

(2019) 03 CAL CK 0048

In the Calcutta High Court

Case No : General Application (GA) No. 1, 552 Of 2019 With Civil Suits (CS) No. 34 Of 2019

Vikram Jairath And Anr.

APPELLANT

Vs

Middleton Hotels Private Limited And Ors

RESPONDENT

Date of Decision : 13-03-2019

Acts Referred:

Companies Act, 2013 — Section 1(4)(a), 2(55), 58, 58(2), 59, 70(4)(a), 241, 242, 430, 434

Code Of Civil Procedure, 1908 — Section 9, Order 2 Rule 2, Order 7 Rule 11

National Company Law Tribunal Rules, 2016 — Rule 35, 70, 70(4), 70(5), 70(5)(b)

Citation : (2019) 03 CAL CK 0048

Hon'ble Judges : Shekhar B. Saraf, J

Bench : Single Bench

Advocate : Jishnu Saha, Ashis Kumar, Ishaan Saha, Ratnanko Banerjee, Jishnu Chowdhury, Shounak Mitra, Manabendra Thakur, A. Singh

Judgement

Shekhar B. Saraf, J

1. This is an interlocutory application praying for orders as enumerated below:

a) An order of injunction be made restraining the defendants from giving any effect or further effect to the purported resolutions dated 15th October, 2018, 14th November, 2018 and 1st December, 2018 or from in any manner representing or holding out that the authorized capital of the defendant No. 1 company has been increased from its original authorized value of Rs.1.5 crores or that any bonus shares have been issued or allotted to the defendant Nos. 2, 3, 4 and 5 or any of them, consequent on increase of the authorized capital of the company or otherwise;

b) An order of injunction be made restraining the defendants or any of them from issuing or allotting any share or allotting any share in the defendant No.1 or from transacting any business of the said defendant or from in any manner dealing with any of its assets or properties or from convening any meeting of the

defendant No. 1 or passing any resolution thereat to deal with, dispose of, alienate, encumber or part with possession of any part or portion of the property of the defendant No. 1 at 10, Middleton Street, Kolkata - 700071;

c) An ad interim order be made in terms of the prayers above;

d) Costs of this application be directed to be paid by the defendants;

e) Such further or other order or orders be made and/or direction or directions be given as to this Hon'ble Court may seem fit and proper.

2. The factual matrix of the case is that the defendants owed the plaintiffs a huge sum of money to the tune of approximately Rs. 30 crores and they had been reneging on their payments. Ultimately, defendants 2 to 5, who own the entire shareholding in the defendant no. 1 company, pledged their shareholding as security for the debt on 25th July, 2018. They failed to pay the outstanding amount and, thereafter, on 24th December, 2018, they transferred the entire shares of the company to the plaintiffs by signing on transfer deeds. It came to the plaintiffs' knowledge on a later date that the defendants had amended the memorandum of association of the company and increased the authorised share capital of the defendant no. 1 company and thereafter issued bonus shares to the defendant nos. 2 to 5. Upon enquiry it transpired that three resolutions were passed between July, 2018 and December, 2018 - first one on 15th October, 2018, another on 14th November, 2018 and the third one on 1st December, 2018. These resolutions authorised the increase in share capital, issuance of bonus shares, and allotment of the said bonus shares. The plaintiffs claimed that they had an oral agreement with the defendants whereby it was implied that no changes would be made in the shareholding of the company and, thus, the defendants committed fraud on the plaintiffs by carrying out the said changes behind their backs.

3. It was brought to light by the counsel for the defendants, Mr. Jishnu Chowdhury, that the plaintiffs had also instituted proceedings before the National Company Law Tribunal (hereinafter referred to as "NCLT") on the 15th of February and that the present interlocutory petition and the plaint before this Court does not disclose this fact. In reply to this, the counsel for the plaintiffs, Mr. Jishnu Saha, stated that he is willing to provide an undertaking to not press the interim prayers before the NCLT. Additionally, he also refers to paragraph 33 of the plaint to state that he had already disclosed that an application has been filed before the NCLT.

