

VPH

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8032 OF 2019

Shankar Assana Gaddam ... Petitioner
V/s.
Achanak Associates Realtors Pvt. Ltd.
And Ors. ... Respondents

Mr. Ram Upadhyay a/w Mr. Dharmesh Singh i/b Law Competere
Consultus, for the petitioner.

Mr. Akshay Patkar a/w Mr. Aniket Malu for the Respondent Nos. 1 to 3.

Mr. Abhijit Desai for Respondent No.4.

CORAM : C.V. BHADANG, J.
RESERVED ON : OCTOBER 14, 2020
PRONOUNCED ON : OCTOBER 26, 2020
(Through Video Conference)

JUDGMENT

1. Heard. Rule made returnable forthwith. The learned counsel Mr. Patkar waives notice for respondent Nos. 1 to 3, and the learned counsel Mr. Desai waives notice for respondent No. 4. Heard finally by consent of parties.

2. The challenge in this petition is to the order dated 04.04.2018 (below Exhibit 22) passed by the learned Civil Judge, Senior Division at Solapur in Special Civil Suit No. 169 of 2017. By the impugned order, application (Exhibit 22) filed by the Respondent No.4 (Defendant No.4) raising objection to the jurisdiction of the Civil Court under Section 9A of the Code of Civil Procedure, 1908 ('CPC' for short) has been allowed.

The Trial Court has thus, held that it has no jurisdiction to try and entertain

Digitally
signed by
Vinayak P.
Halemath

Date:
2020.10.27
14:16:10
+0530

the suit filed by the Petitioner, in view of the provisions of Section 430 of the Companies Act, 2013.

3. The brief facts necessary for the disposal of the petition may be stated thus:

- (i) That the petitioner claims to be one of the Directors of the first Respondent Achanak Associates Realtors Pvt. Ltd., which is a company registered under the Companies Act ('Company' for short). The Respondent Nos. 2 and 3 are the promoters / directors of the said Company. According to the Petitioner, Respondent Nos. 2 and 3 were not holding Annual General Meeting/Board Meeting, nor they were maintaining proper accounts and no returns were filed.
- (ii) In the year 2016, the Petitioner learnt that Respondent Nos. 2 and 3 have executed sale deed dated 30th June, 2014 in favour of Respondent No.4 (in respect of a property belonging to company) unauthorisedly without any proper Board resolution and authority. It is in these circumstances, that the Petitioner filed Company Petition No. 85 of 2017 before the National Company Law Tribunal ('NCLT' for short) on 07.03.2017 under Section 241 and 242 of the Companies Act, for oppression and mismanagement, which is pending. The Petitioner also sought interim relief before the NCLT which was refused on 12.06.2017. It is after this, that the Petitioner filed the aforesaid civil suit against the Respondents *inter alia*

raising a challenge to the board resolution dated 2nd February, 2014 and the sale-deed dated 30th June, 2014.

- (iii) Defendant No.4 filed an application (Exhibit 22) purportedly under Section 9A of the CPC taking objection to the jurisdiction of the Civil Court to entertain the suit, as framed and filed, based on Section 430 of the Companies Act.
- (iv) The Petitioner opposed the said application claiming that the Civil Court has jurisdiction, inasmuch as the entire relief claimed before the Civil Court cannot be claimed or granted by the NCLT.
- (v) The learned Trial Court by the impugned order has allowed application (Exhibit 22) and has upheld the objection to the jurisdiction, which brings the Petitioner to this Court.

4. I have heard Mr. Ram Upadhyay, the learned Counsel for the Petitioner and Mr. Akshay Patkar for the Respondent Nos. 1 to 3 and Mr. Abhijit Desai for Respondent No. 4. Perused record.

5. The learned Counsel for the Petitioner has made the following submissions:-

- (a) That Respondent Nos. 2 and 3 were not holding the Board Meetings or the AGM and were not maintaining proper accounts nor were filing returns. It is submitted that in the year 2016, the Petitioner learnt that these Respondents have executed a sale-deed in respect of the property belonging to the company, in favour of Respondent No.4. It is submitted that this was without authority or any board resolution. In the submission of the learned Counsel

such a transfer/alienation of the property can only be on the basis of proper resolution and not otherwise. It is submitted that the Petitioner, therefore, approached the NCLT against the Respondents for oppression and mismanagement under Sections 241/242 of the Companies Act. The learned Counsel pointed out that the interim relief was sought before the NCLT, which has been refused.

