

(2011) 03 DEL CK 0170
In the Delhi High Court
Case No : CO. A. (SB) 10 of 2005

Venture India Properties P. Ltd. and Others	APPELLANT
Vs	
Capt. Manmohan Singh Kohli and Others	RESPONDENT

Date of Decision : 29-03-2011

Acts Referred:

Companies Act, 1956 — Section 397, 398, 399, 402

Citation : (2011) 164 CompCas 251 : (2011) 123 DRJ 520

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Rohan Thawani and Ashmia Sehgal, for the Appellant; Virender Ganda and Amarjit Singh, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—Present appeal has been filed challenging the orders dated 15 th March, 2004 and 04October, 2004 passed by the Company Law Co.A.(SB) 10/2005 Page 1 of 17 [NG1]Board. While by the first order, Appellants were directed to purchase 33% shares owned by Respondent No. 1 on the basis of Balance Sheet dated 31st March, 1999, by the order dated 04th October, 2004, the Company Law Board appointed a Valuer to value the said shares.

2. Mr. Rohan Thawani, learned Counsel for the Appellants submitted that the Company Law Board vide its judgment and order th 15March, 2004 had directed the Appellants herein to either immediately reinstate Respondent No. 1 as Director of the company or in the alternative to purchase his shares on the basis of valuation made by an independent Valuer. Mr. Thawani stated that the Appellants having reinstated Respondent No. 1, cannot now be compelled to purchase his shares and that too, on the basis of a Balance Sheet dated 31st March, 1999.

3. Mr. Thawani further submitted that the Company Law Board cannot compel the Appellants to purchase shares of Respondent No. 1 especially when the

Company Law Board had rejected the allegations of oppression made by the Respondent No. 1. Mr. Thawani contended that if Respondent No. 1 wishes to exit the company, he may find a third party purchaser, to which the Appellants would transfer the shares. Mr. Thawani lastly submitted that the Company Law Board in the present proceedings had granted relief which had not even been prayed for by Respondent No. 1.

4. On the other hand, Mr. Virender Ganda, learned senior counsel for Respondent No. 1 submitted that the present appeal is th barred by limitation of 120 days qua the order dated 15March, th 2004. He further submitted that the order dated 04October, 2004 was a consent order which was passed after receiving proposals to appoint Valuer from both the parties. Consequently, according to him, present appeal is not maintainable.

5. Having heard the parties at length, I am of the view that the present appeal needs to be disposed of on merits rather than on technical legal pleas raised by the Respondent.

6. I am of the opinion that the Company Law Board by order th dated 15March, 2004 had actually given an option to Respondent No. 1 and not to the Appellants, as sought to be canvassed by the learned Counsel for the Appellants. In fact, the said Respondent had the option to either get himself reinstated as a Director or in the alternative to exit the company after getting his shares valued as on 31st March, 1999.

7. As far as the Company Law Board's power to either grant relief which had not been prayed for or to direct one of the parties unwillingly to enter into a contract for purchase of shares, I am of the opinion that the power of the Company Law Board is of extremely wide amplitude. Sections 397, 398 and 402 of the Companies Act, 1956 (in short "the Act") are reproduced hereinbelow:

397. Application to [Tribunal] for relief in cases of oppression.-(1) Any member of a company who complain that the affairs of the company [are being conducted in a manner prejudicial to public interest or] in a manner oppressive to any member or members (including any one or more of themselves) may apply to the [Tribunal] for an order under this section, provided such members have a right so to apply in virtue of Section 399.

(2) If, on any application under Sub-section (1), the Court is of opinion-

(a)that the company's affairs [are being conducted in a manner prejudicial to public interest or] in a manner oppressive to any member or members; and

(b)that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the [Tribunal] may, with a view to bringing to an end the maters complained of, make such order as it thinks fit.

