

809

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**Present:**

Mr. Justice Nasir-ul-Mulk, CJ  
Mr. Justice Gulzar Ahmed  
Mr. Justice Dost Muhammad Khan

**CIVIL APPEAL NO. 506 OF 2011**

[On appeal against the Judgment dated  
07.05.2004 passed by the High Court of Sindh,  
Karachi, in HCA No.59 of 2003]

English Biscuits Manufacturers Private Limited **Appellant(s)**  
(**EBM**), Korangi Industrial Area, Karachi, & 6  
others.

**VERSUS**

Associated Biscuits International Limited (**ABIL**) **Respondent(s)**  
through its Attorney, Farrukh H. Junaidy, 1-E-9-4  
Nazimabad, Karachi.

For Appellant No.1 : Mr. Anwar Mansoor Khan, Sr. ASC

For Appellants No.2,4-5 : Mr. Aziz A. Munshi, Sr. ASC  
Mr. Hamid Khan, Sr. ASC

For Appellants No.3,6-7 : Mr. Shaiq Usmani, Sr. ASC

For the Respondent(s) : Mr. Munir A. Malik, Sr. ASC  
Mr. Zahid F.Ebrahim, ASC

Date of Hearing : 11.11.2014

**JUDGMENT**

**GULZAR AHMED, J.**— This appeal, with leave of the Court, has been filed against the judgment dated 07.05.2004 of a learned Division Bench of the High Court of Sindh at Karachi, passed in High Court Appeal No.59 of 2003. In the High Court Appeal, the appellants have challenged the judgment dated

10.02.2003 of a learned Single Judge (Company Judge) of the High Court of Sindh at Karachi.

2. English Biscuits Manufacturers (**Appellant No.1**) is a Private Limited Company incorporated under the Companies Ordinance, 1984, having its registered office at Karachi, and is engaged in the business of manufacturing and selling biscuits and other confectionery products. Appellant No.2 is the Managing Director of Appellant No.1 while Appellants No.3 to 7 are the Directors and also 60% shareholders of Appellant No.1 while the Respondent-Associated Biscuits International Limited (**ABIL**) is a Company organized under the laws of United Kingdom has 40% shareholding in Appellant No.1. Except for Appellant No.7, the Board of Appellant No.1 is comprised of the family members of Appellants No.2 and 3. M/s Coronet Foods (Pvt.) Limited (**CFL**) is a Company incorporated under the Companies Ordinance, 1984 (**the Ordinance**) having its registered office at Karachi, is a subsidiary of Appellant No.1. Appellant No.1 holds 51% shareholding in CFL while Appellants No.2, 3, 5, 6 & 7 collectively hold remaining 49% shares in CFL. Appellant No.2 is the Managing Director while Appellant No.3 is the Director of CFL. There seems to be a dispute going on between Appellant No.1 and the Respondent on the very shareholding of the Respondent in Appellant No.1 on the basis that Danone Asia (Pvt) Limited, which is subsidiary of Danone Group, France, has acquired shareholding of ABIL and at the same time has incorporated in Pakistan a Company by the

name of Continental Biscuits Limited, which is in competition with Appellant No.1 and thus there being a Conflict of Interest has sought forfeiture of shareholding of the Respondent. These aspects of the matter are elaborately mentioned in the minutes of 33<sup>rd</sup> AGM of the Respondent dated 26.12.1998. In the minutes of the Board of Directors Meeting dated 30.08.1999, Appellant No.1 decided as follows:-

"Purchase of 49% Shares of CFL  
From Individual Share-Holders:

*The Board in principle considered to acquire 49% shares from individual share-holders of CFL at a value to be determined/settled with the present Share-holders based on valuation of CFL's shares as may be determined by the Auditors of CFL M/s A.F. Ferguson & Co.- Chartered Accountants (Price Water House Coopers) and M/s Sidat Hyder Morshed Associates (Pvt) Ltd (Arthur Andersen) on behalf of the proposed buyer (EBML). The move to make CFL a wholly owned subsidiary of EBML is to achieve the objectives of creating manufacturing and marketing synergies through horizontal integration of the two companies. The Board also considered the funding of the proposed acquisition of 49.0% Shares in CFL by raising paid-up capital of EBM. The Board authorised Mr. Iqbal Ali Muhammad to approach the individual Share-holders of CFL (Subsidiary) for negotiating the proposed sale of share."*

