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SooperKanoon Citation : sooperkanoon.com/814075

Court : Chennai

Decided On : Aug-10-2000

Reported in : [2002]108CompCas863(Mad)

Judge : A. Ramamurthi, J.

Acts : [Companies Act, 1956](#) - Sections 56; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 39, Rule 1

Appeal No. : Civil Suit No. 545 of 2000, Original Application No. 688 of 2000 and Application No. 3107 of 2000

Appellant : Kothari Orient Finance Ltd.

Respondent : Tele Data Informatics Ltd. and ors.

Disposition : Application allowed

Judgement :

A. Ramamurthi, J.

1. Original Application No. 688 of 2000 has been filed by the applicant/plaintiff under Order 14, rule 8 of Original Side Rules read with Order 39, Rules 1 and 2 of the Civil Procedure Code for interim injunction restraining respondents Nos. 1, 3 and 4 from proceeding with the issue of the equity shares to the public till the disposal of the suit. Application No. 3107 of 2000 has been filed by the first

respondent/first defendant to vacate the order of interim injunction passed in O. A. No. 688 of 2000, dated July 24, 2000.

2. The case in brief for the disposal of both the applications is as follows :

The plaintiff-company was incorporated in the year 1983, as a hire-purchase and leasing company for extending financial assistance to various industries and individuals. The first respondent/first defendant approached for financial assistance for acquiring some computers that they are carrying on business in software development for the Navy, Defence and Telecommunications Department. The plaintiff entered into a hire-purchase agreement with the first respondent and the contract commenced on March 31, 1995, and ended on March 31, 1998. The total facility granted was Rs. 34,54,735 inclusive of finance charges. The first respondent is expected to discharge the loan amount in 36 instalments, but they failed to comply with the terms of the contract in paying instalments and as on date the total amount outstanding is Rs. 30,67,443. In addition to the aforesaid contract, they also entered into another hire-purchase agreement for financial facility to the extent of Rs. 25,08,480 inclusive of finance charges. The first respondent did not pay any instalment ever since the facility was granted. There is an overall outstanding of Rs. 78,52,110 as on date. Despite legal notices and several attempts to collect the money, the first respondent has not discharged any of the dues till date. In the meantime it was brought to the notice of the petitioner, that the first respondent has issued a prospectus inviting the public to subscribe for 25,00,000 equity shares of Rs. 10 each at a premium of Rs. 15 per share aggregating to Rs. 625 lakhs. The first respondent has appointed respondents Nos. 3 and 4 as lead managers to the said issue of equity shares and the issue is slated to open on July 20, 2000. The first respondent is misleading the public by saying that there are no dues and defaults to the financial institutions and banks and there are no pending litigations.

3. The plaintiff had already filed a complaint under Section 190(I)(a)22 of the Criminal Procedure Code before the Second Metropolitan Magistrate, Egmore, against that first respondent-company and it is pending in M. P. No. 6209 of 1999. The criminal case has been filed against all the directors of the first respondent-

company for having cheated the petitioner-company. Neither the computers were made available for repossession nor the huge outstanding payable by them was settled. The plaintiff-company was struck in a difficult situation to pay back its depositors and also to various bank institutions which resulted in litigation faced by the petitioner-company in various forums. The first respondent is trying to induce the innocent public to subscribe for its equity shares posing themselves as financially sound and a bona fide corporate body.

