

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 62 OF 2016**

1. M/s. Candolim Developers Pvt. Ltd.,
a Company incorporated under the
Companies Act, with its registered
Office at Miramar, Panaji Goa.
Through its Director
Shri Sunil Thukral
 2. Mr. Sunil Thukral,
Director of Candolim Developers Pvt. Ltd.,
FT-2, Block -B1,
Adwalpalkar Shelter,
Caranzalem,
Panaji Goa.
- ... Appellants

Versus

1. Mr. Pravin Grover,
Major of age,
(Since Deceased)
1(a) Kum. Saba Grover
 2. Smt. Amita Grover,
Major,
 3. Shri Sahil Grover,
Major,
All r/o B-64, Lajpat Nagar,
Part II FF, Opp. Aria Samaj Mandir,
New Delhi 110 024,
 4. Mr. Anant Volvoikar,
Director of Candolim Developers Pvt. Ltd.,
Major of age,
Residing at H.No.151,
Post Taleigao,
Near T. B. Hospital,
Chincholim Goa.
- ... Respondents

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. Vinod Vishnu Korgaonkar, Advocate for the appellants.

Mr. Anthony Joe D'Silva, Advocate for the respondent nos.1(a), 2 & 3.

Respondent no.4 present in person.

**Coram:- F. M. REIS &
NUTAN D. SARDESSAI, JJ.**

Date:- 13th October, 2016

ORAL JUDGMENT (Per F. M. Reis, J)

Heard Mr. J. E. Coelho Pereira, learned Senior Counsel appearing for the appellants and Mr. A. D'Silva, learned counsel appearing for the respondent nos. 1(a), 2 and 3.

2. Admit. Heard forthwith with the consent of the learned counsel.

3. The notice indicated that the matter would be disposed of finally at the stage of admission.

4. On the last date of hearing, an opportunity was given to the respondent no.4 who was not represented to appear but however, none

appears for the said respondent today as well.

5. The challenge in the above appeal is to the order passed by the learned Civil Judge Senior Judge, Panaji, dated 12.11.2013 whereby the plaint filed by the appellants against the respondents came to be rejected in terms of Order VII Rule 11(d) of the CPC.

6. Mr. Coelho Pereira, learned Senior Counsel appearing for the appellants has pointed out that the learned Judge has misconstrued the provisions of Section 10GB of the Companies Act, 1956 to come to the conclusion that the jurisdiction of the Civil Court is barred. The learned Senior Counsel further pointed out that the suit filed by the Company as well as two directors of the Company is on the ground that there was a fraud committed by the respondent no.1 whilst running the affairs of the plaintiff no.1/Company. It is further pointed out that documents were not available but however documents were fabricated to defraud. Accordingly, the following reliefs were sought.

(a) For a decree and order of this Hon'ble Court declaring that Form No.5 filed by the defendant no.1 at annexure-Q before the Registrar of Companies, purporting to be the

Share Capital from 51% to 70% as null and void and/or inoperative and order, it to be cancelled.

(b) For a Judgment and decree declaring that Form No.32 filed at Annexure-T and Annexure-U by the defendant no.1, before the Registrar of Companies, purporting to intimate the Registrar of Companies, that plaintiffs no.2 and 3 resigned as Directors and purporting to appoint defendant no.2 and defendant no.3 as Directors of the said Company, as null and void and/or inoperative and order it to be cancelled.

(c) For a judgment and decree, directing the defendant no.1 to recoup and/or pay to the said Company an amount of Rs.6,53,35,699.01 detailed at Annexure-Z-17 along with interest due thereon at the rate of 18% as from the date of institution of the suit until its effective payment to the Company.

(d) For a Mandatory injunction directing the defendant no.1 to hand over the vehicle bearing no.GA-01-C-8001 belonging to the said company forthwith.

(e) For a permanent injunction, restraining the defendants no.1, 2 and 3 from acting and/or posing themselves as Directors of the Company and/or causing any interference to plaintiff no.2 and 3 in the management of the affairs of the said company as its directors.

(f) For a Mandatory injunction directing the defendant no.1 to hand over the documents listed at Annexure-Z-18 to the plaintiffs.

7. The defendants filed an application for rejection of plaint on the ground that the jurisdiction of the Civil Court is barred under Order VII Rule 11(d) of the CPC which came to be allowed by the impugned order dated 12.11.2013.

