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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25-4-2016

CORAM:

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN

Company Appeal Nos.15 and 19 of 2011

Dr.K.Balasundaram

...Appellant/Petitioner
in C.A.No.15/2011 & R1/
Petitioner in C.A.No.19/2011

1.K.Venkatesh

2.K.Narayanasamy

...Appellants/R2&R4 in CA.No.19/
2011 & R2 & R4/Respondents in
CA.No.15/2011

Vs

1.G.K.Alloy Steels Private Limited,
Having its registered office at
Velayutham, Avinashi,
Coimbatore - 641 654

..R1/Respondent in CA.No.15/2011
& R2/R1 in CA.No.19/2011

2.Mr.E.Gopalakrishnan

..R3/Respondent/R3
in CA.Nos.15&19/2011

3.Mr.N.Sujay Senthil

..R5/respondent in CA.No.15/2011
& R4/R5 in CA.No.19/2011

5.Mr.N.Siranjeevi Saravanan

..R6/Respondent in CA.No.15/2011
& R5/R6 in CA.No.19/2011

6.M/s.Coramandal Engineering
Company Limited, Parry House,
3rd Floor, No.43, Moore Street,
Chennai-1.

..R7/Respodent in CA.No.15/2011
& R6/R7 in CA.No.19/2011

Company Appeals filed under Section 10F of Companies Act,
1956, against the order dated 10.6.2011 in C.P.No.7 of 2009
passed by the Company Law Board, Chennai Bench.

For Appellant in C.A.No.15/2011 &

For 1st Respondent in C.A.No.19/2011 : Mr.V.Raghavachari



For Appellants in C.A.No.19/2011 &
For Respondents 2 & 4 in C.A.No.15/2011 :Mr.R.Murari, SC

COMMON JUDGMENT

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These Company Appeals arise out of an order passed by the Company Law Board, Chennai Bench, in Company Petition No.7 of 2009 filed by the appellant in the first of these appeals, under Sections 397 and 398 of the Companies Act, 1956.

2. I have heard Mr.V.Raghavachari, learned counsel for the appellant in Company Appeal No.15 of 2011 and first respondent in Company Appeal No.19 of 2011, Mr.R.Murari, learned Senior Counsel for the respondents 2 and 4 in Company Appeal No.15 of 2011 and the appellants in Company Appeal No.19 of 2011.

3. The company in question namely G.K.Alloy Steels Private Limited, was incorporated on 23.10.1980, as a closely holding private limited company. The annual return of the company as on 30.9.1993 shows that the capital of the company was divided into 35,000 Equity Shares of Rs.100/- each. This 35,000 Equity Shares were held by (1) Mr.G.Kandaswamy (HUF); (2) Three sons of Kandaswamy by name K.Narayanaswamy, K.Balasundaram and K.Venkatesh; (3) The wife of Kandaswamy by name Mrs.K. Lakshmiammal; (4) Mr.G.Kandaswamy as individual; (5) The grandson of Kandaswamy by name Master Sujay Senthil, S/o K.Narayanaswamy and two group of Companies.

4. The head of the family G.Kandaswamy died on 17.4.1999. But, it appears that the company was making losses even as on 31.3.1998. The appellant in the first of these appeals was a Medical Practitioner, who had settled at United Kingdom. After the death of his father, he issued a legal notice on 14.7.1999 to his brothers, asking for particulars of the properties and seeking partition. The brothers as well as the mother issued a legal reply to the appellant. It appears that upto the year 1998, two sons namely K.Venkatesh and K.Narayanaswamy were the Directors of the company. K.Narayanaswamy resigned from Directorship on 4.7.2001 and in his place E.Gopalakrishnan was appointed as an Executive Director. The registered office of the company was shifted on 4.7.2001 and it appears that in an Annual General Meeting held on 28.9.2001, a Special Resolution was passed, inserting certain restrictive Clauses in the Articles of Association.

5. It appears that there was another company by name Akkammal Steels Private Limited, which was also closely held by the members of the same family. Both these companies namely Akkammal Steels Private Limited as well as G.K.Alloys Steels Private Limited had borrowed money from Dena Bank and State Bank of India. Dena Bank filed O.A.No.2277 of 2001 on the file of the



Debts Recovery Tribunal-I, Chennai against Akkammal Steels Private Limited and its Directors K.Narayanaswamy and K.Venkatesh, for recovery of a total amount of Rs.7,13,53,075.76/- and for the sale of the mortgaged and hypothecated properties as described in Schedules A to E of the Original Application. Thereafter, the matter got transferred to the Debts Recovery Tribunal, Coimbatore and renumbered as T.A.No.499 of 2002. In the said Application, G.K.Alloy Steels Private Limited, which is a company, in respect of which, the present appeals arise, was also made the fourth respondent, since that company had guaranteed the repayment of the loan availed by Akkammal Steels Private Limited and they had also leased out a portion of the property mortgaged to the Bank.

6. Similarly, the State Bank of India filed an application in O.A.No.32 of 2002 on the file of the Debts Recovery Tribunal, Coimbatore as against G.K. Alloy Steels Private Limited and its Directors K.Narayanaswamy, K. Lakshmiammal and K.Venkatesh, for the recovery of a sum of about Rs.1.49 Crores and for the sale of the pledged and hypothecated machineries listed in the schedules to the application.

7. Due to the action initiated by both the banks, the company took a decision in an Extraordinary General Body Meeting held on 21.11.2005, for the sale of a land of an extent of about 3.34 acres. In pursuance of the said resolution, the said property was sold under two different sale deeds dated 9.12.2005 and 20.12.2005, to one N.Siranjeevi Saravanan, who is none else than the son of K.Narayanaswamy (one of the brothers of the appellant and one of the Directors of the Company). While, under the first sale deed dated 9.12.2005, the land of an extent of about 79 cents was sold for Rs.2.50 lakhs, under the second sale deed, a land of an extent of acres 2.55 was sold for a sum of Rs.25.00 lakhs.

