
(2005) 10 BOM CK 0128

In the Bombay High Court

Case No : Summons for Judgment No. 766 of 2004 in Summary Suit No. 2550 of 2004

Niskalp Investments and Trading Co. Ltd.

APPELLANT

Vs

Hinduja TMT Ltd.

RESPONDENT

Date of Decision : 19-10-2005

Acts Referred:

Bombay Securities Contracts Control Act, 1925 — Section 2(4), 3(4), 6
Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2
Securities Contracts (Regulation) Act, 1956 — Section 2

Citation : (2006) 2 ALLMR 563 : (2008) 143 CompCas 204 : (2007) 79 SCL 368

Hon'ble Judges : S.U. Kamdar, J

Bench : Single Bench

Advocate : Virag Tulzapurkar, for the Appellant; Rohit Kapadia and Prem Ranga, for the Respondent

Judgement

S.U. Kamdar, J.—The present suit is filed for the recovery of Rs. 8,67,11,781 with interest (a) 20 per cent per annum on the principal amount of Rs. 3,70,00,000 from 11 -8-2004 till the date of payment and/or realisation.

2. It is the case of the plaintiffs that the claim arises under the agreement dated 25-11-1997 entered into between the plaintiffs and the defendants. The said agreement inter alia provided that Hinduja Finance Corporation Ltd. (HFCL) has agreed to offer 10 lakhs shares of the Mody International Paper Ltd. (MIP) held by HFCL in the share capital of MIP to plaintiffs herein who agrees to acquire the same from HFCL " Rs. 37 per share. The total consideration fixed under the agreement for the aforesaid 10 lakhs shares is sum of Rs. 3.7 crores. The said amount is due and payable by the plaintiffs to HFCL against the delivery of the said shares. Clause 8 of the said agreement inter alia provided that HFCL agrees to take, in consultation with the plaintiffs all such necessary actions/steps as may be required to make the offer for sale of the said MIP shares to Public being 35,45,000 shares including the shares acquired by the plaintiffs herein and those held by SICOM. The object of the said clause was to list the same on the Mumbai

Stock Exchange, National Stock Exchange, OTCEI as per the terms and conditions mentioned in the said agreement. The said listing was required to be done as per the SEBI and stock exchange regulations. Under clause 12 HFCL agreed that HFCL shall buyback the said shares from the plaintiffs provided HFCL is not able to offer the MIP shares by way of listing on the Mumbai Stock Exchange, National Stock Exchange by 31 -12-2003. The price of Rs. 37 per share plus simple interest " 20 per cent per annum from the date of disbursement of purchase consideration for the said shares by the plaintiffs is worked out. However, it is further provided that if as stated in clause 8 of the said agreement if listing cannot take place due to change in existing SEBI/stock exchange norms, HFCL shall not be required to do the said listing of the shares and plaintiffs will be free to dispose them off any or all of its shareholding in MIP as it deems fit. Clauses 13 and 16 inter alia provided that even before the date of 31 -12-2003 HFCL will be free to buyback the shares from the plaintiffs on spot delivery basis " price of Rs. 37 per share with simple interest " 20 per cent per annum from the date of disbursement of purchase consideration. It is agreed and understood between the parties that in case HFCL agrees to purchase the said shares as aforesaid and it is not accepted by the plaintiffs for any reason whatsoever, then in such event HFCL shall be free of its obligations to buyback the said from the plaintiffs as per clause 12 of the said agreement. Clause 16 further provides that HFCL agrees to indemnify and keep plaintiffs indemnified for any losses that may be incurred by plaintiffs due to non-compliance by HFCL. Thus it is the case of the plaintiffs that under clause 12 of the agreement there was buyback agreement between the plaintiffs and defendants to repurchase the said shares since defendants failed to list the said shares by 31-12-2003 on the stock exchange.

3. It is further the case of the plaintiffs that sometime in or about 21-10-2003 defendants for the first time contacted the plaintiffs by letter and sought a consent for offering the shares held by the plaintiffs to the public. It is the case of the plaintiffs that though such consent was not necessary still the said consent was given by letter dated 19-12-2003. However, in spite of the said consent being given the said shares were not offered to the public and the shares of the company were also not listed on any of the stock exchanges as contemplated under the agreement between the parties and thus under clause 12 defendants became liable to buyback shares of the plaintiffs " Rs. 37 per share plus interest " 20 per cent per annum. In view of the fact that the plaintiffs failed to buyback the said shares plaintiffs by notice dated 6-8-2004 called upon the defendants to make payment of the aforesaid amount. No payment was received and accordingly after considerable correspondence plaintiffs have filed the present suit for the recovery of the amount as payable by the defendants to the plaintiffs under the said buyback arrangement.

4. The main contention raised by the defendants is that the present suit is not maintainable as summary suit because the agreement to buyback the shares is hit by the provisions of Securities Contract (Regulation) Act, 1956 and in that

view of the matter contract is invalid in law. It has been thus contended that the suit cannot be filed for recovery of amount under such invalid contract and therefore suit is not maintainable as Summary Suit.

5. The learned Counsel for the defendant has relied upon the judgment of the F.I. Rebello, J. in Summons for Judgment No. 511 of 1997 in Summary Suit No. 4556 of 1996 being dated 6-4-1999. The learned Single Judge in the aforesaid judgment was considering the identical situation and by considering all earlier judgments including the judgment of the Apex Court in the case of B.O.I. Finance Ltd. Vs. Custodian and Others, has come to the conclusion that the arrangement of buyback is contrary to the provision of Securities Contract (Regulation) Act, 1956 and is unenforceable in law and in that view of the matter summary decree cannot be granted. Summons for Judgment must be dismissed.

