

Brooke Bond India Ltd. Vs. U.B. Ltd. and Others

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Court : Mumbai

Decided On : Dec-05-1991

Reported in : 1992(2)BomCR429; [1994]79CompCas346(Bom)

Judge : B.N. Srikrishna, J.

Acts : [Companies Act, 1956](#) - Sections 1, 2, 293, 293(1), 372, 372(2) and 372(4);
Securities Contracts (Regulation) Act, 1956 - Sections 2, 13 and 16

Appeal No. : Notice of Motion No. Nil of 1991 in Suit Lodging No. 3874 of 1991

Appellant : Brooke Bond India Ltd.

Respondent : U.B. Ltd. and Others

Advocate for Def. : K.S., Adv.

Advocate for Pet/Ap. : J.I. Mehta, Adv.

Judgement :

B.N. Srikrishna, J.

1. By this notice of motion, the plaintiffs have sought an injunction to restrain the first defendants from in any manner disposing of, alienating, transferring, encumbering or selling 10,712 shares of the Company, known as 'Kissan Products Ltd.' and 3,600 equity shares of Merryweather Limited. There is also a prayer that

the first defendant company be directed to carry out certain acts as detailed in prayer (c), pending the hearing and final disposal of the suit. The suit is for specific performance of an agreement dated July 31, 1991, between the plaintiffs and the first defendants.

2. The first defendants hold 10,712 equity shares of the face value of Rs. 100 each, comprising 67% of the paid-up and subscribed capital of Kissan Products Ltd. (hereinafter referred to as 'the KPL') and 3,600 equity shares of the face value of Rs. 100 each, comprising 90% of the paid-up equity share capital of Merryweather Limited (hereinafter called 'the MW'). The balance of 400 equity shares, comprising 10% of the paid-up equity capital of MW is held by another Company, Herbertsons Ltd. (hereinafter called 'the HL'). HL is a subsidiary of the first defendants. HL owns and controls a food division comprising a plant situate at Bhandup in Bombay, where food products are manufactured. KPL also holds 10% of the share capital of another Company, Nepal Beverages and Food Products Ltd. (NBFPL) and is engaged in the manufacture and sale of food products. KPL and MW are owners of several trade marks, which have acquired wide reputation and are valuable.

3. By the agreement dated July 31, 1991, the first defendants agreed to sell their 'food division' to the plaintiffs. The sale was to be achieved in the following manner :

(i) The first defendants undertook to transfer to KPL 100% shareholding of MW held by them and their subsidiary, HL.

(ii) The first defendants also undertook to transfer to KPL the food division of HL, including the Bhandup plant as a going concern, free from all liens, charges and encumbrances.

(iii) After the aforesaid had been achieved, the first defendants agreed to sell to the plaintiffs, as incidental to the sale of the 'food business' of the first defendants, 10,712 equity shares of KPL of the face value of Rs. 100 each, fully paid up.

4. The said shares of KPL were agreed to be sold on spot delivery basis for a consideration of Rs. 6,85,00,000. The consideration amount was to be adjusted by increase or decrease in the net worth of KPL at the effective date over the net worth as on March 31, 1989. The effective date was defined as the date on which the transfer of the said shares to the plaintiffs would be effected.

5. The plaintiffs paid a sum of Rs. 3,42,50,000, prior to the execution of the agreement, as and by way of earnest money. The agreement acknowledges the receipt of such earnest money and also provides that one nominee of the plaintiffs would be inducted on the boards of KPL and MW, to facilitate understanding the business for eventual take over of the management. This has actually been done, and one nominee of the plaintiffs, Pranab Barua, has been appointed as additional director of KPL on August 19, 1991, and subsequently elected as a director at the annual general meeting held on September 26, 1991.

6. Detailed manner of ascertaining the net worth, as at the effective date, is provided for in the agreement. The agreement also provides for the complete list of the trade marks owned by KPL, MW and HL. It is specifically agreed by clause 8 that, pending the completion of the final details, the first defendants would ensure that such trade marks are kept alive, renewed and protected, and no rights or liens accrue in respect of the trade marks in favour of any third party.

