

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 19th August, 2013
Date of decision: 26th August, 2013

+ CO. A. (SB) No.35/2013 & CO. APPL. Nos.399-1401/2013

S. P. GUPTA

..... Petitioner

Through : Mr. Sudhir Nandrajag, Sr. Adv.
with Mr. Atul Sharma, Mr
Nitesh Jain, Mr Sugam Seth and
Ms. Sagriti Ahuja, Advocates.

versus

**M/S. PACKWELL MANUFACTURERS
(DELHI) PVT. LTD.**

.....Respondent

Through: Mr. U. K. Chaudhary, Sr.
Advocate with Mr. Shario Reyaz
and Mr Mohd Saif Abbasi,
Advocates.

CORAM:

HON'BLE MR. JUSTICE R.V.EASWAR

JUDGMENT

R. V. EASWAR, J.:

1. This is an appeal filed by one S.P. Gupta under Section 10F of the Companies Act, 1956 (hereinafter referred to as 'the Act'). It is directed against the order passed by the Company Law Board ('CLB', for short) on 26.04.2013 in Company Application No.156/2013 [in CO. PET. No.1(ND)/2010]. The contesting respondents are: (i) M/s.

Packwell Manufacturers (Delhi) Pvt. Ltd.(R-1); (ii) Mrs. Rajni Gupta, W/o. Late Mr. B.C. Gupta (R-2) and (iii) Ms. Gudiya Gupta, D/o. Late Mr. B.C. Gupta (R-3).

2. The appeal came to be filed in the following circumstances. Respondent No.1 is a company incorporated on 13.03.1970 with an authorised share capital of ₹15 lakhs. The appellant and respondent No.2 were the promoter directors of the respondent-company. M/s. Vinod Sanjeev Bindal & Co. Chartred Accountants, were appointed the statutory auditors of respondent No.1 in 1980's. It would appear that the appellant was removed from the Board of Directors on 20.06.2009 under Section 283(1)(g) of the Act; earlier on 18.11.2008, respondent No.3 had been appointed as director of respondent No.1, allegedly without any meeting of the Board of Directors. Since differences between the appellant on the one hand and respondent No.2 and respondent No.3 on the other had cropped up, a petition under Section 397 and 398 of the Act was filed by the appellant before the CLB against the present respondents. The same was withdrawn on the ground that there were some technical errors and after rectifying them, it was filed again.

3. On 25.01.2010, the company petition came up for hearing before the CLB and *status quo* was granted.

4. On 17.02.2011 an application was filed by respondent No.1 before the Regional Director (NR), Ministry of Corporate Affairs, seeking removal of the statutory auditors M/s. Vinod Sanjeev Bindal & Co. The application was filed under Section 224(7) of the Act which says that the statutory auditors may be removed from office, before the expiry of the term for which they were appointed, by the company in general meeting after obtaining the previous approval of the Central Government in that behalf. The statutory auditors were appointed from the conclusion of the annual general meeting of respondent No.1 held in the year 2008 till the conclusion of the next annual general meeting for audit of the books of accounts for the financial year ended 31.03.2009.

5. On 13.12.2012, an order was passed by the Regional Director on the application for removal of the statutory auditors. This order was passed after considering the objections of the Chartered Accountants submitted through their letters and after giving them an opportunity of personal hearing. After considering the averments in the application setting out the reasons for seeking removal and the submissions of the

Chartered Accountants the Regional Director arrived at the following findings: -

“i) The applicant company has filed an application under section 224(7) of the Companies Act, 1956 online on 17.02.2011 and physically on 18.02.2011 for removal of M/s. Vinod Sanjeev Bindal & Co., Chartered Accountants, Statutory Auditor of the Company for the audit of financial year 2008-09.

ii) The application for removal of auditors was filed after filing of petition under section 397/398 before CLB against the company and others by Shri S.P. Gupta.

iii) It is also confirmed that majority share holders have expressed their un-willingness for continuance of the present statutory auditors as they have lost confidence on the auditors.

iv) The petition under section 397/398 of the Companies Act, 1956 is pending wherein issue of removal of Auditor is also under consideration before the CLB. The CLB has vast power under section 402 to regulate the affairs of the company including decision on removal of present auditors of the company.”

