IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON
&
THE HONOURABLE MR.JUSTICE K.HARILAL

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

Co.Appeal.No. 7 of 2015 ()

AGAINST THE ORDER IN CP 57/2014 of COMPANY LAW BOARD(SR),MADRAS DATED 21-09-2015

APPELLANTS/PETITIONERS IN THE CP:

1. MR. NIREJ V.PAUL
VADAKKEDATHU HOUSE, OORAMANA POST, ERNAKULAM DISTRICT
KERALA-686 730.

2. MRS.JAYA P.
TOCH INSTITUTE OF SCIENCE & TECHNOLOGY
ARAKKUNNAM POST, ERNAKULAM DISTRICT, KERALA-682 313
RESIDING AT VADAKKEDATHU HOUSE, OORAMANA POST
ERNAKULAM DISTRICT, KERALA-686 730.

BY ADVS.SRI.ANIL D. NAIR
SRI.R.SREEJITH
SMT.ROSIE ATHULYA JOSEPH
SMT.O.A.NURIYA
KUM.SOUMYA PRAKASH
KUM.MEKHALA M.BENNY

RESPONDENT(S)/RESPONDENTS:

1. M/S THE CANNING INDUSTRIES COCHIN LIMITED
A COMPANY REGISTERED UNDER THE COMPANIES ACT
1913 AND HAVING ITS REGISTERED OFFICE AT C-234/32
CAICO ROAD, THRISSUR-680 006.

2. MR.P.D.JOSE.
POOTHOKARAN HOUSE, EAST FORT PO, THRISSUR
680 005.

3. MR.P.V.DAVIS
D-201, PARAPPULLY APARTMENTS, CHEMBUKAVU
THRISSUR-680 020.

4. MR.O.P.RAPPAI,
OVUNGAL HOUSE, LATIN CHURCH ROAD, THRISSUR-680 001.

5. DR.M.K.AELIAS
VALIAVEEDU, COLLEGE ROAD, THRISSUR-680 001.

6. MR.CHIRIYANKANDATH PALU JOSE
CHIRIYANKANDATH HOUSE, PIPE LINE ROAD, MYLIPADAM ROAD
THRISSUR-680 020.

7. MR.JOY GEORGE
CHIRIYANKANDATH HOUSE, PIPE LINE ROAD, MYLIPADAM ROAD
THRISSUR-680 020.

8. MRS.JESSY PAVOO
ANCHERY HOUSE, MISSION QUARTERS, THRISSUR-680 005.

9. MR.RAPHEL VADAKKEN
VADAKKEN HOUSE, EAST FORT PO, THRISSUR-680 005.

10. DR.T.T.PAUL
THALOKARAN HOUSE, BISHOP PALACE ROAD, EAST FORT PO
THRISSUR-680 005.

11. MR.JACOB M.P.
MANNUKADAN HOUSE XIV/3, NYTHAVANAMPANJIKAL
AYYANTHOLE PO, THRISSUR-680 003.

12. DR.RAJU C.VARGHESE
CHELLAKUDAM HOUSE, MALAPALLIPURAM PO
THRISSUR-680 732.

13. MR.JOHN M.P.
MANNUKADAN HOUSE, XIV/3, NYTHAVANAMPANJIKAL
AYYANTHOLE PO, THRISSUR-680 003.

14. MR.FRANCIS ATTOKARAN
ATTOKARA HOUSE, JESSYNIVAS
KIZHAKKUMPATTUKARA THRISSUR-680 005

15. MR.PIUS ALAPPAT
ALAPPAT HOUSE, KOLAMPARAMBU, AYYANTHOLE PO
THRISSUR-680 003.

16. MR.RAJU DAVIS P.
C-201, PARAPPULLY APARTMENTS, CHEMBUKAVU
THRISSUR-680 020.

17. COMPANY LAW BOARD,
CHENNAI BENCH, CHENNAI-600 004.

R1 BY ADV. SRI..MILLU DANDAPANI (CAVEATOR)
ADV. SMT.ANNA THOMAS (CAVEATOR)
R17 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL

THIS COMPANY APPEAL HAVING BEEN FINALLY HEARD ON 28-09-2015, THE COURT ON 08.10.2015 DELIVERED THE FOLLOWING:

P.R. RAMACHANDRA MONON
&
K. HARILAL, JJ.

