

(2022) 08 KAR CK 0010

In the Karnataka High Court

Case No : Writ Petition No. 8432 Of 2018 (GM-FE)

Ordyn Technologies Pvt Ltd. & Others

APPELLANT

Vs

Assistant General Manager, Reserved Bank Of India, Foreign
Exchange Department, Central Office, Central Office Building,
Shahid Bhagat Singh Marg, Fort, Mumbai ? 400001 & Others

RESPONDENT

Date of Decision : 11-08-2022

Acts Referred:

Companies Act, 1956 — Section 2(12), 457
Foreign Exchange (Compounding Proceedings) Rules, 2000 — Rule 10
Foreign Exchange Management (Transfer Or Issue Of Any Foreign Security)
(Amendment) Regulations, 2004 — Regulation 2(o), 6(2), 6(2)(i)

Citation : (2022) 08 KAR CK 0010

Hon'ble Judges : Krishna S.Dixit, J

Bench : Single Bench

**Advocate : Jayna Kothari, Rohan Kothari, R V S Naik, Adithi Shetty,
M.B.Nargund, Madhukar Deshpande**

Final Decision : Dismissed

Judgement

Krishna S.Dixit, J

1. First petitioner, a company incorporated under the provisions of the erstwhile Companies Act, 1956 and the second petitioner its Managing Director, are knocking at the doors of Writ Court for assailing the notices dated 26.09.2013 9.12.2013 issued by the first respondent – Reserve Bank of India, at Annexures-C & D. They also seek quashment of the compounding order dated 22.08.2014 issued by the said Bank at Annexure-K. They also seek to set aside all proceedings initiated by the third respondent Directorate of Enforcement, pursuant to notice dated 9.2.2018 at Annexure-S.

2. After service of notice, the respondent-RBI has entered appearance through its Panel Counsel who has filed the Statement of Objections; the third respondent-ED is represented by the learned CGC who too has filed the

Statement of Objections opposing the Writ Petition. Learned Sr. Advocate appearing for the respondent-RBI and learned Addl. Solicitor General of India appearing for the third respondent have resisted the Writ Petition, making submission in justification of the impugned notices & orders, drawing attention of the court to the provisions of law and to the Rulings.

3. BRIEF FACTS OF THE CASE:

(a) As already mentioned above, first petitioner is a company incorporated on 28.07.1995 and second petitioner happens to be its Managing Director. The Company was engaged in the manufacturing of telecommunication equipments. "The company also had a wholly owned subsidiary in Malaysia..." The subsidiary had borrowed approximately Rs.20 plus crore from a financial institution based in Malaysia way back in November 2008. The petitioner company happen to be a corporate guarantor.

(b) The first respondent vide notice dated 26.09.2013 had raised some objections as to the corporate guarantee alleging violation of contravention of regulation 6(2)(i) read with regulation 2(o) of Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004 [hereafter '2004 Regulations']. The RBI had also offered to have compounding of the said contravention by moving an application, if so desired by the petitioners. This notice having remained unanswered, the RBI shot another notice on 9.12.2013 substantially reiterating the version of the earlier one.

(c) The first petitioner company sent a letter dated 24.12.2013 seeking extension of time for moving compounding application pleading some difficulty. Extension arguably having been granted, the application dated 9.1.2014 was also accepted by the RBI. The second respondent official of the RBI passed the compounding order dated 22.08.2014 and imposed a fine of Rs.50,90,000/- (Rupees Fifty Lakh Ninety Thousand) only. However, petitioners chose not to pay the fine and eventually, the matter landed with the third respondent – ED who has shot the impugned notices/summons.

(d) Petitioners' representation dated 9.12.2017 requesting the second respondent to recall the compounding order on the grounds pleaded therein remained unconsidered. It is the case of petitioners that there is no contravention of any law whatsoever and therefore, the impugned proceedings need to be set at naught. Per contra, the respondent-RBI and respondent-ED controvert the version of petitioners and seek to justify the impugned proceedings.

4. Having heard the learned counsel for the parties and having perused the Petition Papers, this Court declines indulgence in the matter for the following reasons:

(a) The first petitioner admittedly being a company in winding up, cannot maintain a petition on its own, as rightly contended by learned Sr. Adv. Mr.Naik.

The Apex Court in SIRMUR CHEMICAL AND GENERAL INDUSTRIES LIMITED VS. UNION OF INDIA, CIVIL APPEAL NO.12/1960 decided on 3rd March, 1962 observed "...We do not think that Section 457 of the Companies Act, 1956, or the corresponding provision in the 1913 Act contemplates that on an order of winding up by the court any person other than the liquidator shall have the power to institute or defend any suit, prosecution or other legal proceeding, etc..." Therefore, the Writ Petition by the petitioner company cannot be maintained without its cause being espoused by the Official Liquidator vide ASSISTANT COMMISSIONER VS. HINDUSTAN URBAN INFRASTRUCTURE LIMITED, (2015) 3 SCC 745.

