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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 12th April, 2019
Pronounced on: 10th May, 2019

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CO.APP. 15/2013

GOPAL KRISHAN

..... Appellant

Through: Mr. P. Nagesh with Mr. Rakesh
Kumar, Mrs. Preeti Kashyap and Mr.
Ashish Khattar, Advocates.

versus

SUPER CASSETTES INDUSTRIES LTD. & ORS.

..... Respondents

Through: Mr. Amit Sibal, Senior Advocate with
Mr. Harsh Kaushik with Mr. Abhay
Chattopadhyay, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I. S. MEHTA

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This judgment disposes of the question of maintainability of the present appeal filed by Mr. Gopal Krishan against an order dated 17th December, 2012 passed by the learned Single Judge in CA No.730/2002 in CP No. 167/1999.

2. The background facts are that on 20th September, 1999 the learned Single Judge in the company jurisdiction of this Court had passed an order in CP No.167/1999 approving the Scheme of Amalgamation of Tony Electronics

Limited (TEL) (Respondent No.2) and Mandakini Aqua Minerals Limited (MAML) (Respondent No.3) with Super Cassettes Industries Limited (SCIL) (Respondent No.1) under Section 391 of the Companies Act, 1956 ('Act'). The said order was preceded by the first motion order dated 26th February, 1999 convening the meetings of the shareholders and secured and unsecured creditors of SCIL, TEL and MAML on 17th April, 1999.

3. The Appellant filed the aforementioned application being CA No. 730/2002 more than three years later on 22nd July, 2002 *inter-alia* on the ground that the Appellant, who claimed that he held 52,470 equity shares of TEL (constituting 52.47% of the shareholding) did not receive notice of the said meeting of shareholders called pursuant to the order dated 26th February, 1999. The Appellant stated that he was the brother of Respondents No.5 and 6 and late Shri Gulshan Kumar and that TEL, MAML and SCIL were closely held family companies. Respondent No.4 was the son of late Shri Gulshan Kumar and therefore a nephew of the Appellant as well as Respondents No.5 and 6. Respondent No.7 was the wife of late Shri Gulshan Kumar. Respondents No.8 and 9 were Directors in SCIL. Respondent No.10 was the wife of the Appellant and therefore a proforma Respondent. Likewise Respondents No.11 and 12 who were the children of Appellant and Respondent No.10 were also proforma Respondents.

4. According to the Appellant after the death of Shri Gulshan Kumar a family settlement had taken place through two hand written notes signed by Respondent No.4 and the Appellant on 19th February, 1998. Another agreement had been arrived at on 21st February, 1998. According to the

Appellant in terms of the family settlement dated 19th February 1998, eight properties were to be transferred in his favour.

5. It had further been agreed that Rs. 2.5 crores were to be paid to the Appellant by Respondents Nos.4, 5 and 6. As *quid pro quo* the Appellant agreed to transfer his shares in TEL, MAML and SCIL in favour of Respondent No.6. Accordingly, on 21st February, 1998 his shares in the aforementioned three companies were transferred by him in favour of Respondent No.4. Eight gift deeds dated 26th February, 1999 for the properties set out in the family settlement were executed in favour of the Appellant and Respondents Nos. 11 and 12. However, the deeds with respect to only four of those properties were registered in favour of the Appellant and Respondents No.11 and 12. According to the Appellant by failing to register the remaining four properties, the Respondents 4 to 6 had dishonoured the family settlement. Two of these properties belonged to TEL.

6. As far as the sum of Rs. 2.5 crores was concerned, according to Appellant in case of non-payment, the Appellant would have a right to transfer 52,470 equity shares of TEL which stood in the name of Respondent No.6 to himself. On that basis, the transfer deed dated 1st March, 1998 was executed by Respondent No.6 for transferring the aforementioned shares in favour of the Appellant, which was like a counter guarantee for payment of Rs.2.5 crores.

7. For the purpose of the present appeal it is not necessary to discuss certain other details concerning the use of the brands and trademarks of the

companies in terms of the settlement. According to the Appellant, although after the scheme of amalgamation TEL should have got dissolved, Respondents 4 to 6 kept it alive.

8. The Appellant's case is that he was unaware of the settlement and was under the *bona fide* impression that TEL was still in existence. He came to know of the merger only on 21st May 2002. Within two months thereafter on 22nd July, 2002 he filed an application being CA No.730/2002 in CP No. 167/1999 before the learned Single Judge under Rule 9 of the Company (Court) Rules seeking recall of the order dated 20th September, 1999 by which the scheme for merger of TEL and MAML with SCIL had been approved.

