

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

APPEAL (L) NO. 741 OF 2014
WITH
NOTICE OF MOTION (L) NO. 2744 OF 2014
IN
APPEAL (L) NO. 741 OF 2014

N.K. Proteins Limited ...Appellant
V/s.
Modern India Ltd. & ors. ...Respondents

Mr. Milind Sathe, Sr. Advocate with Pradeep Sancheti, Sr. Advocate with Mr. Vishal Maheshwari with Mr. Nandish Chaudgar, Ms. Melini D'Souza, Mr. Bankim Gangar i/b. Khaitan Legal Associates for the appellants.

Mr. Mustafa Doctor with Mr. Gautam Ankhad with Mr. Akshay Patil, Mr. Rashmikant, Mr. Hiral Thakkar, Mr. Ashwin Bhadang i/b. Federal and Rashmikant for respondents 1 to 4.

Mr. Janak Dwarkadas, Sr. Counsel for defendant no.5.

Mr. Ravi Kadam, Sr. advocate with S.U. Kamdar, Sr. Advocate with Chirag Kamdar with Ameet Naik, Anuja Jhunjhunwala, Abhishek Kale i/b. Naik & Naik Company for respondent no.6.

WITH
APPEAL (L) NO. 766 OF 2014
WITH
NOTICE OF MOTION (L) NO. 2879 OF 2014
WITH
NOTICE OF MOTION (L) NO. 2880 OF 2014
IN
APPEAL (L) NO. 766 OF 2014

White Water Foods Pvt. Ltd. & ors. ...Appellants
v/s.

2/22

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Modern India Ltd. & ors.

...Respondents

Mr. Girish Godbole with Mr. Amitabh Chaturvedi, Mr. Utkarsh Tiwari, Shailesh Mendon, Sunil Patel i/b. Sunil & co. for the appellants.

Mr. Mustafa Doctor, Gautam Ankhad, Akshay Patil, Mr. Rashmikant with Ms. Hiral Thakkar, Mr. Ashwin Bhadang i/b Federal & Rashmikant for respondents 1 to 4.

Mr. Janak Dwarkadas, Sr. Counsel for defendant no.5.

Mr. Ravi Kadam, Sr. Advocate with Mr. S.U. Kamdar, Sr. advocate with Chirag Kamdar, Ameet Naik, Anuja Jhunjhunwala, Abhishek Kale i/b. Naik Naik for respondent no.6.

APPEAL (L) NO. 767 OF 2014
WITH
NOTICE OF MOTION (L) NO. 2915 OF 2014
WITH
NOTICE OF MOTION (L) NO. 2916 OF 2014
IN
APPEAL (L) NO. 767 OF 2014

White Water Foods Pvt. Ltd. & ors.
v/s.

...Appellants

Modern India Ltd. & ors.

...Respondents

Mr. M.M. Vashi, Sr. advocate Mr. Amitabh Chaturvedi, Mr. Utkarsh Tiwari, Shailesh Mendon, Sunil Patel i/b. Sunil & co. for the appellants.

Mr. Mustafa Doctor, Gautam Ankhad, Akshay Patil, Mr. Rashmikant with Ms. Hiral Thakkar, Mr. Ashwin Bhadang i/b Federal & Rashmikant for respondents 1 to 4.

Dr. Birendra Saraf with Mr. Ameet Naik with Chirag Kamdar, Anuja Jhunjhunwala, Abhishek Kale i/b. Naik Naik for respondent no.6.

**CORAM : NARESH H. PATIL AND
V.L. ACHLIYA, JJ.**

**RESERVED ON 7th May, 2015.
PRONOUNCED ON 17th June, 2015.**

P.C.

The matter was closed for orders on 7th May, 2015. Immediately thereafter summer vacation started.

2. The appellants have challenged the order dated 2nd September, 2014 passed by the learned Single Judge in Notice of Motion No. 240/2014 in Suit No. 173/14. The learned Single Judge passed the impugned order pursuant to the minutes of order drawn by consent between the original plaintiffs and original defendant nos. 1 to 3 and 5 of the said suit.