(b) The vehement submission of learned Sr. Adv. Smt. Jayna Kothari that the Compounding Order which levied exorbitantly higher fine disproportionate to the arguable guilt of his client needs to be set at naught, cannot be countenanced for more than one reason: Firstly, the said order having been made against the first respondent company in winding up, the second petitioner cannot lay a challenge, he having seized to be its office bearer/agent on winding up order being made. Secondly, the first petitioner company also cannot lay a challenge thereto either, for the discussion made in the immediately preceding paragraph. Thirdly, once the fine is not paid pursuant to Compounding Order, Rule 10 of the Foreign Exchange (Compounding Proceedings) Rules, 2000 not only renders the said order non est but also deems that no application for compounding was ever made. The said Rule has the following text:

"In case a person fails to pay the sum compounded in accordance with the rule 9 within the time specified in that rule, he shall be deemed to have never made an application for compounding of any contravention under these rules and the provisions of the Act for contravention shall apply to him."

That being the position, treating the question of quashing what is non est would be an exercise in futility which Writ Court cannot afford to do that.

(c) The vehement submission of Smt. Jayna Kothari that issuance of corporate guarantee by her client on behalf of its wholly owned foreign subsidiary was for an amount that was much lesser than the limit prescribed by Regulation 6(2)(i) of 2004 Regulations, is bit difficult to countenance. Petitioner company had issued the subject corporate guarantee dated 16.12.2008 for MYR 15 million on behalf of said subsidiary in Malaysia, in favour of the lending agency there. Regulation 6(2)(i) prohibits an Indian company assuming a financial commitment towards its wholly owned subsidiary abroad beyond 400% of its net worth as on the date of its last audited balance sheet. As per the statutory Auditors Certificate dated 8.12.2008, the petitioner company had the net worth of INR 17,51,71,624/-. However, the auditor had included INR 38,88,50,400/- raised via debentures in question while computing the net worth in terms of this Regulation. Should the said amount be excluded, the net worth of the petitioner company would be in the negative value and therefore, it could not have issued the corporate guarantee in the teeth of the restrictions enacted in the subject

Regulation.

(d) The vehement contention of Smt.Jayna Kothari that the Net Worth certification has to be done in accordance with the provisions of 2004 Regulations as amended in 2007 w.e.f. 19.12.2007, cannot be much disputed. Regulation 2(o) defines 'Net worth' to mean 'paid up capital and free reserves'. Regulation 6(2) provides for an Indian company to assume a financial commitment in favour of its foreign subsidiary in a value not exceeding 400% of its net worth. However, the contention that while adjudging the 'net worth', the debenture value to be excluded, is bit difficult to countenance. Such an argued exclusion if accepted, would defeat the very purpose of law that enacts the limit. This view gains support from the observation of the Apex Court in R.D.GOEL VS. RELIANCE INDUSTRIES, (2003) 1 SCC 81 at paragraph 24:

"...a debenture is an instrument of debt executed by the company acknowledging its receipt to repay the same at a specified rate and also carrying an interest. It is in sum and substance a certificate of loan or a bond evidencing the fact that the company is liable to pay a specified amount with interest and although the money raised by the debentures becomes a part of the company's capital structure yet it does not become a share capital..."

The reliance of Smt.Jayna Kothari on the decision of Apex Court in NARENDRA KUMAR MAHESHWARI VS. UNION OF INDIA (1990) (Supp) SCC 440 that the convertible debenture is a new type of instrument and in terms of its definition given under section 2(12) of the Companies Act, a debenture need not be secured at all, does not much advance the case of her client. Suffice it to say that the debentures are the debts of the company that issues the same and therefore, while working out its net worth, they cannot be excluded, notwithstanding that the term "net worth" is described by the Regulation by employing a "means" definition as distinguished from "means and includes" definition. In matters like this, what needs to be seen is the object underlying the Statute. What is said is significant and at times what is left unsaid is equally significant. Significance of the unsaid has to be gathered by looking to the text & context of the provision.

(e) Lastly, the Writ Courts do not ordinarily grant indulgence when challenge is to the notices calling for the explanation from the litigant; the text of the impugned notice, more particularly the one dated 9.2.2018 issued by the third respondent at Annexure-S is in the nature of Show Cause notice. The contention that the said notice has been issued in furtherance of the subject Compounding Order, is liable to be rejected to say the least. Merely because in its schedule, the said notice mentions 'details of shareholding including debentures', one cannot hastily jump to a conclusion cottoning with the submission of petitioners' counsel. The schedule gives an idea as to what information the noticee should furnish. The term 'Compounding Order' is conspicuously absent in the said notice or the one that preceded it.

In the above circumstances, this Writ Petition being devoid of merits, is liable to be dismissed and accordingly, it is, costs having been made easy. In the fitness of things, petitioners are granted a period of four weeks to respond to the impugned notices and that all contentions are kept open in that regard.