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

COMPANY APPEAL NO.10 OF 2008
IN
CLB/COMPANY PETITION NO.14 OF 2007

Industrial Development Bank of India Ltd.)
A company incorporated under the)
Companies Act, 1956 (1 of 1956) and)
Banking Company within the meaning of)
Section 5(c) of the Banking Regulation Act)
1949 (10 of 1949) having its Registered)
Office at IDBI Tower, WTC Complex, Cuffe)
Parade, Colaba, Mumbai-400 005)….Appellant
(Org. petitioner)

V/s.

1. Parmeshwari Fabrics Private Limited)
a company incorporated under the)
Companies Act 1956, having its registered)
Office at 413/G, Basant Wadi, Kalbadevi)
Road, Mumbai-400 002)

2. Maliram Makharia Finstock Private Ltd.)
a company incorporated under the)
Companies Act, 1956 having its registered)
Office at 906, Raheja Centre, Free Press)
Journal Marg, Nariman Point, Mumbai-21)

3. Mahadev Fabrics Private Limited)
A company incorporated under the)
Companies Act,1956 having its registered)
Office at 413/G, Basant Wadi, Kalbadevi)
Road, Mumbai-400 002)

4. Maliram Makharia Surgicals Private Ltd)
a company incorporated under the)
Companies Act, 1956 having its registered)
Office at 413/G, Basant Wadi, Kalbadevi)
Road, Mumbai-400 002)

5. Speed Trade Securities & Broking)
Private Limited, a company incorporated)
Under the Companies Act, 1956, having)
Its registered office at No.331, 3rd Floor)

Arun Chambers, Tardeo Road,)
Tardeo, Mumbai-400 034)

6. Gateway Intermediaries Private Limited)
a company incorporated under the)
Companies Act, 1956 having its registered)
Office at 308, Sona Chambers, 507/509,)
Chira Bazar, Mumbai-400 002)

7. Kotak Securities Limited)
A company incorporated under the)
Companies Act, 1956 having its registered)
Office at Nirlon House, 2nd floor, Near)
Passport office, Dr.Annie Besent Road,)
Worli, Mumbai-400 025)

8. Emtex Industries (I) Limited)
A company incorporated udner the)
Companies Act, 1956 having its registered)
Office at F/4, MIDC, Badlapur, District)
Thane-421 503)

9. L&T Finance Limited, a company)
Incorporated under the Companies Act,)
1956 having its registered office at 802)
Swastik Chambers, 8th Floor, CST Road,)
Chembur, Mumbai)

10. Mr.Niraj Dalmia, adult, residing at)
215, Rewa chambers, 31, New Marine)
Lines, Mumbai-400 020)

11. Ms.Prerana Makharia, adult, residing)
At 413/G, Basant Wadi, 8th Floor,)
Kalbadevi Road, Mumbai-400 002)

12. Mr.Rahul Dalmia, adult residing at 12A)
Rajmilan, Dixit Road, Vile Parle (E))
Mumbai-400 057)

13. Mr.Ganesh Khemka, adult residing at)
215, Rewa Chambers, 31, New Marine)
Lines, Mumbai-400 020)....Respondents
(Org.Respondents)

Mr.Kevick Setalvad, Senior Advocate a/w Makarand Rege, Anupam Surve, Shayama Parkar and Puja Pilankar i/by M.P.Rege & Co. for the appellant.

Adv.Pecy Mody, Senior Advocate a/w Kalpana Desai, Brenda i/by U.S.Samudrala for respondent nos.2, 3 & 4.

Adv.U.S.Samudrala i/by RKM Legal Services for respondent no.1.

Adv. Dr.Birendra Saraf a/w Adv.Anand Choratia and Sheela Mehta i/by Yogesh Adhia for respondent no.5 and a/w Ms.Shruti Maniar and Adv.Simonlim Mohite i/by Solomon & Co. for respondent no.9.

CORAM : K.R.SHRIRAM,J

RESERVED ON :22.2.2016.

PRONOUNCED ON : 26.2.2016.