6. However, the Regional Director did not render any decision on the question of removal of the auditors, but held as follows: -

“5. Since the subject matter of removal of Auditor is still under consideration of a superior authority i.e. Company Law Board which is chaired by Judge (retd.) of Hon’ble High Court, the undersigned is of the opinion that it would not be proper to issue any order by this office in the matter till matter is under consideration of the Hon’ble Company Law Board. Therefore, the applicant Company may consider to approach the

Hon'ble Company Law Board for necessary direction, if so desire. The present application is accordingly disposed off.

However Company may apply again to this office, after obtaining necessary directions from the Hon'ble Company Law Board in the matter."

7. After the aforesaid order was passed by the Regional Director, respondent No.3 filed an application before the CLB in Company Application No.156/2013 [in CO. PET. No.1(ND)/2010]. The prayers made in this application were (i) for passing directions for removal of the statutory auditors and for directing that the decision of the CLB shall be final and binding in this regard and no further approval from any other authority shall be required; (ii) for passing an order confirming the appointment of M/s. K.N.A. Associates, Chartered Accountants, as the statutory auditors of the company for the financial year 2009-2010 and (iii) for passing such other orders or directions which the CLB may deem fit and proper. It needs to be noted that though the application for removal of the statutory auditors was filed before the Regional Director by the company (respondent No.1), the application before the CLB in Company Application No.156/2013 was filed not by the company but by respondent No.3. In the affidavit accompanying the application before the CLB, respondent No.3

affirmed that she was competent to swear and file the affidavit on her own behalf and on behalf of the other respondents i.e. the company as well as Mrs. Rajni Gupta (respondent No.2).

8. On 18.04.2013 the company application was taken up for hearing for the first time by the CLB and on this date, the following order was passed: -

“Ld. Counsel for the Petitioner accepts notice on CA No.156/13 filed by the Respondents and prays for a short adjournment to seek instructions. The matter is already listed on 22nd May 2013 at 10.30 A.M.

Shri U.K. Chaudhary, Ld. Sr. Counsel for the applicants states that this board may hold that it has no jurisdiction to adjudicate on the removal of the Statutory Auditor which lies solely in the domain of the delegatee of the Central Govt., i.e. the Regional Director and dispose off CA 156/13 with a direction to the Respondents to take appropriate steps before the Regional Director.

List on 26th April 2013 at 10.30 A.M. as Item No.1.

*Sd/-
[Justice D.R. Deshmukh]
Chairman”*

9. It is noteworthy that in the application before the CLB praying for orders for removal of the statutory auditors M/s. Vinod Sanjeev Bindal & Co. and for the appointment of M/s. K.N.A. Associates as statutory auditors for the financial year 2009-2010, a request was made

on behalf of the applicant before the CLB that the CLB may hold that it has no jurisdiction to adjudicate on the removal of the statutory auditor which power remains with the Central Government under Section 224(7) of the Act.

10. The application was taken up for final hearing on 26.04.2013 by the CLB. After setting out the facts and the decision of the Regional Director, the application was disposed of by the CLB in the following manner: -

“5. The sole repository of the power conferred u/s. 224(7) is the Regional Director being the delegatee of the Central Govt. If the Regional Director being the sole repository of the power conferred u/s. 224(7) of the Companies Act has declined to exercise jurisdiction vested in him by law for the reasons stated by him, it is open to R-1 to take appropriate remedial measures as provided in law against such order. It is clarified that pendency of CP No.1(ND) of 2010 before this Board should in no manner be a ground for the Regional Director to decline to exercise jurisdiction vested in him by law under section 224(7) of the Companies Act 1956. Exercising liberty given by the Regional Director the Company may also choose to move a fresh application before the Regional Director under section 224(7) for the said purpose.

6. It is also seen that the present application CA No.156/2013 has not been moved by R-1 company but only by R-3 who is not shown to be the authorized by R-1 to file such application. Even the affidavit of R-3 does not reveal that she has been authorized by the company to file the application on behalf of R-1 company.

7. *With the aforesaid clarification, the application CA No.156/2013 is disposed off.*

8. *The matter is already listed on 22nd May 2013 at 10.30 A.M.*

*Sd/-
[Justice D.R. Deshmukh]
Chairman”*

11. The present appeal has been filed against the aforesaid order passed by the CLB on 26.04.2013 in Company Application No.156/2013.

