

Subhash Mohan Dev Vs. Santosh Mohan Dev and ors.

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Court : Guwahati

Decided On : Jan-05-2000

Judge : D.N. Chowdhury, J.

Acts : [Companies Act, 1956](#) - Sections 10F, 397, 398 and 402; [Arbitration Act, 1940](#) - Sections 34

Appeal No. : Company Appeal No. 13 of 1999

Appellant : Subhash Mohan Dev

Respondent : Santosh Mohan Dev and ors.

Advocate for Def. : Mr. Utpal Bose, Mr. P.K. Jhunjhunwala, Dr. H. Das and Mr. R. Pathak, Advs.

Advocate for Pet/Ap. : Mr. R. Gogoi and Mr. S. Bhuyan, Advs.

Disposition : Appeal dismissed

Judgement :

1. This appeal is directed against the two orders passed by the Company Law Board (hereinafter referred to as the CLB) in Company Petition No. 52/98 u/s 397/398 of the Companies Act which has arisen in the following circumstances.

2. Crozier's Agency Private Limited, pro forma respondent No.6 is a Company belonging to one family consisting of three brothers each with sharholding in the

proportion of one third. Two of the brothers, who are respondents in this proceeding, brought an action before the CLB alleging, inter alia, that the shareholding position has altered by issue of additional shares in favour of the appellant group and that one of the respondents was removed from the office of the Director. Considering all the aspect of the matter the CLB suggested the parties for resolving the dispute amicably. The CLB accordingly passed an order on 16.12.1998 suggesting for restoration of parity in the shareholding and ordering one of the petitioners to continue in the Board of Directors along with the independent nominee of the CLB. The CLB also appointed M/s Batliboi & Co of M/s Price Waterhouse to verify the accounts of the Company and to ascertain the amounts invested by the appellant into the Company. It was further ordered that on completion of the audit and on restoring the parity in the shareholding in the original level the parties should discuss the method of settlement of the entire family properties including the Company. The CLB with the consent of the parties passed a consent order and disposed the petition accordingly vide order dated 25th May, 1999. The appellant thereafter submitted an application seeking for recalling of the consent order that was passed on 25th May, 1999 before the CLB, which was numbered as Company Petition No. 52/98, alleging inter alia that because of the obdurate conduct of one of the respondents the order of the Board became unworkable. The CLB after hearing the parties and considering the respective claims of the parties and on evaluation of facts turned down the application vide order dated 22.7.1999 and reached the following conclusion :

'8. It is an admitted position as revealed from the various orders that we have issued, that both the parties expressed their desire, more particularly the 2nd respondent, to resolve the disputes amicably. The liberty granted to the parties to apply in case of any difficulties in working out the consent order was only with a view to assist the parties in case of any difficulty faced by them in implementing the said order. This liberty cannot extend to pray for recalling of the consent order. Once a consent order is passed, as pointed out by Shri Kapur, cannot be recalled unless and otherwise all the parties agree. As pointed out by him, the petitioners have discharged their obligations under the consent terms by bringing necessary funds to the company to pay off the 2nd respondent and after which other terms in that order like issue of shares to the petitioner holding of an EOGM and amending

the Articles have also been completed. It is a well settled law that once parties have entered into terms of consent and obtained an order incorporating the consent terms, then, such an order becomes binding on the parties unless and otherwise the same is assailed on the grounds of fraud, coercion, mistake or fraudulent misrepresentation or being illegal or being against the provisions of law or other similar grounds which would invalidate a private agreement.

