

(2005) 07 DEL CK 0015
In the Delhi High Court
Case No : CP 369 and 370 of 2003

Basant Mishra

APPELLANT

Vs

Frost Falcon Distilleries Ltd. and Iceberg Industries Ltd.

RESPONDENT

Date of Decision : 04-07-2005

Acts Referred:

Companies Act, 1956 — Section 406, 420, 434
Foreign Exchange Management Act, 1999 — Section 2
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2005) 07 DEL CK 0015

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : S. Vaidialingam and Trideep Pais, for the Appellant; Man Mohan and Rakhi Ray, for the Respondent

Judgement

A.K. Sikri, J.—In these petitions, the petitioner had given a sum of Rs. 1,00,00,000/- to the respondent in CP No. 369/2003 and Rs. 1,01,00,000/- to the respondent in CP No. 370/2003. Both the respondent companies are sister concern and the petitioner is the same. The circumstances in which the transactions took place are also identical. Therefore, both the petitions were heard together and are disposed of by this common judgment. For the sake convenience, facts in the case of CP No. 370/2003 are noted.

2. The case of the petitioner is that it had given a sum of Rs. 1,01,00,000/- to the respondent company (hereinafter referred to as 'the company') vide cheque No. 416660 dated 8th August, 2002 drawn on Deutsche Bank, Mumbai. Although initially the company had proposed to issue shares for this amount, however, after encashing the cheque, the company treated it as a loan and agreed to repay the same within one month. For refunding the amount two cheques in the sum of Rs. 50 lacs each were issued by the company in favor of the petitioner which were dated 9th May and 18th May, 2003. On presentation these cheques were returned dishonoured with the remarks 'account closed'. The petitioner, Therefore, claims that the aforesaid debt is payable by the company to the

petitioner which has not been paid even statutory notice dated 11th August, 2003 u/s 434 of the Companies Act, 1956 (for short 'the Act') was sent to the company and that notice was returned with the endorsement 'refused' and thus present petition is filed for winding up of the company. The petitioner, because of the dishonour of the aforesaid cheques given by the company, had earlier issued notice u/s 138 of the Negotiable Instruments Act as well and thereafter filed complaint under u/s 138 of the Negotiable Instruments Act which is pending before the court of the Judicial Magistrate.

3. The defense of the company, on the other hand, is that the money in question was given by the petitioner to the company for allotment of shares and those shares have even been allotted to the petitioner. In support of this submission, the company has annexed, along with the reply, various documents and it is sought to argue that the transaction in question was one for allotment of shares. It is the case of the company that the petitioner is a non-resident Indian who was looking for business opportunities in India and approached the company through common acquaintances and volunteered to invest in the company and its sister concern M/s Frost Falcon Distilleries Ltd. (money paid to this company is the subject matter of litigation in CP No. 369/2003).

After the receipt of the request for allotment of shares, the company started the process of completing the formalities required for investment by non-resident Indians. Vide letter dated 5th September, 2002 the company forwarded a report for receipt of funds in Indian rupees through NRE towards share application money to the Foreign Investment Division of the Reserve Bank of India (RBI), Central Office, Mumbai. This was returned by the Central Office, Mumbai with advice that it has to be filed with Delhi regional office of the bank and thereafter report with was re-submitted to the Regional office vide letter dated 17th October, 2002. The company also allotted 1,01,000 shares of Rs. 10 each at a premium of Rs. 90 to the petitioner and return of allotment was filed by the company with the Registrar of Companies (ROC) as well. Subsequently as required by the RBI, the company filed another report with the RBI on 4th July, 2003 in Form FC-GPR under para 9 of Schedule-I to the Foreign Exchange Management Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (hereinafter called 'the Regulation 2000'). In so far as giving of the two cheques of Rs. 50 lacs each by the company to the petitioner is concerned, case of the company's that it was altogether separate and independent transaction between the company through one of its directors, namely, Mr.Amit Katyal and the petitioner. It so transpired that the petitioner represented company and its directors that he had very good contacts with Shaw Wallace Group and also showed a letter of intent from the Shaw Wallace Group in favor of the petitioner to the effect that the proposal for allotment of CandF agency to the petitioner was under consideration. The petitioner also represented to the company that in order to finalize the deal with Shaw Wallace he needed to show an investment of minimum of Rs. 8 crores. The petitioner represented to the directors of the company and the group that such an arrangement with Shaw

