

(2016) 01 BOM CK 0072

In the Bombay High Court

Case No : Company Appeal No. 59 of 2014, Company Appeal (L) Nos. 45 and 46 of 2013

Yusuf Kagzi and Others

APPELLANT

Vs

Avigo Trustee Co. Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 07-01-2016

Acts Referred:

Constitution of India, 1950 — Article 14(a)

Citation : (2016) 194 CompCas 258 : (2017) 2 CompLJ 129 : (2016) 134 SCL 298

Hon'ble Judges : S.C. Gupte, J.

Bench : Single Bench

Advocate : Mustafa Doctor, Sr. Advocate, Karl Tamboly and Purazar Fouzdar i/b. J. Sagar Associates, for the Appellant; Rakesh Khanna and Sahil Chopra i/b. Shailendra Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Gupte, J.—1. This appeal (Company Appeal No. 59 of 2014) impugns an order passed by the Company Law Board, Mumbai Bench ("CLB") in a petition filed by Respondent Nos. 1 and 2 under Sections 397 and 398 of the Companies Act, 1956. By the impugned order, CLB accepted the case of Respondent Nos. 1 and 2 of oppression and mismanagement, and dissolved the Board of Directors of Appellant no.2 and reconstituted the same. CLB also declared resolutions passed in certain meetings of the Board as also General Body as illegal and set aside the same.

2. The Appellants' case may be briefly stated thus:

Respondent nos. 1 and 2 had invested a sum of Rs. 40 crores in Appellant No. 2 Company ("Company"), under a Share Subscription cum Shareholders Agreement ("SSSA") dated 24 March 2008 entered into between promoters of the Company who are represented by Appellant no.1, Respondent nos. 1 to 3 and the Company. After acquiring land and setting up a new factory, the

Company commenced production around 10 October 2009. Purportedly due to a world-wide recession and market crash around that time and withdrawal of several orders placed on the Company by its prospective customers, the business of the Company was severely affected. Respondent Nos. 1 to 3 offered to invest a further sum of Rs. 10 crores in the Company and called a meeting on 5 March 2010 for discussions on the terms and conditions of the proposed investment. This meeting, which was treated as a board meeting followed by a general meeting, purported to pass resolutions approving amendments to the SSSA as well as Articles of Association of the Company to give effect to the amendments inter alia allowing Respondent nos. 1 to 3 to convert their preference shares (Series A) into equity shares in the manner provided in the amended SSSA. This was followed by a purported Supplemental Agreement dated 6 March 2010. Respondent nos. 1 to 3 claimed to have exercised their right of conversion of preference shares into equity shares. After such conversion, the shareholding of Respondent Nos. 1 to 3 went up from 0.01% to 69.38% of the issued, subscribed and paid up share capital of the Company. Upon such conversion, Respondent Nos. 1 to 3 requested for re-constitution of the Board of Directors of the Company, which was not done. Respondent Nos. 1 to 3 also served a notice on 7 May 2010 pointing out various breaches of the terms of SSSA and the Articles and misconduct of affairs of the Company by the promoters. Soon, the nominee director of Respondent Nos. 1 to 3 resigned from the Board. It was the case of Respondent Nos. 1 to 3 that instead of reconstituting the Board, in a meeting of the Board, Respondent Nos. 8 and 12 herein were appointed as additional directors and Respondent No. 13 herein as director. Respondent Nos. 1 to 3, thereupon, by notice dated 2 July 2010, terminated the SSSA. It was the case of Respondent Nos. 1 to 3 that instead of acting upon such termination in compliance with the SSSA, the Appellants fabricated the records of the Company inter alia resulting in 100% net worth erosion and made a reference before BIFR. The reference was, however, rejected by BIFR on 16 April 2012. It was also the case of Respondent Nos. 1 to 3 that various meetings and general meetings held by the Appellants after 5 March 2010 were non-est, void and illegal. In the premises, the present petition alleging oppression and mismanagement against the Appellants was filed by Respondent Nos. 1 to 3, in which the impugned order came to be passed.

3. On the petition of Respondent Nos. 1 to 3, CLB came to following conclusions:

(i) The issue relating to maintainability of the petition (i.e. on the ground of not having claimed a relief of rectification under Section 111 of the Companies Act simultaneously) was already decided at the preliminary stage in favour of Respondent Nos. 1 to 3 (original Petitioners) and the same not having been appealed from, was final and could not be re-agitated at the hearing. In any event, the petition was maintainable.

(ii) The meeting of the Board of Directors and the Extra-ordinary General meeting which followed it on 5 March 2010, were duly held and the resolutions

passed therein were valid and binding upon the parties.

(iii) The contention of the Appellants that the petition was filed for a collateral purpose (i.e. for recovery of their money under the SSSA) had no merit.

