REPORTABLE

IN THE HIGH COURT OF DELHI AT NEW DELHI

CO (Appeal) (SB) No. 31 of 2005

Date of Decision : 20th December, 2006.

Padmini Technologies Ltd. .... Appellant.

Through Mr. Ganesh Sr. Advocate with Mr. Krishna Kumar with Ms.Lupaulu Gangmei, Advocates.

Versus.

Union of India .... Respondent

Through Mr. Darpan Wadhwa, Advocate.

CORAM:

HON'BLE MR.JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be

allowed to see the judgment?

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported

in the Digest ? YES

SANJIV KHANNA, J.

1. Order dated 30th May, 2005 passed by the Company Law Board is subject matter of the present Appeal under Section 10F of the Companies Act, 1956 (hereinafter referred to as the Act, for short) filed by Padmini Technologies Ltd and others (hereinafter referred to as the appellant, for short). Company Law Board by the impugned Order has directed the Central Government to appoint two additional Directors on the Board of the company for a period of two years. The said direction was given in a petition filed by the Union of India, Ministry of Company Affairs under Sections 397, 398, 401 and 408 of the Act.
2. In the Appeal as originally filed, no questions of law had been framed. Later on an application-CA No.1202/2006 was filed setting out questions of law. The said application was allowed vide Order dated 6th October, 2006 and the questions of law mentioned in the said application were directed to be treated as part of the grounds of Appeal.

3. Learned counsel for the appellant submitted that the directions given in the impugned Order are contrary to Section 408 of the Act as conditions precedent are not satisfied. It was submitted that the reasoning given by the Company Law Board is untenable and the said order cannot also be upheld on the basis of reasons not set out in the order itself. Reliance was placed upon the judgment of the Supreme Court in the case of Mohinder Singh Gill versus CES reported in AIR 1978 SC 851. Some other submissions were also made and these have been noticed in the later part of the judgment.

4. Learned counsel for the respondent, on the other hand, referred to various acts and omissions on the part of the management of the appellant company and submitted that an appeal under Section 10F arises only on questions of law. It was submitted that no questions of law arise in the present Appeal and therefore the appeal is liable to be dismissed.

5. The respondent herein, namely, Union of India, Ministry of Company Affairs had filed a petition before the Company Law Board under the aforesaid provisions seeking as many as 5 different reliefs including a prayer to issue directions to prevent conduct of affairs in a manner prejudicial to public interest and issue of appropriate directions. Number of allegations were made in this application. An order under Sections

397, 398 or 408 of the Act is a quasi judicial order passed by the Board after hearing the parties. The parties themselves are not authors of the order. In these circumstances, the appellate Court while deciding an appeal is not strictly governed by the ratio in the case of Mohinder Singh Gill versus CES reported in AIR 1978 SC 851. The said decision is applicable when an authority supports an order on grounds and reasons other than those mentioned in the order itself. The respondent herein is not author of the impugned order. It was a party before the Board, just as the appellant. In the present case by virtue of Rule 6 of the Companies (Court) Rules, 1959 provisions of Order XLI and XLII of the Code of Civil procedure 1908 (hereinafter referred to as Code, for short) are applicable. Under Order XLI Rule 22 of the Code, a respondent is entitled to support the decree or decision under appeal by laying challenge to a finding recorded or issue decided against him though the order, judgment or decree was in the end in his favour. Even otherwise the said principles are applicable to courts of superior jurisdiction. It was held by the Supreme Court in case of Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai,(2004) 3 SCC 214 as under:

> "A person who has entirely succeeded before a court or tribunal below cannot file an appeal solely for the sake of clearing himself from the effect of an adverse finding or an adverse

> decision on one of the issues as he would not be a person falling within the meaning of the words person aggrieved. In an appeal or revision, as a matter of general principle, the party who has an order in his favour, is entitled to show that even if the order was liable to be set aside on the grounds decided in his favour, yet the order could be sustained by reversing the finding on some other ground which was decided against him in the court below. This position of law is supportable on general principles without having recourse to Order 41 Rule 22 of the Code of Civil Procedure."

