(2010) 02 CAL CK 0061

Calcutta High Court

Case No: A.P.O. No. 613 of 1998

Pradip Kumar Sengupta and Others		APPELLANT
	Vs	
Titan Engineering Co. P. Ltd. and Others		RESPONDENT

Date of Decision: Feb. 22, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 11 Rule 2, Order 23 Rule 1
- Companies Act, 1956 - Section 10F, 397, 398, 399, 402
- Constitution of India, 1950 - Article 20(3)

Citation: (2010) 3 CALLT 634 : (2011) 166 CompCas 169

Hon'ble Judges: Indira Banerjee, J

Bench: Single Bench

Advocate: Ratnanko Banerjee, for the Appellant;D.N. Sharma, for the Respondent

Final Decision: Allowed

Judgement

Indira Banerjee, J.

The question of law involved in this appeal u/s 10F of the Companies Act, 1956, is whether a company petition filed in the Company Law Board under, inter alia, Sections 397 and 398 of the Companies Act, 1956, after withdrawal of a comprehensive suit, covering the allegations made in the company petition to a substantial extent, is not maintainable, if the civil court has declined leave to the Plaintiff to institute a fresh suit in respect of the same cause of action.

2. This appeal is against an order dated July 27, 1998, passed by the Company Law Board, Principal Bench, New Delhi dismissing the application of the Appellant being C.P. No. 35 of 1993 (Pradip Kumar Sengupta v. Titan Engineering Co. P. Ltd. [1998] 94 Comp Cas 825) and the connected applications being C.A. No. 160 of 1993, C.A. No. 134 of 1996 and C.A. No. 237 of 1997, filed under Sections 397, 398, 399, 402 and

403 of the Companies Act, 1956, on the preliminary ground of withdrawal of Title Suit No. 24 of 1993, without leave to file a fresh suit.

3. The Appellants who claim to be one-third shareholders of the Respondent-company, Titan Engineering Co. P. Ltd., which is hereinafter referred to as the company, filed Company Petition No. 395 of 1993 before the Company Law Board on April 30, 1993, under Sections 397, 398, 399, 402 and 403 of the Companies Act, 1956, against the Respondents, alleging acts of oppression and mismanagement in the affairs of the company.

4. While the said application being C.P. No. 35 of 1993 was pending, the Appellants filed the connected applications being C.A. No. 160 of 1993, C.A. No. 134 of 1996 and C.A. No. 237 of 1997, wherein further allegations were made.

5. By the order impugned, the Company Law Board dismissed the C.P. No. 35 of 1993 as not maintainable holding that Title Suit No. 24 of 1993, filed on February 8, 1993 and withdrawn on April 30, 1993, was a comprehensive suit covering most of the allegations that had been made in C.P. No. 35 of 1993.

6. The relevant part of the order under appeal is extracted herein below for convenience (page 831 of 94 Comp Cas):

"We have gone through the plaint in T.S. No. 24 of 1993. This is a comprehensive suit covering most of the allegations that have been made in the present petition before us. We also find that certain interim orders were passed in that suit.... This suit was filed on February 8, 1993, by the Petitioner herein and he made an application to the court for withdrawal of the suit on April 30, 1993. The instant petition before us was also filed on the same date, i.e., on April 30, 1993. Even though in the application for withdrawal, the Petitioner had stated ''it is, therefore, and for ends of justice necessary that your Petitioners be granted leave to withdraw the instant suit and file proceedings before the hon''ble Company Law Board involving marginally the subject-matter of this suit'', the court passed the following order on March 29, 1994, ''that the Plaintiff is at liberty to withdraw the suit subject to payment of costs of Rs. 100. No liberty is given to file any suit afresh on the same cause of action''. It is, therefore, abundantly clear that the instant petition before us was filed when the prayer of the Petitioner before the civil court was pending. His prayer for liberty has been refused by that court. In other words, in spite of the Petitioner''s prayer for filing a fresh suit on the same cause of action, the court has expressly declined to grant the liberty. Therefore, consistent with the legal propriety and as held in the cases cited by Shri Ganguli, when the court has refused liberty to reagitate the same matter, we are of the view that we should not permit the Petitioner to reagitate the same in the proceedings before us and as such we are not looking into any of the allegations as contained in the petition. That being the case, the petition has to be dismissed as not maintainable. Once the petition is not maintainable, as we have already observed, the question of looking into other

allegations in subsequent applications, does not arise. Moreover, we also find that the subsequent allegations are more or less covered in Title Suit No. 70 of 1994."

