IN THE HIGH COURT OF DELHI AT NEW DELHI

CO.A (SB) No. 102 of 2012

WORLD PHONE INDIA PVT. LTD. & ORS. ..... Appellants
Through: Mr. U.K. Choudhary, Senior Advocate with Ms. Srishti Jai Singh, Ms. Maneesha Dhir, Mr. Hemant Sharma and Mr. Kshitij Khera, Advocates

versus

WPI GROUP INC., USA ..... Respondent
Through: Mr. Virender Ganda, Senior Advocate with Mr. S.K. Giri & Mr. Shubham Aggarwal, Advocates

CORAM: JUSTICE S. MURALIDHAR

O R D E R
15.03.2013

1. The challenge in this appeal under Section 10F of the Companies Act, 1956 ('Act') is to an order dated 15th November 2012 passed by the Company Law Board ('CLB') in an application, CA. No.566 of 2012, in Co. Pet. No. 102(ND) of 2010 filed by the Respondent, WPI Group Inc., USA ('WPIGI'), to declare a Board meeting of World Phone India Pvt. Ltd. ('WPIPL'), Appellant No.1 held on 31st October 2012 as null and void.

2. The facts in brief for the purposes of this appeal are that Appellant No.1, WPIPL, is a private company incorporated on 7th September 1992 under the Act within the jurisdiction of the Registrar of Companies ('ROC'), Delhi and Haryana, having its registered office at D-100, IInd Floor, Okhla

Industrial Area, Phase-I, New Delhi-110020. The Respondent, WPIGI holds 43.75% of the total paid up equity share capital of WPIPL. While Mr. Vivek Dhir, Appellant No.2, holds 43.75% of the equity shares of WPIPL, Mr. Pankaj Patel held the balance 12.5%. WPIGI is represented by its Chairman, Mr. Aditya Ahluwalia.

3. The case of WPIGI in Co. Pet. No. 102(ND) of 2010 before the CLB under Sections 397 and 398 of the Act read with Sections 402, 403, 406 and 408 thereof was that the Annual General Meeting ('AGM') of the company for the financial year ended 31st March 2010, which ought to have been held on or before 30th September 2010, was not so held. Meanwhile, the shares of Mr. Pankaj Patel, who was arrayed as Respondent No.3 in Co. Pet. No.102 (ND) of 2010 in the CLB had, according to WPIGI, been transferred on 22nd September 2009 jointly to Mr. Vivek Dhir and his wife, Ms. Malini Dhir (Appellant Nos.2 and 3 herein). As a result, Appellant Nos.2 and 3 came to hold 56.25% of the paid up equity share capital of Appellant No.1. This, according to Mr. Aditya Ahluwalia, came to light when he received the draft annual accounts for the year ending 31st March 2010 which showed an increase in the salary of Mr. Vivek Dhir. It may be mentioned that on 20th September 2010, Ms. Malini Dhir was appointed as an Additional Director of the Appellant No.1. Consequently, as on date, there are three Directors in the Appellant No.1: Mr. Vivek Dhir, Ms. Malini Dhir and Mr. Aditya Ahluwalia.

4. According to Mr. Ahluwalia, there were discrepancies noticed by him in the accounts and the notice for the AGM, which was to be held to consider

the accounts for the year ending 31st March 2010, which he brought to the notice of Appellant Nos.2 and 3. He alleges, however, that he subsequently downloaded the annual accounts filed by Appellant No.2 with the ROC which showed that they had been approved by the Board of Directors ('BoD') on 22nd July 2010 and that the AGM was held on 20th September 2010. According to him, the documents sent to him mentioned the date of the Board meeting for approval of accounts as 9th August 2010 and the date of the AGM as 12th September 2010. The petition also listed out all the instances of oppression and mismanagement, including the legality of the appointment of Appellant No.3 as a Director of the company, the holding of postponed AGM, non-receipt of notices of Board meetings and the shareholders meetings and, in particular, the validity of the transfer of 18,663 equity shares from Mr. Pankaj Patel to Appellant Nos. 2 and 3 jointly. The case of Mr. Aditya Ahluwalia is that as a result of this transfer, there was an imbalance in the shareholding pattern. It was initially agreed that Mr. Pankaj Patel would transfer shares in equal proportion both to Mr. Vivek Dhir and WPIGI. However, as a result of his entire shareholding being transferred to Appellant Nos.2 and 3 jointly, WPIGI was reduced to a minority shareholder. WPIGI also alleged siphoning off of funds and mismanagement in maintenance of records and filing them with the ROC. The said petition was filed on 18th October 2010. The pleadings in the said petition are complete and it is stated to be at the stage of final hearing before the CLB.

