(2013) 08 CAL CK 0072

Calcutta High Court

Case No: A.C.O. No''s. 39 of 2006 and 66 and 67 of 2011 and A.P.O. No. 500 of 2006.

Ganesh Commercial Co. Ltd. and Others		APPELLANT
	Vs	
Arun Kumar Mohata		RESPONDENT

Date of Decision: Aug. 16, 2013

Citation: (2013) 116 CLA 337 : (2013) 180 CompCas 1 : (2013) 4 CompLJ 404 : (2014) 125 SCL 118

Hon'ble Judges: Patherya, J

Bench: Single Bench

Advocate: Satyabrata Mookherjee, S.N. Mookherjee, s, D. Basak, Paritosh Sinha, Vivek Jhunjhunwala, Krishnaraj Thakkar and K. Pandey, for the Appellant;Jayanta Mitra , Jishnu Saha, Utpal Bose, Ravi Kapoor, Bhupesh Sharma, Miss Moushumi Bhattacharjee, Niladri Bhattacharjee and Pratik Ghosh, for the Respondent

Judgement

Patherya, J.

In this appeal the appellant has challenged the order dated March 30, 2006 ((2006) 134 CompCas 500) whereby the application filed under sections 397 and 398 of the Companies Act, 1956, by the respondent, Arun Kumar Mohata (AKM) was allowed and proceedings of the annuals general meeting held on August 20, 2004, was declared null and void. The allotment of additional shares was also set aside and AKM and his son were allowed to continue as directors. Shri Basant Kumar Daga was removed from the board of the company and the appellants directed to deposit Rs. 12 lakhs received from sale of plant and machinery of the appellant-company, Rs. 20.53 lakhs for funds misappropriated by them and Rs. 20.71 lakhs on account of liabilities created in respect of the appellant-company. According to counsel for the appellants the case of the respondent AKM before the Company Law Board was that:

(i) Removal of AKM and his son is contrary to law,

(ii) Funds have been misappropriated by appellant No. 2 (PKM),

(iii) Increase in shareholding was without notice.

2. The said allegations are baseless. AKM and his son had absented themselves from 3 consecutive meetings of the board and therefore u/s 283 of the 1956 Act called for their removal. Notices of the meeting was sent to respondent No. 1 and his son at the last known address mentioned in the shareholder''s register maintained with the company by hand which was the practice of the company even during the life time of Sriratan Mohta. It was also sent to New Friends Colony, New Delhi the present address of AKM and his son. Publication was also made on August 12, 2004, in the Financial Express, Calcutta. Therefore, all steps were taken by the company and it cannot be said by the respondent AKM that no notice was served on him or he was not aware of the meeting held on August 20, 2004. The notices were sent under certificate of posting and although the appellants wanted to bring the record of service of notice of meeting by a sur-rejoinder before delivery of judgment but the same was not allowed although the Company Law Board has made a discussion on the mode of service but without taking the sur-rejoinder on record. All that the company is to do u/s 286 of the 1956 Act is to give notice of the meeting at the usual address and section 53 of the 1956 Act contemplates the same as deemed service. In view of the documents annexed to the sur-rejoinder service was evident and the burden to rebut the statutory presumption was cast on AKM. The Company Law Board by not allowing the sur-rejoinder to be taken on record has acted with perversity. Reliance is placed on Shri V.S. Krishnan and Others Vs. Westfort Hi-tech Hospital Ltd. and Others, Shri V.S. Krishnan and Others Vs. Westfort Hi-tech Hospital Ltd. and Others, , Samittri Devi and Another Vs. Sampuran Singh and Another, and Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others,
3. The misappropriation alleged is on account of--

(i) Travelling expense,

(ii) Liabilities created,

(iii) Sale of plant and machinery.