7. The civil court had granted liberty to the Appellants to withdraw the suit subject to payment of costs of Rs. 100 but refused leave to the Appellants to file any suit afresh on the same cause of action. The Company Law Board, therefore, dismissed the company petition and the connected applications.

8. The short issue in this appeal is, whether the Company Law Board was justified in dismissing the company petition, on the ground that Title Suit No. 24 of 1993 filed by the Appellants earlier, had been allowed to be withdrawn without leave to initiate a fresh suit on the same cause of action.

9. Appellant No. 1, appearing in person, submitted that the order of the Company Law Board was patently unsustainable. Appellant No. 1 pointed out, and rightly, that the subject-matter of Title Suit No. 24 of 1993 and the subject-matter of the pending applications before the Company Law Board were not entirely the same.

10. Appellant No. 1 argued that the cause of action in Title Suit No. 24 of 1993 was the lack of quorum for holding the board meeting on January 15, 1993. This was the only issue in the title suit. However, in Company Petition No. 35 of 1993 filed on April 30, 1993, Appellant No. 1 complained of various acts of oppression.

11. Appellant No. 1 argued that in the application before the Company Law Board, the Appellants had made distinct allegations of submission of forged and false sales tax declaration forms. The Company Law Board thus erred in holding that Title Suit No. 24 of 1993 was a comprehensive suit which covered most of the allegations on the basis of which Company Petition No. 35 of 1993 had been filed.

12. Appellant No. 1 strenuously contended that Title Suit No. 24 of 1993 12 was not a comprehensive suit, but was confined to the board meeting held on January 15, 1993. In the proceedings before the Company Law Board comprehensive reliefs had been sought.

13. When a suit is withdrawn without leave under Order 23, Rule 1 of the Code of Civil Procedure, 1908, a subsequent suit in respect of the same cause of action is barred. As rightly submitted on behalf of the Respondents only where permission to withdraw a suit is granted with liberty to bring a fresh suit that the bar of res judicata is removed. The proposition of law laid down in AIR 1925 55 (Privy Council) , Shashi Bhusan Basuri Vs. Moti Bala Dassi and Others, and in Jonnala Sura Reddy and Another Vs. Tityyagura Srinivasa Reddy and Others, , cited on behalf of the Respondents, is well established. The `1judgments, however, have no application in the facts and circumstances of this case.

14. The bar of res judicata is attracted when the subject-matter of an earlier suit is directly and substantially in issue in a subsequent suit. An application in the Company Law Board u/s 397/398 of the Companies Act, 1956, is not a suit. In any

case, Title Suit No. 24 of 1993 was admittedly filed on February 8, 1993. However, in the company petition filed in the Company Law Board, the Appellants also impugned the board meetings held on February 15, 1993 and April 2, 1993 and the decisions taken in the aforesaid board meetings.

15. Comparison of the plaint in Title Suit No. 24 of 1993 with the petition in C.P. No. 35 of 1993 in itself shows that there may have been some overlapping of allegations. The subject-matter of the suit was not substantially and directly in issue in the company petition. The reliefs claimed were entirely different.

16. In Title Suit No. 24 of 1993, the Petitioner had questioned the legality of the meeting of the board of directors of the company held on January 15, 1993. The Appellants, inter alia, prayed for a declaration that all resolutions adopted on January 15, 1993, including the appointment of directors was bad in law, illegal and void.

17. In the company petition filed before the Company Law Board, the Appellants, inter alia, prayed that a scheme be framed by the Company Law Board for management and administration of the company and an administrator be appointed to assume charge of the management and affairs of the company. These reliefs were neither sought nor could be granted in T.S. No. 24 of 1993.

18. The bar of Order 11, Rule 2 of the Code of Civil Procedure, 1908, read with Order 23, Rule 1 would be attracted in case of a subsequent suit, only if the court in which the earlier suit had been filed, had jurisdiction to grant reliefs claimed in the subsequent suit.

19. The Company Law Board has not considered the issue of whether the reliefs claimed by the Petitioner in the company petition before the Company Law Board, could at all have been granted in Title Suit No. 24 of 1993, which was withdrawn on April 30, 1993, without leave to institute a fresh suit in respect of the same cause of action.

