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

COMPANY APPLICATION (L) NO.80 OF 2015
IN
COMPANY APPEAL (L) NO.71 OF 2015
IN
COMPANY PETITION NO.62 OF 2015
WITH
COMPANY APPEAL (L) NO.71 OF 2015
IN
CLB COMPANY PETITION NO.62 OF 2015

Krishna Murari Goenka & Anr. ...Applicants
(Original Petitioners)

In the matter of :
Krishna Murari Goenka & Anr. ...Appellants
(Original Petitioners)

vs.

Schreiber Dynamix Dairies Pvt. Ltd. & Ors. ...Respondents
(Original Respondents)

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Mr. Ravi Kadam, Sr. Counsel, a/w. Mr. Chirag Mody, Mr. Nirav Shah, Mr. Hamed Kadiani and Mr. Parth Jain, i/b. DSK Legal, for the Appellants.

Mr. Janak Dwarkadas, Sr. Counsel, a/w. Counsel Dr. Birendra Saraf, Mr. Ranjit Shetty, Mr. Krishnava Dutt, Ms. Adity Chaudhary, Mr. Krunal Sampat and Ms. Aditi Chandak, i/b. Argus Partners, for Respondent 1.

Mr. Fredun Devitre, Senior Counsel and Ms. Tapasvini Shah, i/b. M/s. TJS Legal, for Respondent No.2.

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CORAM: S.C. GUPTE, J.

DATE : 28 SEPTEMBER, 2015.

P. C. :-

. The Company Appeal impugns an order passed by the CLB refusing to grant any interim relief by way of stay of the Agenda of a proposed General Body Meeting of the 1st Respondent Company concerning increase of authorised share capital and also stay of the minutes of the Board Meeting of the 1st Respondent Company held on 16 July 2015.

2. The case of the Appellants, who were the Original Petitioners in a Company Petition alleging oppression on the part of Respondent No.2, in the petition was briefly this :

The 1st Respondent Company was set up in the year 1992 with 80% shareholding of the Appellant Group (known as the G Promoters' Group) and whilst around 20% of shareholding belong to the 2nd Respondent Company (known as the Schreiber shareholders). This Company was in BIFR in or about 2002 purportedly as a Sick Industrial Company. At that stage, at the request of G Promoters' Group, the Schreiber shareholders bailed out the 1st Respondent Company by investing around Rs.34 crores as equity in the Company. With this investment, the Schreiber shareholding went up to 51%, whilst the G Promoters' shareholding came down to 49%. Since then, the Company has been managed by Board of Directors, on whom the Schreiber shareholders had four Directors, whilst the G Promoters' had three. In or about February 2012, the 1st Resplendent Company entered into three agreements with Nestle to set up a project known as Sahara Project in which a particular grade of milk powder was to be manufactured and sold to Nestle. The 1st Respondent Company made an investment of

Rs.1.35 crores, whilst Nestle made an investment of Rs.95 crores. A particular plant consisting of a specialised dryer was purchased from out of these investments. A company by the name of Sahyadri Agro & Dairy Farm Pvt. Ltd. (SADL), which was a company owned and controlled by the Appellants was to supply milk of a particular grade to the 1st Respondent Company and the 1st Respondent Company, in turn, was to process this milk and make milk powder of a particular grade (infant milk powder), which would be purchased by Nestle. There were some disputes between SADL and Nestle and, as a result, SADL stopped supplying milk for the project. The 1st Respondent Company, thereupon, entered into negotiations with Nestle for purchasing Nestle's interest in the plant and equipment. There were board resolutions passed from time to time in respect of the proposal to purchase the interest of Nestle. Finally, by a board resolution dated 21 May 2015, the board of the 1st Respondent Company approved the purchase of Nestle's interest in the dryer. The board, accordingly, accorded its consent to buy Nestle's interest in the dryer at the cost of approximately Rs. 95 crores on the terms and conditions to be further negotiated and finalised with Nestle. It was decided that the board of the 1st Respondent Company, based on directions and guidance of Schreiber Foods Board, would take a final decision in regard to the arrangement of financial resources for buying Nestle's interest whether by raising loans from bank or through shareholders by infusing additional capital under a rights issue. By a further board meeting held on 16 July 2015, the board of directors decided to go for rights issue instead of obtaining loan from a bank or financial institution for raising the finances required for purchase of Nestle's interest. In pursuance of this board resolution, a notice was issued on 31 July 2015 for holding of an Annual General Meeting of the 1st Respondent Company on 2 September 2015 with a view to pass necessary resolutions for increase in the authorised share capital of the Company and to proceed with the rights issue. At this stage, the Appellants (representing G Promoters' Group) approached the CLB by way of the present petition seeking a stay of both the minutes of board meeting dated 16 July 2015 and the proposed Annual General Meeting to be held on 2 September 2015. (The meeting is now scheduled to be held on 30 September 2015.)