8. Mr. D'Silva, learned counsel appearing for the respondent nos. 1(a), 2 and 3 has pointed out that the suit is barred under Section 10GB of the Companies Act as according to him on plain reading of the plaint, the allegations by the Company cannot be adjudicated under Sections 397 and 398 of the Companies Act. The learned counsel further pointed out that the learned Judge has rightly passed the impugned

order. In support of his submissions, the learned counsel has relied upon the judgment of the Apex Court reported in ***(2008) 3 SCC 363 in the case of V. S. Krishnan and others V/s Westfort Hi-tech Hospital Ltd., & Ors.***

9. On the other hand, Mr. Coelho Pereira, learned Senior Counsel has relied upon the judgment reported in ***(2003) 6 SCC 220 in the case of Dwarka Prasad Agarwal and Anr. V/s Ramesh Chander Agarwal and others.***

10. We have considered the submissions of the learned Counsel and we have also gone through the records. Whilst examining an application under Order 7 Rule 11 of the Civil Procedure Code, the defence of the defendants in the W.S. cannot be looked into but only the plaint. The suit is filed for the aforesaid reliefs by the Company as well as other Directors of the Company. It is the contention of the appellants that the plaintiff no. 2 has blood relationship with the Respondent no. 1 and that he had issued a General Power of Attorney which has been misused. It is also contended that the Respondent no.1 represented to the Appellant no.2 that the Company required money to complete the project as there was good demand for Block A. The main contention

prima facie is to claim that there was mistrust and misuse of the authority by the Respondent no.1. Looking into the allegations in the plaint, the reliance to the provisions of the Companies Act and the judgment in the case of **V. S. Krishnan & Ors** (supra) is not applicable to the facts of the present case. The exclusion of jurisdiction cannot be readily inferred. Section 10GB has been inserted by the Companies (Second Amendment) Act, 2002 in order to provide for two main matters. One of them is that no Civil Court is to have any jurisdiction to entertain any suit or proceeding in respect of any matter vested in the Tribunal or Appellate Tribunal for its determination. The second is that no injunction is to be granted by any Court or other authority in respect of any action taken or proposed to be taken in exercise of powers conferred on the Tribunal or Appellate Tribunal. The Code of Civil Procedure, states in Section 9 that the Civil Courts shall have jurisdiction to try all suits of a civil nature except suits of which cognizance is expressly or impliedly barred. The scope of an exclusion of jurisdiction of the Civil Code is not to be readily inferred but that such exclusion must either be explicit, expressed or clearly implied.

11. The learned Single Judge of this Court in the Judgment reported in **(2006) 1 Bom. C.R. 328** in the case of **Sahara Fabrics Pvt. Limited & Ors V/s Smt. Kailash w/o Ramprashad Mehra & Anr.**, it has been observed at paras 7, 8, 9, 10, 13 and 14 thus :

“ 7. In **Dhulabhai’s case (supra)** the Supreme Court was considering the question of exclusion of jurisdiction of the civil court to entertain a suit in the context of section 17 of the M.B. Sales Tax Act which bars the jurisdiction of the civil court to entertain certain proceedings. The principles laid down by the Supreme Court which have a bearing on the present case are as under:

"(1) Where the statute gives a finality to the orders of the special tribunals the civil courts’ jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the

inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether, remedies normally associated with action in civil courts are prescribed by the said statute or not.

(3) x x x x x x

(4) x x x x x x

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.

8. In **Santosh Poddars' case (supra)**, the Division Bench of this court was dealing with a suit where the plaintiffs had prayed for a declaration that

defendant 1 therein had ceased to be a director of Poddar Tyres Limited, defendant 3 therein, with effect from 31/12/1990. They sought a further declaration that all meetings of the Board of Directors of defendant 3 company held after 31/12/1990 and in particular, the meetings allegedly held on 23/3/1991 and 10/6/1991 are illegal, invalid, nonest and the resolutions passed at these meetings are illegal, invalid and nonest and not binding on defendant 3 company or the plaintiffs. A further declaration was sought that they continued to be the directors of defendant 3 company and their purported cessation as such directors is invalid, illegal, nonest and void. In yet another suit, similar declaration was sought. The suits were filed in the City Civil Court at Bombay. The plaintiffs had taken out a notice of motion for interim relief. In the affidavits in reply filed by the defendants, a preliminary objection was taken to the jurisdiction of the City Civil Court to entertain and try the suits. The City Civil Court framed a preliminary issue as to whether it has jurisdiction to entertain and try the suit in view of the provisions of section 10 of the said Act read with the Notification dated 29/5/1959.

This court referred to sections 2(11) and 10 of the said Act and came to the conclusion that whenever there is any reference under the said Act to any proceedings before a Court under that Act, (other than proceedings relating to an offence under

the Act), the court which will have jurisdiction shall be the High Court or, if there is the requisite Notification, the District Court. However, there is no ouster of the jurisdiction of the City Civil Court in all cases where the provisions of the said Act may be attracted. It was further observed that it is only in respect of those proceedings which are expressly contemplated under the said Act under any specific provision that the court which is referred to in that section would be the special court, namely the High Court or the Notified District Court. In all other cases, ordinarily the civil courts would continue to have jurisdiction. In this behalf, the Division Bench placed reliance on the judgment of the single judge of this court in **Rao Saheb Manilal Gangaram Sindore v. M/s. Western India Theatres Ltd., LXIV Bom.L.R. 532.**

