M/s BQR Systems India Private Ltd. Vs Union of India and Others

Court: Delhi High Court

Date of Decision: Dec. 21, 2011

Citation: (2012) 127 DRJ 266

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: L.R. Khatana, Mr. Narveer Dabas and Mr. Siddharth Khatana, for the Appellant; Ruchir Mishra, for UOI. Mr. Neeraj Sharma, Nishant Menon and Ms. Anjali, Advocates for R-2 to 5, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J.
This intra court appeal is preferred against the order dated 14th March, 2011 of the learned Single Judge

dismissing W.P.(C) No.8862/2008 preferred by the appellant. The said writ petition was preferred seeking mandamus against Foreign Investment

Promotion Board (FIPB) to initiate proceedings against the respondent no.2 M/s Deutsche Gesellschaft zur Zertifizierung von

Managementsystemen (Foreign Company), a Company incorporated in accordance with the Laws of Germany for having acquired equity in

respondent no.3 UL Management Systems Solutions India Private Limited (Indian Company), a Company within the meaning of Companies Act,

1956 and against the respondents no.4 & 5 being Managing Directors and shareholder respectively of the Indian Company, for allowing sale of

such equity and all of which was alleged to be in contravention of the Press Note-1 (2005 Series) of the Secretariat for Industrial Assistance,

Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India. The appellant in the writ petition further

sought a declaration of the acquisition of the said shares by the foreign company in the Indian company to be null and void and also sought to

restrain any further investment.

2. The appellant had on 1st December, 2003 entered into a licence agreement with the Foreign Company. The Press Note-1 (supra) was as

under:-

Subject: Guidelines pertaining to approval of foreign/technical collaborations under the automatic route with previous ventures/tie-up in India.

1. The Government has reviewed the guidelines notified vide Press Note 18 (1998 Series) which stipulated approval of the Government for new

proposals for foreign investment/technical collaboration where the foreign investor has or had any previous joint venture or technology

transfer/trademark agreement in the same or allied field in India.

2. New proposals for foreign investment/technical collaboration would henceforth be allowed under the automatic route, subject to sectoral

policies, as per the following guidelines:

(i) Prior approval of the Government would be required only in cases where the foreign investor has an existing joint venture or technology

transfer/trademark agreement in the "same" field. The onus to provide requisite justification as also proof to the satisfaction of the Government that

the new proposal would or would not in any way jeopardize the interests of the existing joint venture or technology/trademark partner or other

stakeholders would lie equally on the foreign investor/technology supplier and the Indian partner.

(ii) Even in cases where the foreign investor has a joint venture or technology transfer/trademark agreement in the "same" field prior approval of the

Government will not be required in the following cases:

a. Investments to be made by Venture Capital Funds registered with the Securities and Exchange Board of India (SEBI); or

b. Where in the existing joint-venture, investment by either of the parties is less than 3%; or

c. Where the existing venture/collaboration is defunct or sick.

(iii) In so far as joint ventures to be entered into after the date of this Press Note are concerned, the joint venture agreement may embody a

"conflict of interest" clause to safeguard the interests of joint venture partners in the event of one of the partners desiring to set up another joint

venture or a wholly owned subsidiary in the "same" field of economic activity.

3. These guidelines would come into force with immediate effect.

3. It is the case of the appellant that, the licence agreement of the foreign company with the appellant, is in the nature of a "joint venture/technology

transfer/trademark agreement" and the foreign company as per the Press Note (supra), was required to obtain prior approval of the Government

for making investment in or entering into technical collaboration with the Indian Company and which approval had not been taken; that the

respondents no.2 to 5 owing to the agreement with the appellant, were not entitled to take the automatic route as has been taken by them. It is

contended that a false declaration was made by the Foreign and the Indian Companies while making investments in the Indian company to the effect that the Foreign Company did not have any joint venture/technology transfer/trademark agreement with any other person in India in the

"same field". It is contended that the Foreign and the Indian Companies are liable to be prosecuted under the provisions of Foreign Exchange

Management Act, 1999 (FEMA) and Regulations made thereunder for violation of the Press Note (supra) and for making a false declaration; that

notwithstanding the complaints/representations of the appellant, no such action was taken, compelling the appellant to file the writ petition

aforesaid.

4. The learned Single Judge has dismissed the writ petition holding:

6. The requirement to obtain prior approval of the Central Government arises when the foreign investor has "in the existing joint venture or

technology transfer or trademark agreement in the same field with another Indian company. Even in terms of the Press Note No.1 of 2005 dated

12th January, 2005 as clarified by Press Note No.3 of 2005 dated 15th March, 2005 what is to be shown as existing on 12th January, 2005 is a

"joint venture technology transfer/trademark agreement". The ELA entered into between the petitioner and the DGZ did not partake the character

of a joint venture or a technology transfer or trademark agreement. Consequently, it is not open to the petitioner to question the action of

respondents 2 to 5 in opting for the automatic approval of shares of Indian company being transferred/acquired by the foreign company with prior

approval of the central government. The petitioner clearly lacks locus to seek the reliefs as prayed for in this writ petition.