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Company Appeal No. 7 of 2015

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Dated, this the 8th day of October, 2015

<u>JUDGMENT</u>

<u>Ramachandra Menon, J.</u>

This appeal arises from Annexure G order dated 21.09.2015 in C.A.1 of 2015 in C.P. 57 of 2014 preferred by the appellants, whereby interim relief sought for as per application dated 12.09.2015 (produced along with Annexure E), seeking for an injunction restraining the respondents from taking up or passing the resolution listed as item No. 6 under the head 'Special Business' in the notice dated 31.07.2015 calling for the 68th Annual General Meeting to be held on 28.09.2015 until disposal of the company petition, was not granted, observing that there was no urgency in the matter and listing the same to be taken up on 03.12.2015.

2. The sequence of events is as follows :

The appellants herein, who are stated as holding substantial number of shares in the first respondent company constituted under the relevant provisions of the Companies Act, filed C.P. No.57 of 2014 before the 17th respondent/Company Law Board in view of the alleged mismanagement and other mischief, seeking for immediate intervention, under Sections 397 and 398 of the Companies Act. It is stated that the first appellant was having 12015 equity shares, holding more than 5 % of the total share capital of the company. Similarly, another establishment by name Vadakken Gold Exporters Private Ltd. was holding 28000 shares as on 31.03.2013. All of a sudden, the position was turned upside down, when the aforesaid names were seen substituted in the 'Notes' forming part of the accounts for the year ending on 31.03.2014 and two other persons by name Jose Paul Cheriyankadath & Mr. Chacko V.A. were introduced and shown as possessing 164864 and 27000 shares respectively. It was also shown therein, that the total number of shares issued during the year was '170060'. The allotment of shares as above was sought to be challenged by filing the company petition before the Company Law Board with the main prayer to declare that the allotment of 170060 shares at the Board Meeting of the Company held on 23.11.2013 is illegal, arbitrary, non est and not binding on the company, raising such other incidental/consequential prayers.

3. By way of <u>interim relief</u>, the following prayers were sought for in the C.P:

> (a) Pass an order restraining the respondents 2, 5, 6 and 7 from in any manner exercising any voting or other rights on the shares allotted to them at the Board Meeting on 23rd November 2013 till the disposal of this Company Petition;
>
> (b) Pass an order restraining the board of directors from making any preferential allotment to themselves as mentioned in agenda item No. 6 in the AGM notice dated 19th August 2014 without offering the shares to the other shareholders;
>
> (c) Restrain the board of directors from in any matter alienating or encumbering the assets of the 1st respondent company;
>
> (d) Pass an order restraining the respondents from conducting meeting of the board of directors and meeting of members without leave of the Hon'ble Bench.
>
> (e) Pass an order restraining the respondents 2, 3 and 4 from representing the company as directors till disposal of the petition.
>
> (f) Pass such other further orders or other orders

> as this Hon'ble Board may deem fit in the facts and circumstances of the case.

After considering the interim reliefs, the prayer at serial No. (b) alone was granted by the Company Law Board, as borne by Annexure B order dated 20.10.2014, until further orders. The respondents were directed to file counter affidavit and the C.P. was ordered to be posted on 04.12.2014. The said order is still in existence. In the meanwhile, notice dated 31.07.2015 was issued to convene the 68th Annual General Meeting of the first respondent company, to be held on 28.09.2015, also to consider the disputed item as aforesaid.

4. The dispute is mainly with regard to item 'No. 6' shown under the head 'Special Business' in relation to issue of unsecured fully convertible debentures and the special resolution proposed to be passed in this regard. The proposed resolution reads as follows:

> "**RESOLVED THAT** pursuant to sections 62(3), 71 and other applicable provisions, if any, of the Companies Act, 2013 read with rule 18 of the Companies (share capital and debentures) Rules, 2014, Ordinary Resolution passed at the 62nd Annual

General Meeting of the Company held on 24th September, 2009 and in accordance with clause 3 (t) of the Memorandum of association and the Articles of Association of the company, the approval of the company be and is hereby accorded to the Board of directors of the company ("the Board" which term shall be deemed to include any committee thereof which the company may have constituted or hereinafter constitute to exercise its powers including the powers conferred by this resolution) to offer, allot and issue 1,92,900 (one lakh ninety two thousand and nine hundred) 10% (ten percent) Unsecured mandatorily Fully Convertible Debentures of Rs.250 (Rupees two hundred and fifty) each aggregating Rs. 4,82,25,000 (Rupees four crores eighty two lakhs and twenty five thousand), in one or more tranches during a period of one year from the date of passing this resolution on such terms and conditions, more detailed vide item number 6 of the explanatory statement annexed to the notice.

