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

#3 & 9

\+ **CO.APPL.(C) No. 4 of 2011**

GANGA YAMUNA FINWEST PVT LTD ..... Petitioner
Through: Mr. Ashish Makhija, Advocate for Official Liquidator

versus

NATIONAL STOCK EXCHANGE
OF INDIA LTD ..... Respondent
Through: Mr. Sanjay Bhatt, Advocate

WITH

\+ **Co. Appl. 401 of 2012 in Co. Pet. No. 42 of 2009**

GIRIRAJ RATAN DAGA & ANR. ..... Petitioners
Through: Mr. Sanjay Mishra, Advocate.

versus

GANGA YAMUNA FINVEST PRIVATE LTD. ..... Respondent
Through: Mr. Vibhor Garg, Advocate for ex-Directors with ex-Director Mr. J.C. Gupta in person.
Mr. Ashish Makhija and Mr. S.P. Singh, Advocates for OL.
Mr. Ramesh Ajmani, Advocate for SFIO with Mr. Dharamvir Singh, Dy. Director SFIO.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
23.01.2013

1. Co. Appl. (C) 4 of 2011 is an application by the Official Liquidator ('OL') under Section 446 of the Companies Act, 1956 ('Act') seeking a direction to the Respondent, National Stock Exchange of India Ltd. ('NSEIL') to deposit

with the OL a sum of Rs. 1.10 crores together with interest @ 18% p.a. from 10th November 2010 till the date of realisation. Co. Appl. 401 of 2012 is an application by NSEIL under Rule 9 of the Companies (Court) Rules, 1959 read with Section 529A of the Act to permit the Defaulters' Committee of the NSEIL to deal with the amount lying with it.

2. The background to these applications is that by an order dated 6th September 2010, this Court passed an order for the winding up of Ganga Yamuna Finvest Private Ltd. ('the company') and appointed the OL as a Provisional Liquidator ('PL').

3. The company was a trading member of NSEIL and was admitted as such in 1995. The company was, therefore, bound by the byelaws, rules and regulations of NSEIL. As a condition for admission to membership, the company deposited with NSEIL the following amounts by way of cheque as security:

a) Rs. 50 lakhs towards bank guarantee pledge in Canara Bank

b) Rs. 50 lakhs towards Trading Membership

c) Rs. 10 lakhs against foreign currency segment.

4. The submission of NSEIL is that under Byelaw 1(c) of Chapter-V of the

byelaws, the fees, security deposits, other monies and any additional deposits, whether in the form of cash, bank guarantee, securities or otherwise with NSEIL by a trading member from time to time shall be subject to a first and paramount lien for any sum due to NSEIL and all other claims against the trading member for due fulfillment of engagements, obligations and liabilities of trading members arising out of or incidental to any dealing made subject to byelaws, rules and regulations of NSEIL. It is further contended that the relationship between NSEIL and its trading members, apart from being statutory, is contractual in nature.

5. NSEIL states that it has set up National Securities Clearing Corporation Limited ('NSCCL') as a 100% subsidiary and entrusted NSCCL with the work of clearing and settling trades executed on NSEIL by its trading members. NSCCL is also constituted as the clearing house of NSEIL under Byelaw 16 of Chapter-IX of NSE byelaws framed in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 ('SCRA'). Chapter-XII of NSEIL byelaws deals with the declaration of defaulter of a trading member. It is submitted that upon a trading member being declared a defaulter, the Defaulters' Committee of NSEIL is required to deal with the money in accordance with Byelaw 23 of Chapter-

XII of NSEIL byelaws. Under Rule 20(f) of NSEIL Rules, the provision of Chapter-XII of NSEIL byelaws pertaining to default becomes applicable to a trading member expelled from NSEIL as if such trading member has been declared a defaulter. Consequently, when a trading member is declared as a defaulter or is expelled, the Defaulters' Committee calls in and realizes the security deposit in any form lying to the credit of the defaulter and recovers such sum. The assets of the trading member are then dealt with by the Defaulters' Committee under Byelaw 23 of Chapter-XII of NSEIL byelaws.

