
(2015) 04 BOM CK 0134
In the Bombay High Court
Case No : First Appeal No. 158 of 2007

EDC Limited

APPELLANT

Vs

GKB Ophthalmics Ltd. and Others

RESPONDENT

Date of Decision : 06-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Companies Act, 1956 — Section 77, 77A
State Financial Corporations Act, 1951 — Section 29

Citation : (2015) 3 ABR 671 : (2015) 4 BomCR 712 : (2015) 128 CLA 79 :
(2015) 191 CompCas 262

Hon'ble Judges : C.V. Bhadang, J

Bench : Single Bench

Advocate : S.N. Joshi and Sumedha Joshi, for the Appellant; S.M. Singbal,
Advocates for the Respondent

Final Decision : Dismissed

Judgement

C.V. Bhadang, J.—This is an appeal at the instance of the original plaintiff, EDC Limited (formerly known as Economic Development Corporation of Goa, Daman and Diu Limited) challenging the judgment and decree dated 28/03/2007, passed by the learned Civil Judge, Senior Division at Panaji in Special Civil Suit No. 55/2001/B. By the impugned judgment, the suit for recovery of money filed by the appellant, has been dismissed.

2. The brief facts, necessary for the disposal of the appeal, may be stated thus:

That the appellant is a Financial Institution owned by the Government of Goa and Industrial Development Bank of India. The first respondent M/s. GKB Ophthalmics Ltd. is a Public Limited Company incorporated under the Indian Companies Act, 1956 (Old Act). The second and the third respondents are the promoters/directors and shareholders of the first respondent. Sometime in the month of April, 1996, the first respondent had approached the appellant, with a request for equity participation for its project at Thivim, Goa, which involved the

manufacture of Ophthalmic lenses with the use of modern and advance technology. The equity participation request was to the tune of Rs. 17,50,000/-. It appears that there was a policy for promoting such equity participation by the appellant, with a view to promote industrial development in the region. Pursuant to the request, the appellant had subscribed to the equity capital of the first respondent to the extent of Rs. 17,50,000/-, which comprised of 50,000/- equity shares of Rs. 10/- each at a premium of 25 per share. This was subject to the terms and conditions contained in the letter of sanction dated 12/04/1996.

3. The first respondent, apart from, agreeing to the said terms and conditions, had executed an agreement for equity participation on 17/04/1996 (hereinafter referred to as "the Principal Agreement"). The second and third respondents had executed a separate Deed of Guarantee on the same day, for the payment of the entire subscription amount of Rs. 17,50,000/- along with interest and other costs and charges, should it become payable in terms of the Principal Agreement. By yet another document of the even date, the second and third respondents had executed Guarantee Indemnity Agreement (Indemnity Agreement, for short), inter alia, agreeing to indemnify any loss suffered by the appellant along with interest at the rate of 22 % p.a. in the event of sale of the shares.

4. It appears that on the same day i.e. on 17/04/1996, the amount was disbursed and the appellant has been allotted 50,000 equity shares, subject to the terms and conditions as agreed.

5. According to the appellant, vide clause 18 of the Principal Agreement, the first respondent had undertaken, that its Promoter/s shall buy back the said shares in three equal instalments at the end of 3rd, 4th and 5th years respectively from the date of investment as per the formula laid down in clause 16(a)(i) (ii)(iii). It is the material case of the appellant that as per clause 18, first instalment was due on 17/04/1999. Hence, by letter dated 21/09/1999, the second and third respondents were called upon to buy back 16670 shares at a price of Rs. 58.10 per share, calculated as per clause 16 of the Principal Agreement. However, the second and third respondents failed to buy back the same. Therefore, by a letter dated 01/02/2000, the appellant intimated its intention to sell the said 16670 shares to the respondents. However, the respondents did not purchase the same. In such circumstances, the appellant decided to off-load the shares in the market, by issuing an advertisement and calling offers. A similar attempt was made in respect of the second instalment of 16670 shares and on the failure of the second and third respondents to buy back, an attempt was made to off-load the said shares in the market.

