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Rev.A.No.211 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.02.2022

Pronounced on : 24.02.2022

C O R A M :

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Review Application No.211 of 2015

in

Comp. Appeal No.12 of 2011

- 1.DSLV Ventures LLC
1540, Oakwood Trail,
Xenia Ohio – 45385.
Rep. By.M.Swaminathan
- 2.Venkataramani Swaminathan
1540, Oakwood Trail,
Xenia Ohio – 45385.
Rep. by POA Holder -
M.Swaminathan
- 3.G.Pushpalatha (Died)
- 4.S.Ganapathy
L.R. of third Applicant
- 5.G.Nandhini
(5th Applicant is the LR of the deceased
3rd Applicant, namely, G.Pushpalatha
Vide order dated 30.07.2021 in
M.P.No.11244/21 in Rev.A.No.211/2015) ... Applicants

VS.



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1.Dr.Kamakshi Memorial Hospital Limited,
No.1, Radial Road, Pallikaranai,
Chennai – 601 302.

2.Dr.T.G.Govindarajan

3.Dr.T.S.Sivaranjani

4.R.Balaji & Co.
Chartered Accountants,
No.10, Vathiyar Thottam,
1st Rangarajapuram,
Chennai – 600 024.

5.Indian Overseas Bank,
No.32, Dr.R.K.Salai,
Chennai – 600 004.

6.State Bank of India
Commercial Branch,
NSC Bose Road,
Chennai – 600 001.

7.HDFC Bank Ltd.,
Perungudi Branch,
Perungudi,
Chennai – 600 096.

... Respondents

This Review Application has been filed under Order XLVII Rule 1
R/W Section 114 of the Code of Civil Procedure, to review the order dated
18.03.2013 and thereby allow the appeal in C.A.No.12 of 2011.



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For Applicant : Mr.S.R.Rajagopal
for S.R.Raghunathan

For Respondents : Mr.R.Venkatavaradan for R-1

Mr.M.S.Krishnan, Senior Counsel
for M/s.Sarvabhauman Associates
for R2 and R3

Mr.C.Mohan
for M/s.King and Partridge
for R-7

ORDER

This Review Application is directed against an order dated 18.03.2013 in Comp. Appeal No.12 of 2011. The appellants therein are the Review Applicants herein.

2. The appellants filed C.P.No.25 of 2011 before the Additional Principal Bench, Southern Region, Company Law Board, Chennai. The said Petition was filed under Sections 111(4), 397 and 398 r/w Section 402, Schedule XI and other applicable provisions of the Companies Act, 1956(CA 1956). A Share Subscription Agreement dated 31.03.2006 (the SSA) was executed by and between the second Review Applicant and Respondents 1, 2 and 3 herein. In terms thereof, the second Review Applicant was required to



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invest a sum of Rs.5 crore in the Dr. Kamakshi Memorial Hospital Limited(the Hospital). The SSA specified the manner of investment of the above mentioned sum of Rs.5 crore. It also provided that the second Review Applicant would hold 20% of the equity capital of the Hospital and the remaining 80% would be held by the promoters. The SSA contained an arbitration clause. Pursuant to the SSA, the second Review Applicant invested a sum of Rs.2.5 crore in the Hospital. Such investment was made through the first Review Applicant, which was not a party to the SSA.

3. Upon receipt of the sum of Rs.2.5 crore, the Hospital received the said sum under the automatic route for foreign direct investment (FDI) in terms of the Foreign Exchange Management Act, 2000 (FEMA) and regulations framed thereunder. In connection therewith, Foreign Inward Remittance Certificates(FIRC)s were issued by the authorised dealer (AD)/receiving bank. Such FIRC)s indicate that the amount was remitted towards issuance of equity shares. However, the admitted position is that the Hospital did not allot shares to the second Review Applicant or its nominee. Disputes arose between the parties in the above facts and circumstances. The Review Applicants filed C.P.No.25 of 2011 under specific provisions of CA 1956, as indicated above. The Petition was



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opposed on the ground that the petitioners did not meet the prescribed eligibility requirements under Section 399 of CA 1956. In particular, the Respondents contended that the Review Applicants did not hold 10% or more of the paid up share capital of the Hospital to satisfy the requirements of Section 399 of CA 1956. Therefore, even before the Petition was numbered, it was listed for arguments on maintainability. By order dated 03.03.2011, the CLB rejected the petition. The CLB held that the petitioners should be shareholders of the company with the qualifications prescribed under Section 399 of CA 1956 in order to maintain the petition. Secondly, the CLB held that the Review Applicants have an alternative remedy by way of invoking the arbitration clause in the SSA. The CLB noticed the fact that the Review Applicants had also invoked Section 111(4) of CA 1956, but held that the issue of allotment of shares is directly linked to specific performance of the SSA and that it cannot be adjudicated in summary proceedings since it involves complex questions of law and fact.