In the present case, the respondents do not question the validity of the terms of consent but they are seeking recalling of the order only on the grounds of subsequent conduct of the 3rd petitioner that after the consent order was passed, the 3rd petitioner has acted against the interest of the 2nd respondent, by writing a letter to the bank and taking away the letter heads etc. While we feel that the 3rd petitioner had not acted in any way prejudicial to the interest of the respondents/company in writing a letter to the bank to honour only those cheques jointly signed both by himself and the 2nd respondent, we also feel that the 2nd petitioner need not have taken possession of letter heads etc. without the consent of the 2nd respondent. We feel that the 3rd petitioner should have had the mandate of the interim Board before taking any action in furtherance to the consent order. The same way we also feel that the 2nd respondent has also over acted by lodging a police complaint as well as by filing a criminal case against the 3rd petitioner. The real outcome of the consent order is the restoration of the status quo ante before the disputes started and has not brought about any new relationship between the parties. As a matter of fact, this order provides safeguards against possible allegations of oppression by providing for right issue of further shares and for proportional representation on the Board. There is nothing in the consent terms governing the

subsequent conducts of the parties nor the respondent have alleged that the petitioners have acted against the terms of the consent. Therefore, we do not find any justification to recall the consent order and as such we dismiss CA 153 OF 1999.'

Hence the appeal challenging the legality and validity of the orders dated 25.5.1999 and 11.8.1999.

3. Mr G. Gogoi, learned Sr. counsel appearing on behalf of the appellant questioned the legitimacy of the consent order dated 25.5.1999 and submitted that the impugned consent order is prejudicial to the interest of the Company. Mr Gogoi, learned Sr. counsel more specifically referred to the resolution of the Board of Directors seeking to liquidate the loan of Rs. 54,66,700 along with interest thereon from the equity capital. The learned counsel submitted that if the unsecured amount of Rs. 54,66,700 together with interest is repaid to M/s. S M Dev & Associates from the capital of the Company it will affect the credibility and interest of the company which may in turn compel the Banker of the company to recall the loan amount advanced to the Company for the hotel project. The learned counsel submitted that the CLB refusing to recall the order fell into serious error which effected the ultimate decision of the CLB.

4. The Company Petition was seriously contested by the respondents. Mr. U. Bose, learned counsel appearing on behalf of the respondents raised the preliminary objection questioning the maintainability of the appeal. Mr Bose, the learned counsel first questioned the consolidated appeal in which the appellant challenged the orders dated 25.5.1999 and 11.8.1999. The appeal questioning the order dated 25.5.1999 and 11.8.1999 was preceded by two consent orders namely, the order dated 16th December, 1998 and 25th May, 1999. The learned counsel submitted that no appeal is maintainable against a consent order. The appellant is estopped from challenging the consensual order to which he was a party. The learned counsel for the respondents also submitted that appeal u/s 10F is maintainable only on question of law. The jurisdiction of the High Court in appeal is to be confined to the determination of any question of law and not against any finding of fact. Mr. Bose lastly submitted that even otherwise the CLB did not commit any error requiring interference with the discretion of the CLB.

5. An appeal is a process before the superior court for reversing, varying or setting aside an order, determination or award by an interior court in the hierarchy of the Courts and Tribunals on the

ground that the subordinate authority acted illegally/unlawfully or in violation of some established principles of law. An appeal is the right for entering a superior

court calling upon its aid and intervention for redressal of the error committed by the court below. There is no inherent right to appeal. It is only a creature of the statute. An appeal u/s 10F of the [Companies Act, 1956](#) (for short the Act, 56) is maintainable against any decision or order of the CLB on any question of law arising out of such order within sixty days from the date of communication of the decision or order. Under the proviso to Section 10F the aforesaid period can be elongated further upto sixty days where the High Court is satisfied that the appellant was prevented by sufficient cause for filing the appeal within the aforesaid period. One of the orders of the CLB, which is also a subject matter in this appeal, is passed on 25.5.1999. The present appeal was presented in the court on 23rd August, 1999. The appeal against the order dated 25.5.1999 is, therefore, time barred. The appellant has not also pleaded sufficient cause for not preferring the appeal earlier indicating any event of circumstances which prevented it from preferring the appeal in time. That apart, the order dated 25.5.1999 is an order equal to the order dated 16th December, 1998 which was also a consensus order which reads as follows :

'In view of the fact that the company is a family we have suggested to the parties that the disputes should be resolved amicably and the parties have also expressed the same desire to do so in the following manner:

(1) The percentage sharholding of the parties would be restored as prevailed before the issue of the new shares and the method of doing so will be decided after the audit of the accounts of the company are completed.

