

(1971) 11 DEL CK 0004

In the Delhi High Court

Case No : First Appeal No. 10 of 1966

The Punjab Distilling Industries Ltd

APPELLANT

Vs

Biermans Paper Coating Mills Ltd. and Another

RESPONDENT

Date of Decision : 15-11-1971

Acts Referred:

Citation : (1973) 43 CompCas 189 : (1972) ILR Delhi 431

Hon'ble Judges : Hardayal Hardy, C.J.;V.S. Deshpande, J

Bench : Division Bench

Advocate : B.R. Iyengar, H.L. Anand, S.K. Khurana, R.L. Tandon and M.L. Bhargav, for the Appellant;

Judgement

Hardayal Hardy, C.J.

(1) This judgment will dispose of two appeals viz. F.A.O. No. 10 of 1966 and F.A.O. No. II of 1966. The petitioner in both the appeals is the Punjab Distilling Industries Limited while the Biermans Paper Coating Mills Limited and G. H. Dupre

(2) The original petitions were filed on 14.12.1965 under S. 155 of the Companies Act, 1956 which will hereafter be referred to as the Act. The relief sought by the petitioner was one of rectification of the Register of members of Messrs Biermans Paper Coating Mills Limited (respondent No. 1), which will hereafter be referred to as the respondent company with regard to 10,051 fully paid-up equity shares of Rs. 100.00 each. These shares stand in the Register of members of the said respondent at present in the name of G. H. Dupret (respondent No. 2) and they bear numbers 0031 to 10081. Ordinarily, since both the petitions were for rectification of the Register of members of the respondent-company in respect of identical shares, there should have been only one petition, but it appears that since the validity of the allotment with regard to those shares is challenged on different grounds the petitioner, which was also a company, filed two petitions.

(3) It may also be mentioned here that before these petitions were filed, the petition had also filed on 15-4-1965 petition No 5 of 1965, under sections 397 and 398 of the Act and that petition was admitted by the Companies Tribunal New Delhi on the same day. In that petition, Shri R. D. Bhagat, the Chairman of the petitioner company had also joined as a petitioner.

(4) In petition No. 29 of 1965 which was the number of the original petition filed before the Tribunal, the contention of the petitioner was that 10,051 equity shares were originally allotted to respondent No. 2. G. H. Dupret, at the Board meeting of the respondent-company held on March 25, 1963. Shri Dupret is a Belgian collaborator of the respondent-company who had supplied machinery for the working of the respondent-company which has been started for the purpose of manufacture, sale of and dealing in coated art paper and board of all kinds and description as well as plastic products of all kinds and description. The collaboration agreement showed that respondent No. 2 was to supply machinery and the value of the machinery was assessed at Rs. 10,05,154.00. At its meeting held on March 25, 1963 the Board of Directors of the respondent-company treated Rs. 5,02,550.00 as a call in advance and Rs. 54.42 were allowed to stand to the credit of personal name of Dupret. Subsequently it was contended before the Tribunal by the counsel appearing for the petitioner-company that these shares had been treated as fully paid-up shares by the respondent-company with the result that the foreign collaborator, Dupret, was shown as a share-holder in respect of 10,051 fully paid-up shares against the value of the machinery supplied by him which was said to be worth Rs. 10,05,154.00. These facts were shown to the Tribunal from the minutes of the Board meeting held in March 1963.

(5) At that meeting, Shri R. D. Bhagat, the present Chairman of the petitioner-company, was present as a director of the respondent-company. But subsequently disputes arose between the directors of the respondent-company and Shri R. D. Bhagat who alleged various acts of non-co-operation and mismanagement against the other directors. Those acts are the subject matter of petition No. 5 of 1965 which as we have said before, was pending before the Companies Tribunal. Now when the jurisdiction of the Tribunal has been taken away the said petition is said to be pending in this Court.

(6) The short question raised by the petitioner in petition No, 29 of 1965 was that the machinery supplied by the foreign collaborator had been found to be almost worthless and if that be so according to the petitioner, the respondent-company entered the name of Dupret in its Register of members, without sufficient cause and Therefore the petitioner-company which is a share-holder of the respondent-company, would be justified in seeking rectification of the Register of members under S. 155(1)(a)(i) of the Act.

