Tejas Networks Limited vs Flextronics Technologies (India) ... on 18 March, 2013

Author: K.B.K.Vasuki

Bench: K.B.K.Vasuki

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 18.03.2013
CORAM
THE HONOURABLE Ms. JUSTICE K.B.K.VASUKI
C.P.Nos.118 and 237 of 2010
and Comp.A.Nos.996 and 1333 of 2010
and 1525 of 2010

Tejas Networks Limited
No.58 1st Main Road,
J.P.Nagar,
3rd phase, Bangalore 560 078

represented by its Sr.Vice President
Supply Chain Mr.Ramanathan N ... Petitioner in CP.118/2010

represented by its Vice President
Finance Badrinarayanan R ... Petitioner in CP.237/2010

..V..

Flextronics Technologies (India) Private Limited
Plot No.3, Phase II,
Sipcto Industrial Park
Sriperumbudur Taluk,
Sandavellure C. Village,
Kancheepuram, Tamil Nadu 602 106. ... Respondent in both CPs

Prayer in CP.118/2010: Petition filed under section 433(1)(e), 433(1)(f) and 434(1)(a) a
Prayer in CP.237/2010: Petition filed under section 237 of the Companies Act, 1956 for d
For Petitioner : M/s.A.K.Mylsamy & Associates
For Respondent : M/s.Lakshmikumaran

COMMON ORDER

The petitioner and the respondent in both the CPs are one and the same. While CP.No.118 of 2010 is filed by the petitioner for winding up the respondent company on the ground that the respondent company is unable to pay its debts due to the petitioner company, CP.No.237/2010 is filed for direction to the Central Government to appoint an Inspector for investigation into the affairs of the respondent company under Section 237(a)(ii) of the Companies Act.

2.The facts, which led to filing of the petition in CP.118/2010 are as follows: While the petitioner company is engaged in the manufacture of telecommunication equipments and also in the business of designing, developing, selling and servicing of networking equipment and software in India and abroad, the respondent company is involved in the business of providing technologically advanced electronics manufacturing services to original equipment manufacturers and others and to provide wide range of integrated services from initial produce design to volume production. The petitioner entered into an agreement termed as 'Flextronics Manufacturing Services Agreement' with the respondent on 5.7.2002 to perform 'Work' as defined under the agreement, pursuant to purchase orders placed by the petitioner on the respondent, for an initial period of one year, with automatic renewal for successive one year, subject to desire of the parties. In order to perform its obligation under the agreement by the respondent, the petitioner granted non exclusive and non transferable license of the petitioner's parents, trade secrets and other intellectual property rights and further provided certain software, test equipment and accessories to the respondent.

3.In the course of performance of the said work and manufacture of products, the respondent placed purchase orders on the petitioner from time to time and the petitioner inturn supplied components including high value components and parts. For such transactions, both the parties raised several invoices against each other and were maintaining running account in respect of the dues of others. The payments effected by both parties were lumpsum consolidated payments and not made towards any specific bill. The petitioner used to set off the dues payable by the respondent to the petitioner, as per the agreement. According to the petitioner, inspite of set off, the respondent has huge outstanding amount due to the petitioner. Hence, the petitioner discontinued to place purchase orders and had been demanding the dues payable by the respondent through oral and written requests. The same was followed by efforts taken for reconciliation of accounts and letter dated 31.12.2008 after setting off all dues payable by the petitioner to the respondent. However, the respondent neglected and failed to pay the amount due to the petitioner, which constrained the petitioner to issue legal notice dated 25.7.2009, calling upon the respondent to pay all the outstanding to the tune of Rs.4,99,57,909.29, the details of which is extracted hereunder:

(a) Balance due as per the statement of accounts 2,60,97,148.83

(b) Under the purchase order No.4589000415 dated 10.6.2008 (USD 50,641.01) towards materials 21,71,982.79

(c) On account of Test Equipment & Accessories etc provided by the petitioner 62,44,141.67

(d) On account of faulty RMA equipment 1,13,19,671.00

(e) Interest on the aforesaid amount at 18% pa from 31.12.2008 to 30.6.2009 i.e., date of first legal notice 41,24,965.00 .....

Total amount due 4,99,57,909.29 .....