12. The contention of the appellant mainly is that the appeal raises the question of the power of the CLB to pass orders under Section 402 of the Act and whether, having regard to the pendency of Co. Pet. No.1(ND)/2010, the CLB was justified in law in not exercising the said powers and in directing the applicant to move a fresh application before the Regional Director under Section 224(7). It is further submitted that having held that respondent No.3 did not have the authority from respondent No.1 to file the application, whether the CLB was right in law in proceeding to entertain and dispose of the application. It is contended that these are important questions of law which arise for consideration and my attention in this behalf was drawn to para 2(a) of the present appeal. It is further contended on behalf of CO. A. (SB) No.35/2013

Page 8 of 29

the appellant that the question of removal or continuance of the statutory auditors M/s. Vinod Sanjeev Bindal & Co. was inextricably inter-twined with the proceedings pending before the CLB under Sections 397 and 398 of the Act, a position which was accepted even by the Regional Director and, therefore, it was only the CLB which had the power to deal with the application filed by respondent No.1 before the Regional Director, as rightly held by him. My attention was drawn to the findings of the Regional Director, particularly subparagraph (iv) of para 4 of his order in which he has observed that the issue of removal of the auditors is under consideration before the CLB in the pending petition under Sections 397 and 398 and, therefore, it was the CLB, with its vast powers under Section 402, which can regulate the affairs of the company including the question of removal of the statutory auditors. It is pointed out that no steps were taken by the company (respondent No.1), which filed the application before the Regional Director, against the order passed by the Regional Director on 13.12.2012. The application filed before the CLB in Company Application No.156/2013 was not filed by the company, but was filed by a person (respondent No.3) who was admittedly not authorised by the company to do so.

13. On behalf of the respondent, its learned counsel who appeared on advance notice, submitted that respondent No.3 as one of the majority shareholders was aggrieved by the order of the Regional Director passed on 13.12.2012 and therefore could validly move an application before the CLB and for this purpose there was no need to obtain any authorisation from the company. It was submitted that the statutory auditors are removed only by the majority shareholder in the annual general meeting and not by the company and, therefore, if there is any impediment in such removal, the majority shareholders is the person who is aggrieved and who is entitled to agitate the matter before the higher forum. It was submitted in this behalf that though Section 224(7) refers to the removal of the statutory auditors by the company, the company acts only through human agency, which in this case is the majority shareholders, of which respondent No.3 is one and if this right to remove the statutory auditors is affected in any manner, it is open to the individual shareholder, as part of the majority shareholders, to seek the removal of the statutory auditors before the CLB, even if the company does not take any step in this behalf. It is also argued that the appellant herein cannot be said to be aggrieved by the order passed by the CLB and that whatever objections he has, can be ventilated before

the Regional Director who stands seized of the matter, pursuant to the directions given in the impugned order.

14. In the rejoinder, the learned counsel for the appellant drew my attention to paragraph 24 of the application filed before the CLB by respondent No.3 in which it was stated that since the Regional Director had waived his power to grant approval, it was not for the company (respondent No.1) to approach the office of the Regional Director again. Respondent No.3 further stated in the said paragraph that it is open to the CLB to decide the matter and in fact requested the CLB to decide the matter, which decision would be final and binding. The submission is that having exhorted the CLB into rendering a decision, respondent No.3 later changed her mind and requested the CLB not to exercise the jurisdiction but to restore the matter for fresh decision by the Regional Director, on steps being taken by the applicant. It was further pointed out that even though it is true that it is only the shareholders who exercise the right of removing the statutory auditors, that is only an act of the company since a company has to necessarily act through human agency; it is submitted that this principle, however, cannot obliterate the corporate personality conferred upon the company

and the act of removal of the statutory auditors is an act of the company, and not that of the majority shareholders.

15. As regards the question as to how the appellant is aggrieved by the impugned order, it is submitted on behalf of the appellant that during the financial year 2008-09 the appellant was undisputedly a director of respondent No.1 and any attempt to remove the statutory auditors of the accounts for the said financial year would act to the prejudice of the rights of the appellant and, therefore, the appellant was rightly aggrieved by the impugned order. It was also pointed out that it was on 24.08.2009 that the respondents and their relatives were allotted 73,170 equity shares which is an act of oppression. It is claimed that there are no minutes of the Board meeting showing this allotment.