RESOLVED FURTHER THAT the Board be and is hereby authorized to execute all documents or writings, as may be necessary, proper or expedient for the purpose of giving effect to this Resolution and for matters connected therewith or incidental thereto".

5. Grievance is that, when the Company Law Board intervened with regard to the allotment of preferential shares as per Annexure B order, a sum of about Rs.4.82 Crores is sought to be collected by way of convertible debentures of Rs.250/- each, which will adversely affect the rights and interests of all concerned, including the appellants. The purpose of such procurement allegedly to meet the company's requirement of funds for automation of packaged drinking water project, advertisement & sales promotion and similar working capital requirements for penetrating into the existing market as well as expanding to new market, both domestic and international, by making use of the un-utilized plant capacity and thereby substantially increasing its market share. It is sought to be projected that the effort is aimed at bringing back the company to a profit making one, since its accumulated losses at the end of the current financial year was more than its net worth. In the Annexure to the notice, the quantum of issue is shown as 192900 FCDs having face value of Rs.250/- each aggregating Rs.4,82,25,000/- and the proportion of offer is stated 100 FCDs for every share holder holding equity

shares on the record date to be fixed by the Board of Directors. It is further stated in the notice that the share holders will have no right to renounce the offer in favour of any person, however adding that, in the event of under subscription, the un-subscribed portion may be disposed of by the Board of Directors in such manner as they think most beneficial to the company. Citing these transactions as total shady and malicious, the appellants filed the company application (forming part of Annexure E) to grant injunction restraining the respondents from taking up or passing resolution listed as item No. '6' under the head 'Special Business' in the notice dated 31.07.2015 for the 68th Annual General Meeting to be held on 28.09.2015 or such other adjourned dates, until disposal of the company petition.

6. Objection was filed by the first respondent vide Annexure F, asserting the necessity to identify the source and to pump in necessary funds to bring the company back to normalcy, with specific reference to the requirement of funds for automation of packaged drinking water project, advertisement & sales promotion and similar working capital requirements for penetrating to new market, both domestic and international, by making use of the

unutilized plant capacity. It is also pointed out that immediate necessity has been felt, also by virtue of the interim order passed by the CLB vide Annexure B. The said matter came up for consideration before the CLB on 21.09.2012, on which date the matter was adjourned to 03.12.2012 granting time to the respondents to file counter affidavit, simultaneously observing that no urgency was felt in the matter. This in turn is sought to be challenged in this appeal.

7. Heard Mr. Anil D Nair, the learned counsel for the appellant and Sri. Millu Dandapani who entered appearance on behalf of the respondent Company (the petitioner in Caveat Application No. 1137 of 2015).

8. The learned counsel for the appellants submits that the very basic issue is with regard to the allotment of '170060 shares' in the Annual General Meeting held on 23.11.2013 and there is every chance to have it intercepted by the Company Law Board, granting favourable orders in the C.P. As such, if the respondents are set at liberty to proceed with the Annual General Meeting scheduled on 28.09.2015 and in particular item No. 6 mentioned therein, it will complicate the issue, necessitating multiplicity of

litigations. This is more so, when Annexure B interim order passed by the Company Law Board is still in existence and as such, the course now proposed to be pursued is stated as a dubious exercise to outreach the effect of the interim order. It is also pointed out that once the C.P. is allowed, it will extremely difficult to put the clock back to position as on the relevant date. The learned counsel further submits that the proclaimed purpose of generation of funds cannot be of any legal or valid footing, in so far as production/manufacture of the packaged drinking water project is not covered by the Memorandum/Articles of Association, as the only activity now possible by the first respondent is only to manufacture and market various types of juices/jams. In other words, unless and until the Articles are amended suitably, no such business can be pursued and hence no fund raising programme as now proposed is liable to be entertained. The learned counsel also points out that the very observation of the Company Law Board in Annexure G order that counter affidavit was to be filed by the respondents, for which the case was adjourned, itself is wrong in so far as the respondent company has already filed their counter affidavit, as borne by Annexure F, and as such, the order under challenge, passed on the misconceived facts, is liable to be intercepted by this Court.

