

Devaraj Dhanram Vs. Firebricks and Potteries P. Ltd. and ors.

Devaraj Dhanram Vs. Firebricks and Potteries P. Ltd. and ors.

SooperKanoon Citation : sooperkanoon.com/384112

Court : Karnataka

Decided On : Jul-27-2009

Reported in : [2009]151CompCas37(Kar); [2010]97SCL281(Kar)

Judge : D.V. Shylendra Kumar and ;Aravind Kumar, JJ.

Acts : [Companies Act, 1956](#) - Sections 10F, 397, 398 and 399

Appeal No. : Company Appeal No. 3 of 2005

Appellant : Devaraj Dhanram

Respondent : Firebricks and Potteries P. Ltd. and ors.

Advocate for Def. : A. Murali, Adv. for respondent Nos. 1 and 6 to 9

Advocate for Pet/Ap. : B. Ramesh, Adv.

Disposition : Appeal dismissed

Judgement :

D.V. Shylendra Kumar, J.

1. This is an appeal under Section 10F of the [Companies Act, 1956](#) (for short, 'the Act') filed by a shareholder of the first respondent-company, who had petitioned the Company Law Board, Additional Principal Bench, Chennai, under Sections 397 and 398 of the Act, but has failed in his attempt to make good either, in terms

of the order dated February 28, 2002, passed in Company Petition No. 25 of 1999 (Devaraj Dhanram v. Firebricks and Potteries P. Ltd. [2003] 117 Comp Cas 380) and being aggrieved by the said order, is before this Court.

2. This appeal, obviously, is to be confined to the question of law that arises in the passing of the impugned order by the Company Law Board. The question of law as submitted by Sri B. Ramesh, learned Counsel for the appellant, is that transfer of as many as 2,392 shares of the company held by respondents Nos. 2 to 5 in favour of respondents Nos. 6 to 9 at a price of Rs. 7,031 per share, is clearly in contravention of Article 37 of the articles of association and the order of the Company Law Board is vitiated for not taking note of the specific provision.

3. Brief facts leading to the above appeal are that the company petition before the Company Law Board has a history, in the sense that in respect of the very subject-matter the appellant had approached this Court earlier by filing Company Petition No. 77 of 1989 (Devaraj Dhanram v. Firebricks and Potteries P. Ltd. : [1999] 96 Comp Cas 361 (Karn)), under the provisions of Sections 397 and 398 of the Act. This petition, though was pending for more than eight years before this Court, was ultimately disposed of, inter alia, observing that it is open to the petitioner therein, the very appellant herein, to withdraw the petition with liberty to re-institute the same before the Company Law Board by or before November 30, 1998, as per order dated November 9, 1998 (Devaraj Dhanram v. Firebricks and Potteries P. Ltd. : [1999] 96 Comp Cas 361 (Karn)). It is thereafter, the present company petition has its birth before the Company Law Board and had received attention of the board for another three years or so, resulting in the impugned order.

4. The basic grievance of the appellant-petitioner was that whereas Article 37 of the articles of association of the company provided for a right of preemptive purchase on any shareholder in the event of any shareholder of the company willing to sell his/her shares and while respondents Nos. 2 to 5, who amongst them held as many as 2,392 shares, have sold as many number of shares in favour of respondents Nos. 6 to 9 at a price of Rs 7,031 per share, the pre-emptive right in favour of the appellant-petitioner was not effectuated in a proper or rightful manner ; that even before offering the shares to the present appellant, respondents Nos. 2

to 5 had negotiations for the sale of the very number of shares in favour of the sixth respondent; that they had already fixed the price per share and it is only after all such transactions had been gone through, a mere pretence of offering the shares to the appellant-petitioner for purchase was made just to indicate that they were technically complying with the requirement of Article 37 of the articles of association of the company, whereas, in fact, the respondents have violated the same in letter and spirit. This act was alleged to be an act of oppression within the scope of Section 397 of the Act.

5. Certain developments subsequent to the presentation of the company petition before this Court earlier and before the presentation of the petition before the Company Law Board, particularly the sixth respondent, who had become part of the management (of the company) by then, having been instrumental in the management of the company leasing an immovable asset of the company in favour of a sister concern of the sixth respondent at a lease rent not remunerative to the company, which virtually, according to the appellant-petitioner, would cause loss to the company, was alleged to be an act of mismanagement and with the further grievance that the Company Law Board has totally bypassed these grounds for examination within the ambit of Section 398 of the Act.

