IN HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	17.10.2019
Pronounced On	15.11.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.Nos.675 & 676 of 2004
and
C.M.P.No.3484 of 2004

Securities and Exchange Board of India,
D' Monte building, 3rd Road,
32 D' Monte Colony, TTK Road,
Alwarpet, Chennai – 600 018
represented by its Chariman ...Appellant in both C.M.As

vs

1.DSQ Software Limited,
G.R.Complex,
407-408, Mount Road,
Nandanam, Chennai – 600 035.

2.Dinesh Dalmia ...Respondents in both C.M.As

Common Prayer: Civil Miscellaneous Appeals filed under Section 10 of the Companies Act, 1956, to call for the records of the orders dated 29.11.2002 passed by Company Law Board, Southern Region Bench at Chennai in Company Applications Nos.115 & 116/621-A/SRB/2002 and set aside the same.

For appellant : Mr.R.Shiva Kumar in both C.M.As.
For R1 : No appearance in both C.M.As.
For R2 : Not ready in Notice both C.M.As.

C O M M O N J U D G M E N T

The appellant is aggrieved by the impugned orders dated 29.11.2002 passed by the Company Law Board, Southern Region Bench, Chennai in C.A.Nos.115-116/621-A/SRB/2002.

2.The appellant had earlier passed an order dated 20.07.2001 under section 11 of the SEBI Act with the following observations:-

(a) DSQ cancels this acquisition of Fortuna Technologies being done on swap basis after following the procedure laid down under the Companies Act. (a copy of this order has been separately sent to Dept. of Company Affairs to ensure compliance by the company)

(b) DSQ is prohibited from accessing capital market for a period of one year of completion of investigation and action thereupon whichever is later.

(c) Mr Dinesh Dalmia is debarred from dealing in securities for a period of one year or completion of investigation and action thereupon whichever is later. These actions are without prejudice to any further action(s) which may be considered on the outcome of the findings of the investigations.

3.Thereafter, another order dated 20.12.2001 was passed by the appellant under section 11 & 11B of the SEBI Act, relevant portion of this order reads as follows:-

In view of the above, I hold that the conduct of DSQ Software and Mr. Dinesh Dalmia with the investors and shareholders of the Company was fraudulent in nature and was violative of the provisions of the SEBI Act 1992 read with Regulation 6 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations 1995. I.D.R. Mehta, therefore, in the interest of the investors, invoking the powers conferred under Section 11B read with section 4 (3) of the SEBI Act, 1992 and Regulation 11 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations hereby order that the earlier directions issued vide order dated July 20 , 2001 asking DSQ to cancel the purported acquisition of Fortuna, prohibiting DSQ to access the capital market and debarring Mr.Dinesh Dalmial from dealing in securities passed by SEBI be continued. This order will come into force with immediate effect. This order has been passed without prejudice to any action which may be considered on the outcome of further investigations.

4.The dispute is in the present Civil Miscellaneous Appeals pertains to the questions of shareholders of M/s.Fortuna Technologies Inc. Sunny Vale, California, USA and failure on the part of the respondent to comply with requirement of SEBI Act and Regulations thereon.

5.Under these circumstances, the 1st respondent herein had filed Company Application No.115 of 2002 while the 2nd respondent herein had filed Company Application No.116 of 2002 under 621A of the Companies Act, 1956 read with Section 629A and for sought composition offences under Sections 81(1), 75 and 150 of the Companies Act, 1956.