4. The first respondent had a sister company, viz., B.P.N. Dyes and Chemicals Ltd. and they have also taken financial assistance to the tune of Rs. 54,40,000 inclusive of finance charges. This company had also defaulted in its payment and there was huge outstanding of Rs. 32,23,518 as on December 31, 1999. The plaintiff-company was unable to repay the loan secured from the Small Industries Development Bank of India and they have filed a case before the Debt Recovery Tribunal. The Tribunal by an order dated December 17, 1998, had issued garnishee orders to various borrowers of the petitioner-company including the first respondent-company and the sister concern. The plaintiff-company was advised to proceed against the first respondent-company under Section 434 of the Companies Act for winding up its operations. In the event of any order being passed by the court of law winding up the first respondent, the innocent public who subscribe for equity shares based on the misstatements appearing in the prospectus as genuine and bona fide will suffer and the money deposited towards purchase of equity shares will be totally lost. The first respondent-company ought to have mentioned the liability payable to the plaintiff-company in the prospectus so as to enable the public to take proper judgment before they decide on making any investments. As there is a deliberate suppression, the first respondent is duping the public for unlawful gains. The first respondent-company is supposed to mention about the current liabilities for the previous six months prior to the date of issue. The auditors are only watch-dogs and in connivance with the auditors, the first respondent-company had prepared the accounts in such a camouflaged way to influence the public illegally for subscribing to the public issue. It is mandatory for every prospectus to set out all the details stated in Parts I and II of Schedule II to the Companies Act. The first respondent had not divulged all such material information to the second respondent. The lead managers who had drafted and

designed the prospectus had lost sight of this crucial information on the current liabilities and they are expected to exercise due diligence to ensure that the first respondent discharges its responsibility adequately in this regard. The first respondent had obtained the second respondent's permission by suppression of all the facts and figures and there is every possibility of cheating the public detrimental to the claim of the plaintiff. The plaintiff-company has got a prima facie case and the balance of convenience is also in their favour. Hence, the application.

5. The first respondent filed a counter denying the various averments. The plaintiff has not come to the court with clean hands and they have suppressed the material facts that they are restrained from receiving any money from this respondent as well as B.P.N. Dyes and Chemicals among other companies by the order passed by the Debt Recovery Tribunal. There is absolutely no misleading statement in the prospectus. It is a matter of fact that there are no dues and defaults to the financial institutions and banks. Only after receiving the notice from the Debt Recovery Tribunal, it was brought to light that on the assets of various companies, the plaintiff has raised huge loans in the order of several crores of rupees. No amount is due and payable to the plaintiff either from this respondent or from its group company. They never informed the Tribunal that they are prepared to pay back an amount of Rs. 32,23,518 to get the title deeds released. The title deeds of the property are in the possession of the plaintiff-company. The plaintiff has been taking various steps only to harass this respondent and attempt to blackmail at the time of public issue. The alleged criminal case as well as notice under Section 434 of the Companies Act are not relevant. In fact, the plaintiff-company has not paid to various depositors and they are acting against the public interest. The amount advanced under hire-purchase agreement dated March 31, 1995, is only Rs. 25 lakhs odd which carries interest at 14 per cent. flat rate for three years. As per the statement of account, they are liable to pay only Rs. 12,80,587 and the Debt Recovery Tribunal passed an order in I. A. No. 992 of 1998 restraining this respondent from making any payment.

6. The plaintiff suggested to put up a new proposal for Rs. 18,72,000 and obtained 24 post-dated cheques for payment of monthly instalments. No consideration

passed under the alleged agreement and, as such, they cannot claim any amount. The alleged second hire-purchase agreement is non est in law since no consideration has been passed. They have also issued reply notice to the legal notice issued by the plaintiff. On February 12, 2000, the deputy manager of the plaintiff-company one Mr. Ashok brought the inspector of police and his team to the residence of K. Padmanabhan who is a director of this respondent without any notice or search warrant and threatened the members. In the prospectus of the said public issue, they have clearly mentioned their liability in pages 102 and 104 that they have secured loans as on April 30, 2000, of Rs. 68.78 lakhs. They have not withdrawn the permission already granted for the said public issue. This respondent published the opening of public issue on July 20, 2000, in Economic Times and in the publication itself a specific note was put up regarding the liability towards the plaintiff. They also published closure notice of the public issue on July 24, 2000, in The Hindu with the very same specific note regarding the liability. There are no pending litigation against them. This respondent was not served with any criminal case notice for any alleged misappropriation. The computers purchased under the hire-purchase agreement are very much available with them. Their company is a running company doing computer software business. They have followed all procedural formalities through their lead managers. The public have already subscribed and the public issue is oversubscribed.