In the minutes 34<sup>th</sup> AGM held on 18.10.1999 of Appellant No.1, Respondent's observation was incorporated relevant part of which is as follows:-

*"Mr. Zahid F. Ebrahim also conveyed ABIL's point of view on acquiring additional 49.0% Shares in CFL by EBML as under:*

*"We agree in principle with this Plan in so far as it would put to an end the **"Conflict of Interest"** situation. It is imperative that the valuation be made on a transparent basis taking into account recurring profit and relationship between EBM and CFL. Therefore, we request for the details of terms of reference given to A.F.*



*Ferguson & Co. and Seedat Hyder Murshed Associates (Pvt) Ltd. We would also request for the clarification as to final valuation based on two valuation of different Auditors."*

On receipt of minutes of 34<sup>th</sup> AGM, the Respondent through its letter dated 02.11.1999 reiterated that there has been no response to its request for providing copy of the detail terms of reference provided to A.F. Ferguson & Co. and Sidat Hyder Morshed Associates and the clarification as to the final valuation based on the reports of two different Auditors pertaining to the valuation of CFL shares. Through letter dated 11.11.1999, Appellant No.1 provided to the Respondent terms of reference and as regards the clarification of the valuation of CFL shares, it was stated that on receipt of reports from the Auditors the final value shall be determined by the Board. The report of the Auditors on valuation of the shares of CFL was received by the Appellant No.1 pursuant to which the Board of Directors of Appellant No.1 on 22.12.1999 decided to purchase 49% shares of CFL and fixed its value at Rs.20/- per share and to finance such purchase resolved to increase the paid-up capital of Appellant No.1 from Rs.9.80 million to Rs.30.00 million through Right Issue of 2,020,000/- shares of Rs.10/- each at a premium of Rs.10/- per share with further resolution that the new shares shall be offered in proportionate to the number of existing shares held by the members. Through letter dated 14.01.2000 Appellant No.1 offered Respondent to subscribe to the Right Issue to the extent of its entitlement i.e. 808,000/- shares by making payment by 26.01.2000, failing

which the offer shall be deemed to have been declined and the Board shall be entitled to dispose of the same in such manner as it thinks beneficial to the Company. The Respondent in this respect was asked to deposit an amount of Rs.16,160,000/- in the current account of the Bank mentioned in the letter.

3. The Respondent being aggrieved and feeling oppressed by the decision of the Board of Directors dated 22.12.1999 and the letter dated 14.01.2000, filed a petition under Section 290 of the Companies Ordinance, 1984 in the company jurisdiction of the High Court of Sindh, Karachi, on 25.01.2000 with an application seeking interim relief. On 26.01.2000, the Court directed the parties to maintain status-quo.

4. The application for interim relief was disposed of vide order dated 15.3.2000 with directions as follows:

- "a) *that the respondents are to supply to the petitioner the entire material/record including the copies of reports of Iqbal Nanji and Company to the petitioner within a period of seven days.*
- b) *thereafter the respondent No. 1 to approach the two auditors namely M/s. A.F.Ferguson & Co. Chartered Accountant and Sidat Hyder Murshed Associates (Pvt) Ltd. for once again carry out the exercise to determine the value of shares of CFL by associating all parties including the petitioner after due notice and submit report to the company within a reasonable time; the auditors will be at liberty to call for any other material or document/report/evidence for reaching the right conclusion. The petitioners to bear the cost of auditors for the exercise to be carried out by them herein above.*
- c) *the respondent company if wishes to increase share capital is directed to call the general body meeting of their share*

*holders as provided under section 92(3) of Companies Ordinance, 1984.*

- d) *order dated 26.1.2009 will remain in force till compliance of the above directions."*

Against this order of learned Company Judge, the Appellant filed High Court Appeal No. 163 of 2000 and on 05.10.2001 this appeal was disposed of by consent, by omitting the following lines from the impugned order:

*"....but they have to invoke the provisions of section 92(3) ibid for its final approval..."*

with observation that the matter being that of increase in paid-up capital, it is covered under section 86 of the Companies Ordinance, 1984.