6. However, the learned Counsel for the plaintiffs has sought to distinguish the said judgment by relying upon the judgment of the Division Bench of this Court in the case of Jethalal C. Thakkar v. R.N. Kapur AIR 1956 Bom. 74 and it has been contended that in the present case contract being contingent contract provisions of Securities Contract (Regulation) Act, 1956 are not applicable as held by the Division Bench. He has relied upon clause 12 of the agreement which reads as under:

16. HFCL agrees to indemnify and keep Niskalp indemnified, saved, harmless, and defended for any losses that may be incurred or suffered by Niskalp due to non-compliance by HFCL of any clause/s of this agreement and/or any clause of the said agreement a copy whereof is annexed hereto as Annexure A.

7. It has been contended that contract under the aforesaid provisions read with clause 8 provides for listing of the shares by 31-12-2003 on various stock exchanges and only on failure to do so there is an obligation to buyback the said shares. Thus, it has been contended that provisions of contract being dependent upon a contingency is a different type of contract in the present case, therefore judgment of the learned Single Judge in the case of Gill & Co. (supra) would not apply and thus, this Court should pass a decree and not to follow the judgment of the learned Single Judge as mentioned herein above.

8. I have considered the rival contentions of parties based upon the judgment of the Single Judge of this Court in the case of Gill & Co. {supra} and in my opinion it directly covers the case in the present matter. The view which has been expressed by the learned Single Judge in the aforesaid judgment after considering the entire case law is that an arrangement of buyback of the share under a contract is not permissible and such an arrangement is hit by the provisions of the Securities Contract (Regulation) Act, 1956 and thus void ab initio. In my view the judgment also covers the case at hand.

9. However, the learned Counsel for the plaintiffs sought to distinguish the said judgment by relying on the aforesaid Division Bench judgment. I have perused the said Division Bench judgment also. In my opinion the Division Bench

judgment has no application on the facts of the present case. Firstly because the Division Bench has considered the provision of Bombay Securities Contracts Control Act, 1925. The words "ready delivery contract" has been defined in Sub-section (4) of Section 3 of the said Act which reads as under:

(4) "ready delivery contract" means a contract for the purchase or sale of securities for performance of which no time is specified and which is to be performed immediately or within reasonable time.

10. Under the said definition ready delivery contract is a contract for purchase or sale of securities for the performance of which no time is specified and it has to be performed within reasonable time. In that light of the matter, Division Bench has made a distinction between contingent contract and regular contract. It has been held by the Division Bench that a contingent contract is not contract at all till such contingency happens. However, provision of Securities Contract (Regulation) Act, 1956 defines the spot delivery contract as under:

2(i) "spot delivery contract" means a contract which provides for,:

(a) actual delivery of securities and the payment of a price therefore either on the same day as the date of the contract or on the next day, the actual period taken for the despatch of the securities or the remittance of money therefore through the post being excluded from the computation of the period aforesaid if the parties to the contract do not reside in the same town or locality;

(b) transfer of securities by the depository from the account of a beneficial owner to the account of another beneficial owner when such securities are dealt with by a depository;

11. The provision of spot delivery contract are *pari materia* different then the provision of ready delivery contract as provided under the Bombay Securities Contract Control Act, 1925. The provision of Section 2(4) which has to be read with Section 6 of the Bombay Securities Control Act, 1925 in my opinion as contrast to the provision of Section 2(i) of the Securities Contracts (Regulation) Act, 1956 which provides for prohibition for entering into any contract which is other than the spot delivery provides for different scheme altogether. Under the provisions of Securities Contracts (Regulation) Act, 1956 spot delivery means delivery of securities and payment of a price thereof either on the same day i.e., as on the date of the contract or on the next day. In the light of the provisions as discussed above, I am of the opinion that even a contingent contract of a nature entered into in the present case is hit by the aforesaid provisions and thus is invalid in law. Thus, the judgment of the Division Bench relied upon by the plaintiffs has no application on the facts of the present case because the provision thereof are materially different. Apart therefrom the argument of contingent contract in my opinion is totally baseless as the contract in the present case provides both under clauses 12 and 13 for buy back arrangement of the shares. Under clause 12 if the shares are not listed by 31 -12-2003 then the buyback arrangement is provided at the rate of Rs. 37 whereas under clause 13

even prior to the date of 31-12-2003 an option has been given to the defendants to buyback the said shares from the plaintiffs at the said rate of Rs. 37. The conjoint reading of clauses 12 and 13 in my opinion does not provide for any such contingent contract. Contract is simply for future performance and in effect is a not a spot delivery contract which is the only nature of contract permissible under the provisions of the said Securities Contracts (Regulation) Act, 1956. In that view of the matter I am unable to accept the contention of the learned Counsel for the plaintiffs that in the light of the judgment of the Division Bench of this Court in the present case the judgment of the learned Single Judge in Gill & Co. {supra} should not be accepted. Apart from the aforesaid in my view such an arrangement to buyback the shares cannot form a part of Order 37 Rule 2 of the CPC because in effect what is sought is specific performance of the said clauses 12 and 13 of the contract because it requires simultaneously delivery thereof to the opposite party in view thereof, the present suit is not maintainable as summary suit. I am therefore of the opinion that the defendants deserves unconditional leave to defend. I accordingly direct unconditional leave to defend to the defendants. Suit is transferred to the list of Commercial Causes. Written Statement or points of defence to be filed within four weeks from today. Affidavits, list of documents to be filed within four weeks thereafter. Inspection within four weeks thereafter. Suit to be on board of the learned Judge taking Commercial Causes. Summons for judgment dismissed accordingly. No order as to costs.