



IN THE HIGH COURT OF JUDICTURE AT MADRAS

DATED:31.07.2009

CORAM:

THE HON'BLE MR.JUSTICE P.JYOTHIMANI

COMPANY APPEAL NO.10 OF 2009
AND CONNECTED MISCELLANEOUS PETITION.

1.M/s.S.V.T.Spining Mills Pvt. Ltd.,
V.R.G.Gardens, Thadagam Road
Edayarpalayam
Coimbatore 641 025.

2.T.K.Muthusamy
3.T.N.Chenniappan
4.M.Vijayakumar
5.T.N.Mani

.. Applicants/Respondents

vs.

1.M.Palanisami
2.Mrs.P.Pushpaveni
3.Ms.Yesdohai
4.A.P.Ashok Kumar
5.M.Gopal
6.M.Chidambaram
7.Mrs.M.Dhanalakshmi
8.K.Thangavelu
9.K.Shanmugam
10.N.Venkatachalam
11.A.Gandhiban
12.V.R.Govindarajulu

.. Respondents/Petitioners

Company Appeal is filed under Section 10-F of the Companies Act,1956 against the order of the Company Law Board, Additional Principal Bench, Chennai passed in C.A.No.161 of 2006 in C.P.No.37 of 2006 dated 30.01.2009.

For appellants : Mr.R.Thiagarajan,Sr.Counsel
for Mr.K.Ramasamy

For respondents : Mr.R.Venkatavaradhan

..



JUDGEMENT

This appeal is filed under section 10-F of the Companies Act, 1956 against the order of the Additional Principal Bench of the Company Law Board made in C.A.No.161 of 2006 in C.P.No.37 of 2006 dated 30.01.2009.

2. The respondents in this appeal have filed the company petition against the appellants for oppression and mismanagement under sections 397 and 398 read with 402 and 403 of the Companies Act, 1956. It was, in that company petition, the appellants have filed Application No.161 of 2006 before the Company Law Board for dismissal of the said company petition on the ground of maintainability. That application came to be dismissed by the Company Law Board on the basis that the issue raised by the appellants require consideration in detail, which can be done only in the main company petition.

3. The grounds on which the appeal is filed are that, the Company Law Board cannot decide about the title in respect of shares stated to have been transferred while exercising jurisdiction under sections 397 and 398 of the Companies Act; that the decision of the Company Law Board in rejecting the application on the ground of maintainability is perverse and without basis; and that the Company Law Board ought to have dismissed the company petition on the admitted ground that the respondents are not holding shares in the company and therefore, they are non-members, who cannot maintain the petition under sections 397 and 398 of the Companies Act, 1956. Besides, the appellants have also raised other legal issues.

4. The facts which are relevant for the purpose of disposal of this appeal are as follows:

(a). The appellants 2 to 5 along with the first respondent M.Palanisamy, have jointly purchased 64 cents and 65 sq.ft. of vacant land under a sale deed dated 19.4.1995. When the said appellants 2 to 5 have purchased the first appellant's mill, it was in the name, G.S.S.Spinners Private Limited, subsequently converted as M/s.S.V.T.Spinning Mills Private Limited. It is stated that the said appellants 2 to 5 have purchased the shares of the erstwhile G.S.S.Spinners Private Limited while the first respondent has not purchased any share. It was due to the reason that the first respondent was negotiating to purchase the said company, he was taken nominally as one of the directors of the company even though he has not contributed to the share capital.

(b). Subsequently, it is stated, the first respondent was removed from the directorship in the General Body Meeting held on 11.8.1985, since he had not purchased the qualification shares. It is



WEB COPY

seen that the first respondent claiming himself to continue as a Managing Director, has filed O.S.No.1056 of 1995 on the file of the District Munsif's Court, Coimbatore for injunction against the appellants from interfering with his function as Managing Director. He has also filed O.S.No.49 of 1998 in the same Court for declaration that the resolution of the first appellant's company in the Extraordinary General Body Meeting held on 11.8.1995, removing him from the directorship is null and void. He has further filed O.S.No.201 of 1999 before the Sub Court, Coimbatore for declaration that himself and his family members, who are other respondents in the appeal (shareholders in respect of 3880 equity shares) bearing distinctive numbers from 0150 to 4050 and for permanent injunction against the company from registering any transfer of those shares.

