

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMPANY APPEAL NO.35 OF 2014
IN
CLB COMPANY PETITION NO.34 OF 2012**

Mr.Sathyaprakash Subramanian & Ors.)....Appellants

V/s.

Mr.Mohamad Rafiq Jafferbhai Bagwan)....Respondent

WITH

COMPANY APPEAL NO.62 OF 2015

IN

COMPANY PETITION NO.34 OF 2012

Mohamad Rafiq Jafferbhai Bagwan)....Appellant

V/s.

Sathyaprakash Subramanian)....Respondent

Mr.Arif Bookwalla, Senior Advocate I/by Amrita Saldanha for appellants in Company Appeal No.35 of 2014 and for respondent in Company Appeal No.62 of 2015.

Mr.Manish D.Modak for respondent in Company Appeal No.35 of 2014 and for appellant in Company Appeal No.62 of 2015.

CORAM : K.R.SHRIRAM,J

RESERVED ON : 10.8.2018

PRONOUNCED ON : 4.10.2018

Judgment :-

1. These appeals are filed under Section 10F of the Companies Act 1956 impugning a judgment delivered on 5.8.2013 by the Company Law Board, Mumbai Bench, Mumbai (CLB) in a petition filed

under Sections 397 and 398 of the Companies Act 1956.

2 Mohamad Rafiq Jafferbhai Bagwan-respondent in Company Appeal No.35 of 2014 and appellant in Company Appeal No.62 of 2015) (hereinafter referred to as Jafferbhai) had filed the original Petition No.34 of 2012 in CLB alleging certain acts of oppression and mis-management by Sathyaprakash Subramanian (hereinafter referred to as Sathyaprakash) and Bhageerathy Sathyaprakash (Mrs.Sathyaprakash) appellants in Company Appeal No.35 of 2014 and respondents in Company Appeal No.62 of 2015 (both collectively referred to as Mr.& Mrs.Sathyaprakash) in the affairs of the company Opulent Auto Care Pvt. Ltd. (company).

3 Sathyaprakash and Jafferbhai have known each other since the year 2000. Sathyaprakash and Jafferbhai started a business in the name and style of M/s.Opulent Car Care (hereinafter referred to as firm). It was a partnership firm in which Sathyaprakash and Jafferbhai were 50 : 50 partners. A deed of partnership was executed on 11.8.2000 and the business was relating to automobile accessories.

4 On or about 19.4.2003, the company was incorporated and the share holding pattern was 70% by Sathyaprakash, 5% by

Mrs.Sathyaprakash and 25% by Jafferbhai. Of course, according to Jafferbhai the partnership firm was converted into a private limited company whereas it is the case of Sathyaprakash that the partnership firm was not dissolved and the company was a separate legal entity. Sathyaprakash has also relied upon the balance-sheet of the company which shows the firm as a creditor of the company, which naturally would mean that the firm was not converted into a private limited company. This would have a bearing on whether the company was a glorified or quasi partnership firm. We will deal with this at a later stage.

5 Things were going on smoothly until 2011. Sometime in the beginning of 2012 certain disputes and differences arose between Sathyaprakash and Jafferbhai. It is the case of Jafferbhai that he was surprised on receipt of a notice dated 22.2.2012 calling a board meeting to be held on 8.3.2012. One of the agenda was to consider removal of Jafferbhai from the post of director of the company. It is the case of Jafferbhai that on 9.3.2012 he received another notice for EOGM on 30.3.2012. Jafferbhai has challenged the validity of the notices on various grounds and has also made allegation of misconduct and malafides against Mr. & Mrs.Sathyaprakash. According to Jafferbhai, Mr. & Mrs.Sathyaprakash had filed a caveat in the court on

9.3.2012 which goes to show that they had planned to remove Jafferbhai from the post of director which is an act of mis-management and oppression. The other act of oppression alleged is that Mr. & Mrs.Sathyaprakash had issued directions to the bank not to allow Jafferbhai to operate the bank account, w.e.f., 9.3.2012. The 3rd act of oppression alleged is that Jafferbhai received a letter dated 13.3.2012 which was attempting to correct some irregularities of the notice issued earlier by sending an explanatory statement and the reasons under the explanatory statement were framed maliciously and intentionally without any support to the ground for his removal. According to Jafferbhai the acts of Mr. & Mrs.Sathyaprakash are malafide in order to gain control over the management of the company and the chain of evidence amounts to act of oppression within the definition provided under Section 397 of the Companies Act, 1956. Jafferbhai had also complained to the Registrar of companies, Pune. Nothing much came out of the complaint. Jafferbhai also listed various instances against Mr. & Mrs.Sathyaprakash which were allegedly within the definition of mis-management and the same are as under :-

- (i) After filing of the petition, Mr. & Mrs.Sathyaprakash revengefully filed bogus civil suit against Jafferbhai for the recovery of service tax, petrol allowances, daily recovery

amount etc. ;

(ii) Without issuing any demand letter, Mr. & Mrs.Sathyaprakash filed a criminal case against Jafferbhai for the recovery of mobile phone, laptop and car at the cost of the company ;

(iii) Mr. & Mrs.Sathyaprakash have siphoned off funds of the company for their personal gain and have made huge properties in their names ;

(iv) Mr.& Mrs.Sathyaprakash have also fabricated and manipulated the documents ;

(v) Mr. & Mrs.Sathyaprakash deliberately did not declare the dividend for the current year ;

(vi) Mr. & Mrs.Sathyaprakash have misused the office of Independent Auditor of the Company who attended date of hearing of the case without any valid reason.