6. Thus, according to the appellant, the respondents have defaulted the terms and conditions, as contained in clause 18 of the Principal Agreement, thereby entitling the appellant to recall the amount in terms of clause 20 thereof, along with interest at the rate of 22 % p.a. and other costs/expenses. By a notice dated 20/11/2000, the appellant recalled the entire subscribed amount along with interest and other charges, which was not complied with. In such

circumstances, the appellant filed the suit for recovery of an amount of Rs. 36,75,000/- (comprising of the principal amount of Rs. 17,50,000/- and interest) along with further interest at the rate of 22 % p.a., calculated from 17/04/2001 till the date of payment.

7. The respondents contested the suit by filing separate written statements. It was contended that the suit is barred by limitation. It was also contended that it is premature and without any cause of action. The respondents contended that the Principal Agreement is null and void and is without consideration. Clause pertaining to buy back of shares is void, being opposed to public policy. It was contended by the first respondent that there is no covenant in the agreement which is breached. It was contended that in terms of Principal Agreement, the equity shares have already been allotted and in such circumstances, there being no breach of the terms and conditions, no amount becomes payable to the appellant. It was also contended that the first respondent did not give any undertaking as regards buy back of any of the shares. The first respondent made reference to clause 14 of the Principal Agreement, in order to contend that the amount of equity contribution with interest, was agreed to be repaid only in the event the project was not implemented. In short, it was contended that once, the equity shares were allotted and the project was implemented, there was no breach of the any of the terms of the Principal Agreement.

8. The second respondent, apart from raising similar contentions, raised an additional ground, namely the Deed of Guarantee and the Indemnity Agreement being executed under misrepresentation and fraud practised by the appellant. Insofar as the claim, which is based on clause 18 of the Principal Agreement, is concerned, it was contended that it was null and void and cannot be enforced against the second respondent.

9. The third respondent contended that the Deed of Guarantee dated 17/04/1996 was null and void and unenforceable in law, being against public policy. It was contended that the said respondent was not a party to the Principal Agreement. It was contended that the Indemnity Agreement can be invoked only in the event of any loss being caused to the appellant on the sale of shares. It was contended that the appellant did not make any serious efforts for selling the shares through stock market and in the absence of any loss being demonstrated, no claim would lie on the basis of the Indemnity Agreement. It was contended that the third respondent was an employee of the first respondent and at the relevant time, the Companies Act, 1956 prohibited a Company from buying back its own shares. It was also contended that the third respondent had resigned from the Company with effect from 31/05/1999 and in order to confirm this, had intimated about his resignation to the appellant, by a letter dated 09/08/1999. Thus, he would stand discharged.

10. The appellant examined Shri Dayanand Kanekar (Deputy General Manager) (PW1) and produced certain documents. The second respondent examined himself along with one Prashant Mallya. The third respondent examined himself

in support of his defence. The learned Trial Court framed as many as seven issues, including the issue about limitation, which was answered in favour of the appellant, thereby holding that the suit is within limitation.

The Trial Court also answered the issue Nos. 3, 4 and 5 in the negative and against the respondents. It was, thus, held that the agreement of equity participation, Deed of Guarantee, Indemnity Agreement were not null and void. It was also held that the third respondent had failed to prove that he was discharged from his liability. The learned Trial Court, however, came to the conclusion that the suit is premature and/or without any cause of action and, accordingly, in view of the affirmative finding against the issue No. 7, the suit came to be dismissed.

11. Feeling aggrieved, the original plaintiff is before this Court.

12. I have heard Shri Joshi, learned Counsel for the appellant, Shri Singbal, learned Counsel for the first and second respondents and Shri Bhobe, learned Counsel for the third respondent. With the assistance of the learned Counsel for the parties, I have perused the record and the impugned judgment.

