BEFORE THE COMPANY LAW BOARD, NEW DELHI BENCH: NEW DELHI

CA 116/2016 in CP 1/2015

Present: B.S.V. PRAKASH KUMAR, Member (Judicial)

In the matter of:

Regulation 44 of the Company Law Board Regulations, 1991

And

In the matter of:

Union of India .....Petitioners

v.

M/s. Financial Technologies (India) Ltd. & Ors. .....Respondents

Present:

The counsel for the Petitioners: Mr. Navin Chawla, Mr. Siddhath, Ms. Prerna Shah Deo Advocates, Mr. Kirtiman Singh (CGSC).

The counsel for the Respondents: Dr. A.M.Singhvi and Shri Amit Sibal, Senior Advocates, Mr. Ankur Saigal, Mr. Raghav Dwivedi, Mr. Amit Bhandari, Advocates for R1.
Mr. Nooruddin Dhilla and Mr. Ankur Saigal, Advocates for R5 to R8.
Ms. Priyanka Vora and Mr. Ankur Saigal, Advocates for R9, R18 and R22.

Order
(Pronounced on 05.04.2016)

Financial Technologies (India) Ltd. (**in short "FTIL"-R1**) filed this CA under Regulation 44 of Company Law Board Regulations 1991 (which is analogous to section 151 of CPC) to stay or adjourn sine die, this CP 1/2015 till the hearing and final disposal of WP 2743/2014 and Suit No.221/2014; Suit No.991/2013; Suit No.121/2014; Suit No.173/2014 pending before the Honourable High Court of Bombay or in the alternative, to restrain Union of India (in short "UoI" – the

petitioner) from proceeding with the CP in terms of prayer clauses 17.1(a),(d) and/or 18.2(a),(f) till final disposal of WP 2743/2014 and other suits as mentioned above.

2. The Union of India filed this CP under sections 397/398 r/w 388B, 388C, 401, 402, 403, 406 & 408 of the Companies Act, 1956, seeking *inter alia* removal of directors that is R2 to R28 from the board of directors of **FTIL**. For having R2 to R28 through FTIL perpetrated fraud in its wholly owned subsidiary company namely National Stock Exchange Ltd. (**in short "NSEL"-R29**) in complete violation of the principles of corporate governance which has led to payment crisis of approx. ₹5,600crores in NSEL. UoI says that R2 to R28 have deliberately and wilfully caused the said payment crisis due to defaults of the trading clients of NSEL affecting 13,000 investors of NSEL.

3. That the promoters of FTIL hold 45.63% of its shares, the main promoter shareholders are La-Fin Financial Services Pvt. Ltd. with 26.76%, Jignesh Shah (R2) with 18.08%, Devang Neralla (R3) with 0.13%. That FTIL has a stake of 99.99% in NSEL and stake of 26% in MCX. R2 is the ex-managing director of the company, who continued as MD of FTIL since 31.03.2012 to 20.11.2014. R3 was also whole time director of FTIL since 31.01.2012 to 20.11.2014. As to other respondents from R4 to R28, some of them continued as directors of the company for some time, some are still continuing as directors of the company.

4. UoI submits that R2 to R4, acting in concert and independently conducting the affairs of FTIL and its subsidiary, NSEL in a manner prejudicial to the public interest and oppressive to its members creating payment crisis of ₹5,600crores due to gross mismanagement, non-compliance of Rules and Regulations, utter lack in transparency, integrity competence, compliance with law, negligence and misfeasance on the part of the promoters and the board of directors. The acts of these directors are lacking probity in dealing with the affairs of FTIL and NSEL. R2 was managing director and R3 and R4 were whole time directors of FTIL from the year 2012 to 2014. Now, FTIL is being managed by its managerial personnel consisting of one MD, one chief financial officer, two whole time directors, five executive directors and five additional directors.

5. For the sake of brevity, I hereby summarize the substance of this case into saying that having UoI noticed that FTIL, being holding company of NSEL, indulged in fraud, misfeasance, default in carrying out the obligations and functions under law, which is prejudicial to public interest, UoI has filed this CP under the sections as aforesaid.

6. The pleadings are complete in this matter; the matter was in fact posted for main hearing to 06.04.2016. In this case, the Honourable High Court of Madras passed orders to expedite hearing of main case. While this matter is ready for main hearing, FTIL filed this CA on 29.03.2016 for stay of final hearing or to adjourn this matter sine die until other matters are heard and disposed of.

7. On perusal of this CA moved by FTIL, it appears that FTIL says that since UoI, in the merger proceeding pending before Hon'ble High Court of Bombay, filed final order on 12.02.2016; since Hon'ble High Court of Madras passed an order on 07.03.2016 modifying the order dated 11.12.2015, directing CLB to dispose of this CP as expeditiously as possible subject to the outcome to the proceeding pending before Hon'ble High Court of Bombay without giving any time limit for disposal of the case as was given in the past, and since FTIL is of late permitted to say that this proceeding is hit by section 10 of CPC in an application for amendment of sur-rejoinder, this matter has to be adjourned sine die or stayed until the aforesaid proceeding is heard and disposed of.