4. The order of the CLB was assailed by filing Company Appeal No.12 of 2011 before this Court. The said Appeal was rejected by order dated 18.03.2013. By such order, this Court held that there are disputes



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between the parties as to whether the Review Applicants had performed their obligations under the SSA. On the basis that complicated questions are involved, this Court held that such questions should be decided by the civil court or through arbitration and not by the CLB. The present review application is directed against the said order in appeal.

5. Oral arguments on behalf of the Review Applicants were submitted by Mr.S.R.Rajagopal, learned counsel; on behalf of the first Respondent by Mr.R.Venkatavaradan, learned counsel; on behalf of Respondents 2 and 3 by Mr.M.S.Krishnan, learned senior counsel; and on behalf of the 7th Respondent by Mr.C.Mohan, learned counsel.

6. The first contention of the Review Applicants was that there are errors apparent in the order of this Court and in the order of the CLB. The Review Applicants pointed out that neither the CLB nor this Court appreciated the implications of filing a composite petition under Section 111(4) and Sections 397 and 398 of CA 1956 before the CLB. The Review Applicants contended that they were constrained to file a composite petition because the Hospital and its promoters failed or refused to allot shares to the



Review Applicants in spite of receiving remittances towards equity shares.

In support of this contention, the Review Applicants referred to a communication dated 24.02.2007 from the Hospital to the Reserve Bank of India(the RBI). By such communication, the Hospital informed the RBI that DSLV Ventures, the first Review Applicant herein, had invested a sum of US \$ 69,992, which is equivalent to Rs.30,78,948/- through the Indian Overseas Bank under the automatic approval route. A further communication dated 06.06.2007 was also placed in this regard. This communication is also from the Hospital to the RBI. By this communication, the RBI was informed about the investment by the first Review Applicant of a sum of US \$ 199,985, which is equivalent to Rs.81,59,388/- through the Indian Overseas Bank under the automatic approval route. The Review Applicants also referred to and relied upon the FIRC's issued by the Indian Overseas Bank on 13.04.2006, 28.02.2007 and 06.06.2007. On such basis, the Review Applicants contended that these documents indicate, beyond doubt, that the investment was towards equity.

7. According to the Review Applicants, both the CLB and this Court committed a patent error in failing to notice or appreciate the significance of the communications addressed by the Hospital to the RBI



and the FIRCs issued by the AD/bank of the Hospital indicating conclusively that the investment was towards equity shares in the Hospital. Therefore, C.P. No.25 of 2011 should not have been rejected.

8. The Review Applicants further contended that the conclusion of this Court that the amount was paid by the Review Applicants by way of financial assistance is an error apparent on the face of the record in view of the documents referred to above. The next contention of the Review Applicants was that the Hospital and its promoters cannot take advantage of the default committed by them in issuing and allotting shares after receiving remittances towards equity shares under the automatic approval route as per the FEMA.

9. The Review Applicants referred to the order of the CLB and pointed out that the CLB committed a grievous error in rejecting the petition at the threshold merely because the petitioners therein, the Review Applicants herein, could not produce share certificates. Since the Hospital committed the illegality of not allotting shares and issuing share certificates, it was contended that the Hospital should not have been permitted to benefit



from such default. With reference to the findings of the CLB that the case involves complex questions of law and fact, the Review Applicants submitted that such conclusion was drawn without referring to the documents pertaining to the investments. By turning to the order of this Court, the Review Applicants contended that the conclusion of this Court that the investments made by the parties should be treated only as investments and not otherwise is a patently erroneous conclusion, which warrants interference in review jurisdiction. The Review Applicants further pointed out that this Court failed to notice that the SSA expressly provided for proportional allotment. Therefore, findings were recorded to the effect that the Review Applicants are not entitled to maintain the petition because they did not make investments within the time limit set out in the SSA. For all these reasons, the Review Applicants submitted that the Review Application is liable to be allowed.

