(2012) 08 CAL CK 0124

Calcutta High Court

Case No: A.P.O. No''s. 245 and 246 of 2011 Arising Out of C.A. No''s. 686 and 721 of 2010, 541 of 2011 in Connection with C.P. No. 252 of 1985

Ajit Kumar Agarwal		APPELLANT
	Vs	
Nischintapur Tea Co. Ltd. and Others		RESPONDENT

Date of Decision: Aug. 6, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 9
- Companies Act, 1956 - Section 111A, 155, 397, 398, 399

Citation: (2012) 175 CompCas 289

Hon'ble Judges: Shukla Kabir Sinha, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Pratap Chatterjee, Pramit Kumar Ray, Aditya Kanodia, Ms. Anshumala Bansal and Ms. Nikita Jhunjhunwala, for the Appellant;S.N. Mukherjee , Ratnanko Banerjee, Jishnu Chowdhury and Sandip Das Gupta for Respondent No. 1, P.C Sen , for Respondent No. 2, S.B. Mookerjee , for Respondent No. 4, Arunava Sarkar for Respondents Nos. 2 and 4, Debangshu Basak for Respondent No. 9 and S. Trivedi for Respondent No. 10, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

Backdrop

1. Nischintapur Tea Co. Ltd., was a closely held company having a tea estate in North Bengal. The shares were held by Sen family of North Calcutta. In a proceeding u/s 397 of the Companies Act, 1956 (hereinafter referred to as the said Act of 1956) the learned single judge by an order dated June 21, 1985, appearing at page 19 of the compilation appointed Special Officer for inspection and inventory of the books of account. The learned judge also passed an interim order of status quo as of that date with regard to the shareholding of the company to be maintained until further

orders. The petition was kept pending. We do not find any active step being taken wither by the petitioner or by the respondents until 2006. In 2007 Sens made an application for withdrawal of the proceedings being C.P. No. 252 of 1985. The application was numbered as C.A. No. 302 of 2007. The applications stood dismissed vide order dated April 12, 2007, as appearing from page 121 of the compilation. This particular order created so much of confusion. The order states:

It is submitted on behalf of the applicants that the matter need not be proceeded with.

Company Application No. 302 of 2007 is dismissed as not pressed.

Sens subsequently realised, that the mistake crept in as the prayer for withdrawal of the proceeding was not pressed and as such the main proceeding continued to be pending. They applied for correction by making C.A. No. 53 of 2010 that was opposed by the appellant who already made an application being C.A. No. 40 of 2010 (Nischintapur Tea Company Ltd. Vs. Subrata Sen and Others, for being added as party respondent in section 397 proceeding.

Company and its shareholders

2. Nischintapur Tea Co. Ltd., is a closely held company by Sens of North Calcutta. It has a tea estate in North Bengal. One Maidhan Das Agarwal was also owning a tea estate, next to the tea estate belonging to the company. Maidhan Das was also a shareholder in the present company, so was his wife Sarboti Devi. Maidhan Das had three thousand eight hundred number of shares whereas Sarbati had one thousand nine hundred and forty number of shares in the company. Maidhan and Sarboti had two sons namely, Omprakesh and Ajit and daughters. Omprakash also acquired shares of the subject company having two thousand twenty-one number of shares. Ajit did not have any share of his own. He claimed share through Maidhan, Sarboti and Omprakash.

Past litigations at the instance of Maidhan Das, Sarboti and Om

3. Maidhan Das filed a suit for specific performance being Suit No. 386 of 1965 against Sudhindra Mohan Sen one of the shareholders for specific performance of an agreement of sale of tea estate. The suit was dismissed for non-prosecution vide order dated June 8, 1965. An appeal was carried being Appeal No. 153 of 1965 that was dismissed vide order dated January 19, 1967.

