IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF JUNE, 2023

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

COMPANY APPEAL NO.20 OF 2015

BETWEEN:

MR.H.ARUN KUMAR,
NO.92, 12TH MAIN, II STAGE,
BINNY LAYOUT, VIJAYANAGAR,
BENGALURU - 560 040. ... APPELLANT

(BY SRI A. MURALI, ADVOCATE)

AND:

1. NISHMA ELECTRICAL SYSTEM PVT. LTD.,
   NO.290, HALAGEVADERAHALLI,
   BEML LAYOUT,
   BENGALURU - 560 098.

2. MR.B.K.NAGENDRA KUMAR,
   NO.801, 24TH CROSS, 33RD MAIN,
   RAJARAJESHWARINAGAR,
   BENGALURU - 560 098.

3. MR.B.K.ASHOK KUMAR,
   NO.96, 4TH MAIN,

CANARA BANK COLONY,
NAGARBHAVI ROAD,
BENGALURU - 560 072.

4. MRS.B.K.CHITRA,
NO.96, 4TH MAIN,
CANARA BANK COLONY,
NAGARBHAVI ROAD,
BENGALURU - 560 072.

5. MRS.SHILPA H.N.,
NO.801, 24TH CROSS,
33RD MAIN, RAJARAJESHWARINAGAR,
BENGALURU - 560 098.

6. M/S SHILPA ELECTRICALS,
NO.427/B, 9TH MAIN,
1ST FLOOR, VIJAYANAGAR,
BENGALURU - 560 040.

7. M/S MADHU ENTERPRISES,
NO.96, CANARA BANK COLONY,
NAGARBHAVI ROAD,
BENGALURU - 560 072.

...RESPONDENTS

(BY SRI K.S.RAGHURAM, ADVOCATE FOR R1 - R7)

THIS COMPANY APPEAL IS FILED UNDER SECTION 10F OF THE COMPANIES ACT, 1956 READ WITH SECTION 151 OF THE CODE OF CIVIL PROCEDURE, 1908 PRAYING TO PASS AN ORDER SETTING ASIDE THE ORDER DATED 31.08.2015 PASSED IN COMPANY PETITION NO.22/2023 BY THE HON'BLE COMPANY LAW BOARD, CHENNAI AND ETC.,

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 20.06.2023, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, ***ANANT RAMANATH HEGDE J.,*** DELIVERED THE FOLLOWING:

JUDGMENT

This Company appeal is filed under Section 10F of the Companies Act, 1956 (hereinafter referred to as the 'Act' for short). The petitioner in C.P. No.22/2003 before the Company Law Board is the appellant and has assailed the order dated 31.08.2015. In terms of the impugned order, the Company Law Board has rejected the C.P. No.22/2003 filed under Sections 397 and 398 of the Act.

2. The brief facts necessary for the adjudication of the case are;

- The first respondent is a Company registered under the Act. The appellant is a 20% shareholder. Respondents No.2 to 5 are the holders of the remaining 80% of the share. Respondents No.6 and 7 are two partnership firms in which respondents No.2 to 6 are said to be partners.

3. The petition is filed before the Company Law Board on the premise that respondents No.2 to 5 are acting contrary to the interest of the Company and the appellant. It is urged that respondents No. 2 to 5 without the knowledge and consent of the appellant started bidding for the contract on behalf of respondents No.6 and 7. It is alleged that act of respondents No.2 to 5 is contrary to the understanding between the petitioner and respondents No.2 to 5 arrived at the formation of the Company. It is further alleged that the respondents took total management and control of the Company to the exclusion of the appellant and respondents have not accounted for a sum of Rs.8.30 crores in their

books of accounts and thereby have caused loss to the Company as well as the appellant. It is further alleged that the funds of the Company have been diverted through respondents No.6 and 7. In addition, the appellant has also claimed that the amount advanced by the appellant to the Company is not returned to the appellant.

4. In the backdrop of the aforementioned allegations, the appellant has prayed before the Company Law Board to frame an appropriate scheme for the management and administration of the 1st respondent-Company including the prayer to appoint an administrator/special director. The appellant has also sought a direction to participate in the management, business and day-to-day affairs of the 1st respondent/Company.

5. The appellant has also sought an investigation into the management and affairs of the 1st respondent/company including an audit to ascertain the extent of misappropriation and loss to the Company. Prayer is also made to direct respondents No.6 and 7 to refund the funds.

6. Further, certain other restraint orders are also sought against the respondents. Prayer is also made to alter the capital structure of the First respondent company.

7. The petition was opposed by the respondents. In their counter statement the allegations leveled against the respondents are denied. The respondents contend that the appellant was aware of existence of the partnership firm viz. respondents No. 6 and 7 and being fully aware of the

their existence and nature of business carried on by them, the appellant came forward to float the company.

8. It is also the contention of the respondents that the money credited to the account of respondents 6 and 7 is the money payable to respondents No.6 and 7 in respect of contracts executed by respondents No.6 and 7 before the incorporation of the 1st respondent/company.

9. It is also contended by the respondents that the books of accounts of the 1st respondent/company are seized by the Lokayukta and from the year 2001 1st respondent company has not carried out any business.

10. After hearing the parties, the Company Law Board dismissed the petition. Aggrieved by the said order instant appeal is filed.

11. Learned counsel appearing for the appellant raised the following contentions:

(i) The Company Law Board has passed the impugned order without taking into consideration the materials placed by the appellant. The materials placed before the Board would disclose the fact that respondents No.6 and 7 earned huge profits by securing the contracts which otherwise would have been awarded in favour of the 1st respondent company.

