

Calcutta High Court

Harsh Vardhan Lodha vs Rameshwara Jute Mills Co. Ltd. & ... on 17 August, 2009

Author: Aniruddha Bose

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Aniruddha Bose

A.P.O.T. No. 297 of 2009

Harsh Vardhan Lodha

Vs.

Rameshwara Jute Mills Co. Ltd. & Ors.

Advocates for the Petitioner: Mr. Anindya Kumar Mitra (Sr. Adv.)
Mr. Abhrajit Mitra
Mr. Paritosh Sinha
Ms. Manju Bhutoria
Mr. Sachchida Nand Pandey
Mr. Anubhav Maitra

Advocates for Respondent

No. 7:

Mr. P. C. Sen (Sr. Adv.)
Mr. Debangsu Basak
Mr. Sanjiv Kumar Trivedi
Mr. Debanjan Mandal
Mr. Deepnath Roy Chowdhury
Mr. Sourya Sadhan Bose

Advocates for Respondent

Nos. 12 to 35:

Mr. Pratap Chatterjee (Sr. Adv.)
Mr. Malay Kumar Chosh
Mr. Jishnu Chowdhury
Mr. Sarvapriya Mukherjee
Ms. Sudeshna Bagchi
Mr. Subhojit Roy

Advocates for Respondent

No. 1:

Mr. S. Pal (Sr. Adv.)
Mr. Sudipto Sarkar (Sr. Adv.)
Mr. R. Banerjee

Advocates for Respondent No. 2: Mr. Shyama Prasad Sarkar (Sr. Adv.)
Mr. D. N. Sharma

Advocates for Respondent
No. 3 to 5: Mr. S. N. Mukherjee (Sr. Adv.)
Ms. V. Mahevia
Mr. R. K. Rai

Advocates for Respondent
No. 6: Mr. P. Sengupta
Mr. A. Rai
Mr. N. G. Khaitan

Judgement On: 17.8.2009

ANIRUDDHA BOSE, J.:-

1. The present appeal under Section 10F of the Companies Act, 1956 is directed against an order of the Company Law Board (CLB) passed on 22 July 2009 in a proceeding initiated by certain shareholders of Birla Corporation Limited under Sections 397 and 398 of the Act. The original application under the said provisions was filed in the year 2004, which was registered as C.P. No. 57/2004. But the order under appeal was passed in an interlocutory proceeding (CA 333 of 2009) arising out of the main petition, filed by one of the shareholders of the Company, being Rameshwara Jute Mills & Co. Ltd. (RJM in short). Hearing of the application of RJM, however, remained inconclusive before the CLB, and by an interim order, the CLB directed:-

"ORDER

(Dated: 22.7.2009)

During the arguments on the main petition, this application CA 333 of 2009 has been filed by the 6th petitioner, which is a corporate entity holding 260 shares in M/s Birla Corporation Limited (the company). It has filed this instant application seeking for freezing the voting rights of the shares held by respondents 9 to 24 and 26 to 34, which collectively account for over 62% shares in the company and for appointment of an independent Chairman to chair the AGM convened by the company on 27.7.2009. The counsel for the parties have extensively argued on this application for nearly 9 hours spreading

over 3 days and completed the same only on 20.7.2009. Since the AGM is to be held on 27.7.2009, to give a reasoned order by dealing with all the factual and legal issues raised by the counsel, the time available for me is too short. Further, any decision in this application might also amount to giving a decision on the main petition itself, on which, arguments are yet to be completed. Therefore, for the time being, keeping the equities between parties in mind, I only propose to pass an interim order, which would not be prejudicial to the contention of either of the parties, and to reserve the final order along with the order on the main petition, the arguments on which would be completed by 25th/31st August, 2009. Accordingly I direct, that, in case poll is taken on any of the agenda items, then the voting by the above-mentioned respondents shall be counted separately and the results of the poll shall be determined with and without taking into account the votes of these respondents. However the results of the poll shall not be announced. The shareholders are free to elect anyone as the chairman except Harsh Lodha, to conduct the proceedings of the meeting. One of the representatives of the petitioner no. 6, as nominated by it, will be one of scrutinizers of the proxies. The chairman of the meeting shall submit a report on the proceedings of the AGM along with the results determined as above the poll, in a sealed cover, through the company secretary, on the day of hearing on 25th August 2009."

