
(2016) 5 NEJ 322

MEGHALAYA HIGH COURT

Case No: Com. Pet No. 5 of 2013

Susheel Kumar Sharma

APPELLANT

Vs

M/s Dees Chemicals
Private Limited

RESPONDENT

Date of Decision: July 21, 2016

Acts Referred:

Companies Act, 1956 - Section 397, Section 398

Citation: (2016) 5 NEJ 322

Hon'ble Judges: Mr. Dinesh Maheshwari, CJ.

Bench: Single Bench

Advocate: Mr. H.S. Thangkhiew, Sr. Advocate with Mr. P.N. Nongbri, Advocate, for the Appellants; Mrs. T. Yangi, Advocate, for the Respondent No. 7

Final Decision: Dismissed

Judgement

Mr. Dinesh Maheshwari, C.J.(Oral) - The instant one is essentially an appeal under Section 10-F of the Companies Act, 1956 ["the Act of

1956"] against the order dated 13.09.2011 as passed by the Company Law Board (Kolkata Bench) in a petition under Sections 397/398 of the

Act of 1956 as filed by the appellants-petitioners, being C.P. No.18 (Kol)/2008.

2. This appeal has been registered in this Court as Company Petition No.5 of 2013 for having been titled as a "Company Petition", though it

should have been titled and registered as a "Company Appeal". Be that as it may, this petition has been dealt with as an appeal and has been finally

heard as such with reference to Section 10-F of the Act of 1956 and Section 434(1)(b) of the Companies Act, 2013, which has come into force

w.e.f. 01.06.2016.

3. Put in brief, the relevant background aspects of the matter are that the respondent No.1 Dees Chemicals Private Limited (hereinafter referred to

as "the company"/the respondent company") is a company incorporated under the Act of 1956 having its registered office at Them Marwet,

Khanapara, Meghalaya that came into existence on 24.11.1999 for carrying waxes business with the authorised share capital of Rs.50 lakhs

divided into Rs.5 lakhs equity shares of Rs.10/- each. It has been the case of the appellants-petitioners that the appellant-petitioner No.1 was

holding 1 lakh shares and the appellant-petitioner No.2 was holding 39,900 shares, which together amounted to 28% of the total paid up capital of

the respondent company; and they were the Directors of the company whereas the respondent No.2 Shri Kamesh Kumar Himatsingka was the

Managing Director. The appellants-petitioners pointed out that the respondent Nos.2 to 5 were together holding 3,60,100 shares, amounting to

72% of the paid up capital of the company. The respondent No.5 Andhra Bank, Guwahati is said to be maintaining the account of the company

whereas, the respondent 7 State Bank of India, Burnihat Branch, Meghalaya is said to be the creditor bank of the company.

4. It has been pointed out that in the process of establishing its business and working capital requirements, the respondent company procured two

loans in the sum of Rs.34,00,000/- (thirty four lakhs) and Rs.41,00,000/- (forty one lakhs) respectively from the respondent No.7, with the

appellants-petitioners as also the respondent Nos.2 to 4 standing as guarantors therefor. According to the appellants-petitioners, for the

company's inability to pay its dues after suffering huge losses, it had been seeking assistance from the State Government for revival. It has been the

case of the appellants-petitioners that since beginning, the respondent No.2 had been maintaining the overall management and affairs of the

company to the exclusion of the others; that the respondent No.2 neglected to take any step to repay the loan amount to the creditors including the

State Bank of India; and that the appellants-petitioners were not given any notice of Annual General Meeting nor any account was shown to them.

5. The appellants-petitioners preferred a petition under Section 397/398 of the Act of 1956 before the Company Law Board, Kolkata Branch

with the submissions that they had received a copy of the notice dated 08.02.2008 from the State Bank of India under Section 13 (2) of the

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ["SARFAESI Act"] making demand to the

tune of Rs.73,18,764.57/- and threatening to take steps for enforcement of securities in case of failure of payment. According to the appellants-

petitioners, they made enquiries whereupon the respondent No.2 admitted that such a notice was served on the company as well. Apart from the

aforesaid submissions, the appellants-petitioners alleged that the respondent No.2 had siphoned out a sum of Rs. 88,26,870/- from the bank

account of the company maintained with the Andhra Bank, Guwahati Branch. With these averments, the appellants-petitioners sought the reliefs,

inter alia, that the Annual General Meeting or the Meeting of the Board of Directors of the respondent company be declared null and void; and the

respondent No.2 be directed to restore the aforesaid amount of Rs. 88,26,870/-. The appellants-petitioners further prayed that the respondent