(7) The petition was dismissed by the Tribunal in limine, although a speaking order was made by the Tribunal on September 3, 1966.

(8) The petitioner has now come up in appeal against the same. ii Learned

counsel for the petitioner, who will hereafter be referred to as the appellant, does not dispute that it is a summary and discretionary jurisdiction which is exercised by the Tribunal in such matters. We Therefore do not see what fault can be found with the order in. that view of the matter.

(9) It was however contended by the learned counsel for the appellant that the only issue that had been raised in the petition which has given rise to Fao 10 of 1966, was whether the initial allotment of 10,051 shares in favor of Dupret, the foreign collaborator was erroneous because machinery that was obtained by the respondent- company in consideration of this allotment was a worthless machinery. In support of this contention, our attention was drawn to the survey report (Annexure C to the petition) dated 26th November 1965 by one Mr. H. P. Von Friedlein, a German engineer in Delhi which was submitted at the request of Mr. R. D. Bhagat, the Chairman of the petitioner-company. That report showed that the said consultant engineer made survey of the equipment of paper coating plant on 126-I 1-1965 which was lying at a site to the south-west and approximately two miles from Gurgaon on the Manesar Road. More than 80% of the plant was lying packed in wooden cases partly on the property of the other company and partly on the land owned by the respondent-company. The surveyor however critically inspected the un-packed machinery and on the strength of available optical evidence he came to the conclusion "the equipment is at least several decades old and falls for all practical purposes into the vintage category". The surveyor also gave opinion that the plant in the condition in which it was found was a long way off from being operative and he doubted if it would ever become operative. According to him, this was due to multitude of reasons, such as faulty and careless packing, utter neglect of the most basic rust preventive measures for the sea transport and that any effort in salvaging it would be bound to fail on account of the prohibitive cost involved. As regards its value, in his opinion the plant which was sold for around Rs. 10 lacs to the respondent-company would certainly not be able to fetch more than a fraction of the above amount. It was on the basis of that survey report that the counsel for the appellant wanted the Tribunal to entertain the petition and issue notice to the respondent-company in order that the rectification prayed for may be ordered.

(10) The contention was rejected by the Tribunal. It was conceded by the counsel for the appellant that the machinery must have come into this country by the middle of 1962. The resolution passed by the Board of Directors of the respondent-company at its meeting held on March 25, 1963 mentioned the machinery as worth Rs. 10,05,154. Shri R. D. Bhagat, the present chairman of the appellant, and Shri D. S. Chawla were the two directors of the company present at that meeting, We must assume that they took sufficient care to find out the value of the machinery as it was received in 1962 and a resolution allotting 10,051 shares in favor of the foreign collaborator was passed-if. March 1963.

(11) As against that, the German Engineer who saw the machinery for the first

time on 26-11-1966 and then too only 25% of it, came to the conclusion that it was worthless. The Tribunal Therefore rightly held that it would be difficult for the Tribunal to assess the true value of the machinery in a petition u/s 155 of the Act.

(12) Counsel for the appellant argued that the section gives un-limited jurisdiction to the Court to rectify the Register. In all cases where justice requires, the order to rectify will be nunc pro tune (see in re. Sussex Brick Company, (1904) 1 Ch 598 and Re Imperial Chemical Industries Limited, 1936)-2 All E.R. 463. In Smt. Soma Vati Devi Chand Vs. Krishna Sugar Mills Ltd. and Others, , H. R. Khanna J. (as his Lordship then was) observed that "Although the power conferred by the section on courts is very wide, the law seems to be well settled that the remedy provided by the section is summary. It can be invoked in non-controversial matters requiring quick decision. Section 155 is not meant to be used for deciding disputes requiring investigation. In the case of a dispute of complicated nature involving controversy under several heads, the section ought not to be allowed to be used and the party concerned should be directed to proceed by way of a regular suit." Reference was made by the learned Judge to the following decisions

In re: Greater Britain Products Development Corporation Ltd. (1924) 40 Tlr 488.