13. It is submitted by Shri Joshi, the learned Counsel for the appellant that the learned Trial Court was in error in holding that the suit was premature and/or without any cause of action. The learned Counsel has taken me through the various agreements executed between the parties, in order to submit that the respondents had failed to abide by the material terms and conditions thereof. It is submitted that although the appellant had offered the shares, calling upon the second and third respondents to buyback the same, the same did not materialise. The appellant, therefore, made an attempt to sell the shares, by inviting offers by publishing an advertisement, which also did not lead to any desired result. It is, therefore, submitted that in view of the breach of the provisions of the agreement and more particularly, clause 18 of the Principal Agreement, the appellant is entitled to an amount of Rs. 17,50,000/- along with interest. It is contended that clause 18 of the Principal Agreement starts with a non-obstante clause and would prevail over the other clauses of the Agreement and the second and third respondents were duty bound to purchase the shares. It is contended that the reliance placed by the Trial Court on clause 14(xi) of the Principal Agreement is clearly misplaced. It is also contended that the finding of the learned Trial Court that the second and third respondents were not parties to the Principal Agreement, is perverse inasmuch as admittedly, the second respondent was a director/promoter of the first respondent and is a signatory to the agreement. It is submitted that the finding of the learned Trial Court that there is no breach of the Principal Agreement, is clearly misplaced and cannot be sustained. It is also submitted that no exception can be taken to the decision of the appellant in attempting to off-load the shares, by inviting offers by publishing an advertisement and not trying to sell the shares through the broker/stock market. It is submitted that if the bulk shares are off-loaded in the stock market, there is a possibility of a substantial decline in the price, as a result of which the

appellant would have sustained loss. The learned Counsel submitted that the appellant acted in public interest in making an attempt to off-load the shares by inviting offers through an advertisement. The learned Counsel has placed reliance in this regard on the decision of the Hon"ble Supreme Court in the case of Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, AIR 1993 SC 935 : AIR 1992 SC 935 : (1993) 78 CompCas 1 : (1992) 2 CompLJ 89 : (1992) 2 JT 326 : (1992) 1 SCALE 388 : (1993) 2 SCC 279 : (1992) 1 SCR 616 . Insofar as the contention regarding prohibition by the Company in buying back the shares is concerned, the learned Counsel submitted that the Trial Court has already held that Section 77 of the Companies Act is not applicable to the first respondent. He, therefore, submitted that the appeal be allowed.

14. It is submitted by Shri Singbal, the learned Counsel for the first and second respondents that admittedly, the first respondent was a Private Limited Company on 17/04/1996 and shortly thereafter i.e. on 21/04/1996, it became a Public Limited Company. It is submitted that admittedly, the Company is listed on a recognised stock exchange and as such, it was obligatory on the part of the appellant to sell the shares through a broker/stock market. It is submitted that it was not permissible for the appellant to make an attempt to sell the shares, by inviting offers through an advertisement, as has been done. It is submitted that the learned Trial Court was right in holding that there is no breach of any of the terms of the Principal Agreement inasmuch as the equity shares have already been allotted and the project has been implemented. He submitted that the clause about the return of the amount of the equity participation along with interest, was applicable only where the project was not implemented. He submitted that insofar as the claim based on the terms of the Deed of Indemnity is concerned, that is clearly not maintainable, in the absence of any loss being suffered by the appellant. The learned Counsel would submit that admittedly, the shares have not been sold and consequently, there is no loss, which is demonstrated. He, therefore, submitted that the learned Trial Court was justified in holding that the suit was premature and was lacking cause of action.

15. While supporting the impugned judgment dismissing the suit, the learned Counsel for the first and second respondents has challenged the findings against issue Nos. 3, 4 and 5. It is submitted that the learned Trial Court was in error in holding that Section 77 and for the matter of that, Section 77A of the Companies Act was not applicable to the first respondent. It is submitted that the first respondent is a Company, which is limited by shares and thus, Section 77 would be clearly applicable. The learned Counsel also submitted that the observations of the learned Trial Court, in this regard, are contradictory.

16. The learned Counsel for the third respondent has submitted that the respondent had resigned from the Company on 31/05/1999 and this was intimated to the appellant and thus, the third respondent would stand discharged from the liability, if any.

17. In reply, it is submitted on behalf of the appellant that it would not be open

to the respondents now to challenge the finding against issue Nos. 3, 4 and 5.