7. Clause 9 of the agreement provides that, in the interregnum between the date of the agreement and the completion of the sale and purchase of the shares, the first defendants shall ensure and procure that PL, MW and Bhandup plant shall not do any of the several acts or deeds specified in sub-clauses (a) to (g), except with the previous written consent of the plaintiffs. Sub-clause (f), inter alia, refers to the passing of any resolution by the members in general meeting or making any alteration in the memorandum or articles of association. The whole purpose of clause 9 appears to be that, pending the finalisation of the transaction and actual sale of the shares contemplated by clause 1 of the agreement, the first defendants would ensure that the two other companies concerned, KPL and MW would do nothing which would change the control of the said companies or affect their value or net worth.

8. Clause 10 provides for transfer of management control of KPL only on completion of the transaction as a whole, viz. transfer of the shares after receipt of statutory approvals, wherever required. Simultaneously with the completion of the sale, transfer and delivery of their shares is also agreed. After transfer of the shares, the first defendants undertook to procure the resignation of the directors of KPL and MW, who represented or were the nominees of the first defendants, as the plaintiffs may require.

9. Clause 11(a) provides for payment of the balance of the total purchase price within the expiry of 30 days after all the approvals required for effecting the sale, transfer and delivery of the shares to the plaintiffs have been completed. The balance of the total purchase price was to be adjusted by the increase or decrease in the net worth of KPL, as detailed in clause 2.

10. Clause 11(b) provides that the first defendants shall arrange for KPL to transfer the 10% equity shares in NBFPL held by KPL to another Company nominated by the first defendants to ensure severance of KPL connection with NBFPL before the effective date or within such extended date as mutually agreed.

11. Clause 11(c) provides that, if the plaintiffs commit a default in complying with the provisions of clause 11(a) or of any of their other obligations under the agreement, the first defendants shall be entitled to forfeit the earnest money paid by the plaintiffs.

12. Clause 11(d) provides that, if the first defendants commit a default (other than due to non-receipt of Government approvals) in complying with the terms and conditions of the agreement, the earnest money paid by the plaintiffs should be refunded with interest at 16% per annum.

13. Clause 11(e) stipulates that, if the required statutory provisions for effecting ultimate transfer of the shares by the first defendants to the plaintiffs are denied, within a period of 9 months from the date of the agreement, the earnest money paid by the plaintiffs shall become due and refundable immediately without any interest accruing thereupon. If, however, the approvals/clearances from Government or other statutory bodies, as the case may be, are denied so as to

make the deal incapable of being put through, the earnest money shall become due and refundable immediately with simple interest calculated at 9% per annum from the date of expiry of the period of 9 months from the date of realisation and credit to the account of the first defendants of the said money.

14. As stated hereinbefore, after the signing of the said agreement and receipt of the earnest money, the first defendants partly performed their obligations and one Pranab Barua, an employee of the plaintiffs, was inducted on to the board of KPL, as a director. The first defendants also represented to the plaintiffs that they were arranging for necessary applications in Form 37-I Section 269UC of the Income-tax Act for securing the transfer of the Bhandup factory from HL to KPL. The plaintiffs were also informed by the first defendants that they had applied for and obtained necessary approval from the Central Government under the Monopolies and Restrictive Trade Practices Act for transfer of shares of MW to KPL, which approval was also got renewed. Meetings were held from time to time between the plaintiffs and the first defendants embodied in the agreement and to effectuate all things necessary to implement the agreement.

15. The fact of the impending transfer of the food division by the first defendants to the plaintiffs was reported widely in the newspapers and was also the subject of announcements made by the chairman of the first defendants in press statements.

16. On November 13, 1991, the first defendants addressed a letter to the plaintiffs, in which the agreement of July, 31, 1991, was confirmed and information was provided that the incremental net worth of KPL stood altered to Rs. 88,652,082 as at March 31, 1991, after incorporation of NBFPL shares. The first defendants formally confirmed that the purchase consideration would be Rs. 88,652,082 (which was subject to a further adjustment for the increase in net worth up to the transaction date) and that it stood apportioned as below :

Rs. For MFPL (sic) shares	16,00,000	Take over of Bhandup	6,30,00,000	For KPL
Shares	2,40,52,082	-----	8,86,52,082	-----

17. The said letter also enclosed a 'repositioned balance-sheet after KPL's take over of Bhandup Factory (from HL) and shares of NBFPL' along with certain

annexures. The said letter, read with its annexures, makes it clear as to what is the total consideration and the apportionment thereof.

