

SUPREME COURT OF INDIA

Girdhar Gopal Gupta

Vs.

Aar Gee Board Mills Pvt. Ltd.

C.A.No.601 of 2009

(Dr. Arijit Pasayat, P. Sathasivam and Aftab Alam JJ.)

02.02.2009

JUDGMENT

Dr. Arijit Pasayat, J.

1. Leave granted.
2. Challenge in this appeal is to the judgment of a Division Bench of the Delhi High Court dismissing the appeal filed by the appellants as not maintainable. Challenge in the appeal was to the judgment of a learned Single Judge of High Court. Two appeals were disposed of by a common order dated 7.2.2005.
3. Background facts in a nutshell are as follows:

“M/s Aar Gee Board Mills was incorporated as private limited company in which two groups hold the shares. One group is led by Girdhar Gopal Gupta (hereinafter referred to as ‘Gupta Group’) and other by Guru Charan Dass (hereinafter referred to as ‘Garg Group’). The company was incorporated with authorized share capital of Rs.20 lacs (20,000 equity shares of Rs.100/- each). At the time of incorporation, the Gupta Group subscribed 1722 equity shares and the Garg Group was allotted 1662 equity shares. The shareholding between the two groups was accordingly in the ratio of 50.9% : 49.1%. This company purchased a sick unit from UPFC in the year 1985 consisting of land at GT Road Industrial Area Ghaziabad measuring 7215 sq. yards along with the plant and machinery. The company operated the aforesaid unit for few years after its purchase. However, in October 1994 this unit had to be closed down. Reasons were stated to be non-installation of water treatment plant for pollution control and non payment of Government dues. Both the groups alleged non cooperation and mis-management against each other.

After the closure of the aforesaid unit, disputes arose between the parties. Both the parties referred the matter for arbitration. Three arbitrators were appointed who gave their awards. In the final award given on 18th April, 1998 the arbitrators inter-alia

concluded that the aforesaid unit should be divided equally between the two groups. There is some dispute about the terms of reference to the aforesaid arbitrators. Fact remains that although proceedings before the said arbitrators were initiated under the Arbitration Act, 1940 and, therefore, awards were required to be made rule of the Court, but no steps were taken in this behalf by either of the groups.

On 20th August, 1998, Garg Group filed the return with the Registrar of Companies informing the Registrar of Companies about the allotment of 9507 equity shares of Rs.100/- each which was allotted in favour of the members of the Garg Group. It was stated that these allotments were made in the years 1994 and 1995.

With the allotment of aforesaid shares in favour of the family members of the Garg group the shareholding pattern changed drastically. The shareholding of the Gupta Group which was hitherto to the extent of 50.9% came down to 13.4% and that of the Garg Group rose to 86.6%.

Aggrieved by this and some other acts on the part of the Garg Group, Gupta Group filed CP.65/2001 under Sections 397 and 398 of the *Companies Act, 1956* (in short the `Act') before the Company Law Board (for short the `Board') alleging oppression and mis-management on the part of the Garg Group. Three acts of oppression and mis-management were highlighted which are as under:

(a) Illegal allotment of 9507 equity shares as noted above.

(b) Appointment of Mr. Parmanand, brother of Mr. Guru Charan Dass Garg as the Additional Director with effect from 20th October, 1994, return in respect of which was also filed with the Registrar of Companies on 20th August, 1998.

(c) Removal of Mr. Girdhar Gopal Gupta and Mr. Ram Narain Gupta as directors from the company on 16th September, 1998 without notice of any Board meeting.

The Board decided this petition vide order dated 25th March, 2004. As far as issue of allotment of shares is concerned, the Board opined that allotment of 5564 shares to the Garg group was illegal and set aside the same. In so far as allotment of 3943 shares is concerned, benefit of doubt was given to the Garg Group on the ground that this allotment was within the knowledge of the Gupta Group.

On the two counts, this petition was decided in favour of the Gupta Group as it is held that appointment of Mr. Parmanand as Additional Director was invalid. Likewise, removal of Mr. Girdhar Gopal Gupta and Mr. Ram Narain Gupta as directors was also held to be illegal.

The Gupta group has preferred Co.A.(SB) No.9/2004 against that portion of the Order whereby allotment of 3943 shares is not disturbed. The Garg Group on the other hand, filed Co.A.(SB) No.11/2004 in respect of other findings which were returned in

favour of the Gupta group. That is how these appeals were heard together and were disposed of by a common Order.

In so far as issue of allotment of shares is concerned, Board in para 12 held as follows:

"The last point for consideration is the allotment of 9507 equity shares which have been allotted on 25.6.1994, 20.10.1994, 9.1.1995. The respondents have failed to produce notice/minutes of the board meeting in which 9507 shares were allotted. The return of allotment of shares in Form No. 2 has been filed in one lot on 20.8.1998 with the ROC after a delay of 4 years. The respondents have submitted that in the balance sheet signed of 1993-94 by the petitioner indicated application money of Rs.3,94,320 and accordingly the petitioners were aware of allotment of 9507 shares. It is true that a sum of Rs. 3,94, 320/- has been shown in the balance sheet of 1993-94 which the respondents have allotted further shares of Rs.5,56,380 for which no explanation has been given. It is also not known whether any money amount to Rs.5,56,380/- was ever received by the company and how the same has been utilized in the company which was closed down in 1995."