4. Omprakash filed a petition u/s 155 of the Companies Act, 1956, inter alia, claiming transmission of two thousand twenty one shares which he purchased from scattered shareholders. Omprakash also filed a suit being Suit No. 1045 of 1968 on April 29, 1968, for declaration that he was the lawful owner and holding the said two thousand twenty one shares. The suit was dismissed on February 20, 1973.

5. Maidhan Das filed another suit along with his wife Sarboti Devi being Suit No. 293 of 1967, inter alia, praying for an order of restraint against Sudhindra Mohan Sen from selling the tea estate. He died an unnatural death on May 8, 1968, leaving behind him surviving his wife Sarbati Devi, two sons Omprakash and Ajit and five daughters as his heirs and representatives. His heirs got themselves substituted in Suit No. 293 of 1967 vide order dated February 25, 1969. Omprakash died on July 28, 1986. Sarbati Devi died on January 10, 2000.

6. After the death of Maidhan Das, Omprakash and Sarbati, Ajit claimed to be the beneficiary of seven thousand seven hundred and sixty one number of shares that he inherited from his parents and elder brother. He claimed, he was entitled to the share of Maidhan Das by virtue of his Will. He became the sole owner of the shares held by Sarbati and Omprakash through deeds of gift executed by them respectively. The company did not entertain such claim. According to them, Maidhan was entitled to only eight hundred shares as he did not respond to the call made for the balance three thousand shares. The company also denied Omprakash having held two thousand twenty one shares. The company denied mutation for eight hundred shares of Maidhan Das and one thousand nine hundred and forty shares of Sarbati on the ground of that Ajit must get appropriate order from the succession court. He filed application before the Company Law Board u/s 111(A) of the said Act of 1956 in 2006 that is still pending as we are told.

Section 397 proceedings--Grievance of Amita

7. In the year of 1985 one of the shareholders Amita Sen filed an application before this court being C.P. No. 252 of 1985, inter alia, alleging mismanagement and oppression as against the persons having management and control of the said company also belonging to the same family. The principal grievance as we find from the record was, the company failed and neglected to mutate the shares held by Amita''s late husband and thereby preventing her from taking part in the day to day affairs of the company.

Entry of Gargs

8. Amita died leaving her surviving sons who were subsequently substituted in her place. We find from the record, by an order dated December 21, 2005, four sons of Amita including Sudipta Sen, Ranjan Sen, Subrata Sen and Sanjoy Sen were substituted. Sudipta and Ranjan subsequently died leaving Subrata and Sanjoy. It is contended, the company was in a precarious condition. The creditors were pressing for payment including the financial institutions. Sens could not arrange for funds of their own. They had to find out a financier that is how the Gargs came into picture in 2006. Their inclusion and/or mode of entry is however not clear. Fact remains, they paid off the creditors and the company was bailed out from the liability as claimed by Mr. S.N. Mukherjee appearing for the company and in effect protecting the interest of the Gargs.

Proceedings

9. There are protracted litigations between the parties. If we bring these litigations in a short compass we would find, Maidhan Das initially filed a suit for specific performance that was dismissed. Maidhan Das again filed a suit along with his wife for an order of restraint on the management from selling the tea estate that was also dismissed. Omprakash filed a suit claiming declaration as to the ownership of two thousand twenty one shares that was dismissed. We are not aware as to whether his application for rectification of the shareholders register u/s 155 is pending or not.

10. After the death of the parents and brother, Ajit initiated proceeding u/s 111A in 2006 as stated above that was pending before the Company Law Board.