The respondent denied the entire contents of the legal notice by way of interim reply notice dated 25.8.2009 and detailed reply notice dated 9.12.2009 and made counter claim of Rs.2,02,16,486.90. Immediately the petitioner sent notice dated 23.3.2010 by denying the counter claim made by the respondent. On receipt of the same, the respondent sent reply notice dated 5.4.2010, requesting to meet the petitioner's representative to settle the dispute between them. Accordingly, meeting was held on 19.4.2010, at the office of the petitioner, but no settlement was arrived at. According to the petitioner, though the petitioner provided all pertinent records at various times, the respondent did not reconcile its accounts with that of the petitioner and that the respondent company has been incurring continuous and substantial losses. As such, the respondent failed and neglected to pay its dues to the petitioner, inspite of several reminders and legal notices and that, no step was taken by the respondent either secured or compounded the claim of the petitioner, which compelled the petitioner to come forward with this petition for winding up the respondent company.

4.Whereas, the relief sought for herein is seriously opposed on the side of the respondent. The respondent denied its liability to pay the sum of Rs.4,99,57,909.29 as claimed under various heads in the legal notice dated 25.7.2009 issued by the petitioner on the following grounds: (i)no payment of interest by the respondent to the petitioner is contemplated as per the terms of the agreement dated 5.7.2002; (ii)if any equipment is in fault, the same has to be returned by the petitioner to the respondent within a period of 10 days from receipt thereof and the failure to do so would amount to deemed acceptance, as per clause 6 of the agreement and (iii)as the respondent has a counter claim of Rs.2,02,16,486.90 against the petitioner, it has a right of lien over the test equipment, dehors its alleged value of Rs.62,44,141.67 though its actual value is much lesser than what is alleged by the petitioner.

5.According to the respondent, the respondent always made payments, which were due to the petitioner as per the purchase orders for supply of materials. However, due to business relationship between the parties, the petitioner on many occasions, would set off the payments made by the respondent for the supply of the materials with the payments that the petitioner had to make to the respondent and the petitioner did not give the respondent any written information in this regard, which led to confusion and difficulty to the respondent to reconcile its accounts against payable and received amounts. Further, the petitioner did not provide all the relevant information including documents and billing details, due to which the reconciliation efforts were not successful. However, the respondent has been continuously providing products to the petitioner upto September 2007, inspite of the fact that there were huge outstanding invoices, which were unpaid by the petitioner. Both the parties on several occasions met and attempted to undertake the reconciliation exercise, but the same ended in failure. Thereafter, there were exchange of communications, notices and reply notices demanding and denying the dues against each other. However, pending reconciliation exercise, the petitioner filed this winding up petition in order to pressurise the respondent to recover the alleged claim.

6.It is further contended on the side of the respondent that the petitioner did not make any allegation about the financial strength of the respondent that the respondent is commercially insolvent. The respondent company is the subsidiary of Flextronics International Asia Pacific Ltd and is part of a worldwide conglomerate Flextronics International Limited, which is also listed on NASDAQ stock exchange in New York and the respondent earned Rs.2,73,26,02,581/- as foreign exchange for India as on 31.3.2009. The respondent commenced its operation at Special Economic Zone, Sriperambadur Taluk, Kanchipuram during November 2006, with the investment of US$ 65 million (more than Rs.260 crores) in order to expand the size Flextronics Group's presence in India. The respondent took burden of charging its profit and loss account for Rs.4.97 crore towards inventory expenses related to projects pertaining to the petitioner. Therefore, the loss which are reflected in the books of accounts of the respondent are only due to the charging of these preliminary expenses, which have been capitalised. Further, the loss is caused only due to depreciation on account of a very large increase in capital expenses, which have been amortized into the books. The return on investment is expected to be about 20% over the next 5 years and the respondent expects to recover its capital expenses within few years, as such, there is no cause for alarm about the profitability of the respondent or its capacity to pay its debts much less a sum of about Rs.5 crores which itself is a disputed amount. Apart from that, the net current assets of the respondent is about 1.25 times the net current liabilities and at any given time, the respondent would be able to meet all of its current liabilities. Hence, there is no question of commercial insolvency of the respondent for it to be would up and the petition for winding up may be dismissed.

