

(2007) 09 CAL CK 0057

Calcutta High Court

Case No: A.P.O.T. No. 566 of 2006 and A.C.O. No. 97 of 2006

Mayank Kocher

APPELLANT

Vs

Company Law Board and Others

RESPONDENT

Date of Decision: Sept. 26, 2007**Acts Referred:**

- Companies Act, 1956 - Section 10F, 111, 214, 237, 239

Citation: (2008) 1 CHN 1089 : (2008) 143 CompCas 613 : 112 CWN 334 : (2008) 87 SCL 248**Hon'ble Judges:** Sanjib Banerjee, J**Bench:** Single Bench**Advocate:** Tilok Bose, R. Bhattacharjee and D.N. Sharma, for the Appellant; S. Chowdhury, for Respondents Nos. 3, 4 and 6, for the Respondent**Final Decision:** Dismissed

Judgement

Sanjib Banerjee, J.

The appellant raises the principal legal question as to whether an application for investigation u/s 237 of the Companies Act, 1956, is an alternative to proceedings for oppression and mismanagement or rectification. Such question clearly arises on the reading of the order of dismissal of the appellant's petition u/s 237 of the Act by the Company Law Board.

2. The appellant sought an investigation into the affairs and conduct of the business of a company which he claims was born out of funds of a partnership business carried on by the deceased patriarch of the two groups of parties fighting these and other proceedings. The appellant claimed that as an heir of a partner who held fifty per cent, share in the firm, he was entitled to be apprised of the conduct of the company's affairs and participate therein. He cited fraud being practised on him by the other group in the manner in which the company's affairs were being conducted. The appellant urges that the Company Law Board exercising powers u/s 237 of the Act is obliged to form an opinion as to the nature of conduct of the

company's affairs and upon such opinion, direct or decline to order investigation. It is submitted that it is such formation of opinion that is central to the authority accorded to the Board u/s 237 and the refusal to form an opinion by the order impugned amounted to abdication of jurisdiction.

3. The Company Law Board noticed the preliminary objections raised by the opposing group, found such objections to be meritorious and proceeded to dismiss the petition. The Board took a view that in the absence of proceedings for oppression and mismanagement or proceedings for rectification being lodged by the appellant, the investigation would be futile for the petitioner could not obtain any benefit thereof as the matters complained of were stale and the appellant's remedy against the same could not be pursued. It is the Company Law Board's finding to such effect that the petitioner makes the basis for the principal question of law raised u/s 10F of the Act in this appeal.

4. The appellant relies on the judgment reported at [The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others](#), and Another judgment rendered by a single judge of the Madras High Court reported at [Shankar Sundaram Vs. Amalgamations Ltd., Chennai, A. Sivasailam, A. Krishnamoorthy, Simpson and Co. Ltd., Chennai, Addisons Paints and Chemicals Ltd., Huzur Gardens, Sembium, Chennai, India Pistons Ltd., Huzur Gardens, Sembium, Chennai, Shardlow India Ltd., Huzur Gardens, Sembium, Chennai, Tractors and Farm Equipment Ltd., Chennai, Tafe Access Ltd., Chennai, Southern Tree Farms Ltd., Chennai, Associated Publishers \(Madras\) Ltd., Chennai, Bimetal Bearings Ltd., Strip Mill Plant, Huzur Gardens, Sembium, Chennai, IP Rings Ltd., Arjay Apex Centre, Chennai, Wallace Cartwright and Company Ltd., London, W.J. Groom and Company Ltd., London, Amco Batteries Ltd., Bangalore, Amalgamations Valeo Clutch Ltd., Chennai, Tafe \(USA\) Inc.d. Memphis, U.S.A., Amco Power Systems Ltd., Bangalore, Madras Hi-Tech Circuits Ltd., Chennai, R.G.N. Price and Co.,Chartered Accountants, Chennai, S. Balasubramaniam, Director, Addisons Paints and Chemicals Ltd., Huzur Gardens, Sembium, Chennai and P.V. Sundaram, Director, Addisons Paints and Chemicals Ltd., Huzur Gardens, Sembium, Chennai](#). The appellant relies on the following passage from the judgment of Hidayatullah J, part of the majority view taken in the [The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others](#), :

(26) An action, not based on circumstances suggesting an inference of the enumerated kind will not be valid. In other words, the enumeration of the inferences which may be drawn from the circumstances, postulates the absence of a general discretion to go on a fishing expedition to find evidence. No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out. As my brother Shelat J., has

put it trenchantly:

It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on circumstances which it thinks exist.

Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. The conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct or the withholding of information of a particular kind. We have to see whether the chairman in his affidavit has shown the existence of circumstances leading to such tentative conclusions. If he has, his action cannot be questioned because the inference is to be drawn subjectively and even if this Court would not have drawn a similar inference that fact would be irrelevant. But if the circumstances pointed out are such that no inference of the kind stated in Section 237(b) can at all be drawn the action would be ultra vires the Act and void.