JUDGMENT:-

1 Pursuant to a Notification dated 30.9.2006 issued by the Government of India, Ministry of Finance, Department of Economic Affairs (Banking Division) under Section 45(7) of the Banking Regulations Act 1949, erstwhile United Western Bank (UWB) amalgamated with the appellant. The scheme of amalgamation came into effect on 3.10.2006. From the prescribed date of the scheme, the properties and assets of the erstwhile UWB got transfered to and became the properties and assets of the appellant. On the same footing, all liabilities, duties and obligations of erstwhile UWB became the liabilities, duties and obligations of the appellant. As per paragraph 6(5) of the scheme of amalgamation, the appellant in partial satisfaction of the claim in respect of the interest in the

shares of UWB, was to pay upfront a sum of Rs.28/- in cash in respect of each fully paid up share of erstwhile UWB to the members of the erstwhile UWB. During the course of doing due diligence after the prescribed date, it is the case of the appellant, it came to their notice that the erstwhile UWB had entered into an Articles of Agreement on 26.11.2002 with one Ashish Shivprakash Makharia who represented the other members and associate enterprises of the Makharia group under which the erstwhile UWB had a pre-emption right in respect of transfer of any share held by Makharias in UWB as and when they desired to dispose of any of their investments in the said shares. Such shares were to be offered to the nominees of erstwhile UWB and if they were not accepted by the nominees of the bank, then the said Makharias were entitled to sell the said shares or any part thereof to any other person on the same terms and conditions as were offered to the nominees of erstwhile UWB. It is the case of the appellant that the Makharias have breached the said Article of Agreement in as much as when the due diligence was done, it came to light that 10th, 11th and 12th respondents who belonged to Makharia group have on 3.5.2006 transferred 11,90,989 shares to respondent no.9- L & T Finance Limited and L & T in turn, has on 5.9.2006 transferred 4,50,000 shares to respondent no.7 Kotak Securities Limited. It also came to light, according to the appellant, that the respondent nos. 1, 2 & 3 had also pledged

16,80,000 shares in favour of 5th & 6th respondents and Canara Bank Limited. According to the appellant, these transfers as well as the pledge were in violation of the terms of the articles of agreement and therefore, they filed the petition praying that the transfer and pledge should be cancelled and the register of members to be rectified by inserting the names of the original shareholders viz. transferrers and the pledgers in the register of members.

We are not, for a moment, going into the merits of these issues as to whether it is possible at all because UWB has ceased to exist having got amalgamated with the appellant. We are on questioning the maintainability as the respondents have filed replies questioning the maintainability of the petition under Section 111A of the Companies Act, 1956.

2 After hearing the parties, the Company Law Board was pleased to dismiss the petition on the ground that the petition was not maintainable. The appellant has challenged the said order dated 7.2.2008. The short point in this appeal is- whether the petition was maintainable before the Company Law Board under Section 111A of the Companies Act 1956 ?

This appeal came to be admitted on 19.9.2008.

3 The sub-sections of section 111A of the Act relevant for

this appeal are as under :-

> *"111A. Rectification of register on transfer- (1) In this section unless the context otherwise requires, "company" means a company other than a company referred to in sub-section (14) of section 111 of this Act.*
> *(2) Subject to the provisions of this section, the shares or debentures and any interest therein of a company shall be freely transferable :*
> *[Provided that if a company without sufficient cause refuses to register transfer of shares within two months from the date on which the instrument of transfer or the intimation of transfer, as the case may be, is delivered to the company, the transferee may appeal to the [Tribunal] and it shall direct such company to register the transfer of shares]*
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> *(3) The [Tribunal] may, on an application made by a depository, company, participant or investor or the Securities and Exchange Board of India, if the transfer of shares or debentures is in contravention of any of the provisions of the Securities and Exchange Board of India Act, 1992 (15 of 1992) or regulations made thereunder or the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) or any other law for the time being in force, within two months from the date of transfer of any shares or debentures held by a depository or from the date on which the instrument of transfer or intimation of the transmission was delivered to the company, as the case may be, after such inquiry as it thinks fit, direct any depository or company to rectify its register or records]*
>
> (4) to (7)....."

4 Therefore, this section applies only to a company which is not a private company. In other words, to a public company. Sub-section 2 also states that the shares are freely transferable and the companies should register the transfer of all shares and if the company refuses to register the transfer of shares within two months

without sufficient cause, the transferee may appeal to the CLB which shall direct such companies to register the transfer of shares.

5 From the facts narrated earlier, it is not the appellant's case that the company refused to register the transfer of shares. The appellant cannot raise those grounds because the appellant itself is a company with whom the erstwhile UWB has got amalgamated. If anyone has to transfer, it has to be only the appellant.

