

Rajan Gupta vs Pradeep Kumar Gupta & Ors on 10 January, 2022

Author: Yogesh Khanna

Bench: Yogesh Khanna

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CS(COMM) 16/2022
RAJAN GUPTA

Through : Mr.Mandeep Singh Vинаik
Sharma and Mr.Deepak
Advocates.

versus

PRADEEP KUMAR GUPTA & ORS.

Through : Mr.Sandeep Sethi, Sr Ad
Mr.Swapnil Gupta
defendants No.1,4 & 6
Mr.Rajshekhar Rao, Sr
Ms.Tahira Kathpalia,
defendant Nos.2,3, &

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA
ORDER

% 10.01.2022

1. The hearing has been conducted through Video Conferencing.
2. Exemption allowed, subject to all just exceptions.
3. The application stands disposed of.

CS(COMM) 16/2022, I.A. Nos.374-375/2022

4. Present suit is filed for perpetual injunction against defendants No.1 to 5 restraining them from using the name and goodwill of defendant No.6. The basis of the entire suit is defendant No.1 is using the vehicle of defendant No.5 and is diverting the business form defendant No.6 company, wrongfully to defendant No.5, using the name and goodwill of Hi Tech Audio Systems Private Limited/defendant No.6 which has been created by lots of efforts over several decades. It is alleged, the plaintiff and defendant No.1 are 50% share holder of defendant No.6 and that defendant No.1 is instrument in creating defendant No.5 namely Hi Tech AVI India LLP in the name of his son and daughter-in- law and thus diverting substantial business of defendant No.6 to defendant No.5.

5. The learned counsel for the plaintiff has argued over the last three decades, the value of the company has been increasing. In the year 2005 the sale was of Rs.1070.49 lacs with a net profit of Rs.35.40 lacs; in the year 2019 the sale was of Rs.17227.95 lacs with a profit of Rs.725.15 lacs; but in the year 2020, the sales were only Rs.13954.36 lacs with a profit of Rs.470.01 lacs; and such loss was not due to pandemic but because of defendant No.1 creating defendant No.5 in the name of his son and daughter-in-law and due to diverting of business. It is submitted there are various prestigious projects in line with plaintiff as it provides sound systems to various esteemed government institutions; Courts, legislative assemblies etc. The work is of an highest order as is reflected in profit turnover of defendant No.6. It is argued one of its directors viz defendant No.1 has now decided to launch a different entity i.e. defendant No.5 controlled by his family members viz defendants No.2 & 3 and such an action of defendant No.1 is bad per Section 166 Companies Act, 2013. The relevant provision notes:-

Section 166: Duties of directors.

(4) A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

6. It is argued in September 2021, the plaintiff got a notice of Board's meeting to be held on 27.09.2021 for appointment of a legal advisor and a company secretary, whereas both these appointments were already made on 06.09.2021 and merely an intimation was given to plaintiff despite he being a 50% shareholder of company. The plaintiff on 22.09.2021 had protested qua their appointment.

7. The learned counsel for the plaintiff has also taken me to a hand written note dated 21.02.2020 sent by defendant No.1 wherein he had taken over all major functions of the company without consulting the plaintiff and thus usurping all powers of the Board, including diverting of business of defendant No.6. Hence, a notice dated 16.10.2021 was sent by the plaintiff to defendant No.1 for his conducting of business in an oppressive manner - and also qua diversion of business to defendant No.5. Instead of giving a reply to notice, defendant No.1 filed a petition before NCLT by impleading the plaintiff as respondent No.2 saying plaintiff is not allowing to run defendant No.6. A reply has been filed by the plaintiff before the NCLT giving all details of oppression of defendant No.1 and in rejoinder defendant No.1 had though allegedly admitted all his allegations yet did point out some faults of the plaintiff.

8. The learned counsel for the plaintiff also referred to a bid made by defendant No.5 at Andaman Airport for providing sound system and refer to a format of Central Airport Permit Proforma in the name of defendant No.5 wherein passes were issued to nine employees of defendant No.5, who essentially were the employees of defendant No.6 and were on its pay roll. Thus, it is argued defendants No.1 to 4 in conspiracy has created defendant No.5 and have gradually siphoned off the profits of defendant No.6 company, thus seeks restraint orders.

