

2 SCOB [2015] AD 1

APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mrs. Justice Nazmun Ara Sultana

Mr. Justice Syed Mahmud Hossain

Mr. Justice Hasan Foez Siddique

CIVIL PETITION FOR LEAVE TO APPEAL NOS.718-720 of 2013

(From the judgment and order dated 23.6.2011 passed by the High Court Division in Company Matter Nos.40, 126 and 127 of 2011.)

Bangladesh Bank:

Petitioners.
(In all the cases)

Versus

Eagleway Investment Ltd. and others:

Respondents.
(In C.P. No.718 of 2013)

Sun Ascent Holding Ltd. and others:

Respondents.
(In C.P. No.719 of 2013)

Onbright Corporation Ltd. and others:

Respondents.
(In C.P. No.720 of 2013)

For the Petitioner:
(In all the cases)

Mr. Ajmalul Hossain, Senior Advocate (with
Mr. Mahbubey Alam, Senior Advocate),
instructed by Mr. Mvi. Md. Wahidullah,
Advocate-on-Record.

For the Respondents:
(In all the cases)

Not Represented.

Date of hearing : 9th February, 2015.

Fraud practiced upon Court:

Since the judgments were obtained by practicing fraud upon the court, we have no alternative but to set aside the said judgments of the Company Court and the persons concerned should be put to justice. We direct the Registrar to file complaints before the Chief Metropolitan Magistrate, Dhaka against the respondent(s)... for using forged documents for securing judgments from the Company Court. ... (Para 11)

J U D G M E N T

Surendra Kumar Sinha, CJ:

1. Delay in filing these petitions is condoned. The petitioner in these petitions is same but the facts, and the law points being identical, though the respondent No.1 (the respondent) of these petitions is different, these petitions are disposed of by this order in order to avoid repetition.

2. For our convenience the facts in Civil Petition No.718 of 2013 are narrated below:

Eagleway Investments Ltd. was incorporated in Hong Kong. It moved a petition under section 43 of the Companies Act, 1994 for rectification of the share register of the respondent No.3, ICB Islami Bank Limited. It claimed that it purchased 45,000 shares of Tk.1000/- each in the respondent No.3 Bank, formerly the Oriental Bank Limited, equivalent to 8.67% of the issued shares. At the time of purchasing the shares, the respondent submitted to the respondent No.3 a declaration to the effect that it was not purchasing the shares as a nominee of another or in the 'benami' and that it had not purchased any shares in 'benami' before, in fulfillment of the requirements of section 14 Ka(3) of the Bank Company Act, 1991 ('the Act'). During the relevant time, persons and firms associated with the Orion Group, a group of public companies, private companies and firms also purchased shares in respondent No.3 Bank. Bangladesh Bank decided to acquire the respondent's interest basing on information available in its various reports, which proved inadequate and did not fully disclose the true state of affairs. Despite the endeavours of the preceding Directors of respondent No.3 Bank, Bangladesh Bank appointed an administrator for the respondent No.3 on 19th June, 2006, upon suspending the Board of Directors. On 6th August, 2006, Bangladesh Bank superseded the Board of Directors of the then Oriental Bank for one year. On 29th January, 2007, the respondent received a memo from the respondent No.3 notifying that the respondent's shares, along with the shares of 13 others amounting to 69.87% of the issued shares in the respondent No.3 Bank have been forfeited to the Bangladesh Bank immediately by operation of law. The memo alleged that Mr. Obaidul Karim's family had acquired the said shares in the respondent No.3 Bank in the names of 13 individuals/companies. The respondent was not provided with any copy of the Bangladesh Bank's report. Accordingly, the respondent had no knowledge about the facts alleged against it. The respondent did not submit any false affidavit. The respondent purchased the shares upon obtaining specific permission from the Securities and Exchange Commission.

