Modi Fibres Limited a Company Incorporated Under the Companies Act, 1956 Vs. Modi Rubber Limited a Company Incorporated Under the Companies Act, 1956 and ors.

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Court : Mumbai

Decided On : Jul-03-2009

Reported in : 2009(4)BomCR547; 2009(111)BomLR3154; [2009]151CompCas181(Bom); [2009]94SCL102(Bom)

Judge : A.M. Khanwilkar, J.

Acts : Companies Act, 1956 - Sections 10F, 111, 111(4), 111(14), 111A, 111A(4), 155, 235(2), 235(3), 397, 398, 433 and 434; Evidence Act - Sections 58

Appeal No. : Company Appeal No. 34 of 2009 in CLB Company Application No. 255 of 2008 in CLB Company Petition No.

Appellant : Modi Fibres Limited a Company Incorporated Under the Companies Act, 1956

Respondent : Modi Rubber Limited a Company Incorporated Under the Companies Act, 1956 and ors.

Advocate for Def. : Parag Tripathi, Sr. Adv., ;Anjoo Jain, Adv. for Hitesh Sachar & Hamed Kadiani

Advocate for Pet/Ap. : Janak Dwarkadas, ;Navroz Seervai, Sr. Counsels, ;Chetan Kapadia, ;Sharan Jagtiani, ;Shaukat Merchant, ;Nikhil Dharod and ;Rana Mittal, Advs., i/b, M & M Legal Ventures

Judgement :

A.M. Khanwilkar, J.

1. This Appeal under Section 10F of the Indian Companies Act, 1956 takes exception to the Judgment and order passed by the Member of the Company Law Board (Principal Bench, New Delhi) (hereinafter referred to as CLB) dated 16/4/2009 in Company Application No. 255/2008 in Company Petition No. 48/2008. For the nature of order that I am inclined to pass, it is not necessary to reproduce all the facts in detail. Similarly, it may not be necessary to delve upon all the issues on merits. The contesting Respondent No. 1 waives notice. In view of the short question, appeal is finally disposed off.

2. I would straightway advert to the operative order passed by the CLB which is subject matter of challenge in this Appeal. The same reads thus:

Considering the facts and circumstances of this case this composite petition is admitted in part under Section 111A of the Act, a prima facie case having been made out this composite petition is held to be maintainable under Section 111A(4)(b) of the Act, the parties are at liberty to amend the pleadings/file additional affidavits to prove/disprove their case under Section 111A(4) at this stage, further, the preliminary issues of maintainability of the petition as well as on merits considering the allegations attracting the provisions of Sections 397/398 of the Act are left open to be decided at a later stage depending upon the outcome of the hearing under Section 111A(4)(b) of the Act. Parties would be at liberty to move at a later stage for consideration whether it is necessary to examine the question of admission or otherwise of the petition for reliefs sought under Section 397/398 of the Act. The petitioner is at liberty to apply under Section 235(2) of the Act. However, this is not the stage to consider applicability of Section 250(3) of the Act. Interim reliefs to continue till further orders. There is no way to consider impleaders application at this stage. It is deemed to be dismissed for being not

maintainable at this stage seeking impleadment in the present company petition, however, the impleader is at liberty to file a fresh company petition or the impleaders application shall stand revived for consideration only if the parties move under Section 397/398 after the decision on petition under Section 111A of the Act.

Company Application No. 255 of 2008 is disposed of in the above terms. Interim orders to continue till decision in this matter under Section 111A of the Act. No order as to cost.