6. However, while holding that Mohinder Singh Gill (supra) is not applicable, I have to be conscious of the fact that the present Appeal under Section 10F is maintainable only on questions of law.

7. On the basis of submissions and arguments made by learned counsel for the parties, the following questions of law arise for consideration:

(1) Whether the findings of Company Law Board in para 10 of the Order dated 30th May, 2005 are perverse and based on no material evidence?

(2) Whether the Company Law Board is right in issuing direction to the Central Government to appoint two Directors on the Board of Directors of the appellant for a period of two years?

8. Answer to the second question depends on the answer to the first question.

9. Learned Company law Board in the concluding portion of its order, namely, para 10 has given the following reasons for directing the Central Government to appoint two Directors in the appellant company for a period of two years : firstly, there have been repeated violations of the Act; secondly, serious allegations have been made by SEBI in its report, and thirdly the appellant company has suffered huge losses. The appellant has denied these allegations but has not been able to explain and give reasons for the losses. Fourthly, the appellant company had entered into transaction with a vanishing company, namely, Kalyani Finance Ltd. and no action was taken to protect its interest. Fifthly, general public holds nearly 70% shares in the appellant company. Interest of general shareholders is required to be protected.

10. In the reply to the petition filed by the appellant before the Company Law Board, the appellant had stated as under:-

> "That when the respondent company made capital advances to M/s. Kalyani Finance Ltd in the year 1996-97, the same company was in existence and functioning. It is denied that the capital advance given to the said company is a loss to the respondent company. It is further denied that there was any diversion of funds as alleged or at all."

11. In the second reply/affidavit filed by the appellant before the Company Law Board, it was stated as under:-

> "As regards the allegations pertaining to M/s. Kalyani Finance Ltd here again the allegations are based on presumption and conjectures and wholly misconceived. During the financial year 1995-96 and 1996-97 we have sold software to M/s. Kalyani Finance Ltd. There was an outstanding balance of Rs.10,45,47,190 to be recovered from M/s.Kalyani Finance Ltd as on 30.06.1997 shown as debtors in the balance sheet. The above said balance was later on transferred from debtors to advance for capital goods while preparing the balance sheet for December, 1998."

12. There is inherent contradiction in the two replies. In the first reply it has been stated that the appellant had made capital advance to Kalyani Finance Ltd. in the year 1996-97 and there was no loss caused. Probably realising that the appellant will not be able to justify giving of huge capital advance and as no supporting documents were filed, the stand was changed in the reply affidavit and the plea taken was that during the financial year 1995-97 software worth crores of rupees was sold to a finance company, namely, M/s. Kalyani Finance Ltd. and thereafter balance of Rs.10,45,47,190/- was transferred from sundry debtors to advance for capital goods. No details of the software have been furnished. Infact no reason and details have been given as to why

advance for capital goods was given. Nature and type of capital goods, contract and agreement were not placed on record. In the reply filed before the Company Law Board, in order to get over the two contradictory statements it was stated that the outstanding balance of Rs.10,45,47,190/- as on 30th June, 1996 was payable for supply of goods and shown under the heading "sundry creditors" was transferred to "advance for capital goods" as on 31st March, 1998.

13. The stand that no loss was caused in the reply filed on 15th January,2004, was changed to admission that loss of more than Rs.10,45,47,190/- was suffered by the appellant in the reply/affidavit of 26th April,2004.

14. The appellant company had admitted that advance of Rs.10,45,47,190/- was given to Kalyani Finance Ltd in the year 1996 in the reply filed by Mr. V.S. Gupta, Director of the appellant company dated 15th January, 2004. It was also admitted by Mr.V.S. Gupta that the said amount was given as a capital advance in the year 1996-97. However, he has denied that there was any loss or diversion. Mr. Vivek Nagpal, another Director of the appellant company in his affidavit dated 26th April, 2004 has taken the stand that the appellant had sold software to Kalyani Finance Ltd in the financial years 1995-96 and 1996-97.