8. Basing on the above points as cause of action, the Respondents counsel has vehemently argued that UoI has specifically stated that this CP is actuated to frustrate the deliberate attempts of the parts of FTIL, its board and NSEL to take various steps to frustrate the ultimate object of the proposed merger to provide suitable compensation to the victims of default for which R1 to R28 are as much responsible as NSEL. The counsel submits that for having UoI already filed final order in compulsory merger on 12.2.2016, there need not be any separate action under section 388B or under 397/398 to proceed against the directors of FTIL. Moreover, the merger proceedings are prior in point of time to this proceeding, likewise, the civil suits dealing with the same subject matter being prior in point of time to this proceeding, to avoid conflict of decision, it is imperative to stay this proceeding because this subject matter is sub-judice before Hon'ble High Court of Bombay in the proceedings above mentioned.

9. The counsel appearing on UoI behalf has refuted these allegations stating that this point was already decided by Honourable High Court of Bombay in Notice Motion No.147/2015 in WP 2743/2014 on 17.03.2015 as follows.

> *"15. **We are also of the considered view that the proceedings under section 396 and the proceedings initiated by the Union of India which is the subject matter of the present petition are totally in a different field.** The proceedings under section 396 are with regard to amalgamation of two companies. However, the*

proceedings which are the subject matter of the present Notice of Motion are for the purpose of preserving the property of the company, in the background of the complaint that the affairs of the company are being conducted in a manner prejudicial to the public interest or in a manner oppressive to the member or members. The provision for which an action is sought by the Union of India is also pertaining to removal of directors, on the basis of allegation that the directors are found to be involved in the mismanagement of the affairs of the company".

10. Therefore, the counsel for UoI submits that merely by UoI filing final order in the merger proceeding on 12.02.2016 will not create any new cause of action to FTIL to raise the same issue that was already decided by Honourable High Court of Bombay holding that the proceedings in this CP are entirely different from the proceedings of compulsory merger, therefore there is no merit in this application.

11. The counsel of UoI further says that Honourable High Court of Madras, has only stated on 07.03.2016 that CLB shall dispose of this CP as expeditiously as possible subject to the outcome of the proceeding pending before Honourable High Court of Bombay, for which, UoI has no objection, if this Bench passes orders subject to the outcome of the proceedings pending before Honourable High Court of Bombay. Moreover, that order was passed in an application for extension of time for hearing main CP. In that order, it was nowhere said that CLB proceedings shall be stayed.

12. The petitioner counsel further submits an amendment of sur-rejoinder depicting maintainability point will not invalidate the pleadings already filed and the order dated 17.03.2015 passed by Honourable High Court of Bombay holding that CLB proceedings are entirely different from the compulsory merger proceedings.

13. On hearing the submissions of either side, the point for decision is ***whether this proceeding is to be stayed in the light of the submissions made by FTIL or not.***

14. On reading Section 388B, it is understandable that it is a right conferred upon the State to ask for a relief authorising Central Government to remove the managerial personnel on the basis of CLB decision. It is a right conferred upon the state to monitor as to whether managerial personnel of a company have been discharging their fiduciary duties in managing the affairs of the company. If at all UoI notices circumstances suggesting that the persons concerned in the conduct and management of the affairs of a company indulged in fraud, misfeasance, persistent,

negligence or default in carrying out his obligations and functions under the law, or indulged in not managing the affairs in accordance with the sound business principle or prudent commercial practices or causing serious injury or damaged to the interest of the trade industry or the business to which such company pertains or managing with intend to defraud its creditors, members or any other persons or in a manner prejudicial to the public interest, then Central Government will take action under section 388B and 397, 398 of the Companies Act, 1956. On such an application from Central Government, CLB holds an enquiry and pass orders stating as to whether such and such persons are not fit and proper person to hold the office of the director or not. If any finding has come out that those personnel are not fit to continue in the management, Central Government may remove those managerial personnel in pursuance of the order.

15. It is needless to say that Companies are regulated by the Companies Act, and this regulatory mechanism is regulated by Central Government in many ways, perhaps for this reason alone, most of the actions of a company have to be reported to Central Government. As to some actions, it has to take permission of central government before taking any action. Central Government has power to cause investigation of a company; likewise many powers are given to the central government to monitor the functioning of companies. Whenever the management of the company flouts the provision of law so as to do any of the things above mentioned, UoI, as a custodian of public interest, is conferred with powers to take action under various provisions of the Act. Section 388B is one such provision that empowers the central government to initiate action against the delinquent managerial personnel. In any proceeding, the only point to be seen is ***whether fair hearing is provided to the party before passing an order or not***. The managerial personnel cannot say that such an action could not be taken by UoI when some other proceeding is pending. I must say that no provision of law is brought into existence to invalidate another provision of law. In fact courts will harmonise the statutes in such a way that they may not clash each other to invalidate the purpose for which they have come into existence.