8. On 26.12.2005, the Dena Bank issued a notice under Section 13(2) of the SARFAESI Act to Akkammal Steels Private Limited. In the meantime, a petition for winding up was filed on the file of this Court in C.P.No.70 of 2002 by one of the creditors of G.K.Alloy Steels Private Limited. By an order dated 22.3.2006, this Court allowed the petition for winding up and directed the Official Liquidator attached to this Court to take over the assets and interests of the company. Paper publications were also directed to be effected.

9. As against the said order, an appeal was filed by the company in OSA.No.194 of 2006. In the appeal, the company offered to make payment of the entire liability to the creditors. The amount payable was arrived at as Rs.1,13,842.71. Therefore, on the basis of the undertaking given by the company to pay the amount within two weeks, the order for winding up was



10. Thereafter, a Board Meeting was convened on 18.6.2007 for convening an Extraordinary General Body Meeting for the sale of the land of an extent of 3.29 acres. The Extraordinary General Body Meeting was convened on 12.7.2007 and the General Body approved the sale.

(i) to declare the sale deeds dated 9.12.2005, 20.12.2005 and 21.7.2005 executed in favour of the two sons of Narayanaswamy as illegal, non est and void in law;

(iii) to direct an investigation into the affairs of the company and surcharge the respondents to make good the loss caused to the company through their various acts of mismanagement;

(v) to remove K.Venkatesh and E.Gopalakrishnan from the Directorship of the company; and

12. Pending disposal of the main petition praying for various reliefs as aforesaid, the appellant in the first of these appeals also prayed for the grant of several interim reliefs. One such prayer for interim relief was made in Comp.A.No.42 of 2009 for the appointment of a Commissioner to authenticate the statutory registers of the company. By an order dated 30.11.2009, the Company Law Board allowed the said application Comp.A.No.42 of 2009 and appointed one Mr.Ranji, Chartered Accountant as Commissioner to authenticate the statutory registers of the company from 1.1.2005 till October 2009 and to submit a report. The respondents were also directed to furnish all the extracts of the Meetings of the Board and the General Body from January 2005 to October 2009.



13. Yet another application in Comp.A.No.84 of 2010 was filed by a company by name M/s.Coramadel Engineering Company Limited, which had entered into Joint Development Agreement, seeking permission of the Company Law Board to proceed in terms of the Joint Development Agreement. The said application was allowed by the Company Law Board by an order dated 12.7.2010 subject to three directions namely:

(a) that all transactions are to be routed through a single bank account;

(b) that the respondents will furnish to the appellant herein, a periodical statement of the sales made, money realised and expenses incurred; and

(c) that the respondents shall keep the factory, land, building and plant and machinery unencumbered until further orders.

14. As against the order passed by the Company Law Board in Comp. A.No.84 of 2010, at the instance of the Joint Development Agreement holder, the appellant herein filed an appeal in Company Appeal No.21 of 2010 on the file of this Court. While ordering notice in the said appeal on 13.8.2010, this Court granted an interim order of status quo. Subsequently, the appeal was allowed by a final order dated 22.9.2010 with a direction to the Company Law Board to hear the main company petition and to pass appropriate orders. In pursuance of the said order, the Company Law Board took the main petition in C.P.No.7 of 2009 itself for hearing and framed four issues for consideration. They are:

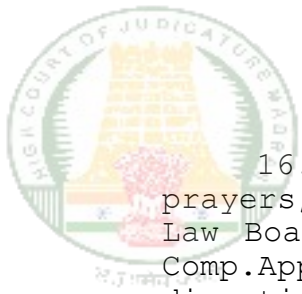
(1) Whether the affairs of the company were being conducted in a manner oppressive of one shareholder and prejudicial to the interest of the company ?

(2) Whether the sale of 6.3 acres of land was liable to be set aside ?

(3) Whether the Joint Development Agreement was liable to be set aside ? and

(4) Whether the Directors were liable to be surcharged ?

15. After hearing all the parties, the Company Law Board passed a final order in C.P.No.7 of 2009 on 10.6.2011, (1) rejecting the prayer of the appellant herein for setting aside the sale deeds dated 9.12.2005, 20.12.2005 and 21.7.2005; (2) rejecting the prayer of the appellant herein for setting aside the MOUs, Powers of Attorney Agreements and Joint Development Agreement; (3) rejecting the prayer of the appellant herein for appointment of a Management Committee. However, the Company Law Board granted a limited relief, directing the Directors to remit a sum of Rs.20 lakhs to the account of the Company within six months from the date of the order, failing which, they will be liable to pay interest at the rate of 6% per annum.



16. Aggrieved by the said order rejecting most of his prayers, the petitioner in C.P.No.7 of 2009 before the Company Law Board, has come up with the first of these appeals, namely Comp.Appeal No. 15 of 2011. Aggrieved by the surcharge order directing the Directors to pay Rs.20 lakhs, those two Directors have come up with the second of these appeals namely Comp. Appeal No.19 of 2011.