7.The facts, which led to filing of the petition in CP.No.237/2010, are as follows:

> The petitioner, in its capacity as unsecured creditor of the respondent company, filed this petition seeking direction to the Central Government to appoint an Inspector for investigation into the affairs of the respondent company, which committed serious and wanton violations on various aspects governed under the relevant provisions of law and the same is summed up as under: (i)requirement of the maintenance of proper accounting system and maintaining accounts, which do not contain a fair and proper financial picture (ii)failure to strengthen its internal controls in relation to its payable inspite of their statutory auditor qualifying the accounts repeatedly in this regard (iii)failure to maintain the required levels of internal audit measures as pointed out by the statutory auditors (iv)contravention of Section 17 of the Companies Act and the Company Law Board Regulations 1991 relating to shifting of its registered office (v)attempting to procure the sanction to a Scheme of Arrangement filed by its before this Court without complying with the substantive provisions of its own Scheme (vi) obtaining orders in relation to the scheme on an unsigned application the prayers of which are completely contrary to prayers sought for in the signed application (vii) attempting to reduce its capital reserve and share premium account without complying with the provisions of Sections 78, 100 to 103 of the Companies Act and Rule 85 of the Companies (court) Rules; and (viii)not complying with the requirements of Section 391(2) which requires all material facts to be placed before court. While the respondent has filed a complete set of accounts in respect of all Transferor companies, it has purposely withheld its own Auditor's

Report, which contain severe qualifications and further withheld its own Director's report, which again contain material information regarding the respondent with a view to discreetly obtain the sanction of the Scheme in a completely malafide manner; and (ix) filing false affidavits before this court and misleading this Court on facts that are completely contrary to the respondent's documents themselves.

8.The relief sought for in CP.237 of 2010 is seriously resisted by the respondent both in legal and on facts. It is argued by the learned counsel for the respondent that (i)the petitioner is neither a creditor nor a shareholder nor a person interested in the affairs of this respondent and hence, has no locus standi to maintain this petition; (ii)this petition filed by the petitioner is an after thought and not bona fide; and (iii) an order for investigation requires a prima facie case of breach of fiduciary duties and related illegal acts and it should not be ordered on the issues which are apparent from the balance sheet. On merits, it is contended on the side of the respondent that as the Auditors Reports do no disclose any fraud on or by the company, the defects pointed out by the petitioner in the internal auditing systems and accounting cannot be treated as one of the grounds for ordering investigation into the affairs of the respondent company. Further, the petitioner has not made out a prima facie case of any illegality, mismanagement or misappropriation and in the absence of the same, the court should not entertain this petition, which may seriously tarnish the reputation of the respondent. It is further contended that the respondent obtained the order in respect of transfer of registered office from the Company Law Board after complying with all the legal formalities according to the relevant provisions of law and the respondent has not contravened any of the provisions of the Companies Act or the Company Law Board Regulations, as such, the allegations raised by the petitioner are false, baseless and unfounded, due to wrong interpretation of the statements of the statutory auditors and no investigation need to be ordered into the affairs of the respondent company.

9.The learned counsel for the respondent in support of the contention so raised herein, cited the following judgments:(i)AIR 1967 Cal 406(In Re: Patrakola Tea Co. Ltd) and (ii)(1975) 45 CompCas 33 (Delhi) (S.L.Verma v. the Delhi Flour Mills Company Ltd. and others); (iii)(1980) 50 CompCas 127 (Delhi) (V.V.Purie v. E.M.C.Steel Ltd and others); (iv)(1983) 53 CompCas 493 (Ker) (U.A.Sumathy and another v. Dig Vijay Chit Fund (P) Ltd; (v)(1983) 54 CompCas 370 (Ker) (Kumaranunni v. Mathrubhumi Printing and Publishing Co. Ltd);(v)(1998) 93 CompCas 41 (Andhra Pradesh) (Unnet India Ltd and others v. I.C.Rao and others); (vi)(2009)4 MLJ 692 (First Bench of this Court) (G.Haresh Chand v. Gee Gee Granites Ltd and others).

10.Heard the rival submissions made on both sides.