7. There is only one valid hire-purchase agreement between the plaintiff and this respondent and they have already paid 13 instalments and the balance amount payable is Rs. 22,71,020 less security deposit already paid. Similarly B.P.N. Dyes and Chemicals, the sister concern also entered into hire-purchase agreement with the plaintiff and they have also paid 25 instalments and the balance amount payable is only Rs. 26,05,900. The plaintiff-company has syphoned off the public funds and cheated their depositors. The plaintiff has not filed any suit for recovery of money and they have no cause of action for winding up proceedings also. There is bona fide dispute between the parties. The plaintiff cannot represent the public. The public also will invest the shares only after making thorough enquiry. The plaintiff is using this suit as a lever to coerce them to come for the terms. It is not a representative suit. There is no authorisation for Thiru Mohandoss to file vakalat and affidavit on behalf of the plaintiff and no board resolution is also filed. The lead

managers have correctly put the liability of this respondent in the prospectus. Now the shares have been fully subscribed and they have to issue the share certificates within 10 days. Unless the ex parte order of injunction is vacated, the public will suffer and it will result in multiplicity of proceedings also. The plaintiff can always recover the amounts legitimately due to them.

8. The plaintiff filed a reply affidavit denying the various averments made in the counter affidavit filed by the first respondent.

9. Heard the learned counsel of both the sides.

10. The points that arise for consideration are :

(1) Whether the plaintiff has got prima facie case and the balance of convenience is in their favour ?

(2) Whether the interim injunction already granted in O. A. No. 688 of 2000 is liable to be vacated ?

(3) To what relief ?

11. Points : Kothari Orient Finance Ltd. is the applicant/plaintiff in the suit. They filed O. A. No. 688 of 2000 under Order 14, rule 8 of original side rules read with Order 39, Rule 1 of the Civil Procedure Code, 1908, to grant interim injunction restraining respondents Nos. 1, 3 and 4 from proceeding with the issue of equity shares to the public and obtained an interim injunction by the order dated July 24, 2000. The first respondent filed Application No. 3107 of 2000 to vacate the order of interim injunction. Learned counsel for the plaintiff contended that they entered into two hire-purchase agreements with the first respondent and there is an outstanding of Rs. 78,52,110. Despite legal notice and demands, the first respondent has not discharged the dues ; but on the other hand, the first respondent had issued prospectus inviting public to subscribe 25 lakh equity shares of Rs. 10 each at a premium of Rs. 15 per share aggregating to Rs. 625 lakhs. The public issue is slated to open on July 20, 2000, and coming to close on July 24, 2000. The first respondent is misleading the public by saying that there are no dues and defaults to the financial institutions and banks and there are no

pending litigations. Learned counsel further stated that in the prospectus issued by the first respondent-company, the particulars of the loans and the pendency of cases have not been furnished and as a result of which, there is every possibility to mislead the public and, as such, the first respondent should be restrained from issuing the equity shares.

12. Learned counsel for the plaintiff further stated that already a complaint has been filed under Section 190(l)(a) of the Criminal Procedure Code against the first respondent before the Second Metropolitan Magistrate Court, Egmore, and it is pending in M. P. No. 6209 of 1999. This complaint has been laid against all the directors of the first respondent-company for cheating and the finance was given for the purpose of securing computers and they are also not available in the company. The first respondent is not in a position to repay the debts to the plaintiff as well as other companies and now the first respondent is trying to induce the innocent public to subscribe the equity shares posing themselves as a financially sound and a bona fide corporate body. Similarly the sister concern of the first respondent-company also has entered into hire-purchase agreement with the plaintiff-company and they are also liable to pay nearly Rs. 32 lakhs odd. It is the duty of the first respondent-company to mention the liability payable to the plaintiff-company in the prospectus so as to enable the public to take proper judgment before investing the money. Now the first respondent is duping the public for unlawful gain, it is mandatory that in every prospectus to give the details in Parts I and II of Schedule II to the Companies Act and the first respondent had not divulged all the material information and obtained the permission from the second respondent also.