Jagan Nath v. Gopi Chand Air 1915 Lahore 100,

S. Bhagat Singh and Another Vs. The Piar Bus Service Ltd., Amritsar and Others,

In the matter of In Re: Dhelakhat Tea Co. Ltd., ,

Peoples Insurance Co. Ltd. Vs. C.R.E. Wood and Co. Ltd. and Others, and

Public Passenger Service Ltd. Vs. M.A. Khader and Another,

And to a passage in Volume 6 of Halsbury's Laws of England Third Edition at page 218 which reads :-

"If the Court thinks that the case, by reason of its complexity or on the ground that there are matters requiring investigation or otherwise, could more satisfactorily be dealt with by an action, the court will decline to make an order on a motion, without prejudice to the right of the applicant to institute an action for rectification."

Learned counsel for the appellant further argued that if it was held that there was no total failure of consideration in respect of allotment of these shares so as to bring the case within Section 155(1)(a)(i) of the Act, the Tribunal could come to the conclusion that there was no total failure of consideration and the Register of members could be rectified only with respect to those shares in, the name of G. H. Dupret for which there was no consideration. The Tribunal felt rightly that though there was a prayer in the petition to that effect, partial failure of consideration may not justify the avoidance of the collaboration agreement partially. In any event, so far as we are concerned, we do not think that we

should be justified in entertaining a petition for rectification on such a ground under S. 155 when it is bound to raise complicated questions of fact which have to be resolved on technical expert opinion which will have to be subjected to cross-examination.

(13) In these circumstances, we are in agreement with the Tribunal that so far as petition No. 29, which has led to Fao 10 of 1966. is concerned was rightly dismissed by the Tribunal.

(14) This brings us to the second appeal, namely, Fao 11 of 1966 which arises out of petition No. 30 of 1965. The question involved in this petition was whether the Register of members of the respondent- company should be rectified with respect to the same identical shares on the ground that the allotment of these shares was inconsistent with the collaboration agreement and was violative of the condition imposed by the Central Government while approving the collaboration agreement and giving consent to the issue of capital under the Capital Issues Control Act, 1947. The said allotment being in contravention of Section 3 of the said Act is punishable u/s 13 thereof and is as such void ab initio and invalid, and, Therefore, rectification Of the Register of Members should be ordered.

(15) The Tribunal acceded to the appellant's submission that this petition raises a pure question of law and Therefore called for its admission. Article 2 of the Collaboration agreement dated 10th November 1961, of which a copy was annexed to the petition, showed that it was proposed to issue paid-up capital of the value of Rs. 30 lakhs and Dupret would be allotted shares of the value of Rs. 101 lakhs in lieu of the machinery and plant to be imported as detailed in Article 1. Shri R. D. Bhagat and his nominee were to contribute 51 lakhs in the paid-up capital and the rest of the issued capital would be sold in open market. This agreement was entered into in November 1961 and the machinery from the foreign collaborator was received sometime in the middle of 1962. The authorised capital of the respondent-company was Rs. 50 lakhs divided into 10,000, 9% preference shares of Rs. 100.00 each and 40,000 equity shares of Rs. 100.00 each. The subscribed capital of the respondent-company was Rs. 11,84,300/ divided into 11,843 equity shares of Rs. 100.00 each. The petitioner claimed that it was the holder of 1076 fully paid-up equity shares of Rs. 100 each. The other share-holders were Shri G. H. Dupret to whom were allotted 10,051 fully paid-up equity shares of Rs. 100.00 each and one Shanti Lal Bajaj who was a transferee of 690 shares of Rs. 100 each of which only 50% was paid up. There were three other share-holders including Shri R. D. Bhagat, the present Chairman of the appellant company, who held 5 fully paid-up equity shares each of the respondent of Rs. 100.00. One other share-holder held 5 equity shares of Rs. 100.00 each. of which only 50% was paid up. This holding, as already stated, would make up the subscribed capital of the respondent-company of Rs. 1,84,300.00.