11.This Court is inclined to first deal with the relief sought for in CP.No.118/2010, for winding up the respondent company. The facts remain undisputed herein are that the petitioner Tejas Networks Limited entered into an agreement called Flextronics Manufacturing Services Agreement dated 5.7.2002 to perform 'Work', which means to procure labour, components, materials, equipment and other supplies and to manufacture, assemble and test products pursuant to detailed to written specifications for each such product which are provided by Tejas and accepted by Flextronics and to deliver such products etc. As per Clause 2.2 of the agreement, the petitioner shall issue purchase

orders on the respondent for purchase of the products. Clause 2.3 proceeds to say that upon the respondent's acceptance of a purchase order, the respondent was deemed to be authorised to procure the labour, components, materials and supplies necessary for the manufacture of products covered by such purchase order. Clause 7.1 of the agreement deals with 'Price and Payment Terms', as per which, the price for products to be manufactured will be agreed by the parties and will be indicated on the purchase orders issued by Tejas and accepted by Flextronics and the price for products may be reviewed periodically by the parties and that all prices quoted are exclusive of federal, state and local excise, sales use and similar taxes and any duties and Tejas shall be responsible for all such items. Payment for any products services or other costs to be paid by Tejas as given below:

> 7.1.1 35% of the Total purchase order value at the time of purchase order.
>
> 7.1.2 40% of the Total purchase order value at the end of 6th week from date of purchase order.
>
> 7.1.3 10% within seven days from the date of delivery.
>
> 7.1.4 Balance 15% shall be paid within fifteen days from of the date of delivery by Flextronics.
>
> Tejas agrees to pay 1.5% monthly interest on all late payments. Further more, if Tejas is late with payments, or Flextronics has reasonable cause to believe Tejas may not be able to pay, Flextronics may require prepayment or delay shipments or suspend work until assurances of payment satisfactory to Flextronics are received.

12.The combined appreciation of the clauses contained in the agreement as referred to above would reveal that it is more in the nature of a job work agreement for specialised technological products and the respondent agreed to manufacture certain technological products for telecommunications on the basis of the purchase orders placed on them by the petitioner. As per Clause 6 of the agreement, if any products delivered by the respondent to the petitioner were not rejected within a period of 10 days of the receipt of the product, the petitioner is deemed to have accepted the same and is bound to pay the respondent for the same. Pursuant to the agreement, the parties had business transactions and raised several invoices against each other and lump sum payments were made and for sometime, set off method was adopted, which led to dispute and the same was followed by reconciliation efforts, which ended in failure.

13.It is the case of the petitioner that the respondent is liable to pay a sum of Rs.4,99,57,909.29 representing the outstanding amount, arising out of the business transactions with the petitioner, in terms of the agreement. Whereas, the respondent not only denied such claim made by the petitioner, but also made counter claim to the tune of Rs.2,02,16,486.90 against the petitioner. The same stand was reiterated by the parties in their respective communications, notice, reply notice, petition, counter and rejoinder. Be that as it may, the nature of the dispute raised herein can be appreciated, in the light of the legal principles laid down by the Hon'ble Supreme Court in the

following judgments, wherein the Honb'le Apex Court discussed in detail the scope and ambit of Section 433(e) of the Companies Act.

14.It is laid down by the Hon'ble Supreme Court in the decision reported in (2005) 7 SCC 42 (Mediqup Systems P Ltd v. Proxima Medical System GmbH, which is extracted hereunder:

> "This Court in catena of decisions held that an order under Section 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression 'unable to pay its dues' in Section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilised merely as a means for realising debts due from a company".

15.It is equally well settled in the decision reported in 2004 Vol. 120 Comp Cas 784 (Neg Micon v. NEPC India Ltd) (DB of our High Court) that "invoking the provisions of the Companies Act and seeking a prayer for winding up will not be entertained if it is only in the nature of exercising pressure to enforce payment of a debt". It is further held in the same decision that "if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the Company. In determining whether a debt is disputed bona fide or mala fide, the conduct of the parties, the character of the pleas and the circumstances which will be peculiar to each case will be the contributing factors. The test is whether the dispute is raised only to avoid payment of the debt and not based on any substantial ground".

16.The Hon'ble Supreme Court in the decision reported in (1965) 35 Comp Cas 456 (SC) (Amalgamated Commercial Traders (P) Ltd v. A.C.K.Krishnaswami and another) held that "it is well settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt, which is bona fide disputed by the company. A petition presented ostensibly for a winding up order, but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court".

17.Our High Court in para 11 of the judgment reported in (2008) 2 Comp LJ 209 Mad (Tata Iron and Steel Co. Ltd v. Omega Cables Ltd) observed that "in a company petition filed for winding up of a company, the petitioner has to first prove that the amount due is undisputed and admitted by the respondent company." The Division Bench of our High Court in the decision reported in Indian Kanoon-http://indiankanoon.org/doc/ 280659 (Sical SWT Distriparks Limited v. Besser Concrete Systems Limited) observed that when the respondent is able to show that there was a bonafide dispute with regard to liability in question, the winding up proceedings is not the proper remedy to resolve the dispute.