(c). It is stated that during the pendency of the said suits, an agreement was entered into by the first respondent on 15.10.1995, agreeing to convey his 1/5th share in the said 64 cents and 65 sq.ft. of lands stated above and having received an amount of Rs.1,92,000/-, he failed to perform his part of obligation, which resulted in the filing of a suit in O.S.No.1638 of 1995 on the file of Sub Court, Coimbatore for specific performance against the first respondent, which is pending. It appears that some criminal complaints had been lodged by the first respondent, which were subsequently dismissed.

(d). It is stated that thereafter, the first respondent sought permission to withdraw all the said suits with liberty to claim remedy before the appropriate forum, however, the Civil Court permitted the first respondent to withdraw his suits on 18.1.2006, without granting liberty as sought for by him. Nearly six years after withdrawing the suits, the first respondent approached the Company Law Board by filing the company petition against the appellants for oppression and mismanagement. However, the suit filed by the appellants 2 to 5 for specific performance against the first respondent is still pending.

(e). It was the case of the appellants that the filing of company petition by the first respondent is an abuse of process of law and inasmuch as the first respondent has not purchased the qualification shares and become a shareholder of the company, the petition filed by him for oppression and mismanagement under sections 397 and 398 of the Companies Act is not maintainable by virtue of section 399 of the Companies Act, 1956.

5. On the other hand, it was the case of the first respondent before the Company Law Board that the application filed by the appellants questioning the maintainability of the company petition is only to prolong the matter and the first respondent has in fact paid a sum of Rs.1 lakh by way of cheque as against the agreed



WEB COPY

consideration of Rs.60 lakhs, agreeing to pay the balance of Rs.59 lakhs to the 12th respondent and later, on payment of balance amount to the 12th respondent and his group, the 12th respondent has transferred 3880 shares in favour of the first respondent and delivered the original share certificates numbering 0150 to 4050 in compliance of the formalities in respect of transfer of shares. Since the first respondent has lost the original share certificates, he made a request to the appellants to issue duplicate share certificates, which was not considered, resulting in filing of the suits. Therefore, it was the case of the first respondent before the Company Law Board that he has substantial interest over the company's affairs as he is a shareholder since the transferor viz., 12th respondent who was the owner had received the full consideration and delivered the share certificates.

6. As stated above, the Company Law Board has considered the rival submissions and held that the questions whether the first respondent has substantial interest over the company's affairs and whether the transfer of shares has not been effected in favour of the first respondent in spite of payment of entire sale consideration are all matters which have to be decided in the company petition for the purpose of finding whether the first respondent as a member can maintain the said company petition. Taking such view, the Company Law Board has felt that the question of maintainability cannot be decided at this stage and rejected the application filed by the appellants.

7. Mr.R.Thiagarajan, learned senior counsel for the appellants would submit that the case of first respondent himself is that he has paid the sale consideration in respect of the shares to the 12th respondent, who after receiving the same has handed over the share certificates but, the shares are not transferred and are not standing in his name as on date, and therefore, the shares have not been transferred in the name of the first respondent legally and on that account, the company petition has to be rejected as not maintainable.

7(a). According to the learned senior counsel, the Company Court, while exercising its powers under Sections 397 and 398 of the Companies Act, cannot decide as to whether the transfer has been effected or not and whether the transfer of shares is valid or not, and what the Company Court, while exercising its powers under sections 397 and 398, can do is to prima facie satisfy that the person who approaches it under the abovesaid provisions is a member of the company on the said date. When, on the admitted pleadings, the first respondent cannot be treated as a member of the company and a shareholder of the company, according to him, the very filing of the company petition by him should be treated as meaningless and the Company Law Board cannot be expected to keep the petition which is on the face of it not maintainable.



WEB COPY

7(b). It is his submission that while rejecting the application filed by the appellants for maintainability of the company petition, the Company Law Board shall have referred to the income-tax returns of the 12th respondent/transferor about his assets and rights in respect of the share certificates.