Company Appeal No.15 of 2011 :

17. Before proceeding to consider the grounds on which and the questions of law on the basis of which the impugned order of the company Law Board is assailed in the first of these appeals, it is necessary to take a look at the shareholding pattern of the company. As I have stated earlier, the company was a closely held company with the father, the mother, three sons and a grandson, apart from two companies being the only shareholders. The father G.Kandaswamy died on 17.4.1999. Till the death of the father, the shareholding pattern stood as follows:-

Name of the Shareholder	No.of shares of Rs.100/- each
G.Kandaswamy (HUF)	10705
K.Narayanawamy	5480
G.Kandaswamy (Individual)	415
K.Balasundaram	5185
K.Venkatesh	5558
K.Lakshmiammal	3027
Master Sujay Senthil	625
Rangai Sai Chit Funds P Ltd.	5
G.K.Steels (Coimbatore) Ltd.	4000
Total	35000

18. The family also had three more companies by name (1) G.K.Steels (Cbe) Limited, (2) G.K.Steel and Allied Industries Limited and (3) Akkammal Steels Private Limited.

19. Since G.Kandaswamy died intestate, the shares left behind by him devolved upon his legal heirs. The mother also died on 12.8.2006. Consequently, the shares of the mother also devolved equally among all the three sons. To be precise, 10,705 shares held in the name of G.Kandaswamy (HUF), 415 shares held



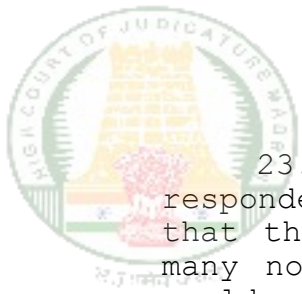
in the individual name of G.Kandaswamy and 3027 shares held in the name of mother K.Lakshmiammal totalling to 14,147 shares, devolved equally upon the three sons namely K.Narayanaswamy, K.Balasundaram and K.Venkatesh. Since the appellant Dr.K.Balasundaram already had 5,185 shares and since he will be entitled to about 4,715 shares (1/3rd of 14,147 shares), his share capital should come up to 9,900 Equity Shares.

20. The grievances of the appellant in Company Appeal No.15 of 2011, were (1) that no Board Meeting or General Body Meeting were ever held; (2) that no notices of any of those meetings were served upon the appellant; (3) that valuable properties were sold unnecessarily without there being any necessity; (4) that the sales were fraudulent in as much as they were made in favour of Narayanaswamy's sons for a consideration much lower than the market value; and (5) that the company cannot enter into any Joint Development Agreement with a Real Estate Developer, when the Memorandum and Articles of Association do not permit the company to engage in such business.

21. It is the further contention of the appellant, that the shares held by the parents were never represented in the decision making process. The company was a Public Limited Company and it was only in the Annual General Meeting held on 28.9.2001 that the Articles were amended to insert the word "Private". Till the Registrar of Companies was intimated of the decision to take the benefit of removal of Section 43A, the company continued to be the Public Limited Company and was required to have a minimum of three Directors. But, the second Respondent alone remained as a Director and hence, he could not constitute the quorum for any meetings. Hence, it is contended that all decisions taken without a quorum, were vitiated.

Contentions 1 & 2 : (No Board or General Body Meetings were ever held and no notices ever served) :

22. The first ground of attack to the order of the Company Law Board is that no notice of any meeting whatsoever was received by the appellant. In paragraph 12 of the main petition in C.P.No.7 of 2009, the appellant Dr.K. Balasundaram claimed that no notice of any meeting was ever received and that the notices of the Extraordinary General Meetings held on 22.11.2005 and 12.7.2007 were also not received. According to the appellant, even the notice of the Annual General Meeting dated 28.9.2001, in which, Clause 3(1)(iv) was incorporated in the Articles of Association, was not served on him. Again, in paragraphs 15 and 16 of the main company petition, the appellant claimed that the notices of the General Body Meeting held on 4.7.2001, 21.11.2005 and 12.7.2007, were not served on him.



23. In paragraph 15 of the counter filed on behalf of the respondents 1 and 2 to the main company petition, they claimed that the appellant had all along been working in U.K. and that many notices including those issued by Debt Recovery Tribunals could not be served on him due to his absence in India. The respondents 1 and 2 further pointed out that the appellant made a request in writing only on 4.12.2008 that all notices are to be sent to him only by registered post. In paragraph 16 of the counter, the respondents 1 and 2 have made a positive averment that for the General Body Meetings held on 21.11.2005, 12.7.2007, the notices dated 24.10.2005 and 18.6.2007, marked as Ex.R.16 and Ex.R.17 were sent.

24. Before proceeding further, it should be pointed out that the company became a deemed public limited company, by virtue of Section 43A. But, this concept was removed by virtue of the amendment under the Companies (Amendment) Act, 2000. Thereafter, in an Annual General Meeting held on 28.9.2001, the words 'private company' were incorporated in the Articles. Therefore, the Company Law Board was right in holding in paragraph 10 of its order that the company regained its status as a private limited company with effect from 13.12.2000.

25. Keeping the above background in mind, if we test the validity of the first contention, it can be seen that the main or only act of oppression that the appellant alleged against the majority was the sale of the company's property. But, as rightly contended by the respondents and as rightly accepted by the Company Law Board, Section 293(1)(a) of the Act is a complete answer. Under the said provision, it is only the Board of Directors of a public company or of a private company, which is a subsidiary of a public company, which cannot sell or dispose of the company's property without the consent of the company in a general meeting. Since the company in this case is a private limited company, there was no necessity to convene a general meeting for this purpose.

26. As a consequence, even assuming that no notices of the general body meetings were ever served on the appellant, the same would not vitiate the sale that did not require the consent of the general body.