2. The appellant before me, who is an existing director of the company, had filed a petition before the Hon'ble Supreme Court under Article 136 of the Constitution of India praying for Special Leave to Appeal against the said order. On 27 July 2009, the Hon'ble Supreme Court was pleased to pass the following order, by which the special leave petition was disposed of:-

"UPON hearing counsel the Court made the following
ORDER

SLP (C) No. 17869 of 2009 This SLP has been filed against the decision of the Company Law Board dated 22nd July, 2009 against which First Appeal lies under Section 10F of the Companies Act to the High Court.

On 24th July, 2009 A.P.O.T. No. 292/09, which is an appeal in connected matter, came up for hearing before the Company Judge, Shri Justice Anirudha Bose, which has been kept for hearing tomorrow, i.e. on 28th July 2009. On that day another Appeal bearing No. A.P.O.T. 289/09 was pending in the Registry which was filed by M/s. Birla Corporation Limited.

Since AGM has commenced today, we are of the view that both the above appeals should be heard together by the Company Judge, Shri Justice Anirudha Bose, tomorrow, i.e. on 28th July, 2009. This order is passed in the peculiar facts and circumstances of this case. Needless to add that the

appeals may be taken up and decided as early as possible.

The special leave petition stands, accordingly, disposed of. In view of the order passed above, we are not inclined to grant permission to file this SLP."

3. The appellant has filed this appeal, on 30 July 2009 after disposal of his special leave petition in the above terms. At the stage of admission, preliminary objection has been taken on maintainability of this appeal by Mr. S. Pal, assisted by Mr. S. Sarkar, learned Senior Advocates appearing for RJM. It is their submission that since the petition for special leave filed by the appellant has already been disposed of by the Hon'ble Supreme Court, it is no more open to the appellant to challenge the same order by way of appeal under Section 10F of the Act. The legal principle on which reliance was primarily placed by the learned counsel for RJM resisting the admission of appeal is the doctrine of Election. However, the principles of res judicata and doctrine of merger also came up for consideration in course of hearing on the point of maintainability of the appeal. At this stage, thus, I shall only address the issue of maintainability of the appeal.

4. The main submission of Mr. Pal is that since the appellant has already applied before the Hon'ble Supreme Court challenging the same order, he cannot invoke the appellate jurisdiction of this Court again, after failing to obtain any relief in the petition for special leave. He argued that since no liberty was granted to the appellant by the Hon'ble Supreme Court to approach this Court in its appellate jurisdiction, the appellant had forfeited his right of appeal. He relied on a decision of the Hon'ble Supreme Court in the case of Shankar Vs. Krishna (AIR 1970 SC 1) in support of his submissions.

5. In the case of Shankar Vs. Krishna (supra), the appellant was the plaintiff in a suit filed for possession of certain premises, which was rented out to the defendant. The Court of first instance held that only a part of the premises ought to be retained by the tenant, and granted a decree for possession of two out of four rooms which were in occupation of the tenant, with further direction for proportionate reduction in rent. Appeal was preferred by both the parties against this judgment and decree, and the appellate Court had affirmed the decree. The defendant in that suit thereafter challenged the legality of this order by filing a revisional application under Section 115 of the Code of Civil Procedure before the High Court. An Hon'ble Single Judge of the High Court declined to interfere with this order and the application under Section 115 of the code was dismissed. Thereafter, the defendant moved another application under Articles 226 and 227 of the Constitution of India before the High Court. The High Court, in exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India entertained the said application, and found the conclusions of the Court of first instance and the appellate Court to be wrong, and the orders passed by the Courts below were set aside.

