

Assambrook Ltd.

Vs

Krishen Kumar Kapoor and Others

Civil Appeal Nos. 209-11 of 1993

(CJI L.M. Sharma, B.P. Jeevan Reddy, Dr. A.S. Anand JJ)

21.01.1993

JUDGMENT

B. P. JEEVAN REDDY, J. -

1. Heard counsel for the parties. Leave granted in all the three SLPs.
2. The appellant, Assambrook Limited, is a tea company owning certain tea estates in the country. Its case is that it acquired four tea gardens in Kerala for Rs. 8.15 crores in February 1990. The amount of consideration was borrowed either from the banks/public financial institutions or from certain private corporate bodies. It was necessary to raise funds for repaying the said loans. Accordingly, on November 25, 1991 the company issued a notice convening an Extraordinary General Meeting on January 6, 1992 for increasing the authorised capital of the company and to consider and approve the Rights offer of convertible/non-convertible debentures.
3. On January 4, 1992, an interim order was passed by the Calcutta High Court in Suit No. 1 of 1992, instituted by Suparswa Investments Limited directing that while the proposed meeting can be held, the resolutions passed thereat should not be given effect to without the leave of the court. At the Extraordinary General Meeting (E.G.M.) held on January 6, 1992, special resolutions were passed by 3/4th majority for increasing share capital and also to offer on Rights basis to the holders of the equity shares of the company, convertible and/or non-convertible debentures aggregating to a value of Rs. 15 crores.
4. On January 6, 1992 the Company Law Board passed certain orders with respect to the implementation of the said resolutions but the same were vacated on March 20, 1992. Hence, no reference to those orders is necessary.
5. The interim order dated January 4, 1992 referred to above was vacated on May 12, 1992. Suparswa Investments Limited preferred an appeal against the order dated May 12, 1992 being Appeal No. 377 of 1992. While the said appeal was pending the appellant-company issued another notice on June 23, 1992 convening another E.G.M. on July 24, 1992 for considering and approving the Rights offer of fully convertible debentures (F.C.Ds.) aggregating Rs. 12.70 crores. Such a meeting was necessary - according to the appellant - in view of the requirements of Securities and Exchange Board of India. An application was moved in Appeal No. 377 of 1992 to stay the E.G.M. convened on July 24, 1992. A Division Bench of the Calcutta High Court, however, refused to stay the E.G.M. but observed that any resolutions passed thereat will abide by the result of the said appeal.

6. With a view to stop the E.G.M. convened on July 24, 1992, three different proceedings were taken by three different persons. They were : (1) a petition before the Company Law Board by one Shri Vinay Vij which the Company Law Board declined to entertain on July 22, 1992. Against the order of CLB the said person filed a writ petition in the Calcutta High Court on July 23, 1992 wherein a learned Single Judge made an interim order that the resolutions passed at the said E.G.M. shall not be given effect to pending further orders; (2) one Sunita Kumar filed a suit in the court of District Judge, Alipore along with an interlocutory application to stay the said E.G.M. Stay was refused. (An appeal preferred against the said order refusing stay was also dismissed ultimately by the Calcutta High Court on August 19, 1992); (3) a concern called Sonawalla Exports Limited, claiming to be a shareholder of the appellant-company filed a suit on the original side of the Calcutta High Court (Suit No. 473 of 1992) along with an application for injunction restraining the holding of the said E.G.M. Injunction was refused. In other words, all the three attempts failed to stop the convening of the E.G.M. on July 24, 1992.

7. At the E.G.M. of the appellant-company held on July 24, 1992, a special resolution was passed approving the Rights offer of F.C.Ds. aggregating to Rs. 12.7 crores, by a majority of more than 82 per cent. Even the financial institutions who are holding a substantial chunk of equity in the appellant-company also voted in favour of the resolution, according to the petitioner.

8. The interim order dated July 23, 1992 passed by a learned Single Judge in the writ petition filed by Vinay Vij was vacated on July 27, 1992.

9. On September 9, 1992, says the appellant, the Securities and Exchange Board of India (S.E.B.I.) permitted the appellant-company to file letter of offer with the stock exchanges concerned subject to the conditions contained in its letter. The Calcutta stock exchange, says the appellant, received the letter of offer filed by the appellant-company accordingly.

