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CORPORATE LAWS

Case Law Update

Companies Act, 2013

The Scheme of Arrangement and Amalgamation of Protrans Supply Chain Management Private Limited ('Transferor Company I'), Ag-Vet Genetics Private Limited (Transferor Company II) with Baramati Agro Limited (Transferee Company') (hereinafter collectively termed as "Petitioner") and their respective shareholders. NCLT Mumbai order dated, 20th September 2021.

Facts of the case

- The sanction of Tribunal is sought under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 to the Scheme of Arrangement and Amalgamation of Protrans Supply Chain Management Private Limited (Transferor Company) and Ag-Vet Genetics Private Limited (Transferor Company) with Baramati Agro Limited (the Transferee Company).
- The Transferee Company is having 21,675 Shareholders holding A Class Equity Shares. Out of the same, approximately 21,000 are shareholders holding a small amount of equity shares in the Transferee Company.
- The smaller shareholders of the Transferee Company have been requesting for regular dividends on their investments since they are not interested in seeking management control or running the operations of the transferee company.
- The Transferee Company had also received requests from some of its smaller shareholders to redeem their investments within a fixed timeframe and also to start paying dividends on such investments on a regular basis.
- Considering the shareholding pattern of the transferee company, it was difficult to pass on the benefit of dividends to these small shareholders.
- In view of this, it is proposed to convert certain A class Equity Shares into 9% non-cumulative optionally convertible redeemable Preference shares of ₹ 10/- each.
- The Petitioner Companies have approved the said Scheme by passing the Board Resolutions at their respective board meeting held on 25th February, 2019.

Regional Directors in its Report observed as follows:

- It appears that the Scheme is not prejudicial to the interest of the shareholders and public, except specified matters in the report issued by ROC, Pune.
- One complaint is pending against Baramati Agro Limited (Transferee Company) which was referred by SEBI and the same is under examination by ROC Pune.

ROC, Pune in its Report Observed that:

- The Petition contains conversion of equity shares into preference shares. It is not permissible to issue Redeemable Preference Shares against existing equity shares as its value, terms, rights are different and cannot be termed as same the kinds of shares to exchange in ratio for consideration.
- It is submitted that the equity shareholders are having rights different to that of the preference shareholders which include voting rights.
- Ministry vide letter no, 03/08/2019. CL V, dated 27th July, 2020 has stated that one litigation in on going w.r.t. conversion of equity shares into preference shares and vice versa whereby reclassification of such type was rejected by ROC, Delhi.
- Further, the instant scheme is placed before a member of the transferee company having only 48.45% of the value which is not representing the majority. Hence such conversion may be considered undesirable.

Petitioners' Reply on the Observations
Reply to observations of Report of Regional Director:

- Inquiry of the ROC, Pune is under examination and yet to be completed. The inquiry is related to the Transferee Company which is going to continue in existence and not going to get dissolved, unlike Transferor Companies. The Transferee Company undertakes that, it would provide all necessary information and explanation to complete the said inquiry as and when called for.

Reply to observations in Report of ROC

- The conversion of shares from one type to another, for example from Equity shares to Preference Shares, is **not barred by any provision of the law** and in fact and in law such conversion **only amounts to the reorganization of the Share Capital** of the Companies which is **permissible under section 61** of the Companies Act 2013.
- The Supreme Court in ***Rajendra Prasad Gupta vs. Prakash Chandra Mishra & Ors***[1] held that **"Courts are not to act upon principal that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principal that every procedure is to be understood as permissible till it is shown to be prohibited by the law**. As a matter of general principal **prohibition cannot be presumed**".
- A Scheme of **Compromise or Arrangement may involve an increase, consolidation, or subdivision of shares or reduction of share capital**. Therefore,

1. SLP No 984 of 2006

the **conversion of equity shares** into preference shares as sought by the Petitioners under the Scheme **cannot be deemed to be impermissible**.