6 Based on these allegations, Jafferbhai had approached the Company Law Board and the prayers sought were :-

(a) to quash and set aside the impugned resolution dated 30/03/2012 passed in the illegal and invalid Extra Ordinary General Meeting by Mr. & Mrs.Sathyaprakash for removal of Jafferbhai as Director of the company ;

(b) to stay the effect and operation of impugned resolution dated 30/03/2012 passed in the Extra Ordinary General Meeting by Mr. & Mrs.Sathyaprakash for removal of Jafferbhai as Director of the Company ;

(c) to declare that the nature of the Company is that of quasi partnership company ;

(d) to declare that the acts of Mr. & Mrs.Sathyaprakash are oppressive, arbitrary and corrective and illegal which amounts to misuse of majority shareholding and ignored the valuable contribution by Jafferbhai as a promoter, founder, Director and growth seen by the company since its incorporation ;

(e) to protect Jafferbhai's right as a founder, promoter and to refrain Mr. & Mrs.Sathyaprakash by appropriate order from doing any act which will jeopardize Jafferbhai's status and interest in the Company ;

(f) to declare that the 100 shares forcefully and illegally transferred from Jafferbhai to Mrs.Sathyaprakash with direction to restore the same to Jafferbhai.

7 Mr.& Mrs.Sathyaprakash filed reply denying that Jafferbhai had 25% share holding. According to Mr. & Mrs.Sathyaprakash,

Jafferbhai had only 24% of the total paid up capital of the company equal to 6000 shares and Mr.Sathyaprakash and Mrs.Sathyaprakash had 70% and 6%, respectively. Mr. & Mrs.Sathyaprakash also justified the expulsion of Jafferbhai as director by the company to be in accordance with law and in the interest of the company. Mr.& Mrs.Sathyaprakash also denied the challenge relating to the validity of the board meeting and the subsequent EOGM as well as the validity of notices issued, all in respect of the board meeting and EOGM. Mr. & Mrs.Sathyaprakash also pointed out various mis-conducts committed by Jafferbhai against interest of the company and further denied allegations that funds were siphoned or misappropriated from the company.

8 The Company Law Board framed following issues, viz.,:

(a) whether the company was a glorified partnership/quasi partnership and therefore, dispute relating to directors can be agitated under Sections 397 & 398 of the Companies Act, 1956 ?

(b) whether any act on the part of Mr. & Mrs.Sathyaprakash would amount to oppression committed by them ?

(c) whether Jafferbhai's allegation that the 100 shares

that he transferred in favour of Mrs.Sathyaprakash was null and void for want of consideration ?

(d) Whether the board meeting held on 8.3.2012 and EOGM held on 30.3.2012 and the resolutions passed therein were valid ?

(e) What further steps to be taken keeping in mind the best interest of the company ?

9 The operative order reads as under and answers the issues.

ORDER

i) The impugned resolution dated 30/03/2012 passed by Respondent No.3 thereby removing the Petitioner as a director is hereby set aside. The petitioner is reinstated as a director w.e.f. the date of his removal. Form No.32 filed by the company showing his removal as a director in the office of ROC is cancelled. Another Form No.32 shall be filed by Respondent No.3 showing him as a director. The petitioner shall be entitled to get salary, perks and allowances and other consequential benefits with effect from the date of his removal until the amount is actually paid to him ;

ii) The petitioner is directed to sell his 24% shareholding to R1 and R2 in terms of Articles of Association on a fair value to be assessed by an Independent valuer. The parties may nominate some valuer by consensus within 15 days. If they fail to reach at any consensus for the appointment of any Independent Valuer, M/s.V.A.Bapat & Co., Chartered Accountant, 208/209, Acharya Commercial Centre, Dr.G.C.Road, Chembur Mumbai-400 074 Phone No.022 65145672, who is on the panel of the list of Official Liquidator, shall carry out the valuation within 30 days from the date of his appointment. Such valuer shall value

the shares of the Respondent No.3 Company as on the date of filing of the petition, strictly as per norms applicable for the valuation of shares of a going concern. The parties are directed to render all assistance to such valuer and furnish all the documents as desired by him for the purpose of valuation of the shares ;

iii) The copy of valuation shall be provided to the parties who shall be entitled to file objection, if any, to the report and in that case, CLB may determine the valuation taking into the consideration the objection of the parties. Upon adjudication of the objection, if any, the Respondents shall be bound to deposit the amount with the CLB within 30 days through Bank Draft, which shall be converted into FDR in some Nationalised Bank earning maximum rate of interest by the Bench Officer. In the event, the Respondents fail to deposit the amount as directed above, the petitioner shall be entitled to get interest at the rate of 12% p.a. to be compounded on quarterly basis until the actual amount is paid. Upon making deposit, the petitioner shall cease to be director of the company with immediate effect ;

iv) Upon deposit of the amount as directed above, the petitioner shall be bound to transfer his shares in favour of Respondent Nos.1 and 2 on proportionate basis of their respective shareholdings. In the event, he does not execute the transfer deed, CLB may appoint any person to carry out the necessary legal formalities for transfer of shares in the name of the Respondents. Upon the transfer of shares, the amount together with interest accrued thereon deposited with CLB shall be paid to the petitioner ;

v) The expenses of the valuer shall be borne out by the Petitioner and Respondents in equal proportions ;

vi) Parties are left to bear their own cost of the petition ;

vii) Parties are at liberty to seek clarification if required, in the implementation of the order, despite C.P being disposed off ;

viii) The interim order if any stands vacated. C.A if any,

pending also stands disposed off ;

ix) C.P stands disposed off accordingly.”

Mr. & Mrs.Sathyaprakash are not happy with para (i) and Jafferbhai is not happy with para (ii) to (v).

10. Mr. & Mrs.Sathyaprakash have impugned the order to the extent that the CLB has set aside the resolution dated 30.3.2012 removing Jafferbhai as director and directed reinstatement of Jafferbhai as director of the company and further directed that Jafferbhai shall be entitled to get salary, perks and allowances and other consequential benefits w.e.f. the date of his removal until the amounts are actually paid to him. It is the case of Mr. & Mrs.Sathyaprakash that the company was not a quasi or glorified partnership and therefore, CLB could not have gone into the issue of directorial dispute under Sections 397 and 398 of the Companies Act, 1956 and secondly it defies sensibility as to when Mr. & Mrs.Sathyaprakash have to purchase the 24% shares of Jafferbhai at fair value to be assessed by independent valuer, there was no need to make Jafferbhai once again as director of the company and then again remove him. Thirdly, no final order in a petition under Sections 397 and 398 of the Companies Act could be passed without first coming to

the conclusion that it was fair and justifiable that the company should be wound up and come to a further conclusion that to wind up the company would unfairly prejudice Jafferbhai. It is the case of Mr. & Mrs.Sathyaprakash that even Jafferbhai has not prayed for winding up of the company in his petition.