3. The National Spot Exchange Ltd. (hereinafter referred to as NSEL, for short) a company registered under the provisions of the Companies Act, 1956 was incorporated in the year 2005. The main object of the said company was of providing a platform for the purpose of trading (purchase and sale) of agriculture based commodities. In exercise of powers

conferred under Section 27 of the Forward Contracts (Regulation) Act, 1952 respondent no.6-NSEL was exempted from the operation of the provisions of the said Act by a notification dated 5th June, 2007. Under the said notification the activities of the trading of electronic exchange of NSEL were not required to be regulated by Forward Market Commission (hereinafter referred to as 'FMC' for short).

4. The appellants N.K. Proteins Ltd. submits that it became member of FMC in the month of October 2008. As a result the appellant was permitted to carry out activities on the said Exchange for itself and on behalf of its clients. The other appellants also became members of the NSEL and started trading activities. By gazette notification dated 6th February, 2012 the FMC was appointed as a designated agency by the Central Government. It is stated that under the directions of the Central Government, NSEL by circular dated 31st July, 2013 had suspended all the contracts until further notice.

5. It is contended that as a result of this development many persons/entities who allegedly claim to have invested their funds with NSEL allegedly did not receive back their money. A complaint was lodged by one Mr. Pankaj Saraf on which First Information Report being

5/22

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FIR No.216/2013 came to be registered against the Directors/management personnel of NSEL under various provisions of the Indian Penal Code and MPID Act.

6. Some disputes arose between the NSEL and the appellant N.K. Proteins Limited which culminated into NSEL invoking arbitration clause and preferring an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the High Court for interim orders for recovery of alleged dues. The appellants N.K. Proteins Limited disputed the claim of recovery of money as made by the NSEL in the said proceedings. It is submitted that by an order dated 23rd September, 2013 the High Court declined to grant ad-interim relief in favour of NSEL observing that NSEL had failed to substantiate its claim for the alleged outstanding dues against the appellant-N.K. Proteins Limited.

7. The learned Senior Counsel Mr. Sathe in Appeal (L) 741/2014 appearing for appellants submitted that the learned Single Judge has committed error in passing the impugned order. The order is against the mandatory provisions of Civil Procedure Code. Reference was made to the provisions of Order-26 and Order-1, Rule 8 of the Civil Procedure Code. It was submitted that the consent of the parties for drawing

6/22

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minutes of order was a collusive act of the parties. Asking the appellant to appear before the Three member Committee constituted by the Court would amount to compelling the appellant to open its defence before the Committee. In view of the fact that criminal case has been lodged, it would not be reasonable and proper to compel the parties to open its defence before the Three Member Committee. The learned Counsel referred to proceedings of arbitration. It was submitted that the NSEL failed to secure any interim order against the N.K. Proteins Limited in the arbitration proceedings. While referring to some of the proceedings/notes of the Committee it was submitted that Committee is proceeding in a coercive manner and exceeding its jurisdiction as prescribed under the provisions of CPC and the order passed by the learned Single Judge. The Committee is acting in an arbitrary, harsh and unreasonable manner.

8. The learned Senior Counsel Shri Sathe for the appellants submitted that third party proceedings were not initiated against the appellants-N.K. Proteins Limited under Order-1 Rule-8, neither such proceeding is permitted, in the facts of the case, to be initiated. The appellant N.K. Proteins is not a party to the present subject Suit. Order of copy of minutes was even not handed over to the appellant before the impugned order was passed. Learned Counsel submitted that Three

Member Committee cannot act like a Civil Court.

