

(2010) 04 BOM CK 0007

In the Bombay High Court

Case No : Company Appeal No"s. 6 and 7 of 2009

Morgan Ventures Ltd.

APPELLANT

Vs

Blue Coast Hotels and Resorts Ltd. and Others

RESPONDENT

Date of Decision : 16-04-2010

Acts Referred:

Companies Act, 1956 — Section 108, 109, 10F, 110, 111
Depositories Act, 1996 — Section 11, 28

Citation : (2010) 3 CompLJ 33

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : M.S. Sonak with Parag Rao, for the Appellant; Surendra Dessai and Rajeev Mehra s with Rahul Srivastava, S. Halia, G. Agni and S. Usgaonkar, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Vazifdar, J.—At the request of the parties the above company appeals u/s 10F of the Companies Act, 1956 are disposed off finally and by a common order. The learned Counsels have requested me to dispose off these appeals only on the preliminary point of law. It is agreed that in the event of the appeals being allowed the matter may be remanded to the Company Law Board for decision on the merits of the case. I have however upheld the; order of the Company Law-Board which decided the preliminary objection raised by the Respondents. The question of remanding the matter therefore does not arise.

2. Company Appeal No. 7 of 2009 is against the order of the Company Law Board dated 20.3.2009 dismissing the Appellants" petition on the ground that it is not maintainable. Company Appeal No. 6 of 2009 is against an order of the Company Law Board dated 29.4.2009 dismissing an application for a review of the order dated 20.3.2009.

3. The question of law that arises in the above appeals is whether the remedy of an appeal lies u/s 111A of the Companies Act, 1956 in respect or allotment of

shares made by a public company. I have answered the question in the negative.

4. I must answer this question only on precedent. I find it covered in the Respondents favour by a judgment of a learned Single Judge of this Court in the case of Gopal Krishna Baliga Vs. Poona Industrial Hotel Ltd., The Appellant relied upon a subsequent judgment of another learned Single Judge of mis court in the case of Finolex Industries Ltd. Vs. Mr. Anil Ramchand Chhabria, I consider myself bound by the judgment in Gopal Krishna Baliga Vs. Poona Industrial Hotel Ltd., for two reasons. Firstly, the attention of the learned judge in Finolex Industries Limited was not invited to the judgment in Gopal Krishna Baliga Vs. Poona Industrial Hotel Ltd., dealt with a case of allotment of shares as does the present case whereas Finolex Industries Limited (2000) 3 Comp LJ 330 (Bom) dealt with a case of transmission of shares.

5. In view of the limited scope of the appeals, it is necessary to state the facts only briefly.

(A) It is admitted that the first Respondent company is a public company limited by shares incorporated in the Companies Act, 1956. The Appellant holds 4.39% of the total issued, subscribed and paid up equity share capital of the first Respondent.

(B) The first Respondent is listed on various stock exchanges. The authorised capital of the first Respondent is Rs. 100,00,00,000 divided into 1,85,00,000 equity shares of Rs. 10 each and 81,50,000 preference shares of Rs. 100 each The issued, subscribed and paid up capital of the first Respondent as on 31.3.2008 was Rs. 88,05,28,000 consisting of 65,52,800 equity shares of Rs. 10 each and 81,50,000 preference shares of Rs. 100 each. (C) Respondent No. 1 issued a notice dated 25.7.2008 to convene and hold an extraordinary general meeting on 18.8.2008 to adopt a resolution to authorise its board of directors to offer, issue and allot upto 23,24,324 equity shares of Rs. 10 each at a price of Rs. 185 on a preferential basis to Respondent Nos. 2 and 3, namely, Ferry Holdings Limited and Jetty Capital Limited. The Appellant objected to the same at the meeting and even prior thereto. The Appellant had also offered to purchase the shares at Rs. 200 per share.

5.1 The resolution which was passed reads as under:

Resolution u/s 81(1A) of the Companies Act, 1956-authorising the board of directors of the company to issue, offer and allot equity shares not exceeding 23,24,324 (twenty three lakhs twenty four thousand three hundred twenty four) equity shares of face value of Rs. 10 each for cash at an exercise price of Rs. 185 (including premium of Rs. 175), on such terms and conditions as may be finalized by the board of directors, to investors, namely, Ferry Holdings Limited and Jetty Capital Limited on preferential basis.