11 Jafferbhai has filed cross appeal (Company Appeal No.62 of 2015) in which he has raised the following as questions of law :-

- (a) Whether Jafferbhai being the first permanent, founder, director, investor, majority (24%) shareholder without any fault deserves to be excluded from the management of a duly established Quasi-Partnership Company in spite of him having been a part of successful management for more than 13 years ?
- (b) Whether in the absence of pleadings, facts or the prayer, the direction given by the Company Law Board to sell out the 24% shares of a duly established profit making Quasi-Partnership Company under joint management for more than 13 years is justified ?
- (c) Whether a Company should be governed as per the Articles of Association or as per the whims and fancies of any particular Director, i.e., Mr.Sathyaprakash ?

(d) Whether while exercising power u/s 397-398 and sec.402 of the Companies Act, 1956, in the peculiar facts and circumstances, the Company Law Board can direct a minority shareholder to sell out his shares in a duly established Quasi-Partnership company where he has been directed to be a Director on the conclusion of continuous oppression and mismanagement with accounts by majority shareholders (Mr.Sathyaprakash) ?

(e) Whether Company Law Board in the light of reinstatement of Jafferbhai as Director on the basis of fully established continuous act of oppression on the part of majority shareholder could direct the sale of his shares/property ?

(a) and (c) does not really raise any question of law where as (b), (d) and (e) basically are the same.

In effect what Jafferbhai raises is whether the CLB can direct Jafferbhai to sell his shares after coming to a conclusion that the company was a quasi partnership and there was continuous act of oppression on the part of Mr. & Mrs.Sathyaprakash.

12 When the appeal was listed on 14.11.2017 counsel representing both the sides stated that the matter can be worked out. Counsel for Mr. & Mrs.Sathyaprakash stated that his clients are ready and willing to buy shares of Jafferbhai. Jafferbhai was also agreeable and both suggested that a firm of Chartered Accountant be appointed as Valuer. By consent, one M/s.A.R.Sulakhe & Co. of Pune was appointed as valuer and the parties agreed to share the valuer's fees and expenses 76 : 24. The valuation report was submitted and when it was placed before the court on 12.1.2018, Jafferbhai's counsel stated that the valuation report was not acceptable. Mr.Muchhala, a very respected senior Advocate who was then appearing for Jafferbhai stated that his instructions were to go on with the matter and not to accept the valuation report. The appeal was listed on 1.2.2018 and on that day on the joint request of counsel, was stood over. On 1.3.2018 Mr.Muchhala informed the court that the reason why the valuation report was not acceptable was because the valuer did not even visit the site and one of the main asset of the company was landed property in Pune. It was also submitted that the valuer has only stated that the value of the movable properties has been based on valuation report given by an approved valuer but no details of the said approved valuer or valuation given by the said approved valuer was provided to Jafferbhai.

13 Mr.Bookwala on the contrary stated that he was accepting the valuation report of A.R.Sulakhe & Co. and went on to say that in the report, fair value of each paid up equity share indicated was Rs.2,500/- per share but Mr. & Mrs.Sathyaprakash were ready to pay Rs.5,000/- per paid up equity share to Jafferbhai who had 6000 paid up equity shares, constituting 24% of the shares. Mr.Bookwala also made a counter offer that Mr. & Mrs.Sathyaprakash were ready to sell their 76% share holding at 10% discount, i.e., at the value of Rs.4500/- per paid up equity share to Jafferbhai. Mr.Muchhala stated that the offer of Mr.Bookwala was not acceptable and in any event Jafferbhai did not have financial capacity to buy the 76% share holding of Mr. & Mrs.Sathyaprakash.

14 Both Shri Bookwala and Shri Muchhala, learned senior Advocates, thereafter, on instructions from their respective clients who were present in court, i.e., Mr.Sathyaprakash & Jafferbhai, respectively, agreed that M/s.Bansi S.Mehta & Co., Chartered Accountants, be appointed as valuer to value the company and arrive at the fair value of each paid up equity share of the company as on 31.3.2012. This is the last financial year when Jafferbhai was removed as director. Both Shri Bookwala and Shri Muchhala on instructions stated that their respective clients shall accept and be bound by the

valuation given by M/s.Bansi S. Mehta & Co., Chartered Accountants. In fact, Mr.Muchhala explained to Jafferbhai that we will have to accept whatever M/s.Bansi S.Mehta & Co would state and Jafferbhai informed Mr.Muchhala that it was acceptable to him. Jafferbhai, looking at the court, said he was agreeable and would accept the report of M/s.Bansi S.Mehta & Co. and will not raise any objection thereafter. Both parties were also given liberty to give their comments, suggestion and objections to M/s.Bansi S.Mehta & Co. who was directed to consider the same before arriving at final valuation. It will be useful to reproduce paragraphs 1 to 10 of the order dated 1.3.2018.

“1 Pursuant to order dated 14th November, 2017, one M/s. A.R. Sulakhe and Company, Pune was appointed as Valuer and the fees of the valuation was to be shared 76% by Mr. Bookwalla's client and 24% by Mr. Muchhala's client. M/s. A.R. Sulakhe and Company have given a valuation report as on 31st March, 2012 because that is the cut-off date indicated by both the parties and as recorded in the order dated 14th November, 2017.

2 Mr.Muchhala states that the valuation report given by M/s. A.R. Sulakhe and Company is not acceptable because according to Mr. Muchhala's client, the Valuer has not even visited the site because one of the main asset of the company is landed property in Pune. Mr. Muchhala submitted that the Valuer has only stated that the valuation of movable properties has been based on valuation report of an approved Valuer but no details of the approved Valuer or the valuation given by the approved Valuer as indicated is provided to his client.