Reliance in this regard was placed on the ledger entries which have been placed on record in the present Appeal at pages 224-260. The ledger entries show alleged sale of goods worth crores of rupees between the period January, 1996 to November, 1996 and thereafter, reverse entries from April, 1997 to June, 1997 when goods worth crores of rupees were allegedly bought by the appellant from Kalyani Finance Ltd.

15. Learned counsel for the respondent had also drawn my attention to the balance sheets of Kalyani Finance Ltd for the year ending 1996. In the financial year ending 31st March, 1996, Kalyani Finance Ltd. had incurred expenditure of Rs.1,11,356/- but had allegedly purchased softwares worth Rs.8.50 crores. Admittedly, Kalyani Finance Ltd. was a finance company and not a company dealing with buying, selling or developing of softwares. The total profit made by Kalyani Finance Ltd. for the year ending 31st March, 1995 was Rs.59,295/- and profit for the year ending 31st March, 1996 was Rs.24,141/-. The total paid up share capital of Kalyani Finance Ltd as on 31st March, 1995 was Rs.4,00,200/, which was increased to Rs.85,00,000/- for the period ending 31st March, 1996. The amount payable to the sundry creditors increased from

Rs.1,42,000/- as on 31st March, 1995 to Rs.8.50 crores on 31st March, 1996. The above figures are admitted and have not been disputed.

16. In the Appeal, the appellant has stated that the alleged transaction with Kalyani Finance Ltd were to the tune of Rs.29.04 crores. It is further stated that there was slump in the information technology market in 1998 and therefore value of the software declined drastically, which resulted in heavy losses to Kalyani Finance Ltd. However, this does not explain the delay in getting the payment and huge advances in crores of rupees given between the period 1995-98 to Kalyani Finance Ltd., which initially had no capital or turnover, capability and capacity to pay. Admittedly, Kalyani Finance ltd has vanished. Allegations have also been made that the so called transaction/sale of goods are bogus and not genuine.

17. The contention of the appellant that it did not file recovery proceedings to save court fees as per advice given by advocates and other experts and that it was a prudent commercial decision is nothing but shedding crocodile tears. To any reasonable businessman it was apparent that when alleged supplies/advances worth crores were given, chances of recovery were negligible. Figures relating to financial position of Kalyani Finance Ltd. speak for themselves. Circulation of

money is obvious. The SEBI report has also castigated the appellant and pointed out various illegalities. It was, prima facie, found that Ketan Parekh group had indulged in price manipulation of the shares of the appellant company and there were other illegalities and irregularities.

18. The appellant company had purchased shares of an unlisted company, namely, Shonkh Technologies Ltd. of face value of Rs.10/- each at premium for Rs.130/- and Rs.160/- per share. The total purchase value of these shares were Rs.38,17,80,000/-. These shares were later on transferred to another group company, belonging to Mr.Vivek Nagpal, Managing Director of the appellant, for Re.1/-. Mr. Vivek Nagpal was also a Director in Shonkh Technologies Ltd. The appellant company claims that in lieu of shares of Shonkh Technologies Ltd. it had received bonus shares in Shonkh Technologies International Ltd. and these shares were sold in the open market and a net profit of Rs. 25,88,728/- was made. However, in the chart furnished by the appellant company, it is not stated whether sale consideration has been actually received. Interestingly, Mr. Vivek Nagpal in his affidavit has not stated that the sale consideration has been received but it is stated that the appellant company had acquired rights to the extent of Rs.38,43,68,727/-.