11. The proceeding u/s 397 was also kept pending until 2007 when the sons of Amita attempted to withdraw the same. The learned judge dismissed the said application as referred to above. The Sens thereafter filed an application for correction being C.A. No. 53 of 2010. At this juncture Ajit intervened. He filed an application being C.A. No. 40 of 2010 for his addition. Both the applications being C.A. No. 40 of 2010 and C.A. No. 53 of 2010 were heard by the learned single judge. His Lordship dismissed both the applications vide judgment and order dated March 11, 2010 (Subrata Sen and Another Vs. Nischintapur Tea Company Limited and Others, appearing at pages 31-44 of the compilation. His Lordship dismissed the application of Ajit as he could not yet come as a shareholder in the company. His Lordship dismissed the application for correction as his Lordship was in doubt whether the main proceeding was in fact withdrawn or not. His Lordship was in doubt whether at all any mistake was committed by the court while passing the order dated April 12, 2007. The order was carried to the appeal. The Division Bench dismissed the appeal arising out of C.A. No. 53 of 2010. Another Division Bench dismissed the appeal arising out of C.A. No. 40 of 2010, vide judgment and order dated September 22, 2011 (Ajit Kumar Agarwal Vs. Nischintapur Tea Company Ltd., appearing at pages 81-113 of the compilation.

12. It is at this juncture the company made an application being C.A. No. 686 of 2010, inter alia, praying for dismissal of the proceeding u/s 397. The application was made through a judge''s summons supported by an affidavit of one Sujit Chatterjee whose authority was challenged by Ajit by an application being C.A. No. 721 of 2010. The learned judge heard both the applications and disposed of vide judgment and order dated July 5, 2011 (Nischintapur Tea Company Ltd. Vs. Subrata Sen and Others,) appearing at pages 116-141 of the compilation. His Lordship allowed the application made by the company and dismissed the proceeding initiated by Amita u/s 397 after holding that Sujit was duly authorised to make such application. His Lordship also dismissed Ajit''s application for dismissal of the application made by the company, inter alia, on the ground that Sujit had no authority. In effect, his Lordship heard three applications at a time and allowed the application of the

company and dismissed the other two filed by Ajit. The present appeals would arise from the judgment and order dated July 5, 2011, that were heard by us on the abovementioned dates.

Orders

13. The appellant filed a compilation of fifteen orders involved in these appeals apart from two orders appearing as a quotation in two of the said fifteen orders. In all, the compilation would have seventeen orders. We would however, refer to seven orders that would be relevant for the purpose of disposal of the present appeals:

(i) June 21, 1985

The order of status quo with regard to shareholding of the company to be maintained until further orders.

(ii) April 12, 2007

The application for withdrawal of section 397 petition made by Sens was dismissed as not pressed.

(iii) December 20, 2010

Application for appropriate interim relief in the suit was dismissed by the learned judge holding it as unmeritorious.

(iv) March 11, 2010

The application for correction of order dated April 12, 2007, was dismissed by the learned judge. His Lordship also dismissed the application of Ajit for being added as a party.

(v) August 5, 2010

The Division Bench dismissed the appeal from the order of the learned single judge dismissing the application for correction of the order dated April 12, 2007.

(vi) September 22, 2011

The Division Bench dismissed the other appeal from the order dated March 11, 2010, by which his Lordship dismissed the application of the appellant for being added as a party.

(vii) July 5, 2011

The learned single judge dismissed the proceeding u/s 397 at the instance of the company after dismissing the application made by the appellant challenging the authority of one Sujit Chatterjee to make the application on behalf of the company for dismissal of the main proceeding.

Summing up

14. If we bring the factual matrix in a short compass in the present context we would find, the Sen family was having the virtual control of the tea estate. Agarwals had an eye on the said tea estate. They tried to acquire the said garden initially through agreement for sale. Such bid failed. Now the present appellant claiming to be the sole beneficiary of Agarwal''s interest in the company tries to intervene in the affairs of the company. His prayer for mutation and/or transmission of shares in his name to the extent of 7,761 shares is pending consideration before the Company Law Board. He is now trying to intervene in a proceeding initiated by Amita u/s 397 for a personal cause as her husband''s shares were not being transmitted in her name and her interest was not being looked after in the company. On the other hand, the Sens virtually disposed of their shareholdings and handed over the management to the Gargs who are in control of the company as well as the tea estate. However, their entry is not clear, at least not officially surfaced in the records of this litigation. The learned single judge allowed the main section 397 proceeding to be dismissed and thereby denying the prayer of Ajit to be substituted therein.

