

(2001) 08 CAL CK 0085

In the Calcutta High Court

Case No : A.G.O. 58 of 2001 and A.P.O.T. No. 247 of 2001

Tin Plates Dealers Association (P.) Ltd.

APPELLANT

Vs

Satish Chandra Sanwalka

RESPONDENT

Date of Decision : 24-08-2001

Acts Referred:

Companies Act, 1956 — Section 10F, 483

Citation : (2002) 108 CompCas 295

Hon'ble Judges : Asok Kumar Ganguly, J

Bench : Single Bench

Advocate : Sudipta Sarkar and Sanjib Banerjee, for the Appellant; S.N. Mukherjee, for the Respondent

Judgement

Ganguly, J.—The controversy over which the court was addressed on several days in this matter is whether this appeal u/s 10F of the Companies Act, 1956 ("the Act") from the order of the CLB is to be heard by the company judge sitting singly or this appeal has to be heard by the Division Bench of this court which hears, u/s 483 of the Act, appeals from the orders/judgments of the company judge.

2. In the fitness of things it is proper to set out Section 10F. Section 10F runs thus:

"Section 10F. Appeals against the orders of the Company Law Board.- Any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days."

The section itself does not exactly answer this controversy and so it lingers on

and it appears that courts have not spoken uniformly on this issue either.

Under the said Act, the word "court" has been used in various sections and some of those sections, which are relevant in the context of the controversy, are set out below :

Section 2(11) of this Act is in the following terms :

"(11) "the court" means,--

(a) with respect at any matter relating to a company (other than any offence against this Act), the court having jurisdiction under this Act with respect to that matter relating to that company, as provided in Section 10;

(b) with respect to any offence against this Act, the Court of a Magistrate of the First Class or, as the case may be, a Presidency Magistrate, having jurisdiction to try such offence;"

Section 10 is in the following terms :

"10. Jurisdiction of Courts. - (1) The court having jurisdiction under this Act shall be-

(a) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of Sub-section (2); and

(b) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district.

(2) The Central Government may, by notification in the Official Gazette and subject to such restrictions, limitations and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction conferred by this Act upon the court, not being the jurisdiction conferred -

(a) in respect of companies generally, by Sections 237, 391, 394, 395 and 397 to 407, both inclusive;

(b) in respect of companies with a paid-up share capital of not less than one lakh of rupees by Part VII (Sections 425 to 560) and the other provisions of this Act relating to the winding up of companies.

(3) For the purposes of jurisdiction to wind up companies, the expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up."

3. Section 433 of the Act also refers to the expression "court" when it provides that "a company may be wound up by the court". But the rest of the section is

not important here.

4. Section 483 which provides for appeals from orders/decisions of the court in the matters of winding up is in the following terms :

"483. Appeals from orders. - Appeals from any order made, or decision given, in the matter of the winding up of a company by the court shall lie to the same court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the court in cases within its ordinary jurisdiction."

Here the dispute is not over jurisdiction of courts but over the appropriate forum namely whether appeals provided u/s 10F will be heard by the company judge of the High Court or by the Division Bench which hears appeals u/s 483 from the orders of the company judge. In other words the question is whether the forum for hearing appeals u/s 10F and u/s 483 would be the same namely the Division Bench of the High Court or it would be different namely the court of the company judge in the case of appeals u/s 10F from the order of the CLB.

5. The Original Side Rules of the Calcutta High Court do not throw any light on this controversy. Nor has any rule been framed by the High Court for hearing appeals u/s 10F.

The counsel for the parties have cited a few judgments which the court proposes to consider.

The first decision on which reliance was placed by the learned counsel for the appellant was rendered in the case of *Minoo H. Mody Vs. Hemant D. Vakil and others*, .

In that case, the learned judges of the Division Bench of the Bombay High Court held : (a) appeals u/s 10F shall be filed before the High Court on the original side and not on the appellate side, (b) such appeals shall have to be presented in the form of memorandum of appeal formulating questions of law arising out of the order which is appealed against, and (c) such appeals are to be heard by the company court on the original side as company matters till appropriate rules are made. This court is concerned with the points decided at (c).

