

Dinesh Kumar vs.sinecure Technocity Pvt. Ltd. & Ors

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Court : Delhi

Decided On : May-22-2019

Appellant : Dinesh Kumar

Respondent : Sinecure Technocity Pvt. Ltd. & Ors

Advocate for Pet/Ap. : Mr. Rajiv Tyagi, Mr. Rohit Gupta

Judgement :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

22. d May, 2019 CS(COMM) NO.242/2019 DINESH KUMAR Plaintiff Through: Mr. Rajiv Tyagi & Mr. Rohit Gupta, Advs. Versus SINECURE TECHNOCITY PVT. LTD. & ORS. ...Defendants Through: None. CORAM: HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW The plaintiff has instituted this suit for, declaration and permanent 1. and mandatory injunctions, pleading that (i) the plaintiff is a Director and shareholder, holding 20% of the issued, subscribed and paid up share capital of defendant no.1 Sinecure Technocity Pvt. Ltd.; (ii) the defendant no.1 is in the nature of a quasi partnership between the plaintiff and defendants no.2 to 6 viz. (a) Krishan Kumar, (b) Ankit Gupta, (c) Nitin Rekhan, (d) Atul Gupta, and (e) Neeraj Gupta; the defendant no.1 was incorporated only to acquire six out of twelve apartment blocks at 9, Birla House, Arya Samaj Road, Karol Bagh, New Delhi vide six sale deeds, all dated 12th November, 2009, from the erstwhile owner thereof and has no other business; the other six apartment blocks on the said property are owned by defendants no.2 and 3; out of the six apartment blocks acquired by the

defendant No.1, two have been sold and only four blocks remain; (iii) it has always been the understanding amongst the plaintiff and the defendants no.2 to 6, that each shareholder / director shall have one apartment block to his share and in the event of dissolution by sale of the CS(COMM) No.242/2019 Page 1 of 18 entire business undertaking of the defendant no.1, each shareholder / director shall receive the return of his contribution in the form of apartment blocks in proportion to his shareholding in the defendant no.1; from this perspective, the plaintiff would be entitled to 20% of the entire asset base of defendant no.1; one of the apartment blocks has been earmarked for the benefit of the plaintiff; (iv) earlier, the plaintiff, his father and his brother were the only directors of the defendant no.1; in the year 2010, the defendants no.2 to 6, being acquaintances of the plaintiffs family, requested for being inducted as shareholders in the defendant no.1 company; plaintiffs father and plaintiffs brother agreed to resign as directors of defendant no.1 and to transfer their shareholdings of defendant no.1 in the name of defendants no.2 to 6 as well as their relatives and family members; (v) now the entire shareholding of the defendant no.1 is held by the plaintiff and the defendants no.2 to 6 and their relatives and family members, as six shareholder groups; (vi) defendant no.2 holds 14.5%, the defendant no.3 owns 15%, defendant no.4 owns 13.5%, defendant no.5 owns 16% and the defendant no.6 owns 16% of the issued, subscribed and paid up share capital of the defendant no.1; the remaining 5% of the shareholding is held by family members of defendants no.2 to 6; (vii) defendants no.2 to 6 have taken loans and advances in the sum of Rs.3,34,70,000/- as on 31st March, 2011 against the aforesaid property of the defendant no.1 and which are reflected in the balance sheet of the defendant no.1; the defendants no.2 to 6 have apparently mortgaged the entire business undertaking of the defendant no.1 but the use of the huge advances by the defendant no.1 cannot be deciphered from the financial accounts of the defendant no.1; thus the entire business undertaking of the CS(COMM) No.242/2019 Page 2 of 18 defendant no.1 has been put in severe jeopardy by defendants no.2 to 6; the sale consideration of the two apartment blocks already sold, has also not been reflected in the books of the defendant no.1 and has been siphoned off by the defendants no.2 to 4 for their personal benefits; in fact the plaintiff was party to sale of only one of the apartment blocks and was not even informed of the sale of

the other apartment block; (viii) the defendants no.2 to 4 are siphoning off the funds of the defendant no.1 to cover their financial losses and are now attempting to dispose of the remaining apartment blocks also of the defendant no.1 without informing the plaintiff, who is a Director and shareholder; (ix) Section 180 of the Companies Act, 2013 prohibits the defendants from, by brute majority, selling and disposing of the undertaking of the defendant no.1 which comprises only of the suit property; no meeting of the Board of Directors or of General Body of shareholders has been called to obtain authorisation for sale of the undertaking of the defendant no.1; the sale by the defendants no.2 to 4 of the defendant no.1s property is ultra vires and in violation of Sections 179 and 180 of the Companies Act; (x) the defendants no.2 to 4 have committed grave acts of misappropriation of the business undertaking and the property of the defendant no.1 and have committed criminal breach of trust qua the plaintiff and shareholders holding 20% of the total net worth of the defendant no.1; (xi) it is necessary to restrain the defendants no.2 to 4 from transferring the properties of the defendant no.1; (xii) the plaintiff is entitled to declaration that the sale of one of the apartment blocks already effected in favour of Dandona Infrastructure Pvt. Ltd. is ultra vires.

