(2010) 09 CAL CK 0083

Calcutta High Court

Case No: GA No''s. 938 and 2768 of 2010 and CS No. 67 of 2010

Phillips Carbon Black Limited and Others		APPELLANT
	Vs	
Anil Kumar Poddar and Another		RESPONDENT

Date of Decision: Sept. 14, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 8
- Companies Act, 1862 - Section 32
- Companies Act, 1956 - Section 163, 163(3), 163(6), 196, 284
- Companies Clauses Consolidation Act, 1845 - Section 356(6)

Citation: (2011) 2 CALLT 399 : (2011) 2 CHN 512 : (2011) 100 CLA 209 : (2011) 163 CompCas 181 : (2011) 2 CompLJ 45 : (2010) 104 SCL 113

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: S.N. Mookerjee, Ratnanko Banerji and Sambuddha Datta, Abhrajit Mitra, for Added Plaintiff No. 15, M.S. Tiwari, for Plaintiff Nos. 12, 13, 24 and 25 and Soumen Sen and Suchayan Banerjee, for Added Plaintiff No. 17, for the Appellant;M.S. Tiwari, for Defendant No. 3 and Moinak Bose, Ankur Jain, Soumava Basu, Amit Muhuri and Kumarjit Das for Defendant No. 1, for the Respondent

Judgement

Sanjib Banerjee, J.
The plaintiffs impute improper motive to the original defendants in their seeking to obtain copies or inspection of records that the Companies Act, 1956 permits them to ask for. The plaintiffs suggest that the requests made by the original defendants are mala fide, made with ulterior motive and there is no legal compulsion on the plaintiff companies to accede thereto.

2. The suit has been instituted with leave under Order I Rule 8 of the Code of Civil Procedure. There are certain facts that need to be recorded without comment since

no immediate issue is raised thereon. The leave under Order I Rule 8 of the Code was sought on the basis of the averment in the plaint as to the commonality of interest of the named plaintiffs with other unnamed companies. The plaintiffs have issued advertisements under Order I Rule 8 of the Code. The original defendants have not applied for revoking such leave, though their application for rejection of the plaint on the ground that it does not disclose any cause of action has recently been dismissed. Several applications have been carried for taking other companies on board in this suit. The earlier applications have been allowed by adding the applicants on the plaintiffs'' side despite the objection of the original plaintiffs. The added plaintiffs have been given a second voice, in that an order provides that the added plaintiffs would have separate representations. It is conceivable that this may lead to some embarrassment at the trial of the suit, but the trial of a suit is so distant that the parties may be excused for overlooking the possible conflict on the plaintiffs'' side. In the subsequent applications for addition of parties, the applicants have been arrayed as defendants. An initial interim order was made in favour of the plaintiffs. Logically, and since the suit has been instituted in representative capacity for similarly-situated companies and since the order was not confined to the eo nomine plaintiffs, the other similarly-situated companies could have also taken advantage thereof. The interim order has recently been restricted to the eo nomine plaintiffs and the added defendants.

3. The case made out in the plaint and in the original plaintiffs'' principal interlocutory application is that the request made by the original defendants was a form of extortion to pressurise the original plaintiffs and other companies similarly-situate to give in to the unjust and exorbitant demands of the original defendants. It is an admitted position that the original defendants (the first two in the amended plaint) made requests to the plaintiff companies to issue advertisements in a financial periodical published by the first defendant. The plaintiffs have carried copies of several editions of the first defendant''s publication. They refer to the articles therein containing allegations against some of the plaintiff companies, making charges against statutory bodies and officials and even spewing venom on the judiciary. It is the plaintiffs'' case that upon any company refusing to humour the first defendant by placing advertisements in his publication, the first defendant would cause baseless allegations to be published in his periodical. The plaintiffs say that notwithstanding the original defendants being shareholders in the plaintiff companies (and in other companies), the right to inspect records and receive copies of documents as mandated by statute would be tempered by the motive for such requests.