6. The learned counsel for the respondent has however, assailed the said Division Bench judgment of the Bombay High Court by urging that the judgment has not indicated any reason in support of its conclusion at (c) that appeals u/s 10F have to be heard as company matters before the company judge. This court thinks that the said criticism is well founded. In para. 14 of the judgment, the learned judges of the Division Bench referred to the prevailing practice of hearing of appeals u/s 10F in some High Courts, but did not decide the controversy whether appeals u/s 10F and Section 483 can be equated.

7. The counsel for the petitioner relied on a Division Bench judgment of this court in the case of *Calcutta Chemical Co. Ltd. v. Krishna Das Pal* [1985] 57 Comp.

Cas. 503 . In that judgment the Division Bench held that even though matters under sections 397 and 398 of the Act do not relate to a proceeding for winding up of a company they are an alternative to the same. So from an order in matters under sections 397 and 398 an appeal would lie to the Division Bench of the same High Court. This was held by the Division Bench relying on the judgment of the Apex Court in *Shanta Genevieve Pommerat and Another Vs. Sakal Papers Private Limited and Others*, .

8. The counsel further urged that now in respect of matters under sections 397 and 398, jurisdiction is no longer with the company judge of the High Court but it has been vested in the CLB, a quasi-judicial Tribunal with trappings of a court. But an appeal u/s 10F from the order of the said Tribunal would lie to the High Court only on a question of law. Such limited appellate jurisdiction of the High Court, according to the learned counsel, must be with the company judge.

9. The counsel for the petitioners also relied on the decision in the case of *Prakash Timbers Pvt. Ltd. and other Vs. Smt. Sushma Shingla and another*, . In that decision the learned judges of the Division Bench considered whether the CLB is a Tribunal or a court in the context of Rule 5 of the Allahabad High Court Rules. In the Allahabad High Court appeals from orders of the CLB u/s 10F are filed before the single judge. There is no dispute over that. But the objection, which was raised, was whether against the judgment of the learned single judge deciding the appeal u/s 10F, a special appeal under Rule 5 of Chapter VIII of the Allahabad High Court Rules is maintainable. In the context of that controversy the Division Bench, inter alia, held that (i) Rule 5 of the said Rules is a reproduction of Clause 10 of the Letters Patent; (ii) the CLB is a Tribunal and not a court; and (iii) the special appeal is maintainable since it is an intra-court appeal from the order of a single judge to the Division Bench.

10. The controversy with which this court is concerned here was not in issue in *Prakash Timbers (P.) Ltd.'s case* (supra). But of the points, which were decided in the case of *Prakash Timbers (P.) Ltd.* (supra) one of them is of relevance here also namely that, the CLB is a Tribunal and not an ordinary court of civil jurisdiction. The said decision was given in *Prakash Timbers (P.) Ltd.'s case* (supra) after analysis of the Supreme Court decisions and also a decision of the appeal court in the case of *Shell Co. of Australia v. Federal Commissioner of Taxation* [1931] AC 275. This court is in respectful agreement with the conclusion in the case of *Prakash Timbers (P.) Ltd.* (supra) that the CLB is not a court, even though it may have the trappings of a court. But in the case of *Prakash Timbers (P.) Ltd.* (supra), the learned judges noted the observations of the Supreme Court that whether a Tribunal is a court or not depends on the "given context". Judging by those principles the Supreme Court held in *Canara Bank v. Nuclear Power Corporation of India Ltd.* [1995] 84 Comp. Cas. 70, 4 SCL 42 that in the context of Section 9A(2) of the Special Court Act, the CLB is a court. But divorced from the context of the Special Court Act, the CLB cannot be called a court. The court and the CLB are separately treated under the said Act. The

definition of "court" u/s 2(11) has been extracted above. But the CLB has been defined separately u/s 2(10A) as follows :

"(10A). "Company Law Board" means the Board of Company Law Administration constituted u/s 10E;"

Section 10E(1) and Sub-section (1A) which provide for the constitution of the CLB are set out:

"WE. Constitution of Board of Company Law Administration (1).--As soon as may be after the commencement of the Companies (Amendment) Act, 1988, the Central Government shall, by notification in the Official Gazette, constitute a Board to be called the Board of Company Law Administration.