3. By its impugned order dated 22 September 2015, the CLB did not find any merit in the Appellants' objections to the board resolution passed on 16 July 2015 or the proposed Annual General Meeting of the 1st Respondent Company for considering increase of authorised share capital and issuance of rights shares. Being aggrieved, the Appellants have moved the present appeal.

4. Mr. Kadam, learned Senior Counsel appearing for the Appellants, submits that though the Appellants had accepted the proposal for purchasing of the interest of Nestle in the dryer, the 1st Respondent Company was well within a position to raise the finances required for such purchase by way of debt finance and also by liquidating its inventory. It is submitted that there was an assurance on the part of Rabo Bank for making available finances to the Company at the rate of 3.25% above the libor rate of interest (which suggested that finance might be available from Rabo Bank at the rate of about 4% per annum). It is submitted that Rabo Bank had already issued a letter to that effect to the 1st Respondent Company, which letter was suppressed by Respondent

No.2 and its Directors from the Appellants. It is also submitted that the consent of the directors of G Promoters' Group for purchase of Nestle's interest in the dryer was obtained on the basis of a mis-representation made to the board. It is submitted that what was initially represented to the board of directors was that there would be an increased profitability of the project if the interest of Nestle in the dryer was purchased by the Company. It is submitted that, subsequently, the case of the 2nd Respondent was that the transaction of purchase of Nestle's interest was by way of a compulsion and that the Company was forced to buy the dryer from Nestle.

5. On the other hand, it is submitted by Mr. Dwarkadas, learned Senior Counsel appearing for the Company, that the 1st Respondent Company was driven to purchasing of Nestle's interest in the dryer as a result of the failure of SADL, a group company of the Appellants themselves, to supply milk of a particular grade, as a result of which, Nestle backed out of the project. Learned Counsel submits that both the decision to purchase Nestle's interest and the decision to do so either by raising loans or by resorting to equity finance through a rights issue were accepted by the G Promoters' Group and duly passed accordingly by the board of directors unanimously. He further submits that thereafter the board of directors of the 1st Respondent Company, after internal discussion and deliberations, took a business decision to raise finance for such purchase by additional capital through a rights issue. Relying on the judgments of the Supreme Court in the case of **V.S. Krishnan and others v. Westfort Hi- Tech Hospital Ltd.**[1], learned Counsel submits that a business decision on the part of the board of directors to go for a rights

1 (2008) 3 SCC 363

issue for raising of funds, in the face of an undisputed need for such funds, cannot be questioned in a petition under Sections 397 and 398 of the Act. It is submitted that no unfair prejudice has been caused to the G Promoters' Group as a result of this decision, since the right shares would be offered to them as well in the same proportion as their current shareholding pattern.

6. It is an admitted position in the present case that the board of directors of the Respondent Company has categorically approved the transaction of purchase of Nestle's interest in the dryer. This approval is obviously with the consent of the G Promoters' Group. In fact, it is evident from the minutes of the board meeting dated 21 May 2015 that after prolonged discussion and after considering various business opportunities and operational difficulties as well as financial considerations concerning the purchase of Nestle's interest, the board decided to buy Nestle's interest in the dryer at a price of Rs.95 crores. The Chairman of the Company, who represents the G Promoters' Group, expressly consented to this proposal. This resolution is not a subject matter of challenge. The Chairman of the meeting further suggested that it would be necessary to analyze the current financial status of the Company for giving a decision regarding raising funds for purchase of the dryer "*either by way of securing loans from banks and financial institutions or through shareholders infusing additional capital through rights issue*". Based on this suggestion, the board decided to take a final decision in this regard in a meeting to be held later. Pursuant to this decision, a further meeting of the Board of Directors was proposed on 16 July 2015. A notice of this board meeting set out in detail, under item 4 thereof, the