18. Some time in the third week of November, 1991, the plaintiffs learnt that the first defendants were negotiating with another company, Nestle India Ltd., for transfer or sale of the food business and transfer of 10,712 shares of KPL to them as incidental thereto. This information appears to have been conveyed to the plaintiffs by Nestle India Ltd. In order to set their mind at rest, the plaintiffs addressed a letter dated November 21, 1991, to the managing director of Nestle India Ltd., pointing out the circumstances under which an agreement had been entered into between themselves and the first defendants for sale of the food division and the transfer of the shares of KPL as incidental thereto. In the said letter, the plaintiffs put Nestle India Ltd. on notice that any agreement for the proposed sale of shares of KPL by the first defendants would be in breach of contract, and that the plaintiffs intended to enforce their right, including the right of specific performance of the contract, if necessary, through recourse to the process of law.

19. The plaintiffs also addressed a letter dated November 27, 1991, to the first defendants, in which they put the facts on record as to their fulfilling their obligations under the agreement of July 31, 1991, and indicated that an amount of Rs. 2,57,50,000 had already been paid to the first defendants in part performance of the agreement and the balance of Rs. 85,00,000, as agreed, was to be held as deposit in terms of the first defendants' letter dated July 18, 1991, till necessary permissions were obtained from the concerned authorities. The plaintiffs pointed out that despite the agreement and the confirmation of the first defendants, as contained in their letter dated November, 13, 1991, the plaintiffs had learned that the first defendants had been carrying on negotiations with Nestle India Ltd., in breach of the agreement dated July 31, 1991, entered into with them. The plaintiffs called upon the first defendants to stop any such negotiation with any third party and to confirm that the first defendants will carry out their obligations under the agreement dated July 31, 1991. Unless such confirmation was received within 48 hours of the receipt to the notice, the plaintiffs threatened that they would be adopting appropriate legal proceedings to enforce the agreement at the first

defendants costs and consequences. The only reply elicited to this was the letter dated November 28, 1991, from the secretary to the vice president of the first defendants, which merely stated that the said executive was 'not available in the office' and was likely to attend the office in the next week. Upon his return to office, a reply was promised.

20. The plaintiffs filed the present suit on November 29, 1991, and have taken out a draft notice of motion for interim reliefs.

21. When the notice of motion as moved for ad interim reliefs in terms of the draft on December 2, 1991, the first defendants appeared and opposed ad interim reliefs being granted on several grounds. The first defendants also placed reliance on a letter dated December 2, 1991, from the first defendants, addressed to the plaintiffs, alleged to have been dispatched by registered post acknowledgment due, in which the defendants had taken up the stand that, on the basis of legal advice received, they were of the view that the agreement dated July 31, 1991, was illegal and void ab initio, and, therefore, there was no question of any breach of the same on their part. They also stated that though they were not liable to make any payment of interest for the amount of Rs. 2,57,50,000 held by them, they deemed it fit, fair and just that the plaintiffs should be compensated by payment of interest at the rate of 16% per annum, which was the highest rate which could possibly be claimed by the plaintiffs, even if there was a breach, which they denied. The said letter purportedly enclosed two cheques dated December 2, 1991, for the amount indicated therein. In court, a copy of the notice from the advocate of the first defendants to the advocates of the plaintiffs, dated December 2, 1991, enclosing the xerox copy of the first defendants' letter dated December 2, 1991, was also handed over to the plaintiffs' advocates.

22. The ad interim reliefs sought by the plaintiffs are strongly and vehemently opposed by Mr. Cooper, learned counsel appearing for the first defendants, on the following grounds :

(i) The agreement is illegal and unenforceable, as it is contrary to section 293(1)(a) of the Companies Act.

(ii) It is also illegal and unenforceable, as it is in breach of the provisions of section 372 of the Companies Act.

(iii) The contract itself indicates the consequences which would follow the first defendants' failure to perform their obligations. These were specifically enumerated in clause 11 of the agreement which did not include or reserve the right of specific performance. Hence, the parties contemplated that, in the event of a breach, even if there was one, all that would ensue was the refund of the deposited earnest money with appropriate interest, as indicated in clause 11, and no specific performance was contemplated.

(iv) The contract is vague and incapable of being enforced, as the consideration to be paid, the purchase price of shares agreed to be sold, was never finalised.

(v) Any specific performance of the agreement would amount to a direct interference in the management and internal affairs of KPL, HL and MW, which are neither parties to the agreement, nor to the suit.

(vi) There is not even an averment, much less any material, to show that, though not parties to the contract, KPL, HL, and MW had consented to or confirmed the transaction embodied in the agreement dated July 31, 1991.