(1A). The Company Law Board shall exercise and discharge such powers and functions as may be conferred on it, by or under this Act or any other law, and shall also exercise and discharge such other powers and functions of the Central Government under this Act or any other law as may be conferred on it by the Central Government, by notification in the Official Gazette under the provisions of this Act or that other law."

That the CLB is not a full-fledged court but a Tribunal with the trappings of a court is made further clear from Sub-sections (4C) and (4D) of Section 10E. Those sub-sections are also extracted below :

"(4C) Every Bench referred to in Sub-section (4B) shall have powers which are vested in a court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters namely:--

- (a) discovery and inspection of documents or other material objects producible as evidence;
- (b) enforcing the attendance of witnesses and requiring the deposit of their expenses;
- (c) compelling the production of documents or other material objects producible as evidence and impounding the same;
- (d) examining witnesses on oath;
- (e) granting adjournments;
- (f) reception of evidence on affidavits.

(4D) Every Bench shall be deemed to be a civil court for the purposes of Section 195 and (Chapter XXVI of the Code of Criminal Procedure, 1973) and every proceeding before the Bench shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code and for the purpose of Section 196 of that Code."

It cannot be disputed that substantial restructuring of the composition of the CLB

has been brought about by the Companies (Amendment) Act, 1988 (Act 31 of 1988). Such amendments have been made on the recommendation of the Sachar Committee. The relevant portions of those recommendations on which the 1988 Amendment Act was modelled throw some light to show that the CLB is a Tribunal. Those recommendations are to the following effect:

"We, therefore, feel that appropriate solution would lie in statutorily constituting an independent quasi-judicial Company Law Board broadly on the lines of the Income Tax Appellate Tribunal, as provided in Section 252 of the Income Tax Act, 1961, with Benches permanently located at different regions, including Delhi, so that matters are heard at places not far removed from the offices of the companies. In order to see that the Company Law Board functions independently as a statutorily constituted Tribunal and is independent of the Department of Company Affairs, it would be necessary to frame rules for recruitment and conditions of service of the persons appointed as members of the Company Law Board by a Presidential notification under Article 309 of the Constitution of India, read with the relevant section of the Companies Act dealing with the constitution of the Company Law Board, as in the case of the Income Tax Appellate Tribunal. We are also anxious to see that suitable qualifications are prescribed for recruitment as members of the Company Law Board."

Therefore, the court has to proceed on the basis that the CLB is a Tribunal.

11. Now, the court must ascertain the ratio of the judgment of the Apex Court in *Stridewell Leathers (P.) Ltd. v. Bhankerpur Simbhaoli Beverages (P.) Ltd.* [1994] 79 Comp. Cas. 139, as both sides relied on that judgment and most of the sections quoted above were considered in *Stridewell Leathers (P.) Ltd.*'s case.

Stridewell, the appellant, filed a petition under sections 397 and 398 before the Principal Bench of the CLB at Delhi in respect of a company which has its registered office at Madras. Against the order of the CLB dated 28-5-1993, an appeal by a shareholder was filed u/s 10F before the Delhi High Court. It may be noted that such appeal was entertained by the single Bench of the Delhi High Court. No objection was taken on that ground. But a preliminary objection on another ground, which will be discussed later, was taken before the Delhi High Court and the Delhi High Court rejected it. The matter went to the Supreme Court.

Before the Supreme Court, the appellant contended that the expression "High Court" in Section 10F must mean the High Court of the place at which the registered office of the company concerned is situated. So the appeal is to be filed in the Madras High Court. The Apex Court accepted the said preliminary objection and set aside the order of the Delhi High Court and held that the appeal would lie to the Madras High Court.

So the point with which this court is concerned in this case was not in controversy in *Stridewell Leathers (P.) Ltd.*'s case(supra). Even, then in the judgment some observations of the Supreme Court would help the resolution of

the controversy and those aspects are discussed below.

12. The learned judges of the Supreme Court held that the point for consideration in *Stridewell Leathers (P.) Ltd.* 's case (supra) was whether with the change of original jurisdiction of the High Court in respect of the matters under sections 397 and 398 and vesting of the same with the CLB u/s 10E, the forum of appeal remains unaffected by the change of forum of original jurisdiction.

