

P. PUNNIAH
v.
JEYPORE SUGAR CO. LTD. AND ORS.

APRIL 6, 1994

[B.P. JEEVAN REDDY AND B.L. HANSARIA JJ.]

Companies Act, 1956—Ss.397, 398, 399(1) (a) and (3)—Consent by General Power of Attorney GPA holder on behalf of member to file application—Held, constitutes valid consent—S.399(3)—Whether an exception to the normal rule of agency—Affidavit filed by member in High Court that she had authorised the GPA holder—Whether to be taken as consent—Company (Court) Rules 1959—R.88

In October 1978, three shareholders of the respondent-company including the first appellant filed an application under Ss.397/398 in the High Court. The first appellant, P was General Power of Attorney holder for his daughter, R who was resident in the USA. The statutory requirement of 1/10th share-holding needed to file the said application was admittedly satisfied if this consent was valid.

A preliminary objection, that the consent had to be by the member personally and not by the GPA holder, was raised. In proceedings before the High Court, R filed an affidavit, *inter alia*, clarifying that she had authorised her father to act on her behalf in the matter. The Company Judge and the Division Judge, however, sustained the objection. Hence this appeal.

Allowing the appeal,

HELD (*By the Court*) : 1. The consent given by the GPA holder on behalf of the member constitutes a valid consent, in view of the facts and circumstances of the present case. [394-F]

Per Jeevan Reddy, J.

2. Section 399 of the Companies Act, 1956 or sub-section (3) thereof does not either expressly or by necessary implication indicate that the consent to be accorded thereunder should be given by the member personally. [390-G]

A 3. Section 399(3) is no exception to the normal rule of agency. The normal rule is that whatever a person can do himself, he can do it through his agent, except certain functions which may be personal in nature or otherwise do not admit of such delegation. The consent contemplated by Section 399(3) falls under the general rule and not under the exception.

[391-C]

B 4. Rule 88 of the Companies (Court) Rules 1959 does not in any manner indicate that the consent should be given by the member personally. It only requires that the letters of consent signed by the consenting members shall be annexed to the petition alongwith their names and addresses and other prescribed particulars. [392-B]

C *Killick Nixon Ltd.v. Bank of India*, (1985) 57 Com Cas 831, approved.

Makhan Lal Jain v. Amrit Banaspati Co. Ltd., AIR (1953) All 326, *Charanjit Lal Chowdhury v. Union of India*, AIR (1951) SC 41 and *R. Subba Rao v. CIT, Madras*, AIR ((1956) SC 604, distinguished.

D 5. The preliminary objection to the maintainability of the application filed under Section 397/398 is unsustainable in law. [394-F]

Per Hansaria, J. (*concurring*) :

E 6. The respondent may be correct on the legal question under consideration. But, in view of the affidavit filed by the member clarifying that she had authorised her father to act on her behalf in the matter at hand, the application under Section 397/398 of the Companies Act 1956, as filed in the court, ought to be taken as one to which she had consented.

[pp. 394-H; 395-A]

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1899 of 1981.

From the Judgment and Order dated 27.2.81 of the Orissa High Court in A.H.O. No. 14 of 1980.

G Vinod Bhagat for the Appellant.

G.S. Srinivasa Rao for the Respondent.

The Judgment of the Court were delivered by

H B.P. JEEVAN REDDY, J. An application under sections 397/398 of

the Companies Act, 1956 can be filed *inter alia* by "any member of members holding not less than one-tenth of the issued share capital of the Company" - vide clause (a) of sub-section (1) of section 399. Sub-section (3) of section 399 says that among the members of the Company entitled to make an application by virtue of sub-section (1) "any one or more of them having obtained the consent in writing of the rest may make the application on behalf and for the benefit of all of them".

The three appellants in this appeal are the share-holders of the first respondent-company, Jeypore Sugar Company Limited. The Respondents are its Directors. The first appellant's daughter Smt. V. Rajeshwari also holds certain shares in the first respondent-company. She is married and has been residing in U.S.A. since 1973. Before leaving for the U.S.A., she executed a General Power of Attorney (G.P.A.) in favour of her father, the first appellant herein, on 29th November, 1973.

