

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 29 – 09 – 2015

Coram :

The Honourable Smt. Justice PUSHPA SATHYANARAYANA

Company Appeal Nos. 10 and 11 of 2015

and

M.P. Nos. 1 and 2 of 2015 in Company Appeal No. 11 of 2015

1. Mekuba Petroleum India Private Limited
4D/2 Third Main Road
Ambattur Industrial Estate
Chennai – 600 058
2. S. Balakrishnan
3. S. Kumar
4. Meena Subramanian ... Appellants in both Appeals

vs.

1. Wynn's Mekuba India Private Limited
No. 4D/2 Third Main Road
Ambattur Industrial Estate
Chennai
2. Wynn's Belgium NV
Industrie Park – West 46
B-9100 ST – Niklaas
BE 404.615.605
3. Wynn Oil Company

No. 1050 W, Fifth Street
PO Box No. 9510, Azusa
California 91702.9510, USA

4. Illinois Tool Works Inc.
3600 West Lake Avenue
Glen View
Illinois 60026, USA
5. ITW India Limited
Plot No. 34 to 37, Phase – 2, IDA
APIIC Pashammylaram
Medal District 502307, A.P.
6. Paul Middel ... RR 1 to 6 in both Appeals
7. Kalyani Balakrishnan
8. Subramanian Sundaresan ... RR 7 & 8 in C.A.No. 11 of 2015

Appeals under Section 10F of the Companies Act, 1956 against the common order dated 14.5.2015 by the Company Law Board, Chennai, in C.A. Nos. 3 and 4 of 2014 respectively in C.P. No. 15 of 2008.

For Appellants : Mr. A.K. Mysamy
for M/s A.K. Mysamy Associates

For R 2 : Mr. T.K. Seshadri, SC
for Mr. T.K. Bhaskar

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COMMON JUDGMENT

These are appeals filed under [Section 10F](#) of the Companies Act, 1956, challenging the common order passed by the Company Law Board in interim applications, viz., C.A. Nos.3 and 4 of 2014 respectively, in C.P. No. 15 of 2008, instituted under [Sections 397](#) and [398](#) of the Companies Act, 1956.

2. For the sake of convenience and for easy reference, the parties are hitherto described as per their ranking in Company Petition No. 15 of 2008.

3. Heard Mr. A.K. Mylsamy, learned Senior Counsel for the appellants and Mr. T.K. Seshadri, learned Senior Counsel appearing for the second respondent and perused the records.

4. The first petitioner Mekuba Petroleum India Private Limited [hereinafter, referred to as 'Mekuba'], represented by its shareholders and directors, having an authorized capital of Rs.50 Lakhs consisting of 50,000 equity shares of Rs.100/- each, entered

into a Foreign Collaboration Agreement on 02.6.1997 with the respondents 2 and 6, viz., Wynn's Belgium NV and one Paul Middel from Dubai respectively, agreeing to incorporate the first respondent company Wynn's Mekuba India Private Limited [hitherto called 'Company'] and accordingly, it was incorporated on 24.6.1997 in accordance with the Foreign Collaboration Agreement. The authorized capital of the first respondent company is Rs.35 Lakhs. Under the Foreign Collaboration Agreement, which is marked as Annexure – D, the parties agreed to set up a Joint Venture Company to manufacture and market a wide range of additives for automotive oils and fuels, viscosity improvers, anti-knock preparations for gasoline and diesel engines, emission control products and anti-corrosion preparations for automobiles and other engines and also provision of associated and incidental services.

5. As per the Foreign Collaboration Agreement, the second respondent Wynn's Belgium holds 51% equity shares while the petitioner and sixth respondent Paul Middel [for short, 'Paul'] having 40% and 9% respectively. It was further agreed as per the FCA that the Board of the Company shall initially have 4 Directors and not

more than 7 Directors shall be appointed from Mekuba and Wynn's Belgium in equal numbers in which the sixth respondent will be a Director.