9. The contesting Respondents raised a preliminary objection that CA No. 730/2002 was not maintainable. It was contended that the remedy under Rule 9 of the Company (Court) Rules invoking the inherent jurisdiction of the Court was available only if there was no other alternative remedy for the Applicant. According to the contesting Respondents at the time that the application was filed on 22nd July 2002 Section 391 (7) of the Act had not been repealed and an appeal could have been filed thereunder. This was without prejudice to the contention that such appeal would in any event be time barred.

10. In the impugned order, the learned Single Judge also took note of the second main objection raised by the contesting Respondents that in respect of the 52470 shares of TEL, the name of the Appellant was never entered in the register of members as a shareholder. He was also not a member qua the

100 shares which earlier stood transferred to Respondent No.4 prior to the merger on 27th February 1999 and which was also reflected in the annual return of TEL for 1998-99.

11. The learned Single Judge Court appointed a Local Commissioner (LC) to inspect the record of TEL both at the office of the Registrar of Companies (ROC) as also in the registered office of the Company itself. The LC's report revealed that there were nine shareholders of TEL as per the register of members and name of the Appellant did not find mention therein. The register of members maintained at the registered office of TEL was initialled as far back as on 24th July 2002 at the stage of first visit by the earlier LC. Therefore, this was not a tampered document. On the other hand, the records of TEL with the office of the ROC raised serious doubts since some pages missing.

12. The learned Single Judge concluded that the name of the Appellant did not appear in the list of registered members and, therefore, no notice was required to be sent to him. The learned Single Judge also noted that the Appellant only filed photocopies of the transfer forms and the original thereof had not been produced. A letter dated 2nd March 1998 of TEL stated that the original share transfer forms had been given to the Appellant. The share transfer forms were unstamped and therefore the requirements of Section 108 of the Act had not been met. TEL was not obliged to act on an unstamped transfer form. The distinctive numbers of the shares were missing in the form. There was a remedy available to the Appellant under Section 111(2) by way of an appeal before the Company Law Board in the

event of TEL refusing to register the transfer of shares in favour of the Appellant. The Share Transfer Form was dated 1st March 1998 and was valid only till 1st May 1998. Yet, the Appellant took no steps to invoke Section 111 of the Act.

13. The learned Single Judge noted that since Section 391 (7) of the Act was still in force when the application was filed, the Appellant could well have invoked the appellate remedy thereunder.

14. The learned Single Judge also dealt with the merits of the objections raised by the Petitioner to the sanction of the scheme and found that the allegations of fraud made by him were unsubstantiated. Accordingly, the application was rejected as being entirely without merit.

15. Aggrieved by the impugned order of the learned Single Judge, the present appeal has been filed.

Preliminary objections of the contesting Respondents re: maintainability

16. A preliminary objection has been raised by the Respondents 1, 4 to 8 contesting the maintainability of the present appeal. Mr. Amit Sibal, learned Senior counsel appearing for the said Respondents made the following submissions in this regard:

- (i) The application filed by the Appellant under Rule 9 of the Company (Court) Rules purportedly sought 'recall' of the order dated 20th September, 1999 passed by the learned Company Judge approving the Scheme of Amalgamation between SCIL, TEL and MAML. In effect

it was an invitation to the learned Single Judge to re-examine the merits. Therefore, in effect the impugned order was an order dismissing a 'review' petition.

- (ii) The Appellant was not a party to the said proceedings. Reliance is placed on the decision of the Division Bench (DB) of this Court in ***Ram Kohli v. Indrama Investment Pvt. Ltd (2014) 186 CC 358 (Del)*** holding that an application filed by a litigant who was not a party to the original proceedings seeking to challenge the scheme of merger sanctioned by the Court should be treated as one seeking review of the said order.
- (iii) A distinction had to be drawn between a petition seeking review of an order and that seeking its recall. As explained in the ***Vishnu Aggarwal v. State of UP (2011) 14 SCC 813*** inasmuch as the learned Single Judge has in the impugned order considered the merits of the Appellant's arguments regarding the validity of the order approving the merger of TEL and MAML with SCIL under Sections 391 and 394 of the Act, the impugned order has to be treated as having dealt with the application of the Appellant as an application seeking review.
- (iv) In terms of Order 47 Rule 7 read with Order 43 Rule 1 (w) of the Code of Civil Procedure, 1908 (CPC) an order declining review is not an appealable order. Reliance is also placed in decisions in ***Vinod Kapoor v. State of Goa (2012) 12 SCC 378***, ***Shanker Motiram Nale v. Shiolalsing Gannusing Rajput (1994) 2 SCC 753*** and ***Shiv***

Charan Singh v. State of Punjab (2007) 15 SCC 370.

