IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.03.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A.No. 666 of 2002

1.Asal Malabar Beedi Depot P Ltd
54/3-B, Melakkal Road,
Kochadai,
Madurai – 625 016.

2.M.K.Surendran
3.M.K.Prashanth
4.M.A.Rajeev
5.Parvathi
6.M.K.Jithesh
7.Mahesh
8.Suresh
9.Ashish
10.A.Chandrasekaran
11.Geetha ..Appellants

(11th appellant brought on record
as L.R. of the deceased 3rd and 9th
appellants vide order dated 5.3.2021
in C.M.P.No.2955 of 2021 in
C.M.A.No.666 of 2002)

Vs

1.M.K.Haridas
2.M.K.Sumanth
3.K.S.Shine ..Respondents

Appeal filed under Section 106 of the Companies Act, 1956 against the order dated 12.02.2002 passed in C.P.No. 1 of 2001 (APB) on the file of the Company Law Board, Additional Principal Bench, Chennai.

For Appellants : Mr.B.Giridhara Rao

For Respondents : Mr.Ananthapadmanabhan

JUDGMENT

The order dated 12.02.2002 passed by the Company Law Board in C.P.No. 01 of 2001 is under challenge in the present civil miscellaneous appeal.

2. The appellant is Asal Malabar Beedi Depot Private Limited. The respondents filed an application in C.P.No. 1 of 2001 before the Company Law Board, Branch at New Delhi under Sections 397(2) and 398 of the Companies Act, 1956. The said company petition was adjudicated by the Company Law Board and the Board passed an order providing an option to the applicants/petitioners before the Board to get the shares transferred and the said option is to be exercised before 30.04.2002 by a notice to the Company, together with a Demand Draft for the amount of consideration of these shares. A further direction is issued that once notice is received by the Company along with the consideration as above, the Company will arrange for getting the transfers effected by the respondents 3 to 9 within fifteen days thereafter and register the transfers within further ten days. Identification of 700 shares to be transferred to the petitioners out of 2100 shares allotted to the respondents 3 to 9

shall be the responsibility of the Company. Accordingly, the Company Petition was disposed of.

3. Learned counsel appearing on behalf of the appellants in the present appeal mainly contended that in the absence of requirements contemplated under Section 397 of the Companies Act, 1956, the Company Law Board has committed an error in passing such an order in view of the fact that there was no circumstances established for winding up of the company. In the absence of any concrete finding regarding the situation for winding up, the Company Law Board has no authority to issue a direction for transfer of shares, more specifically, under Section 397 of Companies Act, 1956.

4. It is relevant to consider the findings of the Company Law Board in this regard and paragraph 8, reads as under:

> *"8. The facts not in dispute are that the first petitioner and respondents 2 and 3, being brothers were carrying on the business in beedies as equal partners since the year 1972. Subsequently in the year 1975, the first petitioner retired from the partnership on account of his personal impediments. However, the first petitioner was re-admitted into the*

partnership in the year 1991 with equal shareholding, by which time, the partnership had achieved turnover in the range of Rs.6 crores. Thereafter, the business of the partnership was taken over by the Company in the year 1992 and the first petitioner as well as respondents 2 & 3 were subscribers to the Memorandum of Association subscribing to 100 shares by each of them. The first petitioner and respondents 2 and 3 became directors of the Company. Sometime in December,1997, the first petitioner ceased to be a director on the ground of his absence from three consecutive meetings of the board, but subsequently he was re-inducted on the board. The Company allotted 1700 shares on 3.12.97 in favour of the respondents 3 to 6 and 400 shares on 6.1.99 to the respondents 7 to 9, as per the report dated 7.11.2001 of the Regional Director. However, the petitioner's were excluded. At this juncture, Shri Murari's oral assertions assume importance. According to him, the profits earned by the Company after meeting the expenses are going to the partnership firm, which are shared by the partners, namely, the first petitioner and respondents 2 & 3 in equal proportion. From these undisputed facts and circumstances, in our view, there is a tacit arrangement among the first petitioner and respondents 2 & 3 to share the profits out of *the beedi business among themselves equally. This arrangement has been in practice ever since 1972 and even after formation of the Company, the profits of which are taken equally by the partners of the partnership. We are, therefore, constrained to apply the principles of quasi partnership and legitimate expectations in the present case. In such a family company, any disturbance in the long held shareholding would amount to an act of oppression. The feeble plea of respondents justifying allotment of the impugned shares that the paid-up capital of 30,000 was required to be increased on account of voluminous turnover is not convincing. The respondents, in our view, ought to have allotted shares in favour of the first petitioner's family in parity with the respondents' family, which they have failed. We do not find any justification to exclude the petitioners when new shares were allotted. The respondents have not acted fairly but in a manner oppressive to the interests of the petitioners. However, we do not propose to set aside the impugned allotments in view of the fact that the allotment money has been utilized for the business of the Company. We propose to restore parity among three groups. Therefore, out of 2,100 shares newly allotted, the petitioner's group should be entitled to 33.33 per cent of the shares which works out to*

> *roughly 700 shares. In case the petitioners are willing to acquire these shares the respondents 3 to 9 should transfer to the petitioners these 700 shares at the consideration paid by the respondents when they were allotted shares by the Company. The option to get the shares transferred should be exercised before 30th April,2002 by a notice to the Company, together with a Demand Draft for the amount of consideration for these shares. Once, this notice is received by the Company along with the consideration above, the Company will arrange for getting the transfers effected by the respondents 3 to 9 within 13 days thereafter and register the transfers within further 10 days. Identification of 700 shares to be transferred to the petitioners out of 2100 shares allotted to the respondents 3 to 9 shall be the responsibility of the Company."*

5. On perusal of the above findings, this Court is of the opinion that there is no circumstances established for the purpose of winding up the Company. In the absence of any such compelling circumstances, the Company Law Board, ought not to have passed an order, more specifically, under Section 397 of the Companies Act, 1956, for transfer of shares in favour of the petitioners before the Board.

