

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****COMPANY APPEAL NO. 48 OF 2009
IN
COMPANY APPLICATION NO. 275 OF 2008
IN
COMPANY PETITION NO. 63 OF 1998**

Bombay Cable Car Co.Pvt.Ltd. & Ors.

...Appellants

vs.

B.M. Jain & Sons Co.Pvt.Ltd. & Anr.

...Respondents

Mr.S.H. Doctor with Mr.P.A. Kabadi and Ms.F.J. Thakkar i/b. Dhojode Associates
for Appellants.

Mr.K.R. Bulchandani with Mr.Amit Nikam and Ms.Meena Sudhakara i/b.
M/s.Kamal & Co. for Respondent No.1.

CORAM : S.C. GUPTE, J.**9 OCTOBER 2015****ORAL JUDGMENT :**

The company appeal challenges an order passed on a company application filed in a disposed of company petition under Sections 397 and 398 of the Companies Act, 1956 ("the Act"). The company petition involved disputes between two groups of shareholders of the company. The petition was disposed of by the Company Law Board, Principal Bench ("CLB") by directing one group to sell its shares to the other group at a valuation to be made by the statutory auditor of the company and issuing various other directions. That order was, upon a challenge in an appeal, upheld by this Court with passing of further directions. The statutory auditor thereupon proceeded to value the shares. The valuation was thereafter challenged by the Respondents herein by filing a company application in the disposed of company petition. By the impugned order, the valuation report prepared by the statutory auditor of Appellant No.1 company was set aside and a fresh valuation was ordered. So also, cancellation of 25000 shares held by Respondent No.1 in the company in pursuance of the order disposing of the company petition, was set aside. The order is challenged

basically on the grounds that the CLB, having disposed of the company petition, had no jurisdiction to entertain the company application and secondly, the order of disposal of the company petition had merged with the appellate order passed by this Court, which had since been complied with by the Appellants.

2 On 21 November 1983, Appellant No.1 (“company”) was incorporated with the object of carrying on business of transportation of tourists and local citizens on mono-bio cable car system by Appellant No.2 Sabir Rashid and others of his group (hereinafter referred to as “Rashid group”). In April 1988, Respondent No.2 - Pune Municipal Corporation (“PMC”) issued a tender notice for provision of a passenger ropeway system within the limits of city of Pune between Nehru Stadium and Parvati Hill. The company's tender was accepted by PMC. An agreement for lease dated 5 July 1991 was, accordingly, executed between the company and PMC. The estimated cost of the project was Rs.6.05 crores. Rashid group was not in a position to fully meet the project cost. By an agreement dated 19 June 1993 between Rashid group and Lokhandwala group, Lokhandwala group agreed to invest in the company to the extent of Rs.1.25 crores to implement the ropeway project. Lokhandwala group was, in the premises, allotted 19,170 equity shares of Rs100/- each. The company, thereafter, commenced its work on the ropeway project. On 30 January 1994, PMC issued a stop work notice to the company. Around this time, Lokhandwala group expressed its inability to bring in further finance and offered to return the equity shares to Rashid group, or in the alternative, transfer them to a third party financier. In the premises, by an agreement dated 28 November 1995 between Rashid group, Lokhandwala group and Respondent No.1 (hereinafter referred to as “Jain group”), Jain group was brought in with a view to bring in the requisite funds. Jain group agreed to fulfill the financial liability of Lokhandwala group. Accordingly, Jain group bought 19,170 equity shares of Lokhandwala group. Mr.Mahendrakumar Jain, a nominee of Jain group, was thereupon appointed as an additional director of the company. Sometime thereafter, disputes arose between the company and PMC. These disputes were referred to a sole arbitrator. Whilst the arbitration proceedings were pending, disputes arose between Rashid group and Jain group. In the midst of these disputes, an award