398. Application to [Tribunal] for relief in cases of mismanagement.--(1) Any members of a company who complain-

(a) that the affairs of the company [are being conducted in a manner prejudicial to public interest or] in a manner prejudicial to the interest of the company; or

(b) that a material change not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by an alteration in its Board of directors, [***] [or manager], [***] or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company [will be conducted in a manner prejudicial to the company [will be conducted in a manner prejudicial to the interests to public interest or] in a manner prejudicial to the interests of the company,

may apply to the [Tribunal] for an order under this section, provided such members have a right so to apply in virtue of Section 399.

(2) If, on any application under Sub-section (1), the [Tribunal] is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the [Tribunal] may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

402. Powers of [Tribunal] on application u/s 397 or 398--Without prejudice to the generality of the powers of the [Tribunal] u/s 397 or 398, any order under either section may provide for-

(a) the regulation of the conduct of the company's affairs in future;

(b) the purchase of the shares or interests of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(d) the termination, selling aside or modification of any agreement, howsoever arrived at, between the company on the one hand; and any of the following persons, on the other, namely:

(i) the managing director,

(ii) any other director,

[***]

(v) the manager, upon such terms and conditions as may, in the opinion of the [Tribunal], be just and equitable in all the circumstances of the case;

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in Clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the 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;

(g) any other matter for which in the opinion of the [Tribunal] it is just and equitable that provision should be made.

8. In fact, the Bombay High Court in *Bennet Coleman and Co. v. Union of India* and Ors. 1997 47 Comp Cas 92 has, after referring to the entire scheme of the Act, held as under:

...Further, an analysis of the sections contained in Chapter VI of Part VI of the Act will also indicate that the powers of the court u/s 397 or 398 read with Section 402 cannot be read as being subject to the other provisions contained in sections dealing with usual corporate management of a company in normal circumstances. As stated earlier, Chapter VI deals with the prevention of oppression and mismanagement and the provisions therein have been divided under two heads -under head A powers have been conferred upon the court to deal with cases of oppression and mismanagement in a company falling u/s 397 and 398 of the Act while under head B similar powers have been given to the Central Government to deal with cases of oppression and mismanagement in a company but it will be clear that some limitation have been placed on the Government's powers while there are no limitations or restrictions on the court's powers to pass orders that may be required for bringing to an end the oppression or mismanagement complained of and to prevent further oppression or mismanagement in future or to see that the affairs of the company are not being conducted in a manner prejudicial to public interest. In other words, whenever the legislature wanted to do so it has made a distinction between powers conferred on the Government (vide section 408) and powers conferred on the court (vide section 402) while dealing with similar emergent situations or extraordinary circumstances arising in the management of a company and in the case of the Government it has placed restrictions or limitations on the Government's powers but no restrictions or limitations of anything have been prescribed on the court's powers; if the legislature had desired that the court's powers while acting u/s 397 or 398 read with section 402 should be exercised subject to or in consonance with the other provisions of the Act it would have said so. Moreover, the topics or subjects dealt with by sections 397 and 398 are such that it becomes impossible to read any such restriction or limitation on the powers of the court acting u/s 402. u/s 397 read with Section 402 power has

been conferred on the court "to make such orders as it thinks fit" if it comes to the conclusion that the affairs of a company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up "with a view to bringing to an end the matters complained of". Similarly, u/s 398 read with section 402 power has been conferred upon the court "to make such orders as it thinks fit" if it comes to the conclusion that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company or that a material change has taken place in the management or control of the company by reason of which it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company, "with a view to bringing to an end or preventing the matters complained of or apprehended". Both the wide nature of the power conferred on the court and the object or object sought to be achieved by the exercise of such power are clearly indicated in sections 397 and 398. Without prejudice to the generality of the powers conferred on the court under these sections, Section 402 proceeds to indicate what type of orders the court could pass and Clauses (a) to (g) are clearly illustrative and not exhaustive of the type of such orders..... We are, therefore, unable to accept Mr. Sen's contention that the court's powers u/s 398 read with Section 402 should be read as subject to the other provision of the Act dealing with normal corporate management or that the court's orders and directions issued thereunder must be in consonance with the other provisions of the Act.