9. The Division Bench also referred to **Dhulabhai's case (supra)** and finally observed as under:

"From the provisions of the Companies Act, we do not find anything by which we can infer that the jurisdiction of the Civil Court is ousted. The very fact that section 2(11) is part of the definition clause under the Companies Act under which a Court is defined to mean the Court as prescribed under section 10, clearly shows that whenever the term 'the court' is used in any section of the Companies Act, the term 'Court' will have to be interpreted with reference to section 10. These sections will have no

application where any general civil suit is filed. The definition clause is attracted only when resort is had to a proceeding under the Companies Act under a section which prescribes resort to a Court. Under the Companies act, powers are conferred not only on Courts but also on other authorities like the Company Law Board, the Central Government and the Registrar. Where a power is vested by the Act in a Court, that Court has to be ascertained with reference to section 10. Beyond so specifying the Court competent to deal with such a matter, section 10 cannot be construed as investing the Company Court with jurisdiction over every matter which may arise in respect of a Company or as divesting Civil Courts of their jurisdiction."

10. The trial court has placed reliance on this judgment and I find the reliance placed on this judgment to be apt. It is pertinent to note that in that case also, the declaration was sought that all meetings of the Board of Directors of defendant 3 company and the resolutions passed at these meetings are illegal, invalid and nonest and not binding on defendant 3 company or the plaintiffs and defendant 1 had ceased to be a director of Poddar Tyres Limited. A further declaration was also sought that the plaintiffs continued to be the directors of defendant 3 company and their purported cessation as such directors is invalid, illegal, nonest and void. In the present case also, a declaration is sought that the appointment of

defendants 3 and 4 as directors of defendant 1 is illegal, null and void and of no consequence whatsoever and any acts, deeds and/or things of any nature whatsoever done by defendant 1 company in pursuance of the alleged appointment of defendants 3 and 4 as the directors and/or any other act, deed, thing done by defendants 3 and 4 in exercise of powers in the alleged capacity as directors of defendant 1 is illegal, null and void and not binding. A similar declaration is sought that any resolutions allegedly passed in any purported meeting of shareholders or of Board of Directors of defendant 1 allegedly held by the Kapoor family or any of them is illegal, null and void and of no consequence whatsoever.

13. In that case, the Division Bench was considering section 155 of the said Act. Section 155 of the said Act vests jurisdiction in the company judge, and impliedly ousts the jurisdiction of the civil court in respect of rectification. After referring to **Raja Ram Kumar Bhargava v. Union of India, AIR 1988 SC 752**, this court observed that this judgment is an authority for the proposition that if a pre-existing right in common law is recognised by the statute and a new statutory remedy for this enforcement provided, without expressly excluding the civil court's jurisdiction, then both the common law and the statutory remedies might become

concurrent remedies. This court then referred to **Rao Saheb's case (supra)** and held that for the relief contemplated by section 155, a suit was the primary remedy under the general law. The relief contemplated by that section was one which was available at common law. Section 155 merely provided a statutory remedy. Its object was not to whittle down or abrogate the procedure by way of suit for getting the relief contemplated by that section.

14. After taking a resume of several judgments on the point, this court observed that the authorities on the subject do recognise the common law right of a shareholder to seek rectification of the register of members, and the jurisdiction of the civil court in appropriate cases is not barred where complicated questions of law and fact arise in an application for rectification under section 155 of the said Act and it is not possible for the court to grant relief without first adjudicating the disputed questions of law and fact. Relying on these observations, it was urged by the learned counsel for the petitioners that the plaintiffs have to first go to the Company Law Board and if the Company Law Board comes to the conclusion that disputed questions of law and facts arise then the Company Law Board can relegate the plaintiffs to the civil court.”

12. Looking into the observations made in the said Judgment based on the Judgment of the Division Bench of this Court and the allegations made in the plaint, we find that the learned Trial Judge was not justified to come to the conclusion that the suit is barred in terms of Order 7 Rule 11 of the Civil Procedure Code. The jurisdiction of the Civil Court is not barred taking into account the relief sought by the Appellants which, prima facie, suggests that they are under the general law applicable to the facts of the case. The suit is also filed on behalf of the Complainant who is the Appellant no. 1 herein. Whether the Company has been duly represented is a matter which has to be examined on its own merits in accordance with law and not while examining the application for rejection. The question as to whether the suit itself is maintainable will have to be considered looking into the defence of the Respondents which exercise cannot be carried out whilst considering an application under Order 7 Rule 11. In such circumstances, the learned Judge was not justified to pass the impugned Order and, as such, the impugned Order 12.11.2013 deserves to be quashed and set aside.

13. In view of the above, we pass the following :

ORDER

- (i) The appeal is partly allowed.
- (ii) The impugned order dated 12.11.2013 is quashed and set aside.
- (iii) The Special Civil Suit No.122/2000 is restored to the file of the learned Civil Judge Senior Division, Panaji.
- (iv) The learned Judge is directed to proceed and decide the suit in accordance with law.
- (v) Needless to say that all the contentions of the respondents on merits are left open.
- (vi) The appeal stands disposed of accordingly.

NUTAN D. SARDESSAI, J.

F. M. REIS, J.

at*