16. The first question that falls for decision is whether there was a valid application before the CLB so as to enable it to pass the impugned order. Section 224(7) of the Act enables the company to approach the Central Government for obtaining the previous approval for removal of the auditors. Since it is the company which appoints the auditors, it is the company which can remove them, subject to the prior approval of the Central Government. In the present case, it was the

company which made an application to the Central Government (and rightly so) for removal of M/s. Vinod Sanjeev Bindal and Co., Chartered Accountants. The Central Government acting through the Regional Director (NR), Ministry of Corporate Affairs, opined that it would not be proper to issue any order on the application of the company since the petition under Section 397 and 398 was pending consideration before the CLB. Accordingly no decision was taken on the application of the company. However, it was observed by him that the applicant-company may consider approaching the CLB for necessary directions, if it so desired. The company's application before the RD was not kept pending, but was disposed of. The company was advised to apply again, after obtaining the directions from the CLB in the matter. Thus it was the company which was given the liberty to approach the CLB. What, however, happened was that the company did not move any application before the CLB; it was respondent No.3 who filed the application before the CLB in Company Application No.156/2013. She was not authorised by the company to file the application and this fact is not disputed by the respondents. The CLB was also aware of the same and has said so in paragraph 6 of

the impugned order. Nevertheless it chose to dispose of the application in the manner it did.

17. The consequence of the company not approaching the CLB and not taking any steps against the decision of the Regional Director can only be that the order of the Regional Director passed on 13.12.2012 became final. Since respondent No.3 was not authorised by the company to file any application on its behalf before the CLB pursuant to the order passed by the Regional Director, there was no valid application by the company before the CLB. There was nothing for the CLB to deal with or dispose of. However, as observed by the Regional Director in paragraph 4(iv) of his order, the petition under Section 397 and 398 was pending before the CLB in which the issue of removal of the auditor was also under consideration. This is also borne out by the pleadings before the CLB in the said petition. If that is so, it would have been open to the CLB, while disposing of the petition under Section 397/ 398, to also deal with the question of the removal of the auditor by virtue of its powers under Section 402 of the Act. The same result, that is, that it was for the CLB which was seized of the petition under Section 397/398 of the Companies Act to decide the question of removal of the auditors would ensue even if it is assumed that there

was a valid application before the CLB seeking permission for the removal of the auditors. Therefore, in both situations, that is to say, where it is assumed that there was a valid application before the CLB or where it is held that there was no valid application by the company before the CLB, the consequence would be the same, viz., that the CLB in exercise of its powers under Section 402 can take a decision in the pending petition under Section 397-398, regarding the removal of the auditors.

18. But then the learned counsel for the respondent submitted that it is the shareholders of a company who appoint the auditors and under Section 224(7) of the Act it is they who are entitled to remove him and not the company. The contention is opposed to the language of the provision which says that subject to the proviso to sub-section (5), any auditor appointed under the Section may be removed from office before the expiry of his term “*only by the company in general meeting*”, after obtaining the previous approval of the Central Government in that behalf. The auditors can be removed only by the company but the power has to be exercised in the general meeting of the shareholders. There is always a distinction between the company and its shareholders and this is the effect of registration of a company,

under Section 34 of the Act. Upon registration the company is constituted as a distinct and independent person in law and is endowed with special rights and privileges. It is in point of law a person distinct from its members. This well-settled principle emanates from the judgment of the House of Lords in the case of *Salomon vs. Salomon & Co. Ltd.*, (1897) Appeal Cases 22. There it was observed that a company is at law a different person altogether from the subscribers to the memorandum; it is not in law the agent of the subscribers or trustee for them. In *Tata Engineering and Locomotive Company Ltd. vs. State of Bihar*, AIR 1965 SC 40, it was held that a company being distinct from its board of directors, they cannot seek to enforce a right in their individual capacity which belongs to the company. Therefore, appointment of the auditors or their removal is an act of the company as a distinct and separate entity and cannot be said to be an act of the shareholders merely because the company exercises such a right in the general meeting. Counsel for the respondent would, however, contend that such a distinction between the company and its shareholders cannot be made in the present case since the order of the Regional Director passed on 13.12.2012 affected the rights of the shareholder as shareholder and, therefore, respondent No.3 was entitled to file an