4. The original defendants made requests under Sections 163, 196, 301 and 372A for obtaining copies or inspecting records relating to the register of members and annual returns of the plaintiff companies; for minutes of general meetings of such companies; for the registers of contracts disclosing names of firms and companies in which directors of the plaintiff companies are interested; and, for the registers of

investments or loans made, guarantees given or security provided by the plaintiff companies in relation to any body corporate. The plaintiffs demonstrate that identical notices would be issued by the original defendants to various companies making similar demands for obtaining copies or inspection. The plaintiffs rely on the criminal complaints lodged by the original defendants or the first defendant upon the requests not being complied with by the plaintiff companies and the identical allegations contained in the letters for request and the petitions in the criminal proceedings. They say that it is inconceivable that the first defendant would visit the registered offices of several companies on the same afternoon as disclosed in its petitions filed in the criminal court. They suggest that the criminal proceedings have been instituted with ulterior motive to unnecessarily drag directors of well-known companies to the criminal court. They argue that the manner in which the original defendants have gone about making the requests and filing the criminal proceedings would substantiate the plaintiffs'' charge that the entire exercise is mala fide and undertaken to wreak vengeance on the plaintiff companies upon their refusal to release advertisements in the first defendant''s publication.

5. The ad-interim order on GA No. 938 of 2010, which is the original plaintiffs'' principal application, stood vacated on August 18, 2010 when the application was dismissed for the petition relating thereto not being verified at all. The affidavits, apparently in support of the petition and affirmed by the authorised officers of the original plaintiff companies, did not refer to the petition at all and sought to verify the contents of an "accompanying plaint." On the original plaintiffs'' subsequent application being GA No. 2768 of 2010, the order of injunction originally passed was substantially revived and GA No. 938 of 2010 was restored to the file on August 27, 2010. The original plaintiffs'' second application was, however, not disposed of since it was the petition and the accompanying affidavits to the second application that verified the contents of the petition in the original application.

6. Some of the plaintiffs are well-known commercial entities. The first defendant is a shareholder of the plaintiff companies, in most cases holding one or a few shares in these public mostly listed companies. The plaintiffs submit that the first defendant is well-known in corporate circles in the city as being a person who intimidates the companies of which he is a shareholder "with mischievous requests and requisitions requiring unnecessary paper formalities and expenses which are not commensurate with the value or size of (his) shareholding in such companies." The plaintiffs refer to the absurd requests made by the first defendant in the past for removing chairpersons of the boards of directors of several listed companies by taking advantage of the provisions of the Companies Act that allow any shareholder to make such request. The plaintiffs refer to the first defendant''s request on July 1, 2008 to dislodge the business czar perched atop the first plaintiff company as a director thereof. The plaintiffs say that upon a request to such effect being received, there is a lot of paperwork which is involved in printing copies of the proposed resolution and other attendant matters and circulating them to the large number of

shareholders of a listed company who are strewn all over the country. The plaintiffs rely on an order passed by the Company Law Board at the instance of Dabur India Ltd in the year 2001 where the Company Law Board expressed the opinion that the request for removal of a director issued by the first defendant was not in bona fide exercise of his right as a shareholder but was with "an ulterior motive and as such is an abuse of the provisions of Section 284" of the Companies Act. The plaintiffs say that the first defendant is a known mischief-monger and the second defendant is his associate and accomplice. The extent of the first defendant''s shareholding in the plaintiff companies is detailed at paragraph 19 of the original petition; the first defendant holds one share in one of the plaintiff companies, two shares each in four of the companies, five shares in another plaintiff, ten shares each in two of them and 27 shares and 5000 shares in the other two. The second defendant holds one share each in two of the plaintiff companies and four shares in a third. The plaintiffs assert that the object of the defendants to acquire shares in the plaintiff and other public or listed companies is to cause nuisance therein or make extortionist demands on the management of such companies. They suggest that the original defendants are not genuine shareholders and have acquired shares in the companies to wrongfully exercise their rights and cause prejudice to these companies. They rely on similarly-worded requests received by eight of the ten plaintiffs between mid-August and mid-September, 2009 for supply of copies of the minutes of the last annual general meetings, copies of the registers of investments, copies of the registers of contracts and copies of annual returns. The plaintiffs cite the similarly-worded reminders following the initial requests not being acceded to. They say that all the original plaintiff companies received summons in February, 2010 in respect of criminal proceedings launched by the first defendant. They say that all the complaints carry identical allegations, in most cases even the dates are not changed. The plaintiffs assert that the criminal proceedings have been filed in a mechanical manner and for oblique purpose. According to the plaintiffs'' information, the first defendant has instituted complaints against more than 85 companies. They insist that a bona fide shareholder holding a solitary share in a company cannot be expected to expend the considerable sums required for pursuing the requests and launching criminal proceedings in respect thereof.