18. I have considered the rival circumstances and the submissions made. At the outset, the submission on behalf of the appellant that the respondents cannot challenge the findings against issue Nos. 3, 4 and 5, cannot be accepted, in view of the provisions of Order XLI, Rule 22 of the Code of Civil Procedure. In other words, when the ultimate finding in the suit was in favour of the respondents, they could not have challenged the findings against some of the issues, by filing an appeal and/or cross-objection. It is always open to the respondents, while supporting the final order in the suit, to challenge the findings on some of the issues, which are answered against them. Thus, the submission in this regard has to be refuted.

19. The following points arise for determination in this appeal-

(i) Whether there is any breach of the terms and conditions as contained in the Principal Agreement and Deed of Guarantee? if so, what effect?

(ii) Whether there is any breach of the terms and conditions of the Deed of Indemnity? If so, what effect?

(iii) Whether the impugned judgment needs interference?

(iv) What order?

20. At the outset, it may be mentioned that it is not in dispute that the appellant, which is a joint venture of the State of Goa and the Industrial Development Bank of India, was instrumental in enforcing a policy for having equity participation in project/s, in order to promote overall Industrial Development in the region. In accordance thereto and on request of the first respondent, the appellant had contributed an amount of Rs. 17,50,000/- towards equity capital of the first respondent on 17/04/1996 and accordingly, 50,000 shares of Rs. 10/- each at a premium of Rs. 25/- per share, were allotted to the appellant. It is undisputed that appellant is regularly receiving dividend thereon. It is further undisputed that the parties had executed the three documents, namely Principal Agreement, Deed of Guarantee and Deed of Indemnity on 17/04/1996. For the present purpose, it would not be necessary to go into the aspect whether there was any fraud or misrepresentation, as I would presently show that assuming that agreements were legally executed, no claim in favour of the appellant can arise. It is further undisputed that shortly after the execution of these documents i.e. on 21/04/1996, the first respondent became a Public Limited Company and has been listed on a recognised stock exchange. It is further admitted that the appellant had not made any attempt to off-load the shares through a broker/stock market, where the first respondent was registered and the only attempt made, in this regard, was by inviting offers through an advertisement. This, according to the appellant, was in order to ensure that the appellant gets best bargain, inasmuch as the off-loading of bulk shares may tend to substantially lower the stock price of the share on the stock market. In my considered view,

the submission cannot be accepted for more reasons than one. In the first place, there is no evidence on record to show, as to what was the price of the share on the stock exchange, during the period when the appellant had made an attempt to off-load the shares. The witness for the appellant was cross-examined on this aspect and has said that he is not aware of the share price of the first respondent on the stock market. Secondly, the recognised/acceptable mode of sale of shares of a Public Limited Company, which is listed on recognised stock exchange, would be by sale of the shares through such stock market and not otherwise. Thirdly, it is unacceptable that the appellant could have got better deal, by inviting offers through an advertisement. It is unacceptable that a person would offer to purchase a share at a price, which is higher than the price of the share on the recognised stock exchange. Thus, the contention on behalf of the appellant that there was bonafide attempt to off-load the shares through an advertisement, in my view, cannot be accepted. The case of Mahesh Chandra (*supra*) cannot come to the aid of the appellant. In that case, the issue was about the sale of an industrial concern in view of the default of the loan and in exercise of powers under Section 29 of the State Financial Corporation Act. It was, *inter alia*, held by the Hon'ble Supreme Court that while resorting to sale of defaulting industrial concern, a method of public auction and tender should be preferred to private negotiations. The Hon'ble Supreme Court has set out certain guidelines in paragraph 22 of the judgment. In my considered view, the present case is clearly distinguishable on facts.

21. It would now be necessary to make a reference to the provisions of Principal Agreement as also the Deed of Guarantee and the Deed of Indemnity. Clause 14(xi) of the Principal Agreement reads as under:

"14(xi). If for any reason, the project is not implemented, the Company shall repay the entire share application money/advance extended by the Corporation against their equity contribution along with an interest at the rate of 22 % per annum within 3 months from the receipt of the notice to be issued by the Corporation to the Company."

