from exercising their rights under Article 54 of the articles of the Association of the respondent-company. The petitioners being aggrieved thereby have approached this Court by the present petition under Article 227 of the constitution of India.

3. Heard Mr. H.S. Thangkhiew, learned Counsel for the petitioners. And also heard Mr. S. Sen, learned Counsel for the respondent-company at length.

4. Mr. H.S. Thangkhiew, learned Counsel for the petitioners at the very out set of his argument submitted that civil courts jurisdiction in entertaining the affairs of the company is barred by Section 10GB of the Act, therefore, the impugned order passed by the learned Assistant District Judge, Shillong is without jurisdiction and cannot sustain in law and in that view of the matter this Court has the jurisdiction to set aside and quash the aforesaid impugned order by exercising power of superintendence under Article 227 of the Constitution of India. Further Mr. H.S. Thangkhiew submitted that the petitioners herein being the permanent members of the respondent-company along with others have unfettered rights to requisition for convention of an EGM. Pursuant to the provisions of Article 54 of the articles of the association, this right being the internal affairs of the company is not liable to be challenged in a court of law. For resolving such dispute and other disputes among the members and the Directors of the company provisions have been provided in the Companies Act itself. Since Section 10GB of the Act oust the jurisdiction of the civil court from entertaining any suit or proceeding in respect of any matter, it is within the domain of the tribunal where such jurisdiction lies. Where no such tribunal is in existence the jurisdiction lies with the company bench of the High Court, but the respondent-company without approaching such tribunal or the company bench of the High Court approached the court of Assistant District Judge, Shillong by filing a title suit seeking reliefs contained therein along with the application under Order 39 Rule 1 and 2 of CPC. Mr. H.S. Thangkhiew, therefore, submitted that when Section 10G of the Act oust the jurisdiction of the civil court from entertaining any suit or proceeding in respect of the internal affairs of the company, the impugned order so passed is liable to be interfered with by this Court under Article 227 of the Constitution.

5. Resisting the submission of Mr. H.S. Thangkhiew, learned Counsel for the petitioners, Mr. S. Sen, learned Counsel for the respondent-company submitted that the civil court's jurisdiction is not entirely barred/ousted from entertaining any dispute pertaining to the members of the company and the Directors in the Managing Committee. Mr. Sen referring to the provisions of Section 397 of the Act submitted that for prevention of oppression and mismanagement of the company, any member of the company can apply to the tribunal for relief,

therefore, the subject matter of the suit being not a subject matter of Chapter VI of the Act, the same can be adjudicated by a civil court. Therefore, it would not be appropriate to argue that the civil court does not have jurisdiction to entertain dispute in between the members and the managing committee which is vested with the affairs of the company. According to Mr. Sen the submission advanced by Mr. H.S. Thangkhiew that the civil court does not have jurisdiction has no leg to stand.

6. Admittedly, Article 54 of the articles of association of the respondent-company provides provision for convening of EGM of the company on requisition by the members. It is submitted by Mr. H.S. Thangkhiew that the 15% of the total members of the respondent company submitted the requisition on 4.5.2009 for convention of an EGM of the company for discussion of the subjects indicated in the requisition letter. The notices is required to be issued within 21 days from the date of receipt of the requisition letter by the managing committee of the respondent-company and within 3(three) months from the date of issuance of the notices, the EGM is required to be held. When Article 54 provides such right to the members of the respondent-company there is no reason on the part of the managing committee to file a suit before the civil court with an application under Order 39 Rule 1 and 2 seeking relief contained therein and for permanent injunction. It was also submitted by Mr. H.S. Thangkhiew that the Executive Committee without approaching the Tribunal where jurisdiction lies to seek appropriate relief in respect of the matter, if, in its consideration holding of EGM was not possible on their part approach the civil court, whose jurisdiction is ousted. Therefore, entertainment of the suit and the application under Order 39 Rule 1 and 2 of CPC is beyond the jurisdiction of the civil court. The ex parte order pursuant to filing of the application under Order 39 of Rule 1 and 2 CPC is therefore, not legally sustainable. It is liable to be set aside and quashed.

7. Mr. Sen, learned Counsel appearing for the respondent-company relying on the decisions of the Apex Court rendered in the case between Sadhana Lodh Vs. National Insurance Company Ltd. and Another, and The Case Between Anandwardhan and Anr. v. Pandurang and Ors. (2005) 11 SCC 195, submitted that the civil revision petition is not maintainable under Article 227 since the petitioners have alternative remedy available under CPC. Mr. Sen, learned Counsel for the respondent-company, therefore, prayed this Court to dismiss the petition being not maintainable.

8. In the case of Sadhana Lodh (supra) the Apex Court in paragraph 8 held as under:

8. For the aforesaid reasons, we are of the view that since the insurer has a remedy by filing an appeal before the High Court, the High Court ought not to have entertained the petition under Articles 226/227 of the Constitution and for that reason, the judgment and order under challenge deserves to be set aside. We, accordingly, set aside the judgment and order under appeal. The appeal is allowed. There shall be no order as to costs. However, it would be open to the

insurer to file an appeal if it is permissible under the law.