5. In view of the reasoning aforesaid given by the learned Single Judge, the emphasis of the counsel for the appellant has been to demonstrate

before us that the agreement of the appellant with the foreign company is in the nature of "joint venture/technology transfer/trademark agreement"

in the "same field", as the investment made by the foreign company in the Indian Company. The counsel for the appellant has in this regard invited

our attention to the clauses in the agreement whereunder, the foreign company permitted the appellant to use its trademark "DQS" in India, in

dealing with the business as carried out by the foreign company in other jurisdictions; where the foreign company agreed to make available its

know-how in the form of master copies of product descriptions, procedural descriptions, training programmes and training documents for the

certification and assessment products listed therein; where the foreign company permitted the appellant to promote the brand "DQS" in India, and

on the basis thereof contends that the finding of the learned Single Judge of the agreement of the appellant with the foreign company being not a "joint venture/technology transfer/trademark agreement", is erroneous.

6. Notice of the appeal was issued. We heard counsel for the appellant and the counsel for the Foreign and Indian Companies on 31st October,

2011. However, when we asked for the stand of FIPB, its counsel sought adjournment to make submissions. Thereafter, a letter dated 4th

November, 2011 of the FIPB to its counsel was handed over in the Court on 17th November, 2011 and an affidavit verified on 16th November,

2011 of FIPB, was also filed. The counsel for the appellant sought time and was allowed to rejoin thereto. A detailed rejoinder affidavit with

further documents has been filed. The counsels have been heard further.

7. The counsel for the appellant has further contended that the expression "existing joint venture/technology transfer/trademark agreement" in Press

Note-1 (supra) refers to "an agreement existing on the date of issuance of the Press Note i.e. 12th January, 2005" and cannot have reference to

any agreement even if of joint venture/technology transfer/trademark agreement if entered into between a foreign investor/company/party and an

Indian entity after that date. Attention in this regard is invited also to Press Note 3 (2005 series) clarifying that the joint ventures/technology

transfers/trademark agreements existing on the date of issue of the said Press Note i.e. 12th January, 2005 would be treated as existing joint

ventures/technology transfers/trademark agreements for the purpose of Press Note dated 12th January, 2005. Reliance is placed on Sai Chalchitra

Vs. Commissioner, Meerut Mandal and Others, to justify the locus of the appellant to maintain the writ petition.

8. As far as the stand of FIPB is concerned, we are constrained to observe that a non-committal position has been adopted. Neither in the letter

dated 4th November, 2011 nor in the affidavit filed, has a stand been taken, as to whether FIPB considers the agreement aforesaid of the foreign

company with the appellant a joint venture/technology transfer/trademark agreement and/or as to whether the transaction of the foreign company

with the Indian Company is in contravention of the said Press Note. However, the agency for prosecution even in the event of contravention is

Enforcement Directorate. The Enforcement Directorate in its counter affidavit before the learned Single Judge also merely stated that if there is any

contravention, the appellant has to agitate the matter before the appropriate authorities.

9. Irrespective of the merits of the controversy, we deprecate such stand of the authorities concerned and which leads to unnecessary litigation.

Undoubtedly, if the transaction between the foreign company and the Indian Company is in contravention of the Press Note supra and FEMA, the

authorities were required to proceed against them. However, the authorities i.e. FIPB and the Enforcement Directorate, notwithstanding the complaints/representations of the appellant, chose to maintain stoic silence and even after the writ petition had been filed, failed to take any stand

whatsoever and left it to the Court to determine whether any case of violation was/is made out. The complaint of the appellant to the Enforcement

Directorate and/or FIPB would be in the nature of an FIR and the Agencies on examination of the matter ought to have either informed the

appellant that no merit was found in its complaint or ought to have proceeded to take action. Their conduct demonstrates a total abdication of

jurisdiction by the Enforcement Directorate and FIPB. A copy of this order be forwarded to the said Agencies with a direction to in future exercise

the jurisdiction vested in them. Had such jurisdiction been exercised, the writ petition and this appeal could have been avoided and the challenge if

any, would have been made to the order (which is expected to be reasoned) of the said Agencies either refusing to take action on the complaint of

the appellant or proceeding thereon.

10. The counsel for the Foreign and the Indian Companies, besides supporting the reasoning given by the learned Single Judge informed that the

foreign company had prior to investment in the Indian Company terminated the agreement with the appellant; that the appellant had filed CS(OS)

No.947/2008 in this Court challenging the said termination; that the said suit was dismissed on 20th May, 2008; that the appeal being RFA (OS)

No.38/2008 preferred thereagainst was also dismissed; that the appellant had concealed all the said facts in the writ petition.

11. We may notice that the learned Single Judge, in the impugned order though has noticed the said plea of the counsel for the respondents no.2 to

5 of the appellant having practiced concealment and being not entitled to any relief in the writ petition on this ground alone, has chosen not to return

any finding thereon and has rather as aforesaid dismissed the writ petition on merits. For the said reason, even though the counsel for the Foreign

and the Indian Companies again contends that the appellant is not entitled to any equitable remedy for the reason of having concealed the factum of

having filed the suit and the appeal challenging the termination and remaining unsuccessful therein, we have also chosen to examine the matter on

merits.