- Pursuant to section 43 of Companies Act 2013, there can be only two classes of shares, viz., Equity and Preference and a combination of two depict the total share capital. When shares of one class are **converted** into another class (for instance, equity shares into preference or vice versa) and the value of the paid-up share capital does not undergo any change, the **subscribed and paid-up capital remains unchanged; only the nomenclature of shares undergo change.**
- Under section 230 of the Act, a **scheme of Compromise or Arrangement may be in the form of reorganization** of the share capital of a company and the Explanation appended to sub-section (1) gives an **inclusive definition of the expression 'arrangement 'as including 'reorganization of share capital'.**
- A Merger and a Demerger are not the only components of a composite scheme of arrangement. **The term arrangement in section 391 is of wide amplitude.**
- With regard to the MCA letter refereed by the ROC Pune viz. letter no, 03/08/2019. CL V, dated 27th July, 2020 the Petitioner Companies submitted that, as per the settled principle by the Hon'ble Supreme Court in several cases, **the said letter cannot be binding on the Court or Tribunal or Petitioner companies in this case unless the same is made part of substantive law or delegated legislation.**

Held

The Official Liquidator has filed a report stating therein that **the affairs of the Company have not been conducted in a manner prejudicial to the interest of its members or to the public interest.**

- **No objections were received** from the **Jurisdictional Income Tax Department** of the Petitioner Companies.
- From the material on record, the **Scheme appears to be fair and reasonable** and is not contrary to public policy.
- The **clarifications and undertakings given by the Petitioner** Companies w.r.t. **observations made** by Regional Director in its repor**t are accepted by the Tribunal.**
- Since all the **requisite statutory compliances have been fulfilled** is made absolute in terms of the prayer clause of the Company Petition. The **Transferor Companies are ordered to be dissolved without winding up.**

Ravindranatha Bajpe (Appellant) vs. Mangalore Special Economic Zone Ltd. & Others Etc. (Respondent) Supreme Court Judgment dated September 27th 2021.

Facts of the case

- Appellant who is an original complainant was the absolute owner and in possession and enjoyment of an immovable property. The immovable property was surrounded by a stone wall as a boundary and there were valuable trees on the said property.
- Mangalore Special Economic Zone Ltd., a Company (accused No.1) intended to lay water pipeline by the side of Mangalore-Bajpe Old Airport Road abutting some part of the property pursuant to permission obtained from the Department of Public Works, Mangalore.

- The complaint was that the Company (accused No. 1), its Chairman, Director (accused no.2 and 3), supervisors appointed by Company (accused No. 4 and 5) and Contractor Company (accused No. 6) and its directors (accused No. 7 and 8) and other persons involved in the project (accused No. 9 to 13) without any lawful authority had trespassed over the property and demolished the compound wall. They had cut and destroyed 100 valuable trees and laid the pipeline beneath the said property.
- On noticing this mischief, the complainant filed a complaint at the local police station, but no appropriate action was taken. Thereafter the complainant filed a private complaint against all accused including directors and Chairman of Company in the Court of the learned Judicial Magistrate, First Class, Mangalore.
- The learned Judicial Magistrate, First Class, Mangalore by order dated 24.09.2013 directed to register the case against all the accused, for the offences punishable under Sections 427, 447, 506 and 120B read with Section 34 of the Indian Penal Code (**"IPC"**).
- Feeling aggrieved and dissatisfied with the summoning Order passed by the learned Judicial Magistrate, First Class, Mangalore, for the offences punishable under sections of IPC, accused No. 1 to 8 filed criminal revision petitions before the learned Sessions Court.
- The Sessions Court allowed the revision petitions and quashed and set aside the order passed by the learned Judicial Magistrate, First Class, Mangalore against the Accused Nos. 1 to 8. The order against accused No. 9 was confirmed.
- Feeling aggrieved and dissatisfied with the common judgment and Order passed by the learned Sessions Court, the original complainant (Appellant in this case) preferred the revision applications before the High Court and by the impugned judgment and Order, the High Court has dismissed the said revision applications.
- Hence the present appeal was filed by the Original Complainant and prayed to allow the present appeals and quash and set aside the orders passed by the High Court and the learned Sessions Court and restore the order passed by the learned Magistrate.

Arguments on behalf of the Appellants

Learned Advocate appearing on behalf of the appellant (original complainant) has submitted that:

- The High Court as well as learned Sessions Court have materially erred in quashing and setting aside the orders passed by the learned magistrate summoning accused no. 1 to 8
- High Court has not properly appreciated and considered the fact that earlier the complainant filed an FIR before the concerned police station, but nothing was done and therefore the complainant – appellant was constrained to file a private complaint.
- Learned Magistrate after examining the appellant (complainant) on oath and after considering the evidence/ material on record issued summons,

therefore, the learned Sessions Court was not justified in setting aside the order passed by the learned Magistrate summoning the accused.