Wallace would be greatly beneficial to the company and the company group decided to enter into a sort of partnership for the CandF agency of Shaw Wallace. The company, Therefore, issued cheques worth Rs. 3 crores to the petitioner (Rs. 1 crore issued by Frost Falcon, Rs. 1 Crore by the company and Rs. 1 crore by the director Mr.Amit Katyal). The same were not to be used for any other purpose but only to show the bonafide interest and commitment towards investment by the Frost Falcon group in the CandF agency to the Shaw Wallace group. It is further stated that besides the issue of cheques worth Rs. 3 crores to the petitioner, he also availed perquisites from the company to pursue CandF agency with Shaw Wallace. The petitioner availed of a Ford car and also made several trips to Mumbai at the expense of the company to the tune of several lacs. The expenses for even the mobile phone of the petitioner were also borne by the company in the hope that the ultimate efforts would be fruitful and the company would have a partnership in the CandF agency with the petitioner. Till then the company was not doing any business with the Shaw Wallace as it was bottling for some of its rivals. The petitioner, however, kept reassuring the company that all was going well and the deal had been almost finalized. The company has filed a copy of the letter dated 13th September, 2002 issued by the Shaw Wallace to show that the petitioner was taking up the matter with Shaw Wallace in this behalf. Copy of the draft of partnership deed on which terms parties had allegedly agreed to do business in respect of proposed CandF agency being allotted in the name of the petitioner by Shaw Wallace is also filed. It is further stated that the company had also passed a Board Resolution in its meeting held on 6th December, 2002 authorising Mr.Amit Katyal to negotiate and finalize CandF agreement with the petitioner. However, according to the company, the petitioner avoided signing of the deed on pretext or the other and ultimately it transpired from the officers of the Shaw Wallace that there were no talks going on between the petitioner and the Shaw Wallace as alleged by the petitioner. The petitioner was then asked to return the cheques that had been issued for the purpose of showing financial viability of the CandF agency but when after repeated requests the petitioner failed to comply, the payments of the said cheques were stopped by the company. The company even filed FIR No. 127 with the police station at Sonapat, Haryana under Sections 406 and 420 against the petitioner and his associates and the petitioner and his daughter were even remanded to judicial custody and several significant recoveries were made.

4. The core question that falls for consideration is as to whether the amount of Rs. 1,01,00,000/- given by the petitioner to the company was for allotment of shares or was it a loan?

5. Learned counsel for the petitioner tried to negate the proposition regarding allotment of shares as propounded by the company by submitting that there was no application for allotment of shares given by the petitioner. It was also submitted that according to the company, 1,01,100 shares of the face value of Rs. 10/- each were allotted at a premium of Rs. 90/-. This was not the market value of the shares of the company at that time and, Therefore, it was highly

impractical that the petitioner would pay such a huge premium on those shares to the company. He submitted that the balance sheet of the company as on 31st March, 2002 would reveal that the company had accumulated losses of Rs. 411 lacs as on that date and thus the allotment of shares of such a company could not be at a premium of Rs. 90/-. He tried to buttress his submission by citing another example, namely, that within two months after the alleged allotment of shares to the petitioner, the company offered public issue at par i.e. at Rs. 1/-. It was further submitted that for allotment of shares to the NRI, like the petitioner, prior permission of the RBI is required as per the FDI policy. In this regard he referred to Regulation 4 of the Regulation 2000 which mandates that an Indian entity shall not issue any security to a person resident outside India or shall not record in its books any transfer or security from or to such person and proviso to this Regulation stipulates that this can be done only on an application made to the RBI and the RBI may, for sufficient reasons, permit such a transaction subject to such conditions as may be considered necessary. Referring to Section 2(z) of the Foreign Exchange Management Act, 1999 (FEMA), he submitted that the term 'security' includes shares as well. Again, Regulation 5 of the Regulation 2000 prescribes that a person resident outside India may purchase shares or convertible debentures of an Indian company under Foreign Direct Investment Scheme, subject to the terms and conditions specified in Schedule-I. Schedule-I, inter alia, provides for automatic route of Reserve Bank for issue of shares by an Indian company which is not engaged in any activity or in manufacturing of items in Annexure 'A' to the said Schedule. Thus submission was that automatic route was available only to the companies mentioned in Annexure A and the list of activities or items provided in Annexure A did not include the companies doing manufacturing in liquor or liquor trade. Therefore, according to the petitioner, the sum of Rs. 1,01,00,00/- given by the petitioner could not be towards allotment of shares and it was a loan transaction and as the loan has not been refunded, the debt is payable by the company to the petitioner and as the same is not paid in spite of notice u/s 434 of the Act, it be deemed that the company is unable to pay the same.