7(c). It is his further submission that the returns filed on behalf of the appellants in respect of investment, especially relating to that of 3rd appellant, who claims to be the owner of the abovesaid shares, have been rejected by the Company Law Board as a weak evidence, which, according to him, is not the correct view. He would rely upon various judgments in,

(i) Gulabrai Kalidas Naik and others vs. Laxmidas Lallubhai Patel and Others (1977) 47 Comp.Cas 151;

(ii) Ved Prakash and others vs. Iron Traders (Private) Ltd., and Others 1960 (XXXI) Comp.Cas 122 (Punjab);

(iii) N.Satyaprasad Rao and Others vs. V.L.N.Sastry and Others (1988) 64 Comp.Cas 492 (AP);

(iv) Shri Balaji Textile Mills Pvt. Ltd., and another vs. Ashok Kavle and others (1989) 66 Comp.Cas 654 (Karnataka); and

(v) Mrs.Saroj Goenka and others vs. Nariman Point Building Services and Trading Private Ltd., and others (1997) 90 Comp.Cas 205 (Madras), to substantiate his contention that the Company Law Board has to decide as to whether a person who approaches under section 397 of the Companies Act is a member of the company.

8. On the other hand, Mr.Venkatavaradhan, learned counsel appearing for the respondents, especially for the first respondent, would submit that merely because the civil Court has not granted leave to file appropriate proceedings, it does not mean that the rights conferred on the respondents to file company petition under sections 397 and 398 are taken away.

8(a). It is his case that when admittedly the first respondent has paid the entire sale consideration in respect of shares to the 12th respondent, who was the original owner and who had in fact transferred his right over the shares in favour of the first respondent, which is evident on the face of it, the present application filed by the appellants questioning the maintainability of the company petition was correctly rejected by the Company Law Board.

8(b). He would contend that the entire pleadings prove that the transfer of shares by the 12th respondent in favour of the first respondent is an admitted fact. His submission is, for the purpose of deciding an issue under sections 397 and 398 of the Companies Act and to ultimately decide as to who is the member under section 399 of the said Act, the term 'member' has to be interpreted as per section 2(27) of the Companies Act and not as per section 41 of the Companies Act.



WEB COPY

8(c). It is his submission that the term 'member' , which is a non-inclusive definition under section 2(27) has to be liberally construed in respect of sections 397 and 398 of the Companies Act, since it would include even a legal heir of a person in whose name the transfer has not yet been effected but still is a member within the meaning of section 2(27) of the Act. He would rely upon the judgment of the Supreme Court in World Wide Agencies Pvt., Ltd., vs. Margaratt.Desor [(1990) 1 SCC 536].

8(d). He would submit that the company petition filed by the first respondent is one of composite in nature which not only seeks for an action under sections 397 and 398 of the Companies Act, but also for a direction to rectify the records by issuing duplicate certificates, etc., and therefore, the first respondent having an indisputable and unchallengeable title as a member can maintain the company petition.

8(e). He would also submit that the petition under sections 397 and 398 is filed on just and equitable grounds and therefore, the word, 'member' should be construed liberally. He would refer to the judgments cited by the learned senior counsel for the appellants to substantiate his contention.

8(f). He would submit that the question of considering tax returns, etc. is a matter to be decided on merits of the case and that cannot be construed while deciding about the maintainability. He would rely upon the judgment in Mrs.Saroj Goenka and others vs. Nariman Point Building Services and Trading Private Ltd., and others (1997) 90 Comp.Cas 205 (Madras), to insist that the question of maintainability cannot be treated as a question of law and therefore, under section 10-F of the Companies Act, the appeal is not maintainable.

8(g). He would rely upon the judgment in Nagindas Ramdas vs. Dalpatram Ichharam @ Brijram and others [(1974) 1 SCC 242] to submit that when the decision on an issue involves appreciation of evidence and other factors, it cannot be an issue for maintainability. It is his submission that when the above said issue raised by the first respondent requires a detailed investigation, the Company Law Board has correctly rejected the application for maintainability and directed the main company petition to be heard.

9. I have heard the learned senior counsel for the appellants and the learned counsel for the respondents and given my anxious thoughts to the issue involved in this case.