- There was a specific allegation in the complaint that accused No. 1 to 8 conspired with the co-accused to lay the pipeline under the property of the complainant. Being the administrators of the companies, all the executives are vicariously liable.
- At the stage of summoning the accused, what is required to be considered is whether a prima facie case is made out on the basis of the statement of the complainant on oath. The material produced at this stage and the detailed examination on merits is not required.

Arguments on the part of the Respondent

Learned counsels appearing on behalf of accused nos. 1 to 8 respectively submitted that,

- There are **no specific allegations** and the role attributed to the accused except the **bald statement that all of them have connived with each other,** the learned Sessions Court was absolutely justified in setting aside the order passed by the learned Magistrate issuing the process/ summons against the accused nos. 1 to 8.
- As held by this Court in a catena of decisions that issuing summons/process by the Court is a very serious matter and therefore **unless there are specific allegations and the role attributed to each accused more than the bald statement, the Magistrate ought not to have issued the process**
- All accused persons (i.e. accused no. 2 to 5 and 7, 8) were stationed at Hyderabad and **there is no allegation that they were present on the spot** at the time of the commission of the alleged offence.
- There was **no allegation that at the command** of accused No. 2 to 5 and accused No. 7 and 8, the **demolition of the compound wall has taken place.**
- All of them are arrayed as an accused as Chairman, Managing Director, Deputy General Manager (Civil & Env.), Planner & Executor, Chairman and Executive Director respectively

Held

- In the case of Sunil Bharti Mittal case, it was observed by Supreme Court that **"there is no vicarious liability unless the statute specifically provides so.**
- Thus, **an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused,** along with the company, if there is **sufficient evidence** of his **active role coupled with criminal intent.** The second situation in which he can be implicated is in those cases **where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.**

  When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect.
- Merely because they are Chairman, Managing Director/Executive Director

and/or Deputy General Manager and/ or Planner/Supervisor of Accused No. 1 & Accused No. 6, **without any specific role attributed and the role played by them in their capacity, they cannot be arrayed as an accused,** more particularly **they cannot be held vicariously liable for the offences committed by Accused No. 1 & Accused No. 6.**

- Under the circumstances, the **High Court has rightly dismissed the revision applications** and has rightly confirmed the order passed by the learned Sessions Court quashing and setting aside the order passed by the learned Magistrate issuing process against respondent nos. 1 to 8
- In view of the above and for the reasons stated above, the present appeals deserve to be dismissed and are accordingly dismissed.
- Needless to say, that the learned Magistrate shall proceed with the complaint against the original accused nos. 9 to 13 on its own merits, in accordance with the law.

Cases referred in order

1. ***GHCL Employees Stock Option Trust vs. India Infoline Limited, (2013) 4 SCC 505***
2. ***Sunil Bharti Mittal vs. Central Bureau of Investigation, (2015) 4 SCC 609.***
3. ***Aneeta Hada vs. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661,***
4. ***Maksud Saiyed vs. State of Gujarat, (2008) 5 SCC 668***
5. ***Pepsi Foods Ltd. vs. Special Judicial Magistrate, (1998) 5 SCC 749***

Name of the Case: Adjudication Order no: WTM/GM/IVD/ID4/13744/2021-22 of the Whole Time Member in the matter of GDR issue of Edserv Softsystems Limited.

Facts of the case

1. Securities and Exchange Board of India ('SEBI') conducted an investigation into the issuances of Global Depository Receipts ('GDRs') in overseas markets by Indian companies, allegedly with the intention of defrauding Indian investors. During the course of such investigation, SEBI found that there were several other GDR issues wherein a loan was taken by a foreign entity and the security of the loan was provided by the GDR issuing company by signing a Pledge Agreement. One such company was Edserv Softsystems Limited ("Edserv"/the "Company"). Investigation was done for the period of July 1, 2011 to August 31, 2011 during which Edserv had issued GDRs.
2. SEBI focused the investigation to ascertain whether the shares underlying the GDRs were issued with proper consideration and whether appropriate disclosures were made by Edserv with respect to GDRs issued by it on August 10, 2011.
3. SEBI alleged that the scheme of issuance of GDRs was fraudulent as the Company had entered into a Pledge Agreement with the bank - European American Investment Bank AG ("EURAM Bank") for a loan that had been availed by Vintage FZE ("Vintage/ Noticee No. 7"), also known as Alta Vista International FZE, towards the subscription of GDRs issued by the Company. The Pledge Agreement was not disclosed to the stock exchanges, which made the investors believe that the said GDR issue

was genuinely subscribed by foreign investors.