application before the CLB, even though the company did not do so. This contention runs counter to the settled principle. If regard is had to the basic principle that the company is distinct from its shareholders, it should follow that the cause of the company cannot be canvassed by a shareholder acting individually and not on behalf of the company. It has been found as a fact, which is not disputed before me, that respondent No.3 was not authorised by the company to file the application before the CLB; if she had been specifically authorised to do so, then perhaps it would have been possible to argue that such filing was an act of the company. The principle that a company, even though a distinct corporate personality, can act only through human agency is applicable where the company professes to act itself and this principle cannot be pressed into service to support an argument that all acts done by an individual shareholder are those of the company. The principle of piercing the corporate veil cannot also be invoked since that principle is normally invoked only to reveal the true identity of a company and to expose those persons who seek to use the cloak of corporate personality to hide and shun such exposure. Traditionally, right from the days of the *United States vs. Milwaukee Refrigerator Transit Company*, (1905) 142 F, where it was observed by Sanborn, J.

that “where the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will disregard the corporate entity and treat it as an association of persons”, the principle has been invoked only by the law to expose a fraud or a wrong. According to Gower, piercing or lifting the corporate veil is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interests of the Revenue. No such situation arises in the present case. It appears that the rule has never been invoked in any case where a shareholder seeks to justify his act by saying that he and the company are one and the same and when he acted, it amounted to the company itself acting. It would be dangerous to accept such a sweeping proposition. In other words where the law requires a company to act or do a particular thing, it would be no answer for a shareholder, who acts independently of the company, to invoke the doctrine of piercing the corporate veil and contend that his act was actually the act of the company. This position was recognised and invoked by Badar Durrez Ahmed, J. (as he then was) of this court in ***Prem Lata Bhatia vs. Union of India & Ors.*, (2004) 58 CL 217 = (2003) 108 DLT 346**, and the following observations are pertinent: -

“12. The question therefore is – can the corporate veil be lifted in the present case to reveal the identity of the person or persons behind it? In all cases where courts have permitted the lifting of the corporate veil, it has been so done to reveal the “true” identity of the company and to expose those persons who sought to use the cloak of corporate personality to hide and shun such exposure with a view to “defeat public convenience, justify wrong, protect fraud, or defend crime”. I have not come across any case where a shareholder himself seeks to remove the veil and say to the court – “look, it is me, the company is only a facade!” But, this is what the petitioner wants this court to do to enable her to wriggle out of her liability under clause 8. As observed by the Supreme Court in Tata Engineering and Locomotive Co. Ltd. (supra), it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Yet, the common thread running through cases where lifting of the veil has been permitted is that such lifting has always been sought by persons outside the company and it has never proceeded from those within and who hide behind the veil. Essentially, lifting of the veil has been permitted to prevent persons from taking refuge behind the veil and thereby take advantage of the separate juristic identity of the company. The doctrine has therefore been employed by the courts to prevent persons from taking advantage of their wrongs using the corporate entity as a shield. It cannot, therefore, be employed for permitting the petitioner to take advantage of her wrong in not taking written consent of the Government before permitting the said company to use the said shop. If the corporate veil cannot be lifted, the inevitable conclusion is that the petitioner and the said company are separate and distinct persons. Consequently, user by the said company of the said shop in the facts narrated above would be in violation of the terms and conditions of the license and, in particular, of clause 8 thereof. Clearly, then, the cancellation of the license would be in order. The

‘domino effect’ would be that the order of the estate officer and ultimately the judgment of the Additional District Judge upholding the eviction of the petitioner would all be unassailable.”

In the light of the above, I am unable to look at the act of respondent No.3 in filing an application before the CLB as an act of the company itself under any principle or authority.

19. It is true that the Regional Director, being the delegatee of the Central Government, is empowered to accord previous approval under Section 224(7) for the removal of the auditors on an application being made to him by the company. However, clause (g) of Section 402 of the Act which deals with the powers of the CLB vis-a-vis an application under Section 397 or 398, confers wide powers upon the CLB while dealing with the application. It states that the CLB may pass any order under Section 397 or 398 providing for any matter, other than those specified in clauses (a) to (f), for which in its opinion it is just and equitable that provision should be made. The powers under clause (g) are very wide and while exercising them the only condition that needs to be satisfied is that there should be a nexus between the order that may be passed under the aforesaid clause and the object sought to be achieved by Sections 397 and 398. In ***Shanti***

Prasad Jain vs. Union of India, 1978 Bom. LR 778, Tulzapurkar, J.