18.That being the well settled legal proposition and by applying the same to the facts of the present case, this Court is of the view that the relief sought for herein cannot be entertained and the petition filed for winding up the respondent company is liable to be dismissed, for the following reasons.

Here is the case, wherein, the respondent company has not admitted the liability of Rs.4,99,57,909.29 as claimed by the petitioner in its legal notice dated 25.7.2009. But, the respondent made counter claim of Rs.2,02,16,486.90 against the petitioner. When the liability of the respondent is not admitted, it is the bounden duty of the petitioner to prove its claim by producing supporting materials. Whereas, the petitioner failed to produce the same. It is also relevant to point out at this juncture that after failure of the reconciliation exercise, the petitioner sent a communication dated 17.6.2008 to the respondent stating that they intended to close the accounts and the amount due from the respondent was Rs.2,63,20,364/-. In another communication dated 31.12.2008, it is stated by the petitioner that the outstanding dues payable by the respondent was Rs.2,60,97,148.83. The said fact was also accepted by the petitioner in para 18 of the rejoinder dated 11.2.2011 filed before this court, as such, the petitioner raised two different claims on different occasions against the respondent, but the respondent denied its liability throughout the case.

19.Further, the perusal of the records made available herein would reveal that the respondent also placed purchase orders on the petitioner for procurement of certain materials (Tejas Materials) and was obliged to make payment to the petitioner for such procurement in accordance with the invoice raised by the petitioner, however, the same was not contemplated in the agreement and is in no manner governed by the provisions of or transactions contemplated in the agreement. The petitioner also accepted one such transactions with the respondent, as evident from the communications enclosed in the typed set filed by the petitioner. As a matter of fact, the petitioner in its communications as mentioned above, categorically admitted that both the petitioner and the respondent have been transacting since 5th July 2002 in a bona fide manner and invoices raised against each other and the last payment was made between each other on 28.3.2008 and 25.10.2007 respectively. Except stating that the respondent failed and neglected to make payment of the outstanding amount due to the petitioner, no other reason much less valid reason is made in this petition, to show that the respondent is commercially insolvent and is unable to pay its dues to the petitioner. In that event, this court is of the view that no prima facie case is made out to arrive at the conclusion that the respondent company is unable to pay its debt due to the petitioner to be ordered to be wound up for the same.

20.Even otherwise, it is the case of the respondent throughout that the respondent has always been ready and willing to settle the dispute between the parties and attempting to reconcile the accounts, as evident from the correspondence exchanged between the parties. It is nobody's case that the respondent did not respond the communications sent by the petitioner, regarding alleged liability of the respondent and calling upon them to pay the outstanding amount due to the petitioner. Further, the reading of the communication dated 5.4.2010 sent by the respondent, the copy of which is enclosed at page 174 of the petitioner's typed set, requesting to arrange meeting with the petitioner's representative, for reconciliation of accounts and finalisation of the settlement, would to considerable extent, accept the contention raised on the side of the respondent that the respondent is always ready and willing to amicably settle the dispute between them. However, the petitioner, without adhering to their request, filed the present petition to wind up the respondent company, in order to pressurise the respondent to recover its alleged dues from the respondent.

21.Thus, for the discussions held above, this Court is of the view that the dispute arises between the parties is more of commercial in nature and the truthfulness or otherwise of the claim and counter claim made by the parties cannot be decided in this winding up petition. As it is well settled law that winding up proceedings cannot be resorted to as a means of resolving financial dispute and recovering an alleged debt, the winding up petition is not maintainable, which is summary in nature and the petition is hence liable to be dismissed.

22.Next comes the relief sought for in CP.No.237 of 2010, which is the petition filed by the petitioner Tejas Networks Limited seeking direction to the Central Government to appoint an inspector for investigation into the affairs of the respondent Flextronics Technologies (India) Pvt. Limited. As already referred to, the petitioner entered into an agreement called Flextronics Manufacturing Services Agreement dated 5.7.2002 to perform 'Work' as defined under the agreement with the respondent and they had business transactions and raised several invoices against each other and dispute arises due to such transactions and the same was followed by reconciliation efforts, which ended in failure. Thereafter, the present petition came to be filed by the petitioner herein.