27. The Company Law Board, in paragraph 15 of its order, recorded a finding with regard to the conduct of the appellant. This is extracted as follows :

"The petitioner was a non resident Indian during the relevant period and he had shown scant interest in the family business. Communications sent to him always returned undelivered. Petitioner is even reluctant to



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produce his passport just to avoid any adverse inference being drawn against him. In the DRT proceedings, the Court has to secure notice to him by publication and even then, he remained ex parte. Instead of clearing the decade old liabilities and salvage the company, he has been avoiding the legal proceedings. Notice sent to him even few months prior to the filing of the CP was returned with endorsement 'not claimed', indicating his indifference to the company and absence of bona fides. In the Debt Recovery Tribunal, he remained ex parte. Even if it is accepted that notice of AGM was not served on the petitioner, the non compliance of the provisions of the Act before taking such action will not invalidate the sale, since the action has been in interests of the company and shareholders and not oppressive to the petitioner."

28. The above finding of fact is unassailable and in an appeal under Section 10F, it is not possible for me to dislodge such a finding of fact, unless it is shown to be perverse.

29. In the case of Dale And Carrington Invt. P. Ltd. v. P.K. Prathapan, [(2005) 1 SCC 212], the Supreme Court discussed the scope of power of the High Court in an appeal under Section 10-F of the Act. It laid down as follows:

"Section 10-F refers to an appeal being filed on the question of law. The learned counsel for the appellant argued that the High Court could not disturb the findings of facts arrived at by the Company Law Board. It was further argued that the High Court has recorded its own finding on certain issues which the High Court could not go into and therefore the judgment of the High Court is liable to be set aside. We do not agree with the submission made by the learned counsel for appellants. it is settled law that if a finding of fact is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on the question of law. The perversity of the finding itself becomes a question of law. In the present case we have demonstrated that the judgment of the Company Law Board was given in a very cursory and cavalier manner. The Board has



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not gone into real issues which were germane for the decision of the controversy involved in the case. The High Court has rightly gone into the depth of the matter. As already stated the controversy in the case revolved around alleged allotment of additional shares in favour of Ramanujan and whether the allotment of additional shares was an act of oppression on his part. On the issue of oppression the finding of the Company Law Board was in favour of Prathapan i.e. his impugned act was held to be an act of oppression. The said finding has been maintained by the High Court although it has given stronger reasons for the same. We find no merit in the argument that the High Court exceeded its jurisdiction under Section 10F of the Companies Act while deciding the appeal."

Therefore, unless the appellant establishes that the finding of fact recorded by the Company Law Board was perverse, it is not possible for me to dislodge the finding recorded by the Company Law Board, which I have extracted above. But unfortunately, the appellant has not been able to demonstrate that the finding is perverse.

30. Relying upon a decision of the Madhya Pradesh High Court in Marble City Hospital and Research Centre P. Ltd. Vs. Sarabjeet Singh Mokha [(2010) 155 Comp. Cases 13], it is contended by Mr.V. Raghavachari, learned counsel for the appellant that the respondents ought to have produced primary evidence in the nature of dispatch registers to show that notices of the meetings were actually dispatched. It is only then that a presumption under Section 53 can be drawn.

31. Drawing my attention to the decision in V.S.Krishnan and others v. Westfort Hi-tech Hospital Ltd., [(2008) 3 SCC 363], it is further contended that the provisions of section 172 were not followed. On the question of notices under Section 172, the Supreme Court held in V.S.Krishnan as follows:-

"24. Section 172 of the Act speaks about the contents and manner of service of notice and persons on whom the same is to be served. Sub-Section (1) mandates that every notice of a meeting of a company shall specify the place, the day, hour of meeting and shall contain a statement of business to be transacted thereat. Sub-Section (2) mandates that notice of every meeting of the company shall be given to (i)



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every member of the company, in any manner authorized by Sub-Sections (1) to (4) of Section 53; (ii) persons entitled to a share in consequence of the death or insolvency of a member, by sending it through post in a pre-paid letter addressed to them by name in India supplied for the purpose by the persons claiming to be so entitled or until such address has been so supplied (iii) the auditor of the company, in any manner authorized by Section 53. Sub-Section (3) makes it clear that the accidental omission to give notice to, or the non- receipt of notice by, any member or other person to whom it should be given shall not invalidate the proceedings at the meeting. Apart from the above procedure, while sending notice for any meeting, the procedure prescribed in Section 53 (1) and (2) of the Act has to be followed.

25. It is the case of respondent Nos.1 and 2 that proper notices in terms of Section 172 read with Section 53 (1) and (2) have duly been sent to all the share holders including the petitioners in respect of the AGM dated 29.9.2005. It was contended on the side of the petitioners that in the absence of any other corroborative evidence, it is not safe to accept the notices sent through 'certificate of posting' and it cannot be presumed that the addressee had the knowledge of the meeting."

32. Therefore, it is contended by the learned counsel, that the failure of the respondents to produce the dispatch register to show that they sent the notices as required under the Act, was fatal to their case.

33. But, I do not think that the above decisions are of any assistance to the appellant. As I have pointed out earlier, the company in question was a private limited company at the time when the sale transaction took place. Therefore, even assuming that no notices were issued for the General Body Meetings, such failure would not vitiate the sale transaction that could have been validly approved in the meeting of the Board of Directors. Hence, the first ground of attack to the order of the Company Law Board cannot be sustained.

CONTENTION 3:

34. The third ground of attack of the appellant to the order of the Company Law Board is that till the Registrar of Companies was intimated of the decision about the change of status of the company from a public limited company to a private



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limited company, the company was required to have a minimum of three Directors. But, there was only one Director who could not constitute a quorum for the meetings of the Board. Therefore, it is contended that the decisions taken without a quorum were invalid.

35. It is seen from the factual matrix that Mr.K.Venkatesan and Mr.K.Narayanasamy were the Directors. Mr.K.Narayanasamy resigned on 04.7.2001. Mr.E.Gopalakrishnan was appointed as Executive Director. Therefore, the case of the appellant is that by virtue of Section 260, Mr.E.Gopalakrishnan could not have continued beyond 30.9.2001, since the company was a public limited company till December 2001.