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2. The suit is thus filed, for (A) declaration that the defendants no.2 to 6 have no right individually or collectively to sell, transfer, dispose of or create third party interest in the undertaking of the defendant no.1 i.e. property No.9, Birla House, Arya Samaj Road, Karol Bagh, New Delhi; (B) declaration that the registered sale deed dated 8th September, 2017 executed by defendant no.2, purportedly on behalf of defendant no.1, in favour of Dandona Infrastructure Pvt. Ltd. is null and void and of no effect; (C) alternatively, mandatory injunction directing the defendants no.2 to 6 to deposit entire sale consideration of Rs.2.25 crores received from Dandona Infrastructure Pvt. Ltd. under the registered sale deed dated 8th September, 2017 along with interest; and, (D) permanent injunction restraining the defendants no.2 to 6 from creating third party interest in the four remaining apartment blocks of defendant no.1 at property No.9, Birla House, Arya Samaj Road, Karol Bagh, New Delhi.

3. The plaintiff valued the suit for the purpose of jurisdiction at Rs.2.25 crores and for the purpose of court fees at Rs.200/-.

4. The Registry raised objection. On insistence of counsel for the plaintiff, the suit was listed before this Court first on 10th May, 2019, subject to the said objection. However, on 10th May, 2019, the counsel for the plaintiff, instead of justifying the separate valuations for purpose of jurisdiction and court fees, sought time to deposit the requisite court fees and the suit posted to 22nd May, 2019. The plaintiff has since paid the requisite court fees. CS(COMM) No.242/2019 Page 4 of 18 5. I have however enquired from the counsel for the plaintiff, about the maintainability of the suit and the locus of the plaintiff to file the present suit, admittedly relating to the properties of the defendant no.1 company and in which the plaintiff holds 20% of the shareholding. It has been enquired from the counsel for the plaintiff, whether not the appropriate remedy of the plaintiff is before the National Company Law Tribunal (NCLT), under Sections 241 and 242 of the Companies Act, 2013 and whether not the jurisdiction of this Court to entertain this suit is barred by Section 430 of the said Act.

6. Though there is yet another defect in the suit viz. of non- impleadment of Dandona Infrastructure Pvt. Ltd., sale deed in whose favour by the defendant no.1 is sought to be declared as null and void, but the said defect is capable of rectification. However, the other grounds aforesaid go to the root of the matter and are incurable.

7. The counsel for the plaintiff who was quizzed on this aspect even on 10th May, 2019 when the suit had come up first, has come prepared. He has argued and subsequently also handed over note of arguments (which is taken on record), contending that (i) under Section 9 of the Code of Civil Procedure, 1908 (CPC), the Civil Courts have jurisdiction to try all suits of a civil nature except the suits for which cognizance is expressly or impliedly barred; thus this Court as a Civil Court would have jurisdiction unless barred by any law; (ii) on the other hand NCLT has neither jurisdiction to grant the relief sought nor do the provisions of the Companies Act, 2013 empower NCLT to decide the issues raised in the present suit; (iii) Section 430 excludes the jurisdiction of the Civil Court CS(COMM) No.242/2019 Page 5 of 18 only over matters in respect of which NCLT has been empowered; the powers of NCLT in relation to adjudication of complaints of oppression and mismanagement have been set out in Sections 241 to 244; none