23.While according to the petitioner, the respondent company committed serious violations willfully on various aspects as set out in the petition under the relevant provisions of law and the petitioner, in its capacity as unsecured creditor of the respondent company, sought for this direction, according to the respondent company, the petitioner does not have any locus standi to seek one such direction, as it is not an interested party. It is argued by the learned counsel for the respondent that the dispute in question arises due to failure in the reconciliation process between the parties and the respondent was not given an opportunity to reconcile its accounts and the accounts could not be reconciled due to non-cooperation of the petitioner. It is pertinent to point out at this stage that the petitioner is not a creditor, but a debtor of the respondent, who owes huge amount to the respondent, as evident from the statutory auditor's certificate dated 3.9.2010, enclosed as Annexure I in the typed set, which was also recorded by this Court in para 33 of the order dated 16.12.2010 made in CP.No.65 of 2010. As it is held by the Delhi High Court in the judgment reported in (1980) 50 CompCas 127 (Delhi) (V.V.Purie v. E.M.C.Steel Ltd and others) cited on the respondent's side that a person having no interest or concern with the company as a shareholder or a creditor, has no locus standi to invoke Section 237(a)(ii) of the Companies Act, this Court is of the view that the petitioner has no locus standi to seek one such direction against the respondent.

24.Other contentions raised herein are that the direction sought for in this petition is an after thought and not bonafide and there is no prima facie case of breach of fiduciary duties and related illegal acts. The petitioner already filed CP.No.118 of 2010 during April 2010 for winding up the respondent company for its failure to pay the debts due to the petitioner. Pending the same, the petitioner came forward with this petition during September 2010, for investigation into the affairs of the respondent company. In my considered view, the petitioner cannot seek both the reliefs simultaneously. Further, as already discussed above, the dispute between the parties is more of commercial in nature and the same cannot be decided herein. As rightly argued by the learned counsel for the respondent, the petitioner filed the present petitions, in order to pressurise the respondent to recover the alleged dues from the respondent and as there is no evidence to make out

a prima facie case for any fraud, misfeasance or other misconduct by the respondent, no order for investigation is warranted.

25.At this juncture, it is useful to refer the following decisions relied on by the respondent. The Calcutta High Court in the authority reported in AIR 1967 Cal 406(In Re: Patrakola Tea Co. Ltd) elaborately dealt with Section 237 of the Companies Act, 1956. In that case, the petitioner being a shareholder of the respondent company, filed the petition, directing inquiry against the company for defrauding shareholders. The Calcutta High Court in para 10 observed as follows:

> "....a petitioner must adduce strong evidence in relation at least to matters referred to in Sub section (b) of Section 237 to induce a Court to make an order for investigation under Section 237(a)(ii). There must be evidence either (1)that the business of the Company is being conducted with intent to defraud (i)the creditors of the company or (ii)its members or (iii)any other person or (2)if the business is being conducted (i)for a fraudulent purpose or (ii)for an unlawful purpose or (iii)in a manner oppressive of any of its members or (iv)that the company was formed for any fraudulent or unlawful purpose or (3)that the persons who formed the company or managed its affairs have been guilty of (i)fraud, (ii)misfeasance or other misconduct towards the company or towards any of its members or (4)that information has been withheld from the members about the company's affairs which might unreasonably be expected including calculation of commission payable to (i)a managing or other director (ii)the managing agent (iii)the secretaries and treasurers and (iv)the managers."

By observing so, Calcutta High court thus held that under section 237 powers of Court should be exercised with caution and court ought to require convincing proof of allegation and accordingly dismissed the petition.

26.In the decision dealt with by Kerala High Court in (1983) 54 CompCas 370 (Ker) (Kumaranunni v. Mathrubhumi Printing and Publishing Co. Ltd), the petitioner was a member of a company and wanted an order declaring that its affairs required investigation by an inspector appointed by the Central Government. Kerala High Court before going into the facts of the case, examined the circumstances under which such a declaration could be made, which are as follows:

> "(i)that the business of the company is being carried on with intent to defraud its members or otherwise for a fraudulent or unlawful purpose; or
>
> (ii)that it is carried on in a manner oppressive of its members; or
>
> (iii)that the company itself was formed for a fraudulent or unlawful purpose; or
>
> (iv)that the persons concerned with its formation or management are guilty of fraud, misfeasance or other misconduct in connection with the formation or management; or

(v)that due information is withheld from the members."