- (v) An order declining a review is not a judgment within the ambit of Section 10 of the Delhi High Court Act (DHC Act). Reliance is placed on the decisions in ***Government of NCT of Delhi v. Mool Chand Sharma 2013 (135) DRJ 705*** and ***Basant Kharbanda v. Punjab & Sind Bank 65 (1997) DLT 378.***
- (vi) The Appellant cannot invoke Section 391(7) of the Act to contend that the present appeal is against the order dated 20th September, 1999. Having elected to file a review under Rule 9 of the Company (Court) Rules, it was not open to the Appellant to avail another remedy. In any event the appeal is miserably barred by limitation.
- (vii) The Appellant's real grievance is against the order declining the review and against such an order no appeal is maintainable. If the contention of the Appellant that it should also be treated as an appeal against the main order is accepted, it would defeat the Order 47 Rule 7 CPC as every such aggrieved litigant would claim that an appeal against the order in review should be treated as one against the main order by invoking the doctrine of merger.
- (vii) The caption of the present appeal states that it is under Section 483 of the Act whereas the impugned order is not in a winding up proceedings. Therefore the present appeal is not maintainable under Section 483 of the Act. Reliance is placed on the decisions in ***Sant***

Chemicals Pvt. Ltd. v. Sant Chemicals Pvt. Ltd. (1999) 101 (2) Bom LR 399 and Smt. Ganga Bai v. Vijay Kumar (1974) 2 SCC 393.

Submissions of the Appellant on maintainability

17. In reply, Mr. P. Nagesh, learned counsel appearing for the Appellant, submitted as under:

- (a) The decision in ***Ram Kohli v. Indrama Investment Pvt. Ltd. (supra)*** was distinguishable on facts. The said decision dealt with the merits of the matter and not an application for recall. The DB in that case proceeded on the basis that Section 391 (7) of the Act stood deleted without creating a corresponding provision for appeal. This was a mistaken basis since in fact the repeal of the said provision had not been notified till April 2015.
- (b) The Companies (Second Amendment) Act 2002, the Press Note No. 2/2003 dated 4th April 2003, the notification dated 10th July, 2012 of the Ministry of Corporate Affairs and the Gazette of India dated 14th May, 2015 when read together showed that in fact there was no repeal of Section 391(7) of the Act. Therefore, the present appeal was maintainable even thereunder.
- (c) There was a genuine confusion in this regard and appeals were not getting numbered unless it was filed under Section 483 of the Act. He accordingly submitted that the present appeal ought to be treated as one under Section 391 (7) of the Act. There could never be a situation where the party is left remediless.

- (d) The application for recall was not seeking review of the order dated 20th September 1999 in terms of Order 47 CPC but was on the ground that a fraud had been committed by the contesting Respondents. Therefore, the application was maintainable. Reliance was placed on the decision in ***Kuldeep Gandotra v. Union of India 2007 (136) DLT 44.***

Analysis and reasons

18. The above submissions have been considered. It is to be noticed that the approval of the scheme of amalgamation was under Section 391 of the Act and not Section 394 of the Act. The corresponding provision in the Companies Act, 2013 ('2013 Act') is Section 230. However, at the relevant time when the appeal was filed, the provision relevant for that purpose was Section 391(7) of the Act. Although in terms of the Companies (Second Amendment Act) 2002 ('2002 Amendment'), Section 391 (7) stood omitted, the said amendment was to take effect only from date notified by the Central Government.

19. The purpose behind omitting the Section 391 (7) of the Act was to provide jurisdiction in respect of the matters in relation to mergers and amalgamations to the National Company Law Tribunal ('NCLT') which was constituted under the 2002 Amendment. Till such time the NCLT was not constituted, there was no question of matters involving Section 391 of the Act being transferred to it. The NCLT came into being finally when the 2013 Act came into force 1st June 2016. The fact remained that when the appeal was filed on 18th February 2013, Section 391(7) of the Act continued

in the statute book. The entire 2002 Amendment omitting Section 391(7) of the Act stood repealed finally only on 14th May 2015 with the passing of the Repealing and Amendment (Second) Act, 2015.

20. The decisions of this Court in ***Ram Kohli v. Indrama Investment Pvt. Ltd.*** (*supra*) and ***Government of NCT of Delhi v. Mool Chand Sharma*** (*supra*) [and for that matter even the impugned judgment of the learned Single Judge] proceeded on the premise that Section 391(7) of the 1956 Act stood omitted when in fact it continued in the statute book till 14th May 2015. It is entirely possible that on account of lack clarity on the correct legal position, appeals meant to be filed under Section 391 (7) of the Act were being filed under Section 483 of the Act.