3 Mr. Bookwalla of course stated that his client is accepting

the valuation report of M/s. A.R. Sulakhe and Company and though in the valuation report the value of each equity share is indicated to be approximately Rs.2,500/-, Mr. Bookwalla's client is ready to pay Rs.5,000/- per equity share - paid up to Mr. Muchhala's client, for his 24% shares. Mr. Bookwalla also offered that if Mr. Muchhala's client is ready and willing to buy his client, they are ready to sell even at 10% discount, i.e., at Rs.4,500/- per share.

4 Mr. Muchhala ofcourse was not acceptable to any of the offer of Mr. Bookwalla. Mr. Muchhala states that even at Rs.4,500/- his client is not in a position to buy Mr. Bookwalla's client.

5 After the appeal was heard for some time and after these discussions were over, both the counsel, on instructions from their respective clients, who are present in Court, on the suggestion made by this Court accepted that Banshi S. Mehta and Co., Chartered Accountants having their office at Merchant Chamber, 3rd Floor, 41, New Marine Lines, Mumbai – 400 020 (Telephone NO.2201 4922/2200 4002/8/9, 2206 8409/6636 0763 email ID – bsmco@hathway.com) be appointed as Valuer to value the company and arrive at the value of each paid up equity share of the company as on 31st March, 2012.

6 Both counsel stated that the fees and expenses of Banshi S. Mehta and Co. will be shared equally between the parties, viz., 50% by Mr. Muchhala's client and 50% by Mr. Bookwalla's client. Both counsel state that the moment they get proforma invoice from Banshi S. Mehta and Co., they shall make the payment to Banshi S. Mehta and Co. directly under advise to the other. Both counsel further state that they shall accept and be bound by the valuation report as given by Banshi S. Mehta and Co. without raising any objection.

7 Mr. Muchhala explained to his client that he will have to accept whatever Banshi S. Mehta and Co. state. This Court noticed Mr. Muchhala's client informing Mr. Muchhala that it is acceptable to him.

8 Therefore, Banshi S. Mehta and Co., Chartered Accountants having their office at Merchant Chamber, 3rd Floor, 41, New Marine Lines, Mumbai – 400 020 (Telephone NO.2201

4922/2200 4002/8/9, 2206 8409/6636 0763 email ID – bsmco@hathway.com) is appointed as Valuer to value the company – Opulent Auto Care Private Limited and arrive at the value of per equity share. Banshi S. Mehta and Co. shall raise its invoice directly on Mr. Sathyaprakash Subramanian and Mr. Mohamad Rafiq Jafferbhair Bagwan, who shall pay 50% each of the fees and cost/out of pocket expenses of Banshi S. Mehta and Co.

9 Banshi S. Mehta and Co. shall give atleast 1 week advance notice, simultaneously to both Mr. Bookwalla's client and Mr. Muchhala's client of the date and time of visit to the site and also consider their comments and suggestions and objections before arriving at the final valuation report.

10 Banshi S. Mehta and Co. is requested to complete valuation and submit a report on or before 13th April, 2018. Both Mr. Muchhala and Mr. Bookwalla state that their clients will extend all co-operation required by Banshi S. Mehta and Co.”

15 Banshi S.Mehta and Co., submitted its valuation report dated 12.4.2018 read with clarification letter dated 3.5.2018. M/s.Banshi S.Mehta & Co., after sharing the data provided by the company with representative of Jafferbhair, came to a conclusion that the fair value of each paid up equity share of the company as a going concern will be Rs.6209/- per share.

16 Unfortunately, when the report was placed before the court on the next date, i.e., 27.4.2018, despite Jafferbhair agreeing in no uncertain terms that he will be bound by the valuation report of Banshi S.Mehta & Co. and that he will accept whatever Banshi S.Mehta and Co.

states, Jafferbhai reneged on his commitment given to this court.

Therefore, Mr.Muchhala returned the brief to Jafferbhai and has not appeared for Jafferbhai any further.

17 On 27.4.2018 the following order came to be passed :-

“1. Mr.Nachan states that he and Mr.Muchhala have informed respondent in Appeal No.35 of 2014 who is the petitioner in Company Appeal No.62 of 2015 that in view of the commitment given by him in the court as recorded in the last order passed on which Bansi S.Mehta & Co. was appointed as Valuer, he has to honour the word given to the court and if he does not honour the word given to the court, Mr.Muchhala and Mr.Nachan will not be appearing in the matter any more.

2. Ms.Chandra states that the appellant in Company Appeal No.35 of 2014 who is respondent in Company Appeal No.62 of 2015 is ready and willing to abide the words given to the court. Ms.Chandra states that appeal be listed on 3.5.2018 so that she can ask her client to remain present in court.

Stand over to 3.5.2018 for orders.”

18. I have to note that none of the above noted events were on without prejudice basis. Both parties on proper advice of senior Advocates made statements to the court. I narrated this only to show the conducts of Jafferbhai who had no qualms in going back on solemn words given to the court.

19 Thereafter, when the appeals were taken up on 4.5.2018,

the appeals were stood over at the request of Jafferbhai. On 26.6.2018 Jafferbhai sought further time to engage another advocate which was granted till 12.7.2016. But after the order of 26.6.2018 was dictated, Jafferbhai informed the court that his memo of appeal be considered as his arguments/submissions in the matter and he does not want to add anything thereto. Therefore, the matter was stood over only for Mr.Bookwala to make his submissions.

20 Thereafter, on 31.7.2018, Jafferbhai was represented by Advocate Shri Modak. In view of Jafferbhai closing his arguments on 26.6.2018, Shri Modak was told to restrict his arguments as to why the valuation report of Bansi S.Mehta and Co. should not be accepted as binding on the parties. Advocate Shri Modak declined and stated that he will re-argue the entire matter which the court did not permit. Mr.Bookwala made his submissions. Subsequently, after the appeals were reserved for judgment, Jafferbhai on 1.8.2018, took out Company Application (L) No.15 of 2018 for permission to reargue the matter on merits and to file written submissions. This application was listed on 7.8.2018 when none appeared for Jafferbhai and hence was stood over to 8.7.2018. On 8.8.2018, Jafferbhai appeared and requested the Company Application be stood over to 10.8.2018. On 10.8.2018, the following order came to be passed :-

“1. After the Court reserved the matter for judgment, appellant in company appeal no.62 of 2015 took out a company application to reopen the case effectively and hear appellant though on the date when the appeal was reserved for judgment, the counsel refused to go on with the matter. In the interest of justice, the application was heard today.

