

(2010) 12 DEL CK 0092

In the Delhi High Court

Case No : Company Appeal (SB) No's. 24 and 29 of 2009

Sanjiv Jain

APPELLANT

Vs

Satya Parkash and Bros. Pvt. Ltd.
 Satya Parkash and
Bros. Pvt. Ltd. Vs Sanjiv Jain

RESPONDENT

Date of Decision : 08-12-2010

Acts Referred:

Companies Act, 1956 — Section 10F, 237, 397, 398, 399(4)

Citation : (2011) 1 AD 634 : (2011) 100 CLA 337

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Aadhip Iyer, in Company Appeal SB No. 29 of 2009 and Anusuya Salwan, in Company Appeal SB No. 24 of 2009, for the Appellant; Anusuya Salwan in Company Appeal (SB) No. 24 of 2009 and Aadhip Iyer, Company Appeal (SB) No. 29 of 2009, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—These two cross-appeals are directed against the Order dated 20th May, 2009 passed by the Company Law Board disposing of Company Petition No. 49(ND)/2008 under Sections 397, 398, 237 and 399(4) read with Sections 402, 403 and 406 of the Companies Act, 1956 (hereinafter referred to as the Act, for short).

2. Mr. Sanjiv Jain (hereinafter referred to as the Appellant-purchaser, for short) was the Petitioner before the Company Law Board and has raised the following questions of law in Company Appeal No. 29/2009:

i) Whether in the facts and circumstances detailed hereinabove, the Company Law Board was correct in disposing of the petition of the Appellant in terms of the impugned order and judgment dated 20.05.2009?

ii) Whether the Company Law Board passed the impugned order & judgment dated 20.05.2009 without appreciating the documents produced by the Appellant

in support of the petition for oppression & mismanagement, especially the share application form dated 21.03.2006 for application of 8.5 lakh equity shares, duly acknowledged by the Respondents?

3. Appellants in Company Appeal (SB) No. 24/2009- Mr. Satya Parkash Gupta (Mr. S.P. Gupta, for short), Mr. Ghanshyam Gupta and Mr. Sanjay Gupta (hereinafter collectively referred to as S.P. Group, for short) were Respondents before the Company Law Board and have raised the following questions of law:

i) Whether the grant of interest 18% p.a. on the investment made by the Respondent was justified, as admittedly there was no agreement between the parties for payment of interest?

ii) Whether no case for mismanagement of the company was made and the petition therefore deserves to be set aside?

4. Relevant facts as highlighted by both sides may be noted.

A. M/s. Satya Parkash & Brothers Pvt. Ltd.-Appellant No. 1 in Company Appeal (SB) No. 24/2009 (hereinafter referred to as the Company, for short) was incorporated on 23rd July, 2001 to take over the business of a sole proprietorship concern of Mr. S.P. Gupta.

B. As per the balance sheet for the year ending 31st March, 2007, the authorized capital of the company was Rs. 60 lacs and the issued and paid-up share capital was Rs. 52,06,150/- which was fully subscribed by the S.P. Group. The Appellant-purchaser/Mr. Sanjiv Jain is not related to the S.P. Group and had no concern with the Company or the sole proprietorship.

C. The Appellant-purchaser/Mr. Sanjiv Jain made payment of Rs. 85 lacs to the company in 2006 by way of four different cheques. Appellant-purchaser/ Mr. Sanjiv Jain claims that this payment was for issue and allotment of 85000 shares of Rs. 10/- each at par in the company. It is also a case of the Appellant-purchaser/Mr. Sanjiv Jain that the S.P. Group had agreed to appoint him and one of his nominees as directors of the Company. He relies upon the counterfoil of share application form which was filed by him along with the petition. The case of Appellant-purchaser/Mr. Sanjiv Jain is that shares in the Company could not be issued immediately as the authorized capital of the Company was Rs. 60 lacs and till July, 2007 no shares were allotted and neither he nor his nominee were appointed as directors of the Company. On inspection of the records of the Registrar of Company, the Appellant-purchaser/Mr. Sanjiv Jain came to know that on 31st August, 2007 he was allotted 42,500 shares @ Rs. 200/-per share of Rs. 10/- each at a premium of Rs. 190 per share. It is the case of Appellant-purchaser/Mr. Sanjiv Jain that S.P. Group had agreed that Appellant-purchaser/ Mr. Sanjiv Jain would have and acquire majority shares to the extent of 62% in the Company but with the allotment of the said shares his shareholding was only 7%. As the shareholding of Appellant-purchaser/Mr. Sanjiv Jain was less than 10%, he had applied and obtained permission from the Central Government u/s

399(4) of the Act to file a petition under Sections 397/398 of the Act before the Company Law Board.