- (b) The learned Counsel pointed out that under Section 242(2)(g) of the Companies Act, the NCLT can entertain the challenge to a transfer only within 3 months. Thus, NCLT could not entertain the challenge to the sale-deed of the year 2014. It is submitted that the jurisdiction of the Civil Court is barred only to the extent, the NCLT can entertain and grant relief. He, therefore, submits that the plenary jurisdiction of the Civil Court under Section 9 of CPC is always available. He submits that the Respondents raised an objection to the jurisdiction of the NCLT and now, are raising a similar objection before the Civil Court and the Petitioner cannot be rendered remediless in the matter.
- (c) On behalf of the Petitioner, reliance is placed on the decision of this Court in the case of ***Candolim Developers Pvt. Ltd. and others V/s. Pravin Grover and Ors.***¹

6. The learned Counsel for the Respondents have supported the impugned order. It is submitted that essentially the challenge is to the resolution of the Board of Directors, which can be entertained by the NCLT. It is submitted that at the highest, the challenge to the sale deed

1 2017 (3) MhLJ 373

would be consequential to the challenge to the Board resolution and therefore, in view of Section 430 of Companies Act, the jurisdiction of the Civil Court was clearly barred. The allegations about oppression and mismanagement have been denied. The learned Counsel pointed out that the Petitioner has resigned as a Director on 31st January 2014 and thus, has no *locus standi* to maintain the suit. On behalf of the Respondents, reliance is placed on the decision of the Supreme Court in the case of ***Shashi Prakash Khemka Vs. NEPC India Ltd.***¹, a decision of Delhi High Court in ***SAS Hospitality Pvt. Ltd. Vs. Surya Constructions Pvt. Ltd.***² and a decision of the Calcutta High Court in ***Vikram Jairath Vs. Middleton Hotels Pvt. Ltd.***³ It is submitted that impugned order upholding the objection to the jurisdiction is legal and proper and calls for no interference.

7. I have carefully considered the rival circumstances and the submissions made.

8. It is the case made out in the plaint that on account of absence of the mandatory notice under S. 286 of the Companies Act, 1956, being served on the petitioner / plaintiff, the meeting convened by the Board of Directors and the so called board resolution dated 2nd February, 2014 is void. It is also contended that there is non-compliance with the provisions of S. 291 of the Companies Act, 1956 since the Board of Directors has exercised the powers which are to be exercised by the General Body, as stipulated in the memorandum of Articles of Association.

1 2019 SCC OnLine SC 223

2 2018 SCC Online Del 11909

3 2019 SCC Online Cal 351

It is alleged that Board of Directors without calling for a General Body meeting have sold the property belonging to the Company, which is in violation of S. 293 of the Companies Act, 1956. It is contended that even otherwise there is no justifiable reason for the sale of the company property. It is claimed that the amount of the sale consideration has been misappropriated by the respondent Nos. 1 and 2. It is in these circumstances that the civil suit is filed for the following reliefs.

- “(a) This Hon’ble Tribunal be pleased to set aside the sale dated 30.06.2014 entered illegally without authority into between Defendant No.2 purportedly on behalf of Defendant No.1 and Defendant No.4.*
- (b) This Hon’ble Tribunal be pleased to declare that alleged Board Resolution dated 02.02.2014 is void as same is not passed by legally convened Board of Directors meeting.*
- (c) Pending the hearing and final disposal of this petition, this Hon’ble Tribunal be pleased to Restrain Defendant No.4 and its agents, officers or any person deriving rights through them, to deal with property being land located at Post Kumathe, Sholapur being survey No. 170, Gut No.349/3 to 349/8, (hec.10-r-20), till this suit is finally decided.*
- (d) This Hon’ble be pleased to pass any other order as deemed fit in the circumstances to impact justice in the matter.”*

. It is significant to note that this includes a challenge to the board resolution dated 2nd February, 2014 as being void

9. Before the NCLT, the petitioner has sought reliefs on the ground of oppression and mismanagement under S. 241 / 242 of the Companies Act, 2013 in which a notice of motion was filed seeking injunction in the following terms:

- (i) Pass an injunction restraining Respondent Nos. 2 & 3 from acting as Directors of Respondent No. 1 Company.