10. In support of these contentions, the Review Applicants referred to and relied upon the following judgments:

(i) *Board of Control for Cricket in India and another v. Netaji Cricket Club and others* (2005) 4 SCC 741, wherein, at paragraphs 89 to



92, the court concluded that the words 'sufficient reason' in Order 47 Rule 1 of CPC are wide enough to include a misconception of fact or law by a court.

In addition, it was held that the law should bend before justice and that review jurisdiction may be exercised to prevent miscarriage of justice.

(ii) *S.Bagirathi Ammal v. Palani Roman Catholic Mission* (2009) 10 SCC 464.

(iii) *Vikram Singh alias Vicky Walia and another v. State of Punjab and another* (2017) 8 SCC 518, wherein the court summarized the principles pertaining to the exercise of review jurisdiction in paragraph 22.

(iv) *Sriram Sahu (Dead) through LR's v Vinoth Kumar Rawat and others in Civil Appeal No.3601 of 2020*, judgment dated 03.11.2020, wherein at paragraph 8.2, the Hon'ble Supreme Court considered the meaning and scope of the expression mistake or error apparent on the face of the record.

(v) *Assistant Commissioner Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Limited* (2008) 14 SCC 171

(vi) *Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Limited and others* (1998) 7 SCC 105 (*Ammonia Supplies*), wherein the Hon'ble Supreme Court held that parties should first



approach the jurisdictional CLB for rectification of the register of members and only approach the civil court if the jurisdictional CLB concludes that the matter requires adjudication by a civil court.

(vii) *M/s World Wide Agencies Pvt. Ltd and another v. Margaratt Desor and others (1990) 1 SCC 536*, wherein the Hon'ble Supreme Court held that a petition under Sections 397 and 398 of CA 1956 is maintainable at the instance of legal representatives of a deceased member although the names of such legal representatives are not entered in the register of members.

(viii) *Charanjit Khanna and others v. M/s Khanna Paper Mills Ltd. and others, 2011 SCC OnLine Del 1845*, wherein the Delhi High Court allowed an appeal under Section 10 F of CA 1956 and set aside an order of the CLB by which an amendment application was rejected.

11. These contentions were strongly refuted by the Hospital. The first contention on behalf of the Hospital was that the scope of review jurisdiction is limited. Such jurisdiction may be exercised only if there is an error apparent on the face of the record, or new evidence is now available, which has a material bearing on the dispute but could not be produced by



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the Review Applicants in the first instance in spite of the exercise of reasonable diligence, or for any other sufficient reason. According to the Hospital, the expression 'any other sufficient reason' should be construed *ejusdem generis* with the preceding expressions. In support of this contention, the Hospital referred to and relied upon the judgment of the Hon'ble Supreme Court in *Kamlesh Verma v. Mayawati and others (2013) 8 SCC 320 (Kamlesh Verma)*. In particular, the Hospital referred to and relied upon paragraph 20 of the judgment wherein the grounds on which a review application is maintainable are set out. The Hospital also referred to and relied upon a judgment of this court in *S.Natarajan v. S.V.Global Mills Ltd and others 2016-1-L.W.209*. In specific, paragraphs 21 and 34 of the said judgment were relied upon.

12. After setting out the legal position, the Hospital referred to the order of the CLB. The Hospital pointed out that the CLB took into account the fact that it was a composite petition under Sections 111(4) and 397 and 398 of CA 1956. In spite of noticing that it is a composite petition, the CLB held that the petition is not maintainable because the Review Applicants prayed for an inquiry to determine the share holding of the petitioners.



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According to the Hospital, the scope of Section 111 is confined to matters wherein the company refuses to register a transfer of shares or fails to enter the names of persons in the register of members or wrongly enters the names of persons in the register of members. In order to maintain a petition for rectification, the Hospital contended that the company concerned should have allotted shares to the petitioners. If the names of allottees are not entered in the register of members in spite of share allotment, such persons are entitled to file proceedings for rectification under Section 111. Besides, the Hospital contended that complicated questions of fact, which cannot be addressed in summary proceedings, should be adjudicated either by a civil court or by an arbitral tribunal. In the case at hand, the SSA contains an arbitration clause. Therefore, the Petitioners have an alternative remedy which they have failed to resort to for reasons unknown.