No.2 be directed to take steps to negotiate with the creditor-bank and to liquidate its dues; and the respondent No.2 be prohibited from dealing

with the assets and properties of the company including the bank account. The learned Member of the Company Law Board dealing with the

aforesaid petition found shortcomings too many in the petition so filed by the appellants-petitioners and proceeded to dismiss the petition by the

impugned order dated 13.09.2011, inter-alia, with the observations and considerations as follows:-

3. The petitioner filed statements of accounts of Andhra Bank disclosing some deposits and withdrawals of company account. Except this, the

petitioner filed no other document along with the petition to place some material indicating that the conduct of the 2nd respondent is oppressive

against the petitioner and against the interest of the company.

4. The petitioner himself stated that he found his signatures in the annual returns of the company as forged, but he has not filed those forged annual

returns before this Bench. Since there is an admission from the petitioner that his signatures were found in the annual returns of the company, it is to

be presumed as signed by this petition as long as it is not proved as forged document.

5. He also stated that he approached second respondent and asked him as to why bank loan was not cleared soon after he received notice from

creditor bank SBI, Burnihat Branch, Burnihat District, Ri Bhoi, State of Meghalaya Surprisingly.

6. I firmly believe this petitioner filed this petition colluding with 2nd respondent to get some orders against the creditor bank who initiated

proceeding under SARFAESI Act. This petitioner received a notice from the bank, but he, to the reasons best known to him, failed to serve a

notice upon creditor bank in these proceedings. When I perused the record, I noticed the proof of service affidavit filed by the petitioners, wherein,

it is clear the petitioners have not included proof service against the Banks shown as respondents. At that time, by oversight it has been set ex parte

against R-4 & R-5.

7. The petitioner is not expected to get a relief in a petition under sections 397/398 of the Companies Act simply by showing other parties ex

parte, without any material showing case under sections 397 & 398 of the Companies Act. He has not given even any legal notice to R-2 nor any

correspondence at any point of time with 2nd respondent in all these years when he has been purportedly excluded from the business. He himself

admitted that company has not been carrying any business for the last several years.

8. This Bench, having believed that these proceedings have been initiated to cause hindrance to the proceedings taken up by the creditor bank i.e.,

R-5 against this company and against the securities given by the petitioner and second respondent, finds no merit to invoke jurisdiction under

sections 397 and 398 of the Companies Act.

6. Assailing the order aforesaid, the learned senior counsel Mr. H.S. Thangkhiew has vehemently argued that the Board has proceeded to dismiss

the meritorious petition of the appellants-petitioners on entirely irrelevant considerations and without properly looking into the record of the case. It

is submitted that on the record of the Board, specific proof of service of notice to the respondents including the respondent-banks were distinctly

available and yet the Board has observed that proof of service against the bank was not available. It is further submitted that when the appellants-

petitioners had specifically asserted that the signatures of the appellant-petitioner No.1 on the annual returns were forged; and nothing appeared on

record to controvert the allegations, it was definitely required of the Board to make necessary enquiry on the allegations before concluding on the

petition. Learned counsel for the appellants-petitioners has further submitted that when a clear case of misappropriation of company's money by

the respondent No.2 was asserted and the same remained uncontroverted, the Board was not justified in dismissing the petition. With these

submissions, the learned counsel has prayed that the matter having not been examined on merits, the impugned order be set aside and the matter

be remanded to the jurisdictional Tribunal for a fresh decision in accordance with law.

7. It is noticed that in the present appeal, appearance has been put only on behalf of the respondent No.7-State Bank of India by Mrs. T. Yangi

and else, none has appeared on behalf of the other respondents though at the earlier point of time, an affidavit-in-opposition was filed by the

respondent No.2.

8. The sum and substance of the submissions on behalf of the respondent No.2 is that according to him, the appellants-petitioners being the

Directors of the company had regularly signed the balance sheets, the annual returns and other papers after being fully aware of the contents

thereof and after having understood the same. The respondent No.2 has contended that the appellants-petitioners chose to file the petition before

the Company Law Board only after the creditor bank had adopted the proceedings for recovery of the due loan amount and had filed an

application before the Debt Recovery Tribunal, Guwahati, under the SARFAESI Act (Original Application No.67/2008) against the company as

well as the Directors who stood as guarantors; and the intentions of the appellants had only been to somehow avoid the liability in the recovery

proceedings. However, nobody has appeared for the respondent No.2 at the time of hearing.