5. While the petition was pending in the CLB, WPIGI represented by Mr. Aditya Ahluwalia filed an application, being CA No. 566 of 2012 under

Sections 402 and 403 of the Act, in which he stated that a notice dated 23rd October 2012 had been issued, proposing to hold a Board meeting on 31st October 2012 which was received on 26th October 2012 at his New Delhi address. He stated that at that time he was in the United States of America ('USA'). He was caught in a hurricane which hit the Eastern coast and, therefore, he sent an e-mail requesting that the meeting be postponed. The meeting was to consider the proposal to go in for a rights issue of 1,49,303 equity shares of the company having a face value of Rs.100 each and offering them to the existing shareholders in 1:1 ratio. It is alleged that the agenda for the Board meeting was sent without giving any details of financial projections and how the figure of 1,49,303 equity shares was arrived at. This meant that if Mr. Aditya Ahluwalia had to subscribe to the rights issue, he would have to infuse Rs. 25 lakhs without any interest.

6. It is not in dispute that there was a joint venture agreement ('JVA') dated 1st May 1999 entered into between the parties, in terms of which Mr. Aditya Ahluwalia had an affirmative vote in matters relating to the company. It was under the same JVA that the shareholding pattern of Mr. Vivek Dhir, WPIGI and Mr. Pankaj Patel was decided. Despite Clause 6.2 of the JVA giving an affirmative vote to Mr. Aditya Ahluwalia at the Board meeting held on 31st October 2012 the resolution for approving the rights issue as proposed was approved without his being present and voting. This according to him, therefore, severely prejudiced his rights.

7. One of the questions that was considered by the CLB in CA No. 566 of 2012 was whether Clause 6.2 incorporated in the JVA could *ipso facto* bind

the company inasmuch as there was no corresponding amendment to the articles of association ('AoA') of the company. The question framed by the CLB, as is evident from the impugned order dated 15th November 2012 was whether the approval of WPIGI was required to raise equity for the company and whether Mr. Ahluwalia had sufficient time to examine issues since at the relevant time he was in New Jersey (USA) which was hit by a hurricane.

8. The findings of the CLB in the impugned order were that since the company was a private one and not covered by Sections 81 to 89 and 171 to 176 of the Act, it had the liberty to carve out the rules which were not repugnant to the other provisions of the Act. The company was governed by the AOA as to its internal management. Therefore, any agreement entered into amongst the shareholders "is not binding to the extent repugnant to the AOA of the company." The CLB further proceeded to hold that Section 9 of the Act which stated that the Act prevailed over both the Memorandum of Association ('MoA') and AoA, was not applicable to a private company like Appellant No.1. It was further held that the terms and conditions in the JVA were not inconsistent with the AoA, nor were they explicitly barred under the AoA. The cases cited by the Appellants were distinguished by the CLB on the ground that they did not relate to instances involving a JVA.

9. The CLB held that, in the present case, since there were only three shareholders and all of them were also Directors, the holding of the Board meeting in the absence of a party who had an affirmative vote was in violation of the JVA. Consequently, the Board meeting of 31st October 2012

was held null and void and a direction was issued to hold a fresh Board meeting over the rights issue in compliance with Clause 6.2 of the JVA.

10. When the present appeal was listed before the Court on 12th December 2012, the following order was passed:

> "**Co.A(SB) 102/2012 and Co. Appl. 2405/2012 (stay)**
>
> This appeal has been directed against the order passed by the Company Law Board (CLB) dated 16.11.2012 wherein the prayer made in the application filed by the non-applicant/respondent had been allowed and it was held that the board meeting held by the company on 31.10.2012 and all consequential acts thereof not being in accordance with law, the respondent company had been directed to hold a fresh board meeting by giving notice to the parties.
>
> Let notice of this appeal be issued to the respondent on the appellant taking effective steps by ordinary process, registered A.D. as also courier returnable on 11.03.2013.
>
> Resolutions passed in the fresh board meeting shall not be given effect till the next date of hearing.
>
> Order dasti."