(16) In these circumstances, it could not be alleged that the allotment challenged

by the appellant was inconsistent with the collaboration agreement; but reliance was placed on the correspondence with the Controller of Capital Issues annexed to the petition and it was pointed out that the letter of the Controller of Capital Issues dated June 14, 1962 addressed to the Chartered Accountants of the respondent- company viz. M/s. J. S. Pahwa and Co., showed that" the collaborators were to hold shares not exceeding 49 per cent. That letter conveyed the consent of the Central Government to the issue by the respondent-company of capital to the extent of Rs. 30 lakhs as follows:-

"30,000 equity shares of Rs. 100.00 each, for cash at par, out of which shares not exceeding 49% may be offered to M/s. Leonard and Bier-man, S. A. Belgium."

The next letter relied upon was another letter from the Controller of Capital Issues dated October 11, 1962 which further amended the prior order of June 14, 1962 which had already been amended by a letter dated 21st July 1962. The last mentioned letter was however not produced before the Tribunal. The amendment of the Central Government's consent incorporated in the letter of October 11, 1962 reads as follows:-

"30,000 equity shares of Rs. 100 each, out of which shares not exceeding 49% may be offered to Mr. G. H. Dupret for consideration other than cash i.e. against supply of plant and machinery and the balance to be issued for cash at par."

It appears that two changes were introduced in the original consent by this letter. The consent of the Central Government of June 14, 1962 was for the offer of shares not exceeding 49 per cent of 30,000 equity shares to Messrs Leonard & Bierman, S. A. Belgium. The amendment contemplated that the offer should be made to Shri G. H. Dupret, respondent No. 21, who we were told, is a director of Messrs Leonard & Bierman to whom the offer was to be previously made. Secondly, this offer in the first consent was to be for cash at par whereas under the consent order as modified on Oct. 11, 1962 the consideration for the offer of shares not exceeding 49 per cent, was to be other than cash i.e. against supply of plant and machinery. It appears that in pursuance of this amended consent order at the Board meeting held on March 23, 1963 where Shri R. D. Bhagat was present, 10051 shares were allotted to Dupret and a consequent entry was made in the Register of members.

(17) The contention urged on behalf of the appellant is that the present holding of Shri Dupret is more than 49 per cent of the subscribed capital viz. Rs. 11,84,300 divided into 11,843 equity shares of Rs. 100.00 each and is Therefore vocative of the condition imposed by the Central Government. During the course of the proceedings before the Tribunal, counsel for the appellant was advised to approach the Capital Issue authorities at Delhi to get a clarification of their consent letters. The counsel did make an attempt; but the clarification did not go further than the letters themselves. The position Therefore is that the offer of shares not exceeding 49 per cent to the foreign collaborator of 30,000 equity shares of Rs. 100.00 each could not exceed but while the present holding of Shri

Dupret cannot be said to amount to more than 49 per cent of the capital issued of 30,000 equity shares although it would undoubtedly be more than 49% of the subscribed capital. In this view of the matter, this petition which has given rise to F.A.O. No. 11 of 1966 ought to have been admitted. The Tribunal however felt that the same contention having been raised by the appellant in the winding up petition, Being Company petition No. 10-D of 1966, which was pending before the High Court of Punjab, this petition need not be admitted. The Tribunal however added that the order made by it was without prejudice to the appellant placing before the Punjab High Court in the winding up petition all further facts, if it so desired on the points raised by it and also without prejudice to the appellant taking any steps against the respondent-company or against Shri Dupret, if so advised, before the concerned Capital Issue or other authority.

(18) Counsel for the appellant, however, stated that the only point on which winding up petition has to be considered by this Court and also perhaps the petition No. 5 of 1965 under sections 397 and 398 of the Act which are pending now in this Court, is inability of the respondent company to pay its liabilities. We do not know how far that contention of the appellant is correct. It may be so or it may not be so, but in any event, we are of the view that F.A.O. No. 11 of 1966 has to be allowed and the petition which gave rise to it, has to be admitted. It will now be for the Company Judge hearing that petition and also other connected matters e.g. Company Petition No. 10-D of 1966 and Company Petition No. 5 of 1965, to make necessary orders. As this matter has been before this Court for nearly about five years, we expect that the Company Judge will dispose of this matter and the other connected matters without any un-due delay. There will be no order as to costs.