- (ii) Order and direct that an administrator and / or any other fit and proper person / persons take charge of the affairs of the Respondent No. 1 Company.
- (iii) Pass an injunction restraining Respondent Nos. 2 and 3 from exercising any rights as shareholders of the Respondent No. 1 Company.
- (iv) Appoint an independent auditor to audit the accounts of Respondent No. 1 Company to ascertain misappropriation.
- (v) This Hon'ble Tribunal be pleased to restrain Respondent No. 4 and its agents, officers or any person deriving rights through them, to deal with property being land located at Post Kumthe, Solapur from M/s. Orchid Realty for Rs. 3,00,11,000/-, Survey No. 170, Gut No. 349/3 to 349/8 (hec. 10- r-20), till this company petition is finally decided.

10. The perusal of the order dated 12th June, 2017 passed by the NCLT shows that the said petition has been admitted. However, the interim reliefs seeking restraintment of the respondent Nos. 2 and 3 from acting as directors, etc. have been refused. The interim relief in respect of property which is subject matter of the sale-deed dated 30th June, 2014 has also been refused for the reason that according to the NCLT, the transaction already stands concluded in the year 2014. The NCLT has found, that as per the 'settled position of law', injunction can be granted in respect of a future event, which may cause irreparable loss to the party seeking injunction. In the opinion of the NCLT, an event which has already happened cannot be undone. The NCLT has also observed that if the transaction in question is ultimately held to be *ultra vires* at the final disposal of the petition, then "consequential legal remedy is always available to the petitioner".

11. It can thus be seen that although the respondents herein had raised a ground of limitation in respect of the challenge to the sale-deed of the year 2014 on the basis of S. 242 (2) (g) of the Companies Act, 2013, at this stage it does not appear that the said ground has been accepted by the NCLT. Quite to the contrary, the company petition is admitted, and as noticed earlier the NCLT has also held that if ultimately the transaction is held to be *ultra vires*, consequential reliefs can be granted.

12. Coming to the jurisdiction of the civil court, it is a settled position of law that under S. 9 of the Civil Procedure Code, 1908, the civil court can entertain and try all suits of a civil nature, except any suits of which, the cognizance is either expressly or impliedly barred. It is now well settled that the exclusion of the jurisdiction of the civil court cannot be lightly inferred in view of the plenary jurisdiction conferred on the civil court under S. 9 of the CPC and any plea, seeking exclusion of such jurisdiction, has to be jealously guarded. However, at the same time a legal provision creating a bar of jurisdiction of the civil court, are required to be strictly interpreted and given effect to. In other words, although the exclusion of jurisdiction, cannot be lightly inferred, wherever there is a provision excluding such jurisdiction, either expressly or by necessary implication, the same has to be given effect to in its letter and spirit.

13. Section 430 of the Companies Act in terms provides that no civil court shall have jurisdiction to entertain any suit or proceeding, in respect of any matter, which the tribunal or the appellate tribunal, is empowered to determine, by or under this Act or other law for the time

being in force. A conjoint reading of S. 241 / 242 with S. 430 of the Companies Act, 2013 would make it clear that in respect of such matters, which the NCLT or NCLAT is empowered to determine the jurisdiction of the civil court would be expressly barred.

14. In the context of this clear legal position, the issue in the present case is whether on facts it can be said that there are any reliefs which are claimed by the petitioner before the civil court, which cannot be entertained by the NCLT. For this purpose, the learned counsel for the petitioner has placed reliance on Section 242 (2) (g) of the Companies Act, 2013, which reads thus:

“242. Powers of Tribunal (1) If, on any application made under section 241, the Tribunal is of the opinion –
 (a) that the company’s affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members of prejudicial to public interest or in a manner prejudicial to the interests 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 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.