On October 25, 1978, the three appellants herein filed an application under sections 397/398 in the High Court of Orissa. To comply with the requirement of one-tenth share-holding, the first appellant gave consent in writing for and on behalf of Smt. Rajeshwari as her G.P.A. holder. If the share-holding of Rajeshwari is taken into account and she is deemed to have consented to the filing of the said application, the requirements of section 399 are admittedly satisfied. The precise question in this appeal is whether the consent given by her G.P.A. holder for and on her behalf - and not by her personally - is a valid consent within the meaning of sub-section (3) of section 399

As soon as the application under sections 397/398 was filed by the appellants, some of the respondents raised a preliminary objection to the maintainability of the application on the ground that it does not comply with the requirement of section 399 inasmuch as the consent given by the first appellant on behalf of and as the attorney of Smt. Rajeshwari, and not by herself personally, cannot be treated as 'consent' within the meaning of section 399 (3). Both the Company Judge, and on appeal the Division Bench of the Orissa High Court, upheld the said objection and dismissed the application on the said preliminary ground alone.

For a proper appreciation of the question arising herein, it would be appropriate to read section 399 of the Companies Act here :

A "Section 399. Right to apply under sections 397 and 398. - (1)
The following members of a company shall have the right to apply
under section 397 or 398 :

B (a) in the case of a company having a share capital, not less
than one hundred members of the company or not less than
one-tenth of the total number of its members, whichever is less or
any member or members holding not less than one-tenth of the
issued share capital of the company, provided that the applicant
or applicants have paid all calls and other sums due on their shares;

C (b) in the case of a company not having a share capital, not
less than one-fifth of the total number of its members.

(2) For the purposes of sub-section (1), where any share or
shares are held by two or more persons jointly, they shall be
counted only as one member.

D (3) Where any members of a company are entitled to make an
application in virtue of sub-section (1), any one or more of them
having obtained the consent in writing of the rest, may make the
applications on behalf and for the benefit of all of them."

E (Sub-sections (4) and (5) are omitted as unnecessary.)

The relevant clauses of the General Power of Attorney executed by
Smt. Rajeshwari in favour of the first appellant may also be noted:

F "4. To sell, convert, collect, get in, or manage or collect or
otherwise administer any property movable or immovable which
may be vested in me alone or join with others.

G 10. To take, prosecute, or defend, all legal proceedings touch-
ing any of my matters in which I am or may here-after interested
or concerned and also if thought fit to compromise, refer to
arbitration withdraw or confess judgment or in any such proceed-
ings.

H 12. To vote at the Meetings of the Company or Companies and
otherwise to act as my proxy or representative in respect of any
shares or stock or debentures which may hereafter, be acquired

by me and for that purpose to sign and execute and proxies or other instruments in my name and on my behalf. A

13. To appear and act in all the Courts, in the Registration office and in any Offices of the Government, District, Board, Municipality or any local authority, on my behalf. B

14. To sign, all the papers to be filed into, Courts or offices on my behalf and to receive the moneys or other properties from Courts or other offices on my behalf.

15. Generally to act my attorney or Agent in relation to the matters aforesaid and all other matters in which I may be interested or concerned and on my behalf to execute or do all deeds, acts or things as fully and effectively in all respects as I myself do it if I personally present." C

A reading of the several clause of the G.P.A. discloses *ex-facie* that the powers given thereunder are wide enough to take in the power to grant the consent under section 399 (3). Under the said deed, Smt. Rajeshwari empowered her father to manage and otherwise administer her movable and immovable properties including shares and stock as may be held by her and to take all proceedings before all the authorities and Courts concerning the said properties and shares. The deed also empowered him to sign all necessary papers relevant in that behalf and to file them in courts and generally to do all things as may be necessary to safeguard her interest. It is obvious that in pursuance of the said deed, it would have been perfectly legitimate for the first appellatant to institute suits, petitions and other proceedings with respect to the shares or other movable and immovable properties held by Smt. Rajeshwari. Indeed it would well have been within the power of the G.P.A. holder to have himself figured as an applicant, acting in the name of Smt. Rajeshwari, in the said application filed under sections 397/398. If so, there appears no reason why the consent could not have been given by the Power of Attorney holder which is only a step towards protecting the interest of Rajeshwari. It in effect means joining the filing of the application under section 397/398. May be that there are some functions/duties which cannot be performed through a Power of Attorney Agent (e.g., quasi-judicial/judicial functions) but there appears to be no good reason why the consent contemplated by section D E F G H

A 399 (3) cannot be given by such Power of Attorney-holder, when indeed he could himself have filed such an application in the name of and on behalf of Smt. Rajeshwari. In this connection we may notice yet another fact. With a view to counter-act the objection taken by the respondents, the appellants filed an affidavit of Smt. Rajeshwari wherein she affirmed that on her recent visit to India she was apprised by her father of the affairs of the first respondent-company and of the proposal to file an application against the first respondent-company and its management alleging oppression and mismanagement. She affirmed that she had authorised her father to act on her behalf as her G.P.A. in that behalf and to take all such steps as he deemed proper to protect her interest.

