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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on 03.07.2012

+ **RFA 369/2004**

V.K.SINGHAL & ANR. ... Appellants

Versus

M/S. VANTAGE CONSTRUCTION P. LTD. ... Respondent

Advocates who appeared in this case:

For the Appellants : Mr. Rahul Sharma
For the Respondent : Ms. Sangeeta Jain

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V. K. JAIN (ORAL)

1. This appeal is directed against the judgment and decree dated 12.03.2004 whereby a decree for recovery of amount of Rs.5,25,000/- along with pendente lite and future interest at the rate of 18% per annum and cost was passed in favour of the respondent and against the appellants. The facts giving rise to the filing of this appeal can be summarized as under:-

The appellants before this Court are the promoters of a company known as Hygienic Foods Limited (HFL). A Memorandum of Understanding was executed on 06.12.1990 between the appellants on one hand and the respondent No. 1 on the

other hand. Under the said MOU, the appellants agreed that they will cause HFL to issue and allot 50,000 fully paid-up shares and 4 lacs partly paid-up shares of HFL to respondent No.1. 50,000 fully paid shares were to be allotted within thirty days of the signing of the MOU against payment of Rs.5 lacs. Respondent No.1 was to pay Rs.2.50 per share on allotment of those 4 lac partly paid shares and the remaining amount was to be paid in three calls, subject to fulfillment of certain conditions laid down in para 6 of the MOU.

HFL had taken a term loan from IFCI. HFL, vide its letter dated 08.12.1990, requested IFCI to approve the MOU executed between the appellants and the respondent No.1 so that it is able to get funds from respondent No.1 Company. IFCI vide its letter dated 03.01.1991, rejected the proposal for induction of respondent No.1 as a co-promoter in the management of HFL. As a result, 4 lac partly paid shares of HFL could not be allotted to respondent No.1.

A suit for specific performance of the MOU dated 06.12.1990 or in the alternative, for award of damages on account of failure of the investment made by respondent No.1 was then filed by respondent No. 1. The learned Trial Judge vide impugned judgment and decree dated 23.02.2004, passed a decree for recovery of money, since the learned counsel for the appellant conceded at the time of arguments that in view of refusal of IFCI to approve the MOU, the relief for specific performance had become infructuous.

2. Clause 2, 3, 5(2), 13(a) and 16 of the MOU are relevant for the purpose of deciding this appeal and read as under:-

2. “SINGHALS” shall cause “HFL” to issue and allot to “VANTAGE” 50,000 (Fifty Thousand) Equity Shares fully paid up and 4,00,000 (Four Lakh) Equity Shares partly paid up of the face value of Rs.10/-(Rupees Ten only) per share.

3. The “SINGHALS” shall in consideration of the mutual covenants herein contained support and vote in favour of the Resolution to be considered by shareholders of “HFL” for according their consent by Special Resolution under Section 81 (1-A) of the Companies Act, 1956(hereinafter referred to as the “ACT”) for issue and allotment of 4,50,000 (Four Lakh Fifty Thousand) Equity shares of the face value of Rs.10/-(Rupees Ten only) each in the capital of “HFL”(hereinafter referred to as the “SHARES”) to VANTAGE.

5(2) Against the issue of 4,00,000(Four Lakh) Equity Shares a sum of Rs. 10,00,000 @ Rs.2.50 per share on allotment provided the terms of this Memorandum of Understanding have been approved by the Industrial Finance Corporation of India (“IFCI”). The said shares shall be issued partly paid up to the extent aforesaid and the balance shall be up to the extent aforesaid and the balance shall be called in three calls of equal amount provided the conditions set out in Clause 6 have been satisfied.

13(A) “SINGHALS” have full legal right, power and authority to enter into, execute and deliver this Memorandum of Understanding and to perform the obligations, undertakings and transactions set forth herein.

16. “SINGHALS” undertake to cause “HFL” to take approval of the Financial Institutions, if required, pursuant to the loan agreement with the Financial Institutions.”

3. The first question which comes up for consideration in this appeal is as to whether HFL could have issued its 50,000 fully paid-up shares to respondent No.1 without prior permission of IFCI or not. It has come in the deposition of PW-2 – Shri S.L.Narasimhan Rao that one of the conditions imposed by IFCI, while sanctioning the term loan, was that any fresh equity of the Company should have prior approval of IFCI. It is, therefore, quite clear that no share could have been issued by HFL to anyone, including respondent No.1, without first obtaining prior approval from IFCI. The learned counsel for the appellants submits that permission of IFCI was required only in case authorized share capital of the Company was sought to be increased and no such approval was required to issue additional capital out of the authorized share capital of the Company. I, however, find no merit in the contention. Once the contract between HFL and IFCI stipulated that no fresh equity could be issued by the Company without prior approval of the lender, it clearly prohibited issue of any new shares whether out of the already authorized share capital or by increasing authorized share capital and then issuing the fresh equity. There is nothing in the deposition of Shri S.L.Narasimhan Rao which would indicate that no permission from IFCI was

required for issuing shares out of the existing authorized share capital of the Company. Therefore, I have no hesitation in holding that no share could have been issued to respondent No.1 without the Company obtaining prior approval of IFCI.

