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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPEAL (L) NO. 22 OF 2015
IN
COMPANY APPLICATION NO. 14 OF 2015
AND
COMPANY APPLICATION NO. 22 OF 2015
IN
COMPANY APPLICATION NO. 50 OF 2014

Elder Pharmaceuticals Ltd. …Appellant / Orig.Applicant
vs.
Company Law Board & Anr. ...Respondents

WITH
COMPANY APPLICATION (L) NO. 29 OF 2015
WITH
COMPANY APPLICATION (L) NO. 31 OF 2015
WITH
COMPANY APPLICATION (L) NO. 32 OF 2015
WITH
COMPANY APPLICATION (L) NO. 33 OF 2015
WITH
COMPANY APPLICATION (L) NO. 34 OF 2015
WITH
COMPANY APPLICATION (L) NO. 35 OF 2015
WITH
COMPANY APPLICATION (L) NO. 41 OF 2015
WITH
COMPANY APPLICATION (L) NO. 42 OF 2015
WITH
COMPANY APPLICATION (L) NO. 43 OF 2015
WITH
COMPANY APPLICATION (L) NO. 44 OF 2015
WITH
COMPANY APPLICATION (L) NO. 45 OF 2015
WITH
COMPANY APPLICATION (L) NO. 47 OF 2015
WITH
COMPANY APPLICATION (L) NO. 48 OF 2015
WITH
COMPANY APPLICATION (L) NO. 49 OF 2015
WITH
COMPANY APPLICATION (L) NO. 50 OF 2015

Mr.Ali Abbas Delhiwala with Ms.Pooja Shetty i/b. Joy Legal Consultants for Appellant.
Mr.Jimmy Avasia with Ms.Purnima Awasthi, Mr.Manoj Bang and Mr.Tithe for ROC.

Mr.Rajiv Mehta, Applicant in person in CAAL 29/2015.
Mr.Lakshmanan V. Subramaniam for Applicant in person in CAAL 34/2015.
Mr.Nikhil Sayta, Applicant in person in CAAL 35/2015.
Not on board matters:
Mr.Darayus Dhala, Applicant in person in CAAL 39/2015.
Ms.Salma Munaf Mamdani, Applicant in person in CAAL 41/2015.
Mr.Bhaskar Patkar, Applicant in person in CAAL 42/2015.
Mr.Kalpana Ved, Applicant in person in CAAL 43/2015.
Ms.Yukti Ajani, Applicant in person in CAAL 44/2015.
Dr.Shirin Khoja, Applicant in person in CAAL 45/2015.
Mrs.Olinda Venkatraman, Applicant in CAAL 46/2015.
Mr.Munaf Mamdani, Applicant in person in CAAL 47/2015.
Mr.Farhad Khursetjee, Applicant in person in CAAL 48/2015.
Mr.Ravidnra Bhom, Applicant in person in CAAL 49/2015.
Mr.Farokh Karbhari, Applicant in person in CAAL 40/2015.

CORAM : S.C. GUPTE, J.
RESERVED ON : 24 JUNE 2015
PRONOUNCED ON : 01 OCTOBER 2015

ORDER :

This company appeal challenges an order of the Company Law Board, Mumbai Bench ('CLB') passed on a company application for extension of time for repayment of fixed deposits to the Applicant's depositors under Section 58A of the Companies Act, 1956 and Section 74 of the Companies Act, 2013 read with the Rules made thereunder. There are various applications for intervention in the appeal filed by depositors. Some of these are on board today and some are not. By consent, all these applications are taken on board and heard together.

2. The Appellant (original Applicant) had collected fixed deposits from investors. As of 27 January 2015, the total principal amount of outstanding deposits with the Appellant was about Rs.155.17 crores. Out of these, deposits worth about Rs.63.82 crores had matured, and were due and repayable by the Appellant to the various depositors. The Appellant was unable to repay these deposits on account of financial difficulties faced by it and filed an application to the CLB purportedly under Sections 58A of the Companies Act, 1956 and 74 of the Companies Act, 2013 for various reliefs including extension of time for repayment of the fixed deposits. After hearing the parties, by its order dated 24 December 2014, the CLB directed the Appellant to refund the outstanding