5. Ultimately, the main petition under section 290 of the Companies Ordinance was heard and decided by the learned Company Judge by judgment dated 10.2.2003. In the said judgment, the learned Company Judge, to some extent, dealt with the history and relationship between the Appellant and the respondent; the Court's jurisdiction to pass the order on petition under section 290 of the Companies Ordinance and elaborately dealt with the contentions between the parties regarding oppression and after considering bulk of case law on this point, disposed of the petition with the following directions:

*"1.(a) The respondents are directed to restore ante 15.3.2000 position by reversing the process of acquisition of CFL shares and issuance of rights shares of EBM forthwith.*



(b) The respondents 2 to 7 have rendered themselves liable for attachment of their properties, however, the end of justice would be met if they are fined in the sum of Rs. 10,000/- each, same is imposed. The amount of fine be deposited within a week with Nazir of this Court, failing which their property (share holdings in EBM) stand attached.

2.(a) The decision of Board of Directors dated 22.1.1999 with regard to further issue of shares to finance the acquisition CFL shares and all actions in pursuance thereof are declared illegal and of no legal effect.

(b) The valuation of CLF shares be done a fresh through independent valuator/auditor to be engaged at the expenses of EBM.

(c) On the basis of valuation fixed by auditor, the shares of CFL be purchased from the finance by issuance of right shares.

(d) The petitioner be offered to purchase right share in terms of section 86, if declined or not subscribed, then be sold to other shareholders.

3. The official Assignee is appointed Commissioner for implementation of above order with power to appoint independent auditor and to ensure that all the materials, records, reports and assistance required by auditor in the said process, are provided to auditors by the respondents."

6. The Appellant being aggrieved by the said judgment filed High Court Appeal No. 59 of 2003 alongwith an application for interim relief. In the application for interim relief, the only prayer was that to suspend the operation of operative part of the judgment to the extent that Para No. 1-(a) may not be acted upon till process of revaluation of the shares is completed as per Para No. 2 of the operative part. On 13.5.2003, an exparte interim order was passed on this interim application, the operative part of which reads as follows:-

"We would like to make it clear that there is no restraint on the Official Assignee in complying with the order passed by the learned Single

*Judge without prejudice to the rights of the parties to this appeal."*

5/6

7. A further order on this interim application was passed on 26.9.2003 in the presence of counsel for Respondent, by which the operation of judgment was suspended to the extent prayed in the application. On 29.4.2004, the Court ordered the Official Assignee to be present alongwith his report and record of correspondence entered by him and by the Auditors relating to valuation of shares. The High Court Appeal was heard and vide impugned judgment dated 07.5.2004 was disposed of by maintaining the impugned order subject to the following modifications:

- "(i) That only the decision of the Board of Directors of the appellant No. 1 dated 22.12.1999 to purchase the shares of the appellants No. 2 to 7 at a particular rate and not the earlier decision to purchase such shares and finance the purchase through issuance of right shares is declared illegal.
- (ii) The Official Assignee will cause a fresh valuation by appointing suitably qualified and independent auditors/accountants to carry out the valuation of shares of CFL and determine fair market value without interference from any of the parties of this appeal. In case any information or document is required by the official assignee or accountants/auditors from the appellant No. 1, or from any other source proper notice would be given to the parties to enable them to examine the information furnish and object to its authenticity/correctness. The valuation may be carried out as expeditiously as possible preferably within three months.
- (iii) The respondent will deposit 75% (15/20) of the amount claimed by the appellant No. 1 for financing right shares with the Nazir of the Court within thirty (30) days from the date of this order.



(iv) *That the sentence of fine imposed upon the appellants No. 2 to 7 is hereby set-aside."*