9. In support of his contentions, Learned Counsel Shri Sathe relied on the judgments in the case of **Padam Sen and anr. v/s. The State of Uttar Pradesh {AIR 1961 SC 218}, Secretary, A.P.D. Jain Pathshala & ors. v/s. Shivaji Bhagwat More & ors. {(2011) 13 Supreme Court Cases 99} and in the case of Supreme Court Bar Association v/s. Union of Indian & anr. {(1998) 4 SCC 409}.**

10. Learned Senior Counsel Shri M.M. Vashi in Appeal (L) No. 767/2014 submitted that the appellant is ready to furnish the information in a sealed cover disclosing the information before the learned Single Judge, if the Court orders accordingly, but it would not be reasonable and proper to compel disclosure of information before the Committee as it will cause prejudice to the appellant in various other proceedings and proceedings of the Suit pending before the learned Single Judge of this Court.

11. Learned Counsel Shri Godbole appearing for the appellant in Appeal (L) No. 766/2014 adopted the arguments advanced on behalf of other appellants on the legal issues raised. The learned Counsel

submitted that the Committee is functioning beyond the scope of Section 75, Order 26 of the Civil Procedure Code. In case the Committee is permitted to go ahead with the sweeping powers which it is enjoying and later it is found that order of the learned Single Judge was erroneous or the Committee exceeded its jurisdiction then the entire exercise would be futile.

12. In support of his contention, Learned Counsel Mr. Godbole relied on the case of **A.R. Antulay v/s. R.S. Nayak & anr. {(1988) 2 SCC 602}**.

13. The learned Counsel appearing for the NSEL Shri B.P. Saraf submitted that the appellant in Appeal (L) No. 767/14 did not contest the issue before the Single Judge. It is improper now to file appeal against the order passed by the Single Judge. If the appellant is aggrieved, there is remedy of filing review petition before the Single Judge. Learned Counsel submitted that appellant had even made part payment during the proceedings initiated before the Committee. The appellant has appeared before the Committee and agreed to disclose the necessary information according to the learned Counsel.

14. The learned Counsel Mr. Mustafa Doctor appearing for

respondents 1 to 4 submits that Regulatory Commission and other necessary parties are not made party to the appeal. It was submitted that the order passed by the learned Single Judge is reasonable and proper. The Three Member Committee did not adopt coercive methods. Learned Counsel referred to provisions of Section 75 Order 26 Rule 10(a), 11, 12 and 16 of the CPC. It was submitted that the Committee had already conducted 31 meetings and the appellant had participated in the said proceedings.

15. In support of his contentions, Learned Counsel Mr. Mustafa Doctor relied on the judgment in the case of ***T.N. Godavarman Thirumulpad (50) v/s. Union of India & ors. {(2013) 8 SCC 198}***.

16. Learned Senior Counsel Shri Ravi Kadam appearing for respondent no.6-NSEL submitted that impugned order was passed in five suits. The N.K. Proteins Limited has defaulted in payment of Rs.990 Crores. In view of the provisions of Civil Procedure Code and the High Court Original Side Rules, appropriate proceedings were initiated against the third parties. Leave was granted against third party under Order-1, Rule-8 by the learned Single Judge which was not challenged by either of the appellants. There are 13000 investors involved. By referring to order

passed by the Single Judge and fear and apprehension expressed regarding the functioning of the Committee, the learned Senior Counsel submitted that power to adjudicate is retained with the Single Judge. The Court has not delegated its power to the Committee. The Committee is supposed to submit the report in accordance with terms of the reference, to the Court, and it will be for the Court to take final decision after following appropriate procedure in law. The learned Counsel submitted that even in view of the peculiar facts situation and to protect the money of the large investors, the Court had to invoke its jurisdiction and power conferred under Section 151 of the Civil Procedure Code.

17. In support of his contentions, learned Counsel Mr. Ravi Kadam relied on the judgment in the case of ***Manohar Lal Chopra v/s. Rai Bahadur Rao Raja Seth Hiralal {AIR 1962 SCC 527}*** and on the case of ***R.B.S.S. Munnalal & ors. v/s. S.S. Rajkumar & ors. {AIR 1962 SC 1493}***.