of the said provisions cover the situation and the reliefs claimed in the suit; thus the jurisdiction of this Court as the Civil Court to entertain disputes regarding immovable properties of the defendant no.1 is not barred; (iv) Section 180 of the Companies Act prohibits the directors from selling the undertaking of the company without the consent of the shareholders in general meeting; no such consent has been taken; (v) the Companies Act does not provide for any mechanism or consequences to deal with the breach by the directors of the company of the provisions of Section 180 of the Act; (vi) the Companies Act in Section 450 provides for punishment of such act for which no specific penalty is provided; (vii) ouster of jurisdiction of Civil Court is to be strictly construed; (viii) NCLT does not have any jurisdiction to pass any declaratory or prohibitory order as sought in this suit; (ix) reliance is placed on *Dhulabhai Etc. Vs. State of Madhya Pradesh* AIR 1969 SC78 *The Public Trustee Vs. Rajeshwar Tyagi* (1972) VIII DLT252 *Rajesh Kumar Vs. Shanta Vashisht* 2013 SCC OnLine Del 4063, *Himangni Enterprises Vs. Kamaljeet Singh Ahluwalia* (2017) 10 SCC706 *N. Radhakrishnan Vs. Maestro Engineers* (2010) 1 SCC72 *Sahara Fabrics Pvt. Ltd. Vs. Kailash Ramprashad Mehra* (2006) 134 Com. Cas. 472, *Premwati Vs. Bhagwati Devi* 2015 SCC OnLine Del 11563, *Greenline Transit System Pvt. Ltd. Vs. The Secretary-cum-Commissioner Transport* 2012 SCC OnLine Del 6355, *Samar Kumar Roy Vs. Jharna Bera* (2017) 9 SCC591 and *Dwarka Prasad Agarwal Vs. Ramesh Chander Agarwal* (2003) 6 SCC220 (x) the actions of the defendants CS(COMM) No.242/2019 Page 6 of 18 sought to be restrained have jeopardized the plaintiffs 20% share in the defendant no.1 company; and, (xi) the objection as raised cannot be decided at the threshold and an issue qua the same has to be framed after completion of pleadings. On enquiry, it is informed that the plaintiff is not in possession in of the Resolution dated 21st April, 2017 of the defendant no.1 company in pursuance where to the apartment block was sold in favour of Dandona Infrastructure Pvt. Ltd.

8. I have considered the aforesaid contentions of the counsel for the plaintiff.

9. Chapter XVI of the Companies Act titled Prevention of Oppression and Mismanagement, vide Section 241 entitles any member of a company who complains that the affairs of the company have been or are being conducted in a

manner prejudicial or oppressive to him or prejudicial to the interests of the company, to apply to the NCLT, provided that such member has a right to apply under Section 244 of the Act. Section 244 lays down the qualification of not less than one tenth of the issued share capital of the company. The plaintiff, claiming to have 20% of the shareholding of the defendant no.1, the counsel for the plaintiff admits, so qualifies to approach the NCLT under Section 241 of the Act. Section 242(1) empowers the NCLT, on such application under Section 241 of the Act, if of the opinion that the companys affairs have been or are being conducted in a manner prejudicial or oppressive to any member or prejudicial to the interest of the company and if finds that winding up of the company would unfairly prejudice the complaining member but otherwise the facts justify the making of the winding up order on the ground that it was just and equitable CS(COMM) No.242/2019 Page 7 of 18 that the company should be wound up, to, with a view to bring to an end the matters complained of, make such order as it thinks fit. Sections 242(2) and 242(4) are as under: 242. Powers of Tribunal.-. (1) (2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for- (a) the regulation of conduct of affairs of the company in future; (b) the purchase of shares or interests of any members of the company by other members thereof or by the company; (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital; (d) restrictions on the transfer or allotment of the shares of the company; (e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and CS(COMM) No.242/2019 Page 8 of 18 conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case; (f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e): Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned; (g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(h) removal of the managing director, manager or any of the directors of the company; (i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including CS(COMM) No.242/2019 Page 9 of 18 transfer to Investor Education and Protection Fund or repayment to identifiable victims; (j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h); (k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct; (l) imposition of costs as may be deemed fit by the Tribunal; (m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made. (3) (4) The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the companys affairs upon such terms and conditions as appear to it to be just and equitable. 10. Section 243 of the Act titled Consequences of termination or modification of certain agreements provides that where the NCLT in exercise of powers CS(COMM) No.242/2019 Page 10 of 18 under Section 242 of the Act terminates or sets aside the agreement, such order shall not give rise to any claims whatsoever against the company by any person for damages or for compensation for loss pursuant to setting aside of the agreement.

11. Section 430 of the Act, to which also attention of the counsel for the plaintiff was drawn, is as under: 430. Civil court not to have jurisdiction. - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal. 12. There can be no dispute, nor has any been urged, that the averments of the plaintiff in the plaint are of the affairs of the defendant no.1 company having been and being conducted in a manner prejudicial to the interest of the plaintiff and the defendant no.1 and oppressive to the plaintiff. The remedy of approaching the NCLT under

Section 241 of the Act is thus available to the plaintiff.

