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**(2005) 06 BOM CK 0145**

**Bombay High Court**

**Case No:** Misc. Petition No. 36 of 2002

SICOM Limited

APPELLANT

Vs

Shri Parmod Lath and Others

RESPONDENT

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**Date of Decision:** June 8, 2005

**Acts Referred:**

- State Financial Corporations Act, 1951 - Section 31(1)

**Citation:** (2005) 4 BomCR 498 : (2005) 127 CompCas 170 : (2005) 3 MhLj 875

**Hon'ble Judges:** S.U. Kamdar, J

**Bench:** Single Bench

**Advocate:** K. Setalwad, instructed by M.P. Rege, for the Appellant; A. Kumar, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

@JUDGMENTTAG-ORDER

S.U. Kamdar, J.

The present petition is filed u/s 31(1)(aa) of the State Financial Corporation Act. Respondent No. 4 in the present petition is a company and the principal borrower. Respondent Nos. 1 to 3 are the directors and guarantors who have guaranteed the repayment of the loan amount lent and advanced to the 1st respondent company.

2. Some of the material facts of the present case, briefly enumerated are as under :

3. The respondent No. 4 requested the petitioner to grant financial assistance of Rs. 75 lacs by way of equity participation in the equity shares of the 4th respondent company. It was agreed that the respondent No. 4 shall issue 7,50,000 equity shares of the face value of Rs. 10/- each on par to the petitioner and in consideration thereof the petitioner will pay a sum of Rs. 75 lacs to the respondent No. 4 as and by way of financial assistance to set up a project at village Walkhed, Tal. Dindori, Dist. Nasik in the State of Maharashtra. The respondent No. 4 was proposing to set up a

plant for process of Dehydrated Onions/Garlic. Under the terms and conditions of the subscription agreement dated 13.12.1994 which was entered into by and between the petitioner and the respondent No. 4 company it was agreed that the petitioner will subscribe to the said 7,50,000 equity shares for the total sum of Rs. 75 lacs. It was further agreed that the respondent No. 4 will repurchase the said shares of the petitioner under the terms and conditions of the said agreement. Some of the relevant terms of the said subscription agreement which are relevant for the purpose of the present petition are briefly enumerated as under :

"1. The Company shall issue to the Corporation and the Corporation shall 3 subscribe to 7,50,000 equity shares of the company of the face value of Rs. 10 each at par for Rs. 75,00,000 (Rupees seventy five lacs only). (hereinafter referred to as "the said Shares") on the terms and conditions detailed in Appendix "A" to this Agreement agreed and accepted by the Company."

The terms and conditions annexed as Appendix "A" to the said subscription agreement, inter alia, provide for repurchase of the shares. Clause 3 of the said terms and conditions reads as under :

### 3. REPURCHASE OF SHARES.

a. If at any time the SICOM decides to sell its shareholding in the Company, it shall first make an offer to Shri Pramod Lath and Shri Manish Kejriwal (hereinafter referred to as the PROMOTERS) and/or their nominees for the repurchase of these shares. Such an offer for the sale of the shares shall be on the basis of the highest of the following three alternatives:

i. The (paid up value of the shares)/(price at which the shares are acquired by SICOM i.e. face value plus premium) plus an amount computed at the prevailing lending rate of SICOM for nonrefinanceable loans at the time of sale, less dividends, if any, received by SICOM in respect of these shares from the date of such subscription or disbursement of deposit/ unsecured loan/ advance against the shares upto the date of sale. However, such price shall not be less than the paid up value of the shares) / (price at which the shares are acquired by SICOM).

ii. If listed, the average price of the shares of the Company ruling on the recognised stock exchange computed for a period of preceding 3 months from the date of such offer by SICOM / the date on which the option for the repurchase of shares is to be exercised by the PROMOTERS, as the case may be.

iii. The break up value of the shares of the Company on the basis of proforma and/or audited accounts, if available, for the preceding quarter ended within atleast 120 days from the date of such offer by SICOM for the sale of shares.

b. Acceptance of refusal of the offer for repurchase of the shares shall be communicated by the PROMOTERS and/or the nominees of SICOM in writing within a period of 30 days from the date of the offer by SICOM.

c. In the case the PROMOTERS and/or nominees decide not to purchase the shares or fail to communicate their decision within a period of 30 days from the date of the offer, SICOM shall be free to transfer or sell the said shares to any other party at any time at such price and on such terms and conditions as it may deem fit, without making any further offer to the PROMOTERS.

d. The loss suffered by the SICOM as a result of sale pursuant to Clause (c) hereinabove, and all the expenses incidental to the sale shall be made good to SICOM by the PROMOTERS and/or the nominees within a period of 30 days from the date of demand made by SICOM.

e. Notwithstanding the provisions of the clauses (a) to (d) hereinabove :

(i) The PROMOTERS and/or the nominees shall jointly and severally buy back the shares held by SICOM at the end of the third year, from the date of allotment of shares or commencement of production ink the Project, whichever is later, at a price to be determined in accordance with the formula laid down hereinabove.