6.By the impugned order dated 29.11.2002, the Company Law Board has passed the order with the following observations:-

> 6.I have considered the application, submissions of Counsel and Authorised Representative of the applicants, Report of the Registrar of Companies, Tamil Nadu, Chennai, contentions of the SEBI and the affidavit dated 06.11.2002 filed on behalf of the applicants. After taking into account the facts and circumstances of the case I am inclined to compound the offences by imposing composition fees as detailed hereinunder:
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> C.A.No.115/621A/SRB/2002
> The company shall pay Rs.1,00,000/- (Rupees one lakh only) and the second applicant shall pay Rs.75,000/- (Rupees Seventy Five Thousand Only) by 30.11.2002. The second applicant shall pay the compounding fee from his personal account.
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> C.A.No.116/621A/SRB/2002
> The Company shall pay Rs.1,75,000/- (Rupees one lakh and Seventy Five Thousand only) and the second applicant shall pay Rs.75,000/- (Rupees Seventy Five Thousand Only) by 31.12.2002. The second applicant shall pay the compounding fee from his personal account.
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> C.A.No.117/621A/SRB/2002
> The Company shall pay Rs.1,00,000/- (Rupees one lakh only) and the second applicant shall pay Rs.75,000/- (Rupees Seventy Five Thousand Only) by 31.12.2002. The second applicant shall pay the compounding fee from his personal account.
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> C.A.No.206/621A/SRB/2002
> The Company shall pay Rs.50,000/- (Rupees Fifty Thousand only) and the second applicant shall pay Rs.25,000/- (Rupees Twenty Five Thousand Only) by 31.12.2002. The second applicant shall pay the compounding fee from his personal account.
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> C.A.No.207/621A/SRB/2002
> The Company shall pay Rs.1,00,000/- (Rupees

one lakh only) and the second applicant shall pay Rs.75,000/- (Rupees Seventy Five Thousand Only) by 31.12.2002. The second applicant shall pay the compounding fee from his personal account.

C.A.No.208/621A/SRB/2002
The Company shall pay Rs.1,00,000/- (Rupees one lakh only) and the second applicant shall pay Rs.75,000/- (Rupees Seventy Five Thousand Only) by 31.12.2002. The second applicant shall pay the compounding fee from his personal account.

7.Pursuant to the Order of this Bench mentioned here-in-above, the applicants have lodged demand drafts for a total sum of Rs.10,25,000/- (Rupees Ten Lakh and Twenty Five Thousand only) on 11.11.2002. As the offences have been compounded and composition fees have been remitted by the applicants, a copy of this Order be sent to the Registrar of Companies, Tamil Nadu, Chennai for information and necessary action in terms of this order

7.Aggrieved by the same, the appellant has preferred the present Civil Miscellaneous Appeals question the compounding of offences and receipt of composition fees by the respondents.

8.The appellant has questioned the reasoning of the Company Law Board and it is stated that the allotment of sharers made by the respondent on preferential basis to the allottees are not mere technical infractions of the Companies Act and submitted that it also might constitute violations of inter alia the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 1995 and SEBI (DIP) Guidelines, 2000.

9.Heard the learned counsel for the appellant. There is no representation on behalf of the respondent though notice has been served to them. Therefore, the case was taken up for final hearing.

10.I have perused the impugned orders of the Company Law Board, Southern Region Bench, Chennai and considered the submissions of the learned counsel for the appellant.

11.I have considered the arguments of the learned counsel for the appellant and perused the grounds of appeals. Two orders have been passed by the SEBI are on account of certain violation under the Companies Act, 1956 and therefore, the respondents wanted to compound the offences by paying composition. In the said proceedings, the appellant had also filed a counter stating that the compounding should not be allowed.

12.The respondents have settled disputes under the Companies Act, 1956 alone. By settling the dispute under Section 621-A of the said Act, the machinery provided to the appellant under the SEBI Act, 1992 to prosecute respondents for any violation of the said Act and regulations made thereof has not been stifled in any manner.

13.Section 621-A of the companies Act, 1956 as stood at the relevant time and relevant for our purpose reads as follows:-

> "621-A. Composition of certain offences. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act (whether committed by a company or any officer thereof), not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by-
> (a) the Company Law Board; or
> (b) where the maximum amount of fine which may be imposed for such offence does not exceed five thousand rupees, by the Regional Director, on payment or credit, by the company or the officer, as the case may be, to the Central Government of such sum as that Board or the Regional Director, as the case may be, may specify: Provided that the sum so specified shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded: Provided further that in specifying the sum required to be paid or credited for the compounding of an offence under this sub-section, the sum, if any, paid by way of additional fee under sub- section (2) of section 611 shall be taken into account.
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> (4) (a) Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Company Law Board or the Regional Director, as the case may be.
> (b) Where any offence is compounded under this section, whether before or after the institution of any prosecution, an intimation thereof shall be given by the company to the Registrar within seven days from the date on which the offence is so compounded.