18. The learned Senior Counsel Janak Dwarkadas appearing for defendant no.5 in Appeal (L) No. 741/14 and Appeal (L) No. 766/14 submitted that in the facts of the case the learned Single Judge was fully justified to exercise powers under Section 151 of the Civil Procedure

Code. Even no consent of the parties was required to pass such orders. The Court suo moto could take cognizance and pass such orders. In the submissions of the Counsel, the Committee had no adjudicatory functions. The Counsel on instructions submitted that this Court could very well clarify further so as to clear the cloud and apprehension of the party. The Committee is supposed to submit a proposal and not to decide any issue.

19. In support of his contentions, Learned Counsel Mr. Janak Dwarkadas placed reliance on the judgments in the case of ***Dharni Dhar & ors. v/s. Chandra Shekhar & ors, Khushalrao & ors. v/s. Bapurao Ganpatrao Marathe & ors. {AIR (29) 1942 Nagpur 52}, Nani Lal De & ors. v/s. Tirathlal De & ors. {AIR 1953 Calcutta 513}, Chitivalasa Jute Mills v/s. Jaypee Rewa Cement {(2004) 3 SCC 85}, M/s. P.T. Anklesaria & co. v/s. The Union of India {1972 BLR vol. LXXVI} and in the case of State Bank of India v/s. Ranjan Chemicals Ltd. & anr. {(2007) 1 SCC 97}***.

20. The learned Senior Counsel Shri Kamdar for respondent no.6 submitted that in accordance with provisions of the High Court Original Side Rules and provisions of Civil Procedure Code, the learned Single

Judge was justified and empowered to pass the impugned order. In fact the High Court had restricted the powers of the Committee. Reliance is placed on Order 26, Rule-10, 11 and 12 of the Civil Procedure Code. The Committee is supposed to decide liability of the parties and take steps to recover the amount which was defaulted. The Committee was to make report to the Court and arrive at mutual settlement. It was open for any of the appellant and aggrieved party to approach the learned Single Judge in case they are aggrieved by any order passed by the Committee or the report filed. The learned Counsel submitted the Committee had recommendatory power and not adjudicatory but in the peculiar facts and circumstances the Committee was justified in going through the accounts of the parties, securing their presence, evaluate the proposal for settlement voluntary or otherwise.

21. Shri Kamdar placed reliance on the judgments in the case of ***Stott v/s. West Yorkshire Road Car Co. Ltd. And anr. v/s. Home Bakeries Ltd. & anr. {(1971) Megaw L.J. Page 651}, Shah Babulal Khimji v/s. Jayaben D. Kania & anr. {(1981) 4 SCC 8}*** and in the case of ***Burford vs. Clifford {(1932) Chancery Division, 122}***.

22. The learned Senior Counsel Shri Sancheti for the appellant in

Appeal (L) No. 741/2014 in rejoinder of the arguments at the end submitted that Notice of Motion is pending before the learned Single Judge. The appeals are filed against the ad-interim orders. Reference was made to the provisions of Order-23, Rule-3 of the Civil Procedure Code. Learned Counsel submitted that N.K. Proteins Limited-appellant is not a third party to the Suit. NSEL had already filed a separate suit against the appellant which is pending. The NSEL has liberty in law to proceed against the appellant in the substantive Suit. The learned Counsel submits that in view of the fact that N.K. Proteins Limited is not even a third party to the Suit, how the order passed by the learned Single Judge could be made applicable to the appellant-N.K. Proteins Limited.

23. In support of the above submissions, learned Counsel Mr. Sancheti relied on the judgments in the case of ***Gurpreet Singh v/s. Chatur Bhuj Goel*** **{(1988) 1 SCC 270}**, ***K.K. Velusamy v/s. N. Palanisamy*** **{(2011)11 SCC 275}**, ***Cotton Corporation of India Limited v/s. United Industrial Bank Limited & ors.*** **{(1983) 4 SCC 625}** and in the case of ***M.P. Sharma & ors. v/s. Satish Chandra District Magistrate, Delhi & ors.*** **{AIR 1954 S.C. 300}**.