(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for --

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ...

- (f) ...
- (g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference.”

15. It is submitted that NCLT can set aside any transfer made by or on behalf of the company only within three months, and not beyond. It is contended that thus the challenge to the sale-deed of the year 2014 cannot be entertained by the NCLT in the company petition, which is filed in the year 2017 and therefore the civil court will have jurisdiction to entertain the said challenge.

16. The contention in my considered view cannot be accepted at this stage in view of the clear provisions of S. 241 / 242 read with S. 430 of the Companies Act, particularly in the context of the reliefs sought before the civil court. It is necessary to note that the challenge to the sale-deed is essentially based on the challenge to the board resolution dated 2nd February, 2014, which is subject matter of challenge before the NCLT. In any event, the relief sought in prayer clause 23 (b) before the Civil Court, which consists of a challenge to the said board resolution, cannot be entertained by the civil court as it is the NCLT, which can deal with any such challenge. In that view of the matter, I do not find that exception can be taken to the impugned order upholding the objection under S. 9A of the CPC.

17. The contention about the petitioner being rendered remedyless also cannot be accepted. This is for the reason that, as noticed earlier the company petition has been admitted and is pending before the NCLT. The refusal of the interim relief by the NCLT is not on the ground that it lacks jurisdiction. Therefore, it is for the petitioner to take appropriate steps against refusal of interim relief in accordance with law, if so advised.

18. The reliance placed on the decision of *this* Court in the case of **Condolim Developers** (*supra*) is misplaced. That was a case where petitioner had filed a suit seeking following reliefs:

- “(a) For a decree and order of this Hon’ble Court declaring that Form No. 5 filed by the defendant No. 1 at Annexure-Q before the Registrar of Companies, purporting to be the Share Capital from 51% to 70% as null and void and / or inoperative and order, it to be cancelled.
- (b) For a judgment and decree declaring that Form No. 32 tiled at Annexure-T and Annexure-U by the defendant No. 1, before the Registrar of Companies, purporting to intimate the Registrar of Companies that plaintiffs No. 2 and 3 resigned as Directors and purporting to appoint defendant No. 2 and 3 as Directors of the said Company, as null and void and / or inoperative and order it to be cancelled.
- (c) For a judgment and decree, directing the defendant No. 1 to recoup and / or pay to the said Company an amount of Rs.6,53,35,699.01 detailed at Annexure Z-17 along with interest due thereon at the rate of 18% as from the date of institution of the suit until its effective payment to the Company.
- (d) For a mandatory injunction directing the defendant No. 1 to hand over the vehicle bearing No. GA-01-C-8001 belonging to the said company forthwith.
- (e) For a permanent injunction restraining the defendants No. 1, 2 and 3 from acting and / or posing themselves as Directors of

the Company and / or causing any interference to plaintiff No. 2 and 3 in the management of the affairs of the said company as its directors.

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

19. The defendants had filed an application for rejection of plaint under Order VII, Rule 11(d) of CPC, which was allowed by the trial court. That was the order, which was subject matter of challenge before this Court. Precisely, the issue was whether the trial court could have held that the plaint was not maintainable, in view of provisions of Section 10GB of the Companies Act, 1956 (old Act).

20. In my considered view, the case of *Candolim Developers (supra)* turned on its own facts and is distinguishable at least on two counts, viz. (i) with reference to the nature of reliefs sought before the civil court, which is an important factor while determining the issue of jurisdiction; and (ii) rejection of plaint was in the context of the provisions of Section 10 GB of the old Act, and not under the provisions of Section 241 / 242 and Section 430 of the new Act, as in the present case.

21. I have carefully gone through the impugned order, and I do not find that it suffers from any infirmity. The writ petition is without any merits and is accordingly dismissed. Rule is accordingly discharged with no order as to costs.

22. Needless to mention that this Court has not expressed any opinion on the merits of the challenge in the company petition.

Sd/-
C. V. BHADANG, J.