13. The question for consideration is, whether the NCLT has jurisdiction to determine, what the plaintiff has approached this Court as the Civil Court for determination of. CS(COMM) No.242/2019 Page 11 of 18 14. The plaintiff, besides seeking to restrain the defendants no.2 to 6 from selling the immovable properties, comprising of four apartment blocks aforesaid, of the defendant no.1, is only seeking setting aside of the sale deed admittedly executed by defendant no.1 acting through the defendants no.2 to 4 of one of the apartment blocks to Dandona Infrastructure Pvt. Ltd. and alternatively deposit by the defendants no.2 to 6 in the account of the plaintiff of the sale proceeds. Attention of the counsel for the plaintiff has been drawn to Section 242(2)(f) supra of the Act, which empowers the NCLT to terminate, set aside or modify any agreement between the company and any person other than those referred to in Section 242(2)(e) of the Act. The same, in my view, empowers the NCLT to grant the relief as sought by the plaintiff, of setting aside of the sale deed in favour of Dandona Infrastructure Pvt. Ltd.

15. Not only so, Section 242(2)(m), being the residuary power and which is equivalent to Section 402(g) of the Companies Act, 1956, is very widely worded and has been widely interpreted in M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja (2008) 6 SCC750 V.S. Krishnan Vs. Westfort Hi-Tech Hospital Ltd. (2008) 3 SCC363 Pearson Education Inc. Vs. Prentice Hall India (P) Ltd. 2005 SCC OnLine Del 945, Debi Jhora Tea Co. Ltd. Vs. Barendra Krishna Bhowmick 1979 SCC OnLine Cal 37 (DB) and Bennet Coleman & Co. Vs. Union of India 1973 SCC OnLine Bom 41 (DB) and would confer such a power on the NCLT.

16. The NCLT, per Section 242(4), is also empowered to grant interim relief as sought by the plaintiff along with the plaint in this suit also, of CS(COMM) No.242/2019 Page 12 of 18 restraining the defendants from dealing with the immovable property of the defendant no.1.

17. Moreover, NCLT and its predecessor Company Law Board (CLB), in such situation as pleaded by the plaintiff, if finds merit in the claim of the plaintiff, have much wider powers than the powers of this Court as the Civil Court. NCLT, in

exercise of its powers under Section 442 of the Act, is empowered to bring about a settlement between the plaintiff and the defendants no.2 to 6 and other shareholders of the defendant no.1 company, relating to the affairs of the defendant no.1 and which power cannot be exercised by the Civil Court. NCLT / CLB are known to often make orders providing for sale / transfer of shareholdings inter se shareholders and / or of transfer of immovable properties of the company in favour of a shareholder in lieu of his shareholding in the company and which, this Court as the Civil Court, will be able to do. I am thus unable to fathom, why the plaintiff, instead of choosing the appropriate forum of NCLT, is choosing this Court, when this Court even if were to be said to have jurisdiction, is incapable of, save with the consent of the parties, directing a resolution of the disputes. The Court cannot under its aegis run the affairs of the company and can only pronounce on a particular transaction, even if were to have jurisdiction therefor and which will leave the parties to continue to fight with each other relating to the affairs of the defendant no.1 company.

18. Once it is found that NCLT has jurisdiction, the jurisdiction of the Civil Court to determine the matter which the NCLT is empowered to determine would stand excluded under Section 430 of the Act. A co- CS(COMM) No.242/2019 Page 13 of 18 ordinate bench recently in Sas Hospitality Pvt. Ltd. Vs. Surya Constructions Pvt. Ltd. 2018 SCC OnLine Del 11909 has also held that, (a) NCLT is a Tribunal which has been constituted to have exclusive jurisdiction in the conduct of affairs of companies; (b) it has been vested with powers to pass such order as it may deem fit, to review and also to punish for contempt; (c) NCLT is empowered to oversee and supervise the working of the company and also appoint such persons as may be deemed necessary to regulate affairs of the company; (d) the powers of NCLT are wider than that of the Civil Court; and, (e) the bar under Section 430 is absolute.