3. It is stated that the respondent does not fall within the definition of 'family' as contained in the explanation of section 14 Ka. The respondent is also not dependent on any shareholders of the respondent No.3 Bank. In August 2007, the paid-up capital of respondent No.3 was increased from Tk.519,106,000.00 to Tk.6,647,000,000.00. Thereafter, respondent No.2 floated a tender to sell respondent No.3's majority shares, whereupon ICB Financial Group Holdings AG, having offered the highest bid, purchased 52.76% shares in respondent No.3 Bank in February, 2008. The name of Bangladesh Bank as the holder of the shares belonging to the respondent has been entered without sufficient cause in the register of members upon omitting the name and, as such, the said register is required to be rectified.

4. No affidavit-in-opposition was filed on behalf of the respondent. The Company Court on construction of section 14A of the Bank Company Act held that this section does not prevent a Company to hold shares more than 10% of the total shares of another company, inasmuch as, a Company does not fall within the definition of family; that the said provision does not also prevent a person to hold shares to the extent of 10% independently notwithstanding that he may have sufficient interest in another company; that section 14Ka(I) does not prevent a sister concern to collectively hold shares more than 10% in a Bank Company; that a company, however, cannot purchase shares in the benami of another Company or person; that several companies having one address may also hold more than 10% shares collectively in one group subject to the condition that the share holding of its individual company shall not exceed 10% shares; that a share holder of a Company has no proprietary interest in the assets of the company; that the allegation that Mr. Obaidul Karim holds shares in the benami of the petitioner is devoid of substance; that the respondent never gave any false declaration nor did it hold 8.67% shares in Oriental Bank in benami of Karim family; that the letter of the Bangladesh Bank dated 29th January, 2007, forfeiting the shares can be challenged in an application under section 43 of the Companies Act since Bangladesh Bank did not forfeit the shares under section 45(1) of the Act and that Bangladesh Bank illegally forfeited shares of the respondent.

5. Mr. Ajmalul Hossain, learned counsel appearing for the petitioner has taken us to some documents filed with the additional paper book and submits that the respondent has perpetrated a gigantic fraud upon the Company Court in securing the impugned judgment, inasmuch as, there was non existence of the respondent-Company on the date of institution of the petition under section 43 of

the Companies Act. In this connection, learned counsel submitted that it revealed on a search that Eagleway Investments Limited bearing registration No.0762586 which was incorporated on 6th July, 2001 stood dissolved prior to obtaining 45,000 shares of the respondent No.3 and its registration was subsequently dissolved by striking off on 27th November, 2009, annexure YY-1 and YY-2 respectively. In view of the above, it was contended that the said company ceased to exist as a legal entity prior to the filing of the company matter and the affidavit sworn on 27th November, 2011. Therefore, it is contended that Mr. Peter YC Koh misrepresented the Commissioner of Oaths of the Company Court.

6. Learned Counsel further submitted that the respondent 'Sun Ascent Holdings Limited' whose registration No.0768757 was incorporated on 3rd September, 2001, prior to the obtaining 45000 shares but the Company's registration was subsequently dissolved by striking off on 22 January, 2010 and therefore, it ceased to exist as a legal entity prior to the filing of the Matter No.126 of 2011. It is further contended that the respondent 'Onbright Corporation Ltd.' bearing registration No.0771337 was incorporated on 26th September, 2001 prior to obtaining 43,769 shares but the Company was dissolved on 19th February, 2010 and therefore, the Company ceased to exist prior to the filing of Company Matter No.127 of 2011. Therefore, it is submitted that the said Companies could not have held any shares whatsoever in the respondent No.3 and could not be deemed to have stepped into the shoes of respondent No.3 Bank. In this connection the learned Counsel has drawn our attention to annexure YY-3 of the additional paper book.

7. On perusal of annexures YY-1, YY-2 and YY-3 series, we find substance in the contention of the learned Counsel. These companies which purchased shares in the respondent No.3 Bank ceased to exist on the day of filing petitions for rectification of shares. In course of hearing of these petitions, Mr. Rokunuddin Mahmud was present, who appeared on behalf of the respondent in the High Court Division, took time to meet the points raised by Mr. Ajmalul Hossain, but on the next date on 9th February, 2015, when the matters were taken up for hearing, the learned counsel submitted that the respondent did not enter appearance and that he had no instructions to appear in these matters.