came to be passed in favour of the company by the sole arbitrator on 31 March 1998. Appellant No.3 herein (a member of Rashid group) filed a suit before this Court, being Suit No.2493 of 1998 against Jain group (represented by Respondent No.1 herein). The subject matter of this suit involved a challenge to Jain group holding on to its shareholding. The prayer was to direct Jain group to relinquish the shares to Rashid group in accordance with the original finance agreement between the two groups. Around the same time, the captioned company petition was filed by Jain group alleging oppression and mismanagement against the company and Rashid group. By an order dated 8 December 2000, the CLB disposed of the company petition *inter alia* directing Rashid group to surrender to the company 5,830 shares, which were to be reissued to Jain group on its paying the consideration for the shares after adjustments of its loans / advances. The CLB further directed that as and when the suit of Appellant No.3 (Suit No.2493 of 1998) was concluded and if a decree were passed in favour of Jain group, the company would purchase 50% shares held by Jain group at a valuation to be done by the statutory auditor of the company as of 31 March 1999. The company was authorized to reduce its share capital to the extent of such shares. The CLB also issued certain directions pending the valuation exercise. This matter was carried in appeal by Rashid group before this Court. The appeal (Company Appeal No.4 of 2003) was dismissed by this Court confirming the impugned order of the CLB and directing the statutory auditor to carry out the task of valuation of shares in accordance with the directions of the CLB in the impugned order. This Court also accepted an undertaking given by Rashid group not to press prayer clause (a) in Suit No.2493 of 1998 calling for relinquishment of shares of Jain group in favour of Rashid group and also withdraw the suit as and when the shares of Jain group were transferred in pursuance of the impugned order of the CLB. This order was not carried in appeal by Jain group. After disposal of the company appeal, in pursuance of the order of the CLB, Jain group offered payment of Rs.2,06,180/- against issuance of 5,830 shares to Jain group after adjusting a sum of Rs.3,76,820/- lying to the credit of Jain group with the company. 5,830 shares were thereupon surrendered by Rashid group and were reissued to Jain group. So also, the statutory auditor, after hearing the parties, by his order dated 2

August 2005, gave a valuation report. Immediately, after receipt of this valuation report, the company tendered payment to Jain group for purchase of its shares in accordance with the valuation report. Following such tender of payment, the company also cancelled the shares held by Jain group and issued a public notice in that behalf. So also, in compliance with the undertaking given to this Court, Appellant No.3 withdrew Suit No.2943 of 1998 in the presence of the Advocate of Jain group. In the meantime, whilst the valuation exercise was being carried on by the statutory auditor, the arbitration award of 31 March 1998 was set aside by this Court. On 25 August 2006, this Court, by consent of parties, appointed another sole arbitrator to decide the disputes between the company and PMC. Nearly two and half years after the order of the CLB, as confirmed by this Court, was implemented by the Appellants, Respondent No.1 – Jain group preferred the subject company application (Company Application No.275 of 2008) in the disposed of petition, in which the order impugned in the appeal herein came to be passed. By this application, Jain group prayed for setting aside of the valuation report of the statutory auditor and carrying out a fresh valuation of the shares and also for setting aside the cancellation of shares by the company and restoration of Jain group to the register of members of the company. By its impugned order, the CLB set aside the valuation of shares done by the statutory auditor. The CLB ordered determination of the valuation afresh. The CLB declared the cancellation of shares held by Jain group as irregular and also restored the name of Respondent No.1 in the register of members in respect of those shares. The CLB held that as and when an award is made by the new sole arbitrator, the same would have to be taken as the one available on 31 March 1999 for determination of the value of the shares. Considering the fact that it was too difficult to foresee the time that may be taken for conclusion of the arbitration proceeding, Jain group was given an option to receive a sum of Rs.100 per share as a fair value (aggregating to Rs.25 lakhs). Aggrieved by this order, the Appellants have preferred the present company appeal.

3 It is submitted by Mr.Doctor, learned Senior Counsel appearing for the Appellants, that the CLB, by its order of 8 December 2000, had disposed of the original company petition filed by Jain group under Sections 397 and 398 of

the Act. He submits that that order has since been fully implemented. The CLB, which had thus become *functus officio*, had no jurisdiction to thereafter interfere with the steps taken by the parties in pursuance of the order of 8 December 2000. Besides, it is submitted that the original order of the CLB had merged with the appellate order passed by this Court and after such merger, it was not permissible to the CLB to have modified the original order. Learned Counsel relies on the judgment of the Supreme Court in the case of **Abbai Maligai Partnership Firm vs. K. Santhakumaran**¹ in this behalf.