In paragraph 7 of the judgment rendered in the case of Anandwardhan and Anr. (supra) their lordships of the Apex Court held that there being an alternative remedy available in the Cr.PC for filing a complaint for obtaining appropriate orders when police fails to investigate the case arising from a First Information Report lodged before it, it was not open for the respondent to move the High Court under Article 227 of the Constitution. The Apex Court further observed that such writ petition should not have been entertained by the High Court when remedy is provided to the aggrieved party under the Code of Criminal Procedure in accordance with the procedure established by law. The same is situation according to Mr. S. Sen prevailing upon in the present case. It was submitted by Mr. Sen that on filing of the application under Order 39 of Rules 1 and 2, the Assistant District Judge, Shillong without issuing notice to the opposite parties-petitioners herein granted interim temporary injunction restraining the petitioners from exercising their rights as embodied under Article 54 of the articles of association of the respondent-company. For setting aside of such order there are provisions in the Code itself. Rule 4 of Order 39 provides provision for discharge, variance and setting aside of the order by the court on the application made thereto by the party dissatisfied with such order. Further for setting aside of such order passed under Order 39 Rule 1 and 2 the petitioners could have approached this Court by way of an appeal under Order 43, Rule 1(r). The petitioners herein avoiding such procedure incorporated in Orders 39 and 43 of the CPC resorted to the provision of Article 227 of the Constitution challenging the legality and propriety of the order passed by the Assistant District Judge, Shillong. The above 2(two) remedies being the alternative remedy available in the Code, an application under Article 227 of the Constitution is not maintainable.

9. Mr. H.S. Thangkhiew, learned Counsel for the petitioners, in the context of maintainability of the suit and the application before the Civil Court (Court of Assistant District Judge, Shillong) relying on the decision of the Apex Court in the case between Aligarh Muslim University v. Vinay Engineering Enterprises Ltd., (1994) 4 SCC 710 and the case between Surya Dev Rai Vs. Ram Chander Rai and Others, submitted that power of Superintendence of High Court under Article 227 of the Constitution in the facts and circumstances of the case has not been ousted and, therefore, argument advanced by Mr. S. Sen cannot have any legal force sufficient to dismiss the petition of the petitioners.

10. The Apex Court while deciding the case Surya Dev Rai (supra) held that power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. Curtailment of the revisional jurisdiction of the High Court u/s 115, CPC by amendment Act 46 of 1999 does not take away and could not have been taken away the Constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court, nor is the power of superintendence conferred on the High Court under Article 221 of the Constitution taken away or whittled down. The power exists, untrammelled by

the amendment in Section 115, CPC, and is available to be exercised subject to rules of self discipline and practice which are well settled. In the case of Surya Dev Rai (supra) the question before the Apex Court was whether a aggrieved person is completely deprived of the remedy of judicial review, if he has lost at the hands of the original court and the appellate court, though a case of gross violation of justice having been occasioned can be made out? The Apex Court allowed the appeal holding that the power of Superintendence conferred on the High Court under Article 227 of the Constitution cannot be taken away or whittled down.

11. In the present case the petitioners did not resort to the alternative remedy available to them in the CPC. Bypassing those alternative remedies the power of Superintendence of the High Court under Article 227 of the Constitution has been called in for aid. This Court having taken into consideration of the facts and the law laid down by the Apex Court of the land is of the view that this petition under Article 227 of the Constitution is not maintainable in view of abundance of alternative remedy in the Code.

12. Mr. H.S. Thangkhiew, learned Counsel appearing for the petitioners on the question of maintainability of the suit and the application as well before the Court of Assistant District Judge, Shillong brought in by the respondent-company relied on a decision of the constitution bench of the Supreme Court rendered in the case between Life Insurance Corporation of India v. Escorts Ltd. and Ors. (1986) 1 SC 264 wherein it was held that the share holders of a company have a right to call EGM on requisition, court cannot grant injunction restraining the share holders to exercise of such right. In the case (supra) constitution bench of the court further held that the reasons for resolution and issues stated by the petitioners in the requisition letter are not open to judicial review or judicial determination. According to Mr. H.S. Thangkhiew the same situation prevailed over in the present case at hand. The petitioners and others being permanent members of the respondent-company have the right to requisition for EGM by virtue of Article 54 of the articles of Association of the Company. Therefore, such right under Article 54 of the articles of association cannot be restrained by issuing an injunction under Order 39, Rules 1 and 2 of the CPC, The issues incorporated in the requisition letter are not subject matter of judicial review or determination, hence, according to Mr. H.S. Thangkhiew the impugned order passed by the learned Assistant District Judge, Shillong is beyond the jurisdiction.

13. I have given my anxious consideration to the facts involved in the case, the decisions rendered by the Apex Court and also the submissions advanced by the Counsel of either party. Having considered thus, this Court finds it appropriate to dismiss this petition, same being not maintainable under Article 227 of the Constitution in view of alternative remedy available under the CPC. However, the petitioners will be at liberty to resort to the alternative remedy available under the code, if so advised. The petitioners will also be at liberty to raise the question of maintainability of the suit and the application, if so advised. If such an issue is

raised at all before the court of Assistant District Judge, Shillong it shall not be guided/actuated by the observations rendered by this court.

14. The civil revision petition stands disposed of. No order as to costs.