C
The Company Judge and the Division Bench have, however, taken the view that the consent to be granted by a member of the Company under section 399 (3) must be a conscious decision of the member himself/herself. They opined that the member must personally apply his mind to the advisability of granting consent and then grant it. In this view of the matter, they held, the G.P.A.-holder is not competent to grant the consent. Mr. Sibal, the learned counsel appearing for the respondents, supported the said reasoning. He submitted that the right or power to grant consent under section 399 (3) is a personal right which cannot be delegated to or exercised by an agent. They very filing of an application under sections 397/398 has serious repercussions on the reputation and credit-worthiness of the company. It must therefore be insisted that the decision to grant consent must be a personal decision of the member and not a decision of his agent. Mr. Sibal further submitted that this is not even a case where the Power of Attorney expressly authorised the agent to grant consent under section 399 (3). The deed in question is merely a General Power of Attorney and that is not enough.

G
We are unable to agree with the said reasoning. Section 399 or sub-section (3) thereof does not either expressly or by necessary implication indicate that the consent to be accorded thereunder should be given by the member personally. As we have emphasised hereinabove, the first appellant could have filed, or joined as an applicant in an application under sections 397/398 in the name of and for and on behalf of Smt. Rajeshwari as her G.P.A. holder. No question of 'consent' would have and could have arisen in such a case. If so, it is un-understandable as to why and how he

could not have given consent on behalf of Smt. Rajeshwari, the member, under section 399 (3). No rule or decision could be brought to our notice saying that the consent under section 399 (3) cannot be given by a G.P.A.-holder (who is empowered by the principal to manage and administer the shares and stocks held by the principal and to take all necessary steps and proceedings in all Courts, Offices and Tribunals in that behalf). In this connection, it is relevant to notice that shares may also be held by a company or other corporate body. Question may arise what does one mean by a personal decision by a company or other juristic person. Be that as it may, we see no warrant for holding that section 399 (3) is an exception to the normal rule of agency. The normal rule is that whatever a person can do himself, he can do it through his agent, except certain functions which may be personal in nature or otherwise do not admit of such delegation. The consent contemplated by section 399 (3) falls under the general rule and not under the exception.

Mr. Sibal brought to our notice Rule 88 of the Companies (Court) Rules, 1959 which reads:

"88. Petition under section 397 or 398. - (1) Where a petition is presented under section 397 or 398 on behalf of any members of a company entitled to apply under section 399 (1), by any one or more of them, the letters of consent signed by the rest of the members so entitled authorising the petitioner or petitioners to present the petition on their behalf, shall be annexed to the petition, and the names and addresses of all the members on whose behalf the petition is presented shall be set out in a schedule to the petition and where the company has a share capital, the petition shall state whether the petitioners have paid all calls and other sums due on their respective shares. Where the petition is presented by any member or members authorised by the Central Government under section 399 (4) the order of the Central Government authorising such member or members to present the petition shall be similarly annexed to the petition. A petition under section 397 shall be in Form No. 43, and a petition under section 398 shall be in Form No. 44.

(2) A petition under section 397 or 398 shall not be withdrawn without leave of the Court, and where the petition has been

A presented by a member or members authorised by the Central Government under sub-section (4) of section 399, notice of the application for leave to withdraw shall be given to the Central Government."

B What the Rule says is that the letters of consent signed by the consenting members shall be annexed to the petition alongwith their names and addresses and other prescribed particulars. The Rule does not in any manner indicate that the consent should be given by the member personally.

C Mr. Vinoo Bhagat, learned counsel for the appellant invited our attention to a decision of the Division Bench of the Bombay High Court in *Killick Nixon Limited and Others v. Bank of India and Others*, (1985) 57 Company Cases 831. In this case it is held that the General Power of Attorney-holder empowered to grant consent under section 399 (3). The
D General Power of Attorney concerned therein is substantially in the same terms as the one concerned herein. We agree with the said decision.

Mr. Sibal brought to our notice a few decisions to which we may advert now. A learned single Judge of Allahabad High Court held in
E *Makhan Lal Jain and another v. The Amrit Banaspati Co. Ltd. and others*, A.I.R. (1953) Allahabad 326 that the consent in writing contemplated by section 153 (C) (3) of Companies Act, 1913 requires that the writing itself should indicate that the members have affixed their signatures, having applied their mind to the question before them and have consented for the
F action being taken. (Section 153 (c) (3) of the Companies Act, 1913, considered in the said decision broadly corresponds to section 399 (3). Looking at the sheets of papers allegedly constituting the consent of the consenting members, the learned Judge held that having regard to their contents, they cannot be treated as consent letters. Learned Judge held that the writing itself should indicate that the person has applied his mind
G to the question before him and has given his consent and that where a petitioner obtained another shareholder's signature on a blank piece of paper and sought to supplement it by an affidavit or an oral sworn statement of the member himself or his agent cannot be said to have complied with the requirements of the section. Nowhere does the decision
H say that such consent must be given by the member personally and that it

cannot be given through his agent.