3. In other words, this Appeal essentially takes exception to the order passed by the Company Law Board admitting the Petition filed by the Respondent No. 1 company in part under Section 111A of the Act and also the order continuing the interim-relief passed by it on the earlier occasion till further orders. The impugned order has been passed without addressing the objection raised by the Appellants about the maintainability of the Petition either under Section 397/398 or 111A of the Act. Significantly, the CLB has noted the objections of the Appellants regarding the maintainability of the Petition in Paragraph 38, as follows:

Applying the said principle, the Applicants case is that the petition alone brings out that (a) the petitioner is admittedly not a member of the company; (b) the provisions of Section 111/111A are not applicable; (c) the petitioner having filed a winding up petition in the Bombay High Court has admitted itself to be a creditor; (d) the petition itself confirms the forum shopping by the petitioner; and (e) as per the petition itself, last transaction happened in 1993 and the petition, therefore, suffers from delay and latches without any explanation or application for condonation of delay.

4. Indeed, the CLB has expressed its prima-facie opinion to negative the objection regarding the maintainability of the Petition; but the discussion in the impugned Judgment deals mainly with points (a)(b)&(e) above. Even if this Court were to accept the prima-facie view taken by the CLB on the said points, there is absolutely no discussion in the impugned decision with regard to point (c) in particular. This is notwithstanding the fact that the said contention, if answered in favour of the Appellants would go to the root of the matter so as to non-suit the

Respondent No. 1 (Petitioner) at the threshold. In so far as point (d) is concerned, some discussion is found in Paragraph 52 of the impugned Judgment, which reads thus:

Merely because it may be open to an aggrieved person to avail of more than one remedies in a civil court it does not mean that such a person should be driven to first exhaust his remedy in a civil court or any other forum and thereafter initiate another independent proceeding under the Act to complaint about oppression and/or mismanagement, particularly in this matter where the petitioner company lacked the requisite knowledge. The right of recourse available to the party is ambiguous, the Applicants contention of forum shopping in view of the winding up petition cannot be held as tenable.

5. In this background, the Appellants are questioning the decision of the CLB in admitting the Petition in part. The questions of law have been articulated in the Memo of Appeal. Amongst others, whether the provisions of the Section 111/111-A on the one hand and provisions of winding up under Section 433/434 on the other hand, are mutually exclusive. Further, when a party consciously and under legal advice invokes remedy of winding up of the company under Section 433 on the assertion that he is a creditor of the company on account of certain transaction, is it open to that party to later on institute another substantive proceedings under Section 397/398 or for that matter 111A of the Act relying on the self same transaction to assert that he was a member/shareholder of the Respondent company. Besides it is argued that that the Judgment under Appeal is ex-facie a product of complete confusion in the mind of the Member of the CLB; as she has admitted the Petition in part with reference to provisions which are non-existent. In that, Section 111A(4)(b) of the Act, even if was to be read as Section 111(4)(b), the later would have no application to the Appellant company being a public company, in view of Section 111(14) of the Act. The Appellants have also challenged the correctness of the view taken by the CLB in the impugned decision while dealing with points (a)(b)&(e). According to the Appellants, the CLB has completely misread the decision of the Gujarat High Court in the case of Gulabrai Kalidas Naik and Ors. v. Laxmidas Lallubhai Patel and Ors. reported in (1977) 47 Comp Cas 151 which expounds the legal position that the former Section 155 can

be invoked only by a person who has indisputable and unchallengeable title to the membership of the company.

6. To buttress the objection regarding maintainability of the petition, the Appellants have also pressed into service decision of the Apex Court in the case of Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad (Dead) by LRs reported in : AIR 2005 SC809 to contend that the judicial admissions made by the parties or their Agents on or before the hearing of the case are admissible under Section 58 of the Evidence Act and stand on a higher footing than evidential admission. This legal position has been restated by the Apex Court relying on its earlier decision in the case of Nagindas Ramdas v. Dalpatram Iccharam reported in : [1974]2SCR544 and subsequent decisions thereto, as can be discerned from Paragraph 223 236 of the reported decision. Reliance is also placed on another decision of the Apex Court in the case of B.L. Sreedhar and Ors. v. K.M. Munireddy (Dead) and Ors. Reported in : AIR 2003 SC578 which expounds that though estoppel is described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. This decision also refers to the origin of expression `estoppel and quotes the opinion of Lord Coke that an estoppel is where a man is concluded by his own act or acceptance to say the truth. The grievance of the appellants is that, inspite of having noted the objection about the maintainability of the Petition taken by the Appellants that the Respondent No. 1/Petitioner had filed Petition for winding up of the appellant company in this Court relying on the self same transaction in the capacity of a creditor, the Respondent cannot be permitted to now maintain another substantive proceedings by now wearing the cap of a member/shareholder; the CLB has not dealt with that submission at all in the entire Judgment which runs into almost 45 pages. That point, if answered in favour of the Appellants would go to the root of the matter and the inevitable order that will have to be passed by the CLB is to non-suit the Respondent No. 1/Petitioner at the threshold.