(vii) The agreement is illegal, as it is contrary to the provisions of sections 13 and 16 of the Securities Contracts (Regulation) Act, 1956.

(viii) The suit for specific performance, at least at their stage, is untenable, as the conditions requisite for complying with section 372 of the Companies Act have not been fulfilled, and, therefore, the contract cannot be specifically enforced at this point of time, and, hence, no interim relief should be granted.

23. The first contention is that, under section 293(1)(a), the board of directors of the first defendants, a public company, is prohibited from selling, leasing or otherwise disposing of the whole, or substantially the whole of the undertaking of the company and, hence, the agreement was ultra vires power of the board of directors of the first defendants. It is contended that the plaint makes it clear that what is agreed to be sold is the 'food division' of the first defendants and hence,

what it agreed to be sold to the plaintiffs is a substantial part of the first defendants' undertaking. There is no consent obtained to this sale from the first defendant-company in general meeting. Hence, the agreement is clearly prohibited under section 293(1)(a), as what has been agreed to was completely beyond the pale of the powers of the board of directors of the first defendants.

24. Mr. Cooper placed reliance on *D. N. Banerji v. P. R. Mukherjee*, : [1953]4SCR302 and *Secretary, Madras Gymkhana Club Employees' Union v. Management of the Gymkhana Club*, : (1967)IILLJ720SC , in support of his contention that the expression 'undertaking' used in section 293(1)(a) is not necessarily limited to some property or asset but would extend to a distinct business activity. Reliance was also placed on the judgments of the Mysore High Court in *Yallamma Cotton, Woollen and Silk Mills Co. Ltd., In re : Bank of Maharashtra v. Official Liquidator*, Mysore High Court [1970] 40 Comp Cas 466 and *International Cotton Corporation (P) Ltd. v. Bank of Maharashtra* [1970] 40 Comp Cas 1154 in support of this contention.

25. Banerji's case, : [1953]4SCR302 , was one arising under the Industrial Disputes Act, and the Supreme Court was concerned therein with the interpretation to be given to the expression 'industry' as used in section 2(j) of the said Act. In connection with the interpretation to be put upon the said expression, and, while dealing with the expression 'undertaking', which is a part of the said statutory definition, the Supreme Court observed that the words 'undertaking' used in the first part of the definition, and 'industrial occupation or avocation' used in the second part obviously mean much more than what is ordinarily understood by trade or business, and that the definition was apparently intended to include within its scope what might not strictly be called a trade or business venture. In *Madras Gymkhana Club*, : (1967)IILLJ720SC , the Supreme Court was once again concerned with the connotation of the expression 'industry', as used in section 2(j) of the Industrial Disputes Act, and the Supreme Court commented upon the juxtaposition of the words 'business, trade, undertaking, manufacture or calling of employer' in the collocation of words in the definition. In my view, neither of these authorities is of help in deciding the question that has been argued. In any event, both the authorities were concerned with the meaning of the expression

'undertaking' as used in the definition of 'industry' under section 2(j) of the Industrial Disputes Act. It is a trite principle of interpretation of statute that the interpretation given to a word or expression used in one statute may be of no avail while interpreting the same expression in another statute, unless the two statutes are in pari materia. The provision of section 2(j) of the Industrial Disputes Act are not in pari materia with the provisions of section 293(1)(a) of the [Companies Act, 1956](#), nor are the objects of the two statutes identical or similar.

26. Although the two Mysore judgments relied upon by Mr. Cooper were both cases which arose under the Companies Act and, perhaps, could be said to be nearer home, these judgments are also not of much use in resolving the controversy that has been thrown up. In Yallamma Cotton's case [1970] 40 Comp Cas 466, a learned single judge of the Mysore High Court was concerned with a situation where the official liquidator of the company in liquidation had impugned the action of the creditor bank in taking possession of certain assets of the company in apparent exercise of its power as a mortgagee and charge-holder of the immovable and movable properties of the company. The mortgage had been created by the ex-director of the company. It was argued for the liquidator that the mortgage was beyond the powers of the board of directors under section 293(1)(b), and further that taking into possession the mortgaged property amounted to an act which was specifically prohibited by section 293(1)(a) as beyond the scope of the power of the board of directors, without ratification by the company in general meeting. In this context, the learned section (1) of section 293, and, as the said word was not defined in the Act, placing reliance upon the dictionary definition, the learned single judge observed (at page 485) :

'It is not in its real meaning anything which may be described as a tangible piece of property like land, machinery or the equivalent; it is in actual effect an activity of man which in commercial or business parlance means an activity engaged in with a view to earn profit. Property, movable or immovable, used in the course of or for the purpose of such business can more accurately be described as the tools of business or undertaking, i.e. things or articles which are necessarily to be used to keep the undertaking going or to assist the carrying on the activities leading to the earning of profits.'