Present status

15. The company is in virtual control of the Gargs. Ajit is yet to be recognised as a shareholder of the company.

Contentions

Pratap Chatterjee

16. Mr. Pratap Chatterjee appeared for Ajit in both the appeals. According to him, even if Ajit did not obtain probate of the Will left by Maidhan his interest in the shares could not be disputed. Hence, he had an active interest in the company''s affairs. A proceeding u/s 397 being a representative action could not thus be allowed to be dismissed as Ajit was interested to proceed with the same. Sens could not have transferred their shareholdings to the Gargs in view of an order of status quo being prevalent on and from June 21, 1985 to July 5, 2011, the period in between the Gargs came into control of the company. Hence, their entry in the company was illegal and de hors and in violation of the order of this court. The management of the company was in a precarious condition as the Gargs being nobody in the company took virtual control causing oppression to the existing shareholders.

17. He contended that entry of the Gargs would amount to fraud on court. Once the learned single judge dismissed the application for withdrawal of the proceeding u/s 397 and declined to correct the so-called mistake the proceeding could not be withdrawn and/or dismissed at the instance of the company particularly when Ajit having substantial interest in the company as a shareholder was agreeable to continue with the same.

18. He relied on the single Bench decision of the Delhi High Court in the case of Worldwide Agencies (P) Ltd. and another Vs. Margaret T Desor and others, that was merged in the judgment and order of the apex court reported in M/s. World Wide Agencies Pvt. Ltd. and another Vs. Mrs. Margarat T. Desor and others, In the said decision the lady applicant applied for mutation of shares which she inherited from her late husband that was denied by the company. The learned single judge held that the proceeding u/s 397 by the lady was maintainable. We however, find that during the pendency of the said proceeding the lady obtained appropriate order from the succession court in respect of the subject shares.

19. Mr. Chatterjee also relied upon two apex court decisions in the case of Piyush Kanti Guha Vs. West Bengal Pharmaceutical and Phytochemical Development Corporation Ltd. and Others, and United Bank of India Vs. Naresh Kumar and others,

Ratnanko Banerjee

20. Mr. Ratnanko Banerjee, learned counsel appearing for the company contended that the claim of Ajit was rightly rejected in view of inordinate delay. He contended that the proceeding was pending from 1985 to 2006 whereas Ajit acquired shares firstly from his father when he died in the year 1968 and then in 1986 when his brother died. He acquired his mother''s interest in 2000. The deeds of gifts were also executed by his mother and brother during their lifetime. Ajit did not ventilate his grievance prior to 2006 when he approached the Company Law Board for the first time. Hence, his prayer for intervention in the proceeding u/s 397 could not be acceded.

S.N. Mukherjee

21. Mr. S.N. Mukherjee leading Mr. Ratnanko Banerjee contended that the gift from the mother and brother was said to have been executed in the year 1975. The father died in the year 1968. Ajit also filed a suit for declaration that was pending on the identical issue. His prayer for interim protection was denied by the learned single judge that was carried in appeal that was pending. Significant to note, Ajit also filed a suit being C.S. No. 10 of 2010, inter alia, making identical prayers protecting his right in respect of the shares in question. Mr. Mukherjee also drew our attention to page 142 of the paper book wherein we would find that Ajit wrote to the State Bank of India, the company''s banker, inter alia, instigating them not to extend financial support to the company. His attempt could not be said to be in the welfare of the company and as such his prayer should be rejected. On the authority of Sujit, Mr. Mukherjee contended that in the earlier proceedings Sujit represented the company where Ajit did not take such plea. He obtained benefit of the said affidavit. Hence, he was estopped from challenging his authority. The learned judge rightly declined to accept his contention on that score. Mr. Mukherjee relied on the following decisions:

(i) J. Bollinger S.A. v. Goldwell Ltd. reported in [1971] RPC 412.