13. The next contention of the Hospital was that the second Review Applicant is the only party to the SSA, whereas four persons filed C.P. No.25 of 2011 before the CLB. This was noticed both by the CLB and by this Court. The Hospital referred to the findings recorded in such regard in Paragraph 4 of the order of the CLB and in paragraph 11 of the order of



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this Court. Therefore, the Hospital concluded its submissions by reiterating that the review application is not maintainable.

14. Learned senior counsel for Respondents 2 and 3 contended that the Review Applicants failed to fulfill their obligations under the SSA. As per the SSA, the second Review Applicant was to invest a sum of Rs.5 crore in the Hospital. Instead, only a sum of Rs.2.5 crore was remitted. In spite of the Hospital being ready and willing to refund the said amount, the Review Applicants refused to accept such refund. Since the Review Applicants failed to comply with their obligations under the SSA by investing the full amount of Rs.5 crore, they are not entitled to the allotment of shares. The 2nd and 3rd Respondents reiterated that there are no errors apparent either in the order of the CLB or in the order of this Court. Therefore, the review application is liable to be rejected.

15. Learned counsel for the 7th Respondent submitted that the 7th Respondent is not a necessary party to the dispute and was not the bank which issued the FIRC's.



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16. At the outset, it is important to set out Order 47 Rule 1 CPC,

which deals with an application for review. Order 47 Rule 1 is as under:

“1. **Application for review of judgment**_(1) Any person considering himself aggrieved,-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.”



From the above, it is evident that a review application is maintainable under three circumstances. The said circumstances are: (i) when the review applicant discovers new and important matters of evidence which, in spite of the exercise of due diligence, was not within the knowledge of or could not be produced by such applicant at the time when the order was made; or (ii) on account of some mistake or error apparent on the face of the record; or (iii) for any other sufficient reason. The first of these circumstances is clearly inapplicable in this case and it remains to be seen if the case falls within the latter two.

17. This provision has been interpreted in several judgments. It is unnecessary to multiply authorities on the scope of review jurisdiction. Instead, it is sufficient to refer to *Kamlesh Verma*. At paragraph 17 of the said judgment, the Hon'ble Supreme Court held that the court should not re-appreciate evidence in review jurisdiction so as to reach a different conclusion even if it were possible, and that a conclusion arrived at on the basis of appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or some reason akin thereto. In paragraph 18, the Hon'ble Supreme Court



held that the power of review should not be confused with appellate power.

Thereafter, in paragraph 20.2, the Hon'ble Supreme Court formulated principles relating to when a review will not be maintainable. Paragraph 20.2 is as under:

“20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.



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(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.”

18. Therefore, this case should be tested against the principles set out above. The principal ground on which the order dated 18.03.2013 of this Court is assailed is that the letters from the Hospital to the RBI and the FIRCs were disregarded. Therefore, the first stop in the inquiry should be to examine the order of this Court and the order of the CLB to verify whether these documents were taken into consideration. On this issue, it should be noticed that there is a significant difference between a court disregarding documents and engaging with documents but refusing to assign much materiality or weight thereto for reasons set out therein. In the former case, if the documents concerned are vital, it could be concluded that there is an error apparent in the order. On the contrary, in the latter case, unless no reasons are indicated for not assigning materiality or weight to the relevant documents or the reasons assigned are *ex facie* unreasonable, there would be no scope for interference in review jurisdiction unlike in appellate jurisdiction. Upon perusal of the order of the CLB, the order indicates that the petition was unnumbered. In effect, the order dated 25.02.2011 was



issued even before the relevant company petition was numbered. It appears that the petition was listed for arguments in relation to the maintainability thereof upon the Registry raising objections. In paragraph 4 of the order, the CLB records that the petitioners therein had relied upon documents evidencing that foreign inward remittances were received towards foreign equity. However, no reasons are assigned as to why the said documents were disregarded in the analysis and findings in the said order.