(as he then was) speaking for the Division Bench of the Bombay High Court dealt with the powers of the Court under Section 402 of the Act in extenso. In the opinion of the Division Bench, there are certain provisions in the Companies Act which deal with corporate management of a company through directors in normal circumstances, while Chapter VI of the Act which includes Sections 397 to 409 deals with emergent situations or extraordinary circumstances where the normal corporate management has failed and has run into oppression or mis-management and, therefore, steps are required to be taken to prevent oppression and mis-management in the conduct of the company's affairs. It was held that the powers of the Court under Chapter VI cannot be curtailed by reading them subject to the provisions contained under the other chapters of the Act dealing with normal corporate management. The Court contrasted the provisions of Part-A of Chapter VI with those of Part-B. Whereas Part-A dealt with the powers of the Court (now Company Law Board), Part-B dealt with the powers of the Central Government to prevent oppression or mis-management. The Court noticed that while dealing with the similar emergent situations or extraordinary circumstances, it has placed

restrictions or limitations on the powers of the Government acting under Sections 408 and 409, but no restrictions or limitations of any kind have been prescribed on the powers of the Court. It was observed that if the legislature had desired to place any limitations on the powers of the Court (now CLB) acting under Section 402, it could have stated so, but did not. Moreover, the Court held that the topics or subjects dealt with by Sections 397 and 398 are such that it becomes impossible to read any restriction or limitation on the powers of the Court acting under Section 402. The power of the Court under Section 397 is to make such order as it thinks fit, with a view to bringing an end to the matters complained of. It was held that having regard to the very wide nature of the power conferred on the Court and the object which is sought to be achieved through the exercise of such power, the only limitation that could be impliedly read on the exercise of that power would be that a nexus must exist between the order that may be passed thereunder and the object sought to be achieved by Sections 397 and 398. The Court also noticed from Section 398 read with Section 402 that if the Court is required to provide for the regulation of the conduct of the company's affairs in future because of oppression or mismanagement that has taken place in the course of normal corporate

management, the Court must have the power to supplant the entire corporate management (or corporate mis-management) by resorting to non-corporate management which may take the form of appointing an administrator or special officer or a committee of advisors to be in charge of the affairs of the company. It was eventually held by the Division Bench of the Bombay High Court that the powers of the Court under Section 402 of the Act cannot obviously have any regard to or be subject to the other provisions dealing with the corporate form of management.

20. The decision of the Bombay High Court (*supra*) highlights the position that Section 402 comes into operation under extraordinary circumstances and, therefore, the other provisions of the Act, which apply under normal circumstances, cannot curtail the powers of the Court exercised under that Section.

21. In *Cosmosteel P. Ltd. and Ors. vs. Jai Ram Das Gupta and Ors.*, AIR 1978 SC 375 = (1978) 48 COMPANY CASES 312, a three Judge Bench of the Supreme Court, speaking through *D.A. Desai, J.* was confronted with the question whether the direction of the Court under Section 402 of the Act for purchase of its own shares by a company, which involves a reduction in share capital, can be

implemented only by following the procedure prescribed by Sections 100 to 104 of the Act. The Supreme Court held that Sections 397 and 402 appear to constitute a code by themselves for granting relief to the oppressed minority shareholders and for granting appropriate relief, the Court has been conferred with a power of widest amplitude, including the lifting of the ban imposed on the company by Section 77 from purchasing its own shares. When the Court exercised this power under Section 402 by directing the company to reduce its share capital by purchasing its own shares, albeit contrary to Section 77 of the Act, it cannot be expected that the power should be made subject to the company following the procedure laid down in Sections 100 to 104. According to the Supreme Court if such a limitation on the Court's power is to be imposed, it would amount to holding that the statutory power of the Supreme Court depends, for its exercise, upon the vote of the members of the company. That would lead to an unacceptable situation where the Court's direction could be defeated by the majority of the shareholders voting against the reduction of the share capital. This would make a mockery of the entire situation and would defeat the relief granted by the Court to the minority shareholders against acts of oppression and mis-management of the majority shareholders. Such

a situation, in the opinion of the Supreme Court, cannot be countenanced.