5. The appellant places the following passage from the Madras judgment in support of the contention that the powers u/s 237 of the Act are distinct from the powers available under other provisions of the Act which a petitioner before the Company Law Board can invoke in furtherance of his substantive rights (page 255 of 111 Comp Cas):

I am of the view, merely because specific provisions are made granting a right of inspection of books of account of subsidiaries to the shareholder of a holding company and conferring a right to approach the Company Law Board to get an order of investigation into the affairs of the subsidiary companies, and empowering the inspectors to investigate into the affairs of the subsidiary companies, they do not mean that the Company Law Board has no such power to grant relief under Sections 397, 398 and 402 of the Companies Act. It is well to remember here that before the constitution of the Company Law Board by the Companies (Amendment) Act, 1988, the powers under Sections 397 and 398 of the Companies Act were exercised by the High Courts and in my view, the width of the power of the Company Law Board under Sections 397 and 398 is the same as that was exercised by the High Courts prior to the constitution of the Company Law Board. Hence, it is impermissible to read Sections 397 and 398 of the Companies Act in a restrictive manner. Further, the mere fact that additional powers have been granted to members of a company under Sections 214, 237 and 239 of the Companies Act does not mean that there is no such power conferred on the Company Law Board under Sections 397 and 398 of the Companies Act. Hence, I am unable to accept the submission of Mr. Anil B. Divan, learned senior counsel that Sections 397 and 398 of the Companies Act should be read in the light of Section 214 of the Companies Act.

6. The respondents submit that the Company Law Board, despite upholding the respondents' objections, proceeded to consider the petition on merits and found it unworthy upon concluding that the allegations made in the petition had "not been substantiated to enable this Board to be able to form a prima facie opinion to satisfy itself that the circumstances of the case fall under one respondents also rely on the [The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others](#), , and the following passage from the judgment of Shelat J., who also subscribed to the majority view of the Supreme Court taken in that case (page 689):

There must, therefore, exist circumstances which in the opinion of the authority suggest what has been set out in Sub-clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

7. The appellant's reliance on the Madras judgment is inapposite. The Madras High Court considered the point and held that the powers u/s 237 and under Sections 397 and 398 of the Act were distinct, from a completely different perspective. In construing whether the expression "affairs of the company" in Sections 397 and 398 of the Act would include the affairs of the subsidiary company, it was held that it had to be ascertained and decided on the facts of each case. The appellant before the Madras High Court had claimed reliefs against the subsidiaries of the company which was the subject-matter of Section 397 and Section 398 proceedings before the Company Law Board. The Company Law Board held that u/s 397/398 petitioner could not claim reliefs against the subsidiaries of the concerned company in terms of Section 402 of the Act. It was in such context that the powers of the Company Law Board under Sections 397 and 398 of the Act fell for consideration and it was held that the mere fact that additional powers had been granted to the members of the company, inter alia, u/s 237 of the Act would not mean that the power of investigation under Sections 397 and 398 of the Act would have to be read down. The view that was taken by the Madras High Court was that notwithstanding Section 237, the Company Law Board had authority to investigate under Sections 397 and 398 of the Act. The recognition of such principle cannot further the appellant's case herein.

8. By the impugned order the Company Law Board held that the nature of investigation that the petitioner before it had sought could be more meaningfully conducted in proceedings u/s 111 or under Sections 397 and 398 of the Act. What the Company Law Board implied was that there would be a logical consequence of such investigation if ordered in the course of Section 111 or Sections 397 and 398 proceedings in that upon investigation and the result thereof, the petitioner's right to relief could be assessed.

9. It is beyond question that an investigation u/s 237 can be directed upon subjective satisfaction of the existence of circumstances enumerated in Section 237. If, however, it is shown or the Company Law Board is otherwise satisfied that such circumstances do not exist or that the facts and allegations are such that it is impossible to form an opinion as to the existence of such circumstances, an investigation is not called for.

10. The appellant's plea for investigation was founded on the assertion that the business of the company was being conducted with an intent to defraud the appellant as member and that the business was being conducted for a fraudulent or unlawful purpose and those who managed the company's affairs were guilty of fraud or other misconduct towards the appellant as member. The Company Law Board's upholding the respondents' preliminary objection has to be viewed from the perspective that the circumstances that the petitioner claimed to be existing, were non-existent. The Company Law Board found so as a matter of fact which is unassailable in this appeal restricted to questions of law. The other reasons given by the Company Law Board as to the untenability of the appellant's request are to be viewed in such light and as being ancillary or peripheral to the principal ground for rejection.

11. The appeal fails but there will be no order as to costs.

12. Urgent photostat certified copies of this judgment, if applied for, be issued to the parties upon compliance with requisite formalities.