19. Turning to the order of this Court, the questions of law are set out at paragraph 4 of the order. In paragraph 9, the Court records the fact that amounts were received from the first Petitioner on three different dates pursuant to the SSA. In paragraph 12, the Court refers to the pages of the typed set filed by the appellants therein/Review Applicants herein as evidence of remittances towards equity. However, there is no discussion with regard to the documents contained in those pages. Instead, this Court recorded the following findings:

“12. As far as the first petitioner DSLV Ventures LLC is concerned, the same is admittedly foreign based company. It may be true that the amounts are



received by the first respondent Dr. Kamakshi Memorial Hospital Private Limited from DSLV Ventures as foreign investor. Though the payments under the agreement are by the first petitioner, neither the first petitioner nor the second petitioner sent any communication to the first respondent company regarding the party on whose behalf the investments are made by the first petitioner company. **Going by the details furnished by the first respondent company, which are enclosed at pages 105, 106, and 107 of the typed set filed by the appellants, the investments are received from the foreign investor by the name DSLV Ventures LLC, by the first respondent company. If that is so, as there is no agreement between the parties, the investments, if any made by the same shall be treated only as investments and not otherwise.** As far as the second petitioner is concerned, he has no right to claim allotment of shares for the payments so made by the second petitioner. Viewing from any angle, neither of the petitioners have any right to maintain any claims as made herein on the strength of subscription agreement dated 31.3.2006."(emphasis added)



20. The finding recorded in paragraph 12, which is extracted in the preceding paragraph and emphasised, to the effect that an investment without an agreement shall be treated only as an investment is riddled with errors apparent. First, assuming the investment by DSLV Ventures was not preceded by an agreement, the law does not mandate that an investment in the equity share capital of a company should be preceded by a formal agreement in writing. In fact, most investments in equity are made without a preceding agreement. Secondly, Clause 1 of the SSA enables investment either directly by the investor or through his nominees. Even *de hors* Clause 1, in view of the two letters from the Hospital to the RBI stating that equity investments were received from DSLV Ventures, it is evident that the Hospital recognised DSLV Ventures as an investor in equity. Thirdly, a company raises funds either in the form of debt or equity. When money is raised as debt, it is a borrowing by the company and not an investment. Consequently, the debt is required to be discharged as per the terms of the relevant loan agreement or even debt instrument such as debenture. By contrast, when a person invests in the shares of a company, it is an investment in the company which entitles such investor to receive shares, participate in shareholder meetings, receive dividends when declared and



participate in the surplus, if any, upon winding up. The above finding is patently erroneous also because this fundamental distinction was not appreciated.

21. In paragraph 13, this Court recorded the finding that the investor should make the investment only after the authorised capital is increased by the Hospital, and that the right to file and maintain the petition before the CLB would accrue only thereafter. Paragraph 13, in relevant part, is set out below:

"13.While the investment shall be made by the investor, the promoters shall take steps to increase the authorized capital of the company and the company shall take steps to offer new shares to the investor in accordance with the procedure laid down under the provisions of the Companies Act. **The remittance by the investor shall be only after the company confirming the increase in authorized capital and in offering new shares to the investor** (emphasis added). The rest of the terms and conditions of the subscription agreement relate to conduct of the affairs of the company and the right of the investor to participate in the same. Such right accrues to the



investor only after shares are allotted and only so long as the investor holds the shares of the company. In short, the rights and liabilities under the agreement ought to have been first recognized and legally enforced and only thereafter, the investor's right and liabilities as shareholder/member of the company accrues and thereafter, the shareholder is entitled to seek the reliefs as sought for herein. **In other words, the right of the petitioners to claim the reliefs as sought for herein is, after their being allotted shares and their becoming shareholders of the company. Till then, no such right to make any claim against the company and its directors before the Company Law Board accrues to either of the petitioners herein.**"(emphasis added)

22. The findings in paragraph 13 above are *ex facie* erroneous.

The obligation to increase the authorised share capital and issue and allot shares is on the Hospital and its management. The Review Applicants, who have no control over the same, cannot be non-suited for the default committed by the Respondents after receiving remittances from a non-resident under the automatic route as FDI.