6. In this regard, the learned counsel for the appellant cited the judgment of *Needle Industries (India) Ltd., and others v Needle Industries Newey (India) Holdings Ltd., and others reported in AIR 81 SC 1298*, wherein, the three-Judge Bench made an observation as under:

> *"46. In an application under S.210 of the English Companies Act, as under Section 397 of our Companies Act, before granting relief the Court has to satisfy itself that to wind up the company will unfairly prejudice the members complaining of oppression, but that otherwise the facts will justify the making of a winding up order on the ground that it is just and equitable that the company should be would up. The rule as regards the duty of utmost good faith, on which stress was laid by Lord Keith in Meyer, received further and closer consideration in Ebrahimi v Westbourne Galleries Ltd (1973) AC 360 (HL) wherein Lord Wilberforce considered the scope, nature and extent of the 'just and equitable' principle as a ground for winding up a company. The business of the respondent company was a very profitable one and profits used to be distributed among the directors in the shape of fees, no dividends being declared. On being removed as a director by the votes of two other directors, the appellant petitioned for an order*

under Section 210. Allowing an appeal from the judgment of the Court of Appeal, it was held by the House of Lords that the words 'just and equitable' which occur in Section 222(f) of the English Act, corresponding to our S.433 (f), were not to be construed ejusdem generis with clauses (a) to (e) of Sec.222 corresponding to our clauses (a) to (e) of Section 433. Lord Wilberforce observed that the words 'just and equitable' are a recognition of the fact that a limited company is more than a mere legal entity with a personality in law of its own: and that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure:

"The just and equitable provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the Court to dispense him from it. It does, as equity always does, enable the Court to subject the exercise of legal rights to equitable considerations; considerations; that is, of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way".

Observing that the description of companies as 'quasi-partnerships' or 'insubstance partnerships'

> *is confusing, though convenient, Lord Wilberforce said:*
> *"company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."*
> *Finally, it was held that it was wrong to confine the application of the just and equitable clause to proved cases of malafides, because to do so would be to negative the generality of the words. As observed by the learned Law Lord in the same judgment, though in another contest:*
> *"Illustrations may be used, but general words should remain general and not to be reduced to the sum of particular instances."*

7. Thus, it is a condition precedent that the petitioner, who approaches the Company Law Board, must establish that the Company was in a situation for winding up and only on those circumstances, the power under Section 397 of the Companies Act may be invoked and not otherwise. In the absence of any such circumstances, it is to be held that the Company Law Board would be committing an error in ordering transfer of shares which would affect the rights of the shareholders.

8. In yet another case of *Hanuman Prasad Bagri and Others v. Bagrees cereals Pvt. Ltd and others reported in (2001) 4 SCC 420*, the Apex Court, made the following observation:

> *"3... Therefore, we have to pay our attention only to the aspect that the winding up of the Company would unfairly prejudice the members of the Company who have a grievance and are the applicants before the court and 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. In order to be successful on this ground, the petitioners have to make out a case for winding up of the Company on just and equitable grounds. 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 petitioners."*

9. Thus, the Apex Court in an unequivocal terms held that attention is to be made only with reference to the aspect that the winding up of the Company would unfairly prejudice the members of the company who have a grievance and are the applicants before the court and 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. However, no such circumstances

are raised by the parties nor the Company was considered by the Company Law Board in the present case.

10. The Apex Court further proceeded by holding that "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 petitioners". This being the categorical finding of the Apex Court, more specifically, with reference to Sections 397 of the Companies Act, 1956, the Company Law Board has committed an error in passing such an order of direction without resorting to the fact about the winding up of the Company or otherwise.

11. This Court is of the opinion that when the provisions of the Statute contemplate certain requirements and ingredients then such requirements are to be established by the parties who approached the Court and in the absence of any proof to that effect, relief cannot be granted merely on the ground that there was a dispute existing between the parties. Mere dispute is insufficient to pass an order to transfer the shares. The dispute must result in winding up of the Company and such a situation must be beyond any pale of doubt.

12. In the present case, none of the requirements were adjudicated nor any finding was given by the Company Law Board. Thus, this Court has no hesitation in arriving a conclusion that the order passed by the Company Law Board is not in consonance with the provisions of Section 397 of the Companies Act, 1956, and further opposed to the principles laid down by the Apex Court cited supra.

13. In view of the above, the order dated 12.02.2002 passed in C.P.No. 01 of 2001 is set aside the appeal stands allowed. No costs. Consequently, connected C.M.P.No. 5106 of 2002 is closed.

05.03.2021

Index: Yes
ssm

To

The Presiding Officer,
Company Law Board,
Additional Principal Bench,
Chennai.

S.M.SUBRAMANIAM, J.

(ssm)

C.M.A.No. 666 of 2002

05.03.2021