4. SEBI further found that Vintage was a party to this fraudulent scheme. S.Giridharan, Executive Director, Chairman & CEO - Edserv ("Noticee no.1"), signed a Pledge Agreement with EURAM Bank, whereby the account holding the GDR proceeds was given as security for the loan availed by Vintage from EURAM Bank for subscribing to the GDRs of Edserv. Apart from Noticee no.1 following persons were also part of the Board of Directors of the Company:

   a. G. Gita, Managing Director - Edserv ('Noticee no. 2'),

   b. T.S. Ravichandran, Independent Director – Edserv ('Noticee no.3') and

   c. S. Arvind, Independent Director - Edserv ('Noticee no. 4')

5. SEBI on investigation found that Board of Directors at their meeting held on April 29, 2011 authorised to open a bank account with EURAM Bank for receiving subscription money in respect of GDRs issued of the Company and authorised Noticee no. 2 (Managing Director of Edserv) to operate the account on behalf of the Company. Thereafter on July 25, 2011, the Board of Directors passed another board resolution for authorising Noticee no. 1 (Chairman & CEO of Edserv) to operate this bank account in addition to Noticee no. 2 and to authorise EURAM Bank to use the funds so deposited in the aforesaid bank account as security in connection with loans if any as well as to enter into any Escrow Agreement or similar arrangements if and when so required. On the same day, i.e., on July 25, 2011, Vintage entered into loan agreement with EURAM Bank with respect to the subscription of GDRs issued by Edserv, and on the same day, Edserv also entered into Pledge Agreement with EURAM Bank, whereby the GDR proceeds received by the Company from Vintage, and held in a bank account with EURAM Bank, was pledged as collateral for the loan availed by Vintage from EURAM Bank. Mukesh Chauradiya - Managing Director of Vintage (Noticee no. 6) signed the Loan Agreement on behalf of Vintage for the subscription of GDRs of the Company. Arun Panchariya ('Noticee no. 7') – was the Beneficial Owner and Director of Pan Asia Advisors Ltd, Lead Manager to the issue ('Noticee no. 8'). SEBI further alleged that there were certain entities who acted as Conduits for Noticee no. 7 viz. India Focus Cardinal Fund – Sub Account of FII Cardinal Capital Partners ('Noticee no. 9), Highblue Sky Emerging Market Fund – Sub-Account of FII Golden Cliff ('Noticee no. 10'), Golden Cliff, ('Noticee no. 11') KBC Aldini Capital Ltd ('Noticee no. 12, ') and Cardinal Capital Partners ('Noticee no. 13')

   Charges levied: Considering all the above facts SEBI alleged that Noticees no. 1 to 13 have violated the following provisions of the SEBI Act, 1992 and SEBI PFUTP Regulations, 2003 : Section 12A(a), 12A(b), 12A(c) of SEBI Act 1992 read with Regulations 3 (a), (b), (c), (d) and 4(1) of SEBI (PFUTP) Regulations, 2003

Arguments made by Noticees

1. **Mere certification of Board Resolution does not make us part of Conspiracy:**

   a. Noticee no. 3 and Noticee no. 4 ('Noticees') submitted that Noticee no. 1 and Noticee no. 2 were the

persons who were in charge of the day-to-day affairs of the company and were attending the day to day matters related to the GDR issue. Noticees further submitted that they were ignorant of the fact that they had entered into a pledge agreement with EURAM Bank.

b. Noticees further submitted that mere certification of the Board Resolutions of Edserv passed on April 29, 2011 and July 25, 2011 does not make the present Noticees part of any conspiracy to issue improper GDRs, as the certification only means that the two resolutions were passed by the Board of Directors of Edserv.

c. Noticees further submitted that facts about the GDR issue as reported to the Board by Noticee Nos. 1 and 2, who were in charge of the day-to-day affairs of the Company and also the GDR issue, which were relied upon by the Board of the Company and the Audit Committee during the process of issue and utilization of the GDRs in 2011 and 2012, were in variance with the facts reported by SEBI after its investigations, which can be seen from the Agenda and Notes for the Audit Committee meeting held on February 13, 2012.

d. Noticees further highlighted that on May 30, 2012, the Chairman reported to the Audit Committee and the Board of the Company that out of the total amount available from the GDR issue, the position on March 31, 2012 was that the Company had drawn USD 600,000 for content development expenses and the balance of USD 23,319,263.94 was kept in the retail account abroad, which was noted by the Audit Committee on that date. Further, no reports on the use of the GDR funds were placed before the Board or Audit Committee after the report on May 30, 2012.