10. On 17th and 18th of November, 1992, the appellant-company sent by registered post, letters of offer and other necessary papers to all the members specifically stating that "this offer was subject to and will abide by the result of Appeal No. 377 of 1992 arising out of Suit No. 1 of 1992 of the Hon'ble High Court at Calcutta". The issue opened on November 23, 1992 and was to close on December 26, 1992. It is at this stage that fresh litigation started in addition to the ones already pending to which a brief reference would be in order.

11. On December 15, 1992 one Krishen Kumar Kapoor filed a suit on the original side of the Calcutta High Court wherein he moved an interlocutory application to restrain the appellant-company from giving effect to the said letter of offer and praying for appointment of a special officer and/or receiver in respect of the said matter. The plaintiff's case, (as it appears from the order dated December 16, 1992) was that the letter of offer contained several points of infirmity. The main infirmity was that under the said offer, the appellant-company has reserved to itself an absolute discretion to reject the issuance of shares in favour of the renounee in cases where a shareholder renounces his right in favour of such renounee. This contention was met by the counsel for the appellant-company stating that "in case, for the present, an order is passed stopping the Board of Directors from using their absolute discretion in respect of rejection of the names of persons (until further orders of court) then and in that event the company would not face any immediate practical problems regarding raising of funds by issuance of these convertible debentures". The learned Judge was of the opinion that a limited order to that extent should be passed so that the said issue can be finally disposed of on affidavits. The second point urged by the plaintiff before the learned Judge was that the said offer was violative of the Companies (Acceptance of Deposits) Rules, 1975. The

learned Judge was of the opinion that the said point did not arise at that stage. The third contention of the plaintiff therein was that the said offer offends Section 33(1)(b) of the Monopolies and Restrictive Trade Practices Act. The learned Judge reserved the said argument for future decision. The learned Judge noticed that though the suit was a representative suit, the shareholding of the plaintiff was only "1/200th of one per cent". Accordingly, the learned Judge made the following order :

"Under these circumstances there would be no order on this application at this stage except that in case any purchasers of these convertible debentures subscribe therefor along with a renunciation being made, the company and the Board of Directors shall not use their discretion of rejection in such a case, but shall hold the matter until further orders. Mr. Sen has sought to explain that this right of rejection of renounees has been inserted by the State Bank of India, Cap., (Capital markets Ltd./Capital Issues), and this is said to be insisted upon by the said institution in all cases. The facts and law of the matter in regard hereto would require further and fuller consideration.

Save as above there would be no other orders for the present, affidavit in opposition, if any, by January 11, 1993 reply by January 18, 1993 and the matter will stand adjourned till January 19, 1993.

It is clarified that in case the Board of Directors is not intending to use its right of rejection as against any renounees, it and the company would be free in that event to accept the debentures as from the renounees and proceed with allotment, and the order passed above shall not stand in their way in that regard in any manner whatsoever."

12. Against the aforesaid order dated December 16, 1992 the plaintiff filed a letters patent appeal, wherein a Division Bench of Calcutta High Court passed an order on December 21, 1992 appointing two advocates of Calcutta High Court as special officers and directing that "all monies that may be received on the allotment of debentures by the company shall be held in the names of the special officers by the concerned banks in fixed deposit accounts until the disposal of this application. Let all the particulars of the offers already received by the company and the deposits, if any, received and the names of the banks with respective addresses where such deposits have been made the forwarded to the Joint Special Officers by December 31, 1992." Certain further directions were given with respect to furnishing of information by all concerned to the Joint Special Officers in that behalf.

13. Against the said order dated December 21, 1992 the appellant-company preferred SLP 17415 of 1992 and on December 25, 1992, a learned Judge of this Court, S. C. Agrawal, J., passed the following order :

"The petition may be listed on January 13, 1993. Till then, the order of the High Court dated December 21, 1992 will not be given effect to. Shri Ashoke Sen, the learned senior counsel appearing for the petitioner, states that till then the petitioners will not utilise the funds which have been collected as a result of the issue of convertible debentures."

(It may be noted that this Court was closed for winter vacation from December 20,

1992 onwards and hence, the appellant had to move the learned vacation Judge for orders.)

14. The appellant-company says that because of the litigation and the publicity given to the orders of the court passed from time to time, there was no proper response to its offer. Accordingly, it extended the date of closure of issue up to January 21, 1993. The said extension was questioned by Krishen Kumar Kapoor by moving the Division Bench of the Calcutta High Court in the pending letters patent appeal. The Division Bench passed the following order on December 29, 1992 :

"Let this matter come up in the list before the Regular Bench on January 8, 1993 as 'Application (New)'.