(iv) All the meetings held after 5 March 2010 by the Appellants were illegal and void, and the decisions taken thereat were liable to be set aside.

(v) Holding of Board Meetings as well as General Body Meetings without notice to the nominated directors of Respondent Nos. 1 to 3 (Original Petitioners) was a clear violation of the Articles and showed lack of probity and unfairness, seriously jeopardizing the interest of the original Petitioners.

(vi) The Appellants (original Respondents) had assumed control over the Company by illegal means, including manipulation of records.

(vii) Having regard to the facts of the case, it would have been just and equitable to wind up the Company, but such winding up would be unfairly prejudicial to the interests of the Petitioners who are genuinely entitled to participate in the management of the Company.

On these findings, CLB granted various reliefs including setting aside of the various resolutions passed at the Board meetings and general meetings held after 5 March 2010, and reconstitution of the Board of Directors of the Company.

4. The following questions of law are pressed by Mr. Doctor, learned Counsel for the Appellants, at the hearing of the Appeal for impugning the CLB order:

(i) The reliefs claimed in the petition are on the basis that the Petitioners are 69.38% shareholders of the Company; but no relief can be granted on such footing unless a rectification is sought and obtained as part of the reliefs. Till such time as such rectification is not ordered, the law does not recognize the membership of the Petitioners in respect of 69.38% shares of the Company.

(ii) The petition was filed by the Petitioners for a collateral purpose, namely, recovery of the purchase price for their investment so as to give them IRR of 50 per cent compounded annually, and as such, was not maintainable.

(iii) What happened at the meeting of 5 March 2010 was a matter of evidence, which could only be decided in a suit.

5. In addition to these contentions, Mr. Seervai, learned Senior Counsel appearing for Appellant in the Companion Appeal (Company Appeal (Lodging) No. 45 of 2013) and Mr. Balsara for Appellant in Company Appeal (Lodging) No. 46 of 2013, who are shareholders of the Company, submit that the purported general meeting of 5 March 2010, on the basis of which mainly reliefs were granted to the original Petitioners, was held without notice to their respective clients and thus, illegal and could not have transacted any business or passed any resolution. Learned counsel submit that without considering this aspect, CLB has proceeded to uphold the validity of the general meeting of 5 March 2010.

6. At the outset, it must be noted that non-rectification of the register of members does not reflect on the threshold requirement of maintainability of the petition for the purposes of reliefs under Sections 397 and 398. The original Petitioners, three shareholders in number, out of a total number of fourteen shareholders, satisfy the requirement of being 1/10th of the total number of members and are clearly qualified as such to file the petition. What is submitted, however, by the Appellants is that the Petitioners are not by that reason or otherwise entitled to claim reliefs on the basis that they hold 69.38% of issued, subscribed and paid up share capital of the Company. The contention is that the general meeting of 5 March 2010 and decisions taken thereat, on the basis of which the original Petitioners claim to be entitled to conversion of their preference shares (Series A) to equity shares, are subject matters of dispute; that there is no entry made in the register of members in respect of equity shareholding of 69.38% of the Petitioners; and that in the premises, no relief could be claimed on the basis of the Petitioners actually being members in respect of those shares. The Appellants rely on the decision of the Supreme Court in the case of Balkrishna Gupta & Ors. Vs. Swadesh Polytex Ltd. & Ors. , 1985 (Vol. 58) Company Cases Page 563 and of the Kerala High Court in the case of Lalithamba Bai Vs. Harrisons Malayalam Ltd. , 1988 (Vol. 63) Company Cases Page 662 and the decisions of Company Law Board in Satish Chand Sanwalka & Ors. Vs. Tinplate Dealers Association Pvt. Ltd., & Ors. , (1998) 93 Comp Cas 70 (CLB) T.N.K Govindaraju Chetty & Co. Vs. Kadri Mills (CBE) Limited , (1999) 96 Comp Cas 871 (CLB) and Navin Ramji Shah & Ors. Vs. Simplex Engineering and Foundry Works Pvt. Ltd., , (2007) 136 Comp Cas 770 (CLB) in support of their contentions.

7. The Supreme Court in Balkrishna Gupta's case (supra) has held that the privileges of a member can be exercised by only those persons whose names are entered in the register of members and not by others. (To the same effect are observations of the Kerala High Court in Lalithamba Bai's case (supra) relied upon by the Appellants.) The questions before the Supreme Court were whether a receiver appointed of shares was entitled to a notice of a general meeting and whether mere appointment of a receiver would deprive the holder of shares, whose name was entered in the register of members, the right to issue a notice of an EGM under Section 169 of the Companies Act, 1956 and vote at such meeting. In the context of these questions, the court made its observations referred to above. As far as a petition under Sections 397 and 398 is concerned, the position would be entirely different. Reduction of a petitioner's shareholding or non-allotment of shares to him may itself be an act constituting an oppression. It is futile to suggest that in such a case, the petitioner would not be able to seek reliefs on the basis of his entitlement to the additional shareholding or allotment of shares. So long as the threshold requirement of the requisite number or value of shares is satisfied, a petitioner can claim reliefs on the basis of his entitlement to shares even if he is not brought on record in the register of members in respect of those shares.