10. Some of the undisputed facts are that the appellants 2 to 5 along with the first respondent had purchased jointly the vacant land to the extent of 64 cents and 65 sq.ft. by a sale deed dated 19.4.1995 and the first respondent was made as the Managing Director of the first appellant company and subsequently he was removed in the Extra-ordinary General Body Meeting held on 11.8.1995. The pendency of the suit filed by the appellants 2 to 5 against the first



WEB COPY

respondent for specific performance of agreement dated 15.10.1995, wherein it is stated that the first respondent has agreed to convey his 1/5th share in the above said property purchased jointly on 19.4.1995 and the pendency of the civil suit for specific performance itself cannot be a ground to throw out the company petition filed by the first respondent against the appellants under sections 397 and 398 of the Companies Act, 1956.

11. Again, the mere fact that the civil suits stated above have been dismissed by the Court without giving liberty to the first respondent to take action in an appropriate forum, itself will not take away the rights of the first respondent if the same are available and conferred on him under the provisions of the Companies Act, 1956, especially for approaching the appropriate forum viz., the Company Law Board complaining about the oppression and mismanagement under sections 397 and 398 of the Act. This being a statutory right available to a shareholder or a member of the company, in my considered view, it does not require any leave to be granted by the civil Court. Of course, the question whether the non-transfer of shares in the name of the first respondent by the company is valid or not may not be strictly within the purview of the Company Law Board while deciding the issue under sections 397 and 398 of the Companies Act. But as correctly pointed out by the learned counsel for the respondents, the term, 'member' has to be construed based on the broader object of sections 397 and 398 of the Companies Act.

12. On facts as elicited above, the crux of the issue appears to be that the first respondent and the respondents 2 and 3 have entered into an agreement on 27.3.1995 with the 6th respondent and his family members for acquiring the entire shareholdings of the 12th respondent, Mr.V.R.Govindarajulu and his family members, relatives and friends in the erstwhile G.S.S.Spinnners Private Limited, which has been subsequently converted as M/s.S.V.T.Spinning Mills Pvt. Ltd., for a sum of Rs.60 lakhs and that was for transferring 19580 equity shares of Rs.100/- each aggregating Rs.19.58 lakhs, apart from the building, plant and machinery and other properties of the said company. In furtherance of the said agreement it is stated that the first respondent paid a sum of Rs.1 lakh as advance and the balance amount of Rs.56.50 lakhs was paid to the 12th respondent through bank account said to have been jointly maintained by the first respondent along with respondents 2 to 5 and the remaining amount of Rs.2.50 lakhs was paid in cash and therefore, the case of the first respondent is that he has paid the entire sale consideration in respect of shareholdings of the 12th respondent in the first appellant company and the 12th respondent transferred the shares namely, 19400 shares in favour of the first respondent and his group, in favour of respondents 2 to 5 to the extent of 3880 shares each and the remaining 180 shares were transferred in favour of the transferees at the time of vacating the Office of Director by the



12th respondent. It is the specific case of the said respondents that the 12th respondent and his family members have handed over the original certificates in distinctive numbers and the transfer of shares was duly entered in the register of members of the company. It was only based on that factual position, the suits were filed, which were of course subsequently withdrawn and dismissed.

13. As I have stated earlier, by the withdrawal of the said suits it is not as if the respondents have lost their rights in claiming ownership over the shares in the first appellant company, if really such ownership was transferred. The validity or otherwise of the transfer of shares is not an issue while deciding about oppression and mismanagement under sections 397 and 398 of the Companies Act. Nevertheless, the Company Law Board can certainly go into the merits of the case to find out what interest the respondents have in the shareholdings of the first appellant company. The Company Law Board has, in fact, in my considered view, correctly held that these are the issues to be decided in detail while hearing the main company petition in which the Company Law Board would necessarily decide about the right and interest of the respondents in the shareholdings of the first appellant company and the same cannot be decided in the maintainability application and the respondents cannot be thrown out from the company petition on the preliminary issue.