12. The counsel for the appellant has clarified that the suit was dismissed for the reason of the agreement of the appellant with the foreign company

providing for the jurisdiction of the German Courts. He thus contends that it is not as if the termination of the agreement by the foreign company

has been upheld on merits.

13. It being the admitted position that the foreign company, prior to dealing with the Indian Company had terminated the agreement with the

appellant and in view of clause 2(ii)(c) of the Press Note (supra), we have proceeded to (notwithstanding the finding in the suit and in the appeal,

of the jurisdiction being of the German Courts) consider whether the agreement of the appellant with the foreign company even if a joint

venture/technology transfer/trademark agreement, can be said to be "defunct or sick".

14. A perusal of the said agreement shows the duration thereof being described as "for an unlimited period of time" with liberty to both the parties

to terminate the same by the end of each month by providing a period of notice of six months. The counsel for the appellant has also not

controverted that the agreement was terminable in nature. The plea of the appellant however before us, as also in the writ petition, was that the

same was terminable with a six months notice but had been terminated vide letter dated 15th April, 2008 and the foreign company dealt with the

respondents no.3 to 5 immediately thereafter in May, 2008 itself i.e. within the period of six months of which time notice was required to be given.

15. We are of the view that once it is found that the agreement of the appellant with the foreign company was terminable in nature, the same cannot

be said to be specifically enforceable. As far as the argument of the appellant of the agreement providing for termination by a six months notice is

concerned, we notice that the Apex Court in Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, has held that once the agreement

is found to be not specifically enforceable, the remedy for short notice is by way of damages only and not by injunction or specific enforcement.

We thus enquired from the counsel for the appellant as to why upon termination, the agreement of the appellant with the foreign company, would

not fall in the category of "defunct or sick" within the meaning of clause 2(ii)(c) of the Press Note (supra).

16. The counsel for the appellant contends that for clause 2(ii)(c) to apply, the agreement had to be "defunct or sick" as on 12th January, 2005

and termination subsequent thereto, could not make it "defunct or sick". It is contended that admittedly as on 12th January, 2005 i.e. the date of

issuance of Press Note, the agreement was in existence and was terminated only on 15th April, 2008.

17. We are unable to concur with the contention aforesaid. There is nothing in the Press Note-1 to suggest that the "defunct or sick" status had to

exist on the date of issuance of Press Note-1 i.e. 12th January, 2005. The Press Note was seeking to lay down guidelines safeguarding the interest

of the Indian entities who had a joint venture/technology transfer/trademark agreement with a Foreign Company as on 12th January, 2005 by providing for approval to be obtained by such Foreign Company before entering into an agreement with another Indian entity. However, even

while doing so, exception was carved out for cases where the existing joint venture/technology transfer/trademark agreement was defunct or

sick''even in those cases the Foreign Company before entering into an agreement with another was not required to obtain prior approval and could

take the automatic route. Neither a literal reading of Press Note-1 nor purposive interpretation thereof leads us to hold that such automatic route

was prohibited in those cases where the existing joint venture/technology transfer/trademark agreement becomes ''defunct or sick'' after 12th

January, 2005. We are thus of the opinion that clause 2(ii)(c) of Press Note-1 applies to cases where the joint venture/technology

transfer/trademark agreement existing as on 12th January, 2005 becomes defunct or sick thereafter.

18. Seen in this light, clause 2(ii)(c) of the Press Note (supra) has to be interpreted to find out whether, on termination the agreement of the

appellant even if of joint venture/technology collaboration/trademark agreement, will qualify to be ''defunct or sick''.

19. Black''s Law Dictionary, Sixth Edition defines ''defunct'' as ''having ceased to exist; no longer operative; a business which has ceased to

function''. The Concise Oxford English Dictionary also defines ''defunct'' as ''no longer existing or functioning''. Thus, the Government while issuing

the Press Note intended to exclude from the route of ''prior approval'' even those foreign companies which though had an earlier joint

venture/technology transfer/trademark agreement with another Indian entity, but which earlier agreement had ceased to exist or had become non-

operational.

20. As aforesaid, the foreign company under its agreement with the appellant, was entitled to terminate the agreement at any time and had so

terminated the agreement and the failure to give six months notice, did not entitle the appellant to seek specific enforcement of the agreement for

the said period of six months and at best entitled the appellant to seek damages for short termination. The agreement thus on termination, could not

be said to be operative or operational and was defunct.

21. We are therefore of the opinion that clause 2(ii)(c) of the Press Note aforesaid applies and the action of the Foreign and the Indian Companies

cannot be said to be violative of the Press Note and the Foreign and the Indian Companies cannot be said to have committed any violation on such

count for a mandamus to be issued by this Court for initiating action thereagainst.

22. Since the appeal is liable to fail for this reason alone and further since it has been held that the jurisdiction for adjudication of disputes, is of the

German Courts, we do not find it necessary to enter into a discussion as to the nature of the agreement and as to whether it qualifies as a joint

venture/technology transfer/trademark agreement.

23. We accordingly, though for different reasons than those given by the learned Single Judge, dismiss the appeal.

No order as to costs.