4. No travel expense was incurred by the company on account of appellant No. 2 (PKM) in the year 2001 and 2003. For the year 2001 travel expense was incurred by the company on behalf of AKM and for 2003 on behalf of respondent No. 2, deceased mother of AKM and appellant No. 2 PKM. In the year 2002 travel expense on behalf of appellant No. 2 PKM and the deceased mother was incurred by the company.

5. Similarly legal expense had to be incurred to contest arbitration proceeding and partition suit filed. The management of the company at Calcutta was entrusted to appellant No. 2 (PKM) and to maintain accounts a skeletal staff on job work basis had to be maintained and payments made to them. As the company had no funds, sums were paid by appellant No. 2 PKM and he was entitled to reimbursement but

the company had no means to repay, therefore the shareholding had to be increased and while doing so the procedure of law was followed. As there was no contravention of law, no oppression can be alleged.

6. The family settlement must be given importance as held in Kale and Others Vs. Deputy Director of Consolidation and Others, and Hari Shankar Singhania and Others Vs. Gaur Hari Singhania and Others, . The memorandum of arrangement of October, 2003 was only in respect of clauses 4.1 and 4.2 of the family settlement of 2001 and does not in any way affect clause 3 of the 2001 settlement.

7. The respondent AKM was in charge of the Faridabad unit and its assets were sold by him. A demand note for Rs. 9,76,000 was raised in 2002 by appellant No. 2 PKM on respondent AKM but no step was taken by AKM to honour the same.

8. The accounts have been audited and no allegation has been levelled against the auditors by the respondent AKM. All payments have been made by cheques. In fact for the plants and machinery sold, offers were received and earnest money deposited. On inspection some officers were not interested in continuing with their offer, therefore the earnest money had to be returned, such return was by cheque. Details of the sums received, accepted and returned was explained in the objection filed by the company and PKM before the Company Law Board but without considering the same the order dated March 30, 2006, was passed. From the balance-sheet for the year ended March 31, 2001, the depreciated value of the plant and machinery will appear and the figure taken by the respondent AKM is not based on the figure shown in the balance-sheet but is an imaginary figure and without any basis. The loss reflected in the balance-sheet of 2004 is also reflected in the balance-sheet of 2000. The Company Law Board also did not verify the basis of the figure given by the respondent AKM. Mere allegation of misappropriation will not warrant an order, misappropriation needs to be proved as held in Mohta Bros. (P.) Ltd. and Others Vs. Calcutta Landing and Shipping Co. Ltd. and Others, and Maharani Lalita Rajya Lakshmi M.P. Vs. Indian Motor Co., (Hazaribagh) Ltd. and Others, and the direction of the Company Law Board to make payment is perverse as in the absence of evidence or proof of misappropriation appellant No. 2 PKM could not have been called upon to pay sums.

9. The company had stopped functioning from 1999 and it is thereafter that the Family Settlement of 2001 was executed. Clause 3 of the family settlement related to the company but no step was taken thereunder by AKM. Appellant No. 2 PKM has paid compensation to the company but AKM did not pay his share of compensation. Instead he sold his shares in the Miajan Lane property. Transfer deeds and shares were also not deposited by AKM. The application filed under sections 397 and 398 of the Companies Act was not maintainable in view of the family settlement as the parties had chosen a forum for dispute resolution. The family settlement provided for sale of the company.

10. The conduct of AKM be also considered. The company in 1993 paid Rs. 2 lakhs to Universal Conveyor Belting Ltd., an associate company of AKM as share application money but neither have shares been allotted nor monies refunded to the company. The mother of AKM and PKM had a share in the Bikaner property. In respect of her shareholding in the Bikaner property monies were paid by appellant No. 2 PKM to discharge the liabilities in Universal Conveyer Belting. The terms of the family settlement has also been flouted by AKM. The Faridabad unit was under the control of AKM and although the cycle tyre unit was sold no sum has been paid to the company who as co-owner was entitled to sums.

