
(2003) 04 DEL CK 0027

In the Delhi High Court

Case No : CA 797 of 2000 and 265 of 2003

Mr. Siddhantha Sharma and Another

APPELLANT

Vs

Kesha Investment Pvt. Limited and Others

RESPONDENT

Date of Decision : 10-04-2003

Acts Referred:

Citation : (2003) 5 AD 210 : (2003) 106 DLT 722 : (2003) 69 DRJ 49 : (2003) 46 SCL 52

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : A.M. Singhvi and Anand Srivastava, for the Appellant; Rakesh Sawhney, Rajive Sawhney Jasleen Oberoi and Niraj Sharma for respondent No. 5/ S.K. Modi, for the Respondent

Judgement

Mukul Mudgal, J.—This is an application, filed by the Chairman, Royal Airways Limited (hereinafter referred to as 'the RAL'), an independent Director on the Board of Directors of RAL, formerly known as Modiluft Limited. The respondents 1 to 4 are said to be the Group Companies of Shri S.K. Modi, who is respondent No. 5 herein and was said to be formerly in the management of the Company at the time when actions complained of in the application were committed. This application inter alias seeks a restraint on transfer of the shares enumerated in paragraph 9 of the application and further restraint upon the exercise of voting and other rights in respect of such shares. This application also seeks a declaration that the Board Resolution dated 30th July, 1996 making the disputed shares fully paid up is void.

2. Reliance is placed by the applicants in support of this application on the findings of a decision of this Court, rendered on 28th January, 2003 in CA 1852/2002 in respect of shares more particularly described in Para 9. Reliance is thus placed on the findings, recorded by this Court in Paras 12 & 13 of the aforesaid judgment in CA 1852/2002 which reads as under:

12. Both the SK Modi Group and RHSL, are claiming to be in control of the

Company which dispute is the subject matter of protracted collateral litigation on the original side. Notwithstanding the internecine dispute of SK Modi Group with RHSL, whose reply to this application fully supports the applicant, the interest of all the creditors does require that the amount of Rs.36 crores be preserved and secured. The related nature of Apache with the Company and the nature of the transaction creates bonafide doubts and makes it necessary to issue an order to secure the interests of the creditors. Even if it is assumed that Macho Foods were instigated by RHSL, nevertheless the transaction complained of by them by virtue of this application is such that the orders must be passed in the interest of all the creditors of the Company to preserve the Company's assets.

13. It is clear that the convoluted transaction entered into by the Company with Apache Associates prima facie appears to be the stratagem devised to account for the allotment and call money payable for 1,15,49,272 shares valued at Rs.33,31,80,880/- by three investment companies belonging to the S.K. Modi Group, i.e., Modi Overseas Pvt. Ltd, Kesha Investments Pvt. Limited and Paradise Credits Pvt. Limited. The very fact that the rental for the premises is only Rs.10,000/- per month and the security deposit as large as Rs.36 crores is sufficient in my view to taint the transaction."

3. It is submitted that since the respondents 1 to 4 are owned and controlled by the management of respondent No. 5 and are under his control, the orders as prayed for can even be passed pre-winding up as per the position of law laid down in 1984 (56) Com Cas 19 P.40. It is also submitted that since the action is fraudulent as found by this Court in CA 1852/2002, transactions found to be tainted by this Court cannot be relied upon and are void. It is also submitted that the entire exercise which resulted in adverse findings by this Court on 28th January, 2003 was with the sole motive of making the partly paid shares of the Investment company to be fully paid up. Accordingly orders are sought in respect of the said shares to the effect that the action of making all the shares fully paid up by the method adopted by the respondents for assignments of the alleged security deposit was void u/s 536(2) of the Companies Act. As an interim measure, the learned Senior Counsel for the applicant, Dr. Singhvi has sought interim orders in terms of prayer (v) (vi) & (vii) which read as under:

"(v) Pending disposal of the present Application, direct that all the rights in respect of the Tainted Shares (as per details given in Para 9 of this application) including right to transfer the said Tainted Shares, shall remain suspended;

(vi) Pending disposal of the present Application, direct that none of the Modi Group Companies being Modi Overseas Investment Limited, Paradise Credits Private Limited and Kesha Investment Private Limited shall exercise any rights in respect of the Tainted Shares;

(vii) Pending disposal of the present Application, direct Respondent No. 5 and his Modi Group Companies being Modi Overseas Investment Limited, Paradise Credits Private Limited and Kesha Investment Private Limited to indemnify the

Petitioner Company in respect of the 54,15,900 Tainted Shares having been transferred to third parties and to deposit the consideration so acquired by dealing in the said Tainted Shares in this Hon''ble court;

4. This application is vehemently opposed by the learned Senior Counsel for the respondent No. 5, Shri Rajiv Sawhney who has submitted that this application is not maintainable u/s 536 and is a device to ensure that in the forthcoming Annual General Meeting(AGM), scheduled on 16th April, 2003 voting rights are not exercised in respect of the shares in dispute. The respondent No. 5, S.K. Modi has also questioned the maintainability of the application inter alias on the following grounds :

(a) Applicant No. 1 not being a creditor/shareholder of the company has no locus to invoke the Company Court''s jurisdiction

(b) there is no proper affidavit in support of the application.

(c) the company has not authorized the applicant No. 1 to file this application who has not been appointed as a Director/Officer/representative of the company.

(d) directions sought are not maintainable u/s 391(1) of the Act.

(e) interim orders such as 27th January, 2003 in CA1852/2001 cannot be the foundation for this application.

(f) application u/s 536 can only be maintained after winding up orders are passed.

(g) Ab initio void action do not call for exercise of jurisdiction by this Court.

(h) even if Section 536 is assumed to apply, the reliefs sought do not fall within purview of that section.

(i) since the rights issue closed in March 1995 i.e., six months prior to the alleged commencement of winding up i.e., 30th July, 1996, jurisdiction of Section 536 may not be permitted to be invoked.

5. After hearing the learned Senior counsel for the parties for some time, both the learned counsel were asked to indicate the break-up of the shareholding patterns held by the parties. Learned Senior Counsel for the applicant indicated that the RHSL Group holds 57 per cent and SK Modi Group held 17 per cent of the shares whereas the disputed shares which form part of the subject-matter of this application are about 7 per cent.

6. Considering the above shareholding pattern of the parties and the impending Annual General Meeting scheduled to be held on 16th April, 2003 in my view as an interim measure it will be appropriate and without prejudice to the pleas of Dr. Singhvi and Mr. Sawhney that in the proposed Annual General Meeting scheduled to be held on 16th April, 2003 counting of the 7 per cent of the votes arising from shares indicated in Para 9 of this application be done separately and the results of the meeting be indicated to this Court by counting the 7 per cent

shares separately. The Chairman of the meeting may also indicate the voting pattern in respect of the resolutions voted upon in the meeting so as to enable this Court to consider the impact of the disputed shares.

7. List the application for further directions on 22nd July, 2003.