4. Mr. Saha further stated that the application filed before the NCLT was under Sections 58 and 59 of the Companies Act, 2013 for registration of the shares already transferred to the plaintiffs, which the defendants had refused to carry out. Further, he argued that an application for oppression and mismanagement under Sections 241 and 242 of the Companies Act, 2013 can only be made by a member of the company and since their share transfer deeds had not been registered by the defendants, they were not members and could not have

applied under Sections 241 and 242 before the NCLT. He referred to page 77 of the petition, which is the evidence for conduct of the parties as proof of the oral agreement between them. He further referred to page 78, which shows the signed transfer deeds dated 24th December, 2018, bearing signatures of all the shareholders of the defendant no. 1 company. He next referred to page 170 to show the acknowledgment of the debt owed by the defendants to the plaintiffs, amounting to a sum of Rs. 30 crores. Thus, the plaintiffs allege fraud and deceit on the part of the defendants towards the plaintiff and an attempt by them to defeat the oral agreement between the parties.

5. The counsel for the defendants, Mr. Jishnu Chowdhury, submitted that the NCLT petition was filed on 15th February, that is, three days before the institution of the suit before the High Court and the defendants have already claimed the same interim reliefs in the NCLT proceedings as well. He submitted firstly, that the plaintiff had the duty to indicate that an application before the NCLT had already been filed. Instead, they have stated at para 33 of the plaint that steps to initiate a proceeding before NCLT had been taken. Secondly, the plaintiffs were required to disclose that the same interim reliefs, which have been claimed before this court, had already been claimed before the NCLT, which also they have failed to do and, thirdly, a copy of the said NCLT application must have been brought before this Court by the plaintiffs, which they have not done. Thus, he submitted that the plaintiffs have suppressed material facts and to support his submissions cited the judgement of *Barbara Taylor Bradford -v- Sahara Media Entertainment* reported in 2004 (1) CHN 448.

6. He then referred to Section 430 of the Companies Act, 2013, which bars civil courts from entertaining any suit or proceeding over which the NCLT is empowered to decide. Thereafter, he referred to Rule 70 of the National Company Law Tribunal Rules, 2016 [hereinafter referred to as NCLT Rules]. Thereafter, he placed two judgments *Shashi Prakash Khemka (Dead) Through LRs -v- NEPC Micon (Now called NEPC India Ltd.)* reported in 2019 SCC Online SC 23 and *SAS Hospitality Pvt. Ltd. -v- Surya Constructions Pvt. Ltd.* reported in 2018 SCC Online Del 11909 to buttress his arguments that the jurisdiction of the civil court is absolutely barred when the NCLT has jurisdiction over the matter. He submitted that *SAS Hospitality (supra)* has categorically held that the view taken in *Ammonia Supplies Corporation Pvt. Ltd. -v- Modern Plastic Containers (Pvt.) Ltd.* reported in 52 (1993) DLT 252 was the old view and, as per the new view, the bar on the civil court is absolute in nature. He has also relied on *SAS Hospitality (supra)*, *In the Matter of M/s. M. Square Caterers and Hospitality Pvt. Ltd.* reported in 2012 SCC Online CLB 109 and *In the Matter of Sangeeta Maheshwari* reported in *Company Appeal (AT) No. 11/2018* to argue that a combined application under Section 58, 59, 241 and 242 could have been made in this case before the NCLT. He further submitted that as per the NCLT Rules, the NCLT is empowered to pass any other order or injunction with respect to Sections 58, 59, 241 and 242.

7. In reply, Mr. Jishnu Saha submitted that a copy of the NCLT proceedings was served on the defendants as the NCLT Rules require that notice should be given to the defendants before any application is filed. Thus, there is no question of any kind of suppression of material facts from either the defendants or the High Court. In response to the submission that the plaintiffs were engaging in forum shopping, Mr. Saha submitted that he had filed the suit on an independent cause of action. Thus, the suit was not barred. In this suit, the cause of action stems from a breach of the oral agreement and is governed by the Indian Contract Act, 1872 and the Specific Reliefs Act, 1963 while the cause of action in the application filed before the NCLT arises from a violation of the Companies Act, 2013. He submitted that he seeks enforcement of the agreement before the Court and has sought a negative covenant, which is the prayer for injunction. He also referred to Order II Rule 2 of the Code of Civil Procedure, 1908, which states that a claim can be given up to bring a suit within jurisdiction of the court and, thus, he will not press prayer B in the NCLT proceedings to bring the present suit within the jurisdiction of this court.