11. In the event status quo ante is restored, let monies be paid to appellant No. 2 PKM as he cannot be made to lose on all fronts. As held in Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others, a finding of fact is perverse and based on no evidence can be set aside and the same can be examined in a section 10F appeal. Therefore to do justice let the shares of the appellants be bought by AKM.

12. Opposing the said appeal, counsel for the respondents submits that the respondents were majority shareholders who have been reduced to a minority by change in shareholding. In the objection filed it has been admitted by the appellant that the respondents were not entitled to notice therefore no notice was served. The notice has also not been disclosed. The sur-rejoinder has been dealt with by the Company Law Board and in any event there was nothing to deal with as the case made out throughout by the respondents was that no notice of the meetings was required to be given to them.

13. Sections 264 and 266(1)(a) of the Companies Act have not been followed. In case of increase in share capital Form 5 is to be filed. No such form has been annexed. Only Form 2.3 has been filed. There has been noncompliance of sections 75 and 192 of the Companies Act. Dilution of shareholding is oppressive. The increase in share capital by respondents Nos. 3 to 6 as directors, allotment of 15,000 shares to appellant No. 2 PKM and allotment of 50 shares each to the original respondents Nos. 3 to 9 so also removal of respondent No. 1 AKM and his son from the board of directors are oppressive to AKM. As there was no notice given respondent No. 1 could not attend the meeting. In case notice was issued there was no reason to abstain from attending the meeting. No evidence of service of notice was produced in the objection filed to meet the allegation of non-service. After February 1, 2006, a sur-rejoinder was sought to be filed when the matter had been reserved for judgment and written submission filed on February 11, 2006 and the impugned order was passed on March 30, 2006.

14. By virtue of rule 6 of the Companies (Court) Rules 1959, the Code of Civil Procedure, 1908 and Order 8, rules 3, 4 and 5 of the Code have been made applicable. Service of notice is a point of substance and the same ought to have been specifically dealt with by the company which it did not do in its objection. The

original respondent No. 3/appellant No. 3 Basant Kumar Daga was appointed as an additional director in August, 2001 and the original respondent No. 4/appellant No. 4 was appointed as an additional director in March, 2004 and it was in June, 2004 that 10,000 equity shares were issued to appellant No. 2 PKM. Further, allotment was made in August, 2004 and annual general meeting was held on August 20, 2004, whereat respondent No. 1 AKM and his son were removed as directors and in the same meeting appellant No. 2 PKM and the original respondents Nos. 3 to 6 were reappointed as additional directors. Although it has been alleged in the objections filed that notice was given but no particulars of such notice was given. The documents which has been sought to be relied on in the sur-rejoinder are manufactured and produced subsequently. The persons who have signed on behalf of respondent No. 1 AKM are not known to him. As the address of the Delhi residence of respondent No. 1 AKM was known, notice ought to have been served thereat. As there was no compliance of section 284 of the 1956 Act, the resolutions taken at meeting held on August 20, 2004, have been rightly set aside as the acts are oppressive to the majority group.

15. To remove the directors procedure laid ought to have been followed. True and correct facts have not been stated although each fact is to the personal knowledge of appellant No. 2 PKM, therefore the court ought to draw an adverse inference as held in Atyam Veerraju and Others Vs. Pechetti Venkanna and Others, Commissioner of Income Tax, Madras Vs. Best and Co.,

16. The balance-sheet till the year 2000 has been accepted. The sale of the plant and machinery was in cash. The family settlement of 2001 is de hors the 397 proceedings. The accounts and balance-sheets of 2001-02 and 2002-03 have been created by appellant No. 2 PKM only for claiming monies. The increase in shareholding is to reduce the respondent to a minority. The amount claimed has not been disputed but explanation is sought to be given and it is for the court to decide whether such justification should be accepted. The shareholding pattern has been set out and the family settlement was entered into to equate the parties vis-a-vis, their respective shares. The issues to be considered is with regard to the appointment of respondent No. 3, increase in share capital and allotment of shares to appellant No; 2 PKM and removal of AKM as a director. The liabilities have been created after 2000 In 1999 the company had stopped functioning and Rs. 4.10 lakhs was spent on preparation of a report for a proposed ethanol project which did not fructify. No steps have been taken in respect of the Miajan Lane property by G.D. Kothari. Similarly no step has been taken in respect of the registered office of the appellant-company.