2. Appellant was present in person and tendered written submissions, which has been taken on record. Appellant is happy with the Court taking the written submissions on record.

3. Ms.Saldanha, counsel for respondents states that they have been given a copy of the written submissions and should be given liberty to file a response written submissions, if advised. Ms.Saldanha is justified in seeking time to file a response written submissions. The same to be filed by 20th August 2018.

4. Application accordingly stands disposed.”

21 At the outset, I would say that in view of the order dated 1.3.2018 there is nothing to be heard in the matter on merits. Both the parties had, with prejudice, agreed to accept the valuation report of M/s.Bansi S.Mehta & Co., Chartered Accountants, and having made solemn statement to the court, are bound by the same. No party should be permitted to take statement made to the court lightly. Courts cannot be used by parties to take a chance. The report of M/s.Bansi S.Mehta is binding on Jafferbhai. Even on 31.7.2018 Shri Modak was asked whether Jafferbhai was inclined to buy the shares of Mr.& Mrs.Sathyaprakash, which was declined. Therefore, Jafferbhai,

having expressed his inability to buy out 76% share holding of Mr. & Mrs.Sathyaprakash, is bound to sell his 6000 equity shares comprising 24% of the paid up share capital to Mr. & Mrs.Sathyaprakash. M/s.Bansi S. Mehta & Co. has arrived at a valuation of Rs.6209/- per share and upon Mr. & Mrs.Sathyaprakash paying sum of Rs.3,72,54,000/- (6000 x Rs.6209/-) to Jafferbhai, Jafferbhai shall sign the share transfer forms and hand it over along with original share certificates to Mr. & Mrs.Sathyaprakash.

22 In any event, despite my above conclusion, I would still deal with the merits of the case. I am inclined to interfere with the order of the Company Law Board only to the extent of grievance raised by Mr. & Mrs.Sathyaprakash against Company Law Board coming to a conclusion that this was a quasi or glorified partnership and therefore, a directorial dispute can be interfered with under Sections 397 & 398 of the Companies Act, 1956 and Jafferbhai should be reinstated as a Director of the company. On the issues as raised by Jafferbhai, I see no reason to interfere with.

23 The Company Law Board at one place, while deciding the issue as to whether it is a glorified partnership firm, has stated that it is immaterial whether partnership firm was dissolved or not. In my

view, it is very material. It is the case of Jafferbhai that the partnership firm was started by him and Mr.Sathyaprakash on 50 : 50 basis. Both of them were equal partners. The company namely M/s.Opulent Auto Care Pvt. Ltd. was formed on 9th April 2003 as a separate corporate entity and can be seen from the incorporation certificate that the company is not converted under part IX. There was no agreement between partners to convert the partnership firm, rather the same is dissolved only in August 2003 many months after the incorporation of the company. Further there was no resolution passed by the members for conversion of the said firm and no resolution is filed with office of the Registrar. There is also no board resolution passed to take over the partnership firm by the company and this being so there cannot be any presumption that there was a partnership in the guise of a company. Further when the company was incorporated on 9.4.2003 as a separate corporate entity, the equation changed in as much as that Mr.Sathyaprakash held 70% shares, Mrs.Sathyaprakash held 5% shares and Jafferbhai held 25% shares. Subsequently, Jafferbhai sold 100 shares comprising 1% of his holding to Mrs.Sathyaprakash and the equation changed to 70 : 6 : 24.

In case of a conversion of a partnership firm, the holding of the partners must more or less remain the same on conversion, whereas the share holding patterns were completely different. Therefore there

is nothing to even remotely presume that there was a partnership in the guise of a company. Mr.& Mrs.Sathyaprakash also relied upon the list of schedules annexed to the balance-sheet of the company, i.e., first annual report as on 31.3.2004 which is annexed to the petition that was filed by Jafferbhai, in which the partnership firm, Opulant Car Care, is shown as one of the sundry creditors. In the rejoinder, this specific allegation has not been denied and a general bald statement is made that the submission regarding non conversion of partnership firm into a private limited company, is baseless. The fact that is glaring is that in the first annual report, the firm, Opulant Car Care, is shown as a creditor and if partnership firm has been converted into a private limited company, the question of partnership firm being shown as a creditor would not arise.

The partnership firm therefore continued to be a sundry creditor of the company. Not a shred of document was filed by Jafferbhai which would evidence this conversion or transfer of assets and liabilities from the firm to the company. Therefore, by no stretch of imagination can it be called a quasi partnership firm or glorified partnership firm.

24. In this case there is nothing to indicate a case of complete deadlock in the company and the company is smoothly and efficiently

continuing to run as a commercial concern. There is nothing to indicate that the structure of the company is not the real structure and on piercing the veil it can be stated that in reality it is a partnership. On the allegations and submissions in the present case, I am not prepared to accept that it is a glorified partnership firm or quasi partnership firm.

25 It will be useful to reproduce paragraph nos.33 & 34 of the judgment in *Hind Overseas Pvt. Ltd. Vs. Raghunath Prasad Jhunjhunwalla*¹ and the same read as under :-

“33. When more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked. Besides, it is only when shareholding is more or less equal and there is a case of complete deadlock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding-up on the just and equitable ground. In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership. On the allegations and submissions in the present case, we are not prepared to extend these principles to the present company.

34. The principle of 'just and equitable' clause baffles a precise definition. It must rest with the judicial discretion

1.(1976) 3 Supreme Court Cases 259

of the court depending upon the facts and circumstances of each case. These are necessarily equitable considerations and may, in a given case, be superimposed on law. Whether it would be so done in a particular case cannot be put in the straitjacket of an inflexible formula.”

