

(2012) 04 CAL CK 0016

In the Calcutta High Court

Case No : APO No. 161 of 2011 and ACO No. 26 of 2011

Sarda Plywood Industries Ltd.

APPELLANT

Vs

Hemant Kumar Motihar

RESPONDENT

Date of Decision : 19-04-2012

Acts Referred:

Companies Act, 1956 — Section 10F, 111A, 111A(3), 397, 398

Citation : (2012) 3 CHN 155

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Manju Bhuteria and Preetu Chowdhury, for the Appellant; Debangshu Basak, Chayan Gupta and P.K. Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Sanjib Banerjee, J.—This appeal u/s 10F of the Companies Act, 1956 arises from an order dated January 7, 2011 on a petition u/s 111A of the Act. A solitary point has been canvassed on behalf the appellant company. The appellant refers to a judgment reported at Aska Investments Pvt. Ltd. and Another Vs. Grob Tea Company Ltd. and Others, where the company Judge is said to have held that the violation of either Regulation 7 or Regulation 10 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 1997 would meet with the same consequence. The appellant suggests that in the light of such view expressed by this Court, the order impugned is liable to be set aside.

2. The company carried an application for rectification of its register of members u/s 111A to the Company Law Board complaining that the acquisition of the subject shares was in derogation of the said Regulations of 1997 and, as a consequence, the transfer of the shares allowed by the company without being aware of the violation was liable to be undone and the register rectified. The appellant also levelled charges of the provisions of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 and the Foreign

Exchange Management Act, 1999 being violated by the respondents in acquiring the subject shares. According to the appellant, the real transferee of the shares was a non-resident Indian and the acquisition of the shares was in breach of Regulation 13 of the 1992 Regulations.

3. The CLB framed three issues. The first was whether upon an acquirer of shares failing to discharge the obligation imposed by Regulation 7 of the Takeover Regulations, the acquisition itself was bad and the transfer of the relevant shares in the name of the transferee had to be undone. The second issue framed was as to whether there was any violation of Regulation 7 of the Takeover Regulations or Regulation 13 of the Insider Trading Regulations. The third issue was as to whether the petitioner before it, the appellant herein, was entitled to any relief.

4. In a well-considered judgment, the CLB took the view that there was a distinction between Regulation 7 in Chapter II of the Takeover Regulations and Regulation 10 in Chapter III thereof. The CLB noticed the difference in the wordings of Regulation 7 and Regulation 10 and opined that Regulation 7 obliged an acquirer to make a post-acquisition declaration whereas Regulation 10 required the obligation thereunder to be discharged by the time of or prior to the acquisition. Upon such understanding of the relevant provisions, the CLB proceeded to address the varying effects of the violation of either provision in the context of section 111A of the Act. The CLB concluded that in case of violation of Regulation 7 of the Takeover Regulations, which was akin to Regulation 13 of the Insider Trading Regulations, there was no contravention of the regulations at the time of acquisition and, as such, an application for rectification of the members' register of the concerned company could not be entertained in such a case; but when the violation was of Regulation 10 of the Takeover Regulations, the acquisition of the shares itself was in contravention of the regulations and any recognition of the acquisition by the recording of any transfer of the relevant shares was amenable to rectification u/s 111A. The distinction that CLB made is clear, succinct and well-worded. In the light of the view taken on the first of the three issues framed by the CLB, it declined to go into the second issue since it was not called upon so to do as an answer against the acquirer would still not have entitled the petitioner before the CLB to the order that it sought. The CLB noticed that the petitioner before it had already applied to the appropriate authority, the Securities and Exchange Board of India, for appropriate measures being taken against the acquirer and left such appropriate authority to decide the question. In the light of the answers to the first two issues, it was found that the petitioner before the CLB was not entitled to any relief.

5. The appellant refers to a judgment reported at 108 Comp. Cases 58 (Karamsad Investments Limited vs. Nile Limited) and an unreported judgment of this Court in W.P. No. 331 of 2001 delivered on March 27, 2001 (Arun Kumar Bajoria vs. The Securities and Exchange Board of India) in support of its assertion that Regulation 7 of the Takeover Regulations has been judicially

interpreted to be mandatory. On the strength of the submission that the compliance with Regulation 7 of the Takeover Regulations is as imperative as the adherence to Regulation 10, the appellant suggests that in the light of the view taken earlier by the company Judge of this Court in Grob Tea, the answer to the first issue by the CLB in the impugned order has to be found to be erroneous.

6. In Grob Tea, a combined order of the CLB on two separate petitions, one under sections 397 and 398 of the Act and another u/s 111A thereof, was assailed in appeal. In defence to the grievance under sections 397 and 398 of the Act, the concerned company asserted that the petitioner had no title to the shares - and hence no qualification u/s 399 of the Act - since the very acquisition of the shares was in derogation of Regulation 7 of the Takeover Regulations. The concerned company applied for rectification of its register u/s 111A and the connected issues in both matters were taken up and decided by the Company Law Board. The Company Law Board found that the acquisition of the shares by the section 397 petitioner was in breach of Regulation 7 of the Takeover Regulations, directed forfeiture thereof and dismissed the section 397 and 398 proceedings as being not maintainable.