11. The Court has heard the submissions of Mr. U.K. Choudhary, learned Senior counsel appearing for the Appellants and of Mr. Virender Ganda, learned Senior counsel for the Respondent.

12. The first question that arises for consideration is whether the CLB was justified in holding that since there was no bar to the affirmative vote in the AoA of the company, Clause 6.2 of the JVA which provides for the affirmative vote must be given effect to. This, in turn, requires the

interpretation of Section 9 of the Act which the CLB has understood as not being applicable to private companies.

13. Section 9 of the Act reads as under:

> **"9. Act to override memorandum, articles, etc.** – Save as otherwise expressly provided in the Act—
>
> (a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and
>
> (b) any provision contained in the memorandum, articles, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be."

14. While Sections 81 to 89 and 171 to 186 of the Act insofar as they relate to issuance of shares do not apply to private companies, there is no basis for concluding that Section 9 of the Act *per se* does not apply to private companies. A plain reading of Section 9 makes no such exception. The following features of Section 9 are required to be noted:

(a) The very title to the provision makes it clear that it has an overriding effect over the MoA and AoA of the company.

(b) Section 9 is subject to other provisions of the Act which may provide to the contrary. At the same time, Section 9(a) makes it clear that the Act would have effect notwithstanding anything to the contrary in the MoA or the AOA of the company, "or any agreement executed by it or the

resolution passed by the company in general meeting or by its board of directors."

(c) Section 9 (a) makes no distinction between agreements entered into by the company itself or agreements entered into between the directors or shareholders of the company. Section 9 makes no distinction between a public company and a private company.

(d) Section 9 (b) clearly states that if any provision in the MoA, AoA, agreement or resolution "is repugnant to the provisions of the Act", such provision in the MoA/AoA would be void. This further underscores the overriding effect of the provisions of the Act.

15. The legal position is that where the AoA is silent on the existence of an affirmative vote, it will not be possible to hold that a clause in an agreement between the shareholders would be binding without being incorporated in the AoA. The question to be asked is whether the provisions of an agreement, that are not inconsistent with the Act, but are also not part of the AoA, can be said to be applicable. All that Section 9 states is that clauses in the agreement that are 'repugnant' to the Act shall be 'void'. This does not mean that clauses in the agreement which are not repugnant to the Act would be enforceable, notwithstanding that they are not incorporated in the AoA.

16. Mr. Virender Ganda, learned Senior counsel for the Respondent, has placed extensive reliance on the decision of the Supreme Court in ***Reliance Natural Resources Limited v. Reliance Industries Limited (2010) 7 SCC 1***

(hereinafter referred to as the '***RNRL case***') and, in particular, the observations made in paras 56 and 59 thereof. In the said case, a submission was made on behalf of RNRL that, in terms of the 'doctrine of identification', Reliance Industries Limited ('RIL') was identified by "such of its key personnel through whom it workss", and that in that case, the key persons were Smt. Kokilaben Ambani, Mr. Mukesh Ambani and Mr. Anil Ambani, who had entered into a family arrangement which was reduced in writing in the form of a Memorandum of Understanding ('MoU'). The submission was that in terms of the said doctrine of identification, the actions of the key personnel should be taken to be the actions of the company itself. Mr. Ganda has submitted that in the present case, the JVA was in the nature of an agreement between the key personnel of the Appellant No.1 company and since their actions were taken to be the actions of the company itself, Clause 6.2 which provided for an affirmative vote should be taken to be applicable and enforceable notwithstanding the fact that no amendment was made to the AoA to incorporate such an affirmative vote of WPIGI.

17. The above submission overlooks the fact that even in the ***RNRL case***, the Supreme Court was not prepared to treat the MoU as binding. It was emphasised that the company in that case, i.e., Reliance Industries Limited was 'separate' from the key personnel. The observations made in para 58 of the said judgment that the doctrine of identification "may be applicable only in respect of small undertakings" does not mean that irrespective of the facts of the case, it would be applicable to all small undertakings.