(ii) S. Narayanan v. Century Flour Mills Ltd. reported in [1985] 3 Comp. LJ 209 (Mad).

(iii) Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others,

(iv) Shipping Corporation of India Ltd. Vs. Machado Brothers and Others,

P.C. Sen

22. Mr. P.C. Sen, learned senior counsel appeared for Subrata Sen who was no more a shareholder as fairly admitted by Mr. Sen. He however contended that Ajit did not have any locus standi to intervene the proceeding u/s 397 as he was yet to be brought in the shareholder''s register. The parties to section 397 proceedings did not want to continue such proceeding. Hence, the order of dismissal was apt that could not be challenged at the instance of Ajit. In any event the interest of Ajit would be protected by the civil court in the pending suit. Further continuation of section 397 proceeding was not warranted. He distinguished the decision in the case of M/s. World Wide Agencies Pvt. Ltd. and another Vs. Mrs. Margarat T. Desor and others, by saying that the lady duly obtained appropriate order from the succession court during pendency of the proceeding whereas Ajit did not approach the succession court as yet. Mr. Sen placed the appropriate provisions u/s 397 to section 399 to demonstrate that Ajit could not have any locus standi. He relied on the apex court decision in the case of Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others,

S.B. Mukherjee

23. Mr. S.B. Mukherjee, learned senior counsel appeared for Sanjoy Sen. He adopted what was argued by Mr. P.C. Sen. He contended that Ajit did not have any locus standi to intervene in the proceeding. The Division Bench held so. Such decision was binding upon him. He was not a shareholder of the company as yet. Hence, his petition for intervention was rightly dismissed. His claim on the shares made in 2006 was grossly delayed and barred by laws of limitation. On the authority of Sujit he relied on the decision of the apex court in the case of Turner Morrison and Co. Ltd. v. Hungerford Investment Trust Ltd. reported in [1969] 1 Comp. LJ 94 and the English decision in the case of Alexander Ward and Co. Ltd. v. Samyang Navigation Co. Ltd. reported in [1975] 2 All ER 424 (HL).

Pratap Chatterjee (while replying)

24. The learned judge did not deal with the issue raised on the authority of Sujit Chatterjee. Even if it was contended that Sujit was allowed to represent the company in the earlier proceeding having not disclosed his authority as yet Ajit was lawfully entitled to pray for dismissal of the petition filed by the company at the behest of Sujit. He distinguished the English decision by saying, even if the company''s version was accepted to the extent of forfeiture of three thousand share his right to inherit eight hundred shares of Maidhan could not be disputed by the

company that would demonstrate his locus standi to intervene. He would refer to page 529(A) and 433(A) of the paper book to show that three thousand eight hundred shares were admitted by the then management of the company. He drew our attention to an application made before us recording the death of one of the heirs of Amita wherein the company was represented by one Chandan and not Sujit. He lastly relied on the decision of this court in the case of Piyush Kanti Guha Vs. West Bengal Pharmaceutical and Phytochemical Development Corporation Ltd. and Others, Mr. Chatterjee further contended that a proceeding u/s 397 was in effect a representative action and in any event, could not be equated with a civil suit which could be withdrawn at the desire of the plaintiff at any time as he likes. According to him, the court could not prevent a party to withdraw a suit, however, a proceeding u/s 397 could not be withdrawn at the whims of the parties. He contended, even if full credence was given to what was said against him by the respondents admittedly he inherited eight hundred shares of his father that was yet to be mutated in his name. Hence, he could not be said to be without any interest in the company''s affairs. His interest in the company was enough to resist withdrawal and/or dismissal of the proceeding u/s 397. He need not be a shareholder. He put emphasis on the decision of the learned single judge of the Delhi High Court in the case of Worldwide Agencies (P) Ltd. and another Vs. Margaret T Desor and others, which according to Mr. Chatterjee was not upset by the apex court.