22. Clauses 16(a)(b)(c)(d), 18 and 20 of the Principal Agreement read as under:

16(a). If at any time the Corporation decides to sell its shareholding in the Company it shall first make an offer to the promoters viz Shri K.G. Gupta and Shri Ravi Gupta or their nominees for the purchase of these shares. Such an offer for the sale of the shares shall be on the basis of the highest price of the following three alternatives:

(i) The paid up value of the shares i.e. Rs. 35/- per share plus an amount computed at higher rate of 22 % or the prevailing lending rate of the Corporation which ever is higher less dividend, if any, received by the Corporation in respect of these shares from the date of such subscription or disbursement of deposit/unsecured loan/advance against the shares upto the date of sale.

(ii) The average price of the shares of the Company ruling on the recognised

stock exchange computed for a period of preceding 3 months from the date on which the option for the repurchase of shares is to be exercised by the promoters.

(iii) The break up value of the shares of the Company on the basis of pro forma and/or audited accounts, for the preceding six months from the date of such offer.

(b) Acceptance or refusal of the offer as given by the Corporation for repurchase of the shares shall be communicated by the promoters to the Corporation in writing within a period of 15 days from the date of the offer by the Corporation. In case of refusal or failure to communicate acceptance or refusal and alteration of the offer in any form shall be deemed to be refusal of the offer and the Corporation shall be free to transfer or sell the said shares to any other party at any time at such price and on such terms and conditions as it may deem fit without making any further offer to the promoter/s.

(c) In case, however, promoters decide to repurchase the shares on the offer made by the Corporation, they shall arrange to remit the amount payable to the Corporation and take delivery of the relevant Share Certificates within a period of one month from the date of acceptance of the offer. The share transfer fees, stamp duty and other expenses in connection with such transfer of shares shall be borne and paid by the promoter/s.

(d) The loss suffered by the Corporation as a result of sale pursuant to sub-clause (c) of clause 16 hereinabove, and all the expenses incidental to the sale shall be made good to the Corporation by Shri K.G. Gupta and Shri Ravi Gupta within a period of 30 days from the date of demand made by the Corporation.

"18. Notwithstanding the provisions of clause 16(a), (b), (c) and (d) above, the promoter/s shall:

(i) buy back the entire shares held by the Corporation in three equal instalments at the end of third, fourth and fifth years respectively from the date of investment in accordance with the formula laid down in the said clause 16(a)(i), (ii) and (iii) above for each of the three instalments.

(ii) have the option to repurchase from the Corporation any time after the Public issue all the shares held by the Corporation in one instalment in accordance with the formula laid in the said clause 16(a)(i), (ii) and (iii) above.

20. In the event of the Company failing to carry out any of the terms and conditions of this Agreement or commit breach of any of the terms and conditions or provisions of this Agreement, the Corporation shall be entitled to refuse to subscribe to the share capital of the Company and in case of subscription is made, wholly or partly, the Corporation shall be entitled to recall the same with interest at the rate of 22% per annum together with other costs and expenses caused to or incurred by the Corporation."

23. The Deed of Guarantee stipulates that it is intended to be supplemental to the equity agreement and clause (1) of the Deed of Guarantee inter alia reads as

under:

"If at any time default shall be made by the Company in the payment of the said principal sum equity of Rs. 17.50 lakhs (Rupees seventeen lakhs fifty thousand only) or any part thereof or interest thereon to the Corporation under the said Security Documents, the Guarantors will, without demur, jointly and severally, pay to the Corporation on demand at Panaji-Goa the said amount and interest and all other moneys which shall then be due to the Corporation as aforesaid and all costs, charges and expenses whatsoever which the Corporation may incur by reason of any default on the part of the Company, its successor or successors and assigns and will indemnify and keep indemnified, saved harmless and defended the Corporation at all time hereafter against any loss or damage which the Corporation may suffer by reason of any default by the Company in repayment to the Corporation of the said loan or any part thereof and/or interest thereon or any other moneys for the time being due and payable by the Company to the Corporation under the said security documents and all costs, charges and expenses whatsoever which the Corporation may incur by reason of any default on the part of the Company, its successor or successors and assigns."