6. While the appeal is on such premise, appearing on behalf of the appellant-petitioner, Sri B. Ramesh, learned Counsel, would vehemently urge that the so-called offer made by the company in terms of the letter addressed by the company on July 3, 1989, to the appellant-petitioner, preceded by a letter of respondents Nos. 2 to 5 addressed to the company about their proposal to sell shares in favour of the sixth respondent at the price indicated and to elicit response from other shareholders, more particularly from the appellant-petitioner about the willingness on their behalf to buy the shares at this price, in the wake of the pre-emptive right the appellant-petitioner and other shareholders had as per Article 37 of the articles of association of the company, is only a pretence and only a device to show that the requirement of Article 37 of the articles of association of the company had been complied with.

7. It is submitted by Sri B. Ramesh that the entire drama of offering the shares to the appellant-petitioner had been preceded by an agreement between respondents Nos. 2 to 5 on the one hand and the sixth respondent on the other hand wherein the sixth respondent had made an offer to buy the share at a price of Rs 7,031 per share and it is only thereafter the offer was made in favour of the present appellant, and therefore, it was in fact and in spirit, there was no offer for pre-emptive purchase in favour of the appellant-petitioner and the alleged transfer is also not in consonance with the requirement of Article 37 of the articles of association of the company. The allegation of suppression or oppression is on the premise that the pre-emptive right of the appellant-petitioner as an existing shareholder has been effectively annulled and therefore it constitutes an act of oppression within the scope of Section 397 of the Act.

8. Adverting to the allegation of mismanagement, the subject-matter for examination under Section 398 of the Act, the submission of Sri Ramesh is that even when the appellant-petitioner had raised a specific issue that the company having leased a valuable asset of the company in favour of a sister concern managed by the sixth respondent, being part of the management and with the resulted loss to the company virtually amounts to an act of mismanagement, is not answered or examined by the Company Law Board, but the Board has merely ducked this issue by indicating that such an examination is not necessary in the wake of final directions that they were proposed to give and in the final direction issued by the Company Law Board, there is nothing touching upon the act of mismanagement and therefore the matter requires to be remanded to the Company Law Board for examination on this aspect.

9. Per contra, the submission of Sri A. Murali, learned Counsel for respondents Nos. 1, 6 to 9, is that the Company Law Board has examined all aspects of the matter ; that the Company Law Board has recorded a categorical finding of fact and answered that there was compliance of Article 37 of the articles of association of the company and that an offer in fact had been made and it is only the appellant-petitioner who had not availed of the offer, which only indicates that this aspect has been examined by the Company Law Board and the company petition has been dismissed.

10. It is also submitted that in respect of the act of mismanagement, the Company Law Board has examined the issue in its order and having found that there was no supporting material to convert the allegation of lease in favour of a sister concern of the sixth respondent amounts to mismanagement for want of commensurate material and the Company Law Board while opined that as it was not made good, it was not necessary to go further into the question, in view of the option given to the appellant-petitioner that the appellant-petitioner being a single minority shareholder would face considerable practical problems, an option was given to the appellant-petitioner to sell out his shares, also at the price as had been arrived at by the parties for the sale of complained number of shares or as determined by an independent valuer at the option of the appellant-petitioner, for which purpose the appellant-petitioner has not put forth any offer, and therefore the Company Law Board is right in holding that the appellant-petitioner has not made out the allegation of mismanagement and therefore submits that there is no merit in this appeal and it is to be dismissed.

11. We have examined the impugned order, perused grounds in support of the appeal, submissions made at the Bar and the records.

12. We find that the appeal though had a considerable history, the short question is as to whether there was compliance with Article 37 of the articles of association of the company and if there is any violation, as to whether the violation further leads to an inference resulting in an act of oppression or suppression

13. This is not even the case of the appellant-petitioner, even in respect of violation of Article 37 of the articles of association of the company. On this aspect, on facts, while the Company Law Board has categorically concluded against the appellant-petitioner holding that there was an offer in fact and it had not been availed of and while the appellant also does not dispute this aspect, the grievance is that the offer was made after respondents Nos. 2 to 5 had entered into an agreement with the sixth respondent and after fixing a price and after striking a deal and thereafter the offer was made. But as per the article, the offer should be made to the existing shareholders first and then only to any outsider and that in spirit Article 37 of the articles of association of the company is violated.