6. The appellant/plaintiff filed a petition for special leave to appeal against this order. Leave to appeal against the order was granted, and the appeal was allowed. It was held by the Hon'ble Supreme Court:-

"8. Even on the assumption that the order of the appellate Court had not merged in the order of the single judge who had disposed of the revision petition we are of the view that a writ petition ought not to have been entertained by the High Court when the respondent had already chosen the remedy under Section 115 of the Code of Civil Procedure. If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the Subordinate Court. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the Court to prevent abuse of process as also to respect and accord finality to its own decisions."

7. Mr. Pal further argued that so far the case of the appellant in this appeal is concerned, the special leave petition was not dismissed in limine, but the Hon'ble Supreme Court had examined the controversy involved in its entire perspective. His submission is that the Hon'ble Supreme Court was pleased to dispose of the appeal considering the fact that against the same order of the CLB, the company in question, i.e. Birla Corporation as also the applicant RMJ had also preferred two separate appeals, and Harsh Vardhan Lodha (being the appellant in the present proceeding) was a party in both these appeals. Thus, he was in a position to present his case before the appellate court under the Companies Act in these two appeals in any event. In the light of these facts, without specific liberty being granted by the Hon'ble Supreme Court to maintain this appeal, Mr. Pal contended that the appeal should be dismissed in limine.

8. In support of the appeal, on the question of maintainability, the main submission of Mr. P.C. Sen, learned Senior Advocate has been that since the petition for special leave to appeal filed by the appellant was not admitted by the Hon'ble Supreme Court and it was disposed of without making any observation on merit, it was well within the right of the appellant to prefer the instant appeal under Section 10F of the Companies Act, 1956. He drew my attention to the first paragraph of the order passed on 27 July 2009 in which the Hon'ble Supreme Court observed that "First appeal lies under Section 10F of the Companies Act to the High Court." He submitted that this observation of the Hon'ble Supreme Court ought to indicate that liberty was preserved for the appellant to prefer appeal against the impugned decision before this Court.

9. His further submission was that the doctrine of election was not applicable in the instant case, as under Article 136 of the Constitution of India, the Supreme Court was vested with extraordinary jurisdiction to entertain appeal from an order of any judicial authority. This cannot be considered to be a regular appellate or revisional jurisdiction which a litigant could invoke for quashing an order of the CLB. Mr. Sen contended that doctrine of election could be applied only if a litigant had applied for remedy in one of the regular available legal fora for quashing an order. He relied strongly on a decision of the Hon'ble Supreme Court in the case of Kunhayammed Vs. State of Kerala (2006) 6 SCC 359 in support of his submissions, and referred to the following passage from this judgment:

"..... In our opinion, the legal position which emerges is as under: (1) While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction;

it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave;

(2) If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out;

(3) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in the appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without noticing the respondent.

(4) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.

Dismissal at stage of special leave-without reasons-no res judicata, no merger"

10. Learned counsel appearing for both the parties referred to different passages of the order of the Hon'ble Supreme Court passed on 27 July 2009, and sought to interpret the order of the Hon'ble Supreme Court to support their respective positions. But I do not think this Court can embark on an exercise of interpreting an order of the Hon'ble Supreme Court the same way a legislative instrument is construed. The requirement of construction of a legislative instrument arises in a situation where in a given factual context different interpretations of a statutory provision becomes possible. Such exercise has become an integral part of the judicial decision making process since at the time of enactment of a law, the lawmakers cannot be expected to anticipate all the conflict areas such law may give rise to, and provide solution for all such potential conflict situations. But a judicial order is pronounced in an existing lis between the contesting parties, and the order is to be understood and implemented from the reasons given in the order itself. I do not think there is any scope of going behind the order of the Hon'ble Supreme Court and find out its implications, or reasons behind passing of such order. I, accordingly, decline to venture into the exercise of finding out whether by passing the order, the Hon'ble Supreme Court intended that the appeal shall be filed before the statutory forum, or forfeited the right of the appellant to assail the order in any other forum. I shall test the right of the appellant to maintain the appeal from the order of the Hon'ble Supreme Court, and I shall also consider for this purpose the ratio of the two authorities cited by the learned counsel for the parties, which are binding on me in view of Article 141 of the Constitution of India.