20. Lengthy arguments have been advanced by Appellant No. 1 on the merits of company, petition being C.P. No. 35 of 1993. Appellant No. 1 also argued that the workers of the company had no right to intervene or participate in the management of the company and as such were strangers to the company petition being C.P. No. 35 of 1993.

21. It is not-necessary for this Court to go into the merits of the company petition and the connected applications before the Company Law Board. What is in-issue in this appeal is the legality of the grounds on which the company petition has been rejected.

22. The company petition not having been rejected on the ground of intervention of workers, it is also not necessary for this Court to adjudicate the issue of whether the workers had any right to intervene in the proceedings u/s 397.

23. In Vallabh Das Vs. Madan Lal and Others, , cited by Appellant No. 1, the Supreme Court held that "subject-matter" in Order 23, Rule 1 meant the bundle of facts which had to be proved in order to entitle the Plaintiffs to the relief claimed by them. Where the cause of action and the relief claimed in the second suit were not the same as the cause of action and relief claimed in the first suit, the second suit could not be considered to have been brought in respect of the same subject-matter. The Supreme Court held that mere identity of some issues in the two suits did not bring about identity of the subject-matter of the two suits.

24. In Piyush Kanti Guha Vs. West Bengal Pharmaceutical and Phytochemical Development Corporation Ltd. and Others, a Division Bench of this Court held that if a particular type of relief sought could only be given in an appropriate proceeding under Sections 397 and 398, it was not possible to circumvent that procedure by instituting proceedings in a civil court. It is, therefore, doubtful whether all the reliefs claimed in the company applications could have been claimed by filing a suit.

25. In Saurashtra Cement and Chemicals Industries Ltd. and Others Vs. Esma Industries P. Ltd. and Others,), cited by Appellant No. 1, the Gujarat High Court held as follows (page 386):

"It is no doubt true that proceedings under Sections 397 and 398 of the Act are not, in the strict sense of the term, proceedings between private parties like a Plaintiff and Defendant in the suit and they have wider coverage and they touch upon the public interest of a large body of creditors, shareholders and they are taken to be in the best interest of the company''s business in the commercial world. In these proceedings, even the Central Government has interest."

26. The aforesaid judgment lends support to the contention of the Appellants that proceedings under Sections 397 and 398 are not the same as a suit instituted in a civil court.

27. Mr. Ratnanko Banerjee appearing on behalf of the company however, submitted that an appeal u/s 10F of the Companies Act could only be entertained when there was a substantial question of law involved. The factual allegations made by the Respondents against Appellant No. 1 are not material for adjudication of the issue involved in this appeal.

28. The question of whether the bar of Order 23, Rule 1 of the Code of Civil Procedure, 1908, is attracted in case of a company petition filed in the Company Law Board, inter alia, under Sections 397, 398, 399, 402 and 403 of the Companies Act, 1956, after an earlier suit in a civil court had been withdrawn without liberty to file a fresh suit in respect of the same cause of action, is a substantial question of law. The question is answered in the negative for the reasons given in this judgment.

29. Mr. Banerjee submitted that Appellant No. 1 had been taking recourse to initiation of multiple proceedings against the Respondents and on failing to obtain

an interim order from the Company Law Board, Appellant No. 1 filed Title Suit No. 70 of 1994. The filing of Title Suit No. 70 of 1994 and/or the reasons therefore are not material to the issue involved in this appeal. The company applications were not dismissed on the ground of initiation of Title Suit No. 70 of 1994.

30. Mr. Banerjee further submitted that the Company Law Board did not dismiss the application merely on a preliminary issue but on merits. The Company Law Board found that issues were overlapping in different pending matters initiated by the Appellants in different courts of law. The Company Law Board refused to exercise its discretionary power u/s 397 of the Companies Act, 1956 and accordingly dismissed the proceedings.

31. Mr. Banerjee argued that the Company Law Board had noticed the order dated March 29, 1994, in Title Suit No. 24 of 1993 whereby the learned court had refused to grant leave to the Appellant to file any suit in respect of the selfsame cause of action. There was no appeal from the order dated March 29, 1994.

32. Mr. Banerjee also argued that the impugned judgment and order should be read as a whole. It is a well-settled proposition that judgments should be read as a whole. Sentences or words in a judgment should not be read in isolation.