(emphasis supplied)

26. The Apex Court in ***Sangramsingh P.Gaekwad Vs. Shantadevi P.Gaekwad***² has said that there cannot be a straitjacket formula to determine whether the company is a quasi partnership or a glorified partnership. It would depend upon the facts of each case. Some of the factors which could be kept in mind, the Supreme Court held is equality in the share holding or conversion of pre existing partnership into the company or understanding between the parties for equal participation in the management are some of the circumstances which may lead to presumption that the company is in the guise of a partnership. In the present case none of those factors exist in as much as there is no equality in share holding- Jafferbhai holds 24% and Mr. & Mrs.Sathyaprakash hold 70% and 6%, respectively, and as noted earlier the pre-existing partnership firm has not been converted into a company. Thirdly, there is nothing to show on record that there was any equal participation in the management which any way could not happen because Jafferbhai held only 24% and Mr. & Mrs.Sathyaprakash held 76% and with such share holding

2. 2005(123) Company Cases 23 566

there cannot be equal participation in the management. The CLB has proceeded on an incorrect presumption that the firm was converted into the company. That is patently wrong. CLB says the company carried on the same business as the firm, had the same kind of clients and Jafferbhai got dividend at the same rate as Mr.Sathyaprakash and also perks. Dividend every shareholder is going to get the same rate. The business could be the same as the firm. But the glaring difference is when the firm was 50:50 partnership, the company since inception was 70:5:25 later changed to 70:6:24 shareholding by Mr.& Mrs.Sathyaprakash and Jafferbhai. Therefore, there can never be an equality which existed in the firm. If the firm was converted (Factually it was not) into a company and if it was a glorified partnership firm, then Sathyaprakash and Jafferbhai would have held 50:50 shareholding. Moreover, after the company was formed, the firm was shown as a creditor and later Jafferbhai sold 1% (100 equity shares) to Mrs.Sathyaprakash and became 24% shareholder.

27 Another aspect which could be a circumstance that could leads to presumption that the company is in the guise of the partnership is when there is sufficient material to show that the company was a family company in the guise of partnership. In this case the company cannot be a family company because Jafferbhai is

not a member of the family of Mr.& Mrs.Sathyaprakash. There is nothing on record also to indicate that there was some basic understanding between the parties that the company would be managed on partnership principles. Certainly, there is no evidence led.

28 Therefore, the conclusion of the Company Law Board that the company was a glorified partnership firm is not correct. In fact, in the impugned order, Company Law Board has not dealt with the stand of Mr. & Mrs.Sathyaprakash that the firm continued to remain in existence even after the company was formed.

29 Before we proceed further it would be also useful to reproduce the limited scope of section 10F of the Companies Act. It is well settled as held by the Hon'ble Supreme Court of India in ***V.S.Krishnan & Ors. Vs. Westfort Hi-Tech Hospital Limited & Ors.***,³ and followed in ***Purnima Manthena & Anr. Vs. Renuka Datla & Ors.***⁴ that an appeal under Section 10F of the Companies Act lie only on a question of law. Section 10F expressly states that the appeal will lie only on question of law arising out of the order. It is further held by the Hon'ble Supreme Court that the Company Law Board is a final

³ (2008) 3 SCC 363

⁴ (2016) 1 SCC 237

authority on facts unless such findings are perverse, based on no evidence or otherwise arbitrary. To the extent of CLB's conclusion that the company was a glorified partnership firm and Jafferbhai has to be reappointed as Director as he was oppressed, I find it to be perverse and arbitrary.

30 For the purpose of oppression and mis-management, again there cannot be a straitjacket formula. Sections 397 & 398 of the Companies Act 1956 read as under :-

“397. Application to [Tribunal] for relief in cases of oppression- (1) Any member of a company who complain that the affairs of the company [are being conducted in a manner prejudicial to public interest or] in a manner oppressive to any member or members (including any one or more of themselves) may apply to the [Tribunal] for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Court is of opinion -

(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, the [Tribunal] may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

398. Application to [Tribunal] for relief in cases of mismanagement- (1) Any members of a company who

complain-

(a) that the affairs of the company [are being conducted in a manner prejudicial to public interest of] in a manner prejudicial to the interests of the company ; or

(b) that a material change not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by an alteration in its Board of directors, [or manager] or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company [will be conducted in a manner prejudicial to public interest or] in a manner prejudicial to the interests of the company, may apply to the [Tribunal] for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1) the [Tribunal] is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the [Tribunal] may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.”

31 The provision which is material to the matter in hand is section 397-oppression. Company Law Board has come to a conclusion that removal of Jafferbhai as director constitutes an act of oppression. CLB has not dealt with anywhere on mismanagement-Section 398 and it does not appear to have been argued also. Before holding that affairs of the company are being conducted in a manner oppressive to any

member, the CLB ought to come to a conclusion that the facts would justify making up a winding up order on the ground that it was just and equitable that the company should be wound up but to wind up the company would unfairly prejudice Jafferbhai. Further under Section 397, only members grievance is covered. There is no such finding anywhere in the order of the CLB. I would add that even Jafferbhai has not averred in the petition that the facts would justify in making up a winding up order and that it was just and equitable that the company should be wound up but if the company is wound up it would unfairly prejudice Jafferbhai. The only grievance raised by Jafferbhai is his removal as a Director in a legally held meeting dated 30.3.2002. Jafferbhai has not raised any grievance in his capacity as a shareholder. In such a case there cannot be a finding of oppression. Moreover, without coming to such a conclusion as stated above, CLB cannot say that removal of jafferbhai as a director was an act of oppression and jafferbhai should be reinstated as a director, paid his salary from the date of removal and then again remove Jafferbhai from the post of director after buying his shares.