13. After discussing the statutory definition, the learned judges in para 10 of the judgment held that the concerned High Court continued to be the forum of appeal notwithstanding the transfer of original jurisdiction from the concerned High Court to the CLB.

14. In para 15 of the judgment the learned judges have expressed the position that the order of the CLB in a given case may be amenable to writ jurisdiction of the High Court under article 226. Of course, the learned judges have made it clear that in exercise of jurisdiction under article 226 the writ court may in a given case refuse to entertain the petition in view of the efficacious statutory remedy of appeal u/s 10F. But the fact that the order of the CLB is amenable to writ jurisdiction has been accepted in *Stridewell Leathers (P.) Ltd.*'s case (supra). So from the aforesaid discussion in *Stridewell Leathers (P.) Ltd.* 's case (supra) it is clear that despite the conferment on the CLB of the original jurisdiction of Sections 397 and 398 the CLB cannot be treated as a court. It has to be treated as a quasi-judicial Tribunal and is amenable to a writ court. The learned counsel for the respondent has relied on another Supreme Court judgment in the case of *Shankarlal Aggarwala v. Shankarlal Poddar* [1965] 35 Comp. Cas. 1. The said judgment was relied upon in order to point out the scope and ambit of Section 202 of the Companies Act, 1913. The said Section 202 of the 1913 Act is almost identical with Section 483 of the Act. In *Shankarlal Aggarwala*'s case (supra) while dealing with the scope of Section 202, the court held that the orders passed by the District Court or by a single judge of the Calcutta High Court in the matter of a winding up petition are appealable u/s 202 of the 1913 Act independently of the provisions of Sections 96 and 104 of the Code of Civil Procedure, 1908 or clause 15 of the Letters Patent. There can be no doubt in respect of the aforesaid proposition but this court is not concerned with those questions in this case.

15. The learned counsel for the respondent has also relied on an unreported Division Bench judgment of this court in support of the contention that the appeal u/s 10F will have to be heard by the Division Bench. The said judgment was rendered in the case of *Esemen Metallo Chemicals (P.) Ltd. v. Mrs. Farhat Sheikh (S/A)*. Before proceeding to consider the said judgment, it may be noted that the said matter was assigned before the Division Bench by the Hon'ble Chief Justice and as such the question with which this court is concerned in this case was not in issue in the said unreported judgment. However, the learned judges of the Division Bench in the unreported judgment considered the Companies

(Amendment) Act, 1988, and also the judgment of the Supreme Court in *Stridewell Leathers (P.) Ltd.*'s case (*supra*). The learned judges have noted clearly that no rule has been framed by the High Court laying down the practice and procedure for hearing of an appeal u/s 10F.

16. The learned judges of the Division Bench, however, observed that the assigning of the appeal to the Division Bench is consistent with the amendment made and in the background of the changes in law. The learned judges further observed that since the power, which is exercised by the CLB under Sections 397 and 398, were previously exercised by the learned company judge of the High Court and there is an appeal to the Division Bench from the order of the learned company judge so it appeared to the Division Bench that not only the original forum has been changed but the appellate jurisdiction is also to be exercised by the Division Bench. So the learned judges held that the matter has been rightly assigned by the Hon'ble Chief Justice to avoid all controversy. The learned judges held that it is for the full court of this court to frame rules to decide whether a matter should be heard by a Division Bench or by a single judge. The learned judges further held that such matters are to be decided by the administrative side of this court and a litigant has no say in the matter. The learned judges however, refused to follow the principles laid down by the Bombay High Court and as such the preliminary objection to the hearing of the appeal by the Division Bench was overruled and it was also made clear that so long it is not decided by the High Court administratively by framing rules, the matter will be dealt with by the Division Bench in view of the administrative decision of the Hon'ble Chief Justice.

17. This court, however, has been given to understand by the learned counsel for both the parties that there is no such general administrative direction of the Hon'ble Chief Justice for hearing appeals u/s 10F by the Division Bench. There is no rule to that effect either. It may be noted that the matter in respect of which the unreported judgment was delivered was assigned before the Division Bench.

