(2010) 08 P&H CK 0385

High Court Of Punjab And Haryana At Chandigarh

Case No: Company Appeal No. 5 of 2009

Gurlal Singh Grewal		APPELLANT
	Vs	
Upper India Steel Mfg. and Engg. Co. Ltd.		RESPONDENT

Date of Decision: Aug. 4, 2010

Acts Referred:

- Companies Act, 1956 - Section 10F, 397, 398, 634A
- Contract Act, 1872 - Section 10, 29

Citation: (2011) 1 CompLJ 217 : (2010) 103 SCL 152

Hon'ble Judges: Hemant Gupta, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Hemant Gupta, J.
This order shall dispose of Company Appeal Nos. 5 of 2008 and 13 of 2009 filed u/s 10F of the Companies Act, 1956 (for short "the Act"), i.e., against the order passed by the Company Law Board (for short "the Board") on 25-2-2009 passed in CA No. 442 of 2008 filed u/s 634A of the Act by the respondents herein.

2. In a petition under Sections 397 and 398 of the Act filed by the appellants herein, the Board passed an order on 12-2-2008. The said order reads as under:

Counsel for the respondents sought time to file a surrejoinder. To be done by 1-4-2008. The petition will be heard on 25-4-2008 at 10.30 a.m.

Petitioner may consider my suggestion whether he would be willing for a compromise which the respondents are willing. Interim order to continue.

3. Subsequently on 13-5-2008, the Board records another order which reads as under:

The learned Senior counsel for the petitioner submits that his client is willing to go out of the company for a fair value for his shares. Respondents are agreeable. On 21-5-2008 at 2.30 p.m., respondent will indicate the consideration that they are willing to pay.

4. Later, the order passed by the Board on 21-5-2008 reads as under:

The counsel for the respondents has offered a sum of Rs. 12 crores for the share of the petitioner. Sr. counsel for the petitioner is not agreeable to the amount and seeks time to indicate his price for the share. For doing so, he desires to have some information of the affairs of the company. He may write to the company as to what information he desires the company will furnish the same within 10 days from the date of receiving the request.

To report on 21-7-2008 at 4.00 p.m.

5. As per order dated 21-5-2008, the matter was listed for hearing on 21-7-2008. On the said date, the learned Tribunal passed the following order:

Senior counsel for the petitioners desired to file an affidavit in respect of the order dated 13-5-2008 and 21-5-2008. To be done by 15-8-2008 and reply of affidavit to be filed by 31-8-2008 will be heard on 22-9-2008 at 2.30 p.m.

6. It is admitted by the parties that the petitioner did not file the affidavit in terms of the order dated 21-7-2008 on or before 15-8-2008. An affidavit dated 27-8-2008 was filed on 27-8-2008. Before the said affidavit was filed, the respondent-company filed on 17-8-2008 a miscellaneous application dated 7-8-2008, i.e., IA No. 442 of 2008 u/s 634A of the Act, for enforcement of order dated 13-5-2008 and 21-5-2008. The appellants herein filed reply to the said application by way of affidavit dated 2-9-2008. The said application has been allowed by the learned Board vide the order impugned in the present appeal.

7. The learned Board has found that the appellants have agreed for selling of their shareholding which is apparent from the orders dated 13-5-2008 and 21-5-2008 and, therefore, the question of fair value on which the shareholding is to be sold is required to be determined by the independent valuer, i.e., Chartered Accountant to be appointed by the Board. Thus, the Board sought a mutually acceptable valuer and in case the parties are not in a position to decide on the name of the valuer, the Board itself will appoint a valuer to determine the fair price of the shares held by the petitioners.

8. Learned Counsel for the appellants has vehemently argued that the offer made by the appellants before the Board on 13-5-2008 and 21-5-2008 was an offer and the parties were not ad idem on the terms of the settlement on the basis of which it can be said that an executable order came into existence, the execution of which can be sought by the respondents u/s 634A of the Act. It is contended that an executable order by the Board was necessary to be passed which alone could be executed and

such an order must have reasons, howsoever brief it may be, to confer any right in favour of the respondents in terms of the provisions of Section 634A of the Act. Learned Counsel for the appellants further contended that unless a fair value arrived at or mechanism to arrive at fair value is agreed upon, it cannot be said that there is an executable order passed by the Board, the execution of which can be sought by the respondents.

9. On the other hand, Mr. Chaudhary, learned senior counsel for the respondents, has vehemently argued that the appeal itself is not maintainable as it is against the consent order, i.e., consent of sale of shareholding at fair value. It is contended that fair value of the shareholding of a closely-held Public Limited Company can be determined in terms of the known method of accounting set up by the Institute of Chartered Accountants of India and well-known established practice in the corporate world. Therefore, once the appellants have expressed their willingness to go out of the company for a fair value for their shares, even if fair value is not determined, it can always be determined by a Chartered Accountant in terms of the norms prepared by the Institute of Chartered Accountants of India. It is argued that the appellants have not dissented from the offer made before the Board on 13-5-2008 and 21-5-2008. Such offer was made by the senior counsel appearing for the appellants and after much deliberation and analysis of the affairs of the company. Therefore, there was a conclusive agreement, execution of which can be sought by the respondent u/s 634A of the Act. Learned Counsel for the respondents relied upon Division Bench decisions of Kuki Leather (P.) Ltd. Vs. T.N.K. Govindaraju Chettiar and Co., , Smt. Shanti Devi Mehra v. Gyan Prakash Mehra 75 C.W.N. 162, apart from judgment of the Supreme Court as Ahmadasahab Abdul Mulla (D) by proposed LRs. Vs. Bibijan and Others, in support of his contention.