22. The power of the Court under Section 402 can even extend to directing something which is not provided in the Act. For instance it has been held that the Court can direct the introduction of a clause in the articles of association which runs contrary to Section 255 of the Act (*Shanti Prasad Jain vs. Union of India*) (supra). In *Motion Pictures Association in re*, 1984 (55) COMPANY CASES 375, a Division Bench of this Court directed the alteration of the articles of association of the company and modified an article capable of preventing a duly elected representative body from functioning as such. In *Pearson Education INC vs. Prentice Hall India (P) Ltd. and Ors*, 134 (2006) DLT 450, a learned Single Judge of this Court (A.K. Sikri, J., as he then was) held that the jurisdiction of the CLB under Sections 397/398 and 402 is much wider and a direction can be given even contrary to the provisions of the articles of association; it even has the right to terminate, set-aside or modify any contractual arrangement between the company and any person. It was further observed that the just and equitable principle embodied in clause (g) of Section 402 is an equitable supplement to the common law of the

company which is to be found in its memorandum and articles of association. This judgment has been approvingly cited by the Supreme Court in *M.S.D.C. Radha Ramanan vs. M.S.D. Chandrasekara and Anr.*, (2008) 6 SCC 750.

23. In *Sangramsingh P. Gaekwad vs. Shantadevi P. Gaekwad*, (2005) 11 SCC 314 the Supreme Court held that the Court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation any further relief or reliefs, as the Court may deem fit and proper, are warranted.

24. Having regard to the settled legal position as above, I have no hesitation in holding that notwithstanding that Section 224(7) of the Act names the Central Government as the authority competent to accord previous approval for the removal of the auditors on the application of the company, it would still be open to the Company Law Board, to accord or refuse such approval while dealing with a petition under Section 397/398 of the Act provided the exercise of such a power has a nexus with the object sought to be achieved by the ultimate order passed under Section 402. In the case before me the pleadings before the Company Law Board show that the removal of the

auditors was specifically raised. The relief claimed in paragraph 35(h) of the petition before the CLB is as follows: -

“(h) Removal of the Auditors of the company if they have been changed by the respondent No.2 & 3 and to reappoint the previous Auditors who have been reappointed in the AGM held on 29.9.2009.”

25. The argument on behalf of the respondent that it is open to the appellant to appear before the Regional Director and raise all objections to the change of the auditors appears to me to be no solution; it is only an argument of convenience. The argument is without merit for two reasons. First, it is a question of exercise of the wide powers under Section 402 by the Company Law Board. If the CLB could examine the question of change of auditors – whether it is an act of oppression or mis-management – while dealing with the petition under Section 397 and 398, I do not think it would be proper to relegate the appellant to the Regional Director; if the CLB can validly exercise a power, it should be permitted, - nay, it is bound - to do so. Secondly, it would be wholly inappropriate to permit two different authorities to deal with what essentially is a single grievance. If, as held by the CLB, the Regional Director is to deal with the question of removal of the auditors, it would result in this situation, namely, that a

part of the grievance in the petition under Section 397-398 would be dealt with by the RD, while the other parts of the same grievance would be dealt with by the CLB. This would result in a very anomalous situation. It is well-settled that oppression and mis-management, within the meaning of Sections 397-398, are not constituted by distinct and separate acts, but are constituted by a single continuous act and it is not permissible to dissect the conduct of the alleged oppressor into separate acts of oppression or mis-management. In *Shanti Prasad Jain vs. Kalinga Tubes Ltd.*, (1965) 35 Company Cases 351, the Supreme Court, after a review of leading authorities expressed the opinion that in a petition under Section 397, in addition to showing that there is just and equitable cause for winding-up the company, the petitioner must further show “*that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members*”. This is also the view in *Halsbury’s Laws of England*, 4th Edition,

Volume 7, Para 1011. Logically it would be proper that the entire petition under Sections 397 and 398 is dealt with by the CLB.

26. For the aforesaid reasons the impugned order passed by the CLB is set-aside and the appeal is allowed. The CLB will now deal with the question of removal of the auditors while disposing of the appellant's petition under Sections 397 and 398 of the Companies Act.

(R.V. EASWAR)
JUDGE

AUGUST 26, 2013
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