6. The company was expelled from trading membership by NSEIL with effect from 27th July 2009 in terms of Chapter-IV of NSEIL Rules. The case of NSEIL is that consequent thereto, the amounts lying in the Defaulters' Committee account has to be dealt with only by that Committee in accordance with the provisions of Chapter-XII of the NSEIL byelaws to be distributed in the order of priority as laid down in Byelaw 23.

7. NSEIL points out that pursuant to the proceedings instituted by one of the secured creditors i.e., Canara Bank before the Debts Recovery

Tribunal –II ('DRT-II'), Delhi against the company and others, an order was passed by DRT-II on 15th March 2010 restraining NSCCL from paying Rs. 27,91,000 to the company. NSEIL's application was allowed by an order passed on 29th March 2011 by DRT-II and Rs. 27,91,000 was permitted to be disbursed by the Defaulters' Committee to the respective claimants.

8. It is submitted that, as on 31st December 2011, the total amount lying with the Defaulters' Committee is Rs. 86,54,094.22. Meanwhile, a letter had been written by the OL to NSEIL on 10th November 2010, requesting it to remit the sum of Rs. 1.10 crores lying in deposit with it. NSEIL, by its reply dated 23rd February 2011 declined the said request stating that it was governed by the rules and byelaws of NSEIL which was in turn governed by the Securities & Exchange Board of India ('SEBI') under Section 4 of SCRA. It is stated by NSEIL that pursuant to the letter dated 16th May 2011 received from the OL, the Defaulters' Committee at a meeting held on 30th June 2011 approved of the setting aside of Rs. 83,91,000. On 21st November 2011, the Court directed notice to issue in Co. Appl. (C) 4 of 2011 filed by the OL.

9. In Co. Appl. 401 of 2012 filed by NSEIL on 22nd February 2012, notice was first directed to issue on 28th February 2012. In the said application, NSEIL disclosed that the Defaulters' Committee had received 151 investors' claims against the company, of which 68 were found to be admissible for payment of Rs. 1,07,82,122.11. Out of this amount, claims to the extent of Rs. 81,96,594.59 were settled out of the Investor Protection Fund Trust ('IPFT'). It is stated that the said amount had been paid out of IPFT "since the assets lying with the Defaulters' Committee have been set aside to the extent of Rs. 83,91,000 as aforesaid." Further, prior to the receipt of the letter dated 16th May 2011 from the OL, a sum of Rs. 22,01,760.59 was paid out of the assets available with the Defaulters' Committee of NSEIL towards meeting the 68 investors' claims found to be admissible. It is stated that "Therefore, as against the aforesaid amount of Rs. 83,91,000 set aside, claims amounting to Rs. 85,80,361.52 is eligible for recovery out of the assets lying with the Defaulters' Committee."

10. In the above circumstances, the case of NSEIL is that the amount lying in the account of its Defaulters' Committee be retained with it and not to be asked to be remitted to the OL in the winding up proceedings. On

the contrary, the case of the OL is that once the winding up order has been passed by the Court appointing the OL as PL, the property has to be dealt with only by the OL.

11. Mr. Sanjay Bhatt, learned counsel for NSEIL, submits that Section 456 of the Act envisages the PL taking into custody "all the property, effects and actionable claims to which the company is or appears to be entitled" and that this did not include the deposit placed by the company with NSEIL which now vests with the Defaulters' Committee. He laid emphasis on the words "is or appears to be entitled" following the words "property, effects and actionable claims", to urge that the sum of Rs. 1.10 crores was not an amount to which the company is entitled. He submitted that even in relation to the claims by the secured creditors, DRT-II accepted the plea of NSEIL that the aforementioned amount would not be available for realisation by the secured creditors. Reliance is placed on the decisions in ***Bombay Stock Exchange v. Jaya I. Shah AIR 2004 SC 55*** and ***Collector of Customs v. Dytron (India) Ltd. 1999 (108) ELT 342 (Cal)***.

12. Appearing on behalf of the OL, Mr. Ashish Makhija, learned counsel,

submitted that once a winding up petition has been admitted and the OL appointed as PL, then the settlement of all claims is the sole prerogative of the OL, who is entitled to seek remittance of the amounts lying to the credit of the company. He submitted that once a winding up order has been passed, all claims or various claims of the creditors were to be settled in accordance with Sections 529, 529A and 530 of the Act. It would not be open to NSEIL, and in particular its Defaulters' Committee, to settle the claims of the investors, independent of the Act and the OL.