Sub-section 3 is the provision that applies to the matter in hand. Under sub-section 3 of Section 111A, if the transfer of shares is in contravention of any of the provisions of the Securities and Exchange Board of India Act, 1992 (SEBI Act) or regulations made thereunder or the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) or any other law for the time being in force, the CLB may, on an application made by the company, within two months from the date of transfer of any shares held by a depository or from the date on which the instrument of transfer or intimation of the transmission was delivered to the company, as the case may be, after such inquiry as it thinks fit, direct any depository or company to rectify its register or records. In the present case, admittedly there is no contravention of provisions of SEBI Act or regulations made thereunder or under SICA. Therefore, the appellant has to show that the alleged transfer of shares by respondent nos.10, 11 & 12 to L & T

who in turn, transferred some part of shares to Kotak Securities and pledging of shares by respondent nos.1, 2 & 3 in favour of Respondent nos.5 & 6 were in contravention of any law for the time being in force. The CLB held that the petition as filed is basically alleging breaches of the Articles of agreement on the part of the Makharias and in other words, breach of contractual obligations in respect of transfer of shares and that was not a ground specified in section 111A (3) for rectification of register. I agree with the conclusion of the Company Law Board in the impugned order.

6 The counsel for the appellant/petitioner relied on the judgment of the Andhra Pradesh High Court in [1]***Karamsad Investments Ltd. Vs. Nile Ltd. & Ors.*** to submit that sub-section 2 and sub-section 3 of section 111A should be read together and violation of statutory law is not the only infirmity in the matter of acquisition of shares and even contravention of some existing contractual obligations attached to the shares should be included under “or any other law”.

I am afraid this judgment has no application at all to the facts of the present case. In that case the subject matter was under Section 111A(2). The counsel for the appellant in that case had argued that the expression “sufficient cause” used in Section 111A(2) should be understood only in the light of the three grounds

1 (2002) 1 Comp LJ 251

enumerated under sub-section (3) of section 111A of the Act, which authorized the Company Law Board to direct any depository or a company to rectify its registers or records and the company cannot refuse to register the transfer of shares on any other ground whatsoever. The court dis-agreed with the counsel for the appellant and held that sub-section 2 of section 111A is very broadly worded as compared to sub-section 3 of Section 111A. The court held that the expression used in sub-section-2 was “sufficient cause” and that will include the 3 grounds enumerated in sub-section 3. In a given case even contravention of some existing contractual obligations or some other obligations attached to those shares would come up. The court held that the declaration of free transferability contained in sub-section (2) of section 111A of the Companies Act must be understood in the background of pre-existing legal position that the Articles of association of the company could restrict the rights of the shareholders to transfer his shares and all that section 111A declares was that such a right cannot be restricted. Paragraphs- 45, 46, 47, 51 to 54 of the said judgment read as under :-

> *“45 The only question which still remains to be considered is that apart from the violation of any law in acquiring the shares is there any other reason for which a company could refuse to register the transfer of shares ? As it is already noticed that Section 111A(2), proviso of the Act contemplates the refusal to register the transfer of shares for "sufficient cause".*
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> *46. Learned counsel for the appellants--Sri Chagla very vehemently argued that the said expression "sufficient cause" should be understood only in the light of the various grounds enumerated under Sub-section (3) of Section 111A of the Act,*

which authorized the Company Law Board to direct any depository or a company to rectify its registers or records. Learned counsel further argued that in view of the language of Sub-section (2) of Section 111A of the Companies Act which declares that the shares of any company shall be freely transferable, the conclusion such as the one suggested by him is irresistible and the company cannot refuse to register the transfer of shares on any other ground whatsoever.

47. I regret my inability to agree with the submission made by learned counsel for the appellants. Sub-section (3) of Section 111A empowers the Company Law Board to issue directions to a company to rectify its registers or records in cases where it is found by the Company Law Board that the transfer of shares is in contravention of any one of the specified enactments under the said Sub-section or any other law for the time being in force. Obviously, Parliament thought it fit to authorise the Company Law Board to look into the complaints of the acquisition of shares in contravention of law and take appropriate action in that regard as nothing done in contravention of law shall be permitted to subsist. The scope of the power under Sub-section (3) conferred on the Company Law Board is limited only to the acquisition of shares in contravention of law, but violation of statutory law is not the only infirmity in the matter of acquisition of shares. In a given case, shares could be acquired or transferred by a person in contravention of some existing contractual obligations of the transferor or some other obligation attached to those shares. The legal position in the case of such contravention of contractual obligations is discussed in Palmer's Company Law, 24th edition, at page 637 at para. 40-34 :

"If the shares have been acquired by means of a loan which requires payment of the debt out of specific property including those shares, such a contract is enforceable by a grant of specific performance and creates an equitable interest in the shares in favour of the lender. A subsequent equitable mortgagee of the shares, who proposes to deal with the shares in such a way as to cause a breach of that contract will be restrained by injunction if he acquired them with actual knowledge of the contract."