36. But, at the outset, it should be pointed out that the deeming fiction created by Section 43-A was removed with effect from 13.12.2000. Therefore, the Company should be taken to be only a private limited company with effect from 13.12.2000. Hence, the respondents rightly relied upon Rules 75 and 80 of Schedule A which enabled the continuing Directors to act notwithstanding any vacancy in the Board and which also validated the acts done in a meeting of the Board, notwithstanding any discrepancy discovered later.

37. In A.Ananthalakshmiammal Vs. Indian Trades and Investments Limited [AIR 1953 Mad. 467], a Division Bench of this Court held that the power to co-opt a Director can be exercised even after the Annual Meeting has been called for. The Bench pointed out that it cannot be said that the power comes to an end when once an Annual Meeting is convened. It was contended that when the Articles of a Company provided that in the Board, the continuing Directors may act notwithstanding any vacancy, but if the number should fall below the minimum fixed, the Directors should not act except in emergencies or for filling up the vacancies so long as the number is below the minimum and that even for invoking the aid of the provision, there must be a Board with the minimum strength. Rejecting the said contention, the Division Bench held that the power could be exercised even though the strength of the Board had fallen below the minimum or below the quorum or when there is only one Director capable of acting.

38. Similarly, in P.Natarajan Vs. Central Government [(2004) 1 CTC 340], a Division Bench of this Court held:

(i) that the Directors of a company, who are due to retire at an Annual General Meeting, vacate their office on the last date on which the Annual General Meeting should have been held; and



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(ii) that a Director vacates his office at the latest on the date of which an Annual General Meeting could have been called as required by Section 166 and that though the defacto doctrine will save the decisions taken by Directors after they vacated the office, it will not clothe his presence with any right to remain in the office of de jure.

39. In any case, the company is actually a family company. No other member of the family nor any other Director has objected to the sale transaction that forms the foundation of the case of the appellant. When none of the shareholders and none of the Directors oppose the transaction that were approved in the meetings of the Board, the transactions may be saved by the Doctrine of Indoor Management in so far as third parties are concerned.

40. In the case of MRF Ltd. v. Manohar Parrikar [(2010) 11 SCC 374] the Court discussed the concept of indoor management.

"The doctrine of indoor management is in direct contrast to the doctrine or rule of constructive notice, which is essentially a presumption operating in favour of the company against the outsider. It prevents the outsider from alleging that he did not know that the constitution of the company rendered a particular act or a particular delegation of authority ultra vires. The doctrine of indoor management is an exception to the rule of constructive notice. It imposes an important limitation on the doctrine of constructive notice. According to this doctrine, persons dealing with the company are entitled to presume that internal requirements prescribed in memorandum and articles have been properly observed. Therefore doctrine of indoor management protects outsiders dealing or contracting with a company, whereas doctrine of constructive notice protects the insiders of a company or corporation against dealings with the outsiders. However suspicion of irregularity has been widely recognized as an exception to the doctrine of indoor management. The protection of the doctrine is not available where the circumstances surrounding the contract are suspicious and therefore invite inquiry.

This exception to the doctrine of indoor management has been subsequently adopted in many Indian cases. They are B. Anand Behari Lal v. Dinshaw and Co. (Bankers) Ltd, AIR 1942 Oudh 417 and Abdul Rehman Khan & Anr. v. Muffasal Bank Ltd. and Ors, AIR 1926 All 497. Applying the



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exception to the present scenario, there is sufficient doubt with regard to the conduct of the Power Minister in issuing the Notifications dated 15.5.1996 and 01.08.1996. Therefore there is definite suspicion of irregularity which renders the doctrine of indoor management inapplicable to the present case. "

41. Therefore, the third ground of attack to the order of the Company Law Board also does not merit acceptance.
CONTENTIONS 4 & 5

42. The fourth ground of attack is that valuable properties of the company were sold unnecessarily without there being any necessity. The fifth ground is that the sale transactions were fraudulent inasmuch as they were made in favour of Narayanasamy's sons for a consideration much lower than the market value.

43. But in the given circumstances, I do not think that the sale transactions had been entered into unnecessarily. There is no dispute about the fact that the company in question had borrowed money from Dena Bank and State Bank of India. Dena Bank filed an application before the DRT for recovery of money against a company by name Akkammal Steels Private Limited, which was also held by the members of the very same family. In the said case, the present company was impleaded as the fourth respondent. There was yet another application by State Bank of India against G.K.Alloy Steels Private Limited for recovery of money. The proceedings under the SARFAESI Act were also taken against Akkammal Steels Private Limited. A petition in C.P.No.70 of 2002 was filed against the company in question for winding up. By an order dated 22.3.2006, the Company Court ordered winding up. Therefore, there was a dire necessity for procuring finances. Hence, the argument that there was no necessity to sell the properties, is completely misconceived.

44. The next contention is that the sale transactions were fraudulent in nature and that they were entered into with the son of one of the Directors for a consideration lesser than the market value.

45, It is true that when the property of a company is sold in favour of a close relative of one of the Directors, the transaction is prone to be viewed with some element of suspicion. This is due to the fact that the Directors are obliged to avoid conflict of interests and keep the interests of the company far above that of their own. In Cook v. G.S.Deeks [(1916) 1 AC 554], The Privy Council pointed out that men, who assume the complete control of a company's business, must remember that they are not at liberty to sacrifice the



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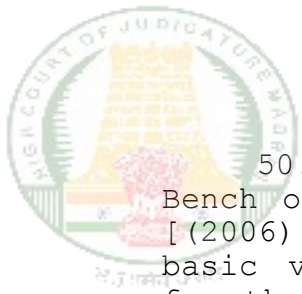
interests, which they are bound to protect and that while ostensibly acting for the company, divert in their own favour, business which should properly belong to the company they represent. The Directors cannot conceal the circumstances relating to their negotiations until a point is reached when the whole arrangement had been concluded in their own favour.