27. The matter was carried in appeal and, in the decision reported at page 1154 of the same volume, the appeal Bench upheld the findings of the learned judge and, while doing so, it also took note of the fact that the expression 'undertaking' as used in section 293(1)(a) of the Companies Act has not been defined. The appeal court, therefore, fell back upon the meaning of the said word contained in dictionaries, and observed (at page 1157) :

'The business or undertaking of the company must be distinguished from the properties belonging to the company. In this case it is only the properties belonging to the company that have been deal with by the board of directors under the deeds of hypothecation and mortgage in favour of the bank. Hence, the learned company judge was right in holding that no part of the undertaking of the company was disposed on in favour of the bank.'

28. In my view, neither of these judgment is of much assistance. In the present case, it is the contention of Mr. Mehta, learned counsel appearing for the plaintiffs, that section 293(1)(a) is not attracted at all, even if one goes by the meaning given to the word 'undertaking' in the authorities cited. He contends that, in order to attract section 293(1)(a) to the agreement relied upon by the plaintiffs, it would have to be shown that, by the agreement, the board of directors of the first defendant-company had sold, leased or otherwise disposed of the whole or substantially the whole of the undertaking of the first defendant-company and that, too, without the consent of the first defendant-company in general meeting.

29. It is urged by learned counsel for the plaintiffs that the agreement is merely an agreement for sale of a specified number of shares of the first defendant. The agreement neither contemplates nor requires the first defendants to sell a substantial part of any of their undertakings. Prima facie, this contention appears to be correct. Notwithstanding the fact that, both in the agreement and in the plaint, there has been use of expression like sale of 'food business' of the seller to the purchase and there has been reference to the seller's 'food business' carried on through KPL and HL, prima facie, I am of the view that agreement merely contemplates sale of the controlling shares of KPL. The sale of shares, whatever be their number, even if it amounts to a transfer of the controlling interest of a

company, cannot be equated to the sale of any part of the 'undertaking' so as to come within the mischief of section 293(1)(a). The argument of the first defendants leave me, *prima facie*, unimpressed.

30. The next contention of Mr. Cooper is that the contract is incapable of being specifically performed, inasmuch as the consideration for the sale of the shares from the first defendants to the plaintiffs and for transfer to KPL of the food division of HL (i.e., the Bhandup plant) has been left unspecified. The contract is, therefore, vague and, hence, unenforceable, in the submission of learned counsel. In the first place, we are not really concerned with the transfer of the Bhandup plant to KPL as that is an arrangement contemplated between KPL and HL. So far as the sale of KPL's 100% shareholding of MW held by the first defendants and their subsidiary and HL is concerned, taking into consideration the confirmation made by the first defendants' letter dated November 13, 1991, and the annexure thereto, it is not possible to accept, at this stage at least, that the consideration for the various acts is vague. As a matter of fact, the first defendants themselves have indicated in the said letter the apportionment or the total consideration which is indicated at Rs. 88,652,082. In the face of this document, *prima facie*, the contention cannot be accepted.

31. The next argument urged for the first defendants is that KPL, HL and MW are neither parties to the agreement, nor to the present suit, and, therefore, the court cannot give any interim relief which would amount to compelling them to do any of the various acts contemplated under the instant agreement. In my view, this argument is misconceived. The plaintiffs are not seeking any direction against KPL, HL or MW. All that the plaintiffs contend in the plaint is that the first defendants, with open eyes and with presumable knowledge to their controlling power in the said three companies, entered into an agreement with the plaintiffs for sale of the specified number of shares and also for transfer of the food division (Bhandup plant) of KPL to HL. This was envisaged, so that it would result in the control of the food manufacturing plant ultimately landing into the hands of the plaintiffs. The plaintiffs are only seeking a direction against the first defendants that they be required to perform what had been undertaken as their obligation under the agreement and that the first defendants be restrained from doing anything that

is inconsistent with the terms of the agreement or likely to defeat the rights of the plaintiffs thereunder.