4 On the other hand, Mr. Bulchandani, learned Counsel appearing for the Respondents, submits that the CLB has wide powers under the provisions of Sections 397 and 398 read with Section 402 of the Act, the object behind exercise of these powers being to put an end to the litigation. He submits that even after passing of an order under these provisions, the CLB could very well supervise the implementation of its order till the disputes between the parties were actually brought to an end. Relying upon Regulations 29 and 44 of the Company Law Board Regulations, 1991, it is submitted by learned Counsel that the CLB has power to pass such orders to give effect to its orders, as may be necessary, for meeting the ends of justice and preventing abuse of the process of the Bench. It is submitted that the impugned order was necessary to give effect to the original order passed by the CLB. It is submitted that the valuer directed to determine valuation of shares in accordance with the original order has abused the order by not valuing the shares as at the specified date and to prevent this abuse, the CLB was well within its rights to pass the impugned order. Learned Counsel relies on the judgments of the Supreme Court in the case of **Supreme Court Bar Association vs. B.D. Kaushik**², the Madras High Court in the case of **Shoe Specialities P.Ltd. vs. Standard Distilleries and Breweries P.Ltd.**³, this Court in the case of **Shanti Prasad. vs. Union of India**⁴, and the Supreme Court in the case of **Cosmosteels Pvt.Ltd. vs. Jairam Das Gupta**⁵, in support of his

1 (1998) 7 SCC 386)

2 (2012) 6 SCC 152

3 (1997) Vol 90 Company Cases 1

4 (1998) Vol. LXXV Bombay Law Reporter 778

5 (AIR 1978 SC 375)

submissions.

5 Section 397 of the Act enables a member of the company, who *inter alia* complains of an oppressive conduct on the part of the company and its directors, to apply for relief in respect of such oppression to the CLB. Section 402 of the Act gives extensive powers to the CLB to pass order for redressal of the grievance of the applicant. These orders may provide for regulation of the conduct of the company's affairs in future, purchase of shares, termination, setting aside or modification of agreements, setting aside of transfers, deliveries of goods, payments, executions or other acts relating to the property of the company and other matters for which orders are necessary on the ground that it is just and equitable to do so. No doubt, as submitted by Mr. Bulchandani, these powers are wide and extensive. It is also correct that the object behind the powers comprised in Section 397 read with Section 402, which are a code by itself, is to put an end to the grievance of the oppressed. But these powers must be exercised by the CLB only when it is in seisin of the matter and not after it becomes *functus officio*. Once the CLB disposes of the petition complaining of oppression and mismanagement finally by making a final adjudication of the rights of the parties and ordering final relief under Section 402, it ceases to exercise any jurisdiction. Regulation 29(6) of the Regulations provides that the bench may make such order or may give such direction as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure ends of justice. These orders, in the context of Section 397 read with Section 402, have to be passed as part of the orders that the bench may pass under Section 402. Whilst making orders under Section 402 for redressal of the grievance of the oppressed applicant, the CLB may make such further orders or issue such further directions to give effect to its orders or to prevent a possible abuse or to secure the ends of justice. The Regulation does not suggest that after the board divests itself of the jurisdiction over the matter by finally disposing of the petition, the board still retains its jurisdiction to issue further orders or directions either to give effect to its earlier order or to secure ends of justice or prevent abuse of the process. In the event an order passed by the CLB under Section 402 of the Act read with Regulation 29(6) is not implemented by the

parties, the CLB has jurisdiction under Section 634A to direct enforcement of its orders. The order, to the extent it remains unimplemented, may be enforced by the Bench in the manner as if it were a decree made by a court in a suit pending before it. But once the orders of the CLB are implemented, the actions taken by the parties in implementation of those orders cannot be brought before the CLB either under Section 634A of the Act, unless such actions reflect non-enforcement of the order of the Bench, or under the original petition under Section 397 or 398 of the Act. Regulation 44 also does not take the case any further. Regulation 44 is a provision, which does not confer any further power on the Bench, but saves any inherent power that the Bench may have to make orders. It is trite to say that every court or tribunal may have powers to make such orders, as may be necessary, for securing the ends of justice or to prevent abuse of its process. What Regulation 44 does is to affirm that nothing contained in the Regulations does in any way limit or otherwise affect such inherent powers. It cannot possibly be suggested that if the board has no power, inherent or otherwise, to issue any order after it becomes *functus officio* or ceases to exercise any jurisdiction in the matter, Regulation 44 gives the board powers to make further orders or issue further directions.

