

(2004) 10 CAL CK 0015
In the Calcutta High Court
Case No : A.P.O. No. 235 of 2004

Aska Investments Pvt. Ltd. and Another	APPELLANT
Vs	
Grob Tea Company Ltd. and Others	RESPONDENT

Date of Decision : 15-10-2004

Acts Referred:

Companies Act, 1956 — Section 111A(3), 397, 398
Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 — Regulation 10, 2, 7
Securities and Exchange Board of India Act, 1992 — Section 15A, 15J

Citation : (2005) 2 CALLT 186 : (2005) 1 CHN 659 : 109 CWN 1 : (2005) 61 SCL 134

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Advocate : P.C. Sen, Siddhartha Mitra and Rajratna Sen, for the Appellant; Sudipta Sarkar, S.N. Mukherjee, Sanjib Banerjee, Ratnanko Banerjee, B.N. Surana and Arvind Jhunjunwala, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—The moot question involved in this appeal is whether the Take Over Code contemplates identical consequences in case of breach of Chapter II or Chapter III under Regulation 97.

2. Appellants held 14.12% shares in the company. The company in its meeting of the shareholders wanted to bring in an unaccounted sum as liability towards the company. Being aggrieved by that the present proceeding under sections 397 and 398 was filed by the appellants. The said sums surfaced when there was raid by the Income Tax Authorities on 6th August, 1998. The Income Tax Authorities found hidden income of Rs. 1 crore and directed payment of tax of Rs. 66.28 lac. The company had to pay the said sum. The management attempted to bring that liability in the accounts of the company to the detriment of the company and its shareholders. During the pendency of the Section 397 proceeding the respondents made an application u/s 111A(3) of the Companies Act, 1956 for rectification of its Shareholder Register by deleting the names of the appellants

as according to them such transfer was in violation of the Take Over Code. In Section 397 proceeding the management contended that since the very acquisition of shares was unlawful the proceeding under sections 397 and 398 was not maintainable. Company Law Board heard both the proceedings and by a common order allowed rectification and dismissed Section 397 proceeding. Hence this appeal.

3. The Company Law Board while allowing rectification relied on their own judgment in the case of Bombay Dyeing, reported in 2002, Vol-I, Company Law Journal at page 347. According to the Board under Regulation 7 shares acquired beyond 5% would be invalid without compliance of the provision of the said regulation and Shareholder Register required rectification u/s 111A(3).

4. The Company Law Board also considered two Single Bench decisions, one unreported decision of this Court in the case of Bombay Dyeing Ltd. and other of the Hon'ble Andhra Pradesh High Court in the matter of Nile Limited, reported in 108, Company Cases, Page 58. The Company Law Board also considered the judgment of Security Appellate Tribunal in the case of Bombay Dyeing, reported in 2002, Vol-III, Company Law Journal page 179. The Company Law Board while rectifying the Shareholder Register observed that the subject shares stood forfeited as the acquisition was illegal.

5. Mr. P. C. Sen, learned Counsel appearing for the appellants contended that Chapter II of the Take Over Code puts a mandate on the acquirer to inform the appropriate authority, for non-compliance the penalty was provided for whereas Chapter III restrains acquisition of more 15% of shares. According to Mr. Sen Chapter II provides for certain obligation, non-compliance cannot attract forfeiture of the shares whereas under Chapter III acquisition of more than 15% was prohibited and thus illegal. The Company Law Board according to Mr. P.C. Sen misconstrued these two chapters by holding that the Chapter II also contemplates forfeiture of shares. Mr. Sen heavily relied upon the judgment in the case of Nile Limited with regard to the construction of the relevant regulations. According to him that was the correct law that should govern the instant issue. Commenting on the unreported decision of this Court Mr. Sen contended that the unreported decision relied upon, was pronounced by the learned Single Judge of this Court in a writ proceeding where a show cause notice was challenged. According to him the writ petitioner in the said case also challenged the validity of Regulation 7 which the learned Single Judge declined.

6. Mr. Sen also assisted me in having his version on the interpretation of the relevant regulations which I would discuss hereinafter.