14. It is further relevant to note that it is not as if the appellants who are the respondents in the company petition have lost their right of proving their case that the respondents are not either the shareholders or members of the company on merits and that the respondents are not entitled to maintain the company petition under sections 397 and 398 of the Companies Act. Therefore, on the face of it, the appellants cannot have any grievance. The contention of the learned senior counsel for the appellants that when the respondents prima facie have no status of shareholders or members of the company, allowing the company petition to prolong for some more time would be only an abuse of process of law and also unnecessarily taking away the court's time, has no application to the facts and circumstances of the case. On facts, it is not possible to draw an inference that the pendency of company petition would be an empty formality.

15. On the one hand, it is the contention of Mr.R.Thiagarajan, learned senior counsel appearing for the appellants that in the income-tax return filed by the 12th respondent, who transferred the shares as stated above for the financial years 1995-96 (assessment year 1996-97), the 12th respondent has shown that he was holding 3830 shares in G.S.S.Spinnners Private Limited to the value of Rs.3,83,000/- and similar is the case for the assessment year 1997-98 (financial year 1996-97) and therefore, the claim of the first respondent and other respondents that the shares have been purchased



WEB COPY

17. It is true that in *Gulabrai Kalidas Naik and others vs. Laxmidas Lallubhai Patel and Others* [1977 (47) Comp.Cas 151], the Gujarat High Court has held that the pre-requisite for invoking jurisdiction under sections 397 and 398 of the Companies Act is provided under section 399(1) and a person who makes a complaint of oppression must be a member of the company. But, in the said case, it was also decided that in cases where title of membership is in dispute, the relief is under section 155 of the Companies Act to get his name rectified in the register of members. In that case, of course, the High Court has taken note of the fact that admittedly the signatures were obtained from the transferor in blank papers, based on certain understanding and it was, in those circumstances, the High Court held that the transferee cannot be held to be a member.

18. Even in the judgment of Division Bench of the Karnataka high Court relied upon by the learned senior counsel for the appellants in *Shri Balaji Textile Mills Pvt. Ltd., and another vs. Ashok Kavle and others* [1989 (66) Comp.Cas. 654], it was held that for the purpose of deciding about the term, 'member' or 'shareholder' under sections 397 and 398 of the Companies Act, it is not necessary for such person to comply with section 41(2) of the Act and a broader meaning to be given to the term, 'member' as per section 2(27) of the Act. The operative portion of the judgment of the Division Bench of the Karnataka High Court is as follows:

"A combined reading of sections 397, 398 and 399 of the Act makes it clear that the meaning of the word "member" of a company should be understood in the context in which it is used and that meaning cannot be tagged on to the membership clause in section 41(2) of the Act. The clause which is applicable to test whether a member satisfies the requirement of sections 397 and 398 of the Act would be section 2(27) of the Act and not the provisions of section 41(2) of the Act. "

19. Again, in the judgment relied upon by the learned senior counsel for the appellants in *Mrs.Saroj Goenka and others vs. Nariman Point Building Services and Trading Private Ltd., and others* [1997 (90) Comp. Cas.205], the Division Bench of the Madras High Court has categorically held that when the issue to be decided in the company petition involves pleadings running to hundreds of pages and several issues are to be gone into, the maintainability question has to be tried along with other issues and it would not be just and proper to subject the parties to the trial of entire case for deciding the question of maintainability. The portion of the judgment on which reliance was placed by the learned senior counsel is as follows:

" That under section 10F of the Act, appeals against orders of the Company Law Board lie only on questions of



WEB COPY

Tribunal is of opinion-

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; 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."

" Section 398. Application to Tribunal for relief in cases of mismanagement-

(1) Any members of a company who complain:

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or

(b) that a material change not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company has taken place in the management or control of the company, whether by an alteration in its Board of directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company;

may apply to the Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Tribunal is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Tribunal may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit."

21. The term, 'member' is defined under section 2(27) of the Companies Act in the form of non-inclusive definition which says as follows:



"Section 2(27) "members", in relation to a company, does not include a bearer of a share-warrant of the company issued in pursuance of section 114."

WEB COPY

Therefore, the term 'member' under section 2(27) of the Companies Act has to be construed on a larger connotation, which means that the persons other than bearers of share warrants are to be treated as members. This is in apparent contravention of section 41 of the Companies Act which is captioned as definition of 'member', as follows:

" Section 41. Definition of "member".- (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company and on its registration, shall be entered as members in its register of members.