8. Mr. Saha further submitted that he has no available remedy under the Companies Act to enforce the oral agreement. He referred to Sections 2(55), 58, 59, 89, 241 and 242 to argue that none of these sections would allow him to enforce the oral agreement between the parties due to the fact that the Tribunal cannot adjudicate on these issues and, thus, he had to bring his claim before this Court. Mr. Saha relied on the judgements in *Howrah Trading Co. Ltd. -v- Commissioner of Income Tax, Central, Calcutta* reported in 1959 Supp (2) SCR 448 and *J.P. Srivastava & Sons (P) Ltd. and Ors. -v- Gwalior Sugar Co. Ltd. and Ors.* reported in (2005) 1 SCC 172 to submit that a person who is not an 'member' cannot raise the issue of oppression and mismanagement before the NCLT, and accordingly, the only course open to him was a civil suit before the High Court. Mr. Saha further placed Section 41 of the 1956 Act to indicate that the definition of 'member' there is *pari materia* with the present definition of 'member' in Section 2(55) of the 2013 Act. He accordingly submitted that the *ratio decidendi* of the above judgments would apply to the present case.

9. Mr. Saha also submitted that there was no bar on him to move two forums on separate cause of action arising from the same set of facts. He further submitted that similar reliefs could also be prayed for before the two forums. He submitted that in certain peculiar circumstances the above mode of proceeding before two forums seeking similar reliefs is neither improper nor illegal as there is no bar under any law to take such a course of action. He relied on Section 9 of the Code of Civil Procedure, 1908 to support his above argument.

10. Mr. Ratnanko Banerjee, Senior Advocate, appearing on behalf of the defendants once again reiterated that the filing of the civil suit is absolutely barred by the Companies Act, 2013. He placed reliance on Section 430 of the Companies Act, 2013 to submit that any matters that can be decided by the NCLT cannot be brought forward by way of a civil suit. He further placed heavy

reliance on sub rule 4 and 5 of Rule 70 of the NCLT Rules to indicate that the NCLT had the power to decide on issues relating to title, issue of bonus shares, incidental matters including power to grant injunction or stay and generally decide any question which is necessary or expedient to decide in connection with the application for rectification of the register of members. He further placed an order passed by the National Company Law Appellate Tribunal, New Delhi in the matter of Sangeeta Maheshwari -v- M/s Premsagar Agricultural Pvt Ltd. and Ors. [Company Appeal (AT) No.11/2018] to show that even a non-member could make a joint application under Section 58, 59, 240, 241 and 242 of the Companies Act, 2013. He further submitted that the plaintiff petitioner in spite of his assurance given to this Court on 27th February, 2019 had moved his application for interim reliefs before the NCLT. He submitted that the NCLT by an order dated 5th March, 2019 had refused to grant any interim order and directed exchange of affidavits in the matter. Mr. Banerjee further submitted that the plaintiffs wanted to steal a march on the defendants by moving the interlocutory application on 26th February, 2019 without service on the defendants. He further submitted that if the plaintiffs had not been present in Court on that day the matter would have been heard suppressing the factual aspect that an application seeking similar reliefs had already been filed before the NCLT.

11. At the very outset, I need to point out that this is an application for grant of injunction made on behalf of the plaintiff. There is presently no application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 before me for rejection of the plaint. However, issues raised by the defendants with regard to point of maintainability of the suit, on the ground that this Court has no jurisdiction cannot be glossed over. Grant of any interim order has to be addressed only after the Court is satisfied fully about its own jurisdiction. The other issues raised by the defendants with regard to suppression of material facts and also the manner in which the same reliefs have been sought from two different forums are also needed to be examined before passing any order of injunction.