33. Mr. Banerjee submitted that when a civil suit and two criminal proceedings initiated by the Appellants over disputes, which required trial on evidence, were still pending, the learned Company Law Board rightly refused to exercise discretion to pass orders as prayed for in the company applications.

34. A reading of the judgment as a whole would, however, show that the Company Law Board had not declined to exercise its discretion u/s 397/398 of the Companies Act, 1956, on the ground of the conduct of the Appellants or on the ground of multiplicity of proceedings.

35. From the language and tenor of the order under appeal, it is patently clear that the company petition and the connected applications were dismissed because of the refusal of the civil court to grant leave to the Appellants to initiate a fresh suit in respect of the same cause of action.

36. The proposition of law enunciated in Mehboob Dawood Shaikh Vs. State of Maharashtra, cited by Mr. Banerjee is unexceptionable. A judgment should be understood in the light of the facts of that case and no more should be read into it than what it actually says. It is neither desirable nor permissible to pick out a word or a sentence from a judgment, divorced from the context of the question under consideration. The observation of the Supreme Court in Mehboob Dawood Shaikh Vs. State of Maharashtra, is also required to be understood in the context in which the same had been made. The Supreme Court held that it was not permissible to pick out a word or a sentence from the judgment of the Supreme Court divorced from the context or the question under consideration and treat the same to be

complete law decided by the Supreme Court. It is difficult to conceive how this judgment can be of any assistance to the Respondents.

37. In Apeejay P. Ltd. v. Raghavachari Narasingham reported in [1989] 2 CLJ 220, cited by Mr. Banerjee, this Court stayed all proceedings in Suit No. 747 of 1988 till final disposal of Criminal Complaint Case No. 1233 of 1988 on the ground that participation in trial of suit before disposal of the criminal case tantamounted to compelling the Defendant to disclose his defence and entailed violation of Article 20(3) of the Constitution. The aforesaid judgment is also of no relevance to the issues involved in this appeal.

38. There is no finding of the Company Law Board, that proceeding with the company petition would prejudice the defence of the Respondents in the criminal proceeding. The company applications have not been dismissed on that ground.

39. An application u/s 397/398 of the Companies Act, 1956, is not a suit, as rightly argued by the Appellant. Moreover, proceedings under Sections 397 and 398 are not in the strict sense proceedings between private parties and they have wider coverage and touch upon public interest of a large body of creditors and shareholders. In any case, as contended by the Appellants, the reliefs and the subject-matter in the two proceedings did not entirely overlap. As held by the Supreme Court in Vallabh Das Vs. Madan Lal and Others, , mere identity of some of the issues in the two suits did not bring about, identity of the subject-matter in the two suits.

40. If a particular type of relief sought can only be granted in proceedings under Sections 397 and 398, it is not possible to circumvent that procedure by instituting proceedings in a civil court as held by a Division Bench of this Court in Piyush Kanti Guha Vs. West Bengal Pharmaceutical and Phytochemical Development Corporation Ltd. and Others, , referred to above.

41. The proceedings u/s 397/398 not being a suit instituted in a civil court, the company petitions in the Company Law Board were not hit by Order 23, Rule 1 of the Code of Civil Procedure, 1908. The Company Law Board has patently erred in holding that the company petitions were not maintainable, since the civil court had declined leave to the Appellants to initiate a fresh suit on the self-same cause of action, while permitting withdrawal of T.S. No. 24 of 1993.

42. In Tara Properties Ltd. v. Bhagirath Agarwala reported in [2003] 4 CHN 558 : [2006] 133 Comp Cas 223, a Division Bench of this Court comprising A.N. Ray and Joytish Banerjee JJ. held that withdrawal of suit did not bar an application u/s 397/398 of the Companies Act. The Division Bench, however, held that where two remedies for identical relief were open, a party could not pursue two remedies at the same time, which would lead to conflict of decisions.

43. The judgment in Tara Properties Ltd. Vs. Bhagirathi Agarwala, , supports the contention of the Appellants that withdrawal of a suit does not bar an application, u/s 397/398 of the Companies Act, 1956. The Division Bench held that where two remedies were open for an identical relief, a party could not pursue two remedies at the same time. The Appellants had not followed two remedies arising out of the same cause of action, together. Moreover, the reliefs prayed for in the company petition could not have been granted in the earlier suit that was withdrawn.