amounts to Fixed Deposit Holders as per the terms and conditions of the FDRs within 30 days of the date of the order, failing which the depositors could approach the Registrar of Companies concerned for prosecution of the company and its officers. This order was not challenged by the Appellant by way of an appeal. Instead by its application (Company Application No.22 of 2015), the Appellant once again applied for extension of time for repayment of the fixed deposits. By another application (Company Application No.14 of 2015) under Section 74(2) of the Companies Act, 2013 the Appellant applied for extension of time. The main ground of the Appellant for seeking extension was that the Appellant was trying to liquidate its assets and make payment to its depositors, but that due to restraint orders passed against it in arbitration proceedings as well as winding up proceedings by this Court, the Appellant was not in a position to liquidate the assets. By its impugned order dated 23 April 2015, the CLB held that there was no good ground to grant any further extension of time. The CLB directed the Company to make payment to the respective deposit holders in compliance of its order dated 24 December 2014 within 7 days. The depositors were directed to approach the ROC concerned, if their dues were not paid within 7 days. Company Application No. 22 of 2015 was disposed of accordingly. Company Application No.14 of 2015 was directed to be kept for hearing, but it was made clear that if the Appellant failed to comply with the orders passed in the companion application, namely, Company Application No.22 of 2015, the application under Section 74(2) might be dismissed *in limine*. Aggrieved by this order, the Appellant has presented this appeal under Section 10F of the Act.

3. The appeal is opposed by ROC and also by several depositors who have filed intervention applications in this appeal. I have heard Mr.Avasia for the ROC and all intervenors who appeared through Counsel or in person.

4. Learned Counsel for the Appellant urged the following grounds in support of the appeal:

(a) The impugned order does not indicate any reasons for the conclusions arrived at by the CLB;

(b) The impugned order is contrary to the order passed by the Division Bench of this Court on 30 March 2015 in Company Appeal (Lodging) No.260 of 2015 in a winding up petition (Company Petition No.961 of 2014);

(c) The Appellant, having been injuncted from selling its assets, was not in a position to raise monies for repayment of deposits and hence, ought to have been granted extension of time for repayment;

(d) There are negotiations between the Appellant and a certain financer for infusion of funds into the Appellant company, which are likely to result into an agreement, which would enable the Appellant to raise the requisite funds for repayment of deposits. This Court, in winding up petitions against the Appellant, had granted time to the Appellant in view of these developments. Likewise time should be granted to the Appellant in these proceedings to repay the overdue deposits.

5 Section 58A of the Act makes several provisions subject to which a company may invite deposits from members of public or from its own members, including provisions for repayment of such deposits and consequences of non-repayment. Sub-section (9) of Section 58A of the Act provides that where a company has failed to repay any deposit or part thereof in accordance with the terms and conditions of such deposit, the CLB , either on its own motion or on the application of any depositor, and upon being satisfied that it is necessary to do so to safeguard the interest of the company, the depositors or any public interest, may direct, by an order, the company to make repayment of such deposit or part thereof forthwith or even within such time and subject to such conditions as may be specified in the order. Before making an order under this sub-section, the CLB has to give a reasonable opportunity of being heard to the company and other persons interested in the matter. Sub-section (10) provides for the consequence of failure to comply with any order made by the CLB under sub-section (9). It provides for punishment of imprisonment extendable up to three years and also fine of not less than Rs.500/- for every day during which such non-compliance continues. Section 74 of the Companies Act, 2013 makes similar provisions.

Under sub-section (2) thereof, the CLB has power to allow extended time of repayment of deposits to the company. If the Company fails to repay the deposits within time or such extended time, the company is liable to pay fine and its officers in default shall also be punishable with imprisonment. Under these provisions, the appellant company had applied for extension of time to make repayment of deposits. The CLB heard the Company and other stakeholders including the depositors. The CLB *inter alia* noted the Company's submissions that there was a financial crunch faced by the Company on account of adverse market conditions and that, in case, the Company was compelled to pay the outstanding amounts, it would have no option but to go for winding up. The CLB did not find any bona fide ground for extention of time sought by the company and directed the Company to make repayment of the outstanding deposits, which had already matured, within a period of 30 days from the date of the order. This order was not carried in appeal by the Company. Instead, the Company filed an application in the form of complaint/letter dated 29 December 2014 vide Diary No.7042, requesting *inter alia* for a schedule of payment to depositors, who were objecting to the company's application. The main grievances of the Company before the CLB in this complaint / letter were as follows :

(a) That it was doubtful that some of the persons, who had signed the attendance sheet of the hearing on 24 December 2014, were genuine depositors, the handwriting, signatures and identity of whom were questionable;

(b) That the financial position of the Applicant company was not satisfactory due to various reasons mentioned in the petition and therefore, extension of repayment of deposits was sought;

(c) That the Company proposed a repayment schedule as set out in the application;

(d) That requests for premature withdrawals made by some depositors could not be granted, as it would disturb the financial schedule of the Company;

(e) That the objections taken by the depositors before the Court were invalid in the eyes of law; and

(f) That the Company had sufficient funds to deal with its repayment obligations relating to the fixed deposit holders.