In the meantime, there will be an ad interim injunction as prayed for.

Appellant is directed to serve the respondents with the copy of this application and file an affidavit of service within January 8, 1993.

Leave granted to have the petition affirmed, duly stamped and punched within January 5, 1993."

Against this order, the appellant-company preferred SLP No. 50 of 1993 in this Court.

15. On December 31, 1992 one Ashok Kumar Singh, said to be holding a certain number of units in the Unit Trust of India moved a writ petition at the residence of the Vacation Judge of the Calcutta High Court, complaining that the proposed subscription to the debentures by the financial institutions was illegal and ill-advised and must be stopped. Thereupon, the learned Single Judge passed the following order :

"Considering the urgency of the matter requirements of Rule 27 of the Original Side Rules relating to applications under Article 226 of the Constitution of India are dispensed with.

The petitioner is directed to serve copy of this application on all the respondents and file affidavit of service.

There will be an interim order in terms of the prayers (j) and (k) of the petition. Returnable before the appropriate Bench two weeks after the X'Mas Vacation.

Leave is granted to the petitioner to have the petition duly stamped and punched within January 11, 1993."

Against the said order the appellant-company has preferred SLP No. 148 of 1993.

16. All the three matters came up before us on January 20, 1993 and we heard the several counsel appearing on both the sides at quite some length. The contesting respondents appeared as caveators.

17. The learned counsel appearing for the appellant-company characterised the several legal proceedings referred to above as having been engineered by certain persons inimically disposed towards the appellant-company. They pointed out that the equity holding of Krishen Kumar Kapoor is so small as to merit no recognition and that at his instance the Rights offer cannot be stopped nor

can the company be deprived of the use of monies raised by it by the said offer. It is submitted that the offer was approved by an overwhelming majority of the company (more than 82 per cent.) and that 'corporate democracy' required that the opinion of such an overwhelming majority should be allowed to prevail. It was submitted that the appellant-company is being put to great prejudice and loss by the said litigation and by the several orders passed therein, with the result that it is obliged to pay interest (on the monies borrowed for purchasing the said Tea Estates in Kerala) @ more than Rs. one lakh per day. The learned counsel expressed their readiness and willingness to passing of such orders as may be necessary to protect the interest of such shareholders as are aggrieved by the said offer including affirmation of the direction made by A. N. Ray, J. on December 16, 1992. At the same time, they requested that the appellant-company be permitted to make use of the monies received in response to the said offer and further that the date of closure of the offer may be extended by a reasonable period so as to enable the shareholders to respond properly to the said offer, untroubled by any further orders from any court in that behalf.

18. On the other hand, the learned counsel for the respondents, (Shri Krishen Kumar Kapoor and Shri Ashok Kumar Singh) submitted that the decisions taken at the E.G.M. dated July 24, 1992 and the offer made by the appellant-company in pursuance thereof are prejudicial to the interest of the shareholders including the financial institutions and that the raising of such large amount by issuing zero-interest debentures is really conceived in the interest of other corporate bodies in whom the majority shareholders of this company are interested. It is submitted that the purchase of four Tea Estates was not a prudent measure inasmuch as the title of vendors to all the four Estates is under a cloud and litigation is pending in that behalf. Fraud is attributed to the Board of Directors of the appellant-company. It is pointed out that the financial institutions stand to lose by subscribing to the said offer. It is emphasised that even a single shareholder of the company is entitled to challenge any action of the company which is ultra vires the company (i.e., contrary to the memorandum and articles of association of the company) or is contrary to law or is vitiated by fraud. The learned counsel submitted that the several orders impugned in these appeals are only interlocutory orders subject to further and final orders of the Calcutta High Court and at this stage this Court ought not to interfere under Article 136 of the Constitution but must relegate the parties to Calcutta High Court to seek appropriate orders according to law.

19. In reply, the counsel for the appellant-company submitted that the appellant-company is one of best managed companies and that for the last few years it has been declaring dividend @ 40 per cent. and more every year and that its shares are being quoted on the stock exchange at more than Rs. 100 per share even during the months of September and October 1992 (i.e., even after the recent crash following revelation of certain irregularities in the matter of government securities). It is argued that the offer is highly advantageous to the shareholders and it is for this reason that even financial institutions like the Life Insurance Corporation of India have already accepted the offer and remitted the appropriate amount.