32. It is next contended that a reading of the contract would indicate that the parties have themselves contemplated that, in the even of breach of the contract, the consequence to ensue would only be that of refund of the earnest money with the stipulated interest on the happening of different contingencies. The terms of clause 11 are highlighted in this regard. It is also urged that there is nowhere a stipulation in the contract that the remedies provided under the contract in the even of a breach by the defendants are to be without prejudice to any other right that the plaintiffs may have in law. Ergo, the agreement was not intended to be specifically performed, is the submission of the plaintiffs. This argument also does not appeal. There is nothing in the contract which expressly precludes or bars the plaintiffs from seeking specific performance of the agreement. Merely because return of earnest money deposit and interest are provided for, it is not possible, at their stage, to come to the conclusion that the parties did not contemplate that the contract should not be specifically performed at the instance of either party. The fact that there is absence of a stipulation that the refund of deposit and interest was without prejudice to other rights makes no difference whatsoever, in my view, so long as there is no express stipulation that the contract was not intended to be specifically performed.

33. It is then argued that the contract is illegal, being in contravention of section 372 of the Companies Act, and, therefore, incapable of being enforced. It is submitted that section 372, as amended by the 1988 Act, was intended to put restriction upon intercorporate investment. Sub-section (1) of section 372 prohibits acquisition of shares by way of subscription, purchase or otherwise or for its benefit or in its account the shares of any other body corporate, except to the extent and except in accordance with the restriction and condition specific in the section. Sub-section (2) permits the board of directors of an investing company to invest in the shares of any other body corporate up to such percentage of its subscribed equity shares or the aggregate of the paid up equity and preference share capital of such other body corporate, whichever is less as may be described. The percentage prescribed for the purpose of sub-section (2) of section 372 is 25

per cent., as indicated in the notification issued by the Central Government. It is not disputed by the plaintiffs that the purchase of the number of shares, as specified in the agreement, would definitely exceed the percentage prescribed under sub-section (2). What is, however, urged for the plaintiffs is that the prohibition contemplated under sub-section (4) of section 372 does not apply at the stage of an agreement. If at all, it becomes applicable only at the time of investment in the shares of the other body corporate in excess of the percentage specified in sub-section (2) and the provisions thereto, unless an investment is sanctioned by a resolution of the investing company in general meeting and unless previously approved by the Central Government. That there is no existence a resolution of the plaintiffs at the general meeting to sanction the investment contemplated by the agreement and that such investment has not been approved by the Central Government previous to the signing of the agreement is not disputed. It is, however, urged that the section itself is inapplicable at this stage and that the plaintiffs are perfectly capable of complying with the section when the time for investment comes. The time for investment would arise after all the steps contemplated under the agreement are taken, and the period forgetting approval is envisaged as a period of 9 months. The plaintiffs urge that, till such period is over, it is not open to the defendants to assume that the plaintiffs would be incapable of complying with the two conditions requisite under sub-section (4) of section 372. It was, therefore, argued that there has been no contravention of section 372. Prima facie, I am inclined to accept the contention of the plaintiffs. What is prohibited by sub-section (4) is 'investment' and not 'agreement to invest'. Prima facie, the prohibition would arise at the time of investment, if the two conditions stipulated in sub-section (4), viz., resolution of the investing a company and previous approval of the Central Government, are not to obtained. Their absence at this point of time does not render the contract illegal, void or incapable of being enforced, as contended for the first defendants.

34. The next contention of the first defendants is that the contract, in order to be performed, depends on the volition of third parties like PL, HL and MW, and, therefore, it cannot be specifically performed. That this is an argument of desperation is obvious. It is inconceivable that seasoned businessmen would enter into contract for transfer of shares and for transfer of assets of companies in which