7. Indeed, the Respondent No. 1 has supported the decision of the CLB and would submit that it is open to the Respondent No. 1/Petitioner to resort to two separate proceedings for winding up of the Appellant company as also under Section 397/398 of the Act against the company. To support this submission, reliance is

placed on the decision of our High Court in the case of Thakur Savadekar & Co. Ltd. v. Shivkumar Shankarrao Thakur reported in 1996 SEBI & Corporate Laws-Reports Vol. 9 page 103. This decision has been distinguished by the Appellants on the argument that observation therein are in the fact situation of that case where the shareholders resorted to Petition for winding up of the company by invoking Section 433(f) of the Act and also another proceedings under Section 397 AND 398. That situation is incomparable where a party relying on a specific transaction takes a conscious stand that he is a creditor of the company and prays for winding up of the company on the ground that the company is unable to pay its debts which relief is ascribable to Section 433 of the Act to be invoked only by a creditor. Such person, later on, cannot be permitted to maintain another substantive proceedings founded on the self same transaction but claiming to be a member/shareholder of the same company. Be that as it may, the Counsel for the Respondent No. 1 has then relied on the observations of the Apex Court in the case of Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors. reported in : [1979]118ITR326(SC) to contend that Waiver has to be express and intentional abandonment of any right. Learned Counsel for the Respondent was at pains to point out by reading out the Petition for winding up filed by the Respondent No. 1 against the Appellant as well as referring to the correspondence which, according to him, would show that the Respondent had not intentionally abandoned its right to pursue remedy under Section 397/398 of the Act in the capacity of a member/shareholder of the Appellant company.

8. Indubitably, these arguments ought to have been addressed by the CLB in the first instance. If the CLB were to accept the stand taken by the Appellants that such person (Respondent No. 1) is not competent to maintain proceedings under Section 397/398 or for that matter Section 111A of the Act, the Petition so filed by the Respondent No. 1 will have to be thrown out at the threshold. In that case, the question of admitting the Petition even in the past would not arise. As aforesaid, the CLB has touched the argument only in the context of point (d) raised by the Appellant that the Petition suffers from the vice of forum shopping by the Respondent No. 1. That discussion can be discerned from Paragraph 52 which has been reproduced in the earlier part of this order. Indeed, the CLB may be generally right in observing that the person can avail of more than one remedies in

a give situation and would not be, therefore, deprived of resorting to another substantive remedy at a later point of time. However, the argument of the Appellants is that the same party cannot be allowed to institute two substantive proceedings taking a diametrically opposite and destructive stand in relation to his capacity in which the same are initiated. In that, in one Petition he would claim to be a creditor of the company on the basis of a particular transaction. Whereas, in the other he would claim to be a member/shareholder of the company on the basis of the self same transaction. The two capacities are entirely different and mutually exclusive.