(2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

(3) Every person holding equity share capital of a company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company."

22. If the term, 'member' as defined in section 41 is applied, there would be two categories viz., (i) deemed members who are subscribers to the memorandum, who on registration are entered in the register of members; (ii) other persons whose names are entered in the register of members. In fact, after the Depositors Act, 1996 came into effect, even a depositor who is a beneficial owner, who is actually a person holding equity shares and whose name is entered as a beneficial depositor, can also be deemed to be a member. Taking note of section 41 of the Companies Act, certainly it is a restrictive definition and it has an apparent conflict with section 2(27) of the Companies Act which defines 'member' in a broad manner.

23. In World Wide Agencies Pvt., Ltd., vs. Margaratt.Desor [(1990) 1 SCC 536], the Apex Court in respect of the above said term 'any member', has considered the contention that even in case of death of a shareholder, shares do not automatically go to the legal heirs by transmission and therefore, even the legal heirs of a shareholder cannot maintain the application under sections 397 and 398 of the Companies Act. The said contention raised as elicited by the Hon'ble Apex Court is as follows:

" On behalf of the appellants it was contended that the right which is a specific statutory right, is given only to a member of the company and until and unless one is



WEB COPY

member of the company, there is no right to maintain application under Section 397 of the Act. Mr. Nariman contended that there was no automatic transmission of shares in the case of death of a shareholder to his legal heir and representatives, and the Board has a discretion and can refuse to register the shares. Hence, the legal representatives had no locus standi to maintain an application under Sections 397 and 398 of the Act. Mr. Nariman submitted that the rights under Sections 397 and 398 of the Act are statutory rights and must be strictly construed in the terms of the statute. The right, it was submitted, was given to "any member" of a company and it should not be enlarged to include "any one who may be entitled to become a member".

The Supreme Court has held,

" 20. We are clearly of the opinion that having regard to the scheme and the purpose of Sections 397 and 398 of the Act, the reasoning on a pari materia provision of the English Act would be a valuable guide. The said construction, appears to us, to further the purpose intended to be fulfilled by petitions under Sections 397 and 398 of the Act. It facilitates solution of problems in case of oppression of the minorities when the member is dead and his heirs or legal representatives are yet to be substituted. This is an equitable and just construction. This construction, as suggested by Pennycuick, J. Does not militate against either equity or justice of such situation. We would, therefore, adhere to that construction. In this connection, it may be mentioned that in the 1972 Edition of Gore-Browne on Companies, it has been stated as follows:

"It has recently been settled that the personal representatives of a deceased member, even though they are not registered as members, are entitled to present a petition under Section 210. In Re Jermyn Street Turkish Baths Ltd. Pennycuick, J. Held that on its true construction Section 210 required that the word 'member' should include the personal representatives of a deceased member, on whom title of his shares devolved by operation of law."

24. The applicability of sections 397 and 398 of the Companies Act is an equitable jurisdiction which is intended to protect the minority members of the company from any oppression and mismanagement at the hands of majority members. It is in that background, the Supreme Court has held that the wider meaning of the term 'member' should be given in the context of sections 397 and 398 of the



WEB COPY

Companies Act. On the facts and circumstances of the case, especially in the circumstance that the respondents filed a composite application, viz., the company petition seeking reliefs including the issuance of duplicate share certificates, I am of the considered view that the claim of the respondents herein in the company petition cannot be thrown out at the threshold without even going into the merits of the issue raised by the respondents under the guise of deciding the question of maintainability as a preliminary issue.