D. Case set up by S.P. Group on the other hand is that they have over 25 years of experience in running and managing business including road construction. The sole proprietorship concern was established in the year 1975 and in 2000-01 its annual turnover was Rs. 52.56 crores, when the sole proprietorship concern was converted into a private limited company. Mr. S.P. Gupta was allotted shares at par equal to Rs. 2,41,23,000/- but his sons Mr. Ghanshyam Gupta and Mr. Sanjay Gupta were allotted 1,20,615 shares of Rs. 10/- each @ Rs. 200/- per share. Thereafter also allotments were made to members of S.P. Group @ Rs. 200/- per share. S.P. Group has disputed the counterfoil of the share application form relied upon by the Appellant-purchaser/ Mr. Sanjiv Jain and had filed before the Company Law Board, share application form purportedly signed by Appellant-purchaser/Mr. Sanjiv Jain for allotment of shares. It is the case of S.P. Group that Appellant-purchaser/Mr. Sanjiv Jain had applied for 34000 equity shares in the Company @ Rs. 250/- each or at a premium of Rs. 240/- per share and had paid Rs. 85 lacs. However, subsequently it was agreed that the Appellant-purchaser/ Mr. Sanjiv Jain would be allotted shares in the Company @ Rs. 200/- each i.e. at a premium of Rs. 190/- per share and accordingly 42,500 shares were allotted to the Appellant-purchaser/ Mr. Sanjiv Jain.

E. An admitted fact is that Appellant-purchaser/Mr. Sanjiv Jain had received back Rs. 65 lacs from the Company or from S.P. Group. The contention of Appellant-purchaser/Mr. Sanjiv Jain is that this payment of Rs. 65 lacs was on account of disbursement of profits, while the case of S.P. Group is that this payment was towards part refund of Rs. 85 lacs invested by Appellant-purchaser/Mr. Sanjiv Jain.

5. The factual findings recorded by the Company Law Board are primarily mentioned in para 7 and the operative portion/directions are mentioned in para 9 of the impugned Order. The said paragraphs read as under:

7. I have considered the pleadings and arguments of the counsel. The admitted fact is that as on date, as per the register of members, the Petitioner holds 42500 shares Constituting to about 7% shares and to prosecute this petition, the Petitioner has obtained the sanction of the Central Government in terms of Section 399(4) of the Act. There are only two allegations - one relates to the allotment of shares at a premium instead of at par and the second is that the Petitioner and his nominee have not been appointed as directors. In so far as allotment of shares is concerned, according to the Petitioner, he was to be allotted 8.5 lakh shares at par by which on his investment of Rs. 85 lacs, he would hold 62% shares in the company. This assertion of shares being allotted at par is based on some understanding. No document evidencing the understanding has been produced. Even otherwise, it is a settled law that no private agreement can be sought to be enforced through a petition under Sections 397/398. Therefore the allegations have to be considered de hors the alleged