17. Appellant No. 2 PKM was in control and management of the appellant-company and created fictitious liability on the ground of loans given to the company. In view of the aforesaid the order under appeal is justified and calls for no interference.

18. Having considered the submissions of the parties although the hearing was completed and judgment reserved an opportunity ought to have been given by the Company Law Board to the appellants to file its sur-rejoinder. From the copy disclosed in these proceedings, it appears that not only an attempt was made to serve a copy of the notice of the meeting held on August 20, 2004, by hand which was the usual practice followed by the company but that such notice was also accepted on behalf of the respondent AKM. Besides the said mode of service, notice was also issued under certificate of posting and by way of pre-cautionary measure a publication was made on August 12, 2004, in Financial Express, Calcutta edition. Publication is notice to all and is good service. Section 286 of the Companies Act postulates service of notice of every meeting of the board to the directors. Such notice was despatched to the last known address of the respondent AKM and this was deemed service on the respondent AKM as per section 53 of the Companies Act. Despatch of notice under certificate of posting was deemed service u/s 53(2) of the Companies Act and by making publication there was deemed service u/s 53(2)(b) of the Companies Act. u/s 172(3) of the Companies Act non-receipt of notice will not invalidate the proceedings. That service effected under certificate of posting was disclosed in the sur-rejoinder. The Company Law Board has dealt with this aspect of the matter in its order dated March 30, 2006, without taking the sur-rejoinder on record. This it could not have done as in the sur-rejoinder the publication made had also been disclosed and service by certificate of posting could not have been considered in isolation. In doing so the Company Law Board has acted with perversity. Therefore service of the notice of meeting held on August 20, 2004, cannot be disputed and the decisions taken at the meeting held on August 20, 2004, cannot be challenged by the respondent AKM as he abstained from the said meeting for reasons best known to him. The finding of the Company Law Board in respect thereof is bad and is set aside.

19. The other issue that needs to be considered is with regard to accounts, viz.-

(i) Travelling expense,

(ii) Accounting charges,

(iii) Sale of plant and machinery.

20. The balance-sheets for 2000-01, 2001-02, 2002-03 and 2003-04 have all been audited. To each of them the auditor''s certificate is enclosed. No allegation has been made against the auditors. The balance-sheet till March 31, 2000, has been accepted. The auditors have prepared the balance-sheet only after verifying the accounts.

21. To ascertain the expense incurred under the 3 heads the Company Law Board was empowered to verify the accounts but no such exercise was undertaken. For each of the alleged expense, the appellants have sought to give an explanation, the Company Law Board ought to have considered the same. The Company Law Board

is a fact finding forum and ought to have called for each required piece of evidence, viz., bills, vouchers and receipts and in not doing so has acted with perversity.

22. The respondent AKM has not challenged the authority of appellant No. 2 PKM to sell the plants and machinery. The allegation made is of siphoning off of funds. The details of sales realisation till October 31, 2003, was disclosed by appellant No. 2 PKM and when the sums received in cash and cheque is totalled, it aggregates to the total sale value. In fact the sums that remained in the till of the company was Rs. 7,12,395 as will appear from the statement of accounts till December 31, 2003, enclosed in the letter dated April 6, 2004, on which the Company Law Board has based its decision. Therefore, to allege manipulation more so when appellant No. 2 PKM has given details of payments received besides the enclosure to the letter dated April 6, 2004, the Company Law Board ought to have considered the same and in not doing so the Company Law Board has acted contrary to the powers vested in it. In fact on the conclusion reached in respect of sale of plant and machinery, it has been held by the Company Law Board that there has been no explanation of the other expense incurred. This ex-facie is an incorrect finding as it evidences total non-application of mind. It has been submitted on behalf of the appellants that the company bore the travelling expense of the respondent AKM for the year 2001 and also for respondent No. 2 (mother) in 2002. Therefore this aspect ought to have been considered and in not doing so the Company Law Board has acted with perversity. Admittedly the company had become defunct in 1999 and clause 3 of the family settlement has been accepted by the respondent AKM. Clause 3 of the family settlement contemplated sale of the company and its assets upon deposit of shares and transfer deeds. The said would in effect remove the company from the hands of the parties herein. This however was not done and the company continued to exist.