14. The Company Law Board has also noticed that the articles of association of the company in the present case, did not proceed for a mechanism to value the shares of the shareholders, whereas normally it was so done in the case of other companies, and therefore the presumption is that the price can be determined or effected by the shareholder offering it for sale and the option is to the buyer to buy for that price or to decline.

15. Be that as it may, the mere fact that the other shareholders had entered into a transaction with the sixth respondent or had held negotiations and arrived at some price, by itself cannot be construed as an act of offer to them and so long as the price which had been determined between the parties, i.e., respondents Nos. 2 to 5 on one side and the sixth respondent on the other is retained as an offer to be made by the appellant-petitioner also, it cannot be disputed that it is a bona fide and valid offer.

16. The right in favour of the appellant-petitioner is only a pre-emptive right of purchase. That right is exercised only when the appellant-petitioner actually agrees for purchasing the shares at the price which was offered to him. It was in those circumstances, an opportunity was given to the appellant-petitioner to exercise his right. Neither before the Company Law Board nor in any proceedings, whether during the pendency of the earlier petition before this Court or during the pendency of the petition before the Company Law Board or even during the pendency of the present appeal before this Court, the appellant-petitioner had indicated his willingness to buy the share at the price offered. On the other hand, one of the grievances of the appellant-petitioner is that when the offer was made to the appellant-petitioner at Rs. 7,031 per share, it was not a reasonable offer, as the shares had not been properly valued. While complaining of higher valuation on one hand, on the other, he is, complaining that the sale in favour of the sixth respondent is not a valid sale, because the company had not offered the shares to public at large or had not invited offers from the public at large, which would have fetched a better price than what is offered by the sixth respondent and it would be to the benefit of the existing shareholders and therefore the sale in favour of the sixth respondent is also bad. This dual or conflicting stand adopted by the appellant-petitioner only indicates that, while on the one hand when it comes to

buy shares by himself, to exercise pre-emptive right, the appellant-petitioner complaining of higher price and when it comes to the examination of the question of transaction in favour of the sixth respondent, the appellant-petitioner is complaining of under-valuation of shares. This is nothing but blowing hot and cold at the same time, which reflects on the conduct of the appellant-petitioner, who has not really availed of the pre-emptive right but is complaining without really making use of the right available in his favour. It is for this reason, the Company Law Board dismissed the petition. We find no reason to defer from the view taken by the Company Law Board.

17. In so far as the argument regarding mismanagement is concerned, on facts, the Company Law Board found lack of supporting materials in favour of the allegation of mismanagement and merely a complaint that the company had leased some part of its assets in favour of a sister concern of the sixth respondent while the sixth respondent was also a part of the management, whether here or there, that itself does not prove any mismanagement, which is based on such irrelevant aspect not based on any aspect as to how such leasing had resulted in prejudicial interest of the company. That the allegation of mismanagement having been not made good on facts, there was nothing further to be examined, but nevertheless, the Company Law Board thought that certain directions that had been issued could provide some solution to the problem faced by the appellant-petitioner.

18. It is not necessary for the appellant-petitioner to sell away his shares even in the manner indicated by the Company Law Board, but can hold on to the shares to continue as a shareholder and in this regard, we are not impressed by the submission and the request of Sri Ramesh, learned Counsel for the appellant that the matter should be remanded to the Company Law Board for further examination on the act of mismanagement, subject-matter for examination under Section 398 of the Act.

19. It is another apprehension of learned Counsel for the appellant that a subsequent petition under Section 399 of the Act before the Company Law Board, which has been presented on subsequent causes of action should not be

prejudiced by the present order.

20. Sri A. Murali, learned Counsel for the respondents while agrees that there are subsequent litigation between the parties and the appellant-petitioner has also instituted a fresh petition for relief under Sections 397 and 398 of the Act and the same is pending as of now, that is an independent question and it has nothing to do with the present appeal.

21. Likewise, the finding and the answers given in the present appeal will not have any bearing on the pending proceedings before the Company Law Board and it is made clear that in respect of the subsequent cause of action, the present order or finding in this order will have no bearing and any petition that has been presented by the very appellant before the Company Law Board has to be independently examined on its merit and not based on any earlier development or proceedings between the parties. With this clarification, this appeal is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com