24. We have heard the learned Counsel appearing for respective

parties at length. We have gone through the various case laws relied upon by the learned Counsel appearing for the respective parties in support of their contentions. The learned Single Judge had passed order in terms of minutes of the orders signed by plaintiffs 1 to 4 and defendants 1 to 3 and 5. Clause-4, clause-5 (b)(e) and (i) of the Minutes of the order and clause-10 reads as under:

"4. The Committee may issue notices to various parties including the alleged defaulters/third parties, their clients and any other party, and if necessary, the Committee may make an application to the Court after giving notice to the affected party (i) to request relevant authorities including the EOW, the Income Tax Department ("IT"), the FMC etc. to furnish copies of any relevant records to the Committee for purpose of carrying out the functions of the Committee as provided by this order and/or (ii) to direct service of summons, to order appearance of parties, to order discovery and inspection of various documents, production of the documents summoning the witnesses and enforcing the attendance and take all necessary steps for enforcement of the aforesaid directions as per the provisions of the Civil Procedure Code, 1908.

5(b) issue notices and call upon the alleged defaulting

Members/clients of the members/defaulters/ of Defendant No.2 or other parties to whom the monies of the alleged defaulters can be traced and all other parties concerned, for the purposes of determining the extent of liability, if any and propose a determination by making a report to this Hon'ble Court for further directions.

5(e) The Committee may give directions to Defendant No.2 for initiation, prosecution and/or to defend any proceedings against or by defaulters, both civil and criminal to which Defendant No.2 may be a party.

5.i) Any party affected by any decision of the Committee shall be entitled to approach this Hon'ble Court.

10. As and when the Committee realizes funds and assets and finds the matter to be ripe for distribution of amounts amongst non-defaulting members and parties entitled to the same, the Committee shall prepare a report to the Court. The parties will be at liberty to apply to the Court on such report for distribution of amounts held by the Committee towards their dues."

25. The learned Single Judge observed in the impugned order that implementation of the settlements and any coercive process required for

such implementation, can only be under the orders of the Court. It was further observed that the Committee has dual function to perform. In the first place it shall conduct itself as a commissioner for investigation and examination of accounts and render assistance to the Court in facilitating the settlement between the parties. Thereafter the Committee would act as a Receiver appointed by the Court in the matter of preservation, custody and management of assets so collected. The Court further observed that the Committee may have extensive powers to examine the parties and require attendance and examination of witnesses. It further observed as under:

“The powers of the Committee, however, in the present case are restricted to calling for information and arrive at proposals of settlement in conjunction with the parties before the Court for collection and custody of the funds and assets involved. The Committee is simply permitted to call upon the various defaulting members/clients of the members/defaulters of Defendant No.2 or other parties and seek information and documents for the purpose of determining the extent of liability, if any, and propose a determination thereof by making a report to this Court for further directions.”

26. The learned Single Judge further observed that any party affected

by any decision of the Committee shall be entitled to approach the Court. The Committee was not authorised by the Court under the minutes of the order to issue process by itself. The Court further observed in para-17 of the impugned order that the Committee's mandate under the Minutes of Order proposed is to explore and negotiate mutual settlements *inter alia* between the defendant no.2 herein and the alleged defaulters/third parties.

27. In the minutes of the order in clause 5(b) it is mentioned that the Committee would have powers for determining the extent of liability and propose a determination by making a report to the Court for further direction. In clause 5(i) it was referred that any party affected by any decision of the Committee shall be entitled to approach the Civil Court.

28. The thrust of the argument of learned Counsel appearing for the appellant was that in view of the provisions of Civil Procedure Code and High Court Original Side Rules and the facts of the case the committee shall not be conferred with any adjudicatory powers. It shall be judicial forum which shall adjudicate and not the Committee. The Committee cannot be delegated powers of adjudication and in law the Committee need not enjoy such powers. The provisions of Section 75 of the Civil

Procedure Code refers to powers of Court to issue commission. Section 75 reads as under:

“75. Power of Court to issue commissions-- Subject to such conditions and limitations as may be prescribed, the Court may issue a commission--

- (a) to examine any person.
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition;
- (e) to hold a scientific, technical, or expert investigation;
- (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;
- (g) to perform any ministerial act.”