46. It is not even necessary that such a transaction was fraudulent. Even in cases where there was breach of duty without fraud, the court cannot close its eyes. In *Daniels v. Daniels* [(1977) 2 W.L.R. 73], the Chancery Division pointed out that where without fraud, the Directors and majority shareholders are guilty of a breach of duty, which they owe to the company, that breach of duty not only harms the company, but benefits the Directors. In such cases, different considerations would apply. Since fraud is very hard to plead and to prove, the minority shareholders are entitled to plead in such cases that some benefit accrued to the Directors. The Chancery Division made an interesting observation that to put up with foolish Directors is different from putting up with Directors who are so foolish as to make profit out of the deal.

47. In so far as companies run by families are concerned, the test may have to be even more rigorous as pointed by the Company Law Board in *Prabhu Dayal Chitlangia Vs. Trinity Combine Associates Pvt. Ltd.* [(2000) 99 Comp. Cases 21 (CLB)]. It was held therein that the decision taken by a company without the participation of the family Directors was an act of grave oppression. In a family company, utmost good faith and fair play is absolutely essential and any action that goes against those principles and having an adverse effect on the interests of the other family members, have to be considered as acts of oppression.

48. Keeping in mind the fundamental principles of law as laid down in the aforesaid decisions, if we come back to the facts of the present case, it can be seen that the sale transactions in question were entered into at a time when the company was facing (i) winding up proceedings (ii) recovery proceedings before the DRT and (iii) recovery proceedings under the SARFAESI Act. In other words, the sale transactions were entered into at a time when the company was in dire financial strait. If these transactions had not been entered into, the Official Liquidator would have taken over the assets of the company and sold them in public auction. This important aspect has to be kept in mind before we scan the sale transactions with an eye of suspicion.

49. The main reason as to why the appellant is attacking the sale transactions is that the sale consideration paid thereunder was far less than the market value, as reflected in the register of guidelines maintained in the office of the Registrar.



50. But, as rightly pointed out by the respondents, a Full Bench of this Court held in Sakthi & Co. Vs. Shree Desigachary [(2006) 2 CTC 433], that the guideline value contained in the basic valuation register maintained by the Revenue Department for the purpose of collecting stamp duty has no statutory base or force and that it cannot form a foundation for determining the market value of a property.

51. Therefore, the appellant cannot succeed merely by pointing out (i) that the guideline value of the property was much more than the sale consideration and (ii) that since the market value was more than the sale consideration, the sale was fraudulent. As held by a Division Bench of the Gujarat High Court in In Re. Navjivan Mills Ltd. [(1986) 59 Comp.Cases 201)], if the Court is satisfied that a disposition of property, falling within the powers of the Board of Directors, has been effected due to commercial expediency, the same will not be interfered with by the Court except in the case of proven bad faith or other exceptional circumstances.

52. In the case on hand, I have found that unless the Directors had decided to sell the properties of the company, the company could not have been saved from the orders of winding up or from proceedings under the SARFAESI Act. Therefore, the first test indicated in Navjivan Mills that the sale was necessary in the interests of the company, stands satisfied in this case.

53. The appellant has not been able to establish bad faith on the part of the respondents. The fact that the sale consideration was lesser than the guideline value, cannot, by itself, be an indication that there was bad faith.

54. There is no doubt that the relationship of a Director with a company is by and large, fiduciary. In Kamal Kumar Dutta v. Ruby General Hospital Ltd. [(2006) 7 SCC 613], the fiduciary relationship of a director with that of his company was indicated as follows :

"43. In Pennington's Company Law, 6th Edn.

At pp.608-09, it is stated:

"Directors owe no fiduciary or other duties to individual members of their company in directing and managing the company's affairs, acquiring or disposing of assets on the company's behalf, entering into transactions on its behalf, or in recommending the adoption by members of proposals made to them collectively. If the Directors mismanage the company's affairs, they incur liability to pay damages or compensation to the company or to make restitution to it, but individual members cannot recover compensation for the loss they have respectively suffered by



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the consequential fall in value of their shares, and they cannot achieve this indirectly by suing the Directors for conspiracy to breach the duties which they owed the company.

However, there may be certain situations where Directors do owe a fiduciary duty and a duty to exercise reasonable skill and care in advising members in connection with a transaction or situation which involves the company or its business undertaking and also the individual holdings of its members."

Therefore, the upshot of the above discussions is that the Directors are in a position of a trust. They must confirm to the probity and their conduct should be above suspicion."

55. But in the case on hand, the Directors were actually facing an emergency to save the company from being wound up. The appellant, who was mostly out of India, does not appear to have contributed anything to save the company. In the proceedings before the DRT, he was actually set ex parte. The bank could not even serve notices on him. Therefore, the Company Law Board was right in holding that the sale transactions are not proved to be fraudulent, warranting an inference of oppression and mismanagement. Hence, the fifth contention is also rejected. Contention-6 (joint development business not permitted)

56. The sixth ground of attack to the order of the Company Law Board is that the company cannot enter into any Joint Development Agreement with a Real Estate Developer, when the Memorandum and Articles of Association do not permit the company to engage in such business.