6. The case of the petitioners, a subsidiary of Wynn's Belgium, is that Mekuba, after the incorporation, at the time of commencing its direct sales in 1998, sought for a term loan of Rs.41 Lakhs from Wynn's Belgium and accordingly, after obtaining necessary sanction from the Reserve Bank of India, Rs.41 Lakhs was disbursed on 29.8.1998, which has to be repaid on 31.01.2005. While so, during December 2004, the third respondent Wynn Oil Company, the Holding Company of Wynn's Belgium, was taken over by the fourth respondent Illinois Tool Works Inc., USA, and as such there was a change in the management of Wynn Oil Company. After change of management of Wynn Oil Company, Holding Company of Wynn's Belgium which is entitled to have equal representation on the Board of the Company, as the major shareholder, it directed to change M/s Sundaresan & Subramanian, Chennai, statutory auditor of the Company. Accordingly, the petitioners and the Company agreed for the change of auditors and appointed M/s Deloitte, Hashkins and Sells

6

[hereinafter, called 'Deloitte'] as statutory auditors of the Company for the year 1996-2007. That being so, on 28.01.2007, in a meeting, the President of ITW Performance Polymers International, which controls the business of Wynn Oil Company and the representatives of ITW, U.K. and India decided to terminate the Foreign Collaboration Agreement and not to use the trade name Wynn's expressing their desire to take possession of the moulds and inventory.

7. It is also the case of the petitioners that from February 2007, Wynn's Belgium stopped shipping fuel, machines, raw materials and also the other requirements sought for by them. Further, on 19.02.2007, Wynn's Belgium issued a counsel notice under Section 434 of the Companies Act, 1956, marked as Annexure – H, to the Company calling upon it to pay a sum of Rs. 1,22,83,657/- for supply of raw materials and the same was replied by the petitioners in detail, on 23.02.2007 stating that the amount due was only Rs.43 Lakhs. It is stated by the petitioners that after receipt of the report of Deloitte, Wynn's Belgium, without convening a Board Meeting, withdrew its nominee and did not take any steps to find out the correctness of the

report of Deloitte despite their endeavour to provide all the information to Deloitte. Subsequently, Deloitte also resigned its office as statutory auditor of the company by its letter dated 23.01.2008 without completing the audit.

8. In such situation, Wynn's Belgium filed C.P. No. 154 of 2007 seeking to wind up the Company on the ground that it was unable to pay its debts. This Court, by order dated 21.01.2008, directed the Company to pay a sum of Rs.15 Lakhs per month on or before 15th of every month, till the entire outstanding is liquidated, commencing the first instalment from 15.3.2008. In pursuant to the same, to show the *bona fide*, the Company credited Rs.10 Lakhs to the account of Wynn's Belgium. The main grievance of the petitioners is that Wynn's Belgium, with a view to enter into the market in India and sell its products under the brand and trade name of Wynn's, has initiated extreme steps of terminating the collaboration agreement, which is wrongful and detrimental to the interest of the Company and its minority shareholders.

9. Alleging that the termination of the Foreign Collaboration

Agreement and the conduct and the scheme adopted by Wynn's Belgium as a major shareholder of the Company, are *mala fide*, the petitioners filed Company Petition No. 15 of 2008 before the Company Law Board for the following reliefs:-

- (a) To declare the termination of Collaboration Agreement dated 02.6.1997 by the second respondent in its letter dated 07.02.2008 is *mala fide* and the same is null and void;
- (b) To direct the parties to faithfully implement the Collaboration Agreement dated 02.06.1997;
- (c) To pass an order of injunction, restraining the 5th respondent from carrying on the business which the Company has been carrying on, using the Trade and brand name of Wynn's in India.
- (d) To direct the second respondent to sell its shares of the first respondent to the Company since it has committed breach of terminating the Collaboration Agreement unilaterally; and
- (e) To direct the Company to market its products under

Wynn's name.

10. Respondents 2, 4 and 5 filed counter statements separately denying the averments made in the Company Petition mainly stating that the Company Petition is not maintainable. According to the second respondent, Clause 7.6 of the FCA has not been incorporated in the Articles of Association of Wynn's Mekuba and hence, it is not enforceable.