they hold controlling interest, unless they knew that they were capable of fulfilling the terms of the contract. The argument put forward is only a ruse to back out of the binding terms of the contract, for obvious reasons. In support of this cognition, reliance was placed by Mr. Cooper on a judgment of Division Bench of the Calcutta High Court in *East Indian Produce Ltd. v. Naresh Acharya Bhaduri* [1988] 64 Comp Cas 259. It is true that the prayer that was sought in the said case was somewhat similar and the court did observe that the relief sought could not be granted, as the performance of the contract depended on the volition of other parties. What is, however, ignored is the radical difference in the facts of the Calcutta case. There, an agreement was entered into by respondents Nos. 1 to 6 for purchase of 8,100 shares in a company, the total subscribed capital of which was 25,000 shares. Though it was represented that 8,100 would be controlling interest in the company, it was not so shown on the record. Out of the agreed shares also, it was stated that some of them were held by the nominees of the seller, some of whom were unknown and untraceable. A number of shares were themselves untraceable. In these circumstances, the Calcutta High Court took the view that granting any relief by way of enforcing a value contract would also depend for its performance on the volition of third parties. It is true that the court in the said case accepted the argument that, as the company itself was not to be a party to the agreement, any order as prayed for would prejudicially affect the statutory rights of the company, as it involved relief relating to the management, control and regulation of the assets or the affairs of the company at the interim stage. In my view, the judgment of the Calcutta High Court, with respect, is entirely distinguishable on facts. The facts were somewhat glaringly distinct. In the present case, the facts do show that the first defendants, without doubts, have controlling interest in the other three companies, viz., KPL, MW and HL. There is nothing on the record from which a doubt can arise in my mind as to the inability or incapacity of the first defendants to stand by and perform their obligations.

35. The last contention urged for the first defendants was that the contract was illegal, as it is hit by the provisions of the Securities Contracts (Regulation) Act, 1956. It is pointed out that the Central Government is empowered, under section 13 of the said Act, to apply the said section by a notification in the Official Gazette, and, upon such declaration, every contract in the State or area which is entered

into after the date of such notification, otherwise than between members of a recognised stock exchange, in such State or area or through or with such member, is rendered illegal. Similar are the provisions 16. It is not disputed that such notifications, both under sections 13 and 16, have been issued. Mr. Cooper contended that the only exception to the operation of section 13 would be a spot delivery contracts defined in clause (i) of section 2, but the agreement in question was not a spot delivery contract.

36. Section 2(i) defines a 'spot delivery contract' as meaning a contract which provides for the actual delivery of securities and the payment of a price therefor either on the same day as the date of the contract or on the next day. The contract with the plaintiffs, though styled as a spot delivery contract, contemplates payment of the purchase price within a period of 30 days of the completion of the transaction, and, therefore, is not a 'spot delivery contract' within the meaning of section 2(i), according to Mr. Cooper. This submission appears to be correct Mr. Mehta does not seriously dispute, at this stage at least, that the agreement may not amount to a spot delivery contract. He, therefore, does not seek the escape hatch provided by section 18. He contends that the provisions of the Act itself are not applicable to the present agreement, inasmuch as the agreement is for transfer of shares of a public limited company, the shares of which are not listed on the stock exchange.

37. Mr. Mehta emphasised the definition of 'securities' contained in clause (h) of section 2, and urged that the expression 'other marketable securities' used in the definition would supply colour to the construction to be put on the word 'shares' used therein. In his submission, the Act is intended to govern large transactions in the known market, viz., stock exchange. The detailed provisions of sections 13 and 16 shed considerable light on this aspect of the matter, as they invest the Central Government with the power of assessing the situation in the stock exchange and taking remedial action by way of the declarations contemplated therein. In his submission, the Act was not intended to apply to a private transaction between parties in respect of shares which were not 'marketable', meaning thereby not sold on the stock exchange. He relies upon the judgment of the learned single judge of this court (Mrs. Manohar J.) in *Norman J. Hamilton v.*

Umedbhai S. Patel [1979] 49 Comp Cas 1 and the judgment of the appeal court, confirming the said judgment, Dahiben Umedbhai Patel v. Norman J. Hamilton [1985] 57 Comp Cas 700.

38. Mr. Mehta submits that though the issue which the court was concerned with in both the said judgments was whether transfer of shares of a private limited company by a private treaty fell within the mischief of this Act, both the judgments of the learned single judge and the appellate court have approached the matter on principle and rejected the argument that the concept of 'marketability' and 'sale ability' must necessarily converge. It is urged that both the judgments have, after an analysis of the historical background in which the statute was enacted, taken the view that the Act was intended to govern transactions in the market, i.e., stock exchange, and not intended to apply to transfer of shares of a private limited company, not listed on the stock exchange, if such transfer was by a private treaty. Though Mr. Cooper, in fairness, himself pointed out the observations in these judgments and attempted to pre-empt the impression that the reading of the general observations might create, I am still left unconvinced by the argument of Mr. Cooper, at this prima facie stage at last. In my prima facie view, both judgments point out the object of the Act was to control operations on stock exchange. Both judgments have looked at the mischief in existence hitherto which was sought to be suppressed, the Gorwalla Committee's recommendations, the objects clause of the Bill, and made observations which, though made in connection with transactions by private treaty of shares of a private limited company, are equally applicable to similar transactions of shares of a public limited company unlisted on the stock exchange. In my view, at least at this prima facie stage, it is not possible to accede to the submission of Mr. Cooper that these judgments have no relevance or application to a transaction of transfer of shares of a public limited company, unlisted on the stock exchange, by private treaty. On the contrary, my prima facie view of these two judgments accords with the submission of Mr. Mehta. I am of the prima facie view that a transaction of shares of a public limited company, unlisted on the stock exchange, is not intended to be governed by this Act.