12. With regard to the issue of suppression of material facts it is to be noted that the application for injunction does not mention anywhere that another application has been filed before the NCLT. There seems to be only a reference at paragraph 33 of the plaint to an application intended to be filed by the plaintiff with regard to the rectification under Section 58 and 59 of the Companies Act, 2013. The reality is far from the above. The documents reveal that the application before the NCLT was filed on 15th February, 2019 while the present plaint was instituted before this Court on 18th February, 2019, three days after the application had been filed before the NCLT. Moreover, the manner in which this matter was moved before me by the plaintiff did not indicate that a pending application had already been filed before the NCLT. The arguments of Mr. Jishnu Saha, Senior Advocate appearing on behalf of the plaintiff that the application before the NCLT was filed only after service on the defendants does not come to his rescue as this Court is concerned with the suppression of material facts before it and not the suppression on any other party. It has to be further pointed out that the plaintiff

wanted to move this matter *ex parte*, and if the same had been allowed, this Court would not have caught a whiff of the pending matter before the NCLT. Even when the matter was argued before me in presence of both the parties, Mr. Jishnu Saha, Senior Advocate appearing for the plaintiffs did not indicate that similar reliefs had been prayed for by them before the NCLT. In my view, the manner and mode in which the plaintiffs have proceeded in this suit before me is not keeping in with the spirit of the law. It is to be noted that the Supreme Court in the case of *S.P. Chengalvaraya Naidu (Dead) by Lrs. -v- Jagannath (dead) by LRs. And Ors.* reported in AIR 1994 SC 853 observed that the Courts of law are meant for imparting justice between the parties and one who comes to the court, must come with clean hands. It can be said without hesitation that a person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court. Furthermore, a person who seeks equitable relief from the court must come to the court with clean hands and disclose all facts which are relevant to the case. In my considered view, the statement in the plaint that the plaintiff is intending to file an application before the NCLT, when the truth was that the application had already been filed is a case of misrepresentation and amounts to suppression of material facts. On this count itself, the application for injunction needs to be dismissed.

13. Even if I were to give the benefit of doubt to the plaintiffs on the above issue of suppression, the further hurdle of jurisdiction of this Court is staring at my face. It would be fruitful to pen down the relevant Section and Rule to highlight this issue. Extract of Section 430 of the Companies Act, 2013 and Rule 70 of the NCLT Rules are provided below:

"Section 430 of the Companies Act, 2013 -

430. Civil Court not to have jurisdiction. - No civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.

Rule 70 of the NCLT Rules -

70. Appeal under sections 58 and 59.- (1) The appeals against the refusal for registration of transfer or transmission of securities under section 58 or for rectification of register of members under section 59 shall be made to the Tribunal by way of a petition in Form No. NCLT. 1 and shall be accompanied by such documents as are mentioned in Annexure B:

Provided that a copy of the appeal shall be served on the concerned company at its registered office immediately after filing of the petition with the Tribunal.

(2) The petitioner shall at least fourteen days before the date of hearing advertise the petition in accordance with rule 35.

(3) Where any objection of any person whose interest is likely to be affected by the proposed petition has been received by the petitioner, it shall serve a copy thereof to the Registrar on or before the date of hearing:

(4) The Tribunal may, while dealing with a petition under section 58 or 59, at its discretion, make-

(a) order or any interim order, including any orders as to injunction or stay, as it may deem fit and just;

(b) such orders as to costs as it thinks fit; and

(c) incidental or consequential orders regarding payment of dividend or the allotment of bonus or rights shares.

(5) On any petition under section 59, the Tribunal may-

(a) decide any question relating to the title of any person who is a party to the petition to have his name entered in, or omitted from, the register;

(b) generally decide any question which is necessary or expedient to decide in connection with the application for rectification."

14. As is evident from a bare perusal of Section 430, the jurisdiction of this Court has been ousted specifically with regard to matters that may be decided by the NCLT. Furthermore, it is to be seen that the powers of the NCLT with regard to dealing with matters in relation to Section 58 and 59 are provided for in Rule 70 which are extremely wide. Powers such as (a) passing orders or any interim order including any orders as to injunction or stay, (b) incidental or consequential orders regarding payment of dividend or the allotment of bonus or rights shares, (c) deciding any question relating to the title of any person and (d) generally deciding any question which is necessary or expedient to decide in connection with the application for rectification, are provided therein. Without going into the controversy as to whether an application could be maintained under Section 241 and 242 of the Companies Act, 2013 (as argued by Mr. Jishnu Saha) it is clear that a conjoint application under Section 58, 59, 241 and 242 could have been made by the plaintiff before the NCLT. Several examples of the same have been brought to my notice by counsel appearing on behalf of the plaintiffs. The two judgments cited by Mr. Jishnu Saha in *Howrah Trading Co. Ltd.* (supra) and *J.P. Srivastava & Sons (P) Ltd. and Ors.* (supra) cannot come to his rescue in light of the changed circumstances as provided in the new Companies Act, 2013. The entire philosophy of the Companies Act, 2013 is that all matters relating to companies shall be handled by the NCLT except certain matters that have been kept back and not transferred as per Section 434 of the Companies Act, 2013.