32 Under section 397 of the Companies Act, CLB has to be satisfied that there is an oppression. It has to be satisfied that the affairs of the company has been conducted in a manner prejudicial to

any member or members of the company and the acts of oppression have not only to be alleged with sufficient particulars but they must also be proved. It is necessary to emphasize that CLB has to form an opinion on 2 essential points that are set out in section 397(2) of the Act. These two points are :- (a) that the company's affairs are being conducted in a manner oppressive to any member or members of the company ; 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 ground that it was just and equitable that the company should be wound up. It is imperative that the court's opinion on both these points has to be affirmative before any order could be made [*Maharani Lalita Rajya Laxmi Vs. Indian Motor Co.*]⁵

33 On both these counts, CLB has failed in as much as it has not come to a conclusion that facts would justify in making up of a winding of order or that it was just and equitable that the company should be wound up and (b) that winding up would unfairly prejudice jafferbhai. Without forming this opinion, even assuming the company is a quasi or glorified partnership firm, CLB could not have come to a conclusion of oppression or passed an order under Section 397 of the

5 1962 (32) Company Cases 207

Companies Act.

If the facts fall short of the case set out for winding up on just and equitable grounds, no relief can be granted to the respondent (*MSDC Radharamanan Vs. MSD Chandrasekara*⁶).

34 Moreover, no case also has been made out that the affairs of the company have been conducted in a manner prejudicial to the public interest or prejudicial to any member or members. The only grievance as stated above, is removal of respondent as a director in a meeting held on 30.3.2012.

35 So far as mismanagement under Section 398 of the Companies Act, 1956 is concerned, it does not appear to have been raised or argued before CLB and there is no finding therein also. What is material is for the CLB to come to a conclusion that the affairs of the company are being conducted in a manner prejudicial to the company and that a material change has taken place in the management for control of the company by an alteration in its board of directors and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interest of the company. There are no averments that I could find in the petition

⁶ (2008) 143 Company Cases 97 (SC)

filed by Jafferbhai wherein such allegations are even made, let alone the CLB to come to such finding. Even if removal of Jafferbhai as a Director would amount to a material change in the management of the company, still how does it prejudicially affect the interest of the company, CLB has not elaborated. In the impugned judgment, paragraphs 22, 23 and 24 read as under :-

“22. In so far as the EOGM dated 30/03/2012 is concerned, it is the case of the petitioner that the notice for calling, convening, and holding the EOGM is bad in law, interalia on the ground that no explanatory statement was attached with the notice and he received the explanatory statement on 14/03/2012, also appears false. From the perusal of the notice dated 8/03/2012 issued under Section 190 of the Act, it is seen that in the notice itself a note is appended that explanatory statement as required under Section 173 of the Act is annexed. It is, therefore, difficult for me to believe that the notice was sent to the Petitioner without annexure i.e., Explanatory Note. In response to the notice, the Petitioner submitted a representation to the company which is evident from the (Exhibit-”14”) filed with the petition. It is not recorded in his representation that the notice issued to him in respect of calling EOGM was incomplete in any respect. The Petitioner also made a complaint to the ROC (Exhibit-”15”). In this complaint, also he did not make mention of the fact that the notice served upon him in respect of EOGM was incomplete in any respect. Contrary to it, the petitioner in para no.13 has admitted that he was provided with copy of the notice of the shareholder on whose request the EOGM was to be convened and he had replied the said letter also to the said shareholder. Further, the other grounds challenging the EOGM that the notice was without any official stamp and letter head did not mention the address of the registered office of the company

are technical in nature and in my opinion are baseless. No prejudice appears to have been caused to him on account of these defects. However, from the perusal of the notice, it is seen that the notice was sent on the letter head of the company and the address of its registered office is mentioned therein.

23. Having given my anxious thoughts on all the grounds challenging the EOGM dated 30/03/2012, I have come to the conclusion that the petitioner has failed to prove any illegality in the calling, convening and holding of the said EOGM wherein a resolution was passed to remove him as a director.

24. Having found that the Board Meeting dated 8/03/2012 and EOGM dated 30/03/2012 were held according to law, I need to examine now, as to whether the termination of the petitioner as director of the R3 company amounts to an oppressive act.”

(emphasis supplied)

Despite disbelieving Jafferbhai on these points, CLB strangely holds Jafferbhai's removal as Director to be oppressive.

36 In paragraph 29 of the impugned judgment, CLB notes the statement of Jafferbhai's counsel that in a petition under Sections 397/398 of the Companies Act directorial disputes cannot be agitated but at the same time, the CLB has concluded that the removal of Jafferbhai as a Director is illegal, invalid and required to be set aside. In paragraph 35 of the impugned judgment, CLB states Mr. & Mrs. Sathyaprakash, when they found that the conduct of Shri

Jafferbhai was not up to the mark, Mr. & Mrs.Sathyaprakash should have issued a memo or show cause notice to Jafferbhai and should have given an opportunity to Jafferbhai to improve performance. CLB states not having given such an opportunity to Jafferbhai, removal of Jafferbhai from the Board of Directors of the company is harsh, burdensome and wrongful act. It has also found some of the statements in the written submissions against Jafferbhai as offensive and therefore his removal as Director was illegal, invalid and liable to be set aside. Nowhere in the order has the CLB noted how removal of Jafferbhai from the Board of Directors was prejudicial to the interest of the company. This approach of CLB is rather bizarre.

37 It is now settled law that directorial disputes cannot be a subject matter of sections 397 & 398. (*Hanuman Prasad Bagri and Ors. Vs. Bagress Cereals Pvt. Ltd. And Ors.*⁷ and *Abdul Wahid Gaffor Khatri & Ors Vs. Safe Heights Developers Pvt. Ltd.*⁸

38 CLB has, on the challenge of Jafferbhai to the validity of the board meeting held on 8.3.2012 and EOGM on 30.3.2012, come to a conclusion that meetings were validly held. In paragraph-21 of its order, CLB has come to a conclusion, after considering the

⁷ (2001) 4 SCC 420

⁸ Company Appeal No.22 of 2013 decided on 24.2.2018 (Coram : K.R.Shriram,J)

communication exchanged and the minutes of the board meeting, that Jafferbhai has failed to prove that the board meeting held on 8.3.2012 was non est, illegal and the resolutions passed there at are liable to be set aside. So far as EOGM is concerned, in paragraph-23 after considering the various facts, CLB has come to a conclusion that Jafferbhai has failed to prove any illegality in calling, holding of the said EOGM wherein a resolution was passed to remove him as a director. Then how can there be an oppression I ask myself.

