(2011) 09 CAL CK 0030

Calcutta High Court

Case No: C.R.R. No. 840 of 2010

Sanjiv Jajodia	APPELLANT
Vs	
Ananta Kumar Sethi	RESPONDENT

Date of Decision: Sept. 26, 2011

Acts Referred:

- Companies Act, 1956 - Section 209A, 234, 61, 628, 63
- Criminal Procedure Code, 1973 (CrPC) - Section 482

Citation: (2012) 2 CHN 795 : (2012) 1 RCR(Criminal) 379

Hon'ble Judges: Kanchan Chakraborty, J

Bench: Single Bench

Advocate: Bhaskar Sen, Sandipan Ganguly, Sutapa Sanyal, Ayan Bhattacharyya and Asish Kumar Mukherjee, for the Appellant; B. Ghosh and Pradipta Kumar Sen, for the Respondent

Final Decision: Allowed

Judgement

Kanchan Chakraborty, J.

This application u/s 482 of the Code of Criminal Procedure has been taken out by Sanjiv Jajodia, an accused in Case No. C/1079 of 2010 pending in the Court of learned Metropolitan Magistrate, 10th Court at Calcutta praying for quashing of the proceeding against him u/s 63 of the Companies Act. The Petitioner has also challenged the legality, validity and propriety of the orders dated 13.1.2010 and 28.1.2010. A reference to the factual aspect is required to be set out in order to appreciate the matter effectively.

2. The Petitioner was appointed as a Director of the said Chandi Steel Industries Limited (hereinafter referred to as the company) on 20th September 19993 and is continuing since then. The company came out with a public issue of 55,00,000 equity shares of Rs. 10 each for cash at par aggregating to Rs. 550 lacs during the year 2003 in terms of prospectus dated 22nd October 2003. The objects of the issue as it

was then envisaged and stated in the prospectus was to expand the installed capacity of the plant from 10,800 MT to 44,000 MT per year at a capex of Rs. 525 lakhs and to meet the issue expenses at an estimated cost of Rs. 25 lakhs. The entire fund requirement of Rs. 550 lacs was to be financed from proceeds from the public issue. The prospectus was filed with the Registrar of Companies, West Bengal on 22.10.2003. The said public issue was opened on 3rd November 2003 and was fully subscribed. On the public issue being made, the company received the sum of Rs. 5, 50,00,000/-(calls-in-arrear Rs. 39,000/- against the 55,00,000 equity shares of Rs. 10 each. As stated in the prospectus, a sum of Rs. 525 lacs was to be utilized for expansion of the re-rolling mill of the company by increasing the installed capacity from 108000 MT to 44000 MT per year and the project was scheduled to be completed by March 2004 and commercial production was to commence in April 2004. The Company was hopeful that it would be able to implement during the year 2005-06 the expansion project for which the public funds were collected. However, before the company could proceed with further implementation of the project, it was observed that further increase of re-rolling mill capacity was no more a viable option in view of two major developments during the years 2004-2005 and 2005-2006.

a. Inspite of the best efforts the Energy charges (power cost) as a cost of production remained at a high level which was affecting the viability of the project in the given competitive market.

b. There was an increase in demand for secondary rerolled steel products. Due to this increase, the primary steel producers started setting up and increasing capacities for producing rerolled secondary steel products. This resulted in steep market competition for the small-scale secondary steel rerolling units.

3. The company has a small-scale secondary steel rerolling unit. In view of market factors as also the energy cost increasing manifold as aforesaid, the Board of Directors of the Company at its meeting held on 25th February 2006 considered it prudent to take a decision to abandon the Expansion project of the Company as envisaged in the prospectus but modernize the existing re-rolling facilities of the company to become efficient in the fact of adverse market situations. Pursuant to the decision taken by the Board at its meeting held on 25th February 2006, an extraordinary general meeting of the company was convened on 27th March, 2006 to consider utilization of the unutilized money amounting to Rs. 381.20 lacs raised through public issue for the modernization of the existing manufacturing facilities of the company instead of undertaking the expansions plans of the company as envisaged in the prospectus. Such Extraordinary General Meeting was held on 27th March 2006 and requisite resolution was adopted at the Extraordinary General Meeting of the shareholders of the company on 27th March 2006. By such Extraordinary General Meeting, the shareholders of the company accorded consent to the management of the company to utilize the balance sum of Rs. 381.20 lakhs