44. In Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, the Supreme Court discussed the acts which constitute acts of oppression and mismanagement. The proposition of law laid down in the aforesaid judgment is well-settled.

45. In Shanti Prasad Jain Vs. Kalinga Tubes Ltd., , the Supreme Court held that lack of confidence between majority shareholders and minority shareholders would not come within Section 397 unless it could be demonstrated that the lack of confidence sprang from a desire to oppress the minority.

46. There can be no dispute over the proposition of law laid down in Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others, . Whether the company petition is maintainable in law, and whether the acts alleged therein amount to oppression or mismanagement, are issues for the Company Law Board to adjudicate.

47. In In Re: Bengal Luxmi Cotton Mills Ltd., , this Court held that the court ought not to exercise the extraordinary and summary jurisdiction under Sections 397 and 398 when an alternative remedy available had already been perused. The court further held that an order under Sections 397 and 398 could only be made on grounds mentioned in the said sections. The court could not make an order under those sections on the ground of a criminal complaint against the directors, or on the ground of an investigation having been made into the company''s affairs or even on the ground that the directors had been convicted of a criminal offence. Allegations of oppression and mismanagement in an application under Sections 397 and 398 had to be supported by evidence. The judgment in Hanuman Prasad Bagri and Others Vs. Bagress Cereals Pvt. Ltd. and Others, was rendered in the facts of the particular case.

48. In Mohta Bros. P. Ltd. v. Calcutta Landing and Shipping Co. Ltd. [1970] 40 Comp Cas 119, a Division Bench of this Court held that no relief under Sections 397 and 398 of the Companies Act, 1956, could be granted on the basis of vague and uncertain allegations unsupported by evidence. The Division Bench further held that negligence or inefficiency did not amount to mismanagement or oppression, even if proved.

49. It was for the Company Law Board to consider the merits of the company petition and the connected applications and to decide whether orders u/s 397/398

of the Companies Act, 1956, should be passed or refused. The Company Law Board ought to have decided whether the allegations in the company petition were vague or unsupported by any proof, as argued by Mr. Banerjee. The Company Law Board has not done so.

50. Since the company petition was not dismissed on merits, the submissions advanced on merits on behalf of the respective parties are not of relevance to the issue in this appeal. Those submissions are, therefore, not dealt with. It is not necessary for this Court to adjudicate the veracity of the allegations and the counter allegations made against each other by the respective parties.

51. There being a substantial question of law involved in the appeal, as observed above, the appeal ought not to be dismissed on the hyper-technical ground of the issue of law not having separately been framed in the petition of appeal.

52. The Company Law Board committed a grave error of law in arriving at its finding that the company petition was not maintainable, just because a civil court had refused leave to the Appellants to initiate a fresh suit on the same cause of action. The Company Law Board patently erred in not appreciating that the company petition filed before it, inter alia, u/s 397/398 of the Companies Act, 1956, was not a suit.

53. The Company Law Board should have appreciated that the civil court did not decline leave to the Appellants to initiate company proceedings, and more so, when the Company Law Board itself took note of and quoted the following submission of the Appellants in their pleadings in the civil court "It is, therefore, and for ends of justice necessary that your Petitioners be granted leave to withdraw the instant suit and file proceedings before the Company Law Board involving marginally the subject-matter of the suit".

54. The civil court consciously did not decline leave to file a company petition u/s 397/398 of the Companies Act, 1956, which the civil court could not have done, but declined leave to file a fresh suit in respect of the same cause of action, which the civil court had power to do. There was thus no reason to hold that there would be any breach of legal propriety in considering the company petition on merits.

55. In any case, as observed above, the subject-matter of the company petition was not directly or substantially in issue in T.S. No. 24 of 1993. The reliefs claimed in the company applications, inter alia, under Sections 397 and 398 were entirely different. The impugned order cannot be sustained.

56. The appeal is thus allowed.

57. The order under appeal is thus set aside. The Company Law Board is directed to decide the company petition being C.P. No. 35 of 1993 and connected applications afresh, and on merits.

58. Mr. D.N. Sharma appearing on behalf of the Respondents prays for stay of operation of the order. The prayer for stay is considered and refused.

59. Urgent certified copy of this order be supplied to the parties, if applied for, upon compliance of all requisite formalities.