19. As far as the judgments cited by the counsel for the plaintiff are concerned, (i) Dhulabhai Etc. supra was concerned with a suit instead of a writ petition under Article 226 of the Constitution of India impugning the Notifications under the Sales Tax Act on the ground of the same being violative of Article 301 of the Constitution. The suits were opposed inter alia on the ground that vide Section 17

of the Sales Tax Act, the jurisdiction of the Civil Court was barred. It was held that where a liability to tax is created by the statute which gives special and particular remedies against illegal exactions, the remedy contemplated by the statute must be followed and it is not open to the assessee to pursue the ordinary civil process of courts. However, the question of ultra vires of the statute, is always open to the Civil Court. CS(COMM) No.242/2019 Page 14 of 18 The said judgment is found to have no application. The company is a creation of a statute and the rights and liabilities of shareholders of a company are also a creation of a statute and the statute i.e. the Companies Act having provided the remedy for grievances inter se shareholders / directors, I see no reason why the said remedy is not the appropriate remedy especially when care is taken in the statute to ensure that the Tribunal constituted thereunder is entitled to handle what, the Civil Court cannot handle. We are here not concerned with any question of ultra vires of a statute. (ii) In Rajeshwar Tyagi supra, a shareholder of a company instituted the civil suit challenging the creation by the company of a Trust, to which a large number of shares of the company were transferred and impugning the vires of Section 187B of the Companies Act. It was in this context held that the CLB, being a creature of the Companies Act, could not entertain a challenge to the vires of the statute. The reliance on the said judgment also in this case, where there is no challenge to the vires of any statute, is misconceived. (iii) In Rajesh Kumar supra, the question before me was whether the suit for recovery of possession of immovable property was with respect to agriculture land, the jurisdiction with respect thereto was barred by the Delhi Land Reforms Act, 1954. There was no clarity on this aspect and in these circumstances, it was held that determination of the said question also requires evidence. However CS(COMM) No.242/2019 Page 15 of 18 here, the question is whether on the plea of the plaintiff in the plaint itself, the jurisdiction of this Court is barred. (iv) Himangni Enterprises supra was concerned with arbitrability of a claim of the landlord for eviction of a tenant and also has no application. In any case, the view taken therein has been doubted in Vidya Drolia Vs. Durga Trading Corporation 2019 SCC OnLine SC358 and the matter referred to the larger bench. (v) N. Radhakrishnan supra is also about arbitrability of a complicated matter and not concerned with the jurisdiction of the Civil Court. (vi) Sahara Fabrics Pvt. Ltd. supra holds a suit for declaration of respective

shareholding in a company and of illegality of the acts of the purported directors of the company to be maintainable. The question for consideration was, whether remedy of rectification of share register under Section 111 of the Companies Act, 1956 was the appropriate remedy. It was reasoned, that even the CLB when approached for rectification of share register was empowered to relegate the parties to the Civil Court and thus the jurisdiction of the Civil Court could not be said to be barred. Again, the said judgment is in its own facts and which have no application to the present controversy. I may in this context also refer to the dicta of the Supreme Court in *Ammonia Supplies Corporation (P) Ltd. Vs. Modern Plastic Containers Pvt. Ltd.* (1998) 7 SCC 105 qua Section 111 of the Companies Act, 1956, also holding to the same effect. CS(COMM) No.242/2019 Page 16 of 18 (vi) In *Premwati supra*, the Division Bench of this Court held that since the dispute raised in the suit was of inheritance of shares in a private limited company, it was eminently a dispute of a civil nature and jurisdiction was not barred. (viii) *Greenline Transit System Pvt. Ltd. supra* was a suit by one Joint Signatory of Account of the company against the other, for injunction restraining deposit of receipts of a contract entered into by the plaintiff in a new bank account of which the former was not a signatory. The suit was held to be maintainable. I may highlight that there were no pleas of oppression and mismanagement. (ix) *Samar Kumar Roy supra* was for continuation of a suit for declaration that the marriage between the plaintiff and defendant was not legal and valid by the legal heirs of the plaintiff and has no application to the present controversy. (x) *Dwarka Prasad Agarwal supra* was also a suit for eviction filed by a lessor, also a shareholder in the lessee company, for eviction of the other member of the company who had dispossessed him and again, having no application to the present controversy.

20. I may in this context also observe that the question of bar of jurisdiction of the Civil Court would depend upon the nature of the averments in the plaint. If the averments in the plaint, though not using the words mismanagement, prejudicial to interest and oppression, are found to be amounting thereto and the relief sought are also which fall in the domain CS(COMM) No.242/2019 Page 17 of 18 of Section 442(2) of the Act, the jurisdiction of the Civil Court would be barred.

21. I am therefore, on the averments made in the plaint, unable to find this Court to be having jurisdiction to entertain this suit.

22. The suit is dismissed. No costs. RAJIV SAHAI ENDLAW, J.

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