understanding. He has relied on a copy of his application at Page 70 of the petition and also some acknowledgement given in the name of the company at Page 71 of the petition. In both, it is stated that the application was for 8.5 lakh shares and the amount remitted was Rs. 85 lacs. The authenticity of these documents is disputed by the Respondents. They have in turn relied on Page 422 of the Reply wherein the Petitioner has given a certificate in which he had certified that he had applied for 34000 shares of Rs. 10/- each at a premium of Rs. 240/-. They have also relied on an application dated 21.3.2006 (Page 423 of Reply) wherein he has mentioned the same number of shares. While the Petitioner contends that the certificate was given at the instance of the company for IT purposes, he denies his signature on the application relied on by the Respondents. The only document which is admitted as genuine by both the parties is the certificate at Page 422 of the Reply. Even though, the Petitioner contends that it was given for IT purposes as desired by the company, yet, since that is the only undisputed document on record, the allegations of the Petitioner have to be considered as per the contents of this certificate, in which he had stated that he had applied for shares at a premium of Rs. 240 per share. Even though as per this certificate, the shares were to be allotted at a premium of Rs. 240, the actual allotment was at a premium of Rs. 190 per share. The Respondents submit that since in earlier two allotments, the premium charged was Rs. 190, the same premium was charged to the Petitioner also. Whether the shares are worth at a premium has to be examined with reference to the financial performance of the company. Admittedly, the Petitioner invested Rs. 85 lacs in March, 2006. A perusal of the profitability chart furnished by the company at Page 41 of the Reply shows that the intrinsic value of shares had gone up from Rs. 256 in 2002 to Rs. 367 in 2006. No man of ordinary prudence would allot such valuable shares at par i.e. Rs. 10/- per share. Further, the same chart indicates that the company had earned an average profit of Rs. 1.7 crore per year during the period 2002 to 2006. Again, no man of ordinary prudence would allot 62% shares for Rs. 85 lacs when the average profit per year is over Rs. 1.7 crores. Further, it is not the first time that the company has allotted shares at a premium. On earlier occasions in 2002 and 2004, the company had allotted at a premium of Rs. 190/- per share. Thus, I find that the Petitioner has not made out a case that he should have been allotted shares at par and not at premium.

8. x x x x x

9. Any way, since, as per the certificate at page 422 of reply given by the Petitioner that he had invested the money for shares at a premium of Rs. 240 per share, the relief to be granted has to be on that basis. Considering the facts and circumstances of the case and in the absence of any concrete material before me that the Petitioner was to be allotted shares at par but has been allotted at a premium and that considering the profitability of the company, no prudent business person would allot shares at par, I reject the prayer of the Petitioner for a direction to the Respondents to allot 8.5 lakh shares at par. The admitted fact is that the Petitioner had been allotted 42500 shares and his

grievance is that certificates had not been delivered to him. In view of the divergent stands taken by the Petitioner and the Respondents in regard to Rs. 65 lacs which the Petitioner has admittedly received and the stand of the Respondents that the Petitioner came in only as an investor, to put an end to the matters complained of, I direct that the company shall refund Rs. 85 lacs invested by the Petitioner together with a reasonable rate of interest. Since the Petitioner has raised the amount of Rs. 85 lakhs by mortgaging his house, I am of the view that the interest payable should take care of whatever interest that the Petitioner has to pay for the mortgage with some return for himself. Accordingly, I fix the rate of interest at 18% (simple) per annum from the date of investment. Since the company has already paid Rs. 65 lacs, the same will be deducted from the total amount payable i.e. Rs. 85 lacs plus interest at 18% from the date of investment till the date of payment.

6. Appellant-purchaser/Mr. Sanjiv Jain in his appeal has submitted that the counterfoil of the share application form dated 21st March, 2006 as per which Appellant-purchaser/Mr. Sanjiv Jain was entitled to allotment of 8.5 lacs shares of Rs. 10/- each at par should have been accepted. It is submitted that the counterfoil is signed by the authorized signatory and also bears the stamp of the Company. This counter foil is disputed by the Company and S.P. Group who have relied upon the share application form signed by Appellant-purchaser/Mr. Sanjiv Jain which does not specify the number of shares. Interestingly, Appellant-purchaser/Mr. Sanjiv Jain had himself written a letter certifying that he had applied for 34000 equity shares of Rs. 10/- each at a premium of Rs. 240/- of the Company and had made payment of Rs. 85 lacs on this account. This letter is admitted by Appellant-purchaser/Mr. Sanjiv Jain. Reference in this regard can be also made to the observations of the Company Law Board in para 7, quoted above, which deals with the profitability profile of the Company and the intrinsic value of a share of the Company which had gone up from Rs. 256/- in 2002 to Rs. 367/- per share in 2006. The Company had earned an average profit of Rs. 1.7 crores per year during the period 2002-06. The Appellant-purchaser/Mr. Sanjiv Jain has tried to explain the letter written by him; that it was for Income Tax purpose but this is hardly a valid and a good explanation. The Appellant-purchaser/Mr. Sanjiv Jain could not have been allotted different number of shares at a premium for the purpose of income tax returns and a different number of shares at par for the purpose of Company records. It is stated by Appellant-purchaser/Mr. Sanjiv Jain that the Company had allotted/issued equity shares to 34 entities at a premium of Rs. 190/- on 25th March, 2002 but Form No. 2 in this regard was filled only in 2007. Thereafter, the S.P. Group had repurchased the said shares from the 34 entities on 24th September, 2005 but again the forms were filed before the ROC only in 2007. Late filing of forms is one aspect but the sale and purchase of the shares and payment for the same is another aspect. In any case, totality of circumstances have to be taken into consideration. It cannot be said that the Company Law Board has not taken into consideration the entire facts and circumstances. Conjectures and queries have been raised about the