19. Regarding the sale of shares of Shonkh Technologies Ltd and Shonkh Technologies International Ltd, questions were put to Mr.V.S. Gupta, whole-time Director of the appellant in his statement recorded under Section 209A (5) of the Act. Some of the relevant questions and answers given by him are as under:-

> Q.No.46 As per balance sheet as at 30/06/2001, the company has sold its entire investment except 6000 shares of Shonkh Technologies Limited at cost price of Rs.130 amounting to Rs.7,80,000/- Please give the details of Investment sold, to whom they have been sold at what price and the date of sale of shares. Did the company sold the shares on profit or loss. Give the complete details thereof.
>
> Ans:46. We will furnish these details by 08/03/2001. Kindly allow.
>
> X x x x
>
> Q.N:51. As per Balance sheet as at 30/06/2000, the Company having investment of 38.18 crores in of 27,06,000 shares of Shonkh Technologies Limited. The said Investment is not reflecting in the Balance Sheet as at 30/06/2001. How the Company has complied with the provisions of Schedule VI read with Section 211 of the Companies Act, 1956.
>
> Ans:51. It appears there has been some error in sending the final balance sheet to you. As per my

knowledge, the adopted Balance sheet contains 6000 shares of Shonkh Technologies International Limited as on 30/06/2001. The adopted copy as B/6 being filed with ROC will be submitted to you on 08/03/2002 with filing proof.

xxxx

Q.54 : Did you sold the shares of Shonkh Technologies International Limited also.

Ans: Yes, we have sold 27 lac shares of Shonkh Technologies International Limited during the end of 30/06/2001.

Q.N:55. Why above these sales were not mentioned in the Balance sheet as at 30/06/2001.

Ans: As already stated earlier, there appears to be a mixed in the Balance sheet sent to your goodself. It does not appear to be a adopted copy. We shall submit the adopted copy of on 08/03/2001 which to my knowledge contains of sale of these investments.

Q.N:56. How, the receipt of shares/27,06,000 of Shonkh Technologies International Limited has been accounted for in the Books of the Company.

Ans:56. The shares has been acquired at Nil cost and sold in market price.

Q-57. Produce investment register u/s.372 of the Co.Act, 1956.

Ans-57 Investment Register upto 30.6.2000 has been shown to your goodself during the course of previous

> inspection. The Register for subsequent period would be produce on 8-3-2002.
>
> Q.58 – As per Schedule 'J' to the P/L A/c 30-6-2001 there is a profit on sale of current investment amounting to Rs.2,12,50,000/- as per Schedule 'K' of the aforesaid P/L Account there is a loss in sale of investment of Rs.1,83,96,895=00 please give the statement.
>
> Ans-58- As stated earlier there appears to be some mix up in the balance sheet sent to you vis a vis adopted by the shareholders. The adopted copies of balance sheet alongwith replies to the above queries would be submitted on 8.3.2002.

(There is a difference in the handwriting in answer to question no.56 and onwards. However, I am not going into this aspect).

20. It is admitted case of the appellant that UTI was allotted Rs.8.50 lacs non-convertible secured debentures of Rs.100/- each. However, the procedure prescribed for creation of security/charge on the movable and immovable assets of the appellant company was not followed. No charge was created and no interest was paid on these debentures to UTI. Filing of proceedings by UTI before the Debt Recovery Tribunal does not bar and prohibit the Company Law Board from adjudicating and deciding the petition under section 397 and 398 etc. of the Act. Debt Recovery Tribunal cannot pass an order under the said provisions. Company Law Board has exclusive jurisdiction to decide cases of

mismanagement, whether affairs of the company are being conducted in a manner which is prejudicial to the interest of the company, public and shareholders. To wait adjudication by Debt Recovery Tribunal would require adjournment for an indefinite period. In a case like the present that requires expeditious decision on merits, delay may be fatal and cause irreparable harm.

21. There are allegations about violation of various provisions of the Act, namely, (i) failure to file annual returns with the Registrar of Companies, (ii) failure to make provision for gratuity, leave encashment, etc. under section 211 of the Act, (iii) failure to maintain register of contracts, (iv) failure to properly maintain register of members and (v) non compliance of Section 418 of the Act. Compounding of the violations, protects the company and its officers from prosecutions. But this one of the facets which the Company Law Board should keep in mind when a petition like the present one is filed by the Central Government. Compounding gives limited protection. It does not obliterate the violation itself. Company Law Board can take into consideration conduct of a party and violations of the provisions of the Act.