(ii) The PROMOTERS and/or the nominees will have the option to repurchase from SICOM any time after three months of listing of the shares on a recognised Stock Exchange, all the shares held by SICOM in the Company in one installment in accordance with the formula laid down hereinabove.

f. In case, however, the PROMOTERS and/or the nominees decide to repurchase the shares on the offer made by SICOM, they shall arrange to remit the amount payable to SICOM and take delivery of the relevant Share Certificates within a period of one month from the date of acceptance of the offer. The share transfer fee, stamp duty and other expenses in connection with such transfer of shares shall be borne and paid by the PROMOTERS.

g. If for any reason the project is not implemented production does not commence in the Project within 5 years of the date of first disbursement by SICOM, PROMOTERS shall immediately repurchase all the shares subscribed by SICOM and/or shall repay the entire unsecured loans/advanced extended by SICOM against their equity contribution in accordance with the formula laid down hereinabove."

Thus, under the repurchase scheme it was provided that if the petitioner decides to sell the said shareholding to the company it shall make an offer to two of the promoters and/or nominees for the repurchase of these shares in any of the three alternatives prescribed thereunder. Under clause 3(c) it was provided that in case the promoters and/or nominees decide not to purchase the shares or fail to communicate their decision within a period of 30 days from the date of the offer, SICOM the offer, SICOM shall be free to transfer or sell the said shares to any other party at any time at such price and on such terms and conditions as it may deem fit, without making any further offer to the PROMOTERS. Under clause 3 (d) of the said terms and conditions it was provided that the petitioner shall be entitled to recover

from the respondent No. the loss suffered by them as a result of the sale of the said shares in pursuance of clause 3 (c) of the said terms and conditions and all other expenses incidental to the sale.

4. According to the petitioner the said shares were required to be repurchased by the respondents on or before 15.1.1999 i.e. within a period of three years from the date of commencement of the commercial production on 15.1.1996.

5. In respect of the said arrangement arrived at by and between the petitioner and respondent No. 4, respondent No. 4 executed guarantees in favour of the petitioner guaranteeing repayment of the said shares. The said guarantee under recitals 3 and 4 inter alia provides as under :

"3. The loss that the Corporation may suffer by sale of the shares to any party/parties will be ascertained by deducting the net amount that may be realised by the Corporation by sale/transfer of the said shares from the agreed purchase price of the said shares so sold as per clause 4 hereinafter mentioned.

4. The Guarantors agree to purchase the said shares at a price on the basis of the highest of the following alternatives :

i. The price at which the shares are acquired by SICOM i.e. face value plus premium plus an amount Computed at the prevailing lending rate of SICOM for non-refinance able loans at the time of sale, less dividends, if any, received by SICOM in respect of these shares from the date of such subscription or disbursement of deposit/unsecured loan/advance against the shares upto the date of sale. However, such price shall not be less than the price at which the shares are acquired by SICOM.

ii. The average price of the shares of the company ruling on the recognized stock exchange computed for a period of preceding three months.

iii. The break up value of the shares of the company on the basis of proforma and/or audited accounts, if available, for that preceding quarter.

6. Clause 6 of the said guarantee which is also relevant reads as under :

"3. The Guarantors further declare that this indemnity/guarantee shall not in any manner be effected by reason of any lapses on the part of the Corporation to sell the said shares."

7. The petitioner did not give any notice to the respondent No. 4 company calling upon them to repurchase the said shares on its due date as contemplated under the subscription agreement. However, the petitioner issued a notice on 21.9.1998 both to the respondent Nos. 1 to 3 and respondent No. 4 jointly calling upon the respondents to repurchase the said shares and directed that the respondents should make payment of Rs. 1,53,30,631/-as per the statement annexed thereto. Thereafter there is a correspondence by and between the petitioner and respondent

No. 1 to 3 which inter alia indicates that the petitioner insisted that respondents No. 1 to 3 should repurchase the said shares. However, the petitioner by their letter dated 15.3.199 refused to accept such an offer and thus the petitioner filed the present petition u/s 31(1)(aa) for enforcement of the said guarantee.

8. In the present petition, it is required to be determined whether the petitioner is entitled to maintain the present petition at all. Firstly, the terms and condition of the guarantee in recitals 3 and 4 as well as terms and conditions annexed to the subscription agreement inter alia provide for a scheme under which the petitioners are required to sale the shares in the open market on default by the principal borrower to repurchase the said shares and only thereafter they, are entitled to claim only the balance amount which is a loss suffered by them in respect of the said shares. In the present case it is clear that the petitioners have neither sold nor have made any effort to sell the said shares in the open market. Thus, the petitioners have failed to arrive at any loss which they could have suffered by selling the said shares in the market. The petitioners under the terms and conditions of the guarantee thus were duty bound to first effect the sale of the shares and thereafter sue for the balance amount from the respondents as guarantors. The guarantee specifically provides for making good only such loss which the petitioner will suffer by sell of the said shares in the open market. In view of the fact that the petitioners have not sold the said shares and have not determined the amount of loss suffered by them, the present petition at the present stage is premature and cannot be granted.

9. In the aforesaid circumstances, the present petition is dismissed. However, there shall be no order as to costs.