9. In support, the learned counsel for the plaintiff has relied upon *Rajeev Saumitra vs Neetu Singh & Others* 2016 SCC OnLine Del 512 wherein the Court has observed if the right is traceable to general law of contract or it is a common law right, it can be enforced through civil court, even though the forum under the statute also will have jurisdiction to enforce that right. Thus, in similar facts, the Court has restrained one of the directors to use the name of the company for her own business or to utilise the goodwill of the company wherein she was also one of the directors.

10. It is argued the plaintiff presently, is seeking the relief only against the defendant No.5, which cannot be claimed before the NCLT and defendant No.5 be injuncted not to use the name HI Tech, which belong to his company i.e. defendant No.6.

11. On the other hand, Mr.Sandeep Sethi, learned senior counsel for defendants No.1, 4 & 6 has argued the entire plaint deals with allegations of mismanagement by defendants No. 1 & 4 and their acts being oppressive to defendant No.6 company. He argued this Court has no jurisdiction in cases of oppression and mismanagement by the director(s) of the company and thus relied upon Section 430, 241 and 242 of the Companies Act, 2013.

12. He even referred to *DDCA vs Sudhir Aggarwal & Others* 2020 SCC OnLine 1223 wherein the Court held no civil Court shall have the jurisdiction to entertain any suit or proceeding in respect of which the Tribunal or the Appellate Tribunal is empowered to deal with, i.e. to say to relegating the parties to a civil suit would not be appropriate form, especially considering the manner in which Section 430 is widely worded.

13. The learned senior counsel for the defendants also argued the defendant No.1 has filed a petition before the NCLT being CPND 180/2021 wherein the plaintiff is respondent No.2 as is obstructing the working of defendant No.6 by refusing to sign the resolutions and is also not conducting the affairs of defendant No.6 in a diligent manner. He argued vide a resolution dated 18.11.2020 the working of defendant No.6 was divided into two division viz project business which came to defendant No.1 and retail business which came to the plaintiff and there is constant loss suffered by the division of which the plaintiff is incharge thereof.

14. The crux of the arguments of the learned senior counsel for defendants is if the plaintiff is aggrieved of oppression and mismanagement by the defendants then an appropriate forum would be NCLT and not to a civil court.

15. Similar are the arguments of Mr.Rajshekhar Rao, learned senior counsel for the defendants No.2,3 & 5 wherein he has referred to various paragraphs of the plaint stating interalia the plaintiff was aware of the creation of the LLP in August 2020, yet delayed the filing of this suit. He referred to *ICP Investments (Mauritius) Ltd. vs. Uppal Housing Pvt. Ltd. & Ors* 2019 SCC OnLine Del 10604 wherein the Court held in India Section 241 not only provides a member to approach the NCLT when the affairs of the company are being conducted in a manner prejudicial to a member or any other member or members but also when affairs are being conducted in a manner prejudicial to public interest and interests of the company itself. Thus, it held a derivative action can be filed before the NCLT to protect the interest of the company within the ambit of Section 241 of the

Companies Act and a civil suit would not be maintainable.

16. I have heard the arguments. Though, ICP Investments (Mauritius) Ltd. (supra) says a civil suit would not be maintainable as derivative action can be filed before the NCLT, but it is equally true Rajeep Saumitra (supra) says there is no provision in the Companies Act to approach the Company Law Board for a wrong done to the company by a director. The Hon'ble Supreme Court in Ahmed Abdulla Ahmad Al Ghuriar vs Star Health and Allied Insurance Company Limited 2018 SCC OnLine SC 2554 says a derivative action is maintainable in a Civil Court though only in a particular situation and as an exception.

17. No doubt contrary views are expressed by this Court, but in view of Ahmed Abdulla Ahmad Al Ghuriar (supra), prima facie one can say such an action cannot be brushed aside in its infancy. Thus, summons of suit and application are hereby issued to defendants. Learned counsels for defendants accepts summons and seeks to file their response.

18. Be filed within statutory period with an advance copy thereof to the learned counsel for plaintiff through email. Replication/rejoinder thereto, if any, be also filed within four weeks thereafter.

19. In the meanwhile, since the plaintiff is in business prior to that of defendant No.5, hence it would be appropriate if the defendant No.5 is directed not to use the name HI TECH as its trade name in its future bids, to be applied afresh from now onwards, till the next date of hearing. Affidavit of admission/denial of documents be also filed by the parties.

20. List for completion of pleadings before the learned Joint Registrar on 20.04.2022.

21. Upon completion the pleadings the matter be listed in this Court.

YOGESH KHANNA, J.

JANUARY 10, 2022 M