11. Pending Company Petition No. 15 of 2008, the second respondent Wynn's Belgium filed an application being C.A. No. 192 of 2012 under Regulation 44 of the Company Law Board Regulations 1991 seeking for a direction to the Company to call a General Meeting for that year and comply with the provisions of Section 257 of the Companies Act and also to vote its proposal to appoint one Jozef Louis Van den dossche and one Pinky Hooda as Directors of the Company and in this regard, a notice also seemed to have been issued on 06.09.2012, which was received by the Company fourteen days before the proposed Annual General Meeting on 27.9.2012. The Company Law Board, Chennai Bench, after contest, on

consideration of the materials placed thereon, allowed the application by order dated 29.5.2013 directing the Company to consider the notice issued by Wynn's Belgium proposing the appointment of Directors as per the notice by convening the General Meeting of the Company.

12. The second respondent Wynn's Belgium also filed another application being C.A. No. 2 of 2014 under Regulation 44 of the Company Law Board Regulations 1991 seeking for a direction to the Company to include the agenda for discussion in the 17th AGM on 27.9.2014, the matter of appointment of Mr. Tim Margriet Georges Verhaeghe and Mr. Jose Berasategui, being its nominees, as directors of the Company and also to appoint a neutral Observer to oversee the proceedings of the AGM.

13. The Additional Principal Bench, Chennai, of the Company Law Board, while declining to interfere with the powers of the shareholders to be exercised in the AGM, by order dated 26.9.2014, directed the Company to consider the appointment of nominees of the second respondent as one of the agenda in the 17th AGM on 27.9.2014

besides appointing one Kanna, Bench Officer of the Bench as Independent Observer to oversee the proceedings and adjourned the C.A. to 20.11.2014.

14. That being so, the petitioner Mekuba filed an application being C.A. No. 3 of 2014 on 17.11.2014 before the Company Law Board praying for interim injunction restraining the second respondent's nominees, viz., Tim Margriet Georges Verhaeghe and Jozef Louis Van den bossche, from functioning or exercising any powers as Directors of the first respondent Company and the same was resisted by the second respondent Wynn's Belgium.

15. Simultaneously, Wynn's Belgium also filed application C.A. No. 4 of 2014 on 12.12.2014 seeking for a direction to the Registrar of Companies to accept and take on record the eForm DIR-12 with respect to the changes effectuated in the Board of Directors of the Company at the 17th AGM. The said application was resisted by the Company through the second appellant herein.

16. The Chennai Bench of the Company Law Board, after hearing the learned counsels for the parties, vide common order dated

14.05.2015, dismissed the application C.A. No. 3 of 2014 filed by the petitioner Mekuba holding that the provisions of Section 160 of the Companies Act have not been complied with while allowing the application filed by the second respondent Wynns Belgium. Aggrieved by the same, the petitioner Mekuba has preferred the instant Company Appeals.

17. Learned counsel appearing for the appellants contended that the second respondent Wynn's Belgium, which is the holding Company of the first respondent Wynn's Mekuba, is acting detrimental to the interest of the Company. It is also the contention of the learned counsel for the appellants that the nomination for appointment of Directors by the second respondent is not in accordance with Section 160 of the Companies Act, 2015.

18. Per contra, learned counsel for the second respondent submitted that since the appellant did not consider the notice issued by the second respondent under Section 257 of the companies Act, 1956 for considering the appointment of its nominees, it filed an application C.A. No. 192 of 2013 and the same was allowed directing

the first respondent Company to consider the said notice. The further contention of the second respondent is that since the said notice was not considered by the first respondent Company despite several reminders, an application was filed for a requisition meeting. According to the learned counsel, since the second respondent is a major shareholder in the first respondent company holding more than 51% shares and was not having any representation in the Board of the first respondent Company, it became incumbent to appoint its nominees and to represent itself in the Board of the first respondent Company.

19. For better appreciation of the case, before going into the merits, it would be relevant to re-produce Section 160 of the Act:-

“160. Right of persons other than retiring directors to stand for directorship.-- *(1) A person who is not a retiring director in terms of section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he, or some member intending to propose him as a director, has, not less than fourteen days*

before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or, as the case may be, the intention of such member to propose him as a candidate for that office, along with the deposit of one lakh rupees or such higher amount as may be prescribed which shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a director or gets more than twenty-five per cent. of total valid votes cast either on show of hands or on poll on such resolution.