25. Distinguishing the decision in the case of J. Bollinger S.A. v. Goldwell Ltd. [1971] RPC 412, Mr. Chatterjee contended that facts involved therein would not tally with the present one. In the said case, the petitioners who initiated passing off action was found to be without any interest in the controversy. His locus standi itself was in dispute. In any event, the said action was a suit and not a representative action. According to him, a shareholder would have to satisfy the requisite u/s 399 to initiate proceeding u/s 397 and/or 398. However, in case of substitution it was not required. Even a shareholder having one share could resist the attempt to withdraw and/or dismissal, as the case may be.

26. On the authority of Sujit, Mr. Chatterjee contended that despite court''s desire Sujit failed and neglected to produce his authority. At this stage, Mr. Sandip Das Gupta, the learned advocate appearing for the company filed xerox copies of the power of attorney as well as the board resolution authorising Sujit to initiate proceeding on behalf of the company. Mr. Chatterjee contended that neither there was any continuous page mark of the minute book nor the resolution was certified. The initial of the chairman was lacking. Even if it was a computer printout the photostat copy did not have the punching mark that would doubt the genuineness of the authority.

Relevant provisions of law

27. Sections 397, 398 and 399 read together would enable the shareholder to bring proceeding as against the company and its management against oppression and

mismanagement. As a prerequisite, the applicant must have in aggregate one-tenth of the total shareholding or the number of shareholders. It could be said to be a representative action on behalf of the shareholders at large who subscribed to the same view as the petitioner had. To that extent, it was an action in rem. It could be an action in personem as well. In case of oppression, it might be a joinder of causes of action where different petitioners might have different grievance. What would be necessary to maintain a proceeding, is their grievance culminated together would raise a pointer to the persons having management and control of the company and would suggest oppression of a class of shareholders and/or mismanagement of the affairs of the company. The primary requisite to maintain the proceeding was to make out a case as to a situation just and equitable for the company to be wound up in view of the oppression and mismanagement. However, winding up is not prayed for as it would otherwise unfairly prejudice the company. That is the distinction between a proceeding of winding up and a proceeding under the above provisions. The precedents would suggest, the above statutory provisions do not operate as an express bar for bringing a civil action at the instance of a shareholder on the identical cause of action. However, there would be divergent views on the issue. One might say, such civil action would be contrary to the provisions of procedural law and/or substantive law including section 9 of the Code of Civil Procedure, 1908. We however do not wish to deliberate in detail on such aspect as it may not be relevant. Question would still be germane as to whether the present appellant could independently maintain any such proceeding having his name not yet entered into the shareholders'' register. M/s. World Wide Agencies Pvt. Ltd. and another Vs. Mrs. Margarat T. Desor and others, would help us to answer this. The learned single judge of the Delhi High Court as well as the apex court would say, he is, provided, he has a claim for the sufficient shareholdings as per section 399 and such shareholding is an admitted position. Mrs. Margaret T. Desor, initiated proceeding on the strength of her husband''s shareholding that was well within the scope of section 399. Mrs. Margaret T. Desor duly applied before the succession court, however, her right to claim ownership came subsequently to the initiation of the proceeding that was held to be maintainable. In the present case, Maidhan Das, Om and Sarbati died long ago. We do not know, whether Ajit applied for succession. His claim for ownership in respect of shares of Om and Sarbati as per deed of gift that is also in doubt being not contemporaneously submitted before the company. Be that as it may, his prayer for rectification of the share register by inclusion of his name is pending before the Company Law Board u/s 111A. We do not wish to deliberate on the issue. Fact would remain, he is not a shareholder of the company as of date. Question would then arise, would he be entitled to be substituted in place of heirs of Amita who were reluctant to continue the litigation. The answer would be "no" as he cannot maintain by himself any such proceeding of his own.