The High Court noted that the Board recorded a categorical finding that the respondents in the petition i.e. Garg Group had failed to produce notice/minutes of the Board meeting in which 9507 shares were allotted. It was also recorded that although these shares were allotted in two lots in 1994 and 1995, return of allotment of these shares was filed in one lot on 20th August, 1998 with the Registrar of Companies after a delay of 4 years. However, the allotment of shares to the extent of 3943 shares only was distributed on the ground that the Gupta Group would have the knowledge much earlier but it was not challenged earlier. Accordingly, the Board declared the allotment of 5564 shares as illegal and the same was set aside. Learned Single Judge first referred to this aspect. He noted that the Garg Group had failed to produce any notice or minutes of the Board meetings regarding allotment of shares."

4. Learned counsel appearing for the Garg Group did not dispute this position before the learned Single Judge at the time of arguments. His only argument was that the records of the company were in possession of the Gupta Group and therefore his client could not produce the records to the aforesaid effect.

5. Learned Single Judge noted that there was some controversy about the possession of company's records. Though learned counsel appearing for the Gupta Group referred to the final award of Arbitrators wherein it has been recorded that some records were in possession of the Garg Group, yet the High Court did not go into this aspect because the categorical submission of Gupta Group in the petition was that there was no notice of allotment of shares and there was no decision of the Board of Directors to allot the shares. The allegations were not traversed by the Garg Group in their reply filed. The High Court noted that the respondents never came out with a case that there was no such notice for allotment of shares given to the

existing shareholders or there was any such decision taken by the Board of Directors for allotment of shares. That part of the Board's order was therefore confirmed.

6. The residual issue was the balance 3943 shares. Here again, a categorical finding recorded was that there was no notice or Board's decision for allotment of shares. However, benefit of doubt was given as share application money was reflected in the Balance Sheet of the company as on 31.3.1994. It indicated share application money of Rs. 3,94,320/-. The original Balance Sheet was produced which shows that it bears the signature of Mr. Girdhar Gopal Gupta as well as Mr. Guru Charan Dass Garg. The Board from the aforesaid entry in the Balance Sheet came to conclude that allotment of these shares were within the knowledge of Gupta Group. The High Court held that such knowledge cannot be ruled out. It was inferred that Gupta Group had information about the allotment of shares in the year 1994 and challenge was made only in the year 2001. Accordingly, it was held that the view taken by the Board was plausible and possible view and the interference was not called for.

7. So far as the question relating to removal of two Directors of Gupta Group and induction of Directors of Garg Group is concerned, the High Court did not interfere with the decision of the Board. It was felt that it was an academic exercise as admittedly the company was not functioning since 1993 and the only aspect relevant for the purpose would be the distribution of assets of the company.

8. Learned counsel for the appellant submitted that allotment of shares could only be done by the Board of Directors and there is no presumption in law of allotment of shares merely because of receipt of share application money. It is pointed out that benefit of doubt had been given to the respondents to the extent of 3943 shares as a result of which the appellants who had a slight majority of shareholding of 50.9 % have been reduced to 23.5% and the respondents who originally held 49.1% shares have been increased to 76.5%.

9. Reference is made to Article 8 of the Articles of the Company which shows that the shares have to be under the control of the Board and the Board has the power to allot or dispose of the same. The same reads as follows:

"The shares be under the control of the Board who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such time as the Board may think fit but subject to the Articles herein contained and also to the restrictions mentioned in the foregoing clause 2 hereof."

10. The concurrent finding is that no notice of the Board meeting was given and no Board's meeting was held in respect of allotment of shares. The said finding has not been under challenge by the respondents and it has become final. It is, therefore, submitted that two different yardsticks cannot be applied for 5564 shares and 3943 shares. In essence, it is submitted that the courts below have erred in giving benefit of doubt in respect of 3943 shares merely because a sum of Rs.3,94,320/- were shown as share application money in the Balance Sheet as on 31.3.1994. It is submitted that records are not in possession of the appellants and have been categorically found to be in possession of the respondents. It is also

submitted that the approach under Sections 397 and 398 of the Act was not belated. Oppression in converting majority shares to minority shares is continuous one and, therefore, there is continuous oppression. It is stated that the appellants learnt about the ostensible issue of shares by the respondents only when they carried out the inspection with the Registrar of Companies in the year 2000. Appellants sent a letter on 3.4.2000 to the respondents intimating about the issuance of shares. Since there was no satisfactory reply, petition under sections 397 and 398 of the Act was filed.