8. In the present case, in terms of the SSSA, the original Petitioners had admittedly invested a total sum of Rs. 40 crores in the Company towards subscription of equity shares together with "Series A" preference shares with a right of conversion into equity shares. Accordingly, the Petitioners were allotted 1000 equity shares and 19,99,000 preference shares of the Company. The SSSA provided for the petitioner's right to convert these preference shares into equity shares in part or full, at any time after 31 March 2009 by giving a notice thereof to the Company in the manner specified (Clause 7.5). The SSSA also provided for automatic conversion of the preference shares into equity shares on the 10th anniversary of the applicable closing date in the manner specified, if not converted earlier. There are other clauses in the SSSA making subsidiary provisions concerning conversion (Clause 7.6 to 7.9). The amended clauses of the SSSA (approved in the Board meeting and General meeting of the Company held on 5 March 2010) provided for conversion price. The relevant Articles of Association of the Company were also, accordingly, amended by a resolution passed on 5 March 2010, providing for conversion of preference shares into equity shares at a stated ratio. The Petitioners, accordingly, exercised their right of conversion and on 31 March 2010, the Company allotted 1,58,64,074 equity shares equal to 69.38% of the issued, subscribed and paid up equity shares of the Company to the Petitioners. The share certificates were produced by the Petitioners before CLB. After such conversion, according to the relevant Article, Article 14(a), the Board of the Company was to comprise of four directors to be nominated and appointed, three by the Petitioners and one by the promoter. The Petitioners called upon the Company to do so. That was not heeded. These allegations form part of the Petitioner's case of oppression. It cannot possibly be suggested that on these allegations, the Petitioners cannot seek reliefs such as reconstitution of the Board or setting aside resolutions passed in meetings, urging their entitlement to 69.38% equity shares of the Company. Andhra Pradesh High Court in the case of N. Satyaprasad Rao & Ors. Vs. V.L.N. Sastry & Ors. , 1988 (Vol.64) Company Cases 492 considered the case of petitioners, who were allottees of shares, but whose names were not entered in the register of members in the context of an application under Sections 397 and 398. The Court held that such petition was maintainable at the instance of shareholders to whom share certificates were issued notwithstanding the omission of their membership in respect of those shares in the register. The Company, held the Court, cannot take advantage of its failure to enter particulars in the register. The Court also held that Section 155 (now, Section 111) was only an enabling provision and could not be invoked to defeat the rights of petitioners who claimed reliefs on the basis of those shares. I am in respectful agreement with these observations. When want of entry in the register itself is occasioned by an act of the oppressor, there is no question of denying relief to the oppressed on the ground of such want.

9. The Appellants contend that Respondent Nos. 1 to 3 have terminated the SSSA by a notice dated 7 May 2010, calling for purchase of their shares at a

price which gives them the specified IRR, and have now filed the petition for recovery of this amount. Clause 15.3.1. read with clause 16.1 of the SSSA (as amended) mandates the Company to purchase shares offered by Respondent Nos. 1 to 3 at a specified price. It is true that this obligation of the Company was invoked by Respondent Nos. 1 to 3. The fact of the matter is that the Company has refused to honour the mandate. Till the shares are purchased in accordance with the provisions of the SSSA, Respondent Nos. 1 to 3 are surely entitled to exercise their rights as shareholders and if they are not allowed to do so by way of an act of oppression or mismanagement, to seek redressal under Sections 397 and 398 of the Companies Act, 1956.

10. Learned Counsel for the Appellants relied on English decision in the case of *Re Bellador Silk Ltd.* [1965] All E.R. Ch.D 667 in support of his contention that the presentation of the petition in order to bring pressure to bear to achieve a collateral purpose was an abuse of the process of the Court. The dicta of the English Court were followed by Kerala High Court in the case of *Palghat Exports Pvt.Ltd. vs. T.V. Chandran* , 1993 SCC OnLine Ker 441 : , (1994) 79 Comp Cas 213. Bellador Silk case was a case where a contributory had presented a petition alleging oppression, but during the evidence it transpired that the real object of presenting the petition was to get repayment of a loan owed by the company to the petitioner's group of companies. In other words, though petitioner was a member of the company and entitled as such to present a petition, the petition itself was to seek reliefs otherwise than as such member. That was clearly a collateral purpose. This ratio cannot be invoked in the present case, where the petitioners are claiming reliefs in respect of their membership. Besides, the real purpose as opposed to the ostensible purpose of the petition is a matter of fact and the finding of CLB in that behalf cannot be faulted on a question of law.