While examining those circumstances, Kerala High Court observed that when the majority of shareholders find that the directors are acting improperly or that the company's affairs are mismanaged, they could remove the directors in a general meeting; they need not go to Court. It is further held in para 9 as follows:

> "....in proceedings under Section 237(a)(ii), the court will look into only those allegations which have a bearing on the fiduciary duties of the majority, or their duty to abide by the law. Of course, the court need not satisfy itself that the allegations are true, it is enough if a prima facie case is made out. No investigation can be ordered merely because the petitioning shareholder feels aggrieved about the manner in which the company's affairs are being carried on, or because the court thinks that they could be better managed. The remedy being equitable, the court has also to satisfy itself that the petitioner has come to court bona fide for obtaining redressal and not for any other purpose. An isolated instance of mismanagement, already remedied, could not also justify the passing of an order under Section 237(a)(ii)."

By holding so, Kerala High court dismissed the petition filed for investigation into the internal affairs of the company.

27.The first Bench of this Court in the decision reported in (2009) 149 CompCas 353 (Mad) G.Haresh Chand v. Gee Gee Granites Ltd and others) cited supra held at stage of ordering an investigation under Section 237(a)(ii) of the Act, Court might not be satisfied about truth of allegations, but court must be satisfied about strong prima facie content of truth in those allegations and that merely on grievance of shareholder about ways company's affairs were being carried on, no investigation could be ordered. However, remedy which was provided under Section 237(a)(ii) of the Act being equitable remedy, the Court had to take into account those allegations, which have bearing on fiduciary duties of majority and the petitioner, who was seeking this remedy before the court, must prove his bona fides. Further, mere claim of alleged mismanagement was not sufficient to satisfy test of bona fide".

28.In my considered view, the law laid down in the decisions cited above are squarely applicable to the facts of the present case, wherein, the relief is sought for based on vague allegations. The object of an investigation under Section 237 of the Act is to discover something in the affairs not apparently visible to the naked eye. Whereas, the present petition is filed, raising allegations against the respondent, based on the balance sheet of the respondent company and statutory Auditor's report. In that event, the initial burden is on the petitioner to establish that prima facie evidence exists concerning circumstances which would lead to the conclusion that an investigation, if any, would be necessary and mere allegations like those that have been made by the petitioner in this petition are not sufficient enough to order investigation into the affairs of the respondent company. In the absence of any substantial material in support of the allegations raised against the respondent, no investigation need to be ordered in this petition.

29.Though it is sought to be argued on the side of the petitioner that there was certain defects in the internal auditing system and accounting and that, the respondent has not complied with the relevant provisions of law and fraudulently obtained orders from the Company Law Board and it incurred heavy loss, this Court finds no merit and acceptance, in the contention so raised on the petitioner's side, for the following reasons.

30.The learned counsel for the respondent in the course of argument, drew the attention of this Court to the Statutory Auditor's report, wherein it is stated that the accounts give a true and fair picture of the financial position of the respondent. The Auditor's report further proceeds to say that there is no fraud on or by the company during the course of its audits, as such, the same cannot be the basis for ordering investigation. Even otherwise, the investigation should not be ordered to probe into the economic working of any company, as it is well settled law that the purpose of an investigation is to see whether the allegations concerning management, misappropriation or other illegal acts.

31.Regarding the qualification made by the Statutory Auditors that the internal auditing system of the respondent are insufficient and that subsequent ratification does not justify earlier defect is concerned, the respondent has considered the recommendations and points raised by the statutory auditors and has been taking steps to rectify the same. As a matter of fact, the petitioner is aware of the subsequent rectification of defects by the respondent, as seen from the averments raised in the rejoinder filed by the petitioner. Further, as per the recommendation of the statutory auditors, the internal controls have been strengthened in the area to account for payments in a timely manner for the future and the respondent is in the process of reconciling its dues, receivable and dues payable with its customers and vendors. After the reconciliation, if any amount is found payable to any vendor or if any, amount is receivable, the same would be paid/received as the case may be. Therefore, no prejudice whatsoever is caused to the creditors. As far as the petitioner company is concerned, it is stated by the respondent that a separate ledger account is maintained by the respondent to determine the amount payable and receivable to and from the petitioner and as per the statement of account, the petitioner is due and owing the respondent a sum of Rs.2,02,16,486.90.