57. In support of this contention, Mr.V.Raghavachari, learned counsel for the appellant places heavy reliance upon the decision of the Supreme Court in Dr.A.Lakshmanaswami Mudaliar Vs. Life Insurance Corporation [AIR 1963 SC 1185], wherein the Supreme Court held that a company, cannot travel beyond the objects stated in the Memorandum of Association. After extracting the objects clause contained in the Memorandum of Association of LIC, the Court went into the question as to how to view the clause relating to ancillary objects and as to how the objects clause had to be interpreted. It was held in this regard :

"Power to carry out an object, undoubtedly includes power to carry out what is incidental or conducive to the attainment of that object, for such extension merely permits Something to be



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done which is connected with the objects to be attained, as being naturally conducive thereto. By sub- clause (i) of cl. III of the objects clause of the Memorandum of Association, the Company is to carry on the life insurance business in all its branches. Clause (ii) authorises the Company to invest and deal with funds and assets of the Company upon such securities or investments and in such manner as may from time to time be fixed by the Articles of Association of the Company. This is in truth not an object clause, it is a clause authorising investment of funds. Clause (ii) does not invest the Directors with power to deal with the funds in such manner as may from time to time be fixed by the Articles of Association: power conferred thereby is power to invest and deal with funds and assets of the Company. The Directors under sub-clause (ii) of cl. III merely have the power to invest and deal with the funds and assets of the Company upon. such securities or investments, and the power is to be exercised in the manner prescribed by the Articles of Association. By Article 93 (t) the Directors are undoubtedly invested with authority to establish, maintain and subscribe to any institution or Society which may be for the benefit of the Company, and to "make payments towards any charitable or any benevolent object, or for any general public, general or useful object". But this is within the authority of the Directors only if the Company has the power under the Memorandum of Association to achieve the object specified, or for doing anything incidental to or naturally conducive to objects specified. If the object is not within the competence of the Company, the Directors relying upon Art. 93 (t) cannot expend the funds of the Company for achieving that object. The primary object of the Company is to carry on life insurance business in all its branches, and donations of the Company's funds for the benefit of a trust for charitable purposes is not incidental to or naturally conducive to that object. There is in fact no discernible connection between the donation and the objects of the Company. Undoubtedly the Memorandum of Association has to be read together with the Articles of Association, where the terms are ambiguous or silent.



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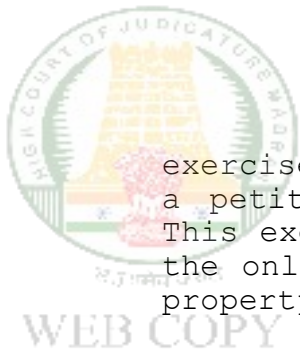
There is however no ambiguity in the relevant terms of the Memorandum of Association. Clause III of the Memorandum deals with the objects, and powers of the Company in language which is reasonably plain. The Articles may explain the Memorandum, but cannot extend its scope. Sub-clause (v) merely authorises the Company to do all such other things "as are incidental or conducive to the attainment of the above objects or any of them". The clause merely sets out what is implicit in the interpretation of every Memorandum of Association : it does not set up any independent object, and confers no additional power. Acts incidental to or naturally conducive to the main object are those which have a reasonably proximate connection with the object, and some indirect or remote benefit which the Company may obtain by doing an act not otherwise within the object clause, will not be permitted by this extension."

58. But, I am unable to appreciate the sixth ground of attack. By entering into a joint development agreement, the company was not seeking to carry on the business of real estate promotion. All that the company was trying to do, was to handover the property to a developer. The developer was obliged under the agreement, to put up a construction at his cost and handover a part of the superstructure to the company, in consideration of the company selling some undivided share of land to the nominees of the developer. This cannot be construed as an act by which, the company entered into the business of real estate promotion.

59. The company can be said to have engaged itself in the business of real estate promotion and development, only if it had entered into agreements for purchase of properties belonging to third parties, for the purpose of developing them into house sites or flats and selling them to third parties. The company in this case could have put up a construction at its own cost and even sold it to third parties. If they had done so, the appellant could not have raised this point. But, the company did not have funds to put up a construction at their own cost. Therefore, they had to necessarily enter into a joint development agreement. This cannot be construed as an activity undertaken by the company beyond the scope of the objects clause contained in the Memorandum and Articles of Association. Therefore, the sixth contention is also rejected.

Scope of Jurisdiction under Sections 397, 398 and 402 :

60. Having rejected all the six grounds of attack of the appellant to the impugned order of the Company Law Board, let me now take up for consideration the scope of jurisdiction to be



exercised by the Company Law Board/this Court while dealing with a petition under Sections 397 and 398 read with Section 402. This exercise has become necessary only in view of the fact that the only and main grievance of the appellant is the sale of the property of the company.

61. In V.S.Krishnan and others v. Westfort Hi-tech Hospital Ltd., [(2008) 3 SCC 363], the Supreme Court listed out of the circumstances when oppression would be made out, as follows:-

"From the above decisions, it is clear that oppression would be made out:

(a) Where the conduct is harsh, burdensome and wrong.

(b) Where the conduct is mala fide and is for a collateral purpose where although the ultimate objective may be in the interest of the company, the immediate purpose would result in an advantage for some shareholders vis-à-vis the others.

(c) The action is against probity and good conduct.

(d) The oppressive act complained of may be fully permissible under law but may yet be oppressive and, therefore, the test as to whether an action is oppressive or not is not based on whether it is legally permissible or not since even if legally permissible, if the action is otherwise against probity, good conduct or is burdensome, harsh or wrong or is mala fide or for a collateral purpose, it would amount to oppression under Sections 397 and 398.

(e) Once conduct is found to be oppressive under Sections 397 and 398, the discretionary power given to the Company Law Board under Section 402 to set right, remedy or put an end to such oppression is very wide.

(f) As to what are facts which would give rise to or constitute oppression is basically a question of fact and, therefore, whether an act is oppressive or not is fundamentally/basically a question of fact."