7. The plaintiffs say that the original defendants are not even entitled to remain as shareholders in the plaintiff companies as their continued ownership of the solitary or nominal shares is against the interest of the plaintiff companies and prejudicial to them. They seek a direction for sale of the shares held by the original defendants in the plaintiff companies at a fair valuation. The reliefs claimed in the suit range from a declaration that the defendants "are not entitled to exercise any right in respect of their shareholding" in the plaintiff companies to a declaration that the criminal proceedings launched are malicious. The plaintiffs have claimed, inter alia, a perpetual injunction restraining the original defendants from exercising any rights as shareholders of the plaintiff companies and for an ultimate direction by court for

the shares held by the original defendants in the plaintiff companies to be sold. The immediate concern at the interlocutory stage, as is reflected from the prayers made, is both in respect of the criminal proceedings being launched and the outstanding requests for copies and inspection which the plaintiffs have not complied with.

8. The first defendant is present to contest the interlocutory proceedings. The first defendant does not offer much by way of explanation or justification. The first defendant insists that if the statute confers him a right to make copies of certain records and inspect others, it would be foolhardy of a company to deny him the exercise of such right. He says that he needs the information that he has sought for his business purpose and that the subsisting order of injunction prejudices his publication. The first defendant insinuates that the affairs of public and even listed companies in this country are conducted neither in the interest of the companies nor of its shareholders but largely for the personal aggrandisement of those in management thereof. He laments that the statutory authorities responsible for overseeing the conduct of those in management of public or listed companies have failed miserably in discharging their obligation and are, more often than not, in league with the recalcitrant management. He says that he is a financial adviser of sorts and his publication brings out the ills of the manner of corporate management in this country.

9. The first defendant says that he is a shareholder of several hundreds of other public companies. He has named a number of well-known corporate entities that have complied with his lawful requests of similar import. He suggests that the bigger, board-managed companies have no qualms in opening their books and records for him to make copies therefrom and take inspection thereof, but it is the mid-sized family-based public or listed companies that have a lot to hide who have joined together to bring the present action.

10. The plaintiffs found their cause of action on the principle that the legal rights exercisable by a shareholder are subject to equitable considerations. They say that though Section 163 of the Companies Act mandates that a company make available copies of certain records to any member or debenture-holder or other person who seeks it, the mandatory "shall" used in Sub-section (3) thereof is diluted by the discretionary "may" in Sub-section (6). In other words, they say that though a company is apparently bound to accede to a person''s request u/s 163(3) of the Act, once such person brings a complaint before the Company Law Board u/s 163(6) of the Act, the Board would be well within its rights to assess the legitimacy and motive for the request and, in deserving cases, decline an order for making available the material sought. The plaintiffs argue that it is the same thread which runs through Sections 196, 301 and 372A that the original defendants have invoked in their requests. They contend that upon the present challenge being made it was incumbent on the original defendants to justify the necessity for the information sought against the backdrop of the charge of extortion levelled by the plaintiff

companies. They submit that the opposing affidavit does not dispel the apprehension expressed in the petition as to the motive for the impugned requests.