11. In the case of Kunhayammed (supra), the Hon'ble Supreme Court considered the question as to whether a review petition would lie against an order, against which a petition for special leave was filed and the same was dismissed by the Hon'ble Supreme Court. In this judgment, distinction was

made by the Hon'ble Supreme Court on the impact of an order of dismissal of an SLP between two stages in which such order of dismissal is passed. Stage one is dismissal of the petition before grant of special leave to prefer an appeal, and the second stage is dismissal by the Supreme Court of the appeal after such leave is granted. So far as the subject dispute is concerned, leave was not granted to the appellant to appeal. In the same judgment (i.e. Kunhayammed), the Hon'ble Supreme Court laid down the legal position in the event a petition for leave to appeal is dismissed:-

"27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this court being the Apex court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court."

12. In the case of Indian Oil Corporation Ltd. Vs. State of Bihar [1986(4) 146], which was referred to in the case of Kunhayammed (supra), a similar legal dispute had arisen when an employer had filed a special leave petition against an award of labour court, which was dismissed by the Hon'ble Supreme Court in the following terms:-

"The special leave petition is dismissed."

The employer thereafter challenged the said order before the High Court under Article 226 of the Constitution of India. The employee took the plea before the High Court that the said writ petition was not maintainable under the doctrine of election. The High Court accepted the plea, and held that the employer after choosing to apply before a superior court and being unsuccessful there could not approach the High Court again for the same relief. This order was assailed before the Hon'ble Supreme Court again, and it was held by the Hon'ble Supreme Court:-

"17. Thereafter the employer approached the High Court by preferring a petition under Article 226 of the Constitution seeking quashing of the award of the Labour Court. On behalf of the employee the principal contention raised was that in view of the order of the Supreme Court dismissing the special leave petition preferred against the award of the Labour Court it was not legally open to the employer to approach the High Court under Article 226 of the Constitution challenging the very same award. The pleas prevailed with the High court forming an opinion that the doctrine of election was applicable and the employer having chosen the remedy of approaching a superior court and having failed therein he could not thereafter resort to the alternative remedy of approaching the High Court. This decision of the High Court was put in issue before the Supreme Court. This Court held that the view taken by the High Court was not right and that the High Court should have gone into the merits of the writ petition. Referring to two earlier decisions of this Court, it was further held: (SCC pp. 148-50, paras 6 & 8) "[T]he effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that this Court had decided only that it was not a fit case where special leave should be granted. This conclusion may have been reached by this Court due to several reasons. When the order passed by this Court was not a speaking one, it is not correct to assume that this Court had necessarily decided implicitly all the questions in relation to the merits of the award, which was under challenge before this Court in the special leave petition. A writ proceeding is a wholly different and distinct proceeding. Questions which can be said to have been decided by this Court expressly, implicitly or even constructively while dismissing the special leave petition cannot, of course, be reopened in a subsequent writ proceeding before the High Court. But neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court dismissing the special leave petition operate to bar the trial of identical issues in a separate proceeding namely, the writ proceeding before the High Court merely on the basis of an uncertain assumption implication. It is not correct or safe to extend the principle of res judicata or constructive res judicata to such an extent so as to found it on mere guesswork.

It is not the policy of this Court to entertain special leave petitions and grant leave under Article 136 of the Constitution save in those cases where some substantial question of law of general or public importance is involved or there is manifest injustice resulting from the impugned order or judgment. The dismissal of a special leave petition in limine by a non-speaking order does not therefore justify any inference that by necessary implication the contentions raised in the special

leave petition on the merits of the case have been rejected by this Court. It may also be observed that having regard to the very heavy backlog of work in this Court and the necessity to restrict the intake of fresh cases by strictly following the criteria aforementioned, it has very often been the practice of this Court to grant special leave in cases where the party cannot claim effective relief by approaching the High Court concerned under Article 226 of the Constitution. In such cases also the special leave petitions are quite often dismissed only by passing a non-speaking order especially in view of the rulings already given by this Court in the two decisions aforesaid, that such dismissal of the special leave petition will not preclude the party from moving the High Court for seeking relief under Article 226 of the Constitution. In such cases it would work extreme hardship and injustice if the High Court were to close its doors to the petitioner and refuse him relief under Article 226 of the Constitution on the sole ground of dismissal of the special leave petition." (emphasis supplied)