8/7

8. We have heard lengthy arguments of learned counsel for the parties and have gone through the record of the case.

9. Mr. Shaiq Usmany, learned Senior ASC appearing for the Appellant Nos. 3, 6 & 7, in the first instance, narrated elaborate facts and point of dispute between the parties on the conflict of interest. He contended that Respondents have consented to the decision of acquiring of 49% shares of CFL by the Appellant No. 1 on fair value and Board of Directors of Appellant No. 1 in its meeting dated 22.12.1999 on the basis of report of Auditors decided to buy the CFL shares of the face value of Rs. 10 with premium of Rs.10 i.e. Rs. 20 per share and such was done after complying all legal formalities under the Companies Ordinance. He contended that as decided by the AGM of Appellant No. 1, these 49% shares of CFL were to be purchased by increase in paid-up capital of Appellant No. 1 by issue of right shares etc. and that pursuant to Board's Resolution dated 22.12.1999, through letter dated 14.1.2000, the Respondent was offered to purchase right shares proportionate to its shareholding in the Appellant No. 1 within twelve days, which offer was not accepted by the Respondent and on making of such default, the Board of Directors of Appellant No. 1 competently decided to dispose of such right shares. He contended that although petition was filed by the

Respondent in which order of status-quo was passed but the dispute was with regard to valuation of shares of CFL and there was no dispute on valuation of right shares of the Appellant No. 1. He contended that Respondent has no right to the right shares which stand disposed of by the Board of Directors of Appellant No. 1.

10 Mr. Aziz A. Munshi, learned Senior ASC appearing for Appellant Nos. 2, 4 & 5 mainly dilated upon the competency of Board of Directors to issue right shares with their valuation and further contended that Respondent having failed to subscribe to the right shares, as offered to it, demonstrate that Respondent has no desire to make further investment and though the shares having been sold and transferred and paid in full the property in goods also stood transferred in terms of section 19 of Sales of Goods Act and its reversal now will be a harsh decision. He has relied upon case law submitted in as many as four binded books.

11. Mr. Hamid Khan, learned Senior ASC, who appeared with Mr. Aziz A. Munshi adopted his arguments.

12. Mr. Anwar Mansoor Khan, learned Senior ASC appearing for Appellant No. 1 contended that dispute was with regard to valuation of CFL shares and not of the right shares of Appellant No. 1, which were legally issued. He contended that all requisite inspection was allowed to Respondent except those which were not permitted by the law. He contended that the

82

Appellant No. 1 was mainly aggrieved by the impugned judgment where it has maintained the judgment of learned Company Judge.

13. Mr. Muneer A. Malik, learned Senior ASC appearing alongwith Mr. Zahid F. Ebrahim, ASC for Respondent has referred to various documents to contend that neither any material or document was supplied rather there was a deliberate attempt on the part of management of Appellant No. 1 to suppress the material documents and three vital agreements from being supplied to the Respondent and as per valuation report of M. Yousuf Adil Saleem & Co. dated 13.1.2004, made in terms of the judgment of learned Company Judge, the value of CFL shares was worked out at Rs. 15.55 per share, which apparently, shows that share value of CFL was not fairly decided by the Board of Directors in its meeting dated 22.12.1999, which directly effected the value of right shares of Appellant No. 1. He further contended that by the impugned judgment, the learned Division Bench of the High Court has maintained the judgment of learned Company Judge and upheld the factum of oppression of the Respondent and has ordered the Respondent to deposit the value of right shares of Appellant No. 1 at the rate of Rs. 15 per share, which the Appellant has deposited and such amount stands invested.

14. So far the contention regarding conflict of interest of Respondent and of Appellant No. 1 on the basis that the



82x

Danone Group, France has acquired the major shareholding of Respondent, such question was not in dispute between the parties in any of forum below nor is it germane before us.

15. The argument that has been pressed before us from the side of the Appellants is that the Respondent has not raised any dispute as regards the value of right shares of Appellant No. 1 but only on the valuation of share of CFL. While elaborating on such argument, it was contended that the resolution of the Board of Directors dated 22.12.1999 to the extent of issuing of right share and its value of Rs.20/- per share and the offer made to the Respondent through letter dated 14.1.2000 to subscribe 808,000 right shares at the value of Rs.20/- per share, which comes to proportionate shareholding of Respondent in the Appellant No. 1 became final and Respondent having not availed such offer, the right shares offered to the Respondent were disposed of by the Board of Directors of Appellant No. 1 and such disposal of right shares cannot be reversed in that property in the shares stood transferred to transferee. Though the arguments on its face appear to be too simple but it does not take into account the fact that the right shares which the Board of Directors of Appellant No. 1 have decided to issue by increasing paid-up capital of Appellant No. 1 were basically meant for acquiring 49% shares of CFL belonging to Appellant Nos. 2 to 7 who were also the shareholder/Directors of Appellant No. 1 and primarily belong to the family of Appellant Nos. 2 and 3. Thus,