20. In view of the fact that the suits and writs are pending in the Calcutta High Court and the Alipore District Court, which have to be tried and finally disposed of by those courts, we desist from expressing any opinion on the rival contentions urged by the appellant-company and the respondents. At the same time, we are of the opinion that appropriate orders ought to be passed in the interest of the company, its shareholders and in the interest of justice. On a consideration of the several aspects of the matter, we are of the opinion that the order passed by A. N. Ray, J. on December 16, 1992 was a proper order to make in the circumstances.

Accordingly, we affirm and restore the said order. We set aside the order dated December 21, 1992

passed by the Division Bench in appeal against the said order. We further make absolute the order passed by S. C. Agrawal, J. on December 25, 1992 in SLP No. 17415 of 1992 subject to the following modification : The appellant-company is permitted to pay off the debts due to the banks and public financial institutions only from out of the monies raised by the said offer. So far as the repayment of the debts allegedly raised from certain other corporate bodies (referred to by the appellant as unsecured loans) are concerned, the question whether the money raised by the offer should be utilised for payment to the said corporate bodies or not shall be decided by the Calcutta High Court in the suit filed by Shri Krishen Kumar Kapoor. Since the appellant is complaining that it is being obliged to pay a substantial amount by way of interest on the amounts borrowed by it for acquiring the said Estates, we think that it would be appropriate if the Calcutta High Court passes orders in this behalf as expeditiously as possible preferably within three weeks from today. For a period of three weeks, the direction made by S. C. Agrawal, J. (on December 25, 1992) to the effect - that the appellant-company shall not utilise the funds collected as a result of the issue of convertible debentures - shall remain operative subject to the above modification. All parties to file their affidavits within one week from today before the High Court.

21. So far as the request of the learned counsel for the appellant regarding extension of the date of closure of the offer is concerned, we are not inclined to pass any orders at this stage. The counsel for the appellant relies upon the guidelines issued by S.E.B.I. which say that such offer cannot be extended beyond 60 days from the date of issue and that any violation of the said guidelines would expose the company to prosecution and other sanctions. The argument of the appellant's counsel is that inasmuch as the court had interdicted the operation of the said offer, the court itself, including this Court, should rectify the same on the principle that 'an act of court should prejudice no one'. May be there is some justification in the said argument but that is a matter for the appropriate authorities, who are competent to extend the said date or who are empowered to take action for violation of the said guidelines, to consider. It may also be a matter for the High Court to consider in the matter pending before it in this behalf. Suffice it to say that at this juncture we do not wish to pass any orders on the said request. The appellants are free to move the court or other competent authority in this behalf.

22. The learned counsel for the Life Insurance Corporation has brought to our notice that the Life Insurance Corporation decided to accept the offer made by the appellant-company and has accordingly remitted the appropriate amount on December 26, 1992 itself.

23. Before parting with this matter, we must refer to a grievance made by Shri Gobinda Mukhoty, learned counsel for Shri Ashoke Singh. He complained that this Court should not pass orders even before his client had an opportunity of filing a counter to SLP No. 148 of 1993. We are unable to see any substance in the said grievance. Firstly, the order under appeal was an ex parte order made without hearing the appellant-company. Secondly, we are not taking into account any other facts than those on record in the appeal (arising from SLP No. 148 of 1993). We have also heard Shri Mukhoty at length who placed all the aspects before us. At the same time, we cannot but observe that Mr Mukhoty's client chose to rush to the court even without approaching the financial institutions beforehand. It is not as if he first approached them and tried to convince them of the inadvisability of responding to the said offer. The presumption is that every person (including a public financial institution) knows his interest best and until the contrary is established, whether at interlocutory or final stage, orders of restraint may not be advisable.

24. For the above reasons, Civil Appeal No. 210 of 1993 (arising from SLP No. 50 of 1993) and Civil Appeal No. 211 of 1993 (arising from SLP No. 148 of 1993) are allowed and the respective

orders under appeal are set aside. So far as Civil Appeal No. 209 of 1993 (arising from SLP No. 17415 of 1992) is concerned, it is allowed in terms indicated in para 20. There shall be no order as to costs.

</html