The CLB heard this application and held that it was still of the view that the application filed by the Company was not bonafide. The CLB noted that the Company had not given any sound or convincing proposal for repayment of the dues of the depositors, whose deposits had already matured; that the Company even showed its inability to pay the interest accrued on the FDRs; that assuming without admitting that the identity of the some of the deposit holders – objectors was doubtful, yet the grounds stated in the application for seeking extension of time for making repayment of dues under the FDRs did not appear satisfactory; that by merely making a bare statement that the financial position of the Company was not satisfactory or pointing some technical defects with respect to the claims of the respective fixed deposit holders, the Company was not entitled to the relief sought by it without showing good reasons for extension of time. The CLB particularly noted the case of some fixed deposit holders, who were aged and ailing, and that despite maturity of their deposits, the Company was not even willing to pay them their dues considering their hardships. The CLB, in the premises, rejected the complaint / letter dated 29 December 2014 by its order dated 29 January 2015. The Company, thereafter, after having defaulted in complying with the order of the CLB, chose to apply for further extension of time, which the CLB refused to grant except for a period of 7 days from the date of its order. There was nothing substantially different from what was already pointed out by the Company to the CLB in Company Application No.50 of 2014 or the complaint/ letter dated 29 December 2014, in this new application. The CLB, in its impugned order, has noted that the Company failed to pay the amount due and payable by it to the deposit holders despite the CLB's earlier orders passed on the application of the deposit holders. The CLB did not find any good ground to grant any further extension of time. The CLB, in particular, was of the view that the application of the Company did not appear bona fide. This order does not give rise to any question of law within the meaning of Section 10F of the Act.

6 The impugned order contains adequate reasons for the conclusion arrived at by the CLB. It is a matter of fact that the Appellant company has failed to comply with the order passed by the CLB earlier under sub-section (9) of Section 58 A of the Act and Section 74(2) of the Act of 2013. Non compliance with an order passed under sub-section (9) directly invites consequences under sub-section (10). So also, non-compliance with an order passed under Section 74(2) invites the consequences under Section 74(3). The aggrieved depositors of the Appellant were already entitled to apply to the ROC and seek prosecution of the Company. The application of the Company for further extension of time, on which the impugned order came to be passed, indeed does not disclose any good ground for grant of further extension in the face of a clear non-compliance with the order of the Board passed earlier. The basis of the application was the financial crisis faced by the Company. The Company has even admitted that it has not paid interest after 30 June 2014 on the deposits. As on 27 January 2015, there was an admitted overdue amount of Rs.63.82 Crores towards the principal of matured deposits. The only reason cited for non-payment of the amounts due on the deposits was the orders passed by this Court by which the Appellant was injuncted from selling its movable and immovable properties and assets and brands without leave of the Court, in a winding up petition filed by M/s Tata Capital, who are one of the debenture holders of the non-convertible debentures issued by the company, and in an order passed in Arbitration Applications under Section 9 of the Arbitration & Conciliation Act, 1996 in arbitration proceedings initiated against the Appellant by other creditors. These orders merely require the Company to obtain leave of the Court before selling its assets. Nothing prevented the Company from applying for such leave. Besides, what is important to note is that there was no concrete plan placed by the Appellant before the Board to enable the Board to consider any further extension of time. If the Company has any defence as to its inability to pay due to consequences beyond its control, that is a matter which can be appropriately urged in a prosecution of the company under sub-section (10) of Section 58A of the Act or Section 74(3) of the 2013 Act, but that cannot the sole basis on which the CLB can grant any extension of time

to the company, particularly after the company defaults in complying with an order passed by the Board under sub-section (9) of Section 58A of the Act and sub-section (2) of Section 74 of the 2013 Act.