23. As the existence of the company continued the statutory, requirements had to be complied with and for such purposes staff on job-work basis was maintained. PKM was entrusted with looking after the affairs of the company. The respondent AKM looked after the Faridabad Cycle Unit therefore it was for the appellant PKM to ensure compliance with the statutory requirement. For such purposes funds was injected by PKM as loans. The Company Law Board based on its reasonings in respect of misappropriation from sale of plant and machinery has reached the conclusion of siphoning of funds in respect of expenses and liabilities. This evidences non-application of mind. Respondent No. 1 had claimed Rs. 11,78,530 in the petition filed before the Company Law Board. This was on the basis of a statement given by the appellant in April, 2004 and to be more precise the statement dated April 6, 2004. In the said statement the figure of Rs. 11,78,530 will not be found. If the basis of the demand does not exist to grant such sums will be contrary to the tenets of all law.

24. The sum of Rs. 20.71 lakhs and Rs. 20.53 lakhs has been directed to be paid on the basis of no explanation given by the appellant in respect thereof, which is ex-facie incorrect as the appellants did take the plea of the audited accounts which had not been assailed and that sums had been spent on account of travel expense of AKM and the mother. The expense borne to meet statutory requirement had also been given and in not appreciating evidence in this respect, the Company Law Board could not reach the conclusion of misappropriation and the said findings with regard to reimbursement cannot be upheld.

25. The next issue that needs to be considered is with regard to allotment of shares. The shareholders of the company are members of the Mohta family or their associates. There is no outsider who is a shareholder. Being a private limited company the company was in the nature of a quasi-partnership. The Company Law Board has also accepted the company to be quasi-partnership in nature, therefore section 81 of the Companies Act would not apply but this would not permit misuse of power for personal gains or ulterior motive.

26. The respondent AKM has alleged that the increase in share capital and allotment of additional shares amounts to mismanaging the affairs of the company and is prejudicial to the interest of the company with an intent to marginalise the respondent AKM and strip the company of its assets to the benefit of the appellant PKM. A notice dated May 15/2004, ''was issued for holding ah annual general meeting on June 15, 2004, wherein the business to be transacted was set-out. The explanatory statement u/s 173(2) of the 1956 Act was also enclosed with the notice. On June 15, 2004, according to the respondent AKM the share capital was increased and the board was authorised to offer equity shares on right basis.

27. As the shares were allotted at the meeting held on August 16, 2004, the said meeting assumes importance. Notice of the said meeting was received by or on behalf of the respondent AKM at the address recorded in the records of the company. Therefore, even after receipt of the notice, if respondent AKM abstains from attending the meeting, he did so at his peril. The reason for increasing the share capital is to facilitate influx of funds. The company though defunct since 1999 continued to remain on the records of the Registrar of Companies and the statutory requirements had to be complied with. Admittedly no contribution was made by the respondent AKM nor did he attend the meeting held on August 16, 2004, in spite of receipt of notice, therefore it cannot be said that the acts of the appellant was intended to convert the respondent AKM into a minority. All that the appellant PKM was doing is to keep the company afloat till such time that the family settlement was worked out. Admittedly no contribution was made by the respondent AKM to keep the company afloat nor to honour his commitment under the family settlement.