6. The Appellant filed a petition being Company Petition No. 108 of 2008 for an order declaring the allotment of the said shares by Respondent No. 1 to

Respondent Nos. 2 and 3 as null and void and for an. order directing the first Respondent to rectify its register of members so as to reflect the shareholding pattern as existing before the said allotment.

7. The Respondents filed an application raising a preliminary objection as to the maintainability of the company petition. It was contended that as the first Respondent, i.e., public company the allotment of shares by it cannot be challenged under the provisions of Section 111A of the Companies Act.

8. By the impugned order dated 20.3.2009 the preliminary objection was upheld and the company petition was dismissed. All the applications were taken up and accordingly disposed off.

9. The Appellant sought a review of the order on the ground that the Company Law Board had not taken into consideration the judgment of another learned single judge of this Court in the case of *Finolex Industries Ltd. Vs. Mr. Anil Ramchand Chhabria*, and the previous orders of the Company Law Board.

10. The learned member of the Company Law Board indeed ought to have considered the judgments of this Court as well as the previous orders of the Company Law Board. It is, however, not necessary for this Court to consider the orders of the Company Law Board as, admittedly, the entire controversy is dealt with by the two judgments of this Court. I will, therefore, restrict myself to the two judgments both of learned single judges of this Court.

11. Sections 111 and 111A of the Companies Act read as under:

111. Power to refuse registration and appeal against refusal - (1) If a company refuses, whether in pursuance of any power of the company under its articles or otherwise, to register the transfer of, or the transmission by operation of law of the right to, any shares or interest of a member in, or debentures of, the company, it shall, within two months from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the company send notice of the refusal to the transferee and. the transferor or to the person giving intimation of such transmission, as the case may be, giving reasons for such refusal.

(2) The transferor or transferee, or the person who gave intimation of the transmission by operation of law, as the case may be, may appeal to the [tribunal] against any refusal of the company to register the transfer or transmission, or against any failure on its part within the period referred to in Sub-section (1), either to register the transfer or transmission or to send notice of its refusal to register the same.

(3) An appeal under Sub-section (2) shall be made within two months of the receipt of the notice of such refusal or, where no notice has been sent by the company, within four months from the date on which the instrument of transfer, or the intimation of transmission, as the case may be, was delivered to the company.

(4) If-

(a) the name of any person-

(i) is, without sufficient cause, entered in the register of members of a company, or

(ii) after having been entered in the register, is, without sufficient cause, omitted therefrom; or

(b) default is made, or unnecessary delay takes place, in entering in the register the fact of any person having become, or ceased to be a member [including a refusal under Sub-section (1)], the person aggrieved, or any member of the company, or the company, may apply to the [tribunal] for rectification of the register.

(5) The [tribunal], while dealing with an appeal preferred under subsection an application made under Sub-section (4) may, after hearing the parties, either dismiss the appeal or reject the application, or by order- (a) direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within ten days of the receipt of the order; or (b) direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved. (6) The [tribunal], while acting under Sub-section (5), may, at its discretion, make- (a) such interim orders, including any orders as to injunction or stay, as it may deem fit and just; (b) such orders as to costs as it thinks fit; and (c) incidental or consequential orders regarding payment of dividend or the allotment of bonus or rights shares.

(7) On any application under this section, the [tribunal] - (a) may decide any question relating to the title of any person who is a party to the application to have his name entered in, or omitted from the register; (b) generally, may decide any question which it is necessary or expedient to decide in connection with the application for rectification.

(8) The provisions of Sub-sections (4) to (7) shall apply in relation to the rectification of the register of debenture-holders as they apply in relation to the rectification of the register of members.

(9) If default is made in giving effect to the orders of the [tribunal] under this section, the company and every officer of the company who is in default shall be punishable with fine which may extend to [ten thousand rupees], and with a further fine which may extend to [one thousand rupees] for every day after the first day after which the default continues.

(10) Every appeal or application to the [tribunal] under Sub-section (2) or Sub-section (4) shall be made by a petition in writing and shall be accompanied by such fee as may be prescribed.

(11) In the case of a private company which is not a subsidiary of a public

company where the right to any shares or interest of a member in or debentures of, the company is transmitted by a sale thereof held by a court or other public authority, the provisions of Sub-sections (4) to (7) shall apply as if the company were a public company:

Provided that the [tribunal] may, in lieu of an order under Sub-section (5) pass an order directing the company to register the transmission of the right unless any member or members of the company specified in the order acquire the right aforesaid within such time as may be allowed for the purpose by the order, on payment to the purchaser of the price paid by him therefor or such other sum as the [tribunal] may determine to be a reasonable compensation for the right in all the circumstances of the case.