7 The order dated 30 March 2015 passed by the Division Bench of this Court in Company Appeal (L) No. 260 of 2015 was in an appeal from an order passed in a winding up petition. The winding up Petition was filed by a debenture holder – Tata Capital Financial Services Ltd. and was in respect of non-repayment of non-convertible debentures issued by the Respondent Company. A learned Single Judge of this Court, hearing the petition, had ordered sale of an immovable property of the Company, namely, Elder House. That order was challenged before the Division Bench in the appeal. The Company had proposed before the Appeal Court that the Company should be permitted to sell its other properties, purportedly valued at Rs.323 Crores, to pay off its dues to the debenture holders, which were said to be in the region of Rs.263 Crores. The Appeal Court did not find anything unreasonable in the above request being made on behalf of the Appellant company, particularly having regard to its bonafides and credentials in paying off the dues of the secured creditors by generating Rs.2004 Crores by sale of 30 brands. The Appeal Court, in the premises, directed that creditors should first put to sale the three other designated properties of the Company and observed that the question of sale of Elder House could be considered only if sufficient sale proceeds were not generated from the sale of these three properties. The Appeal Court also directed the Company to pay Rs.2 Crores to Tata Capital as ordered by the CLB by its order dated 21 August 2014 within a specific time. It is difficult to see what bearing this order has on the pending matter before the CLB under Section 58 A of the Companies Act, 1956 and in what way the impugned order of the CLB in that matter is in breach of the order of the Appeal Court of 30 March 2015.

8 In any event, it is pertinent to note that the even the Appeal Court order is not complied with by the Company till date. There is no payment as yet to Tata Capital of the whole amount of Rs.2 Crores. Incidentally, there is no sale as yet of any of the properties of the Company, that is to say, of either the three

designated properties or Elder House. The debenture holders themselves are still left high and dry. Even other secured and unsecured creditors are not paid their dues. By a separate order passed today, this Court has admitted twenty four winding up petitions filed before the Court by various creditors including Tata Capital against the Company.

9 The Company relies upon a term sheet executed between the Company and a purported lender of the Company, by which the Company proposes to enter into an agreement for availing finance from this lender. The Company submits that having regard to this term sheet, the Appeal Court, in winding up petitions, gave time to the Company to repay its debts and in the meantime granted ad-interim reliefs in respect of sale of the Company's properties. It is submitted that on the basis of the same term sheet this Court ought to grant time to repay even the depositors' dues. It is difficult to see how this Court can adopt such course. In the first place, this Court is hearing an appeal finally from an order of the CLB passed under section 58 A of the Companies Act, 1956 and 74(2) of the Companies Act, 2013. This term sheet was not before the CLB when the impugned order was passed. The correctness or otherwise of the impugned order cannot be tested with reference, or having regard, to the term sheet. This Court is not considering the question whether or not time ought to be now granted to the Company to repay the deposits, but whether the CLB ought to have granted such time and if it did not, whether its order can be assailed on a question of law. Secondly, the term sheet is not even disclosed to the depositors who are before this Court and who oppose the Company's appeal. The depositors are neither aware of the name of the so called lender nor the terms offered by the lender for making available the finance. The term sheet, which is said to be a confidential document till a definitive agreement is reached between the Company and its lender, is disclosed to this Court in confidence and kept in a sealed cover. The Company cannot, in the premises, be allowed to rely upon on undisclosed document (undisclosed to the opponents) and seek orders in an appeal. This same term sheet was sought to be relied upon in the winding up petitions, referred to above, and I have refused to grant the Company any further time in the winding up petitions on the basis of