8. On perusal of the documents we have no reason to doubt that the respondent (respondent No.1 in these petitions) are fake Companies set up by interested persons with a view to overcoming the legal impediment to acquire shares of the respondent No.3 Bank, and by practising fraud obtained the judgments from the Company Court. These fake companies had resorted to corrupt practices in making the petitions for rectification of the shares by making completely false statements on behalf of non-existent Companies. It further appears from the order sheets of Matter Nos.4, 126 and 127 of 2011 that those petitions were admitted on 16th May, 2011 and the learned Judge fixed the Matters for hearing on 29th May, 2011. On 26th May, an affidavit of compliance was filed on behalf of the respondent through their counsel Mr. Mustafizur Rahman Khan on 29th May. Mr. Md. Asaduzzaman appeared on behalf of respondent No.3 and by order dated 23rd June, 2011, the Company Matters were allowed. There was no noting regarding the service of notice upon the Bangladesh Bank.

9. In the affidavits of compliance, it was stated that in compliance of the court's order dated 16th May, 2011, 'the petitioner has served notice on the respondents on 23.3.2011 and caused publication of notice on 23.3.2011'. As a matter of fact, no notices were at all served upon the Bangladesh Bank as appeared from the order sheet. We failed to understand how the Company Court without recording any order or without ascertaining whether or not notices upon the Bangladesh Bank were served, heard the Matters and delivered the judgments within 13 days of admission.

10. We noticed from the judgments that the learned Judge noted the submissions of Mr. Ajmalul Hossain on behalf of the petitioner Bangladesh Bank. Mr. Ajmalul Hossain in course of hearing strenuously argued that being a Senior Counsel of this court, he could affirm an affidavit refuting the observations of the Company Court that he argued on behalf of the petitioner. Record shows that Bangladesh Bank has not entered appearance by engaging a Counsel. Therefore, the submission of Mr. Ajmalul Hussain merits consideration. The order sheet clearly suggests that before the service of notices upon the petitioner the Matters were disposed of. The company court has proceeded with the

Matters hurriedly without even caring to look at whether or not the Matters were ready for hearing. These facts proved beyond doubt that some local powerful persons made the petitions for rectification of shares by using the names of the respondent, the foreign Companies, and all of them have resorted to fraud for abusing the justice delivery system so as to achieve their evil and corrupt aims. We simply record our dissatisfaction in the manner the learned counsel Mr. Mustafizur Rahman Khan has filed the affidavits of compliance showing service of notices upon the Bangladesh Bank.

11. Since the judgments were obtained by practicing fraud upon the court, we have no alternative but to set aside the said judgments of the Company Court and the persons concerned should be put to justice. We direct the Registrar to file complaints before the Chief Metropolitan Magistrate, Dhaka against the respondent No.1, (1) Sun Ascent Holdings Ltd, Unit # 801, 8th Floor, Pacific House, 20 Queens Road, Central Hong Kong, and Low Siok Foon, daughter of Low Peug Luue, Unit # 801, 8th Floor, Pacific House, 20 Queens Road, Central Hong Kong, (2) Eagleway Investment Ltd. Unit # 801, 8th Floor, Pacific House, 20 Queens Road, Central Hong Kong, Hong Kong SAR and Peter Y.C. Koh, son of late Roll ENG Sing, 8th Floor, Pacific House, 20 Queens Road, Ventral Hong Kong, and (3) Onbright Corporation Ltd, Unit # 801, 8th Floor, Pacific House, 20 Queens Road, Central Hong Kong and Steven Ngee Leng Koh, son of Koh Yew Chuan, Unit # 801, 8th Floor, Pacific House, 20 Queens Road, Central Hong Kong and others for using forged documents for securing judgments from the Company Court. Accordingly, we also direct the Registrar to certify and enclose the forged documents filed by these three fake companies along with the petitions for rectification of share register and the documents included with the additional paper books filed in this Division on 1st February, 2015, the judgments of the Company Court, the petitions under section 43 of the Companies Act, this judgment along with the complaint petitions. These petitions are disposed of with the above findings and directions.