13. The relevant part of Section 456 of the Act reads as under-

> "456. **Custody of company's property**.—(1) Where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator, as the case may be, shall take into his custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.
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> ….."

14. The provision itself makes it clear that the PL shall take into his custody or under his control "all the property" to which the company is or appears to be entitled. There can be no manner of doubt, and it is in fact not denied, that the company did place with NSEIL Rs. 1.10 crores when it became a trading member. The said sum definitely, therefore, constitutes the property of the

company. Although upon passing of the winding up order by this Court on 6th September 2010, the assets and the properties of the company came to the custody of the PL, but, in fact, the properties did not vest in the PL. Therefore, the PL acts as an agent of the company, a trustee of the properties as also the officer of the Court. He acts under the directions of the Court. This explains why under Section 457 (1) of the Act, it is the liquidator who has been given the powers thereafter to represent the company under liquidation in all the proceedings.

15. The decisions relied upon by learned counsel for NSEIL do not deal with the interplay between NSEIL byelaws, rules, regulations and the provisions of the Act. In ***Bombay Stock Exchange v. Jaya I. Shah***, no doubt, the Supreme Court observed in para 36 that the rules, byelaws and regulations "have a statutory flavor". There was however no occasion for the Court to deal with the question whether such rules, byelaws and the regulations would override the provisions of the Act. In the said decision, the Court was dealing with the scope of the powers of the Defaulters' Committee. It was held that the vesting of the assets of the defaulters in the Defaulters' Committee was not absolute, as the Defaulters' Committee was merely a trustee holding the said amounts vested in it for the benefit and on account of creditor members. The said decision does not deal with the issue whether

notwithstanding the winding up of a company which happens to be the trading member and the appointment of PL, the deposits made by such company with NSEIL would still be dealt with only by the Defaulters' Committee.

16. In ***Collector of Customs v. Dytron (India) Ltd.***, the Calcutta High Court dealt with the issue of the right of Customs authorities to claim payment of dues and other charges in respect of the goods imported by a company which had subsequently gone into liquidation. The Court discussed the provisions of the Customs Act, 1962 as well as of the Act. It was that unless and until "statutory dues" of the Customs authorities under the Customs Act were paid, the imported material would not be legally available for sale. The imported items would become the assets of the company in liquidation only upon the payment of customs duty. Therefore, the dues of the Customs authorities had to be met before the imported goods were validly sold as assets of the company in liquidation. It is in that context it was held that "the claims of the Customs Authorities would, therefore, stand outside proceedings under Sections 529, 529A and 530 of the 1956 Act."

17. In the present case, although the company was expelled as a trading

member on 27th July 2009, prior to the order of winding up, resulting in the deposit made by it with NSEIL vesting in the Defaulters' Committee, the claims of the investors had not been met out of that fund by the Defaulters' Committee. It, in fact, set aside Rs. 83,91,000 pursuant to the letter written to the NSEIL by the OL. It has met the claims of 68 investors in part out of IPFT. Therefore, the deposit made by the company with NSEIL, which constitutes its property under Section 456 (1) of the Act, remains intact.

18. With the process of liquidation of the company already in progress, the scheme of Section 456 of the Act will have to be followed. The inevitable result would be that wherever any property of the company is available, the possession of such property would have to come to the PL appointed by the Court. Investors, who are before the Defaulters' Committee, will now have the option of pursuing their claims before the OL in accordance with law. Consequently, the plea of NSEIL that its Defaulters' Committee should be allowed to continue to be in possession and control of the deposits of Rs. 1.10 crores lying with it to the credit of the company cannot be countenanced.

19. Consequently, this Court allows Co. Appl. (C) 4 of 2011 and disposes of

Co. Appl. 401 of 2012 filed by NSEIL, directing that within a period of four weeks from today, NSEIL will remit to the OL the sum of Rs. 1.10 crores together with interest, if any accrued thereon. There will be no order as to costs.

S. MURALIDHAR, J

JANUARY 23, 2013
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