25. On the factual matrix, even assuming that the appellants have got the right of raising maintainability of company petition under sections 397 and 398 of the Companies Act filed by the respondents, the same has to be decided in the main petition along with other issues and not as a preliminary issue. The same was also the view taken by the Karnataka High Court in Srikanta Datta Narasimharaja Wadiyar vs. Venkateswara Real Estate Enterprises (P) Ltd., [1990 (3) CLJ 38 (Karn)], wherein while construing the meaning of the word 'member' under sections 41 and 2(27) of the Companies Act in the context of sections 397 and 398, by referring to the judgment of the Gujarat High Court in Gulabrai Kalidas Naik and others vs. Laxmidas Lallubhai Patel and Others [(1977) 47 Comp. Cas. 151] it was held as follows:

" 35. So, the Gujarat High Court has not categorically ruled that the petition should be thrown out on the ground that the petitioner has not got on the register of members. If, in a given case, it is shown that, though the name of a person is not shown in the register of members, if he had been treated as a member by the company, the Company Court can always exercise its equity jurisdiction. This Court should not decline to exercise its equity jurisdiction on the ground of mere technicality. Till the year 1986, i.e., till the matter was taken to this court in this petition, there was no shred of doubt on the rights of the petitioner to represent his interests as a shareholder in respondent No. 1 company. It was contended that in a number of meetings he has signed the proceedings of the said meetings and even the balance-sheet prepared by respondent No. 1 company right from the year 1971 to 1986 does not show any indication that the petitioner had been excluded from the membership of the company either on the ground that he has not inherited the shares or otherwise. In the circumstances, I am of the view that the decision of the Division Bench in Balaji Textile Mills (1988) ILR 1988 Kar 1213: (1989) 66 Comp Cas 654, is applicable on the undisputed material on record. "

26. In these circumstances, I am of the considered view that the contention raised on behalf of the appellants that on the ground of



maintainability the company petition filed by the respondents has to be dismissed is not sustainable. The Company Law Board has correctly come to the conclusion that these are the issues to be decided on merits of the case and cannot be decided at this stage.

WEB COPY

27. The Division Bench of Madras High Court in the above said case reported in Mrs.Saroj Goenka and others vs. Nariman Point Building Services and Trading Private Ltd., and Others [(1997) 90 Comp.Cas. 205] has in fact held that the issue relating to maintainability cannot be a pure question of law while deciding appeal under section 10F of the Companies Act. On the facts of the above said case, the Division Bench has held as follows:

" The contention of the respondents is that the petitioners are not shareholders and their names are not entered in the register of members and they are not the subscribers of the memorandum of the company. As such, they cannot be either held to hold the requisite number of shares, nor can be held to be the members of the company. According to the case of the petitioners, the late Shri Ramnath Goenka was a registered shareholder of 9,280 equity shares and 4,000 cumulative redeemable preference shares and one-third of the same has devolved upon the petitioners, who are no other than the widow and daughter of pre-deceased son of Ramnath Goenka. As such their one-third share would come to 3,093.33 shares and 1,666.67 of the preference shares with voting rights under section 87 of the Companies Act. As such, they have the right to file the petition under sections 397 and 398 of the Act. At this stage, it may be mentioned that there is also a suit, namely, C.S.No. 1246 of 1992, filed on the original side of this court for a declaration that the shares held by the late Shri Ramnath Goenka were, in fact, the shares of the plaintiff. There is also another suit filed by the first-appellant being C.S.No. 1123 of 1992, on the original side of this court for various reliefs pertaining to the shares held by the late Shri Ramnath Goenka. Therefore, it is contended by learned counsel that the issue relating to the maintainability cannot be held to be a pure question of law, as it depends upon the determination of the aforesaid several facts. As such, it could not have been decided as a preliminary issue. Hence, the Company Law Board was justified in deciding that the said issue will also be decided along with the other issues. From the respective case of the parties, referred to above, it is clear that the issue relating to maintainability cannot be held to be a pure question of law. That being so, the Company Law Board cannot be held to have committed any error of law in holding that the issue relating to the



WEB COPY

maintainability of the petition shall also be decided along with the other issues. That being so, it shall have to be held that there was no question of law involved for entertaining the appeal under Section 10F of the Act. However, in the light of the facts and circumstances of the case, we do not consider it necessary to answer point No. 1 at this stage itself. We would now take up point No. 2. "

In these circumstances, the appeal fails and the same is dismissed.

kh

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Company Law Board,
Additional Principal Bench,
Chennai.

+ 1 cc to Mr. R. Venkatavaradan, Advocate SR No.35498

CU(CO)
SR/18.8.2009

Judgment in
COMPANY APPEAL
NO.10 OF 2009