raised through such public offer in the year 2003 in the modernization scheme instead of undertaking the expansion plan as stipulated therein. Pursuant to an in terms of such resolution of the Extraordinary General Meeting, the company undertook the modernization scheme instead of the expansion plan. By a letter dated 12th February 2007, the Deputy Registrar of Companies, West Bengal called for information and explanation u/s 234 of the Companies Act, 1956. The company sent a reply dated 10th April 2007. In continuation of such reply, the company sent another letter dated 17th May 2007 to the Registrar of Companies, west Bengal. The office of the Regional Director, Eastern Region, Ministry of Corporate Affairs, Government of India, undertook inspection u/s 209A of the Companies Act, 1956. By a letter dated 11th September 2008, the Deputy Director (Inspection) alleged that the alleged violation of the provisions of the Companies Act, 1956 had been noticed. By a letter dated 14th November 2008, the company explained and clarified the allegations levelled by the Deputy Director (Inspection) in the letter dated 11th September 2008. The opposite party issued a three show cause notices numbering 2756, 2757 and 2758 all dated 18th December 2009 alleging contravention of the provisions of Sections 63, 68 and 628 of the Companies Act, 1956. The Company requested for time to reply thereto and sought for extension till 15th January 2010. However the opposite party instituted a criminal case against the Petitioner on the self same material by filing a complaint being case No. C/1079/2010 filed by the opposite party as the complainant in the Court of the Learned Chief Metropolitan Magistrate at Kolkata against the Petitioner.

4. On the basis of the said petition of complaint the learned Metropolitan Magistrate had taken cognizance of the same and issued process upon all the accused persons including the Petitioner. The Petitioner, Sanjiv Jajodia has come up with this application praying for quashing of the proceeding against him on the following grounds:

a) that the allegations in complaint if accepted on their face value do not make out any case u/s 63 of Companies Act;

b) that the most essential ingredient of Section 63 of the Companies Act, i.e., ?untrue statement? in the prospectus made deliberately, is conspicuously absent in the instant case because Rs. 156 lacs out of proposed fund of Rs. 550 lacs towards for expansion project was, in fact, spent and remaining balance was spent for modernization of the other schemes which the company could do in view of internal risk factors specifically mentioned in the prospectus with approval as required Section 61 of the Act;

c) that in order to stop abuse of the process of Court, the prosecution lunched against the Petitioner is liable to be quashed.

5. Mr. Bhaskar Sen, the learned Counsel appearing on behalf of the Petitioner contended that in order to attract the offence u/s 63 of the Companies Act, there

should be ?untrue statement?, deliberately made by the company, in the prospectus. There was no such deliberate ?untrue statement? in the prospectus because the company, in fact and in substance, started the proposed expansion project but abandoned it in the midway because of certain unavoidable factors after approving modernization scheme by use the balance public issue capital in a general body meeting. The risk factors mentioned in the prospectus specially risk factors No. (1) (2) (6) and external factors, mentioned in the prospectus have covered the act of the company for abandoning the proposed extension project. Mr. Sen has taken this Court to the prospectus and contended that the cost of new project and means of finance are based on companies own estimate and deployment of the fund collected in the public issue would be at the sole discretion of the management of the company. He has drawn attention of the Court also to the risk factors mentioned in the prospectus to the effect that the management is seized of need for the increase electricity load for the expansion project and should obtain sanction of the enhancement by January, 2004 as per scheduled of implementation.

6. Mr. Sen has drawn attention of this Court also to Section 61 of the Act and contended that the authority could act contrary to any statement made in the prospectus with the approval in general meeting of the members. In the instant case, a general members meeting was held on 27.3.2006 (annexure C at page 98 to the petition) wherein utilization of money raised through public issue was the main agenda and it was decided that the company was not in a position to continue the expansion project of its re-rolling mill and to meet the expenses of the proposed project due to increase in power cost. It was further decided that the balance amount of Rs. 381.20 lacs can not be utilised to accomplish the core object because of some other technical difficulties. So, it was resolved that modernization scheme instead of undertaking the expansion plan was to be carried out with the balance public issue of Rs. 381.20 lacs.

7. Mr. Sen contended that a statement can not be said to be untrue within the meaning of Section 63 of the act simply because the company failed to carry out the project. According to Mr. Sen, the word ?untrue statement? is a statement which was never been or which has never been intended by the maker at the time of making the statement and that has been done deliberately.

8. Mr. Sen relied on a decision of this Court reported in Sunil Kumar Agarwal Vs. G. Mukhopadhyaya (2010) 1 C Cr. L.R. (Cal) 620, a decision of Hon''ble Apex Court in Harshendra Kumar D. v. Rebatilata Kolety etc. reported in JT 2011(2) SC 586 and a decision of Court of Appeal in Chancery Division of England in Metropolitan Coal Consumer Association in support of his submission.