28. Mr. Chatterjee relied upon the decision in the case of State Bank of Travancore Vs. Kingston Computers (I) P. Ltd., ; State Bank of Travancore Vs. Kingston

Computers (I) P. Ltd., AIR 1982 Cal 94. The Division Bench of this court, in this case, declined to stay the proceeding brought for an identical cause of action when a proceeding u/s 155 was pending. The Division Bench held, when the main relief sought for in the company petition was on the ground of oppression and framing of scheme and appointment of directors which was distinctly different from the relief asked for in the civil suit restraining some directors nominated by the Government from functioning, stay of the proceeding in the company petition could not be granted. Mr. Chatterjee relied on the decision to counter act the contention raised against him about his locus standi to make the prayer for intervention during pendency of his suit on the identical cause of action. In our view, the contention of Mr. Chatterjee is misplaced. If we look to the original grievance of Amita it was a personal grievance against the management as her husband''s shares were not being looked after. She was not allowed to be mutated in her husband''s place. Such grievance was absolutely personal and Ajit could not have any say on that score. If we allow Ajit to be substituted it would be a complete new proceeding on a fresh grievance as against the present management. Substitution in a proceeding is granted when right to sue survives. In a personal action if the person having carriage of proceeding is unable to continue either for his death or retirement or any legal incapacity anyone who has otherwise a right to continue with the said litigation can be substituted. To decide this question may we ask ourselves a question, if Ajit is allowed to be substituted would he be able to continue the same on the present pleadings ? The answer would be "no". The grievance of Amita could be persuaded by her sons in her absence. Her sons are reluctant to do so. They say, they are no more shareholders of the company. If that is so, neither they are competent to continue with these proceedings nor can we force them to do so. Even if Ajit had a right on the strength of the shares as he claimed he could not have any grievance against the company relating to the aspect highlighted in the petition. His grievance against the company, as we find today, is, his shares are not mutated. He is not allowed to participate in the company''s affairs. It is an independent grievance for which he has already initiated two proceedings one before the Company Law Board and the other before the civil court. Can he come today with an independent proceeding under the aforesaid provisions with his grievance ? The answer would be "no". When a litigant cannot independently bring an action on a cause he may not be substituted in a proceeding, inter alia, praying for identical relief.

29. Lot was said on the authority of Sujit Chatterjee. Mr. Chatterjee relied upon the apex court decision in the case of State Bank of Travancore Vs. Kingston Computers (I) P. Ltd., State Bank of Travancore Vs. Kingston Computers (I) P. Ltd., In the said decision the authority of the person who filed the suit was doubted. No evidence was shown as to his authority. The apex court held that suit could not be said to be fatal as such defect could be cured through ratification. The apex court held that the letter of authority issued to Raj Kumar Shukla who described himself as Chief Executive Officer was nothing but a scrap of paper in absence of board resolution.

Considering such aspect the appeal was dismissed. The proposition of law is apt as advanced by Mr. Chatterjee. Even if we hold so would the situation be changed ? In our view, "no" as the person who is challenging the authority himself has no locus standi to approach the court of law. The company applied for dismissal of the proceeding. The company approached the court through Sujit. No rival claim is made before this court by any person competent to question his authority. The company did not deny his authority, so is the present management. Ajit is yet to acquire the right to claim any interest in the company. Hence, this judgment would be of no assistance to him. In any event, a defect of the like nature could be cured through rectification/ratification as held by the apex court in United Bank of India Vs. Naresh Kumar and others,

30. Whether a proceeding has a representative character or not, three tests are suggested by the English decision in J. Bollinger S.A. v. Goldwell Ltd. [1971] RPC 412, they are-

(i) Common grievance

(ii) Common interest

(iii) Common beneficial remedy

31. If all the three tests are satisfied a proceeding can be said to be representative action. The decision would also say that even if there was any common grievance and/or interest the court had a discretion to refuse substitution and/or addition. Similar view was taken by the Madras High Court in the case of S. Narayanan v. Century Flour Mills Ltd. [1985] 3 Comp. LJ 209. In the instant case, neither the grievance of Amita and Ajit are common. They do not have any common interest. Hence, even if they would have any beneficial remedy the prayer for Ajit could not be acceded to.