13. Per contra, learned senior counsel for the first respondent-company stated that the suit as well as application filed by the plaintiff are not maintainable under law. The plaintiff is neither a partner nor a shareholder in the first respondent-company. At best, the plaintiff is only a creditor entitled to claim some amount and the plaintiff has no locus standi to file an application to prevent the issue of public share by the first respondent-company. Although the plaintiff stated that the parties have entered into two hire-purchase agreements, only one is admitted by the first respondent and there is also dispute with reference to the quantum of amount

payable. It is also admitted that there is an order passed by the Debt Recovery Tribunal restraining the first respondent and the sister concern as well as other companies from paying any money to the plaintiff-company. This being the state of affairs, admittedly the plaintiff-company has not come forward with any suit claiming the amount legally due and payable by the first respondent. Now the first respondent had issued a prospectus relating to issue of shares opening on July 20, 2000, and closing on July 24, 2000, and taking advantage of this, the plaintiff has come forward with the suit and application so that the company will come to terms. The plaintiff alone has to establish that they have got a prima facie case and the balance of convenience is in their favour. The records produced on the side of the first respondent and the materials now available clearly indicate that the plaintiff has no prima facie case and the balance of convenience is not in their favour.

14. The main contention put forward by the plaintiff is that the particulars of the liability have not been disclosed in the prospectus and it is further stated that particulars of the pending cases have-also not been furnished. Although the plaintiff stated that a complaint was given against the first respondent-company, no document has been filed to show that the case was taken on file and any summons or warrant was issued to the directors of the first respondent-company. In fact, the calendar case has not been furnished by the plaintiff and in the absence of any such particulars, the conclusion that can be drawn is that no criminal case is pending against the first respondent and for obvious reasons the plaintiff has given a picture as if some criminal case is pending against the first respondent. Under the circumstance, the non-disclosure of any criminal case in the prospectus is fully justified. It is quite possible that the plaintiff might have filed a complaint which might have been referred to the police for investigation under Section 156(3) of the Code of Criminal Procedure and this does not mean that a criminal case is pending against the parties.

15. The prospectus issued by the first respondent has been filed and a perusal of the same would clearly demonstrate that the allegations now levelled by the plaintiff are without basis and this application has been filed only to harass the first respondent-company. In page 102 of the prospectus, the assets and liabilities are

mentioned. So far as the secured loans are concerned, as on April 30, 2000, it is shown as Rs. 68.78 lakhs. Similarly in page 104 also, it is stated that secured loan from others represents loan from hire-purchase finance companies which are secured by assets, acquired out of their assistance. The long term debts is given as Rs. 68.78 lakhs. Even in the first page of the prospectus under the caption 'GENERAL RISKS' and 'ISSUER'S ABSOLUTE RESPONSIBILITY', it is stated as follows and it is necessary to extract the same for appreciating the contentions of the parties.

16. General risks : Investment in equity and equity-related securities involve a degree of risk and investors should not invest any funds in this offer unless they can afford to take the risk of losing their investment. Investors are advised to read the risk factors carefully before taking an investment decision in this offering. For taking an investment decision investors must rely on their own examination of the issuer and the offer including the risks involved. The securities have not been recommended or approved by the Securities and Exchange Board of India nor does the Securities and Exchange Board of India guarantee the accuracy or adequacy of this document.

17. Issuer's absolute responsibility : The issuer, having made all reasonable inquiries, accepts responsibility for, and confirms that this offer document contains all information with regard to the issuer and the issue, which is material in the context of the issue, that the information contained in this offer document is true and correct in all material respects and is not misleading in any material respect, that the opinions and intentions expressed herein are honestly held and that there are no other facts, the omission of which makes this document as a whole or any of such information or the expression of any such opinions or intentions misleading in any material respect.

18. It is, therefore, clear that even in the first page of the prospectus, the investors must rely on their own examination of the issuer and the necessary particulars are clearly furnished and the apprehension now put forward by the plaintiff is nothing but a fertile imagination.