7. After referring to the facts and the judicial precedents relevant on the matters in issue, the judgment in Grob Tea observed that the view expressed by a Division Bench of the Bombay High Court in the judgment reported at 109 Comp. Cas 913 (Shirish Finance Investment Put. Ltd. vs. M. Sreenivasulu Reddy) had an "inner meaning." The judgment then proceeded to hold as follows:

20. On a plain reading of Regulation 7 it would appear that the regulation clearly stipulates "acquirer" whereas Regulation 10 under Chapter III includes specifically "persons acting in concert". In my view, two chapters are having totally independent approach. Chapter II obligates the persons to inform and suffer penalty because of non-compliance. Chapter - III puts a complete restriction on acquisition. In my view, in the later situation the acquisition itself is wrongful and is ipso facto invalid and null and void whereas Chapter II provides for penalty only. In case of violation of Chapter II or Chapter III, section 111A(3) empowers the company to apply for rectification. In both the cases the Company Law Board is entitled to properly direct the parties so that the mischief is undone. As in the case of Mega Resources the share ratio was brought down during the pendency of the litigation and as such Company Law Board did not issue any further direction. I am unable to conceive of a situation as to how and under what circumstances the Company Law Board could direct forfeiture of the entire shareholding. Even if I hold that there had been violation of Regulation 7 even then it would be absolutely improper for me to sustain order for forfeiture. In course of submission Mr. Sarkar appearing for the company in his usual fairness contended that the appellants were free to dispose of their shares in the market to bring down the mischief mark under Regulation 7. The Company Law Board could have directed so. Instead they ordered forfeiture of the shares and directed deletion of their names from the Shareholder Register resulting in loss

of money for acquisition which was never contemplated in Chapter II or in Regulation 7 specifically.

8. The appellant says that since the view taken in Grob Tea was that in "case of violation of Chapter II or Chapter III, section 111A(3) empowers the company to apply for rectification," it follows that a violation of Regulation 7 of the Takeover Regulations has been regarded by this Court to be a contravention within the meaning of that word as used in section 111A(3) of the Act.

9. It is necessary, in this context to see what the relevant sub-section in the statute says:

111A. Regulation of Register of Transfer.-

(1)...

(2)...

(3) The company Law Board may, on an application made by a depository, company, participant or investor or the Securities 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 months from the date of transfer of any shares or debentures held by depository or from the date on which the instrument of transfer or the 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.

10. For an application for rectification of a company's register to be successful before the CLB, therefore, section 111A(3) requires the transfer of the shares to be in contravention of, inter alia, the regulations made under the Securities and Exchange Board of India Act, 1992. The CLB has held in the order impugned in the present proceedings that the expression "transfer of shares...is in contravention..." in the relevant sub-section would imply that the acquisition of the shares is in contravention of the relevant provisions or regulations. The appellant suggests that in view of the two sentences in paragraph 20 of the judgment in Grob Tea, the CLB could not have rendered the opinion that it has on such aspect of the matter.

11. It does not appear that the relevant sentences in paragraph 20 of the report in Grob Tea that the appellant emphasises on imply that an acquisition followed by the non-adherence to the obligations under Regulation 7 of the Takeover Regulations would render the acquisition or the transfer upon that acquisition to be bad. Indeed, it would be evident from the nature of the order passed in Grob Tea that the two sentences could not have implied what the appellant ascribes them to have meant. There are good reasons for such view.

12. If the acquisition of any share or the consequent transfer thereof is to be found to be in contravention of any provision of law or any statutory regulation, it would rob the holder of the title to the share. For such a harsh consequence, it is necessary that the statute or the statutory regulation says so without any ambiguity. Regulation 7 attaches an obligation on an acquirer to do certain acts subsequent to the acquisition of the requisite number or level of shares. But it does not follow that if such obligation is not discharged, the violation will date back to the time of the acquisition and render it void. The varying consequences of a violation under Regulation 7 of the Takeover Regulations and a violation under Regulation 10 of the same Regulations also enforce the view. For a Regulation 7 violation, penalties are provided. Upon a penalty being imposed and the payment in respect thereof being discharged, the transgression is condoned. Upon the transgression being condoned, the matter is regularised and the title of the acquirer is not in dispute. If that is the correct interpretation of the relevant provision, it may not be understood to imply that the very title of an acquirer who fails to discharge the obligation subsequent to acquisition under Regulation 7 taints the acquisition. If the acquisition were in breach of the mandatory provision, such acquisition would be incapable of being regularised upon any penalty being paid. It is possible that the appropriate penalty in a particular case may even be to disgorge the shares, but even that would not imply that the acquisition would be void. Regulation 10, on the other hand, by its very wording makes the acquisition in violation of the pre-acquisition obligation bad. The acquirer who has not complied with the pre-acquisition obligation under Regulation 10 acquires no title at all to the shares. The distinction has been sufficiently indicated in the impugned order of the CLB.

13. In reading judgments, stray sentences or passages therefrom cannot be read out of context to imply something that the sentences in the relevant context may not actually imply. The two sentences in paragraph 20 of the report in Grob Tea have to be seen in the light of the final order that was passed therein. The order in Grob Tea set aside the order of forfeiture passed by the Company Law Board and permitted the acquirer in breach of the Regulation 7 obligations to sell off the relevant shares. If such acquirer did not have title to the shares, the Court could not have endorsed the sale of the shares and the appropriation of the proceeds thereof by the same acquirer. The two relevant sentences in Grob Tea have, therefore, to be understood in the larger context of the decision and not twisted out of turn as a stand-alone pronouncement of law.

14. There is no merit in the appeal. APO No. 161 of 2011 and ACO No. 26 of 2011 are dismissed.

15. There will be no order as to costs. Urgent certified photocopies of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.