13. In the present case, the order of the Hon'ble Supreme Court passed on 27 July 2009 is not an order of dismissal similar to the one by which the special leave petition was dismissed in the case of Indian Oil Corpn. Ltd. (supra). There are certain observations and directions of the Hon'ble Supreme Court. The special leave petition of the appellant has also not been "dismissed", but the expression employed in the order is:-

"The said leave petition stands, accordingly, disposed of."

14. I do not think just because the special leave petition has not been dismissed, but was disposed of by the Hon'ble Supreme Court, that would have any significant impact on the rights or the entitlement of the parties, since leave had not been granted by the Hon'ble Supreme Court to appeal against the order of the Company Law Board. As regards the observation of the Hon'ble Supreme Court made in the order passed on 27 July 2009, I would revert to the decision in the case of Kunhayammed (supra) on the binding strength of an order by which a petition for special leave is dismissed without granting of leave to appeal, but with certain observations.

15. In the order passed by the Hon'ble Supreme Court in SLP(C) No. 17869 of 2009, observation relate to the status of the two other appeals filed against the same decision of the Company Law Board. It has also been recorded in the order that the AGM of the company in question had "commenced today", being the day the order was passed. The Hon'ble Supreme Court further expressed the view that the two appeals should be heard by this Court on the very next date (i.e. 28 July 2009). Applying the test formulated by the Hon'ble Supreme Court in the case of Kunhayammed (supra) in paragraph 27, which has been reproduced in the earlier part of this order, what has to be ascertained first is as to whether in this order there is any declaration of law by the Hon'ble Supreme Court which may attract Article 141 of the Constitution. There is no such declaration. The next point which is to be examined is whether this order contains any direction on the parties, which would be binding in nature. I do not think there is any such direction, except the observation that two other appeals against the same order ought to be heard on 28 July 2009.

16. This being the position, since leave to appeal was not granted by the Hon'ble Supreme Court, the appellant could not and did not enter the appellate arena of the Hon'ble Supreme Court with the decision of the Company Law Board against which the present appeal has been preferred. Doctrine

of Merger or Res Judicata would not apply against the appellant. But would he be barred under the doctrine of election in maintaining this appeal? This aspect was considered by the Hon'ble Supreme Court in the case of Indian Oil Corporation (supra), and it was held:-

"11. The doctrine of election referred to by the High Court has no application at all to the present situation and the decision in Shankar Ramchandra Abhayankar Vs. Krishnaji Dattatreya Bapat is clearly distinguishable. The question that arose in that case was whether a party who had a choice of restoring to one of two remedies before the same court namely, the High Court, could successively move the High Court under Section 115 of Civil Procedure Code and again under Article 226 and 227 of the Constitution. The question was answered in the negative for the simple reason that the order passed by the High Court under the first proceeding could conclude the matter inter partes. In such a situation the party had to exercise his choice and elect which remedy he would resort to in the High Court.

12. The grant of leave under Article 226 of the Constitution is undoubtedly in the discretion of the High Court but the exercise of that discretionary jurisdiction has to be guided by established legal principles. It will not be a sound exercise of that discretion to refuse to consider a writ petition on its merits solely on the ground that a special leave petition filed by the petitioner in the Supreme Court had been dismissed by a non-speaking order."

17. In the present case, the Hon'ble Supreme Court in the order passed on 27 July 2009 has not considered the rights of the parties on merit, and there is no observation or direction which has concluded the matter inter partes on merit.

18. In these circumstances, and for the reasons indicated above, the preliminary objection on the issue of maintainability of the appeal is rejected.

19. Let the appeal be placed for admission on 19 August 2009. On that date, I shall examine the question as to whether the order under appeal involves any question of law warranting admission of the appeal or not.

(ANIRUDDHA BOSE, J.)