18. The ratio of the decision in the ***RNRL case*** must be understood by the conclusions in para 125 of the judgment, which reads as under:

> "125. The MoU was signed as a private family arrangement or understanding between the two brothers, Mukesh and Anil Ambani, and their mother. Contents of the MoU were not made public, and even in the present proceedings, they were revealed in parts. Clearly, the MoU does not fall under the corporate domain – it was neither approved by the shareholders, nor was it attached to the scheme. Therefore, technically, the MoU is not legally binding. Nevertheless, cognizance can be taken of the fact that the MoU formed the backdrop of the scheme and therefore, contents of the scheme have to be interpreted in the light of the MoU."

19. The offshoot of the above discussion is that the JVA in the present case cannot be said to bind the company as such. What the company can do has to be ascertained with reference to the AoA. In the present case, although the JVA was entered into in 1999 itself, there was no move made by Mr. Aditya Ahluwalia or WPIGI to have the AoA amended at any point in time to incorporate the affirmative vote provided to WPIGI under Clause 6.2 of the JVA. Nothing prevented WPIGI from doing so. Unless the AoA was actually amended, WPIGI could not insist on exercise of the affirmative vote. This law has been clearly explained by the Supreme Court in ***V.B. Rangaraj v. V.B. Gopalakrishnan AIR 1992 SC 453***. Referring to the decision in ***S.P. Jain v. Kalinga Tubes Ltd. [1965] 2 SCR 720***, the Supreme Court observed:

> "it was also a case of a battle between two groups of shareholders led by P & L as they were named in the decision. In July 1954 these two groups who held an equal number of shares of the value of Rs. 21 lakhs, out of a total share capital of Rs. 25 lakhs, in the company which was then a private company, entered into an agreement with

the appellant who was a third party and certain terms were agreed to. Various resolutions were passed by the company to implement the agreement. However, neither the Articles of Association were changed to embody the terms of the agreement nor the resolutions passed referred to the agreement. In 1956-57, the company desired to raise a loan from the Industrial Finance Corporation and as per the requirement of the Corporation, in January 1957 the company was converted into a public company and appropriate amendments for the purpose were made in the Articles. However, even on this occasion, the agreement of July 1954 was not incorporated into the Articles. Disputes having arisen, the matter reached the Court. The appellant claimed the benefit of the agreement of July 1954. It was held by this Court that the said agreement was not binding even on the private company and much less so on the public company when it came into existence in 1957. It was an agreement between a non-member and two members of the company and although for some time the agreement was in the main carried out, some of its terms could not be put in the Articles of Association of the public company. As the company was not bound by the agreement it was not enforceable."

Further, in ***V.B. Rangaraj v. V.B. Gopalakrishnan***, the Supreme Court quoted ***Palmer's Company Law (24th Edn.)*** and observed:

> **"**In Palmer's Company law (24th Ed.) dealing with the 'transfer of shares' it is stated at page 608-9 that it is well-settled that unless the Articles otherwise provide the shareholder has a free right to transfer to whom he will. It is not necessary to seek in the Articles for a power to transfer, for the Act (the English Act of 1980) itself gives such a power. It is only necessary to look to the Articles to ascertain the restrictions, if any, upon it. Thus a member has a right to transfer his share/shares to another person unless this right is clearly taken away by the Articles."

20. The above decision was followed by the Bombay High Court in ***IL and FS Trust Co. Ltd. v. Birla Perucchini Ltd.[2004] 121 Comp Cas 335 (Bom)***. It was held that the decision of the Supreme Court could not be

confined only to a situation involving transfer of shares but also to other situations, including share subscription agreement which provided for continuance of the nominee of a certain group on the board of directors without any corresponding amendment to the AoA. In the present case as well there was no amendment to the AoA to provide for the affirmative vote for WPIGI and, therefore, the CLB was in error in proceeding on the basis that Clause 6.2 of the JVA had to be applied to decide the validity of the decision taken at the Board meeting held on 31st October 2012.