9. Sri. Millu Dandapani, the learned counsel appearing for the first respondent company submits that the idea and understanding of the appellants is thoroughly wrong and misconceived. It is stated that there are 1928 shareholders in the first respondent Company, among whom only two (appellants) have sought to stall the proceedings, which actually have been taken on clear and transparent basis, in the best interest of the organization. It is stated that the company is in huge loss for the past four years and the loss suffered is nearly to an extent of Rs.1.32 crores. It is in the said circumstances, that the business has been sought to be diversified. In so far as the packaged drinking water project is concerned, there is no much deviation from the Articles of Association, nor does it require any major change in the set up or process. The learned counsel points out that the process is the same and that the very same machinery can be made use of to meet the target; but for the necessity to install a few additional/supplemental items. All the debentures now proposed to be issued would be converted as shares after five years. It is

stated that for implementing the decision by completing the procedural formalities, a minimum period of about 60 days would be taken and as such, the appeal itself is premature as there is no urgency as pointed out by the Company Law Board.

10. It is pointed out that only the first respondent Company has filed counter affidavit vide Annexure F and that all the respondents are entitled to file counter affidavit bringing the actual facts and figures to light. It was for this reason, that the matter was adjourned by the Company Law Board, for completing the pleadings, which cannot be cited as an arbitrary exercise of power. That apart, there is substantial difference in the prayers raised in the company application and the one in the appeal presented before this Court. In the company application, wherein Annexure G order was passed, the prayer sought for was to injunct the respondents from taking up or passing resolution listed as item No. 6 under the head 'Special Business' in the notice dated 31.07.2015 calling for the 68th Annual General Meeting to be held on 28.09.2015; whereas the prayer in the appeal filed before this Court is only to grant stay of implementation of resolution as aforesaid. If the appellants want to have any interim stay, it is

always open for the appellants to approach the Company Law Board and file appropriate proceedings in this regard; and that the present appeal filed without raising any such prayer before the Company Law Board, making the proceedings before this Court as a substitute, is not maintainable. It is also pointed out by the learned counsel that, by virtue of the amendment of Section 62(3) of the Companies Act 2013 [similar to Section 81 of the Companies Act 1956] and the proviso thereunder, it is quite necessary to have prior approval for getting things done as now proposed and it is only in the said circumstances, that the Annual General Body Meeting was sought to be convened on 28.09.2015, which hence is not liable to be intercepted in any manner. With regard to the denial of the right of renunciation as stated in the notice, the learned counsel submits that the renunciation applies only in the case of shares, which has no application in so far as issuance of debentures is concerned. Referring to the balance of convenience to be considered, the learned counsel adds that timely action is necessary and prospectus has to be issued. If any interference is made at this stage, it will take the proceedings to a stand still, resulting in huge loss to everybody including the appellants. With regard to the anxiety expressed by the appellants as to the consequences that may be resulted, if at all the C.P. is allowed by the CLB, the learned counsel for the first respondent submits that there is no basis for such apprehension, in view of Annexure B interim order already passed by the Company Law Board intercepting the allotment of preferential shares. With regard to the proceedings of the Annual General Body Meeting proposed to be held on 28.09.2015, it is stated that such proceedings will only be based on the shares already allotted till 21.09.2015, which would not include the disputed 'preferential shares'.

11. After hearing both the sides, this Court finds that the proceedings pursued by the 17th respondent/Company Law Board vide 'Annexure G' order cannot be branded as arbitrary or illegal in any manner. No immediate necessity to have intervened by this Court is substantiated in the appeal. Even otherwise, if the appellants find it necessary to seek for stay of further proceedings, particularly with regard to implementation of resolution of the Annual General Meeting held on 28.09.2015, it is still open for them to approach the Company Law Board by filing necessary proceedings, upon which it will be open for the Company Law Board

to consider and pass appropriate orders in accordance with law. This Court does not find any need, necessity or occasion to make any intervention at this stage and the appeal stands dismissed accordingly. It is however made clear that all further proceedings taken by the respondents will of course be subject to further orders to be passed by the Company Law Board in accordance with law.

sd/-

P. R. RAMACHANDRA MENON,
JUDGE

sd/-
K. HARILAL,
JUDGE

kmd