11. The questions as to whether the EOGM of 5 March 2010 did take place and whether the resolutions passed thereat and documents executed in pursuance thereof were validly passed and executed, are examined by CLB in the light of the respective pleadings of the parties and documents placed on record before CLB. The extracts of minutes of the Board meeting along with the Notice of EOGM of 5 March 2010 (containing an explanatory statement) was duly signed by Appellant No. 1. Even the minutes of EOGM of 5 March 2010 were duly signed by him. These signatures are not disputed. In pursuance of the decisions taken at the EOGM, share certificates were duly issued to Respondent Nos. 1 to 3 on 31 March 2010. The share certificates contain signatures of the Company Secretary and two directors, one of whom is Appellant No. 1. In the premises, CLB has refused to give credence to the submission of Appellant No. 1 that he was induced to sign these documents by a misrepresentation or a false promise. As rightly held by CLB, it is inconceivable that Appellant No. 1, who is an industrialist and who has been running the Company having net worth of crores of rupees (with financial assistance worth about Rs. 124 crores from banks), was not aware of the consequences of the documents or that he signed the documents under a belief that they would not be used for any purpose other than

for arranging the additional finance of Rs. 10 crores. There was adequate material before CLB to come to this finding and no question of law arises for the consideration of this Court in connection therewith. There is no substance in the Appellants' contention that this was a matter for the Civil Court to decide by reason of being a complicated question of fact needing extensive evidence. In the facts of the case, it was obviously for the Appellants to discharge the onus to show that the documents were signed under misrepresentation or were otherwise not binding. They could very well have led evidence in this behalf. There is nothing on record to show that they offered to lead any evidence on the subject besides what was produced before CLB or were denied any opportunity to lead further evidence.

12. As for the contentions of the Appellant in the companion appeals (Company Appeal (Lodging) Nos. 45 of 2013 and 46 of 2013) concerning want of notice of EOGM, there is nothing to show that this issue was argued before CLB at the hearing of the petition. The order does not reflect any argument advanced on this issue before CLB. In fact, Appellant in Company Appeal (Lodging) No. 45 of 2013 does not appear to have even appeared at the hearing before CLB. This Appellant has not even filed any reply to the petition before CLB. He now relies on a reply filed by original Respondent No. 3 (i.e. Appellant in Company Appeal (Lodging) No. 46 of 2013) to claim want of notice. In his reply to the petition, original Respondent no.3 had averred about want of notice to himself and not to others including Appellant in Company Appeal (Lodging) No. 45 of 2013. In any event, there is no submission in this appeal that the case of want of notice to him was argued before CLB and yet it failed to consider such case. What his appeal contends is that the pleading in this behalf was not considered by CLB. So also in the case of the Appellant in Company Appeal (Lodging) No. 46 of 2013, though he was represented at the hearing before CLB, there is nothing to show that his case on want of notice was argued before CLB or that despite such argument, CLB failed to address itself to the issue. Parties take various positions in their pleadings. What is considered at the hearing by any Court or tribunal is the submissions advanced before it at the hearing. Without advancing submissions on a particular issue, and that too on an issue of fact, a party cannot fault an order of the Court or the tribunal relying on its case on the issue pleaded in its pleadings. That would clearly spring a surprise on the opponent and compromise the integrity of the trial. Besides, the parties have clearly acted on the resolutions passed at the EOGM; the Appellant in Company Appeal (Lodging) No. 46 of 2013 was a nominee director of promoters represented by Appellant No. 1 in the main appeal and has himself signed the share certificates issued to Respondent Nos. 1 to 3 in pursuance of decision take at the EOGM of 5 March 2010. It was the case of Respondent Nos. 1 to 3 before CLB that he was part of the management under Appellant No. 1; that many general meetings were called by the Company likewise with a short notice; and that he had notice of the Board meeting as well as EOGM of 5 March 2010. Had the submissions concerning want of notice been placed before CLB, all these relevant matters would have been

considered by it. It is too late in the day to now agitate these issues. In that view of the matter, it is not necessary for me to consider the case law cited by learned Counsel on merits of the submissions on consequences of want of notice. The impugned order does not, in the premises, suffer from any error of law in this behalf.

13. There is no substance, thus, in any of the submissions advanced by the Appellants. All three Company Appeals are accordingly dismissed. There shall be no order as to costs.

14. On the application of learned Counsel for the Appellants, the ad-interim orders operating in the Company Appeals in terms of the order dated 26 June 2013 shall be continued for a further period of six weeks from today.