11. The plaintiffs rely on a judgment reported at (2002) 2 All ER 440 (Pelling v. Families Need Fathers Ltd.) for the proposition that it is not an unqualified right of a shareholder to be supplied with a copy of the register of members on request and special circumstances may be cited for the court to refuse it. The matter concerned a company limited by guarantee and registered as a charity. The court noticed that Sub-section (6) had been subsequently introduced in the relevant provision that gave an element of discretion that invariably accompanies the word "may." But the court observed that the extent of discretion would be narrow and the usual order would be to give effect to a legal right. In that case, the requesting shareholder had sought to obtain the register of members of the company to communicate his views to other shareholders on the mismanagement in the company. The company cited special circumstances since it was a charity and undertook before court that it would act as an honest mailbox and forward the material supplied by the petitioning shareholder to other members of the company. The court acceded to the request since it upheld the company''s stand to maintain the confidentiality of its members. The following passages from the report are of relevance in the context:

[16] In support of these submissions Dr Pelling cited Davies v. Gas Light and Coke Co. [1909] 1 Ch 248, a decision of Warrington J on the construction of the Companies Clauses Consolidation Act 1845, which did not include a provision in the terms of Section 356 or any equivalent provision. (That procedure for enforcing the right to inspection was not introduced until Section 32 of the Companies Act 1862.) Under the 1845 Act only a member of the company could require a copy of the register and the enforcement of that right was by way of ordinary action and not under a specially prescribed statutory procedure. It was in that context that Warrington J granted mandamus against the company, holding that the member''s right to inspect the register was incidental to his private right of property as a holder of shares in the company, that the court had (at 254) ''no title to inquire into the motives of the person who seeks to enforce that private right'', and that the court had no option but to grant him relief enforcing the right. The decision was affirmed on appeal see [1909] 1 Ch 708.

[23] We have reached the following conclusions. (i) On the true construction of Section 356(6) the registrar had a discretion to refuse the order. In its ordinary and natural meaning the word ''may'' is apt to confer a discretion or power. It is true that there are certain situations where a discretionary power is conferred for the purpose of enforcing a right and is coupled with an obligation or duty to exercise a power, when required to do so, for the benefit of the person who has the right see Julius v. Lord Bishop of Oxford (1880) 5 App Cas 214 at 223, 241 : [1874–80] All ER Rep 43 at 47–48, 57. This is not such a case. The use of ''may'' in Sub-section (6) is in striking contrast to the mandatory force of ''shall'' in other parts of the same section,

such as Sub-section (3). In O''Brien v. Sporting Shooters Association of Australia (Victoria) [1999] 3 VR 251 at 255 Byrne J rejected the submission that the court had no discretion under the similarly-worded provision in Section 1303 of the Australian Corporations Law. It was submitted to him that the word ''may'' in that section was not permissive, but merely signified that the jurisdiction of the court to make an order did not arise unless there had been a refusal or contravention of the Corporations Law. He held (at 255) that the drafting of the Law was such that

the word "may" means exactly that. It means that the court is empowered to make the order where a refusal in contravention of the Law has been established, as in the present case. Whether the power will be exercised must depend upon the proper discretionary considerations affecting the power in the light of the facts as are found by the court.

We agree. For those reasons we reject the absolutist construction proposed by Dr Pelling. (ii) The statutory discretion must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. We agree with Dr Pelling that, as a general rule, the court will make a mandatory order to give effect to a legal right. But, as stated by Lord Evershed MR in Armstrong v. Sheppard & Short Ltd [1959] 2 All ER 651 at 656 : [1959] 2 QB 384 at 396 ''[i]t is not a matter of unqualified right''. There may be something special in the circumstances of the case which leads the court to refuse to make the usual order....

12. The plaintiffs rely on a judgment reported at 239 SW 347 (Dreyfuss & Son v. Benson). In that case the court disagreed with the contention that a statutory expression which was somewhat similar to the comparable provisions of the Companies Act in this country gave an absolute right to a shareholder to inspect the books and records of the concerned company. In the words of the Court of Appeal of Texas,

...To hold this would mean that a court should compel a corporation under this law to open its books and records to a stockholder regardless of whether he is prompted by motives wholly evil and corrupt to seek the information they might reveal.... The effect of the statute, at least, is to put upon a corporation, when it resists such right of inspection by a stockholder, the requirement to plead and prove corrupt motives actuating the stockholder. This is the greatest extent of laxity in this respect which, in our opinion, should be indulged in construing this statute, the terms of which strongly indicate that it was intended altogether to remove the common-law rule that an examination can be compelled only where the stockholder asks for it in good faith and for reasons connected with his rights as a stockholder.