6. Before analyzing the arguments of the petitioner, it would be necessary, at this stage, to refer to the documents filed by the company in support of its contention that the money given by the petitioner was towards allotment of shares and the shares were in fact allotted.

7. Cheque of Rs. 1,01,00,000/- was given by the petitioner to the company with covering letter dated 8th August, 2002 and in the said letter it was written that the money was given 'towards share application/allotment of shares of Iceberg Industries'. It was also stated that the petitioner be informed if there are any formalities to be completed and/or required by the company in this respect. He also demanded formal receipt of the money given. The company vide letter dated 8th August, 2002 acknowledge the receipt of the amount categorically stating that it was 'towards share application money'. Thereafter, the company addressed the letter dated 5th September, 2002 to the Direct Foreign Investment

Division, Exchange Control Department, RBI, Central Office, Mumbai (duly received on 20th September, 2002 by the addressee as per the stamp) enclosing therewith a report of a receipt of funds in Indian rupees through NRE towards share application money. In this report, particulars of receipt of Rs. 1,01,00,000/- from the petitioner are mentioned. The company has also filed a copy of letter dated 8th October, 2002 written by the Central Officer, RBI to the company returning the said report with "advise to report the receipt of funds towards share application money" to their Delhi Regional Office. The company, thereafter, submitted this report to the Delhi Regional Office of the RBI vide letter dated 17th October, 2002 (duly received in the said office on 18th October, 2002 as per the stamp of the addressee). The return of allotment was also filed with the ROC on 11th June, 2003. The company submitted another report with the RBI, New Delhi on 4th July, 2003 in the Form FC-GPR under para 9 of Schedule-I to the Regulation 2000.

8. The aforesaid documents filed by the company are the contemporaneous documents and the events took place in quick succession after the receipt of money from the petitioner. The RBI was informed immediately on the receipt of the said money that the money from a resident outside India was received and it was specifically stated that the same was for allotment of shares. Return is filed with the ROC also showing that the shares were in fact allotted. Therefore, according to the company, the allotment of shares did take place. It is argued that if the grievance of the petitioner is that the allotment is not proper inasmuch as there is no formal application for allotment of shares, the remedy of the petitioner is to file a civil suit as the dispute in that case would be as to whether the allotment of shares is proper or not. The petitioner, however, cannot contend that the money given was by way of loan to the company and, Therefore, has no right to claim refund thereof alleging it to be a "debt". The contention of learned counsel for the company has merit. While giving the cheque itself, the petitioner described the same as towards share application money. Even the receipt issued by the company to the petitioner, which is not denied by the petitioner, clearly describes the receipt of the money towards allotment of shares. The company has given information to the RBI and ROC treating the receipt of this money as share application money and allotting the shares.

9. As against the aforesaid documents produced by the company, following loopholes can be found in the story put forth by the petitioner alleging that the money was given by way of loan.

(i) In the petition, the petitioner has not disclosed that while giving the money it had stated in his letter dated 8th August, 2002 that the same was towards share application money. The petitioner simply states that though the money was initially given for purchase of shares but after encashment of cheque, it was treated as loan. No document is produced on record to show that after the encashment of the cheques it was treated as loan. On the contrary, correspondence of the company with the RBI been thereafter shows that it was

treated as a share application money.

(ii) If the money was treated as loan, as alleged by the petitioner, it was necessary in a case like this, to have some documents executed as the nature of transaction was going to be changed. The petitioner, in these circumstances, would like to receive interest thereon and, Therefore, would call upon the company to reduce it in writing to set down the terms and conditions of purported loan transaction. Further, the petitioner alleges that the so-called loan was to be returned within 30 days. He would have liked this condition also to be incorporated as to bind the company with this term.

(iii) If the money given vide cheque in August, 2002 was to be treated as loan to be paid back within one month, admittedly it was not given back within one month. There is no letter or correspondence addressed by the petitioner to the company for refund of the money. Two cheques of Rs. 50/- lacs each given by the petitioner to the company, which the petitioner alleges for refund of the loan, are of May, 2003. How the petitioner could sleep for a period of 9 months without making a whisper about the refund of money is something which is not explained.