considerations for review of the status of purchase of Sahara Plant including a decision regarding sources for financing the purchase. A detailed note appended to the notice set out the merits and demerits of the two available options, namely, raising of a loan from a bank and infusion of additional capital into the Company. The notice set out the gist of the meetings of the Finance Head and Company Secretary with the Chairman and took into account the various financial indices indicated therein, including the projected cash flow for the next five years. The agenda note analysed the cash flow statement vis-a-vis the interest cost, as also the rising cost of the inventories and in the context of these proposed a detailed discussion to decide means of raising of funds for purchase of Nestle's interest in the dryer. This meeting was held on 16 July 2015. The minutes of the meeting demonstrate that a detailed discussion took place before the board of directors on the various parameters and financial implications of both equity finance as well as debt finance. The suggestions of the G Promoters' Group through the Chairman of the board of directors concerning the advisability of debt finance and inadvisability of raising further equity capital from the shareholders were discussed and deliberated upon. Finally, the board passed the resolutions for issue, offer and allotment of further equity capital on rights basis in the ratio of 4:1 at an issue price of Rs.40/- per equity share, that is to say, at a premium of Rs.30/- per share of Rs.10/-subject to the provisions of the Memorandum and Articles of Association of the Company ranking in all respects *pari passu* to the existing equity shares. The minutes indicate that after due discussion and deliberation, the board of directors of the Company by majority took a business decision of going in for a rights issue rather than debt finance for the transaction of purchase of Nestle's interest in the dryer.

7. Once the Company takes an informed board decision by the requisite majority, its merits *per se* are not open to challenge before a court of law in a petition under Sections 397 and 398 of the Act. What is essential for a petition for oppression to succeed is not merely to show that the business decision of the board is incorrect or even unfair, but that such a decision lacks in probity and amounts to a deliberate act of prejudicing the proprietory interest of the minority shareholders. The Supreme Court in the case of **V. S. Krishnan** (supra) made the following observations:

> "37. As rightly pointed out that CLB missed a most basic principle of Section 397, namely, that mere unfairness does not constitute oppression. When the petitioners were given the right to subscribe to the "rights issue" along with all others in the same proportion, no prejudice, whatsoever, could have been caused to them. It is not in dispute even by the petitioners that the need for more funds was an admitted position. In Needle Industries this Court has pointed out if there is a need for funds the fact that the Directors have incidentally enriched themselves would not entail a court to set aside the issue of shares. In fact, no unfair prejudice has been caused to the petitioners. CLB failed to take note of all these vital aspects and relied on irrelevant materials. Apart from these, it is pointed out that the Company having turned the corner and doing well, it would be fair exercise of discretion by this Court not to interfere with the High Court judgment."

Ever since the case of **Needle Industries,** the Supreme Court has consistently held that it is for the board of directors of a company to decide whether there is a need of funds and if there is such a need, whether to raise additional capital by way of a rights issue and the minority shareholders cannot be heard to complain of an oppressive action so long as the decision of the board is bona fide and in good faith, and the minority is afforded a chance to subscribe to the rights issue. No unfair prejudice can be said to be caused to them, if the proportion of their shareholding is likely to go down as a result of their not being in a position to subscribe to the rights shares.

8. As far as the only other objection of Mr. Kadam, namely, that Rabo Bank's letter regarding debt finance offered by it was not placed before the board of directors, is concerned, the letter issued by Rabo Bank is on record. The letter indicates that the Rabo Bank was willing to offer finance on various terms and conditions, which were to be negotiated between the parties and subject to the current laws and regulations. In the light of the offer of Rabo Bank whether or not it was in the interest of the Company to accept debt finance rather than going ahead with the rights issue, is a matter, which is exclusively within the executive authority of the board of directors of the Company. There is nothing on record to show that this decision was actuated by malafides or was taken to prejudice the interest of the minority shareholders in the Respondent Company. If that is so, the mere fact that the letter of Rabo Bank was not placed before the board is not sufficient to impugn the action of the board in passing the resolution.

9. In that view of the matter, there is no merit in the Appeal. The Appeal is dismissed. There shall be no order as to costs.

(S. C. GUPTE, J.)

CERTIFICATE

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