conduct and stand of both the parties. Irony is that both Appellant-purchaser/Mr. Sanjiv Jain and S.P. Group did not enter into any written memorandum of understanding or agreement. Both the parties basically rely upon oral understanding regarding which they have averred and taken conflicting positions. Company Law Board has taken a plausible view. The findings recorded in paragraph 7 of the order dated 20th May, 2009 are not perverse or one which requires interference in exercise of jurisdiction u/s 10F of the Act.

7. With regard to the payment of Rs. 65 lacs it is submitted that the said amount cannot be collated and treated as part payment of return of the investment of Rs. 85 lacs. It is submitted that Rs. 50 lacs was paid by S.P. Group and Rs. 15 lacs was paid by the Company. Company could not have made any payment to the Appellant-purchaser/ Mr. Sanjiv Jain in lieu of transfer of shares in view of the restriction u/s 77 of the Act.

8. A shareholder is entitled to dividend from a Company. It is not the case of the Appellant-purchaser/Mr. Sanjiv Jain that the Company had declared dividend and pursuant to which Rs. 65 lacs was paid to him. Receipt of the sum of Rs. 65 lacs is admitted by Appellant-purchaser/Mr. Sanjiv Jain. Appellant-purchaser/Mr. Sanjiv Jain has not given satisfactory explanation as to why this payment including Rs. 15 lacs was made by the Company. It is apparent that both the parties have not stated true and correct facts and have concealed aspects of the agreement/understanding between them. The Company Law Board, in these circumstances, has taken a pragmatic and practical view and balancing equities directions have been issued in paragraph 9 of the impugned Order. Directions have been given to the S.P. Group to pay interest @ 18% p.a. on Rs. 85 lacs from the date of investment till payment was made on the reducing balance. Thus Appellant-purchaser/Mr. Sanjiv Jain is entitled to interest @ 18% p.a. (simple) from the date he made payment of Rs. 85 lacs till repayment of Rs. 65 lacs was made to him and thereafter on Rs. 20 lacs till payment. The said order is just and fair and the Company Law Board has taken into consideration the fact that Appellant-purchaser/Mr. Sanjiv Jain had mortgaged his house to raise a loan and pay Rs. 85 lacs. It is not for this Court to fix the rate of interest or return, while examining an appeal on a question of law. The discretion exercised by the Company Law Board while fixing the rate of interest is fair and equitable and merits no interference. The Appellant-purchaser/Mr. Sanjiv Jain in his appeal has submitted that the intrinsic value of each share of the Company was Rs. 477.82 for the year ending 31st March, 2008 and accordingly this amount should have been the basis for calculation of the rate of return. The argument fails to notice the intrinsic value of each share on the date of purchase in 2006. This contention it appears was not raised before the Company Law Board and cannot be accepted for the reason that the Appellant-purchaser/ Mr. Sanjiv Jain had already received back Rs. 65 lacs and has been insisting on allotment of shares not at a premium but at par on the face value. Moreover, he had not participated in the running and operation of the business. Disputes between the parties had arisen way back in 2007 itself.

9. In view of the above discussion, no questions of law arise for consideration in the present Appeals and the same are dismissed. No order as to costs.