47.1 This position of law stated by Palmer is based on a decision of the Court of Appeal reported in Swiss Bank Corporation v. Lloyds Bank Ltd. [1980] 2 ALL ER 419 (CA).

47.2 The principle of law was confirmed by the House of Lords on an appeal from the above decision in Swiss Bank Corporation v. Lloyds Bank Ltd. [1981] 2 ALL ER 449 (HL). Though on the facts of the case both the courts held that there was no violation of any contractual obligation. It therefore follows that a party seeking to transfer shares held by him which would result in the breach of an obligation attached to the shares created by a prior contract could be injuncted from transferring the shares. It logically follows that the transfer if made and registered even before the aggrieved party could obtain an order of injunction,

the transfer could be declared illegal in an appropriate action before a court of law. In which case the company would be bound by such a declaration made by the court, of the illegality arising out of a breach of the contractual obligation and bound to give effect to the decree of the court to refuse registration of transfer.

48 to 50.....

51. Similarly if the transfer of shares in favour of a person is likely to create, or, would ultimately place the company itself, in a situation to make a breach of certain existing contractual obligations of the company, thereby exposing the company to action in law, in my view the company would be justified in refusing to register such transfer of shares.

52. In my view, the expression "sufficient cause" occurring in the proviso to Sub-section (2) of Section 111A of the Act takes within its sweep not only those contingencies contemplated under Sub-section (3) but, there can also be circumstances and reasons other than those contemplated under Sub-section (3) which might require the company to refuse to register the transfer of shares and such a refusal in my view would be refusal for "sufficient cause".

53. Thus in my view, there can be various reasons, though it is not possible to enumerate all of them and it is to be decided on the facts of each case, which could constitute "sufficient cause" for a company to refuse the registration of transfer of shares.

54. The submission of learned counsel for the appellants that in view of the language of Section 111A(2) there cannot be any other ground that they are contemplated under Section 111A(3) cannot be accepted.

The facts and situation are therefore, totally different from the present case.

7 Moreover, section 111 A (2) and section A (3) arise in two different situations. Under sub section 2, the situation arises before the shares are transferred and in sub section 3, it is after the shares

are transferred. The expression sufficient cause is far wider than the expression “in contravention of any of the provisions of the Securities and Exchange Board of India Act, 1992 or regulations made thereunder or the Sick Industrial Companies (Special Provisions) Act, 1985 or any other law for the time being in force.”

Obviously, the Parliament thought it fit in situation after the shares are transferred to authorize the Company Law Board to look into the complaints, to direct any depository or company to rectify its register or records only if the transfer of shares or debentures was in contravention of any law. Per contra, under sub section 2, in every situation a company has to register transfer of shares as the shares are freely transferable except where the company proves that it has sufficient cause to refuse to register. This expression “sufficient cause”, in a given case could also include contravention of some obligations of the transferer or some other obligations attached to this shares, like for example, when certain shares are pledged to a lender or where the transferer has entered into an agreement giving pre-emptive rights to a third party under an agreement. That is why the expression used under sub section 2 is `sufficient cause' whereas the expression used under sub section 3 is specific to mean where after the transfer it has to come to light that the transfer has been `in contravention of law'. A situation may arise where the transfer has been effected due to a fraud played by somebody or a forgery or it

could be even stolen. Such a situation would be in contravention of law.

Therefore, to say that sub section 2 and sub section 3 have to be read together as both effectively overlap each other, is not correct.

8 Further, the word “contract” is defined under Section 2(h) of the Indian Contract Act, 1872 as an agreement enforceable by law. Article 13(3) (a) of the Constitution of India provides that law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. Law is the aggregate of legislation, judicial precedent and accepted legal principles. It does not include contract or an agreement enforceable by law. Infact definition of contract itself shows they are two different things. Breach or contravention of an agreement is a violation of a contractual obligation. This cannot be stretched to say breach of an agreement is the same as contravention of any law.

9 The counsel for the appellant also relied on the judgment of the Division Bench of this court in [2]***Bajaj Auto Ltd. Vs. Western Maharashtra Development Corporation Ltd.*** to buttress his case. Even this judgment is not relevant to the facts of the present case in as much as the Division Bench has only held that consensual

2 2015 (4) Bombay C.R.499

agreement/arrangement entered into by the shareholders of a public company with a 3rd party regarding his own specified shares (either by way of sale, pre-emption or otherwise) do not impinge on free transferability of the shares as contemplated under Section 111A.