9. Mr. Ghosh together with Mr. Pradipta Kumar Sen appearing on behalf of the opposite party, Assistant Registrar of companies contended that the petitioner being one of the Directors of the Company made untrue statement in the

prospectus of the company in order to raise public issue capital. The company, in the prospectus has made it clear that the public issue so collected amounting Rs. 550 lacs would be used only for expansion of the re-rolling mill of the company not for modernization of its other projects. The company has made the statement deliberately knowing very well that it would not use the public issue money in re-rolling expansion project. Therefore, the company made ?untrue statement? in the prospectus and, thereby, committed the offence u/s 63 of the Companies Act.

10. To appreciate the matter effectively, the Section 63 of the companies Act is reproduced below:

Where a prospectus issued after the commencement of this Act includes any untrue statement, every person who authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to (fifty) thousand rupees, or with both, unless the proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the statement was true.

11. A cursory perusal of the unequivocal languages used in Section 63 makes it explicit that when a prospectus includes any ?untrue statement?, every person authorized to issue the prospectus shall be punishable unless he proofs either that the statement are immaterial or that he had reasonable ground to believe and did believe, to the time of the issue of the prospectus, that the statement was true.

12. In the instant case, it is not the case of the opposite party that the company wherein the Petitioner is a Director had no intention at all to carry on expansion project of it re-rolling mill. The company had started that project according to the object mentioned in the prospectus but could not continue it because of certain unavoidable circumstances. The company spent Rs. 156 lacs on that account but ultimately found that carrying on the project would be impossible and infeasible. The company then and there held a general body meeting on 27.3.2006 and abandoned the project and decided to utilize the balance public issue of Rs. 381.20 lacs for the modernization scheme of the company. That the decision was taken unanimously and in accordance with Section 61 of the Act which provides that the company, in a suitable situation, can change the scheme, if approved, in a meeting of like nature.

13. I concede to the submission of Mr. Sen that the statement can be said to be untrue only when the maker makes it knowing fully well that what statement he made is untrue. This can only be inferred from the facts and circumstances of the case and the way one acted. Had the company not spent considerable portion of public issue on re-rolling mill expansion project as promised in the prospectus, the position would have been quite different. When the company had taken up the project as promised in the prospectus and spent a considerable portion of public

issue of that account and abandoned the project thereafter for some justified reasons, it can not be said that the company made deliberate ?untrue statement? in the prospectus.

14. In the instant case, it has been averred in the petition of complaint that the petitioner and Ors. who are the directors of the company made the statement in the prospectus regarding expansion of re-rolling mill falsely because and only because they abandoned the scheme and converted the same into modernization of the other schemes. The allegations and aspersions to that effect in the petition of complaint, in my estimate, do not constitute any offence u/s 63 of the Companies Act simply on the ground that the statement in the prospectus for utilization Rs. 550 lacs public issue in expansion project of re-rolling mills was not at all made falsely and deliberately. It was a true statement and the company started the project and spent considerable portion of public issue on that account. That being so, it can not be said that a prima facie case u/s 63 of the companies Act is made out by the complainant against the Petitioner. The complaint is essentially for non-utilization of the entire fund obtained by public issue and not for making ? untrue statement?. Therefore, the offence u/s 63 of the Companies Act is not at all attracted. At the time the prospectus was issued and the statement in question was made, the company had seriously intended to implement the expansion of re-rolling mill project. So, it can not be said that the said statement is ?untrue statement?, in the facts and circumstances prevailing at that time and immediately thereafter, some other factors subsequently came in the way of the company to carry out the project full-fledgedly. In order to save the interest of holders of the public issue/shareholders, company had to abandon the project by taking a decision unanimously in a general body meeting and decided to utilize the balance public issue in modernization scheme.

15. That being the fact, I find that no offence, prima facie, is made out against the Petitioner u/s 63 of the Companies Act. Further proceeding of this prosecution will be amounting to abuse of the process of Court and, as such, it should be quashed.

16. Accordingly, the revision application is allowed.

17. The proceeding in C/1079 of 2010 pending in the Court of learned Metropolitan Magistrate, 10th Court, Calcutta stands quashed as per as the petitioner, Sanjib Jajodia.

18. No order as to cost is passed.

19. Interim order of stay, if any, stands vacated.

20. Urgent Photostat certified copy of the judgment, if applied for, be handed over to the parties on compliance of necessary formalities.