439

the valuation of shares of CFL was of prime importance vis-à-vis issuing of right shares of Appellant No. 1 and the factor that has influenced the two courts below was that there should not be any element of self enrichment by Appellant Nos. 2 to 7 in purchasing their own 49% shareholding in CFL to the detriment of the Respondent, who has to acquire the right shares by making payment, which otherwise was not so to the Appellants No. 2 to 7. It may be observed here that the consequence of not acquiring the right shares by the Respondent would have relegated it from position of holding 40% shares in the Appellant No. 1 to that of mere 13%. Therefore, the court below in considering the issue of right shares of Appellant No. 1 has directly related the same to the valuation of shares of CFL and it may also be observed with considerable amount of interest that the Appellants themselves have succumbed and gave in on this major issue of valuation of CFL shares, which amounted to an admission from their side that there was no fair and transparent valuation of CFL shares and the decision of Board of Directors dated 22.12.1999 of fixing the value of CFL share was also not a fair one.

16. This aspect of the matter is amply demonstrated when on 15.3.2000 the Company Judge passed order for undertaking the exercise of revaluation of CFL shares and in the HCA No. 163/2000 filed by the Appellants this very order of Company Judge was not agitated and the Appellant merely decided to have said appeal disposed of by merely seeking the deletion of

657

calling of General Body Meeting in terms of section 92(3) of the Companies Ordinance. Yet again while the main petition was disposed of with directions 1 to 3, the Appellants in their HCA No. 59/2003 merely sought suspension of direction 1-(a) and raise no issue to exercise of revaluation of share of CFL etc. This HCA of Appellants was ultimately disposed of vide judgment dated 07.5.2004 of a learned Division Bench of High Court, in which too directions were given for fresh valuation of CFL shares and respondent was directed to deposit 75% at the rate of Rs. 15/- per share of right issue of Appellant No. 1.

17. As per directions of the court, the exercise of revaluation of CFL Shares was carried out. All the auditors have given different value of shares of CFL and apparently there seem to be no common nexus of computation made by each of auditor, inasmuch as the valuations are drastically non-conforming amongst them. In the impugned judgment, the court has directed the respondent to deposit at the rate of Rs. 15 per share of right issue of Appellant No. 1 and during the arguments learned Senior ASC for respondent has contended that fair value of CFL share worked out at Rs. 15.55 per share was the focal point for direction to respondent for making of deposit for right issue. None of the counsel appearing for Appellants made any serious argument or raised any serious objection to dispute or dispel this contention of learned Senior ASC of respondent.



18. Most of the arguments of learned counsel for the Appellants have revolved on legal points that is on interpretation of sections 86 and 92(3) of the Companies Ordinance and on competency of Board of Directors to fix the valuation of shares and also fix the value of right shares of Appellant No. 1 with bulk of supporting case law. There is no cavil to these arguments inasmuch as all these legal aspects have been attended to by the courts below. We may, however, observe that conduct of Appellants during whole proceedings has been that of not supporting the valuation of CFL shares given by the auditors and have conceded to revaluation. Indeed the Directors of the company exercise fiduciary powers and are required to exercise such powers bonafide and in the interest and benefit of the company and its members without causing oppression. Such fiduciary powers in the facts and circumstances of the present case as per record were not exercised bonafide by the Directors of Appellant No. 1, inasmuch as they themselves did not support the valuation of CFL share as decided by it in the proceedings before the courts. Once such fact stood established, there was hardly any reason or justification for the Appellants to argue that respondent has forfeited right to acquire right shares or that the right shares have been disposed of by the Directors and their property stood transferred. These later two arguments run contrary to the very conduct of the Appellants as until the time value of CFL share remain unsettled, the question of

issuing of right share and their valuation could not have been decided.

19. We are, therefore, of the considered opinion that learned Division Bench of High Court has come to the right conclusion and there is hardly any reason or justification either legal or factual to interfere with the same. The appeal, therefore, fails and is dismissed leaving the parties to bear their own cost.

ISLAMABAD

11.11.2014

NOT APPROVED FOR REPORTING

Hashmi

3  
3.1.15