6 The case of **Supreme Court Bar Association** (supra) cited by Mr. Bulchandani concerns the powers of the Supreme Court under Article 142 of the Constitution of India. Under Article 142, the Supreme Court, in exercise of its jurisdiction, may pass such order as it deems necessary for doing complete justice in any cause or matter pending before it. In the case of **Supreme Court Bar Association**, the Court held that this power extends even to enforcement of its orders or directions. It extends to matters in which orders, though passed by the Supreme Court, are yet to be implemented, particularly when the orders sought are necessary for doing complete justice between the parties. In that sense, the Supreme Court cannot be said to have become *functus officio* after passing any order. This is a special jurisdiction of the Supreme Court and is part of the plenary powers of that court under Article 142 of the Constitution. These powers are inherent in the Supreme Court and are complementary to those powers which are specifically conferred on that court by various statutes and are

not limited by those statutes. These powers are said to exist independently of the statutes which provide for the powers of the Supreme Court with a view to doing complete justice between the parties. It is preposterous to invoke this special constitutional power belonging to the Supreme Court for jurisdiction to be exercised by a tribunal such as the CLB in the matter of passing orders under Section 402 of the Act.

7 The case of Madras High Court in **Shoe Specialities P.Ltd.** (supra) at the first blush does seem to support Mr.Bulchandani. A closure scrutiny of that case, however, suggests otherwise. In that case, the parties had carried their disputes concerning oppression and mismanagement before the board. One of the disputes involved a refusal on the part of the board of directors in that case to hold an EOGM as per the requisitions of the majority shareholders. The Bench held such refusal to be improper. The Bench also found that there were grounds made out to show oppression. The Bench, accordingly, directed holding of an extra ordinary general meeting where the majority could “effectively exercise their majority rights”. The Bench, accordingly, disposed of the petition with a direction to the board of directors to act on the requisition lodged by the petitioners. The Bench, in terms, observed that **“both the parties are at liberty to approach us in case of any difficulty in convening the general meeting”**. After this order was passed, apprehending that they would not be in a position to effectively exercise their majority right as the Bench would have them to, the majority shareholders sought intervention of the Bench by filing a miscellaneous application seeking certain directions. By an order on this application (order dated 15 July 1994), the Bench held that the word “convening” used in its main order in the company petition should not be construed literally and the same was used by them in a larger perspective to include all proceedings in the meeting, i.e. till the completion of the extraordinary general meeting. In the circumstances, the Bench *inter alia* directed that the proceedings of EOGM should be conducted in a proper manner and the Bench should have an independent information as to the conduct of this meeting from an independent source. Accordingly, the Bench appointed an observer for the proceedings of the EOGM, directing him to send a report to the Bench within 15 days thereafter. This order was accepted by the

parties and not carried in appeal any further. In pursuance of these directions, when the meeting was held, the chairman of the meeting took a certain stand or position which was objected to by the Petitioners and in the premises, an application was moved for various reliefs including a relief of setting aside the decision of the chairman in permitting certain shareholders to vote and also for declaring certain resolutions as having been passed in that meeting. At this stage, an objection was taken by the Respondents that the Bench had no jurisdiction to entertain this company application, since it had become *functus officio*. It was submitted that when the rights of the parties were at stake, such rights should not be a subject matter of an interlocutory application in a matter which had already been disposed of. The argument on behalf of the opponents was that the application, under Regulation 44, which corresponds to Section 151 of the CPC, could only be filed in a pending proceeding and the same should not be a subject matter to investigate the rights of the parties in a disposed of proceeding. It was submitted that once an order had been passed in the main application, the Bench had ceased to have any power to pass a subsequent order and that too far in excess of the relief that was granted in the main petition. On these facts, the CLB came to a conclusion that it had powers to issue the necessary directions; that it had retained seisin over the matter in particular reference to the convening of EOGM; and that the objection that the CLB had become *functus officio* was, in terms, not correct. The CLB passed the directions prayed for. The matter was then carried in appeal before the Madras High Court. The High Court, after construing the provisions of Section 397 read with Section 402 and after taking into account various judgments on the point including the judgment of this Court in the case of **Shanti Prasad** (supra), came to a conclusion that the powers under Section 397 read with 402 of the Act were wide and extensive; that the CLB had powers to issue such directions as it thought fit to achieve the object of the provisions; and that there would be no limitation or restriction on such powers. The High Court upheld the CLB's conclusion that it had not become *functus officio* expressly on the footing that the original order passed on the petition was only a conditional order in the sense that the reliefs sought for in the petition were not necessary “**since the petitioners can effectively exercise their majority right**”. If that condition were not complied