Mr. Sibal relied upon the decision of this Court in *Charanjit Lal Chowdhury v. The Union of India and others*, A.I.R. (1951) SC 41 and in particular the statement in para 78 at page 62. In the said paragraph, this Court considered the question whether the shares held by a person can be said to be 'property' within the meaning of Articles 31 (2) and 19 (1) (f) and whether acquisition of the company by the Government amounts to acquisition of the shares of the shareholders. The petitioner contended that it does. Repelling the said contention, S.R. Das, J. observed:

"These rights, as already stated, are, no doubt, privileges incidental to the ownership of the share which itself is property, but it cannot, in my opinion, be said that these rights, by themselves, and apart from the share are, " property" within the meaning of those articles, for those articles only regard that as "property" which can by itself be acquired, disposed of or taken possession of. The right to vote for the election of directors, the right to pass resolutions and the right to present a petition for winding up are personal rights flowing from the ownership of the share and cannot by themselves and apart from the share be acquired or disposed of or taken possession of as contemplated by those articles. The second question is assuming that these rights are by themselves "property", what is the effect of the Ordinance and the Act on such "property". It is nobody's case that the Ordinance or the Act has authorised any acquisition by the State of this "property" of the shareholder or that there has in fact been any such acquisition. The only question then is whether this "property" of the shareholder meaning thereby only the rights mentioned above, has been taken possession of by the State. It will be noticed that by the Ordinance or the Act these particular rights of the shareholder have not been entirely taken away, for he can still exercise these rights subject, of course, to the sanction of the Government. Assuming however, that the letters placed on these rights are tantamount to the taking away of the rights altogether, there is nothing to indicate that the Ordinance or the Act has, after taking away the rights from the shareholder, vested them in the State or in any other person named by it so as to enable the State or any other person to exercise those rights of the shareholder".

- A The observations to the effect that the right to present an application of winding up and the right to vote for the election of Directors are the personal rights of shareholders must be understood in the context of the question considered therein. The observations cannot be torn from their context to hold that the said right cannot be exercised through an agent.
- B That was not the issue before the Court. Mr. Sibal also brought to our notice the decision of this Court in *R. Subba Rao v. Commissioner of income-tax, Madras*, A.I.R. (1956) S.C. 604. The matter arose under section 26 (A) of the Indian Income Tax Act, 1922 read with Rules 2 and 6 of the Rule framed in that behalf. The Rules provided that an application for renewal of registration of the firm " shall be signed *personally* by all the partners". It is because of the said requirement that it was held that partners must sign such an application personally. In the absence of any such expression in Section 399 (3), the said decision is of no help to the respondents herein.
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- D Mr. Sibal lastly contended that the petition was filed as far back as in 1978 and that over the years, certain Directors have ceased to be directors by death or otherwise and that some new directors have come into Office. An affidavit was handed over across the bar stating that some of the directors have expired. The affidavit, however, does not say that any
- E new directors have come into office or that in their absence the present appeal is not maintainable. We need not, therefore, express any opinion on this contention.

- F For the above reasons, the appeal is allowed and the orders of the learned Company Judge and the Division Bench impugned herein are set aside. The consent given by the first appellant for and on behalf of Smt. V. Rajeshwari, as her G.P.A. holder, is a valid consent within the meaning of sections 399 (3) and, therefore, the preliminary objection to the maintainability of the application filed under section 397/398 is unsustainable in law. The application may be proceeded with in accordance with law expeditiously, in view of the fact that about fifteen years have been spent on a preliminary objection alone. No orders as to costs.
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- H **HANSARIA, J.** I am in respectful agreement with my learned brother in the conclusion arrived at by him. Though it may be that on the legal question under consideration the contention of Shri Sibal is correct for the

reasons advanced by him, as Smt. Rajeshwari made her position clear in the affidavit filed in the High Court, to which brother Jeevan Reddy has adverted to, I do think she had authorised her father to act on her behalf in the matter at hand, and the application under section 397/398 of the Companies Act, 1956, as filed in the Court, ought to be taken as one to which she had consented. A

U.R.

Appeal Allowed.