62. In Mohanlal Ganpatram Vs. Shri Sayaji Jubilee Cotton & Jute Mills Co. Ltd. [AIR 1965 Guj. 96], the Gujarat High Court was considering this question with particular reference to the setting aside of a past concluded transaction. The Court held that the language of these Sections far from conferring any power on the court to set aside or interfere with past and



concluded transactions between a company and third parties, which are no longer continuing wrongs, confines the power of the court to making an order for the purpose of putting an end to oppression or mismanagement on the part of controlling shareholders. The Court further went on to hold that the remedy provided by these Sections is of a preventive nature so as to bring to an end oppression or mismanagement on the part of controlling shareholders and not to allow its continuance to the detriment of the aggrieved shareholders or the company.

63. In Palghat Exports Pvt. Ltd. v. T.V.Chandran, [(1994) 79 Comp. Cases 213], a Division Bench of the Kerala High Court held that "it is obligatory on the part of the complainant to establish "persistent and persisting course of unjust conduct". Past acts which have come to an end would not be taken for the purpose of involving the court's jurisdiction under section 397 of the Act. Every illegal act may not amount to an act which would constitute a ground for an action under section 397 of the Act. It is settled that isolated acts of the controlling shareholders cannot be used as a ground for taking action under section 397 of the Act. One of the conditions essential for seeking relief under section 397 of the Act is that there should be continued oppression over a period of time."

64. In D.Ramkishore v. Vijayavada Share Brokers Ltd. [(2008) 144 Comp.Cases 326], the Andhra Pradesh High Court held that the Company Law Board has wide powers under Section 402 which are residuary in nature. However, the power to set aside a sale under Section 402, can be exercised if the sale was made within three months before the date of the application under Section 397 or 398, as held by this Court in T.Vinayaka Perumal v. T.Balan [(2011) 1 Comp.LJ 74].

65. In Raghunath Swarup Mathur v. Har Swarup Mathur [(1970) 40 Comp. Cases 282], it was held in paragraph 9 of the judgment, as follows:

"Section 397 of the Act undoubtedly empowers this court to make such orders " as it thinks fit" but only " with a view to bringing to an end the matters complained of". The matters complained of must be proved to establish :

"(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members ; and (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up."

It is, therefore, an essential prerequisite for a petitioner under Section 397 of the Act to prove that, apart from any



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prejudice to the interests of members, a winding up order would be justified in equity. Although, grounds of justice and equity elude categorisation and must necessarily be left to be decided on the particular facts of each case, yet, well recognised tests have to be applied in deciding what they are, and the language used in Section 397 indicates that just and equitable grounds for a winding up must not only exist, but they must be sufficiently compelling so as to "justify" a winding up order."

66. If the principles as laid down in the above decisions are applied, it will be clear that the appellant cannot successfully maintain an action for oppression and mismanagement against the respondents, merely on the strength of the sale transactions relating to the properties of the company, especially when those transactions were entered into at a time when the company was in financial crisis. Therefore, I find that there are no valid grounds to sustain the appeal in Company Appeal No.15 of 2011. Hence, the same is dismissed. No costs.

Company Appeal No.19 of 2011 :

67. As I have pointed out earlier, this appeal is by the existing directors, challenging a surcharge order passed by the Company Law Board, to the tune of Rs.20 lakhs.

68. As seen from the order of the Company Law Board, the question of undervaluation of the properties was taken up for a detailed discussion by the Company Law Board from paragraphs 30 to 32.

69. The appellant in appeal NO.15 of 2011 placed reliance upon the guideline valuation, but I have already rejected the same while dealing with his appeal. The appellants in this appeal produced data sale deeds as Ex.R.25 series before the Company Law Board. A tabulation was also provided before the Company Law Board.

70. Therefore, after taking note of those data sale deeds as well as the valuation reports filed as Exx.R.11 and R.12, the Company Law Board came to the conclusion that the price fixed was not the best and that there was undervaluation. As a consequence, the Company Law Board directed the appellants in this appeal to compensate the company by making payment of a sum of Rs.20 lakhs.

71. But unfortunately, as rightly contended by the learned counsel for the appellants, the Company Law Board committed two errors of law. The first is that after upholding the genuineness of the sale transactions and after holding in the beginning of



paragraph 30 of its order that the transactions were in the interests of the company, the Company Law Board was not entitled to impose a surcharge. The second error of law committed by the Company Law Board is that the amount of Rs.20 lakhs was arrived at only arbitrarily. Therefore, in normal circumstances, the surcharge order passed against the appellants in appeal No.19 of 2011 is liable to be set aside.

72. But, as seen from the facts of the case, the fight is actually between the members of the same family. Though disputes between the directors or shareholders inter se, in relation to an incorporated company, have to be resolved within the parameters of the Company Law, the Court cannot lose sight of the fact that in closely held companies, the disputes largely assume the nature of a claim for partition. Parties to such disputes, when they are in an advantageous position, invoke the provisions of the Companies Act, 1956 to retain the benefits and privileges that they enjoy at the time of commencement of the disputes. But, the others project the disputes from family perspectives and Courts have to strike a balance in such disputes.

73. Therefore, I am of the view that the order for surcharge passed by the Company Law Board, though not strictly in accordance with law, was intended to strike a balance and to provide an equitable relief. Hence, I do not wish to interfere with the surcharge order passed by the Company Law Board. Therefore, Company Appeal No.19 of 2011 is also dismissed. No costs.

74. In the result, both the company appeals are dismissed. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

RS/kpl



To

The Sub Assistant Registrar,
Original Side, High Court, Madras.

+ 2 ccs to M/s. N.A. Ravindran, Advocate Sr.25636, 25637

Comp.Apel.Nos.15 & 19 of 2011.

PUR(CO)
Eu 03.06.16