(2) One of the representative of the petitioners will be inducted into the Board with immediate effect alongwith an independent person Shri Anil Kumar Sen, retired Chief Justice of the Calcutta High Court who will function as the nominee of the Company Law Board and the sitting fees payable to him will be decided in consultation with him.

(3) M/s Batliboi & Co/or M/s Price Waterhouse will conduct the audit of the accounts of the company for the years 1996-97 and 1997-98 and they will also particularly examine the amounts invested by respondent No. 2 into the company till 31.12.1998. The petitioners group will negotiate with these firms and the fees

for the audit will be paid by the petitioners. The audit should be completed by 31st March, 1999.

(4) Once the audit is completed and the parity in the shareholding is brought to the original level, the parties will discuss the method of settlement of the entire family properties including the company.'

6. On the basis of the above order the CLB appointed M/s Batliboi & Co. to verify the accounts of the company, more particularly, in reference to the endorsement made by the appellant. The matter further came up before the CLB and on terms agreed by the parties the CLB passed further order on 25.5.1999 and disposed the Company Petition in terms of resolution between the parties. The order passed by the CLB is since an order that was agreed by the parties, in the absence of anything more like fraud, coercion etc. there cannot be any ground for interfering on a consent order on appeal. The order is based on consent and consent operates as an estoppel. Since both the parties have agreed as to the nature of the order such an order is to be given due effect. There is/was no grievance as to the genuineness and voluntariness of the consent. The CLB passed its order on considering all the relevant aspects of the matter. The power conferred on the CLB i/s 402 are wide and discretionary in nature. Section 397/398 alongwith Section 402 of the Act, 56 clothed the CLB with ample jurisdiction to achieve the object set out in the statute. The only limitation on the exercise of power is that a nexus must exist between the orders that may be passed by the object sought to be attained through Sections 397/398/402 of the Act, 56 and the Company Court Rules. It may further be remembered that where an order is made by the authority within its discretion the appellate court in the matter arising out of the discretionary power will not interfere with its exercise unless the appellate court found that the discretion has been exercised on wrong principle or that there is failure of justice. In this context it would be worthwhile to recall the following statement of law from Halsbury's Laws of England.

'656. Appeal from the exercise of a judge's discretion. - Where the order of a Judge in chambers is made within his discretion, the appellate court, whether it be the Court of Appeal or the House of Lords, will not interfere with its exercise unless

it is shown that the discretion has been exercised on a wrong principle or not at all, or that there has been a miscarriage of justice. The appellate court is not to exercise an independent discretion of its own, but must defer to the Judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised it differently.'

7. The Supreme Court of India while considering the power of the appellate court against an order u/s 34 of the [Arbitration Act, 1940](#) in the case of U.P. Co-oper Federation v. Sunder Bros, Delhi reported in AIR 1967 SC 249, held as follows: -

'8. It is well established that where the discretion vested in the court under S. 34 of the Indian Arbitration Act has been exercised by the lower court the appellate court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial Judge: but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion.'

The similar view was taken by the Supreme Court in interpreting Order 39 Rule 1 and Order 43 Rule 3 in *Wander Ltd & Anr. v. Antox India P. Ltd* reported in (1990) Supp SCC 727 the court observed that in an appeal against the exercise of discretion the appellate court will not interfere with the exercise of discretion of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or adversely or where the court has ignored the relevant facts. The Supreme Court observed that appeal against such exercise of discretion is said to be an appeal on principle. The

appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that it had considered the matter at the trial stage it would have come to a contrary conclusion ...'

8. In the instant case the CLB for resolving the issued between the parties passed the impugned orders as mentioned above. The CLB exercised discretion within its limit which cannot be said to be

unreasonable or injudicious. In the circumstances the decision making process of the CLB cannot be held to be unlawful requiring interference from this court.

9. For the reasons stated above the appeal stands dismissed, but without any order as to costs.

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