There is another aspect of Sections 397, 398 and 402 which also shows that no such limitation as is sought to be suggested by Mr. Sen can be read on the court's power while acting under the sections. Section 397 clearly suggests that the court must come to the conclusion that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members of the company and that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up before any order could be passed by it. In other words, instead of destroying the corporate existence of a company the court has been enabled to continue its corporate existence by passing such orders as it thinks fit in order to achieve the objective of removing the oppression to any member or members of a company or to prevent the company's affairs from being conducted in a manner prejudicial to public interest. Similarly, Sub-section (2) of Section 398 clearly provides that where the court is of the opinion that the affairs of the company are being conducted in a manner suggested in Sub-section (1), then, the court may, with a view to bringing to an end or preventing the matters complained of or apprehended,

make such order as it thinks fit. In other words, sections 397 and 398 are intended to avoid winding up of the company if possible and keep it going while at the same time relieving the minority shareholders from acts of oppression and mismanagement or preventing its affairs being conducted in a manner prejudicial to public interest and if that be the objective the court must have power to interfere with the normal corporate management of the company. If u/s 398 read with Section 402 the court is required by its order to provide for the regulation of the conduct of the company's affairs in future because of oppression or mismanagement that has occurred during the course of normal corporate management, the court must have the power to supplant the entire corporate management, or rather corporate mismanagement by resorting to non-corporate management which may take the form of appointing an administrator or a special officer or a committee of advisers, etc., who could be in charge of the affairs of the company. If the court were to have no such power the very object of the section would be defeated.... But what was urged by Mr. Sen was that if while acting u/s 398 read with section 402 the court thought fit to have recourse to a mode of corporate type of management, for example, if the court felt proper to have a board of directors for future management, then such corporate mode of management to be provided by the court should conform to other provisions of the Act dealing with corporate management. It is not possible to accept this contention of Mr. Sen for two reasons.... In our view, therefore, the position is clear that while acting u/s 398 read with Section 402 of the Companies Act the court has ample jurisdiction and very wide powers to pass such orders and give such direction as it thinks fit to achieve the object and there would be no limitation or restriction on such power that the same should be exercised subject to the other provisions of the Act dealing with normal corporate management or that such orders and directions should be in consonance with such provisions of the Act.

xxxx xxxx xxxx xxxx Having regard to the above discussion, we are clearly of the view that the court had jurisdiction to reconstitute the board in the manner done in this case and such board is not violative of section 255 of the Companies Act and we are also of the further view that the learned judge had ample powers to alter the original Article 95 of Respondent No. 1-company in the manner done by him while acting u/s 398 read with Section 402 of the Act.

(emphasis supplied)

9. In *Sangramsinh P. Gaekwad and Ors. v. Shantadevi P. Gaekwad and Ors.* 2005 123 Comp Cas 566, the Supreme Court has held that Section 402 of the Act provides for reliefs which may be granted without prejudice to the generality of the powers of the Court under such provisions.

10. In *Manish Mohan Sharma and Others Vs. Ram Bahadur Thakur Ltd. and Others*, , the Supreme Court has held that the powers u/s 402 are residuary in nature and in addition to the powers available to the Company Law Board u/s 397(2) and Section 398(2) which permit the Company Law Board to make such

order as it thinks fit with a view to bringing an end to the matters complained of u/s 397(1) and with a view to bringing to an end or preventing the matters complained or apprehended u/s 398(1).

11. In fact, in M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another, the Apex Court specifically rejected the submission that the Company Law Board was not justified in issuing direction to the Petitioner to purchase the shares of the Respondent u/s 402 of the Act despite arriving at a finding of fact that no act of oppression had been committed by the Appellant. The relevant portion of the said judgment is reproduced hereinbelow:

7. Mr. C.A. Sundaram, learned Senior Counsel appearing on behalf of the Appellant, in support of the appeal, submitted:

1. The Company Law Board was not justified in issuing the impugned direction in purported exercise of its jurisdiction u/s 402 of the Act directing him to purchase the shares of the Respondent despite arriving at a finding of fact that no act of oppression has been committed by the Appellant.