39. Mr. Cooper strongly relied on the judgment of the Division Bench of the Calcutta High Court in *East Indian Produce Ltd.*, [1988] 64 Comp Cas 259 on this issue also. The Calcutta High Court relied on an earlier judgment of the same High Court in *B. K. Holdings (P) Ltd. v. Prem Chand Jute Mills* [1985] 53 Comp Cas 367. At that stage, the judgment of Mrs. Manohar J. was cited before the learned single judge of the Calcutta High Court. He seemed to take the view that the decision of Mrs. Manohar J. in *Norman J. Hamilton v. Umedbhai S. Patel* [1979] 49 Comp Cas 1, must be confined to a situation of transfer of shares of a private limited company. So far as the decision of the Division Bench of the Calcutta High Court in *East Indian Produce Ltd.*, [1988] 64 Comp Cas 259 is concerned, it seems to follow the earlier judgment in *B. K. Holdings*. With great respect to the learned Judges of the Calcutta High Court, who decided the aforesaid two cases, even if the matter were not *res integra*, I would be inclined to disagree with their observations made therein. However, in the view I have taken of the judgments of the learned single judge and the appeal judgment of our court, I consider myself bound to take the view that the Securities Contracts (Regulation) Act, 1956, is not intended to regulate private transactions in shares of public limited companies, not listed on the stock exchange. This contention also, therefore, fails.

40. During the course of the arguments, two facts were brought to my notice. First, on November 29, 1991, a suit, being S.C. Suit No. 8927 of 1991, was filed by a shareholder of HL in the Bombay City Civil Court. Interestingly, the advocates representing the first defendant company were the advocates of HL therein, which does not seem to have opposed the motion for interim relief, except to state that it needed time to file a detailed affidavit-in-reply. Consequently, the learned judge of the Bombay City Civil Court took the view that it was necessary to maintain status quo as regards completion of sale of the Bhandup plant or handing over the same to KPL or the present plaintiffs. The motion, I am told, has been made returnable on December 19, 1991.

41. Second, a suit was filed in the Court of the City Civil Judge of Bangalore by two shareholders of the first defendant-company to restrain them from completing the sale and acting in pursuance thereof. A motion was also taken out for interim relief, on which no order has been passed.

42. Referring to these developments, Mr. Mehta strongly contended that these were shareholders who were put up by the first defendants and their subsidiary with a view to wriggle out of the binding agreement. The fact that, on the date the suit was filed by the plaintiffs (i.e. November 29, 1991), an order of injunction was sought from the Bombay City Civil Court by the shareholder of HL, and the Bangalore suit, do, prima facie, support, to some extent at least, the contention of Mr. Mehta that these were evasive tactics of the first defendants to wriggle out of a binding bargain, on second thoughts.

43. The suit is not frivolous and raises serious issues which require trial. Looking at the matter from all aspects, I am of the view that the plaintiffs have made out a prima facie case for grant of ad interim reliefs. The balance of convenience is in favour of granting the ad interim reliefs.

44. P.C. : Leave granted under rule 147/148 of the High Court of Judicature at Bombay (Original Side) Rules, 1980, to take out a notice of motion in terms of draft handed in.

45. Upon the plaintiffs undertaking, through counsel, to pay to the first defendants such sum by way of damages as the court may award as compensation for loss or prejudice sustained, in the event of the plaintiffs failing in the suit :-

(a) Ad interim order in terms of prayer (b) in the draft notice of motion.

(b) Pending the hearing and disposal of the notice of motion, the first defendants, by themselves or through their servants and agents, are restrained from doing anything or taking any steps which would be contrary to or inconsistent with the fulfillment of their obligations under the agreement dated July 31, 1991, and prejudicial to the rights of the plaintiffs thereunder. Leave to amend the plaint. The amendment to be carried out during the course of the day.

46. Motion made returnable on January 13, 1992.

47. Certified copy to be expedited.