Order-26 Rule-11 refers to issuance of Commission to adjust account. Rule-12 of the said order refers to powers of Commissioner. The learned Single Judge has not resorted to exercise of powers conferred under Section 151 of the Civil Procedure Code while appointing the Three Member Committee to act as a Court Commissioner.

29. No doubt it is a case where the issue is raised concerning investors' money which was not been refunded or allegedly defaulted by the parties concerned. At the sametime the submission advanced on behalf of the appellants is that plaintiffs will have to make out their case before the Civil Court and they would be bound by the adjudicatory proceedings of the Court. The other appellants submitted that the Committee has proceeded to exercise powers as adjudicatory authority which is impermissible in law.

30. It is clear from the record and the submissions advanced that appellant-N.K. Proteins was not issued a third party notice by the original plaintiffs as contemplated under the High Court Original Side Rules. It is submitted that a substantive suit has already been filed by NSEL against the appellant N.K. Proteins. We find substance in the submissions advanced by appellant N.K. Proteins that in absence of being a third party defendant to the suit, the appellant would not be bound to appear before the Committee in accordance with order passed by the learned Single Judge. In the case of N.K. Proteins-appellant the submissions advanced on behalf of the respondents that the order of the learned Single Judge would even apply to the appellant N.K. Proteins in exercise of powers

under Section 151 of the CPC is not convincing one. The powers conferred on the Court under Section 151 of Civil Procedure Code are inherent powers of the Court. They cannot override the substantive provisions of law. Such power could be exercised in aid and assistance of the substantive provisions of law. The NSEL had failed to secure any interim orders in the proceedings initiated against the NK Proteins in the substantive suit.

31. It was submitted by the learned Counsel M.M. Vashi, that they have participated in the procedure before the Committee and they have made part payment.

32. The learned Counsel appearing for appellants have brought to our notice some of the orders passed by the Committee. It was submitted by the learned Counsel that the Committee had directed that in case of failing to appear before the Committee, the EOW shall be directed to move for cancellation of bail. In one case the Committee ordered EOW to get in touch with counter part of the Jui Wargal to find out whereabouts of Mr. Sampatrao who was reported absconding. EOW was directed to report on the next date of hearing as to what steps are take to arrest Mr. Sampatrao. In view of the record placed before us and the provisions of

law, we prima facie find that the appellant N.K. Proteins Limited who is not a defendant nor third party to the subject suit shall not be made to appear before the Committee under the impugned orders passed by the learned Single Judge.

33. In respect of the other two appeals we are of the view that the Committee shall function in accordance with the provisions of Section 75 and Order 26 of the Civil Procedure Code.

ORDER

(a) The Appeals are admitted.

(b) By an interim order we direct that the impugned order of learned Single Judge passed on 2nd September, 2014 shall not be operative against the appellant N.K. Proteins Limited.

(c) The impugned order passed by learned Single Judge shall be operative against the appellants in two appeals i.e. Appeal (L) Nos. 766/2014 and 767/2014 on the following conditions.

i) The Committee shall function in accordance with Section 75 of the Civil Procedure Code while discharging its functions under the Minutes of Order and the directions issued by the

22/22

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learned Single Judge.

ii) The Committee shall not have any adjudicatory powers.

After pronouncement of the order, the learned Counsel for respondents pray for stay of operation of the order. The request is objected to by the other side. In the facts of the case, we are not inclined to stay the operation of the order. The request stands rejected.

(V.L. ACHLIYA, J.)

L.S. Panjwani, P.S.

(NARESH H. PATIL, J.)

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Section Officer 18/6/15

High Court, Appellate Side
Bombay