> (c) Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company or by any person authorised by the Central Government against the offender in relation to whom the offence is so compounded.
> (d) Where the composition of any offence is made after the institution of any prosecution, such composition shall be brought by the Registrar in writing, to the notice of the Court in which the prosecution is pending and on such notice of the composition of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.
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> (7) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-
> (a) any offence which is punishable under this Act with imprisonment or with fine, or with both, shall be compoundable with the permission of the Court, in accordance with the procedure laid down in that Act for compounding of offences;
> (b) any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.
> (8) No offence specified in this section shall be compounded ex- cept under and in accordance with the provisions of this section.

14.From the reading of the above provision it is clear that compounding of offence by payment of composition fee before the Company Law Board as it stood under the provisions of the erstwhile Companies Act, 1956 read with Section 629-A was confined to any offence punishable under the Companies Act, 1956. It may be useful to refer to the decision of the Hon'ble Supreme Court in V.L.S.Finance Ltd vs Union of India, (2013) 6 SCC 278 wherein it has been held as follows:-

> 17. Ordinarily, the offence is compounded under the provisions of the Code of Criminal Procedure and the power to accord permission is conferred on the court excepting those offences for which the permission is not required. However, in view of the non obstante clause, the power of composition can be exercised by the court or the Company Law Board. The legislature has conferred the same

power on the Company Law Board which can exercise its power either before or after the institution of any prosecution whereas the criminal court has no power to accord permission for composition of an offence before the institution of the proceeding. The legislature in its wisdom has not put the rider of prior permission of the court before compounding the offence by the Company Law Board and in case the contention of the appellant is accepted, same would amount to addition of the words "with the prior permission of the court" in the Act, which is not permissible.

15.The power of compounding of offences by the Company Law Board under Section 621-A of the Companies Act, 1956 as it stood could be exercised only in relation to any offences punishable under the said Act either before or after the institution of any prosecution. Section 621-A(4)(b) of the said Act provided that where any offences is compounded under it, whether before or after the institution of any prosecution, an intimation thereof shall be given by the Company to the Registrar within 7 days from the date on which the offence is compounded. Section 621-A(4)(d) mandates that where the composition of any offence is made after the institution of any prosecution, notice of such composition would be brought by the Registrar in writing to the notice of the court in which the prosecution is pending and on such notice of the composition of the offences being given, the accused in relation to whom the offences is so compounded shall be discharged.

16.Composition of offences under the provisions of the aforesaid Act did not in any manner preclude the appellant from initiating any proceedings for alleged violations under the SEBI Act, 1992 or the regulations made. Therefore, attempt of the respondents to settle the dispute qua the Companies Act, 1956 did not come in the legitimate way of the appellant from initiating any criminal proceedings against the respondents.

17.Further, appellant themselves have framed guidelines to compound offences under the SEBI Act, 1992 with a view to putting end to litigations and to control the players in the stock market. Therefore, there are no merits in the present Civil Miscellaneous Appeals.

18.Therefore, the present Civil Miscellaneous Appeals are dismissed while preserving the rights of the appellant to initiate appropriate proceedings in accordance with law against the respondents. No cost. Consequently, connected Miscellaneous Petiiton is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1.The Subordinate Court, Arani.

2.The Additional District Munsif Court, Arani.

3.The Section Officer, V.R.Section,
High Court, Madras.

+1cc to Mr. , Advocate SR.No. 95374

C.M.A.Nos.675 & 676 of 2004
and
C.M.P.No.3484 of 2004

A.SK(27/12/2019)