10 The counsel also relied on [3]***Holdings Limited Vs. Shyam Madanmohan Ruia & ors.*** I am afraid even this judgment is not applicable to the facts and circumstances of the case. There also the issue was of free transferability of shares and right of pre-emption. The court held that section 111A is not a provision to curtail the rights of the shareholders to enter into consensual arrangement with the purchaser of their specific shares and as such right to enter into consensual arrangement must prevail so long as it is in conformity with the terms of Articles of Association and other provisions of the Act and the Rules. The court went on to further hold that section 111A(2) is the provision mandating the Board of Directors of the company to transfer shares in the name of the transferee subject to the stipulation in section 111A(2) of the Act. The expression “freely transferable” therein is in the context of the mandate against the Board of Directors to register the transfer of specified shares of the members in the name of the transferee, unless there is sufficient cause for not doing so. The court held that concept of free transferability of the shares of a public company is not

3 2010 (5) Bombay C.R.589

affected in any manner if the shareholder expresses his willingness to sell the shares held by him to another party with right of first purchase (pre-emption) at the prevailing market price at the relevant time and so long as the member agrees to pay such prevailing market price and abides by other stipulations in the Act, Rules and Articles of Association, there can be no violation.

11 The counsel for the appellant also submitted that the Company Law Board erred in rejecting the petition by placing reliance on the judgment of the Supreme Court in [4]***V.B.Rangaraj Vs. V.B.Gopalakrishnan,*** as the ratio laid down by the said judgment was not applicable to the present case. In V.B.Rangaraj (supra) the supreme court has held that the shares are freely transferable and the only restriction on the transfer of shares of a company will be as laid down in its Articles, if any. The Apex Court held that the restriction which is not specified in the Articles, therefore, was not binding either on the company or on the shareholders. In the impugned order the CLB has only stated the preposition from V.B.Rangarajan (supra) but has not dismissed the petition relying on the said judgment.

12 The counsel for the appellant also submitted that the Notification of amalgamation issued by the Government of India was

4 1992(1) SCC 160

akin to laying a law and therefore, the respondents having transferred the shares in violation of the Articles of agreement should be deemed to have violated a law and therefore, CLB has jurisdiction. If one reads the petition filed before the CLB in its entirety, the approach of the appellant is that the respondents have breached Articles of Agreement that they had entered into with erstwhile UWB. Under the Banking Regulations Act, the petitioner gets to step into the shoes of erstwhile UWB and gets to enforce the rights that the erstwhile UWB had against those parties.

13 Even assuming the respondent nos.1,2 & 3 have breached the Articles of Agreement, that would, by no stretch of imagination amount to violating the Banking Regulations Act. Moreover, the entire basis for filing the petition was due to alleged defaults and violations of the agreement by Makharias. From the impugned order, it does not even appear that this point that Shri Setelwad argued, has even been argued before the Company Law Board.

Section 10F of the Act engulfs the requirement of the existence of the question of law arising from the decision of the CLB as an essential pre-condition for the maintainability of the appeal thereunder. Section 10F defines the parameters of inquisition by the appellate forum depending on the nature of the order impugned and

the nature of the type of the order under scrutiny. When a question of law is neither raised nor considered by the appellate forum, it would not be a question arising out of its order notwithstanding that it may arise on the findings given. Only a question that has been raised before or decided by the Tribunal that could be held to arise out of this order. [5](See : ***Purnima Manthena & Anr. Vs. Renuka Datla & Ors.***). Therefore, this point is also a non-issue.

14 The fact laid before the CLB was not an application simplicitor to hold an inquiry as it deems fit to find out whether there has been a contravention of any law for the time being in force and direct any company to rectify its register or record. The question that was required first to be established was whether :-

(a) The respondents 1 to 3 and 8 to 11 had any obligations to the erstwhile UWB ;

(b) Whether the respondents have committed a breach of those obligations ; and if answer to these two issues are in the affirmative ;

(c) Whether that would amount to contravention of law.

Therefore, though it is open to the appellant to take such legal recourse, they may be advised. Adopting action under Section 111A of the Companies Act, 1956 is not an option.

5 2016(1) SCC 237)

15 In my view, the appellant has not made out any case to show that the respondents 1 to 3 & 8 to 11 have contravened any law. Even if I take the case of the petitioners at face value that the respondents 1 to 3 & 8 to 11 have breached the Articles of Agreement, still in my view, that cannot be contravention of any law.

16 In fact, the Company Law Board while signing off, made it clear that dismissal of the petition would not bar the appellant from availing any other remedy as may be available in law. Section 111A(3) does not cover a situation of transfer of shares in violation of a private agreement.

17 In the circumstances, the appeal requires to be dismissed and is hereby dismissed. No order as to costs.

(K.R.SHRIRAM,J)

KJ