10. I have heard learned Counsel for the parties at length but find that the order of the learned Board holding that there was a conclusive settlement and, thus, execution by the respondent is maintainable before the Board is not sustainable in law. The order passed by the learned Tribunal on 13-5-2008 regarding willingness of the appellants to go out of the company at fair value does not amount to a concluding executable agreement. In the order dated 13-5-2008, the appellants have expressed their willingness to go out of the company for a fair value. What would be the fair value was not agreed to which is apparent from the subsequent order dated 21-5-2008 when a sum of Rs. 12 crores offered by the respondents was not accepted. It was not agreed to by the appellants that the fair value can be arrived at by the independent valuer or a Chartered Accountant or any other person or Authority. Unless the fair value was determined or a mechanism to determine the fair value was agreed upon, it cannot be said that there was a conclusive executable settlement has come into existence, the execution of which can be sought by the respondents herein. The argument of learned Counsel for the respondents that the parties consented before the Board and, thus, executable order came into existence is untenable. There was an offer and counter offer but it cannot be said that a

concluding contract came into existence. It is well settled that consent decree is a concluded contract between the parties with a seal of Court or authority superimposed on it.

11. The question which is required to be examined is whether the proceedings taken by the Board on 12-2-2008 and 13-5-2008 amounts to a concluded contract. Section 10 of the Indian Contract Act, 1872 (for short "the Contract Act") contemplates that all agreements are contract if they are made for a lawful consideration and with a lawful object. Obviously, the proceeding does not show that there was a consent of the parties on a consideration. Section 29 of the Contract Act gives illustration as to which agreements, the meaning of which is not certain, or capable of being made certain, are void. The relevant illustrations are (e) and (f). The said section and illustrations (e) and (f) read as under:

29. Agreements void for uncertainty.-Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustrations

(e) A agrees to sell to B one thousand maunds of rice at a price to be fixed by C". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A agrees to sell to B "my white horse for rupees five hundred or rupees one thousand. There is nothing to show which of the two prices was to be given. The agreement is void.

As per illustration (e), if the parties agreed on a price to be fixed by a third person, there is no uncertainty which may render the agreement void. In the present case, there is no agreement between the parties that the fair value shall be determined as per norms of the Institute of Chartered Accountants of India or by any other person including the Board itself. Illustration (f) is that which of the two prices is the agreed price. In the present case, Rs. 12 crores offered by the respondents was not accepted but then what was the price accepted or acceptable to by the appellants is not discernible. Therefore, it cannot be said that either it is a consent order which debars the appellants from challenging it in appeal or that the fair value can be determined as per established practice in the corporate world or known method of accounting set up by the Institute of Chartered Accountants of India. Such option unless agreed to by the appellants cannot be introduced as consent of the appellants.

12. The judgment in Kuki Leathers (P.) Ltd. ''s case (supra) arose out of a case where both the parties agreed to sell 2.4 lakh shares at par. The consideration was required to be paid in one or more instalments within a period of six months. The petitioner was handed over blank transfer form and on receipt of final instalment, the company was to register the transfer. The petition was disposed of accordingly.

The issue raised in the aforesaid case was that the settlement recorded before the Board was not signed and was not in writing by the parties. The said issue is not raised in the present case. That was a case where the parties have finally agreed and the petition disposed of, whereas in the present case, there was no final disposal by the Board and, in fact, the matter was adjourned to 21-7-2008 and again on that date the matter was adjourned for filing of affidavit. The said judgment referred by Sh. Chaudhary is of no help to the argument raised by him.

13. In Smt. Shanti Devi Mehra''s case (supra), a Division Bench of Calcutta High Court held that a decree can be in two parts (1) substantive rights of the parties (2) mechanism to execute the substantive rights of the parties. The substantive rights were the shares of the parties but the property was to be sold at a value to be determined by "Talbot and Company". The auction was to be conducted by one Fateh Chand Dhingra and if the reserve price fixed by "Talbot and Company" was reached in the auction, the higher bidder would purchase it. But if the reserve price was not reached the property would be put to public auction by the same person. In the aforesaid case, Fateh Chand Dhingra refused to participate in the auction process. The Court right held that the machinery to execute the decree be supplied by the Court. It was held that the valuation of the property was to be fixed by "Talbot and Company" and there was no deviation in that substantive right of the parties. In the present case, the basic ingredient of settlement, i.e., consideration was not settled nor there was any settlement in respect of the claim to arrive at fair value. Therefore, even the said judgment is of no help to the argument raised by the learned Counsel for the respondents.

14. In Ahmadasahab Abdul Mulla''s case (supra), there was no date fixed for execution of the sale deed, i.e., an agreement to sell. It does not decide the issue conclusively. The case was referred to the larger Bench and the issue is not even remotely connected with the issue raised in the present appeal.

15. In view of the above, order dated 25-2-2009 passed by the Board is not sustainable in law. The Board has wrongly presumed that the proceedings before it stands settled and led to an executable order in favour of the respondents. Consequently, the application filed by the respondents u/s 634A of the Act is dismissed.

16. The matter is remitted back to the Company Law Board to decide the petition filed by the appellants under Sections 397 and 398 of the Act in accordance with law.