4. It is not in dispute that the appellants were the Promoter Directors of the HFL. They specifically undertook, vide clause 16 of the MOU, to cause HFL to take approval of the financial institution if required pursuant to the loan agreement with those institutions. Therefore, they were in a position to make the Company apply to IFCI for obtaining permission for issue of these 50,000 shares to respondent No.1. HFL sought approval of IFCI to the MOU though no specific approval for allotment of 50,000 fully paid-up shares to respondent No.1 was sought. Allotment of these 50,000 fully paid-up shares to respondent No.1, in my view, was illegal, having been effected without obtaining prior approval of IFCI in terms of the loan agreement which HFL had with the said institution. Therefore, the appellants clearly committed a breach of the MOU by not causing HFL to take approval of IFCI for allotment of these 50,000 shares.

5. Even if I assume for the sake of arguments that no approval of IFCI was required for issue of these 50,000 fully paid-up shares to respondent No.1, it is the appellants' own position that 4 lac partly paid-up shares could have been allotted to respondent No.1 without prior approval of IFCI. Admittedly, IFCI had not granted

any approval for allotment of these partly paid shares to respondent No.1. Section 65 of the Indian Contract Act, 1872, to the extent it is relevant, provides that when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. The MOU, to the extent it provided for allotment of shares to respondent No.1 became void, the moment requisite permission for approval of the MOU was rejected by IFCI. The agreement between the appellants and respondent No. 1 was a package deal, whereby respondent No. 1 was to be allotted 4,50,000 shares and made a co-promoter of HFL. The provision in the agreement for allotment of 50,000 fully paid up shares formed part of that package deal and is not separable from other obligations contained in the MOU. The agreement was to necessarily frustrate, on failure to perform all the obligations which formed part of the package deal between the parties thereto. Consequently, the MOU stood frustrated, on IFCI refusing to approve the same. Therefore, the appellants are bound to restore the benefit which they received from respondent No.1 under the MOU.

6. The contention of the learned counsel for the appellants is that the allotment money for 50,000/- paid-up shares having been paid to HFL which being a company is a separate legal entity and not to the appellants, the advantage under the MOU was received by HFL and not by the appellants and, therefore, they are

not bound to pay that amount to respondent No.1. I, however, find no merit in this contention. A perusal of the letter dated 08.12.1990 from HFL to IFCI would show that appellant Shri V.K.Singhal wrote to IFCI that M/s. Vantage Construction Pvt. Ltd. (respondent No. 1) would subscribe 4,50,000 equity shares of the face value of Rs.10/- each, amounting to Rs.45,00,000 out of which Rs.5.00 lakhs was towards the balance promoters' contribution. It is thus evident that the amount of Rs.5 lakhs which respondent No.1 paid for allotment of 50,000 fully paid-up shares of HFL was utilized by the appellants treating it as their contribution in terms of the agreement which HFL had with IFCI. Therefore, it cannot be said that no benefit under the MOU was received by the appellants.

7. From whatever angle I may take, it is difficult to dispute that the appellants before this Court are liable to pay the amount of Rs.5 lacs which respondent No.1 had paid in terms of the MOU dated 6.12.1990.

8. As regards the amount of Rs.25,000, which formed part of the decree, it has been admitted in para 11 to 14 of the replication that the said amount already stood paid to respondent No.1. P.W.-1- Shri H.P.S.Chawla had admitted in his cross-examination, that the entire amount of Rs.1 lakh which he had paid to HFL have been received by him. This included the amount of Rs.25,000/- which formed part of the decree. Therefore, the judgment, to the extent it directs payment of Rs.25,000/- needs to be set aside. As regards interest, the learned Trial Judge had

awarded the interest at the rate of 18% per annum which I feel is on the higher side, considering the rates at which interest was being charged by Nationalized bank from time to time during the period the decretal amount remained unpaid. In my view, it would be just and reasonable to award interest at the rate of 12% per annum.

8. For the reasons stated hereinabove, the judgment and decree dated 12.03.2004 is modified to the extent that a decree for Rs.5 lakh with proportionate cost and pendente lite and future interest at the rate of 12% per annum is hereby passed in favour of the respondent No.1 and against the appellants. A sum of Rs.2,50,000/- was deposited in this Court during pendency of this appeal and was later on withdrawn by respondent No.1. The appellant shall be entitled to adjustment of that amount. That payment shall be taken into consideration while calculating interest. Decree sheet be drawn accordingly.

The appeal stands disposed of accordingly.

The LCR be sent back.

V.K.JAIN, J

JULY 03, 2012
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