with, it was for the CLB to intervene and set the matter right. The High Court also noted that the order of the CLB passed on the first application on 15 July 1994 was not challenged by the parties; that on reading of that order it was clear that the Bench wanted to have a say even subsequent to the passing of the order. The Court felt that there was no necessity for the Bench to give directions so as to have an independent information as to the conduct of the meeting from an independent source and to that end appoint an observer requiring him to observe the proceedings of the EOGM and report to the Bench. The chairman of the meeting was also directed to record all the votes polled in favour and against each and every resolution separately memberwise and send a copy of the minutes of the meeting within 15 days from the holding thereof. The Court was of the view that, from these directions, it was clear that after the meeting, the Bench was to take a final decision. Whether the meeting was held properly and whether the resolution had been voted out or not, were all matters to be informed to the Bench. If the Bench did not intend to pass any order subsequently, there was no necessity for doing all this. In other words, the Court was specifically of the view that the Bench had retained seisin over the matter and had not become *functus officio*. These facts are clearly distinguishable from the facts of our case. In our case, the CLB had not retained any seisin over the matter. In the original order passed on the company petition finally disposing it of, the Bench had directed as follows:

- (i) Rashid group to surrender 5,830 shares being 50% of the shares of 11,660 shares issued / allotted to that group and these shares to be reissued to the Petitioner (Respondent No.1 herein) on its paying the consideration for such shares;
- (ii) Considering the strained relationship between the parties and their association in the board would only escalate the strained relationship, with a view to put an end to the grievances, as and when the proceedings of the suit were concluded (where the shareholding of the Petitioner was under challenge), the company to purchase 50% shares held by Jain group “**at a valuation to be**

done by the statutory auditor of the company”, the date of such valuation being 31 March 1999 being closest to the presentation date of the petition (filed in November 1998).

- (iii) Upon purchase of these shares, the company to be authorized to reduce its share capital to that extent.

These directions finally disposed of the company petition filed before the CLB. The CLB had not retained any seisin over the matter to enable the parties to approach it upon the valuation to be carried out by the statutory auditor. These directions have since been implemented by Rashid group surrendering its 5,830 shares, by the statutory auditor valuing the shares to be purchased by the company from Jain group as at 31 March 1999, by the company offering the share price at this valuation to Jain group; and by reducing its share capital to the extent of the shares so purchased. On these facts, it is not permissible for Jain group to approach the CLB, if it is aggrieved by the valuation determined by the statutory auditor and the share price offered to it on the basis of such valuation.

8 Learned Counsel for the Respondent No.1 accepts that correctness or otherwise of the valuation cannot be challenged *per se* before the CLB in an application in the disposed of petition, but he submits that the valuation is not in accordance with the directions of the CLB inasmuch as the valuation of shares had to be as of 31 March 1999, but the auditor has considered subsequent events to arrive at the valuation. Even here the Respondent No.1 is not right. In the first place, the valuation report makes it clear that the value of shares has been determined as at 31 March 1999. Apropos of the three commonly used methods of valuation of shares, namely, Market Based Method, Asset Earning Method and Asset Based Method, the valuer has adopted the Asset Based Method. Rightly so, since the shares not being listed, there was no reason for adopting the Market Based Method, and the company not having commenced any business or earned any profit and not having any immediate plans of future business, there was no question of adopting Asset Earning Method for valuation of its shares. Accordingly, the valuer has considered all assets and liabilities of