(12) If default is made in complying with any of the provisions of this section, the company and every officer of the company who is in default, shall be punishable with fine which may extend to [five hundred rupees] for every day during which the default continues.

(13) Nothing in this section and Sections 108, 109 or 110 shall prejudice any power of a private company under its articles to enforce the restrictions contained therein against the right to transfer the shares of such company.

(14) In this -section "company" means a private company and includes a private company which had become a public company by virtue of section 43A of this Act.

111A. Rectification of register on transfer-(1) In this section unless the context otherwise requires, "company" means a company other than a company referred to in Sub-section (14) of Section 111 of this Act.

(2) Subject to the provisions of this section, the shares or debentures and any interest therein of a company shall be freely transferable:

[Provided that if a company without sufficient cause refuses to register transfer of shares within two months from the date on which the instrument of transfer or the intimation of transfer, as the case may be, is delivered to the company, the transferee may appeal to the [tribunal] and it shall direct such company to register the transfer of shares.]

[(3) The [tribunal] may, on an application made by a depository, company, participant or investor or the Securities and Exchange Board of India, if the transfer of shares or debentures is in contravention of any of the provisions of the Securities and Exchange Board of India Act, 1992 (15 of 1992) or regulations made thereunder or the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) or any other law for the time being in force, within two months from the date of transfer of any shares or debentures held by a depository or from the date on which the instrument of transfer or intimation of the transmission was delivered to the company, as the case may be, after such inquiry as it thinks fit, direct any depository or company to rectify its register or records.]

(4) The [tribunal] while active under Sub-section (3), may at its discretion make such interim order as to suspend the voting rights before making or completing such inquiry.

(5) The provisions of this section shall not restrict the right of a holder of shares or debentures, to transfer such shares or debentures and any person acquiring such shares or debentures shall be entitled to voting rights unless the voting rights have been suspended by an order of the [tribunal].

(6) Notwithstanding anything contained in this section, any further transfer, during the pendency of the application with the [tribunal], of shares or debentures shall entitle the transferee to voting rights unless the voting rights in respect of such transferee have been suspended.

(7) The provisions of Sub-sections (5), (7), (9), (10) and (12) of Section 111 shall, so far as may be, apply to the proceedings before the [tribunal] under this section as they apply to the proceedings under this section." In Gopal Krishna Baliga Vs. Poona Industrial Hotel Ltd., the learned Single Judge of this Court considered an identical situation. In that case the Plaintiff had filed a suit in the subordinate court challenging a resolution passed at the annual general meeting of the Respondent company allotting equity shares to the promoters. The trial court dismissed the suit upholding the Respondent's contention that the civil court had no jurisdiction to entertain the suit in view of the provisions of Section 111 of the Companies Act. The Plaintiff challenged the order by filing an appeal from order in this Court. Thus the question that arose in that case is identical to the one that arises in the present appeals namely whether the allotment of shares by a public company can be challenged u/s 111A of the Companies Act. The learned Single Judge held that Section 111A would not apply in the case of an allotment of shares. It was specifically contended on behalf of the Respondent that the word "transfer" would also include allotment of shares and, therefore, the Plaintiff has a right of appeal before the Company Law Board u/s 111A of the Companies Act. The learned Single Judge rejecting the contention held:

4. Now it is clear firstly that before the trial court though Section 111 was amended in 1995, both the parties proceeded on the assumption that Section 111 applies to the Respondent company. That was obviously wrong. It is absolutely clear from the provisions of Sub-section (14) of Section 111 of the Companies Act that with effect from 20.9.1995 the application of Section 111 is restricted only to the private companies and, therefore, it will not apply in case of Respondent- company.