2. The condition precedent for exercise of such power being oppression on the part of a Director of a company being not satisfied, the impugned judgment is wholly unsustainable....

8. Mr. K. Parasaran, learned Senior Counsel, appearing for the Respondents, on the other hand, would contend:

xxx xxx xxx 4. The Company Law Board, in exercise of its jurisdiction under Sections 397 and 398 read with Section 402 of the Companies Act has the requisite jurisdiction to direct a shareholder to sell his shares to the other, although no case for winding up of the Company has been made out or no actual oppression on the part of the Director has been proved.

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15. Ordinarily, therefore, in a case where a case of oppression has been made a ground for the purpose of invoking the jurisdiction of the Board in terms of Sections 397 and 398 of the Act, a finding of fact to that effect would be necessary to be arrived at. But, the jurisdiction of the Company Law Board to pass any other or further order in the interest of the company, if it is of the opinion, that the same would protect the interest of the company, it would not be powerless. The jurisdiction of the Company Law Board in that regard must be held to be existing having regard to the aforementioned provisions.

16. The deadlock in regard to the conduct of the business of the Company has been noticed by the Company Law Board as also the High Court. Keeping in view the fact that there are only two shareholders and two Directors and bitterness having crept in their personal relationship, the same, in our opinion, will have a direct impact in the matter of conduct of the affairs of the Company.

17. When there are two Directors, non-cooperation by one of them would result

in a stalemate and in that view of the matter the Company Law Board and the High Court have rightly exercised their jurisdiction.

xxx xxx xxx 22. The provisions of the Act vis-?-vis the jurisdiction of the Company Law Board must be considered having regard to the complex situation(s) which may arise in the cases before it. No hard-and-fast rule can be laid down. There cannot be any doubt whatsoever that the acts of omission and commission on the part of a member of a company should be qua the management of the company, but it is difficult to accept the proposition that the just and equitable test, which should be held to be applicable in a case for winding up of a company, is totally outside the purview of Section 397 of the Act. The function of a Company Law Board in such matters is first to see as to how the interest of the company vis-?-vis its shareholders can be safeguarded. The Company Law Board must also make an endeavour to find out as to whether an order of winding up will serve the interest of the company or subvert the same. Further, if an application is filed u/s 433 of the Act or Section 397 and/or Section 398 thereof, an order of winding up may be passed, but as noticed hereinbefore, the Company Law Board in a winding-up application may refuse to do so, if any other remedy is available. The Company Law Board may not shut its doors only on sheer technicality even if it is found as of fact that unless the jurisdiction u/s 402 of the Act is exercised, there will be a complete mismanagement in regard to the affairs of the company.

23. Sections 397 and 398 of the Act empower the Company Law Board to remove oppression and mismanagement. If the consequences of refusal to exercise jurisdiction would lead to a total chaos or mismanagement of the company, would still the Company Law Board be powerless to pass appropriate orders is the question. If a literal interpretation to the provisions of Section 397 or 398 is taken recourse to, may be that would be the consequence. But jurisdiction of the Company Law Board having been couched in wide terms and as diverse reliefs can be granted by it to keep the company functioning, is it not desirable to pass an order which for all intent and purport would be beneficial to the company itself and the majority of the members? A court of law can hardly satisfy all the litigants before it. This, however, by itself would not mean that the Company Law Board would refuse to exercise its jurisdiction, although the statute confers such a power on it.

(emphasis supplied)

12. In view of the aforesaid settled legal position, the submissions advanced by the learned Counsel for the Appellants are untenable in law.

13. Consequently, the present appeal is dismissed but with no order as to costs.