



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 147 OF 2022

Vijay Ambadasrao Kadam

Petitioner

Versus

Tukaram Baliram Kulkarni
and others

Respondents

...

Mr. Ganesh P. Shinde, Advocate for the petitioner.
Mr. G.N. Kulkarni, Advocate for respondent No.1.

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CORAM : SANDIPKUMAR C. MORE, J.

Dated : 7 February 2024.

Order :

1. The petitioner, who is the Director of respondent No.2 Company has challenged the order dated 21.04.2022 passed by the learned 8th Joint Civil Judge (Senior Division), Aurangabad (hereinafter referred to as “the learned trial Court) below Exh.9 in Special Civil Suit No. 308/2021, whereby the application moved by present petitioner i.e. original defendant No.5 under Order VII Rule 11 (d) of the Code of Civil Procedure (for short, “C.P.C.”), has been rejected.

2. Learned Counsel for the petitioner submits that the learned trial Court has passed erroneous order ignoring the provisions of the Companies Act, 2013 (“the Act” for short), specially under Sections 73 (4) and 430 of the Act.

According to him, respondent No.1/original plaintiff, while acting as a Director of respondent No.2 Company, had given an unsecured loan to the Company and thereafter on his retirement, filed the aforesaid suit for recovery of that loan. According to the learned Counsel for the petitioner, the Companies Act has provided specific procedure for recovery of such deposit by way of unsecured loan under Section 73 (4) and for that purpose, National Company Law Tribunal (NCLT) is the proper forum. He also pointed out that under Section 430 of the Act jurisdiction of the Civil Court to entertain the proceeding for recovery of such deposit amount is expressly barred.

3. On the contrary, learned Counsel for respondent No.1/plaintiff strongly opposed the submissions made on behalf of the petitioner. According to him, for securing deposit from public, a specific procedure has been laid down in Section 73 of the Act and in the instant case it was not followed. He also pointed out that the provisions under Sections 241 and 242 of the Act need to be considered and powers vested in NCLT are only in respect of the dispute specified in Section 241 of the Act. He pointed out that the present suit is at the stage of evidence, and therefore, the

application under Order VII Rule 11 (d) of C.P.C. at such belated stage is not permissible. He placed reliance on the judgment of this Court in the case of *Cds Financial Services (Mauritius) vs Bpl Communication Limited Vectra* reported in *(2004) 56SCL665(Bom)*.

4. Heard rival submissions. Also perused documents on record.

5. It is not in dispute that respondent No.1/plaintiff has given unsecured loan to the Company i.e. respondent No.2 while he was acting as a Director of the said Company. Further, the unsecured loan also appears to be included in the definition of “deposit” under Section 2 (31) of the Act. Moreover, as per Section 73 (4) of the Act, a depositor can apply to the NCLT if the Company fails to repay his deposit alongwith interest. Further, as per Section 430 of the Act, there is bar of jurisdiction to the Civil Court for entertaining any suit or proceeding in respect of any matter which the Tribunal or Appellate Tribunal is empowered to determine under this Act. Section 430 is reproduced herein-below for quick reference :

“430. 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 any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal”.

6. Thus, in the light of the aforesaid provisions let us peruse the impugned order whereby the application under Order VII Rule 1 (d) of C.P.C. has been rejected. On going through the impugned order, it appears that the learned trial Court has rejected the application mainly on the ground that at the time of giving unsecured loan to the Company, respondent No.1/plaintiff was the Director of defendant No.1 Company and now after his retirement, he is only a shareholder of respondent No.1 Company, and therefore, the provisions of Section 73 (4) of the Act will not apply to the present suit. The learned trial Court has also observed that despite provision under Section 430 of the Act, jurisdiction of the Civil Courts is not completely ousted.

7. It is significant to note that on bare perusal of the

provisions under Sections 73 (4) and 430 of the Act, it appears that remedy is given to the depositor for recovery of deposit given by him to the company which also includes unsecured loan as given by present respondent No.1 / plaintiff. Moreover, under Section 430 of the Act, there is also bar for jurisdiction of Civil Court.

8. However, this Court in the case of ***Cds Financial Services vs Bpl Communication Ltd*** (supra), while dealing with the issue of jurisdiction of Civil Court, has made following observations :

“14. Under section 9 of the Code of Civil Procedure, civil courts have jurisdiction to try all suits of civil nature except those of which cognizance by the civil court is either expressly or impliedly excluded. Such exclusion is not to be readily inferred, the rule of construction being that every presumption should be made in favour of the existence rather than exclusion of jurisdiction of the civil courts. In *Dhaulagiri vs. State of M.P* a five judge Bench of the Supreme Court considered the earlier decisions on this aspect and laid down the following propositions:

"(1). Where the statute gives finality to the orders of the special tribunals, the civil courts jurisdiction must be held to be excluded, if there is adequate remedy to do what the civil courts would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of jurisdiction of the court an examination of the scheme of

the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil Court. Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive.

In the latter case, it is necessary if the statute creates a special right or liability and provides for the determination of the right or liability and further lays down that all questions about the said right or liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with action in civil courts are prescribed by the said statute or not...

An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set out apply."

15. In *Raja Ram Kumar Bharat vs. Union of India*, the principle regarding implied exclusion of jurisdiction has been explained as follows:

"Generally speaking, the broad guiding considerations are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created *uno flatu* and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the civil courts jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil courts jurisdiction, then both the common law and the statutory remedies might become a concurrent remedies leaving open an element of election to the persons of inheritance."

16. From the above two decisions of the Supreme Court it is clear that when there is no express provision excluding jurisdiction of the civil courts, such exclusion can be implied only in cases where a right itself is created and the

machinery for enforcement of such right is also provided by the statute. If the right is traceable to general law of contract or it is a common law right, it can be enforced through civil court, eventhough the forum under the statute also will have jurisdiction to enforce that right. There is a plethora of decisions of various High Courts including the decisions of the High Courts of Kerala, Andhra Pradesh, Madras, Punjab and Haryana, and Calcutta in favour of the view that these sections, 397, 398 and 408 do not confer exclusive jurisdiction on the Company Court to grant relief against oppression and mismanagement. The scope of these sections is to provide a convenient remedy for minority shareholders under certain conditions and the provisions therein are not intended to exclude all other remedies. The suits by minority shareholders against oppression and mismanagement, have been time-honoured exception to the rule in *Foss vs Harbottle* (1843) 2 Hare, 461 and in the absence of word expressly or impliedly barring them it cannot be said that sections 397, 398 and 408 of the Companies Act exclude jurisdiction of the ordinary courts”.

On going through the aforesaid observations, it appears that this Court is of the opinion that if the right is traceable to the general law of contract or it is common law right, it can be enforced through Civil Court, eventhough the forum under the statute also will have jurisdiction to enforce that right. It appears that this observation has come to safeguard the interest of minority share-holders against the operation and mis-management. In the instant case also, the plaintiff, after his retirement, is merely a share-holder of

respondent No.2/Company and as per the aforesaid observation he can opt for the jurisdiction of Civil Court for recovery of his amount even though the statute has provided jurisdiction for redressal of his said right. Thus, the observation of learned trial Court that jurisdiction of the Civil Court is not completely ousted by the Companies Act, 2013, appears proper. In view of the same, there is no need to interfere with the impugned order and accordingly the Civil Revision Application stands dismissed.

(SANDIPKUMAR C. MORE, J.)