7. Mr. Sudipta Sarkar, learned Counsel appearing for the respondents contended that Section 111A(3) empowers the company to apply for rectification in case of any violation irrespective of Chapter II or Chapter III. Mr. Sarkar also contended that Security Appellate Tribunal is a specialized body having expertise and the direction of the said Tribunal in the case of Mega Resources (supra) should be

taken into consideration by this Court. Mr. Sarkar, however, in his usual fairness did not seriously support forfeiture of shares by the Company Law Board.

8. The Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "SEBI ACT") was enunciated to control inter alia stock markets to protect the interest of the investors in securities and to promote the development of and to regulate the securities market. Under the said Act Section 15A provides for penalty for failure to furnish information in terms of the said Act and/or regulations made thereunder. In terms of Section 15A the penalty has been provided for disclosure of acquisition of shares by making public announcement whereas Section 15J provides for adjudication of the penalty. A comprehensive procedure has been laid down in the said Act with regard to the trial of the said offences as well as appeal to be made thereunder.

9. In terms of the said SEBI Act, Take Over Code called as SEBI Regulation, 1997 came into operation in 1997. Regulations 2(i)(b) and (e), 7 and 10 being relevant herein are quoted below :

"2(i)(b) "acquirer" means any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company; or acquire or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer;

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2(i)(e) "person acting in concert" comprises,-

(1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company,

(2) without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established:

(i) a company, its holding company, or subsidiary of such company or company under the same management either individually or together with each other;

(ii) a company with any of its directors, or any person entrusted with the management of the funds of the company;

(iii) directors of companies referred to in Sub-clause (i) of clause (2) and their associates;

(iv) mutual fund with sponsor or trustee or asset management company;

(v) foreign institutional investors with sub-account(s);

(vi) merchant bankers with their client(s) as acquirer; (vii) portfolio managers with their client(s) as acquirer; (viii) venture capital funds with sponsors;

(ix) banks with financial advisers, stock brokers of the acquirer of any company which is a holding company, subsidiary or relative of the acquirer:

Provided that Sub-clause(ix) shall not apply to a bank whose sole relationship with the acquirer or with any company, which is a holding company or a subsidiary of the acquirer or with a relative of the acquirer, is by way of providing normal commercial banking services or such activities in connection with the offer such as confirming availability of funds, handling acceptances and other registration work;

(x) any investment company with any person who has an interest as director, fund manager, trustee, or as a shareholder having not less than 2% of the paid up capital of that company or with any other investment company in which such person or his associate holds not less than 2% of the paid up capital of the latter company.

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7. Acquisition of 5% and more shares or voting rights of a company.-

(1) Any acquirer who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent shares or voting rights in a company, in any manner whatsoever shall disclose the aggregate of his shareholding or voting rights in that company, to the company.

(2) The disclosures mentioned in Sub-regulation(1) shall be made within four working days of-

(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights as the case may be.

(3) Every company, whose shares are acquired in a manner referred to in Sub-regulation (1), shall disclose to all the stock exchanges on which the shares of the said company are listed the aggregate number of shares held by each of such persons referred above within seven days of receipt of information under Sub-regulation(1).

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10. Acquisition of 15% or more of the shares or voting rights of any company.-No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares

of such company in according with the Regulations."

10. Regulation 2(i)(b) provides that an acquirer means any person who directly or indirectly acquires or agrees to acquire control over the company either by himself or with any person "acting in concert".

11. Regulation 2(i)(e) provides that person "acting in concert" means person having a common objective to have subsequent acquisition in the company to gain control.

12. Chapter II deals with the disclosure of shareholding and control in a listed company.

13. Regulation 7 under Chapter II obligates the acquirer to disclose his aggregate shareholding if it exceeds 5%.

14. Chapter III deals with "subsequent acquisition" over a listed company. Regulation 10 provides that no acquirer shall acquire more than 15% either by him or by persons "acting in concert" without making a public announcement to such extent.

15. Section 111A(3) empowers the company to apply for rectification of the Shareholder Register in case of acquisition of any share in violation of SEBI regulation.

16. Precedents on the Subject:

(1) 2001(4) Comp LJ 115 (Bombay Dyeing & Manufacturing Co. Ltd. v. Arun Kumar Bajoria and Ors.)

(2) 2002 (1) Comp LJ 347 (Mega Resources and Ors. v. Bombay Dyeing & Manufacturing Co. Ltd. and Ors.)