21. However, this does not help the case of the Appellant because he chose to adopt a different route. On 22nd July 2002 he chose to file an application under Rule 9 of the Company (Court) Rules seeking recall of the order dated 20th September 1999 approving the merger of TEL and MAML with SCIL. He persisted with that application and invited a full fledged judgment of the learned Single Judge. Therefore, it is not open for the Appellant to now contend that the said application should in fact be treated as an appeal against the order dated 20th September 1999 under Section 391 (7) of the Act. At no time before the learned Single Judge was an attempt made to withdraw the said application with liberty to file an appeal which would, if filed, lie before the DB.

22. The Court is inclined to agree with the submission of the contesting Respondents that CA 730 of 2002 filed by the Appellant was indeed a petition seeking review of the order dated 20th September 1999 and that correspondingly the impugned order is one rejecting a review petition. There is a distinction between an application for ‘recall’ of an order and one seeking its ‘review’. In **Asit Kumar v. State of West Bengal 2009 (1) SCR 469**, the Supreme Court observed:

"There is a distinction between a review petition and a recall petition. While in a review petition, the Court considers on merits whether there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party."

23. This was reiterated in **Vishnu Aggarwal v. State of UP (supra)**. Once this becomes clear, then the question that arises is whether the present appeal, directed against an order dismissing a review petition is maintainable? As rightly pointed out by Mr. Sibal, an order declining review is not an appealable order on a collective reading of Order 47 Rule 7 and Order 43 Rule 1 (w) CPC. In **Bussa Overseas and Properties Private Limited v. Union of India (2016) 4 SCC 696**, the Supreme Court explained the legal position thus:

"30. The decisions pertaining to maintainability of special leave petition or for that matter appeal have to be seemly understood. Though in the decision in **Shanker Motiram Nale v. Shiolalsing Gannusing Rajput, (1994) 2 SCC 753** the two-Judge Bench referred to Order 47 Rule 7 of the Code of Civil Procedure that bars an appeal against the order of the court rejecting the review, it is not to be understood that the Court has curtailed the plenary jurisdiction under Article 136 of the Constitution by taking recourse to the provisions in the Code of Civil

Procedure. It has to be understood that the Court has evolved and formulated a principle that if the basic judgment is not assailed and the challenge is only to the order passed in review, this Court is obliged not to entertain such special leave petition. The said principle has gained the authoritative status and has been treated as a precedential principle for more than two decades and we are disposed to think that there is hardly any necessity not to be guided by the said precedent.”

24. Also, as explained in *Government of NCT of Delhi v. Mool Chand Sharma* (*supra*), an order dismissing a review petition is not a judgment within the ambit of Section 10 of the DHC Act and even on that score the present appeal is not maintainable. It requires to be noticed at this stage that at no point in time during the pendency of the present appeal, was any attempt made by the Appellant to amend the prayer clause to seek to challenge the main order i.e. the order dated 20th September 1999 of the learned Single Judge approving the scheme of merger. The challenge in this appeal is only to the order dated 17th December 2012 dismissing CA 730 of 2002.

25. It is not possible to treat the present appeal as being also directed against the main order, for the reason that the all the grounds in the appeal are against the order dismissing CA 730 of 2002. Moreover, the challenge to the main order would be hit by limitation, since the present appeal was filed 14 years after the main order approving the merger was passed. Having exhausted the remedy of a review petition under Order XLVII CPC, it would be an abuse of process to permit the Appellant at this belated stage to maintain this appeal by treating the review petition as not having been filed at all.

26. This Court is also not persuaded with the plea of the Appellant that he was not seeking a review of the main order by filing CA 730 of 2002 but invoking the inherent jurisdiction on the basis that a fraud had been committed by the answering Respondents. As rightly held by the learned Single Judge, when the remedy of an appeal was available to the Appellant, the inherent jurisdiction was not to be exercised. The fact of the matter is that Appellant was indeed seeking a review and the ground for that was the alleged fraud committed by the Respondents, which incidentally has been disbelieved by the learned Single Judge. The Appellant was seeking to explain away the limitation on that basis since he was seeking a review of the main order nearly three years after it was passed. Once it is clear that CA 730 of 2002 was nothing but a review petition, the corollary is that the impugned order is one that dismisses a review petition and against such order no appeal is maintainable. Consequently, the decision of this Court in ***Kuldeep Gandotra v. Union of India*** (*supra*) is of no assistance to the Appellant.

27. Viewed from any angle, therefore, the present appeal is not maintainable and is dismissed as such.

S. MURALIDHAR, J.

I.S.MEHTA, J.

MAY 10th, 2019

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