One may rely on the relevant observations in the case of Union of India -v- R. Gandhi/ Madras Bar Association -v- Union of India reported in [2010] 156 Comp Cas 392 (SC); [2010] 324 ITR 166 (SC); [2010] 11 SCC 1 to underscore this particular point. The relevant portion is set out below (page 436 of 156 Comp Cas) :

"The argument that there cannot be 'whole sale transfer of powers' is misconceived. It is nobody's case that the entire functioning of courts in the country is transferred to the Tribunals. The competence of Parliament to make a law creating Tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed. When a Tribunal is constituted under the Companies Act, empowered to deal with disputes arising under the said Act and the statute substitutes the word 'Tribunal' in place of 'High Court' necessarily there will be 'whole-sale transfer' of company law matters to the Tribunals. It is an inevitable consequence of creation of Tribunal, for such disputes, and will no way affect the validity of the law creating the Tribunal."

15. Upon coming into force of the Companies Act, 2013, the intention of the legislature seems to be quite clear. If one were to keep in mind the preamble of the Companies Act, 2013 that states "an Act to consolidate and amend the law relating to companies" as also Section (1) sub-Section (4)(a) of the Companies Act, 2013 that states that the provision of this Act shall apply to "companies incorporated under this Act or under any previous company law", it would inevitably lead one to the conclusion that the legislature intended to bring all matters under the gambit of the new enactment. It is to be further seen that proviso to Section 58(2) states "provided that any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract". This power under Section 58 read with Rule 70(5)(b) that gives the power to the Tribunal to generally decide any question which is necessary or expedient to decide in connection with the application for rectification read with Section 70(4)(a) that gives the power to the Tribunal to pass any interim order including any orders as to injunction or stay makes it clear that it is the Tribunal that has the power to decide all issues in relation to transfer of shares by way of an oral or written contract. The very fact that the Tribunal has been empowered with these powers leads one to the inference that all issues relating to transfer of shares, registration and rectification of register of members and any matter incidental to the same including oppression and mismanagement would be retained by the Tribunal.

16. Under these circumstances, I am of the prima facie view that this High Court does not have jurisdiction in the above matter. It is to be noted that the above findings of mine are tentative and I do not wish to further delve into the question of jurisdiction of this Court and the same may be decided at the appropriate time, if and when, an application is made under Order 7 Rule 11 of the Code of Civil Procedure, 1908.

17. Finally, one needs to address the issue with regard to the plaintiff praying for

similar reliefs simultaneously before two different forums. The argument of Mr. Jishnu Saha, that the cause of action in the two applications are different and therefore, the High Court retains its jurisdiction to adjudicate on the cause of action brought forward in this suit do not entice me simply because the interim relief sought for in both the suit and application before the NCLT is the same. A litigant cannot be allowed to seek similar reliefs in different forums at the same time. It would have been a different matter if the application before the NCLT had not been filed or was withdrawn before the filing of the suit. In the event both the applications before the NCLT and the interim application before this Court are allowed to run parallelly, a dichotomous situation would arise as the vital issues involved in both the suit and NCLT petition are the same. The rectification sought for before the Tribunal also proceeds on the argument that the defendants have acted in a fraudulent manner and did not register the name of the plaintiffs as shareholders. The same argument finds place in the suit and the interim application before this Court. The two parallel proceedings may result in diametrically opposite orders being passed with regard to the same core issue. Such a situation is not acceptable and contemplated in law.

18. In conclusion, as indicated above, the present application for an ad interim order of injunction cannot be allowed on two counts - (a) suppression of material facts and (b) the plaintiff praying for similar reliefs simultaneously before this Court and NCLT that would require adjudication on the identical core issue. In light of the same, this matter needs to be decided upon exchange of affidavits. Accordingly, let affidavit in opposition be filed within four weeks, reply if any, within two weeks thereafter. Liberty to mention upon completion of affidavits.

19. All parties are to act on the basis of this order to be downloaded from the official website of this High Court.