2. **Acquisitions were made without informing the Board of Directors and no replies were given to questions raised by Noticee no. 3 and Noticee no.4:** Noticees submitted that Edserv had reported to the stock exchange on August 10, 2012 that the Company had acquired an e-learning company in the UAE. Its name was Alta Vista FZE and the price paid for this acquisition was not revealed. Noticees further submitted that permission of Board of Directors was not taken for this acquisition neither details of this acquisition were informed to Board of Directors. Noticee no. 4 further brought to the notice of SEBI that he had written an email dt: November 6, 2012 to Noticee no.1 (Chairman & CEO of Edserv) with a copy to Noticee no. 3 asking as to how the investment had been made without Board clearance and asking him to give a statement of the use of funds. Further Noticee no. 4 submitted that he had again sent a mail dt: November 7, 2012 to Noticee no.1 with a copy to Noticee no.3 seeking details as to who had done valuation of the acquired company i.e. Alta Vista FZE before it was acquired by Edserv. Both the emails were not answered by Noticee no.1. At the Board meeting held on November 26, 2012 Noticees sought a copy of the valuation report for the acquisition of Alta Vista

but Noticee no. 1 did not provide it stating that it was not available with him in the head office of the Company but was available in the Dubai office of Edserv's subsidiary and he promised to get a copy of the same and convene another Board meeting in a week's time to allow the Board to peruse the report. Post this no Board meeting was conducted. Subsequently, Noticee no. 4 resigned as Director on January 28, 2013 and Noticee no. 3 resigned on December 10, 2012. Noticees submitted that pursuant to Section 149(12) read with MCA Circular no. 08/2011 cannot be held liable.

Conclusions made by Hon'ble Whole Time Member, SEBI

1. **Mere certification of Board Resolution does not make us part of Conspiracy:** Hon'ble Whole Time Member noted that Noticees have not denied the fact that they have certified Board Resolution dt: July 25, 2011. Hon'ble Whole Time Member further noted that it has been asserted by the said Noticees that they were not aware of the Pledge Agreement, whereby the GDR proceeds were pledged as security for the loan taken by Vintage. Hon'ble Whole Time Member further stated that from the email exchanges, it appears that the utilisation of the GDR proceeds for the acquisition of M/s Alta Vista, a company incorporated in the UAE, was without the concurrence of the Board of Directors of the Company. Taking into consideration all the submissions along with evidence produced by Noticees (both independent directors), Hon'ble Whole Time Member accepted the argument that Noticees had merely certified the Board Resolution and they were not aware of the fraudulent act with respect to the GDR issue.

2. **Acquisitions were made without informing the Board of Directors and no replies were given to questions raised by Noticee no. 3 and Noticee no.4:** Hon'ble Whole Time Member noted that Noticees had actively sought the details as to the utilisation of GDR proceeds and acquisition of Alta Vista FZE, an entity incorporated in UAE. Hon'ble Whole Time Member further noted the fact that after the email dated November 06, 2012, whereby information was sought from Noticee no. 1, with respect to the utilisation of GDR proceeds went unanswered Noticee no. 3 resigned as a Director of the Company on December 10, 2012 and Noticee no. 4 resigned as a Director of the Company on January 28, 2013. Taking into consideration these submissions Hon'ble Whole Time Member held that he was inclined to give benefit of doubt to Noticee no. 3 and Noticee no.4 especially in view of the diligence exhibited by them with respect to the utilisation of the GDR proceeds followed by their decision to step down from the Board of Edserv, soon thereafter.

Penalty: Nil

Cases referred:

By Noticee no. 3 and Noticee no. 4:

National Small Industries Corp. Ltd. vs. Harmeet Singh Paintal and Another, (2010) 3 SCC 330

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