the company, whether recorded or not, tangible or intangible, present or future, and contingent or matured. The auditor has considered the balance sheet of the company for the year ending 31 March 1999 for arriving at these values. After considering all financial indices such as capital work in progress, projects in progress, advances, loans, sundry creditors, etc., the valuer had to duly consider the value of the arbitration award. The award, granted by the sole arbitrator on 31 March 1998, was for a sum of about Rs.3.07 crores,. This award was in challenge as at 31 March 1999 and was subject to the final outcome of the case. The outcome was uncertain both in terms of the result and time. The award was clearly a contingent asset and called for the application of the principles of valuation applicable to contingent assets. There are two important considerations, as noted by the valuer, for valuation of contingent assets. In the first place, the assessment has to be on a “conservative basis” and the “time frame” ought to be considered. Secondly, for the purpose of valuation of contingent liabilities as well as contingent assets, the events occurring after the date of valuation should also be taken into account. The valuer has, thereafter, noted that the award was set aside by this Court on the application of PMC on 3 March 2005 and a special leave petition of the company challenging that order was dismissed by the Supreme Court. The events post 31 March 1999, thus, showed that the value of the declared award was zero as of date. The valuer, however, proceeded to consider various other factors, such as the possibility of the company going in for a fresh arbitration, since the award was set aside really on the ground of want of jurisdiction. The valuer, in the premises, considered the value of a possible fresh award as a contingent asset. The valuer then applied the various yardsticks on the basis of norms of the trade and estimated such value at Rs.45,44,972. Thereafter, the valuer, after considering the other financials and taking into account the value of a possible fresh award as a contingent asset, worked out the value of the shares of the company at Rs.8 per share. There is nothing wrong with this approach. The valuer, thus, has obviously determined the value of shares in accordance with the directions of the CLB as at the date of 31 March 1999 and after considering all the relevant material and without taking into account any irrelevant material. The valuation does not give rise to any ground to approach the CLB in challenge of the same.

9 The decision of this High Court in **Shanti Prasad** (supra) merely underlines the width of the powers of the CLB. This decision was rendered in a totally different context. In that case, it was contended that the exercise of powers by the CLB under Section 402 of the Act was to be subject to limitations contained in the other provisions of the Act. That was negated by our Court. This judgment has no bearing on the facts of the present case. So also, the decision of the Supreme Court in the case of **Cosmosteels Pvt.Ltd.** (supra), though it generally affirms the width of the powers of the CLB under Section 397 read with Section 402 of the Act, was rendered in a completely different context and has no bearing on the facts of our case. What was submitted in that case before the Supreme Court was that though under Section 402 of the Act, the CLB had the power to order the company to purchase the shares of minority shareholders to relieve oppression, the procedure prescribed by Sections 100 to 104 was still required to be followed. This was negated by the Supreme Court in that case. The case has no bearing on the facts of our case.

10 Apart from the question of powers of the Bench to exercise jurisdiction in the matter after having become *funtus officio*, there is also the question of doctrine of merger, namely, the original order of the CLB having merged with the appellate order of this court. The doctrine of merger implies that once a trial court order is affirmed with or without modification by an appellate court, it merges with the order of the appellate court and it is thereafter the order of the appellate court which holds the field and which the parties have to abide by. In the present case, the original order of the CLB disposing of the company petition was challenged before this Court. This Court, by its order dated 13 January 2005, dismissed the appeal and passed an order not just affirming the impugned order of the CLB but *inter alia* recording and accepting an undertaking of the Appellants Rashid group in respect of prayer clause (a) of the suit filed by Appellant No.3 (Suit No.2493 of 1998) and also for disposal of the suit as against Jain group after transfer of shares. This Court, after confirming the impugned order of the CLB, directed the statutory auditor to commence the task of valuation in accordance with the directions given by the CLB in the impugned order. This

Court further directed that upon such valuation being completed and shares being ultimately transferred in favour of the Appellants Rashid group in accordance with the impugned order, the undertaking of the Appellants to withdraw the suit for the balance of prayers would also become operative. All this has been fully accomplished. The valuation has been carried out, the price for purchase of the shares on such valuation has been offered, the shares have been cancelled and the suit has been withdrawn as regards the balance of the prayers. After all this, it is certainly not open to the CLB to interfere with the original order of the CLB which has since been confirmed with modification by this Court.

11 In that view of the matter, the impugned order cannot be sustained. The appeal is, accordingly, allowed. There shall be no order as to costs.

(S.C. Gupte, J.)