(3) 2001(3) Comp LJ 179 (Mega Resources Ltd. v. Securities & Exchange Board of India)

(4) Comp Cas 58, (Karamsad Investment Ltd. and Ors. v. Nile Ltd. and Ors.)

(5) Comp Cas 913, (Shirish Finance Investment Pvt. Ltd. v. M. Sreenivasulu Reddy and Ors.)

(6) Unreported decision in the case of Arun Kumar Bajoria v. SEBI (W.P. No. 331 of 2001) dated 27th March, 2001.

17. Summary of the Decisions:

(1) 2001(4), Company Law Journal, Page 115 (Bombay Dyeing); The Company Law Board considered Regulation 7. The Company Law Board held that as per Regulation 7 "an acquirer shall disclose" is a mandatory provision, non-compliance of the same would attract rectification of Shareholders Register in terms of Section 111A(3). The Company Law Board also observed that those acquisition in violation of Regulation 7 was invalid. However, since in the said

case the holding was brought down below 5% no order was passed to the said effect.

(2) 2002 (1) Comp LJ 347 (Mega Resources v. Bombay Dyeing) : Here also the Company Law Board took a similar view.

2001 (3) Comp LJ 179 (Mega Resources Ltd. v. SEBI): Here also Security Appellate Tribunal held that the shares acquired in violation of Regulation 7 mandated the acquirer to make the disclosure and as such the penalty was liable to be imposed as provided in law.

(4) Comp Cas 58 (Nile Limited): The Single Bench of the Andhra Pradesh High Court held that there is clear distinction between Regulation 7 and Regulation 10, Regulation 7 obligates the acquirer to intimate the same to the company whereas Regulation 10 restrains acquisition beyond 15%. By this well versed judgment Chelameswar-J speaking for the Andhra Pradesh High Court made a clear distinction between Chapter II and Chapter III in the said case. The Company Law Board in the said case took a consistent view which was set aside by His Lordship and the matter was remanded back to the Company Law Board to dispose of the same on the basis of the observation made by His Lordship. His Lordship clearly held, "Even then the legality of the acquisition is not affected but if the violation is established, it might expose the case to penalties under Regulation 45."

(5) Comp.Cas 913 (Shirish Finance & Investment Company Pvt. Ltd.) : The Division Bench of the Bombay High Court in this elaborate judgment analysed the entire Act and the regulation specially the meaning of the word "acquirer" as well as "person acting in concert". In the said case a civil suit was also filed challenging the acquisition of shares and also for rectification of the Shareholders Register. Their Lordships ultimately held that the suit was maintainable. Their Lordships also held that the respondents were acting in concert and their acquisition was void.

(6) Unreported decision in the case of Arun Kumar Bajoria v. SEBI (W.P. No. 331 of 2001) dated 27th March, 2001: In this case learned Single Judge of this Court adjudicated the controversy raised in the said writ proceeding by the petitioner challenging a show cause notice issued under the Take Over Code. While doing so His Lordship not only considered the facts involved in the said case but also interpreted the relevant provisions of the statute as well as the regulation. His Lordship ultimately came to a finding that the show cause notice was validly given and dismissed the writ proceeding. An appeal from the said order is still pending before the Division Bench as I am told by the learned Counsel appearing for the parties. His Lordship while interpreting the Regulation 7 came to a conclusion that the provision of the Regulation 7 was mandatory. His Lordship, however, observed that "acquirer" in Regulation 7 also includes "persons acting in concert".

MY VIEW:

18. On a composite reading of the aforesaid decisions I am of the view that the Company Law Board was having a consistent approach by holding that the non-compliance of Regulation 7 would attract forfeiture. Although the same was not clearly spelt out by SEBI Appellate Tribunal or by the Division Bench of the Bombay High Court the inner meaning of the said decision would result in the same view. Learned Single Judge of this Court in the unreported decision (*supra*) although not clearly spelt out, came to an identical conclusion which could be inferred from the said decision.