19. The second respondent is the Securities and Exchange Board of India (for briefly called as SEBI) has given necessary permission to the first respondent for the public issue of shares. It appears that the plaintiff had already sent a complaint to SEBI, but no order has been passed to withdraw the permission granted. In fact, on July 20, 2000, itself publication was given by the first respondent, wherein the investors were advised to refer to the para, on basis for issue price before making an investment in this issue. In the note, it is stated as follows :

'(1) The company along with its group company had obtained hire-purchase assistance from Kothari Orient Finance Ltd. (KOFL) during 1995. The repayment of instalments to KOFL was restrained by the Debt Recovery Tribunal, Chennai (DRT) vide its order dated December 17, 1998, on a petition filed by SIDBI and KOFL and as petitioned to DRT. Rs. 32.23 lakhs is included under secured loans in the financial statements. The company has taken adequate steps to resolve the matter through the DRT, Chennai. (2) A Miscellaneous Petition No. 6209 of 1999 for repossession of articles has also been filed by KOFL before the Second Metropolitan Magistrate Court at Chennai, however the company has not received any notice so far and does not envisage any liability for the same'.

20. Subsequently, in The Hindu edition on July 24, 2000, also, a similar publication has been given wherein the hire-purchase liability of the plaintiff-company is also mentioned. But learned counsel for the plaintiff contended that the total liability amount has not been mentioned. I am unable to agree with his contention. When there is a dispute between the parties relating to the quantum of amount, the plaintiff cannot expect that whatever amount demanded by it has to be incorporated in the publication. The necessary particulars as contemplated under Section 56 of the Companies Act have been furnished and apart from that, the risk factors have also been disclosed in the prospectus. As adverted to, the plaintiff has now come forward with a case in the nature of a public interest litigation. The remedy of the plaintiff, who is a creditor, is only to file a suit on payment of court fee to claim the amount legally due and payable. The plaintiff has no right whatsoever to file an application of this type and prevent the issue of shares by a company to compel the first respondent to come to terms. Order 39, rule 1 of the Civil Procedure Code cannot be used as a lever for the collection of money.

Considering the fact that already the prospectus contains the necessary particulars, I am of the view that the plaintiff has no prima facie case. Similarly the balance of convenience is also not in favour of the plaintiff. Now the shares have been issued and it is stated that they have been oversubscribed. According to the prospectus, share certificates ought to be issued in a period of ten days from the date of closure and in view of the order of interim injunction, the first respondent-company is not in a position to issue the share certificates and by this, there is every possibility that the persons who had purchased the shares may resort to court and by this, there will be multiplicity of proceedings. If that is taken into consideration, I am of the view that the balance of convenience is also in favour of the first respondent-company.

21. Learned senior counsel for the first respondent contended that there is no board resolution authorising the person to file a suit or application of this type. Learned senior counsel in support of his contention, relied on a decision reported in *Swadharma Swarajya Sangha v. Indian Commerce and Industries Co. Pvt. Ltd.* : (1998)1MLJ724 wherein it was stated that the suit having been filed without there being any resolution and as the corporation can only file a suit if there is a resolution for the same, the suit was not filed by an authorised person under Order 29, Rule 1 of the Code of Civil Procedure. The suit as such is not maintainable. However, this is a matter that can be considered at the time of trial for the purpose of this application, it is evidently clear that the plaintiff has rushed up to this court only to harass the first respondent and prevent it from public issue of shares, so that this company also will land in trouble. Under the circumstance, I am of the view that this is a frivolous application filed by the plaintiff only for the purpose of using the same as a lever to collect the money, since already the Debt Recovery Tribunal has passed an order restraining the first respondent from paying any money to the plaintiff. The plaintiff is not prepared to pay sufficient court fee and file a suit, but has adopted a short cut method as a test case and, as such, I am of the view that the plaintiff is not entitled to any indulgence from this court.

22. For the reasons stated above, Original Application No. 688 of 2000 is dismissed. Interim injunction already granted is vacated. Consequently, Application No. 3107 of 2000 is allowed. The first respondent is also entitled to

costs of Rs. 5,000.

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