18. In a matter which has been specially assigned before the Division Bench by the Hon'ble Chief Justice there is hardly any scope for a decision whether the matter is to be heard by a single judge or a Division Bench. At least those questions did not fall for consideration before the court. So observations made on those questions do not constitute the ratio. When a question is not required to be decided by a court, observations on those questions cannot be treated to be part of the decision of the court. See the judgment of the Full Bench of the Calcutta High Court in the case of *The Jay Engineering Works Ltd. Vs. M.G. Wagh and Others*, .

19. From the aforesaid discussions, the following points clearly emerge:

(1) Even though the CLB has the trappings of a court, it is not a court like the company court.

(2) The forum of appeal u/s 10F is different from the forum of appeal u/s 483.

This difference is apparent from the wording of the statute itself.

(3) Section 10F provides for an appeal from any order or decision of the CLB on any question of law arising out of such order. There is a period within which such appeal has to be filed. There is also a provision for condonation of delay where appeal is filed beyond the said period but the extended period is also statutorily fixed.

(4) The decision of the CLB which is appealable u/s 10F is also, in a given case, amenable to the writ jurisdiction of this hon"ble court.

(5) But an appeal u/s 483 would only lie from any order made or a decision given in the matter of winding up of the company by a court.

(6) Therefore, the appellate forum u/s 10F cannot be invoked from any order of the CLB. It can only be invoked from an order of the court within the meaning of Section 2(11). Those orders of the company court are not amenable to a writ court.

(7) An appeal u/s 483 is an intra court appeal and would lie to the same court where the original order has been passed.

(8) Such appeal is not confined to a question of law only.

(9) Such appeal would lie in the same manner and is subject to the same conditions in which appeals lie from any order of the decision of the court in cases within its ordinary jurisdiction.

Therefore, there are substantial distinguishing features between the appellate forum u/s 10F and the forum u/s 483 and one cannot be equated with the other. Though the Bombay High Court has not decided this question, this court is definitely of the opinion that these two forums cannot be equated without doing violence to the statute. There is no dispute that the forum of appeal u/s 483 is the Division Bench. But insofar as the forum of appeal u/s 10F is concerned there is no such clear indication. But this court feels, on a harmonious construction of Section 10F and Section 483, that such appeals should be taken up by the company judge of the High Court and not by the forum u/s 483 which is the appellate forum from the orders of the company judge. Any other construction, in my view, would be inconsistent with the scheme of two different appellate forums provided under the Act. As a right to appeal is never an inherent right but is always a creature of statute, in deciding the forum of an appeal the statutory dispensation must be the best guide.

20. In fact, it may be noted in this connection that the appeal which was filed before the Delhi High Court in the case of Stridewell Leathers (P.) Ltd. (supra) was filed before the learned single judge and not before the Division Bench and the acceptance "per se" of the said appeal by the learned single judge was not found fault with by the Supreme Court. The Supreme Court found that the appeal could not be taken up by the Delhi High Court because of the lack of its

territorial jurisdiction. That is a totally different matter. Before this court, the learned counsel for the petitioner has filed several judgments to show that appeals u/s 10F are taken up for hearing by the single Bench of the company judges in different High Courts. Those judgments which have been cited before this court are mentioned below:

(1) Chand Mall Pincha v. Hathimal Pincha [1999] 95 Comp. Cas. 3681 : 20 SCL 54 (Gau.)

(2) Scientific Instruments Co. Ltd. v. Rajendra Prasad Gupta [1999] 95 Comp. Cas. 6152 (All.) : 19 SCL 451.

(3) National Thermal Power Corpn. v. Canara Bank [1999] 97 Comp. Cas. 930 : 32 SCL 119 (Delhi).

(4) Gharib Ram Sharma Vs. Daulat Ram Kashyap and Others, .

(5) Bhankerpur Simbhaoli Beverages Pvt. Ltd. Vs. The Company Law Board and Others, .

Therefore, considering the question from all angles, this court is of the opinion that this appeal u/s 10F can be entertained by the company judge in the absence of any rule to the contrary. That being the position the appeal is maintainable before this company court. The appeal, therefore, may be placed for hearing two weeks hence. The preliminary objection is, thus, overruled.