The weight of authority in America seems to be to the effect that where the right is statutory the stockholder is not required to show the purpose of his inspection and that the right cannot be defeated by showing an improper motive,....

13. Another judgment reported at 97 SW 2d 966 (Guaranty Old Line Life Co. v. McCallum) has been placed by the plaintiffs for the proposition that the right given to a shareholder to compel the company to give him such records to which he is entitled is for the purpose of remedying a wrong and not to promote one. The Court of Civil Appeals of Texas held that,

The right of inspection granted to a stockholder of a corporation, by statute, is clearly for the benefit of a corporation and the stockholders, and, when the exercise of that right is for the purpose of injuring the corporation or stockholders generally, the right will be denied.

14. The first defendant has relied on a judgment reported at (1909) 1 Ch 248 (Davies v. Gas Light and Coke Co.) and the judgment in appeal therefrom reported at (1909) 1 Ch 708 (Davies v. Gas Light and Coke Co.). The plaintiff in that case applied to the company for a copy of the shareholders'' address book and offered to pay the expenses for obtaining it. The company apprehended that the requesting shareholder intended to use the material for a purpose other than one contemplated by the statute and declined the request. The shareholder sought a mandamus commanding the company to provide him the material. The trial court felt that the motive of the plaintiff was irrelevant. The Court of Appeal agreed that the right did not depend upon the motives the shareholder may have for exercising it, it is enough that the request is made by a shareholder who desires to exercise his right.

15. The Davies cases were noticed in Pelling and the passage from Pelling quoted above would reveal why the Davies judgments are of no relevance now that the statute, as in Section 163 of the Companies Act in this country, confers a right on the requisitionist to approach a judicial or a quasi-judicial authority upon the request being declined.

16. Section 163 stands apart from the other provisions under which requests have been made by the original defendants. Section 163(3) permits any person to make extracts from the relevant documents or require copies thereof against payment. Section 196 confers a right to a member of a company to obtain copies of minutes of general meetings of a company. Similarly, Section 301 of the Act allows a member of the relevant company to inspect the register of contracts and make extracts therefrom and Section 372A also recognises a member''s right to inspect and make extracts from the register recording investments or loans made and guarantees given or security furnished to or for another body corporate.

17. The provision now found in Section 163(6) of the Act was not originally a part of the comparable section in the 1913 Act. It was introduced by way of an amendment in the 1930s. The similar provision did not find place in the statute in England when the Davies decision was rendered but also was subsequently introduced. Neither side here has attempted to throw any light as to the mischief which the provision

had intended to remedy. The right of a shareholder that is now reflected in Section 163(3) of the 1956 Act was also there in the previous Act of 1913 from its inception. There is nothing that the parties have brought to bear as to whether the provision that is contained in Section 163(6) of the Act was introduced to dilute the seemingly absolute obligation of a company to accede to a request under the provision reflected in Section 163(3) of the Act or whether it was introduced to further the legal right in preference to the common law principle that the right conferred could only be exercised in the interest of the company or its shareholders. There is an apparent dichotomy in the use of "shall" in Section 163(3) and the use of "may" in Section 163(6) of the Act. If it is the intention that a company has to comply with a request for copies or extracts of the relevant records, then the word "may" in the context of compelling a company to comply with its statutory obligation would rob the absoluteness of the statutory command in Section 163(3) of the Act. On the other hand, if the statutory dictate implied in the word "shall" in Section 163(3) is as rigid as it appears, there can be no situation in which a company would be permitted to not comply with the request.

18. The word "may" in Sub-section (6) of Section 163 of the Act may have been used to cover several unusual situations. There may be cases where it would be useless to make an order directing the company to make available the records because the request may have been complied with between the time that the application is made and it is heard; where it is physically impossible for the company to comply with the request because of circumstances beyond the control of the company, say destruction by fire. But the strength of the authorities would show that there is an element of discretion, however narrow, still available to the authority receiving an application for compelling a company to comply with the request. It has, per force, to be an exceptional case for the authority to exercise its discretion against the person seeking to compel the company to make available the material; it may be made only in the most rare of cases.