(ii) Withdrawal of huge cash by respondents No. 6 and 7 is not taken into consideration while considering the claim made by the appellant.

(iii) Before the Company Law Board, on an application moved by the appellant, an independent Chartered Accountant was appointed to conduct the audit of the accounts of the 1st respondent-company and despite repeated requests made by the appellant as well as the auditor appointed by the Company Law Board, the respondents did not co-operate with the auditors appointed by the Company Law Board and did not handover the books of accounts and other materials required to carry out the audit. As a result, the Chartered Accountant appointed by the Company Law Board submitted a report expressing the inability to complete the audit as ordered by the Company Law Board.

(iv) In view of the report submitted by the Chartered Accountant, an application was filed by the appellant under Section 235 of the Act to appoint one or more competent persons to investigate the affairs of the 1st respondent company and the same was opposed by the respondents and the application was erroneously dismissed.

12. Elaborating on the above-said contentions, it is urged by the learned counsel for the appellant that had there been a proper audit by the Chartered Accountant or had there been an investigation into the affairs of the Company under Section 235 of the Act, the Company Law Board could have passed an appropriate order in the interest of the Company and all the shareholders.

13. Learned Counsel for the appellant also invited the attention of the Court to a notice issued by the Sales Tax Department under Section 12(A) of the Karnataka Sales Tax Act, which speaks about the

turnover to the tune of Rs.5,61,50,182/- being suppressed. It is urged that the Company has paid the tax pursuant to the said notice which would establish the contention of the appellant relating to the suppression of accounts.

14. Learned Counsel further urged that the Company Law Board having dismissed the application to appoint an independent person to investigate in the affairs of the Company, could not have dismissed the petition on the premise that the appellant has not established his case. The appellant though is the Director of the Company is kept out of the management and does not have access to the books and other documents and appellant thus had prayed for an independent investigation.

15. Learned counsel appearing for the respondents defending the impugned order submitted that the allegation that the respondents did not co-operate with the auditor appointed by the Court is incorrect. Whatever documents that were in the custody of the 1st respondent were handed over to the auditor and rest of the documents were in the custody of the Lokayukta which conducted the raid on the premises of the 1st respondent as well as respondents No. 6 and 7. That being the position, no fault can be found with the respondents in not furnishing the books and other records.

16. It is also urged that the appellant cannot claim the amount credited to the account of respondents No. 6 and 7 in respect of the work carried out by respondents No. 6 and 7 between 1995-1997 when the 1st respondent company was not yet

incorporated. However, prayer for appointment of an independent Chartered Accountant to audit the accounts of the Company has not been opposed.

17. This Court has considered the contentions raised at the bar and also perused the records.

18. There is no dispute that the 1st respondent is a Company and the appellant is 20% shareholder. The respondents 2 to 5 being the members of the same family hold 80% share. At relevant point the appellant was one of the Directors.

19. It is forthcoming from the impugned order and the records placed before the Court that the Company Law Board appointed an independent Chartered Accountant to audit the accounts of the 1st respondent Company. Despite the notices issued by the Chartered Accountant and the appellant, all the

materials necessary for conducting the audit were not furnished by the respondents. Accordingly, the auditor has submitted a report stating that the audit cannot be completed for want of co-operation by the respondents.

20. It is also forthcoming from the records that the Company Law Board has dismissed the application bearing C.A. No.30/2006 seeking direction from the Company Law Board to the Central Government to appoint one or more competent persons as Inspectors to investigate the affairs of the respondent company. Said application is also dismissed.

21. The Company Law Board has concluded that the appellant has not placed materials to substantiate his claim relating to mismanagement. This Court considering the allegations and counter

allegations is of the view to resolve the controversy, deems it necessary to direct investigation into the affairs of the 1st respondent Company.

22. During the course of the hearing, learned counsel for the appellant submitted that accounts and affairs of the 1st respondent Company for the year 1997 to 2001 be audited and appropriate orders on report would be passed.

23. Learned counsel for the respondents who contended that there is no illegality committed by the respondents on principle admitted that the correctness or otherwise of the contentions raised by the parties can be effectively resolved only by a proper audit of the accounts and affairs of the 1st respondent company. It is further submitted by him that the records of the Company and the partnership firm are

seized by the Lokayukta are to be secured and examined by the person investigating into the affairs of the Company and the Company or the respondents no. 6 and 7 are not in position to furnish the books and records required for the purpose.

24. Having considered the impugned order, allegations and counter-allegations leveled by the parties to the proceeding, considering the materials on record and also having regard to Section 235 of the Act, this Court is of the view that the Central Government is to be directed to appoint a suitable person or persons to investigate the affairs of the Company for the period 1999-2003 and to submit the report to this Court.

25. Hence, the following:

ORDER

(i) The Central Government is directed to appoint a person to investigate the affairs and accounts of the 1st respondent Company under Section 235 of the Companies Act, 1956 for the period from 1999-2003, having due regard to the contentions raised by the appellant and respondents

(ii) The person to be appointed to investigate the affairs and accounts is authorized to collect the documents pertaining to the affairs of the 1st respondent Company and 6th and 7th respondent partnership firm, said to be in the custody of the Lokayuktha Karnataka.

(iii) Parties to the proceeding shall cooperate with the person to be appointed to investigate claims and counter claims of the parties to the proceeding.

(iv) The investigating officer on completing the investigation, preferably within 6 months from this date, shall submit the report to this Court.

(v) Registry to forward the copy of this order to the designated officer of the Central Government acting under Section 235 of the Companies Act, 1956.

(vi) Accordingly, the appeal is ***allowed in part.***

Sd/-
JUDGE

Sd/-
JUDGE

BRN