(2) The company shall inform its members of the candidature of a person for the office of director under sub-section (1) in such manner as may be prescribed."

20. The fact remains that the first respondent Company has been carrying on business from the date of incorporation. Subsequently, it is seen that pursuant to the change in the management of the affairs of the third respondent Wynn Oil Company, holding company of the second respondent, with a view to carry on

identical business, the second respondent had withdrawn its nominee of its own accord in February 2007 and thereafter, terminated the Foreign Collaboration Agreement unilaterally on 07.02.2008 as the first respondent Company refused to agree for termination of the Foreign Collaboration Agreement and refused to delete the "Wynns" name from its name besides initiating winding up proceeding against the Company. It is not disputed that there is a prohibition clause in the Foreign Collaboration Agreement as per which the second respondent or its nominees or its associates should not carry on the same business that the first respondent company is carrying on in India. Although the second respondent had a right to appoint its nominee on the Board of the company, in view of strained relationship between the parties and the prohibition clause contained in the Foreign Collaboration Agreement, it is not proper to withdraw the first respondent's Directors and to nominate its own persons on the Board without any notice as it would result in conflict of interests and would not be in the interest of the company. As such, the said action of the second respondent, in the considered opinion of this Court, is *mala fide* and vindictive.

21. Further more, as per Section 160 of the companies Act, 2013, notice has to be issued 14 days prior to the meeting for the appointment of Director together with the deposit of Rs.1 Lakh for the purpose of considering the proposal at the meeting. In the instant case, admittedly, the nomination letter dated 26.9.2014 along with the requisite sum of Rs.1 Lakh deposit were handed over only at the meeting on 27.9.2014. Also, it transpires that on 26.9.2014, the Company Law Board had not dispensed with the mandatory requirement of 14 days notice of the appointment and the deposit of Rs.1 Lakh per Director. On the other hand, it had only directed the Company to consider the proposal for appointment of nominees of the second respondent as Directors. As regards the non-compliance of the provisions of Section 160 of the Companies Act, 2013, the Company Law Board, having recorded a specific finding that the provisions of Section 160 of the companies Act, 2013 were not complied with, dismissed the challenge of appointment of nominees in C.A. No. 3 of 2014 and also directed the first respondent Company to file necessary e-forms to implement the resolutions.

22. At this juncture, it would be worthwhile to refer to

Company Application No. 2 of 2014 filed by the second respondent Wynn's Belgium before the Company Law Board wherein in paragraph 4, it has sought for the relief of dispensing with 14 days notice. The relevant passage in this regard is usefully re-produced hereunder:-

“.... In light of the aforesaid circumstances, it is essential that this Hon'ble Bench issues a direction to the Respondent No. 5 to include additional agenda items with respect to appointment of Mr. Tim Margriet Georges Verhaeghe and Mr. Jose Berasategui as nominee directors of the Applicant on the Board of the Company, in the notice dated August 19, 2014 convening the seventeenth annual general meeting on September 27, 2014 dispensing with 14 days notice requirement in respect of the same.”

23. Significantly, inspite of specific pleading by the second respondent to dispense with the mandatory requirement of issuing 14 days notice, the Company Law Board has not exercised its discretion

and such order passed by the Company Law Board without dispensing with the notice, will not hold good. It is also not the reasoning of the Company Law Board that the appellant raised any dispute over its discretion to dispense with the notice. It is manifestly clear that the Company Law Board had adopted a callous attitude and chose not to go into the issue in detail. In any view of the matter, since the learned Company Law Board did not assess the merits of the case and did not answer the relief sought with regard to dispensation of the mandatory notice, making an endeavor to do the same in this appeal, in my considered view, is not appropriate since original Court viz., the Company Law Board here, has virtually made no effort in that regard. Therefore, there is no other go except to remit the matter for fresh consideration by the Company Law Board, Southern Region Bench, Chennai.

For the foregoing reasons, the common order impugned in these appeals is set aside and the matter is remitted to the Company Law Board to pass orders on the petitions in accordance with the statutory provisions. No costs. Consequently, connected Miscellaneous Petitions are closed.

29 – 09 – 2015

Index : Yes / No

Internet : Yes / No

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PUSHPA SATHYANARAYANA, J.

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