19. What is of importance is that the extent of the discretion available u/s 163(6) may not be the test in the present case; at any rate, in respect of the requests made under Sections 196, 301 and 372A of the Act. It is not the person who made the request to the company who has come to court to compel the company to comply with the demand. Indeed, if the person making the request to the company were to come to court, the court would ordinarily direct such person to the forum recognised by the statute and not usurp the authority in every case. The present action is brought by companies seeking to deny the request made by the original defendants.

20. There is a qualitative difference between Sections 163 and 196 on the one hand and Sections 301 and 372A on the other. Both Sections 163 and 196 carry a provision for the implementation of the right to obtain copies or inspect records thereunder. That is in addition to the criminal consequences that may visit the

officer of the company who is in default. Sections 301 and 372A carry the penal provision and stipulate that the provision of Section 163 would apply to the procedure for obtaining copies or making extracts, but do not specifically provide for either the manner or a forum for the enforcement of the right. The word "shall" in all the relevant sections coupled with the penal provision for failure on the part of the company to comply with the statutory mandate make it obvious that a request made in terms of the provisions has to be complied with. The word "may" in the provision in Sections 163 and 196 of the Act in the matter of implementation of the right to obtain copies or make extracts or inspect records thereunder undeniably confers an element of discretion to the authority specified therein, but it cannot be inferred that the refusal or default on a company''s part to comply with the statutory mandate will be easily condoned.

21. What the plaintiffs say in the present case is that the requests under the various provisions were made by the original defendants following the plaintiffs'' refusal to give in to the extortionist demands of the original defendants that the plaintiffs book advertisements in the first defendant''s periodical. The first defendant has denied the allegation. The plaintiffs'' argument in the present case, if accepted, would turn the provisions on their head. The appropriate question is not why should the request be acceded to, but why should it not be complied with. The plaintiffs do not furnish any particulars as to the circumstances in which the initial demands were made by the original defendants for advertisements to be issued in the first defendant''s periodical. There is nothing said in the petition as to which officers of the plaintiff companies had been approached by the original defendants. There is no affidavit produced from any officer of any of the plaintiff companies detailing the demands allegedly made or the threats allegedly held out by the original defendants. It is a vague charge that has been made and when assessing a statement on oath against a denial thereof on oath on affidavit evidence, there is something more asked of the plaintiff that these plaintiffs have failed to discharge.

22. The test is not, as the plaintiffs suggest, that the requisitionist must have a justification for making the request; the test is for the company to demonstrate that the request is for a corrupt purpose. The provisions that are relevant for the purpose of the present proceedings further transparency in corporate governance and cannot be ordinarily stultified on a vague charge of extortion. As to what would amount to corrupt motive on the part of a requisitionist would depend on facts, but such motive is not to be easily inferred. It would amount to corrupt or improper motive worthy of denial of the request if the requisitionist is shown to cause serious prejudice to the company or its members or officers or if the request otherwise appears to be immoral and opposed to public policy. Prima facie, the plaintiffs have not been able to demonstrate that there is any corrupt motive in the original defendants'' requests made under the relevant statutory provisions.

23. The other aspect of the matter can also not be lost sight of. The principal purpose for the plaintiffs'' launching the present proceedings is to cast some doubt over the criminal proceedings that have been instituted by the first defendant. Those criminal proceedings have to be contested and decided on merits without the pendency of the present action having any bearing thereon. If it is ultimately found that the first defendant had instituted the criminal proceedings with malice, the plaintiffs will be free to take appropriate steps, but this Court or the present proceedings cannot be used for the oblique purpose of gaining some undue benefit in the pending criminal proceedings.

24. GA No. 938 of 2010 and GA No. 2768 of 2010 are dismissed. All interim orders stand vacated. There will be no order as to costs.

25. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Later:

26. The plaintiffs seek a stay of the operation of the order which is declined.