39 As noted above, the scope of section 10F of the Companies Act is very limited and CLB having come to a conclusion that both the meetings were held validly, I do not see any reason how it could have interfered and said removal of Jafferbhai was oppressive. In any event, having perused the pleadings, it is not Jafferbhai's case that the notice regarding meeting of 8.3.2012 was not received. In fact, in the meeting, Jafferbhai had participated and after receiving the notice even sent a representation to the company. In the board meeting as recorded in the minutes of the meeting, Jafferbhai even stated that he had 100% trust in Mr.Sathyaprakash for his integrity towards the company (see para 19 of the impugned judgment).

40 So far as EOGM is concerned, it was Jafferbhai's case that

he had not received any explanatory statement with the notice received on 14.3.2012. CLB has, after considering the records, come to a conclusion that the allegation of Jafferbhai was false. In fact, CLB has also noted that in response to the notice, Jafferbhai has even submitted a representation in which he has not even mentioned that the notice for the EOGM did not have any explanatory statement or notice was incomplete. It is also noted that even in the petition, Jafferbhai did not make mention about any fact that the notice served upon him of EOGM had any defect and CLB came to a conclusion that it was in fact served and there was no illegality.

41 No case has been made out under Section 397. CLB has dismissed the submissions of Mr.& Mrs.Sathyaprakash that before a relief under Sections 397 & 398 could be granted, Jafferbhai must prove that fact warrants winding up of the company by simply stating in paragraph-41 “..... I have considered the submission. In my opinion, on the basis of the facts pleaded and proved by the petitioner (Jafferbhai), a case under Section 397/398 is made out”. CLB has not even dealt with Section 398 (mismanagement) anywhere in the impugned order.

42 On the ground of selling of shares, it is the case of Jafferbhai that CLB having accepted respondent's case that he was unfairly removed and has to be reinstated, cannot direct Jafferbhai to sell the shares to Mr. & Mrs.Sathyaprakash. It is settled law that to bring matters to an end, CLB had the powers to order Mr. & Mrs.Sathyaprakash who hold 76% shareholding to purchase the shares of Jafferbhai particularly when Jafferbhai has expressed his inability to purchase the shares of Mr. & Mrs.Sathyaprakash. By directing Mr. & Mrs.Sathyaprakash to buy shares of Jafferbhai, Jafferbhai would no longer be oppressed and will have no cause to complain. In ***Scottish Co-operative Wholesale Society Ltd Vs. Meyer and Anr.***⁹ the House of Lords observed as under :-

“Some criticism was made of the relief given by the order of the court. It was said that only that relief could be given which had as its object and presumably its effect the “bringing to an end of the matters complained of “ and that an order on the society to purchase the respondents' shares in the company did not satisfy that condition. This argument is without substance. The matter complained of was the oppression of the minority shareholders by the society. They will no longer be oppressed and will cease to complain if the society purchase their shares.

Finally, it was said that the court had not properly exercised its discretion in fixing a price of \$3 15s. Per share. I see no ground for interfering with this decision.

⁹ 1958 3 All E.R.66

Necessarily a price cannot be scientifically assessed but I heard no argument nor had any evidence called to my attention which suggested that their Lordships had acted on any wrong principle or adopted a measure too generous to the respondents.”

43 Moreover, section 402 (b) of the Companies Act gives power to CLB to direct the purchase of the shares or interests of any member(s) of the company by other member(s) thereof or by the company. Section 402(b) reads as under :-

“402. Powers of [Tribunal] on application under section 397 or 398-

Without prejudice to the generality of the powers of the [Tribunal] under Sections 397 or 398, any order under either sections may provide for-

(a).....

(b) the purchase of the shares or interests of any members of the company by other members thereof or by the company.”

The Hon'ble Kerala High Court in the case of ***Subhash Jain and Ors. Vs. Pioneer Shopping Complex Pvt. Ltd. and Ors.***,¹⁰ has considered the position in law and held that the Company Law Board has wide powers. Similarly in the case of ***Reivera Builders Pvt. Ltd. Vs. Vijay Kumar Sekhri and Ors.***,¹¹ had considered the provisions in law and held that the powers of the CLB are of extremely wide

¹⁰ (2008) 142 Company Cases 533

¹¹ (2012) (2173 Company Cases 149

amplitude and that the CLB in ordering sale of shares acted in a fair manner.

44 In the circumstances, CLB was justified in directing Jafferbhai to sell his 24% shareholding to Mr. & Mrs.Sathyaprakash at a price to be fixed by an independent valuer. The valuer appointed by CLB was not accepted. The later valuer M/s.A.R.Sulakhe and Co. gave a valuation report as on 31.3.2012. That also not accepted by Jafferbhaia. By consent of parties, Bansii S.Mehta & Co. was appointed as valuer and both the parties informed the court that they will accept the valuation report given by Bansii S.Mehta & Co. Bansii S.Mehta & Co. has come to a fair value of Rs.6209/- per equity share. Jafferbhai holds 6000 shares. Therefore, it will work out to Rs.3,72,54,000/-. Mr.& Mrs.Sathyaprakash are directed to deposit this amount with the Prothonotary & Senior Master, High Court, Bombay, unless the respondent is ready and willing to accept the sum and sign the transfer forms and also hand over the share certificates. If Jafferbhai does not accept the amount and in consideration thereof hand over the share transfer forms and certificates, Mr. & Mrs.Sathyaprakash to deposit this amount of Rs.3,72,54,000/- with Prothonotary & Senior Master. Upon such deposit being made, Prothonotary & Senior Master or the Company Registrar of this court shall sign the transfer forms on behalf

of Jafferbhai and the company will be entitled to deal with those shares as it deems fit by issuing duplicate or fresh share certificate(s) in lieu thereof.

45. Both the appeals are disposed accordingly. All interim applications stand disposed.

Jahagirdar
Kiran
Ganesh

Digitally
signed by
Jahagirdar
Kiran Ganesh
Date:
2018.10.04
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+0530

(K.R.SHRIRAM,J)