32. In this regard we may refer to Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others, where the apex court held that there was no specific ouster of civil suit on a grievance of oppression and mismanagement under sections 397 and 398. The apex court held that dispute as to hindrance could not be a subject-matter of proceeding u/s 397. Mr. Chatterjee however rightly distinguished this decision by saying that there was no dispute as to inheritance. Hence, this decision would be of no consequence.

33. With due respect to Mr. Chatterjee we are unable to accept his contention on his locus standi. Unless someone is brought in the shareholder''s register he may not be said to be a shareholder in the company, particularly when his prayer for transmission and/or mutation in his favour is pending consideration in an independent proceeding before the Company Law Board as the company declined to bring him on record in absence of any proper authority being obtained from any succession court. The decision in the case of Worldwide Agencies (P) Ltd. and

another Vs. Margaret T Desor and others, , would be of no assistance to him. We fully agree with him that a proceeding u/s 397 could not be equated with a civil suit where the learned judge could not have any say if a plaintiff wants to withdraw his suit. We fully agree with him that a proceeding u/s 397 could not be withdrawn and/or dismissed merely at the whims of the parties. We however feel that the resistance to allow withdrawal and/or dismissal must come from someone who had authority to resist the same. A non-party can only resist dismissal or withdrawal if he is able to show that continuance of the said proceeding would benefit him. In the instant case, Amita brought the action making allegation against the then management. After her death her sons sold off their shares. They categorically asserted before us that they were no more shareholders of the company. Whether such disposition was contrary to and/or in violation of the order of status quo obtained by Amita on June 21, 1985, may not be so relevant. Fact remains the Sens are reluctant to proceed. Company also wants that the proceeding against him should be dismissed. The records would depict that the proceeding pending for last twenty-seven years could not be disposed of as the parties did not take any effective step in getting the said matter heard. Even if no one would actively approach the learned judge for its withdrawal or dismissal it would in course of time be dismissed as infructuous. Only question germane today is whether such eventuality can be resisted by the appellant. We have already dealt with the question and hold it "no" that would seal the fate of the appellant.

34. The learned judge observed, Sujit''s authority was not challenged contemporaneously as the company was also represented by Sujit in earlier proceeding when Ajit did not raise any objection. Mr. S.B. Mukherjee, learned senior counsel relied on the decision in the case of Turner Morrison and Co. Ltd. v. Hungerford Investment Trust Ltd. [1969] 1 Comp. LJ 94 (SC). A suit was filed by the secretary on behalf of the company. The court found that the resolution was manipulated, even then declined to dismiss the said suit. He also relied upon the English decision in the case of Alexander Ward and Co. Ltd. v. Samyang Navigation Co. Ltd. [1975] 2 All ER 424 (HL). In the said decision the proceeding was held to be good when there was subsequent ratification by the liquidator. Thus, we come to a narrow compass. The proceedings initiated by the company for withdrawal of the main proceeding could not be said to be bad merely on the ground that Sujit did not disclose his authority. We hold, it is not so. The proceeding is pending since 1985. The petitioners were reluctant to continue with the same. The substituted petitioners claimed that they seized to be shareholders of the company. Hence, the learned judge rightly held, the proceeding would be stale and infructuous. Merely because Sujit did not disclose his proper authority and that too, a question raised by a person who did not have locus standi to raise so, the order of dismissal of the proceeding could not be upset.

35. Status of Ajit is yet to be decided either in the proceeding u/s 111A or in his suit. In the absence of such decision his prayer for substitution in case of original

petitioners, could not be acceded to.

Result

36. We thus do not find any scope to interfere with the judgment and order of the learned single judge. We would only say that observations made by his Lordship in the judgment and order impugned before us must not prejudice his suit or his appeal from the order of refusal to pass interim order in his suit or proceeding initiated before the Company Law Board u/s 111A. With these observations, we dispose of his appeals without any order as to costs.

Direction

37. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir Sinha, J.

I agree.