11. So far as the receipt of share application money is concerned the Balance Sheet only shows that it was under the head of 'share application money' and there was no allotment.

12. In response, learned counsel for the respondents submitted that the case of the appellants before the Board was that the respondents have raised the share capital of Rs.3,94,320/- by allotting 3943 shares at Rs.100/- each on 25.6.1994, 20.10.1994 and 9.1.1995 without issuing notice of such meetings to the appellants. It is pointed out that admittedly the meetings were held at the registered office of the company i.e. the residence of the appellants and as such allotments made by the respondents lead to an act of oppression under Section 398 of the Act. It is pointed out that the totally a new case is presented before this Court that no meeting for allotment of alleged equity shares were ever held and the share application money reflected in the Balance Sheet ending on 31.3.1994 cannot be converted into share capital and therefore the allotment is bad under Section 286 of the Act admittedly, when the quorum of Directors was duly empowered to do so. Moreover, both the Directors were signatories of the Memorandum and Articles of Association of the Company. It is pointed out that undisputed facts are as under:

13. The registered office of respondents 1 and 2 was at 73, Gujarawala Town, Part-II, G.T. Karnal Road, Delhi which is the residence of the appellants. All the Board's meetings were held and resolutions therein were passed at the same registered office. Moreover, all the statutory records were kept at the registered office as mandated by Sections 193, 196(1), 303 (1), 307(5) and 209 of the Act. The company was passing through financial crises and there was need to meet the government dues and installation of an effluent treatment plant in view of the directions of this Court. The quorum under the Articles of Association was two Directors as per Clause 33 of the Article of Association. Two persons were present in the meeting. The Board of Directors allotted 3943 equity shares when the requisite quorum of two Directors of the respondent group was there. In the meetings held on 25.6.1994, 20.10.1994 and 9.1.1995 at the registered office as per Clause 33 of the Articles of Association as well as under Section 287 of the Act. Auditor was appointed under Section 224 and power of attorney was signed by appellant No.1 on 4.9.1995 for which meeting was held and Balance Sheet as on 31.3.1995 was audited by the auditor on 4.9.1995 under Section 215 of the Act. Significantly, no mala fides have been imputed on the part of the auditor and no allegations of fraud or mala fide intention were imputed upon the respondents before the Board, learned Single Judge and not even before this Court.

14. There is no dispute that the Balance Sheet as on 31.3.1994 was duly signed by appellant No.1 and share application money amounting to Rs.3,94,320/- was reflected as share

application money in the Balance Sheet with mutual understanding that the same was to be treated as share capital in next financial year ending on 31.3.1995.

15. To give effect to the understanding, the same was converted on 25.6.1994, 20.10.1994 and 9.1.1995. Resolution dated 21.4.1997 was passed and signed by appellant No.1 authorising respondent No.2 for getting sales tax and income tax assessment completed. In the sales tax assessment proceedings appellant No.1 was representing the company. The Balance Sheet was filed at that time before the Assessing authority. An order dated 16.6.1998 for the assessment year 1994-95 clearly disclosed that appellant No.1 had appeared before the Sales Tax Authority on 3.6.1998 and produced records of the company. Thus, the Balance Sheet of the company as on 31.3.1995 was available with appellant No.1 and produced before the Sales Tax Authority. Therefore, the claim of the ignorance of the records by the appellants is wrong.

16. It is pointed out that because of rising prices of estates of the company the petition under Sections 397 and 398 of the Act was filed on 20.10.2001. However, the returns for allotment of 9507 shares including 3943 shares were filed before the Registrar of Companies on 20.8.1998.

17. It is submitted that the plea relating to Section 286 is not available in the present case as meeting admittedly held and the proof of service of notice was in the possession of the appellants as part of statutory record. Even after the meeting on 4.9.1995 wherein auditors were appointed the earlier meetings of the board are ratified and the appellants cannot question that. If the appellants' claim is accepted it is inconceivable as to how share application money shown has been utilized in the subsequent years and as to how they were reflected in the Balance Sheet.

18. So far as the other submissions relating to records manipulations it is submitted that this is not a case where jurisdiction under Article 136 of the Constitution should be exercised.

19. We find that there are some factual controversies, for example, the effect of the appellants ratifying the Balance Sheet, appearing before the Sales Tax Authorities and the undisputed position with respect to share application money as reflected in the financial statements. It is difficult to believe that even though the conversion of the share application money was done in June 1994, October, 1994 and January 1995, it was not in the knowledge of the appellants. The fact that the appellants were representing the company before various authorities including the Sales Tax Authorities and Income Tax Authority clearly rules out the possibility of appellants being unaware of the situation. It is true that the allotment of shares is different from receipt of share application money but the conduct of the parties and their understanding of the situation largely determines the basic issue.

20. Considering the nature of the controversy we do not consider this to be a fit case where any interference under Article 136 of the Constitution is called for.

21. The appeal is dismissed. There will be no order as to costs.