22. Confronted with the allegations and evidence mentioned above, the appellant herein sought shelter under Section 10F of the Act and

submitted that this Court has limited jurisdiction to consider and decide questions of law. It was submitted that the Company Law Board in paragraph 10 of its order has without giving any reasoning given its findings and final opinion.

23. Company Law Board in paragraph 1 and 9 has discussed various aspects and contentions raised by the parties. The contentions raised have not been discussed for giving its final decision. In fact number of allegations were made in the petition under Section 397, 398 r/w. 401 and 408 of the Act. Report given by SEBI was also filed. Statement of Mr. V.K. Gupta, Director of the appellant company was also filed. Accounts were also filed. These aspects have not been considered in proper depth and detail. In these circumstances, I set aside the Order passed by the Company Law Board dated 30th May, 2005 with a direction to decide the said petition *de novo* on merits after considering all allegations, evidence and reply given thereto. Thereafter, the Company Law Board will pass an Order giving suitable directions in accordance with law. Object and purpose of Sections 397, 398, 402 and 408 of the Act is two-fold. Firstly, to set right the wrongs and secondly, take remedial action to prevent occurrence of wrongs in future. Thus both preventive and curative action can be taken by the Company Law

Board. For taking action under Section 408 of the Act, Company Law Board is required to take into consideration interest of the company, shareholders and public interest. Past actions and conduct of the Board of Directors forms a foundation and the basis for the preventive action. Unless there is material to establish and show that the affairs of the company have been conducted in a manner which were prejudicial to the interest of the company, its members or to public interest, no directions to prevent repetition of such acts in future can be issued. In this way, past and future acts are interconnected. It may be pointed out here that jurisdiction and power under Section 402 of the Act is extremely wide. Petition in the present case was filed under Section 397 and 398 of the Act. Even while dismissing a petition under the aforesaid Sections, Court and the Company Law Board has power under Section 402 of the Act to pass orders which are just and equitable. Directions/relief can be given in the larger interest of the company even if no specific prayer is made. (See Syed Mahomed Ali versus R. Sundaramurthy reported in (1958) 28 Com. Cases 554 and Shoe Specialities Ltd. Versus Standard Distilleries and Breweries P. Ltd. reported in (1997) 90 Com. Cases 1). In Needle Industries (India) Ltd. versus Needle Industries Newey (India) Holding Ltd. reported in (1981) 51 com. Cases 743 it has been held that power to exercise jurisdiction

under sections 397 and 398 of the Act cannot be defeated by mere technicalities. Jurisdiction of the Board/court under the said provisions is of widest amplitude and orders can be passed with a view to bring to an end to the matters complained of or preventing the matters complained of or apprehended. Reference can also be made to Sangramsinh P. Gaekwad Versus Shantadevi P. Gaekwad reported in (2005) 11 SCC 314 and Manish Mohan Sharma Versus Ram Bahadur Thakur reported in (2006) 4 SCC 416. These aspect shall be kept in mind by the Company Law Board.

24. However, in the meanwhile, interim order is required to be passed. The allegations made, as discussed above, against the appellant are very serious. Prima facie merit in the allegations has been examined and discussed. 70% shares in the appellant company are held by the general public and the management only holds 15% shares. Interest of general public is required to be protected. Balance of convenience requires some restraint and embargo on the powers of the management. The appellant company and its officers are restrained from encumbering, selling, transferring, alienating, creating any third party rights, inducting any person, parting with possession in any of their properties or assets including immovable properties and fixed assets till the matter is disposed of by the Company Law Board. However, the

appellant company will be entitled to deal with, sell and dispose of the stock in trade, raw material and finished products in usual course of business. This interim order will be subject to the rights of the secured creditors and also subject to order(s) passed by Debt Recovery Tribunal.

25. Accordingly, the question of law No.1 mentioned above is answered in favour of the appellant and with the observations made above, the matter is remanded back to the Company Law Board. Question No. 2 therefore need not be decided. Company Law Board will endeavor to decide the Petition expeditiously preferably within four months from today.

Appeal is accordingly disposed of. No costs.

December 20, 2006 **(SANJIV KHANNA)**

P **JUDGE**