5. It is to be seen here that before its amendment in 1995 Section 111 applied to private companies as well as public limited companies. A perusal to the provisions of Section 111 shows that an appeal has been provided to the Company Law Board by Sub-sections (1) and (2) of Section 111 against refusal by the company to register the transfer of share. Sub-section (4) of Section 111 also provides for an appeal, but that appeal is in relation to wrong entries made

in the register of members. Therefore, the right of appeal which is provided by Sub-section (4) of Section 111 is in cases which are not covered by "Sub-sections (1) and (2). Therefore, the scheme of Section 111 shows that a right of appeal was given to the transferees against wrong transfer of shares or refusal of the company to transfer the share and right of appeal was also given to any member of the company when a wrong entry is made in the register of members. Therefore, obviously when the company allots shares and a consequential entry is made in the register, a member could raise objection and challenge that action of the company by filing an appeal under Sub-section (4) of Section 111. It is true that Sub-section (14) was added to Section 11 by the Depositories Act, 1996, and Section 111A was enacted by the same Act. Therefore, it is clear that the legislature was fully aware of the existence of two types of rights of appeal given by Section 111, namely, right of appeal given under Sub-sections (1) and (2) and right of appeal given by Sub-section (4). However, while enacting Section 111A in relation to the public limited companies, the legislature restricted the right of appeal only in case of transfer of shares and the wider right of appeal which was provided by Sub-section (4) was not enacted in Section 111A. The legislature which is aware of the existing position when, makes a conscious departure of such a nature, in my opinion, there would be no room to infer that the right of appeal provided by Sub-section (4) of Section 111A is to be read in consonance with Sub-section (2) and (3) of Section 111A by equating transfer of shares with the allotment of shares. It is thus clear there is no right of appeal provided by Section 111A in relation to the public limited companies, which was contained in Sub-section (4) of Section 111 of the Companies Act. It is thus clear that the Plaintiff would not be entitled to approach the Company Law Board for seeking the reliefs that are prayed for in the civil suit and, therefore, there is no question of jurisdiction of the civil court being barred by the availability of remedy to the Plaintiff u/s 111A of the Companies Act.

6. In this view of the matter, therefore, the appeal is allowed and the order impugned in the appeal is set aside. It is held that the civil court has jurisdiction to entertain the civil suit filed by the Appellant/Plaintiff. The trial court is directed to try the suit and any application that may be filed in the suit in accordance with the law.

12.1 There is no doubt and Mr. Sonak fairly conceded that the above appeals stand covered on this question of law by the judgment in *Gopal Krishna Baliga Vs. Poona Industrial Hotel Ltd.*,

13. Mr. Sonak however submitted that there is a conflicting view taken by another learned single judge in *Finolex Industries Ltd. Vs. Mr. Anil Ramchand Chhabria*. He, therefore, submitted that I ought to place the papers before the learned Chief Justice in order to enable the Chief Justice to consider whether the matter ought to be referred to a larger bench to resolve the conflicting judgments.

14. In my view, the matter ought to be decided only on precedent. The judgment in Gopal Krishna Baliga Vs. Poona Industrial Hotel Ltd., dealt with an identical question, namely, whether an allotment of shares by a public company can be challenged u/s 111A. In Finolex Industries Limited (2000) 3 Comp LJ 330 (Bom) the question that was dealt with was whether a refusal by the company to record a transmission of shares of a deceased member in the name of his heirs can be challenged under the provisions of Section 111A. The learned judge answered the question in the affirmative. The observations of the learned judge however are indeed wide enough to cover even cases of allotment although the question did not arise in that case. I would, therefore, have considered myself bound by the judgment even on the question before me. However, the attention of the learned judge who decided the case of Finolex Industries Limited (2000) 3 Comp LJ 330 (Bom) was not invited to the judgment of the other learned Single Judge in Gopal Krishna Baliga Vs. Poona Industrial Hotel Ltd., which had been delivered earlier. Had the learned judge's attention been invited to the judgment in Baliga's case, he would have found himself bound by the same. The judgment in Finolex Industries Limited (2000) 3 Comp LJ 330 (Bom), therefore, is per incuriam in view of the previous judgment of this Court in Baliga's case. The observations in Finolex Industries Limited relied upon by Shri Sonak are as follows:

15. Unfortunately even this effort of the legislature leaves much to be desired. Even the new provisions do not expressly provide that remedies u/s 111(2) and (4) of the Companies Act are continued. From a perusal of the proviso it becomes apparent that a provision of appeal is provided in case a company refuses to transfer the shares within two months of the receipt of the "instrument of transfer" or the "intimation of transfer". On a literal interpretation this would mean that no remedy of appeal is available in case of non-transmission of shares on the delivery of intimation of transmission. It is this interpretation which led the Company Law Board to substitute the term "instrument of transfer" with "instrument of transmission". In my view, the approach adopted by the Company Law Board is not correct. A careful and meaningful analysis of these provisions would clearly demonstrate the intention of the legislature to give equal treatment to shares held in public companies. This intention can be discerned from the amendment noticed above. There can be no disparity in the treatment of shares based on the mode of transfer or transmission. Therefore, the necessary provision was sought to be made in the proviso to Section 111A(2) and Section 111A(3). Unfortunately it seems due to the haste in which the Depositories Act, 1996, and the Amendment in 1997 were enacted the intention of the legislature was not reflected in the provisions. In the absence of the provision for "intimation of transmission" in the proviso it would appear that there is no appeal provided. But this would be in conflict with Section 28 of the Depositories Act which makes it clear that the provisions of the Act shall be in addition to and not in derogation of any other law for the time being in force relating to holding and transfer of securities. Thus the proviso has to be