(iv) The amount given by the petitioner to the company is Rs. 1,01,00,000/-. Why two cheques for a total amount of Rs. 1,00,00,000/- are given? If the petitioner was expecting interest at the rate of 18 per cent per annum why he would not get the interest for intervening period. Even if the intention was to pay back the principal amount why the company would pay Rs. 1,00,00,000/- as against Rs. 1,01,00,000/- by retaining Rs. 1 lac only? If the cheques given by the company of Rs. 1,00,00,000/- were towards refund of amount, the company would have paid the entire amount of Rs. 1,01,00,000/- as it was short by Rs. 1 lac only.

(v) The petitioner has given Rs. 1,01,00,000/- to M/s Iceberg Industries Ltd. (respondent company herein) and Rs. 1,00,00,000/- to M/s Frost Falcon Distilleries Ltd. (another sister concern of the respondent company against which CP No. 369/2003 is filed).

However, the petitioner has been given Rs. 1,00,00,000/- by the company Rs. 1,00,00,000/- by M/s Frost Falcon Distilleries Ltd. and Rs. 1,00,00,000/- by Mr.Amit Katyal. During arguments, the court put a query to both the counsel as to whether any amount wallet to Mr.Amit Katyal by the petitioner? Affidavit dated 21st May, 2005 by Mr.Amit Katyal is filed stating that the petitioner has never loaned any money to him in his personal name by cheque or in cash. On the contrary, the petitioner withdrew various sums of money from his personal account under the guise of expanding for the purpose of obtaining CandF agency of Shaw Wallace. He has stated that in this manner the petitioner withdrew Rs. 11,30,000/- (on various dates) and Rs. 38 lacs from his personal account. Details are given along with the affidavit. On the other hand, the petitioner has filed an affidavit dated 23rd May, 2005 alleging that he had loaned Rs. 95.5 lacs to Mr. Amit Katyal who is the director of both the companies, on various dates.

However, details of Rs. 95.5 lacs are not given. Instead the petitioner has enclosed photocopies of certain cheques issued by Mr.Amit Katyal drawn in favor of `self" and the picture sought to be projected by the petitioner is that these cheques were given by Mr.Katyal to him against the money advanced in cash by the petitioner to Mr. Katyal.

Such a plea cannot be taken at its face value and would definitely require evidence. Fact remains that even if Rs. 95.5 lacs was lent why cheques of Rs. 1,00,00,000/- were issued by Mr.Katyal in favor of the petitioner. Thus, according to the petitioner, he has given Rs. 1,01,00,000/- to M/s Iceberg Industries Ltd., Rs. 1,00,00,000/- to M/s Frost Falcon Distilleries Ltd. and Rs. 95.5 lacs to Mr.Amit Katyal. However, in return he gets identical sum of Rs. 1,00,00,000/- each from the aforesaid three parties and it would require much convincing Explanation from the petitioner than is sought to be given.

10. Under these circumstances, the case put up by the company that a sum of Rs. 1,00,00,000/- (two cheques of Rs. 50 lacs each) were for different transactions altogether would not be a sham defense. Although no evidential value can be attached to the draft partnership deed as it does not bear any signatures of the petitioner, the company produced on record letter dated 13th September, 2002 written by Shaw Wallace to the petitioner which shows that Shaw Wallace was at one stage, agreeable to offer him the business of CandF agency/sales promoter for Mumbai on the terms mentioned in that letter.

11. What is emphasized is that such a matter would require evidence to find out the real nature of the transaction, namely, whether the money was for loan or for allotment of share application?

12. While on the one hand, the petitioner has not been able to give clinching and impeccable proof that the money given was towards loan and not share application, the company on the other hand has been able to show, with the aid of some documents that the money remitted by the petitioner to the company was towards share application money and defense of the company is not moonshine but a probable defense. Merely by contending that there is no proper and valid allotment of shares, the money given would not become loan and debt payable on this ground till it is held that such an allotment is invalid.

13. Therefore, I am not inclined to exercise my discretionary jurisdiction in a matter like this and take extreme step of winding up of the company. These petitions are accordingly dismissed. It is, however, clarified that these observations are tent at give and if any suit is filed by the petitioner against the company for recovery or in any pending proceedings u/s 138 of the Negotiable Instruments Act, the said court (s) shall deal with the matter on the basis of evidence produced without being influenced by the these observations.

14. There shall, however, be no orders as to costs.