9. The respondent No.7-creditor bank has not filed any affidavit-in-opposition. It is, however, submitted on its behalf that the inference drawn and

conclusion reached by the Company Law Board that the petition was a collusive one cannot be said to be unjustified when it was filed with vague

and frivolous averments and without cogent material in support thereof.

10. After having given thoughtful consideration to the submissions made and after having examined the record, this Court is satisfied that this appeal

does not involve any question of law and deserves to be dismissed.

11. The main-plank of the submissions on behalf of the appellants-petitioners is that the observation made in para-6 of the order impugned, to the

effect that they did not get the banks served is not correct and the proof of service in the form of postal acknowledgements was indeed available

on record. The learned counsel for the appellants-petitioners has particularly drawn attention of this Court to the copies of the acknowledgments as

placed on record as part of Annexure-9 (p.p.163 and 164 of the paper book) to submit that the said banks had indeed been served. However,

this Court is clearly of the view that these submissions, even if taken on their face value, do not have a material bearing on the relevant aspects of

the matter and no case for interference is made out.

12. As noticed, the appellants-petitioners had filed the petition under Sections 397/398 of the Act of 1956 on the allegations of oppression of the

members of the company and mismanagement of the affairs of the company. In such a matter, the initial burden was heavy on the appellants-

petitioners to show that the affairs of the company were being conducted in the manner oppressive to them or in the manner prejudicial to the

public interest. The burden was further heavy to the appellants-petitioners in the first place to show by cogent material that the affairs of the

company were being conducted in the manner prejudicial to its interest. However, apart from making bald allegations against the respondent No.2,

the appellants-petitioners could not produce even the primary material in support of such allegations. The appellants-petitioners further failed to

show that the petition was made bona fide and failed to dispel the presumption directly arising against them.

13. This Court finds nothing of infirmity in the observations made by the Company Law Board in para-4 of the order impugned that even while

alleging that his signatures on the annual returns were forged, the appellant-petitioner No.1 did not file even the copies of the alleged annual returns

with the petition. There being no material on record to support the bald allegations of the appellants-petitioners, the Company Law Board cannot

be faulted in observing that as a matter of presumption, the annual returns would be considered carrying the signatures of the appellant-respondent

No.1. Moreover, it has rightly been observed that even while making allegations against the respondent No.2, the appellants-petitioners failed to

show that they had served any legal notice on the respondent No.2 or entered into any correspondence with him at any point of time. In order that

the Company Law Board could have considered the allegations of exclusion from the management worth examining, it was minimum required of

the appellants-petitioners to show if they had ever served any notice on the respondent No.2 or the other respondents.

14. The significant factor operating heavily against the appellants-petitioners has been that the petition was filed before the Company Law Board

only after the respondent No.7-creditor bank had adopted the recovery proceedings and had filed Original Application No.67/2008 before the

Recovery Debt Tribunal, Guwahati.

15. The appellants-petitioners having failed to bring any cogent material on record in support of their allegations and having failed to satisfy the

basic tests of bona fide, the inferences as drawn by the Company Law Board cannot be said to be unjustified or unwarranted.

16. Taking an overall view of the matter, the inference remains irresistible that the cursory and frivolous petition filed before the Company Law

Board with vague and bald allegations was only aimed at obstructing the recovery proceedings by the creditor bank; and it had not been a case of

any genuine grievance of oppression and mismanagement.

17. In view of what has been discussed herein above, the petition filed before the Board could have only been, and has rightly been, dismissed for

no case of oppression or mismanagement having been made out.

18. In the aforesaid view of the matter, when the petition itself was lacking even in prima facie merit, and it was required to be dismissed as such,

the observation as made in para-6 of the order impugned about want of proof of service of the bank losses its relevance. The banks concerned

were not necessary parties to the petition; and whether they were served or not, the petition was nevertheless required to be dismissed.

19. For what has been discussed herein above, this Court finds no reason to interfere in the impugned order dated 13.09.2011 as passed by the

Company Law Board (Kolkata Bench) in C.P. No.18 (Kol)/2008.

20. The appeal is fails and is, therefore, dismissed.

21. No costs.