construed in such a manner that would preserve the rights and remedies already available to the shareholdings in public companies. The interpretation would have to be such that Section 111A provides additional benefit to the shareholders in public companies which they already enjoyed and continue to enjoy u/s 111 of the Act. Only then would the proviso give effect to the intention of the legislature. The interpretation cannot be such as to deny the right of appeal to shareholders of a public company on the basis of the mode of transfer or transmission. At the same time it should not leave the shares held in depositories without a remedy of appeal. Substitution of the term "intimation of transfer" with "intimation of transmission" would remove the right of appeal given to shares held by depositories. This is not the intention of the Parliament.

18 By virtue of provisions of Section 28 of the Act it cannot be held that Section 111A(3) is restricted to rectification of the register only in transfer matters. This would mean that no remedy of rectification is available in case of loss of shares, bad deliveries, theft and forgery. This would be in derogation of the law for the time being in force. Remedy provided in Section 111A(3) is in addition to the remedy provided in Section 111(4). It is, therefore, held that the remedies of appeal and rectification are available to all kinds of shares held in a public company under the proviso to Section 111A(2) and 111A(3) read with Sub-section (7) of Section 111A of the Act which would make applicable the provisions of Section 111(1), (2) and (4) by virtue of Section 111(5) of the Act.

19. Is Section 111 only applicable to private limited companies in view of Sub-section (14)? As noticed earlier, the provisions of the Depositories Act are in addition to and not in derogation of the existing provisions of the law. Therefore, it cannot be held that by virtue of Section 111(14) the provisions of Sub-sections (1), (2) and (4) of Section 111 are not applicable to public companies. Sub-section (1) of Section 111 makes it incumbent on the company to serve a notice of refusal of transfer within two months of the delivery of instrument of transfer or intimation of transmission. This provision is now incorporated in proviso to Section 111A(2) of the Act. But an additional benefit has been given to the shareholders in that no limit is provided for filing the appeal against the refusal or neglect of the company or the depository to transfer the shares. For this reason Section 111(3) has not been incorporated in Section 111A(7) which provides the manner in which the applications are to be decided by the Company Law Board u/s 111A. Sub-section (14) of Section 111 cannot exclude the application of Sub-sections (1), (2) and (4) of Section 111 shares held in a public company as it would then be in conflict with Section 28 of the Depositories Act. Under this section, the law made under the Depositories Act is in addition to and not in derogation of any law which is/was in force at the time when the Depositories Act was enacted. Therefore, restriction contained in Sub-section, (14) of Section 111 would not apply to transfer and ownership of the shares of the public company held in the form of share certificates. Construed in this manner, the provisions of Sub-section (1) of Section 111A would clearly mean that the remedy of rectification of register on transfer provided in Section 111A

would not be applicable to private companies. For the private limited companies, the remedies of appeal and rectification would remain under Sections 111(2), (3) and (4) of the Act. When an application is made u/s 111 with regard to a private company, the Company Law Board will deal with the same under the provisions of Section 111. The limit of two months appeal as provided under Sub-section (3) of Section 111 would still be applicable to the private companies.

15. In the circumstances, I am bound by the judgment of the learned Single judge of this Court in Gopal Krishna Baliga Vs. Poona Industrial Hotel Ltd., I am not inclined place the papers before the learned Chief Justice to enable his Lordship to consider whether the matter ought to be placed before a larger bench as the judge case was on the identical question I have no reason to believe that the famed judge who decided the case of Finolex Industries Limited (2000) 3 Comp LJ 330 (Bom) would not have followed Gopal Krishna Baliga Vs. Poona Industrial Hotel Ltd., if his attention had been invited to it.

16. The above appeals are therefore dismissed. There shall however be no order as to costs. The operation of this order is stayed for 16 weeks to enable the Respondents to challenge this order.

17. Appeal dismissed.