23. The order sought to be reviewed is patently erroneous for another reason. In paragraph 13, this Court referred to the fact that the SSA envisages proportional allotment of shares by holding *inter alia*, "that it may be true that the parties to the agreement agreed to allot certain shares to the investors in proportion to the investments made in four installments within the specified time." Nonetheless, the Court absolved the Hospital of the obligation on the ground that investments were received in part and belatedly. In this regard, Clause 1 of the SSA is set out below:

“1.The investor hereby agrees to bring in either by himself or through his nominees up to an amount of Rs.5 crores or equivalent in foreign currencies in stages **with proportionate allotment towards subscription of the equity shares of Rs.10/- each of the company** (emphasis added) at a premium of not exceeding Rs.15/- per share as follows:-

- a) 5% on receipt of Rs.1.25 crores on or before 31.03.2006
- b) 5% on receipt of Rs.1.25 crores on or before 15.05.2006
- c) 5% on receipt of Rs.1.25 crores on or before 30.06.2006
- d) 5% on receipt of Rs.1.25 crores on or before 15.08.2006”

Such findings were drawn by completely disregarding vital documents. As set out earlier, both by communication dated 24.02.2007 and 06.06.2007, the Hospital informed the RBI that remittances were received from the first



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Review Applicant towards equity under the automatic approval route. This is corroborated by the three FIRC's annexed by the Review Applicants. The FIRC's are certificates issued by the AD, i.e. the bank receiving the remittances. The authorised dealer is empowered to issue the FIRC's under regulations framed under the FEMA provided the remittances are permissible under the automatic route under FEMA. By disregarding these documents, the CLB dismissed the composite petition of the petitioner at the threshold. The order of the CLB is brief and consists of only four paragraphs. By contrast, the order of this Court is elaborate. Nonetheless, there is no discussion or finding with regard to the above vital documents which were issued either by the Hospital or by the AD and clearly evidence the fact that the money was received towards issuance of equity shares. In *Kamlesh Verma*, the Hon'ble Supreme Court held that minor mistakes should not be a ground for review and that an error which has to be fished out is not an error apparent. Therefore, it remains to be considered whether the errors set out above are either minor errors or errors which were required to be fished out.



24. Under FEMA, investments in equity are permitted under the automatic route currently and the same avenue was also open when remittances were made by the first Review Applicant. The automatic route refers to general permission to make investments by way of FDI without the prior approval of the RBI subject to post-remittance compliances such as the issuance of FIRC's by the AD and the filing of Form FC-GPR to report the remittances to the RBI. The rationale for allowing such remittances under the automatic route is that the inflow of foreign exchange is bolstered and given the nature of equity, outflow is generally limited to dividend payouts. By contrast, borrowing by an Indian company from a non-resident is strongly discouraged because it would entail foreign exchange outflow in accordance with the terms of the credit facilities. Therefore, except for specific and limited end-uses, borrowing from non-residents, which is referred to as external commercial borrowing (ECB) is not allowed without prior approval under a stringent regulatory regime. The documents on record provide strong evidence that the remittances were towards the issuance of equity. The contesting Respondents are unable to controvert the genuineness of these documents, which were issued either by the Hospital or by the AD. These documents were disregarded both by the CLB and by this



Court without assigning cogent reasons for the same. Besides, these are

material and, indeed, vital documents forming part of the record.

Consequently, the Review Applicants were non-suited at the threshold. These

errors cannot be characterized as minor and are evident *ex facie*. Therefore,

it is not necessary to undertake a fishing expedition to ferret out these errors.

Accordingly, in my view, the Review Applicants have made out a case of

errors apparent on the face of the record to set aside the order sought to be

reviewed.

25. The last aspect to be discussed is the conclusion that the dispute is complex and cannot be decided in summary proceedings. Such conclusion was arrived at for two reasons: first, because non-parties to the SSA are parties to the petition; secondly, because the second Review Applicant did not fulfil all its obligations under the SSA. Paragraph 24 of the order of this Court, which contains these findings is set out below:

“24. Here is the case, wherein the parties to the agreement and by whom the amount was paid and the parties, who are entitled to become member are in dispute. The other complication involved herein is as to whether such party performs their part of the contract



within the time specified in the agreement and he is hence entitled to enforce the terms of the agreement. If so, before ever, such right of the parties to allot the shares is determined, other statutory formalities for increasing the share capital and for making an application calling the company to offer new shares and to allot the shares to become members of the company etc. are to be complied with. That being the nature of the complicated issues involved herein, the same are outside the jurisdiction of Company Law Board and are to be determined by the civil court or through arbitration as held by the Supreme Court in the decisions cited on the side of the respondents and as held by the Company Law Boards in (i) 1999 comp cas vol.96 page 323 9escorts finance Ltd. V. G.R.Solvents and allied Industries Ltd and others); (ii) 2005 Company cases Vol 123 page 280 (Griesheim GMBH v. Goyal MG Gases Pvt. Ltd and others) and (iii) (2011) 171 Comp cas 427 (CLB) (Voith Paper GMBH v. R.Ramasamy and others).”