28. In Shanti Prasad Jain Vs. Kalinga Tubes Ltd., shares were allotted to strangers in aid of financial assistance and while considering whether this could be done it was held that if the resolutions passed is in accordance with law, there will be no

contravention thereof and therefore no oppression. While it is true that the appellant in the objection filed by it before the Company Law Board did not annex the receipt of the notice issued and received by the respondent but an attempt was made after conclusion of the hearing but before delivery of judgment to bring the said documents on record and the Company Law Board ought to have considered the same to resolve the disputes between the parties finally especially when the sur-rejoinder was considered by the Company Law Board vis-a-vis the certificate of posting.

29. The family settlement of July 16, 2001, contemplated that the company will surrender its tenancy to the heirs of Sriratan Mohta and the heirs shall pay compensation to the company for the improvements made. The amount payable would be decided by one Mr. G.D. Kothari. From the amount received the company would discharge its liability.

30. As an heir of Sriratan Mohta, the respondent AKM had a share in the Miajan Lane property, but only upon payment of his share of compensation could the tenancy be surrendered by the appellant-company. The respondent AKM did not pay his share of compensation but as submitted by the appellant PKM sold his share in the Miajan Lane property to third parties. This aspect ought to have been-considered by the Company Law Board. All that the Company Law Board has said in its order dated March 30, 2006, about the family settlement is that the "family settlement is a different matter".

31. The Company Law Board failed to consider that in the event all the parties had complied with the family settlement the company would have been sold and the proceeds divided amongst its heirs.

32. Therefore it appears that the acts of the respondent AKM created a situation which made it impossible to sell the company and to only meet the statutory requirements of a shell company expenses had to be borne by the company which had become defunct since 1999. To do so finance was required which was raised by the company by increasing its share capital by allotment of shares. The respondent AKM did not apply for additional shares in spite of notice and cannot blame the appellant PKM for shares allotted.

33. Section 397 of the Companies Act empowers the filing of an application thereunder in cases of oppression before the Tribunal, viz., the Company Law Board, and the Tribunal may pass orders so as to bring an end to the matters complained of, provided it is of the opinion that the company''s affairs are being conducted in a prejudicial manner which is oppressive to the complainant member and to wind up the company will cause prejudice to such member.

34. The complaints made by the respondent AKM as discussed above have not been considered by the Company Law Board in its proper perspective. The contentions of the appellant PKM have been overlooked. That the expenses borne by the company

was due to the non-co-operative attitude of the respondent AKM has been ignored by the Company Law Board. The sur rejoinder has been dealt with without taking the same on record. This therefore calls for interference with the order dated March 30, 2006.

35. But will it be prudent to send back the parties once more to the Company Law Board after a lapse of so many years and further add to their agony or resolve their disputes. This has been answered by the Supreme Court of India in the decision reported in Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others, where it has been held that a finding of fact based on no evidence is perverse and this becomes a question of law. In ignoring the family settlement the Company Law Board has acted perversely.

36. Section 402 of the Companies Act empowers the Company Law Board to pass orders for purchase or sale of the shares of any members by the other on terms that may be in the opinion of the Company Law Board, just and equitable. In the family settlement of 2001 in clause 3 the future of the company has been decided. There is no challenge to the said clause. Accordingly to prevent a deadlock, let the networth of the company be assessed by M/s. Singhi and Co., chartered accountants of the company against whom no allegation has been made by any of the parties and on basis thereof let the worth of the shares be assessed. The same be intimated to the parties with the offer to buy or sell. Either of the parties will exercise the option within 2 weeks thereof. The said direction is given to also aid implementation of the family settlement.

37. In case of a stalemate one could have directed winding up of the appellant-company but this was not what the parties intended in the family settlement of 2001 and the parties must be bound to the terms of such settlement.

38. In view of the aforesaid this appeal is allowed and order dated March 30, 2006, set aside.

Later:

Prayer for stay made by counsel for the respondent AKM is considered and rejected.