21. Mr. Ganda referred to the decision in ***M.S. Madhusoodhanan v. Kerala Kaumudi (P) Ltd. (2004) 9 SCC 204*** which in turn discussed the decision in ***V.B. Rangaraj v. V.B. Gopalakrishnan*** but proceeded on the basis that under Section 10 of the Specific Relief Act 1963 "specific performance of a contract for transfers of shares in a private limited company could be granted." The decision in ***V.B. Rangaraj v. V.B. Gopalakrishnan*** was held to be "entirely distinguishable on facts." The present case does not involve any restriction on the transfer of shares but the existence of an affirmative vote which cannot be recognized without a corresponding amendment to the AoA.

22. Lastly, it was submitted that even a conduct which is technically and legally correct, may still justify the grant of relief in a petition under Sections 397 and 398 of the Act on the application of the 'just and equitable' jurisdiction. Conversely, a conduct involving illegality may not warrant the grant of any remedy. Reliance is placed on the decision of the Supreme Court in ***Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad***

(2005) 11 SCC 314. Mr. Ganda contended that in the present case it was just and equitable for the CLB to have granted relief to the Respondent notwithstanding the fact that the decision in the Board meeting may have been "technically legal and correct."

23. The above observations in ***Sangramsinh P. Gaekwad*** were made in the context of the question whether an isolated act of oppression may be sufficient to grant relief. That question was answered in the negative. It was further observed that the test of lack of *bonafides* should be applied "in both the winding up petition and while determining an application under Section 397." However, the question whether any just and equitable relief ought to be granted has to be tested in the facts and circumstances of each case.

24. There were two grounds on which the CLB proceeded to interfere with the decision of the Board meeting held on 31st October 2012. One of those grounds was that the decision could not have been taken without the affirmative vote of WPIGI. For the reasons explained above, this Court is unable to sustain the above finding as it is based on an erroneous reading of Section 9 of the Act. Accordingly, this Court sets aside the above finding.

25. The other ground on which the CLB interfered with the decision at the Board meeting held on 31st October 2012 was that the notices of the Board meeting were issued at a time when the Respondent was not in the country and was stuck in New Jersey, USA, which was admittedly hit by a hurricane. While the notice was properly delivered to the Respondent, its request for adjournment of the meeting could have been easily

accommodated by the Appellants. Nevertheless, they went ahead and held the meeting. This has been sought to be remedied by the impugned order of the CLB by directing that a fresh Board meeting be convened. In the facts and circumstances, the CLB was justified in issuing the said direction. What however cannot be sustained in law is the direction that in the fresh Board meeting, effect must be given to Clause 6.2 of the JVA. That portion of the impugned order is, therefore, set aside.

26. During the pendency of the present appeal, the Board meeting was held with the same result that by majority the resolution to go in for the rights issue was approved. Obviously, for the reasons explained the decision could not be faulted on the ground that the affirmative vote under Clause 6.2 of the JVA was not given effect to.

27. However, that will not bring the matter to an end. The above Board meeting was held pending the decision of the CLB on the main petition under Section 397 of the Act filed by the Respondent. One of the grounds urged in the said petition concerns the legality of the transfer of 12.5% shares of Mr. Pankaj Patel in favour of Appellant Nos.2 and 3. Therefore, the validity of any of the decisions taken subsequent to the transfer will depend on the outcome of the final decision in the petition under Section 397 of the Act filed by the Respondent.

28. In the circumstances, it is considered appropriate to direct that the interim order passed by this Court on 12th December 2012 to the effect that the resolution passed in the fresh Board meeting "shall not be given effect"

is directed to continue for another period of eight weeks or till such time the CLB passes a final order in the petition filed by the Respondent, which decision, in any event, should not be later than 12 weeks from today. If for some reason, the CLB is unable to pronounce its final order in the petition within twelve weeks then, it will be open to either party to approach this Court for further directions. In that event, the interim order passed by this Court will continue till further orders are passed by this Court.

29. It is clarified that this Court has not expressed any opinion on the principal contentions of the parties on the other issues which will be examined by the CLB on merits.

30. The appeal is disposed of in the above terms, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J.

MARCH 15, 2013
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