The first reason in paragraph 24 is erroneous because Clause 1 of the SSA permits investment through nominees and the communications from the Hospital to the RBI evidence beyond doubt that the investment in the equity shares of the Hospital by the first Review Applicant was received with full



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knowledge of the particulars of the remitter by the Hospital. As regards the parties to the SSA, it is self-evident on a cursory examination of the SSA.

The second reason, as stated earlier, is equally fallacious because the obligation to increase the authorised share capital and issue and allot shares is on the Hospital and its management. The Review Applicants, who have no control over the same, cannot be non-suited for the default committed by the Respondents. A contention was advanced on behalf of the Hospital that an action for rectification would lie only if allotment of shares is made. If so construed, any defaulting company can defeat this statutory remedy by receiving remittances towards equity and not fulfilling its corresponding obligation to issue and allot shares. Thirdly, this Court conflated the scope of arbitral proceedings - which, if initiated, would have turned on contractual obligations and may have involved a measure of complexity - with the statutory remedies claimed by the Review Applicants, which do not involve complex issues that cannot be decided without a trial. Indeed, on the facts of this case, the documents relied upon by the Review Applicants emanated either from the Hospital or the AD and are not denied by the Respondents. Even the execution of the SSA is admitted by all parties. Therefore, it is difficult to fathom as to why a trial is required to adjudicate this dispute.



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While on this subject, it is pertinent to notice that under sub-section (7) of

Section 111, even title to shares and all questions relating to rectification may be decided. Besides, the Review Applicants prayed for statutory relief under CA 1956, such as rectification and relief from oppression and mismanagement, including surcharge of the defaulting directors, which remedies cannot be granted by an arbitral tribunal. Therefore, even assuming that only one or two Review Applicants out of four are entitled to seek such relief, the petition should not have been rejected in this fashion. The key issue to be adjudicated as regards the eligibility of the Review Applicants would be whether the Review Applicants would be entitled to maintain the composite petition if shares had been allotted by the Hospital upon receipt of remittances. Such issue has not been adjudicated. The assertion by the Review Applicants that their shareholding would be in excess of 10% of the paid up share capital of the Hospital in such event has not been controverted by the Respondents. The primary forum for rectification, as per *Ammonia Supplies*, should not abdicate its role without due deliberation. For all these reasons, the Review Applicants are entitled to succeed.



26. Before parting with the case, it should be emphasised that no definitive conclusions are drawn herein on the merits of the dispute, i.e. on the core issues as to whether the Review Applicants are entitled to rectification and whether acts of oppression and mismanagement were committed by the Respondents. These core issues require adjudication by the statutory forum of first instance and these findings are limited to the preliminary question of maintainability.

27. For the reasons set out above, this Review Application is allowed by setting aside the order dated 18.03.2013 in Company Appeal No.12 of 2011. As a corollary, Company Appeal No.12 of 2011 is allowed by setting aside the order dated 02.03.2011 of the Company Law Board in Company Petition No.25 of 2011.

28. The Companies Act, 1956 was repealed and replaced by the Companies Act, 2013. The Companies Act, 2013 contains provisions analogous to Sections 111, 397 and 398 of the Companies Act, 1956. Accordingly, it will be open to the Review Applicants to re-present the petition under the equivalent provisions of the Companies Act, 2013 by also



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complying with procedural requirements in such regard within a period of three weeks from the date of receipt of a copy of this order. Upon such re-presentation, the National Company Law Tribunal, Chennai, shall consider and dispose of such petition on merits. Review Application No.211 of 2015 is allowed on the above terms.

24.02.2022

Index : Yes
Internet : Yes
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SENTHILKUMAR RAMAMOORTHY

J.,

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Rev.A.No.211 of 2015

Order made in
Rev.A.No.211 of 2015
against
Comp. Appeal No.12 of 2011

Dated

24.02.2022