For, once he claims to be a creditor in relation to a particular transaction then intrinsic in that stand is that he conciously abandons his claim of being a member/shareholder of the company in the context of that transaction. A member/shareholder cannot be a creditor of the company at the same time in relation to the self same transaction. It is the efficacy of this dichotomy that was required to be addressed by the CLB to answer the point in issue. In my opinion, instead of examining these aspects for the first time in the present appeal and more so when the order impugned in the present appeal is only one of admitting the Petition filed by the Respondent in part under Section 111A, the appropriate course, is to set aside the impugned decision and to relegate the parties before the CLB for reconsideration of the matter afresh. I am conscious of the fact that ordinarily this Court would not interfere with an order of admitting the Petition. However, in the peculiar facts of the present case, it has become inevitable to do so as the issue raised by the Appellants goes to the root of the matter and the CLB has failed to address the same one way or the other.

9. It is placed on record that during the course of arguments, Counsel for the Respondent No. 1 realising the difficulty in sustaining the impugned decision, on instructions submitted that, in that case, the Company Petition filed by the Respondent No. 1 against the Appellant company in this Court under Section 433 of the Act be treated as one filed only under Section 433 of the Act or in the alternative the Respondent No. 1 be allowed to withdraw the same. This submission, if accepted, contends Learned Counsel for the Respondent No. 1, the argument regarding maintainability of the Petition pressed into service by the

appellants would become unavailable. In so far as the submission that the Company Petition instituted by the Respondent No. 1 in this Court for winding up of Appellant company be considered as one under Section 433(f) of the Act, that is advanced on the basis of averments in Paragraph 16 of that Petition. However, that is a general statement in the Petition that the company should be wound up also for just and equitable grounds. Besides, Counsel for the Appellants submits that if the Respondent No. 1 is allowed to withdraw the said company Petition, it would result in allowing the Respondent No. 1 to withdraw from the judicial admission which cannot be countenanced. He further submits that the Court also cannot overlook the fact that the said company Petition is already admitted and advertised and it is not open to the Respondent No. 1 on its own to withdraw the said Petition which in turn is espousing the cause of the body of creditors. In my opinion, it is unnecessary to delve upon these aspects at the present having regard to the fact that I am relegating the parties before the CLB for reconsideration of the Petition for admission by setting aside the order of admitting the Petition in part under Section 111A of the Act. All questions raised by the parties will have to be addressed on its own merits at the appropriate stage as and when occasion arises.

10. That takes me to the challenge in this Appeal to the order continuing the interim-reliefs passed by the CLB on the earlier occasion. According to the Appellants, the scope of authority of CLB to grant interim-relief is restricted by Sub-section (4) of Section 111A of the Act. The ad-interim reliefs granted on 13/3/2008, 15/4/2008 or 1/5/2008 are clearly in excess of jurisdiction of the CLB to grant such interim relief. As I am inclined to relegate the parties before the CLB, even this question can be considered by the CLB on its own merits. For the time being, I would observe that since the ad-interim orders have continued from March, April and May 2008 respectively, the same be continued till further appropriate order to be passed by the CLB. It will be open to the CLB to examine the question of grant or non-grant of interim-relief alongwith the issue of admission of Company Petition. As aforesaid, all questions to be raised by the respective parties will have to be examined by the Company Law Board on its own merits in accordance with law.

11. Accordingly, this Appeal succeeds. The impugned Judgment and order passed by the Company Law Board dated 16/4/2009 is set aside and instead the Company Application No. 255/2008 is restored to the file to be heard alongwith Company Petition No. 48/2008-admission whereof will have to be considered on its own merits afresh. All questions in that behalf are left open. It is clarified that the interim arrangement in terms of order dated 13/4/2008, 15/4/2008 and 1/5/2008 shall continue to operate till further orders to be passed by the CLB in the light of observations made in the earlier part of this Judgment.

12. The Company Law Board shall consider the Company Petition for admission and restored Company Application, as expeditiously as possible preferably within two months from today.

13. Parties to appear before the Company Law Board on 17th July, 2009 on which date the Company Law Board may fix the schedule for hearing of the Company Petition for admission alongwith the restored Company Application. Ordered accordingly.