this term sheet. As I have observed in that order, it is a primary requirement of our justice system that a document cannot be used against an opponent without giving him an opportunity to deal with it. It is another matter that based on a confidential document with a third party, which is shared with the Court, a short time given to a party to enable it to arrive at a definitive agreement so as to resolve the disputes, which is what the Appellate Court initially did in the winding up petitions, but quite another to take a final decision on an appeal on the strength of such undisclosed, confidential document. Besides, as I have also noted in the admission order passed on the winding up petitions today, the term sheet has still not resulted into any definitive agreement till date, despite the Company having told the Appeal Court that within about ten days of 24 April 2015 (on which date the term sheet was for the first time produced before the Appeal Court) the Company would enter into a definitive agreement with the lender. The matter before the Appeal Court was adjourned thereafter on at least four occasions, but no definitive agreement was in sight. In the premises, finally by its order dated 3 August 2015 the Appeal Court observed that if by 14 August 2015, the agreement was not placed on record, all interim orders granted earlier would be vacated. The agreement was not only not placed before the Court by that date, but even today, whilst passing this order, there is no agreement entered into between the Company and its lender, and we are no better off than when the term sheet was for the first time produced before the Court. Whilst I was passing this order, I was told that there is now a final term sheet of 31 August 2015, whereby the financer would be able to provide upto Rs.170 crores by 31 October 2015, subject to execution of mutually acceptable documents and deeds. That means two things. Even now there is no definitive agreement, but a term sheet containing an offer to provide Rs.170 crores '*subject to execution of mutually acceptable documents*' and even if this entire finance comes by the stipulated date, even the claims of debenture holders, for whose benefit this term sheet is said to be executed, are not likely to be satisfied. (The claims of debenture holders are admittedly over Rs.263 Crores.) There is still no concrete proposal to repay the matured deposits (as of the date of the CLB order) of Rs.63.82 Crores. Neither is the name of the lender still disclosed to the parties nor is any provision of the term sheet placed on record. It would be a travesty of justice, if this Court, in the premises, were to rely on the term sheet whilst disposing of this appeal. Many of the depositors are small-time investors and individuals who have invested their life's savings in the company to fund their retirements as children's education. These investors cannot be asked to wait indefinitely till the company executes an agreement with a financer and the financer, in turn, brings in the finance. The Appellant also cannot take any advantage of the fact that the Appeal Court has, in a separate winding up petition, taken the final term sheet on record in a sealed cover. That was expressly said to be without prejudice to the rights of the petitioning creditors Tata-Capital before the Appeal Court in that case. It cannot even be suggested that, that would prejudice third party depositors, who have separate claims against the Company and in altogether different proceedings.

10 Learned Counsel for the Appellant relied upon judgments of the Supreme Court in the case of **Kranti Associates Pvt. Ltd. Vs. Masood Ahmed Khan**[1] and **Claviant International Ltd. Vs Securities & Exchange Board of India**[2]**.** These judgments bear on certain time tested principles of administrative law. **Kranti Associates** deals with importance of reasons in a quasi-judicial decision or even in an administration decision prejudicially affecting a party / parties. **Claiviant International** deals with importance of reasons in a quasi-judicial decision and reiterates that in view of the fact that civil consequences would ensure by reason thereof, such discretion must be exercised fairly and bona fide and also reasonably. As I have observed above, both these tests are satisfied in the impugned order. There are reasons in it and the discretion is exercised bona fide, and fairly and reasonably. I do not see how these judgments take the Appellant's case any further.

11 Learned Counsel for the Appellant also relied upon orders of the Board in the matter of **Nuchem Ltd.**[3]**, Dinesh Mahesh Finance Co. Vs. Lunar Diamonds Limited**[4,] **in the matter of D.C.M. Limited**[5] and **in the matter of**

1 (2010) 9 Supreme Court Cases 496
2 (2004) 8 Supreme Court Cases 524
3 (1997) 3 Comp L J 338 (CLB)
4 (1999) 3 Comp L.J. 303 (CLB)
5 (1998) 5 Comp L.J. 451 (CLB)

Shamken Cotsyn Ltd[6] **,**These orders do show that in an appropriate case, time could be granted to a company, or a schedule of payment can be provided to a company, to repay its deposits. There is no gainsaying of this legal position. Only the facts of the present case, as more particularly noted above, do not warrant granting of any such time or ordering of any such schedule. In all these cases, there were concrete plans for repayment of dues placed by the companies before the Board and undertakings furnished to pay the dues accordingly. That is not the position here. The proposal of the Company to repay is general and too vague to merit acceptance. What is proposed is merely that finances would come through a lender with whom the Company has a term sheet. I have elaborately dealt with this aspect of the matter in the foregoing paragraphs and found no merit in it.

12 The impugned order, in the premises, does not raise any question of law for the interference of this Court in a Section 10F appeal. There is no merit in the appeal.

13 The Company Appeal is, accordingly, dismissed. There shall be no order as to costs.

14 I have heard the interveners in the appeal, without formally deciding their Company Applications for intervention. These interveners are all depositors of the Company and their contentions have been duly considered. As the appeal is dismissed, all Company Applications are disposed of.

15 Learned Counsel for the Appellant applies for stay against the prosecution under Section 58 A of the Companies Act, 1956 or Section 74 (3) of the Companies Act, 1913. That obviously cannot be granted. I have heard fully and dismissed the appeal, after recording that there is no merit in it whatsoever. No single question of law arises in the matter. The application is rejected.

(S.C.GUPTE J.)

6 (2004) 4 Comp. L.J. 547 (CLB)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/ Order.