19. On the other hand the Single Bench decision of the Andhra Pradesh High Court is clear and unambiguous. His Lordship was specific on the identical issue and held that forfeiture was not contemplated. His Lordship's view is absolutely correct in my view and I respectfully beg to differ with the other decisions referred to above. With due respect to His Lordship in the Single Bench decision of this Court I am in total disagreement with the view where His Lordship held that the Regulation 7 would include "persons acting in concert". However, the same may not be relevant herein and I do not feel it necessary to refer the said issue to a Larger Bench for a decision as I feel that the present issue can be resolved without going into detail as to what has been held by His Lordship on the meaning of Regulation 7.

20. On a plain reading of Regulation 7 it would appear that the regulation clearly stipulates "acquirer" whereas Regulation 10 under Chapter III includes specifically "persons acting in concert". In my view, two chapters are having totally independent approach. Chapter II obligates the persons to inform and suffer penalty because of non-compliance. Chapter - III puts a complete restriction on acquisition. In my view, in the later situation the acquisition itself is wrongful and is ipso facto invalid and null and void whereas Chapter II provides for penalty only. In case of violation of Chapter II or Chapter III, Section 111A(3) empowers the company to apply for rectification. In both the cases the Company Law Board is entitled to properly direct the parties so that the mischief is undone. As in the case of Mega Resources the share ratio was brought down during the pendency of the litigation and as such Company Law Board did not issue any further direction. I am unable to conceive of a situation as to how and under what circumstances the Company Law Board could direct forfeiture of the entire shareholding. Even if I hold that there had been violation of Regulation 7 even then it would be absolutely improper for me to sustain order of forfeiture. In course of submission Mr. Sarkar appearing for the company in his usual fairness contended that the appellants were free to dispose of their shares in the market to bring down the mischief mark under Regulation 7. The Company Law Board could have directed so. Instead they ordered forfeiture of the shares and directed deletion of their names from the Shareholder Register resulting in loss of money for acquisition which was never contemplated in Chapter II or in Regulation 7 specifically.

CONCLUSION:

21. In the result the appeal succeeds. The order of forfeiture as directed by the Company Law Board is set aside.

22. Question now comes as to what further relief the parties would be entitled to and what order this Court should pass to bring to an end the act complained of.

23. On the date of presentation of Section 397 proceeding rightly or wrongly the appellants were having 14% shares approximately. Since I have just now held that the forfeiture was bad, on the date of presentation of the petition the appellants were having more than 10% shareholding and as such the Section 397 proceeding was maintainable as on that date and the order of the Board to that extent is also set aside.

24. During the pendency of the appeal the appellants filed an interim application which is also pending and awaiting its disposal. In the said application it was contended that the company was divesting of its assets. The company was having a substantial shareholding in another company called Octovious Tea. The same was being divested. The tea estate belonging to the company was also being divested as appears from the notice issued by the Board of Directors. The respondents contended that because of the death of the promoter of the company the present management decided to divest of the said assets by observing regular formalities required in law.

25. I am also told that as on the date of presentation of Section 397 proceeding the value of the share was Rs. 73.40. However, presently the value of the shares have gone down subsequently. The respondent contended that although actual value of the share as on the date of presentation of Section 397 proceeding was much less the value of the shares was artificially hiked up at the instance of the appellants.

DIRECTIONS:

26. In this backdrop, I feel interest of justice would be subserved if I direct the company to buy back the shares of the appellants @ Rs. 73.40 per share being the value as on the date of presentation of Section 397 proceeding. The appellants are also directed to sell their shares at the said value.

27. In the case the appellants do not want to sell their shares in the company, the company would be free to delete their names from the Shareholder Register after depositing the value of those shares at the aforesaid rate in any nationalized bank earmarked for payment to the appellants. The company would also be entitled to proceed to dispose of their assets as they were contemplating in accordance with law without taking the appellants in confidence.

28. The company is directed to offer the price of the shares within a period of fortnight from date. The appellants would also be at liberty to tender their shares simultaneously on receipt of payment. Needless to say, at the time of handing over of all those shares the appellant would execute necessary transfer deeds and would comply with all formalities required in law for transfer of this shares in

favour of the company and/or their nominee or nominees. Interim order of injunction already passed by this Court would, however, continue for a period fortnight after long puja vacation so that the share transfer could be effected in between.

29. APO No. 235 of 2004 is disposed of accordingly. ACO No. 111 of 2004 is also disposed of accordingly.

30. There would be, however, no order as to costs.

31. Urgent xerox certified copy would be given to the parties, if applied for.