32.As far as the allegation relating to transfer of the registered office from the Company Law Board is concerned, the order was passed by the Company Law Board, after considering all the issues that were to be complied with by the respondent before changing the address of the registered office and the same was also recorded by this court in the order made in CP.No.65 of 2010. It is also categorically stated by the respondent that the respondent has complied with all the mandatory provisions of the Companies Act for change of its registered office and only after obtaining permission from the Company Law Board by order dated 12.11.2008 changed its registered office from Bangalore to Chennai. If the petitioner has any grievance about the change of registered office, the petitioner is not at liberty to agitate the same in this petition. As such, the petitioner cannot be permitted to raise the same as one of the grounds for the relief sought for herein.

33.Regarding the alleged loss incurred by the respondent is concerned, the same is, according to the respondent, on account of the high fixed costs incurred for the establishment of the new SEZ facility

in Chennai and depreciation provided for the increased fixed costs. Even otherwise, no investigation can be ordered unless the result of loss is linked with fraud, misfeasance, mismanagement, oppression etc. That being the nature of the allegations raised herein, the same are, in my considered view, false, baseless and unfounded and have been made due to wrong interpretation of the statements of the statutory auditors.

34.It is also relevant to point out at this juncture that all the allegations made in this petition were already raised by way of objections by the petitioner herein as objector in CP.No.65 of 2010 filed by the respondent company/Flextronics for sanction of the Scheme of Arrangement. The learned brother judge after hearing all the parties allowed the company petition by order dated 16.12.2010. While doing so, the learned brother judge dealt with all the objections raised by the petitioner herein, who is the sole objector therein, and observed in para 18 that the objector (petitioner herein) mainly relies upon the remarks made by the statutory auditors about the nature of functioning and financial status and so on, but curiously the capital structure of the petitioner (respondent herein) has never been questioned by the objector (petitioner herein). On the other hand, there are records to show that the assets of the petitioner (respondent herein) is worth nearly Rs.433 crores and available as on date. While the claim of the objector is only few lakhs, the same is objected to by the petitioner (respondent herein). It is further observed in para 28 that the cash flow statement cannot be said to be either alarming, depicting the financial instability of Flextronics as it is focused by the objector and there is no question of any suppression. As the allegations made by the petitioner against the respondent herein, were already considered and decided in negative by the learned brother judge on earlier occasion in CP.No.65/2010, the same allegations cannot be now permitted to be raised in support of the relief sought for herein, as such, the same are liable to be negatived.

35.Though the learned counsel for the petitioner would, by relying on the authority reported in 2002 Vol.110 CompCas 721 (Kerala High Court) (Premier Plantations Ltd and another v. M.Ebrahimkutty and others), contend that the company court has discretionary power under section 237(a)(ii) of the Companies Act to order investigation into the affairs of the company, this Court is not inclined to accept the same for the reason that when there is no prima facie material at all before the court, the court cannot order investigation under section 237(a)(ii) as a fishing expedition.

36.It is held by Kerala High Court in (1983)53 CompCas 493 (Ker) (U.A.Sumathy and another v. Dig Vijay Chit Fund (P) Ltd), that Clause (a)(ii) of Section 237 does not lay down what circumstances are to be proved before the court and on what materials the court could act. But that does not mean that mere allegations are sufficient. A court can act only on the materials placed before it; and those materials should at least be such as to satisfy the court that a deeper probe into the company's affairs is desirable in the interests of the company itself. The Delhi High court in Delhi Flour Mills Co. Ltd's case (1975) 45 Comp Cas 33 (Del) observed that the materials should be such as would result in proceedings being taken under sections 242 -244; no investigation could be ordered merely because a shareholder feels aggrieved about the manner in which the company's business is being carried on.

37.That being the factual and legal position, this court is of the view that the materials placed before this court do not satisfy that a deeper probe into the company's affairs is warranted and the direction sought for by the petitioner to the Central Government to appoint an Inspector to investigate into the affairs of the respondent company is hence negatived and the petitioner is dis-entitled to get any relief in this petition.

K.B.K.VASUKI, J rk

38.In the result, both the company petitions are dismissed. Consequently, connected company applications are closed.

18.03.2013.

Index : Yes/No Internet : Yes/No CP.Nos.118 and 237 of 2010