24. Clauses 1, 2 and 3 of Deed of Indemnity, which are relevant for the present purpose read as under:

"1. In consideration of the Corporation having agreed to subscribe to the Equity share capital of the Company to the extent of face value of Rs. 17,50,000/- (Rupees seventeen lacs fifty thousand only). The Guarantors hereby agree to indemnify and keep indemnified the Corporation against any loss which the Corporation may suffer because of the sale of all or any of the shares that Corporation may subscribe under the Equity participation agreement with the Company at any time from the date of subscribing to the said shares and the Guarantor will personally indemnify and pay to the Corporation at Panaji, Goa on demand the said amount of loss together with interest thereon at the rate of 22% (twenty two percent) per annum from the date of sale till payment.

2. The price of the shares shall be the highest of the price that may be arrived at under any of the following provisions:

(a) The offer price of the share i.e. Rs. 35/- per share plus an amount computed at the rate of 22% p.a. or the prevailing lending rate of Corporation whichever is higher less dividend if any, that may be received by the Corporation in respect of those shares from the date of such subscription or disbursement or deposit/unsecured loan/advance against the share upto the date of sale by the Corporation.

(b) The average price of the shares of the Company ruling on the recognised Stock Exchange computed from the preceding three months from the date on which the option to purchase the shares is to be exercised by the Guarantor.

(c) The break-up value of the shares of the Company on the basis of Pro forma

and/or audited accounts for preceding six months from the date of such offer."

3. The loss that the Corporation shall suffer by sale of the said shares will be ascertained by deducting the net amount that may be realised by the Corporation by sale of such shares out of the price of the shares so sold as provided in clause 2 hereinabove.

25. Clause 18(ii) of the Principal Agreement would show that any time after the public issue, the promoters have an option to repurchase from the Corporation shares held, in one instalment, in accordance with formula laid down in clauses 16(a)(i)(ii)(iii) above. I find that the respondents are justified in saying that once the first respondent had become a Public Limited Company, it is clause No. 18(ii) which would be applicable. Even this would be subject to the provisions of the Companies Act and in particular, Section 77 and 77A thereof. The learned Trial Court was not right in holding that Section 77 of the Companies Act would not be applicable. The reason that the first respondent is a Public Limited Company and as such Section 77 of the Companies Act, is not applicable, cannot be sustained. Thus, clause 18(ii) of the Principal Agreement would show that there was an option given to the promoters to buy back the share, which would be subject to the provisions of the Companies Act, as may be applicable. Clause 14(xi) would not be attracted inasmuch as admittedly, shares have been allotted and the project is also implemented. It is nobody's case that the project has not taken off. In that view of the matter, in my considered view, the appellant cannot successfully place reliance on clause 18 in support of the claim.

26. This takes me to the question of the Deed of Indemnity. A bare perusal of clauses 1, 2 and 3 of the Deed of Indemnity would show that the respondents had agreed to indemnify the appellant against any loss, which it may suffer because of the sale of all or any of the shares, that the Corporation may subscribe under the equity participation agreement with the Company. The price of the shares is to be determined in accordance with clause (2) thereof. It is not shown as to what was the average price of the shares of the Company ruling on recognised stock exchange for the preceding three months, which is one of the relevant factors in terms of clause 2(b) of the agreement. Further more, clause (3) would make it clear that this indemnity only extends to loss, that the Corporation may suffer by sale of the said shares and the quantum of loss has to be ascertained by deducting the net amount, that may be realised by the Corporation by sale of such shares out of the price of the shares so sold, as provided in clause (2). In the present case, admittedly, the sale of the shares has not materialised. I have already held that the appropriate mode of off-loading the share was through stock market, when it was in respect of the shares of a Public Limited Company, listed on a recognised stock exchange. At any rate, the sale of the shares and the incurring of the loss, would be a condition precedent to any claim, that may arise under the terms of the Deed of Indemnity. In the absence of the sale having been materialised, there is no question of the appellant invoking the terms of the Deed of Indemnity.

27. For the aforesaid reasons, I find that no exception can be taken to the impugned judgment and order, dismissing the suit. In the result, the appeal fails and is dismissed, with no order as to costs.