16. The trump card of the argument of the counsel appearing on behalf of FTIL is that compulsory merger proceedings are to protect the public interest, likewise, the proceedings in this CP are also to protect public interest, for the compulsory merger proceedings being prior proceedings, the issue in this CP cannot be decided separately since the subject matter in both the proceedings are overlapping.

17. I must say that simply because public interest is common in both the applications, the proceedings pending before this Bench can't be stayed. The reason behind this conclusion is that the term public interest is a generic term. It is an inclusive definition. There will be several actions to protect public interest. There in merger proceedings, as stated by Honourable High Court of Bombay, it is for merging two companies. Here it is for the removal of directors and other reliefs on the allegation that the directors defrauded the investors or traders who invested thousands of crores. Therefore, it can't be said since both the proceedings are for protecting public interest; they are overlapping against each other. It is needless to say that merger proceedings are for merging two companies, whereas, Section 388B proceedings and 397/398 proceedings are meant for taking action against the Acts committed by the managerial personnel. The petitioner might have mentioned that R1 Company in concert with other respondents trying to frustrate the proceedings of merger, it is only one of the pleadings of CP. Simply because the petitioner mentioned this pleading along with other pleadings of the CP; other pleadings cannot be invalidated assuming that the proceedings in this CP are collateral in nature. Both are independent proceedings holding separate fields with distinct purposes, hence, I don't find any merit in the argument of R1 for stay of these proceedings.

18. As I have already mentioned that Honourable High Court of Madras has only modified the order lifting the time limit for disposal of CP, such an order can't be given to understand that Honourable High Court of Madras has indicated not to proceed with this matter pending disposal of the merger proceedings pending before Honourable High Court of Bombay.

19. The Respondents counsel raised another argument to say that the subject matter in the Civil Suits is same as the subject matter of these proceedings. For the Civil Suits being prior in point of time to this proceeding, the same having remained before fact finding Court, this being a summary jurisdiction, the counsel says, these proceedings are liable to be stayed as envisaged u/s 10 of CPC.

20. I don't see any merit in the arguments above for more than one reason. The Civil Suits pending before High Court are not the cases filed by UoI, they are in fact the cases filed by public sector undertakings and other individuals seeking monetary reliefs basing on contractual obligations. No doubt facts may be same in both the cases, but it does not mean that the other reliefs that could be granted against the defendants cannot be pursued by other parties. I don't think I need to go any further to say that State is empowered to take action against the persons indulged in causing

injury or harm to the society or public. Sometimes individual rights will become public rights; it all depends on the situation. Sometimes an act may be harmful to the individual and the society as a whole. Though 'act' is one, the remedies to an individual will be different from the remedies available to the public, whose cause is generally taken up by the State. If any contractual promise is violated by another, as long as it is mere breach of promise, the cause of action may be limited to civil remedy, when such breach is subsumed in a fraudulent action, the cause of action arise not only gives a right to civil remedy but also a right to other remedies such as criminal action against the person accused of. It can't be construed that whenever any criminal action or administrative or disciplinary action is sought on the ground of fraud, civil remedy is barred or vice-a-versa. In civil action, the court has to see preponderance of probabilities, there need not be any proof beyond reasonable doubt. Here, removal of directors is not a criminal action, therefore, when court is in a position to ascertain preponderance of probabilities it is always free to decide the same. Whether evidence is to be let in or not, it is up to the court to decide when it comes for hearing, not now. Till date, that stage has not come to decide as to whether evidence is to be let in or not. Moreover, in corporate governance umpteen documents will come into existence from time to time, therefore, it can't be said in every case that court cannot come to a conclusion until and unless evidence is taken in.

21. Therefore, I am of the opinion that the action under section 388B, 397 &398 read with other sections supra is not at all overlapping with the relief of compulsory merger sought before Honourable High Court of Bombay, or reliefs sought in the civil suits.

22. In view of the aforesaid discussion, I hereby hold that the remedy under section 388B, 397, 398 is altogether different from the remedy, the investors sought in Civil Cases. Moreover, Section 10 says that the parties must be the same in the prior suit and the matter in issue shall be directly and substantially in issue in a previously instituted suit between the parties. Though, the fact of not making payment to the investors in both the cases is the same, the issues are entirely different in these two proceedings, the parties are different, the remedies are different, the objects are different, the nature of claim is different. Therefore, the bar u/s 10 of CPC is not at all applicable to the present proceeding.

23. FTIL has made hectic efforts to keep these proceedings under carpet by highlighting that subject matter in all these proceedings is one and the same, ignoring the fact when fraud is manifest, actions are many to control the damage

that has been caused to individuals and to the public as a whole. Here it is managerial personnel against whom an allegation of defrauding investors for an amount of ₹5600crores is made; therefore, an enquiry has to be conducted as expeditiously as possible to decide whether their removal of directors is necessary or not. Therefore, I hereby reiterate that the orders that this Bench passes will remain subject to the outcome of the proceedings pending before Hon'ble High Court of Bombay.

24. The respondents counsel relied upon two judgements ***Guljarilal Kanoria and another v. Loptchu Tea Company Ltd. & Ors. Comp Cases Vol 102, Page No.292-CLB*** and ***M.S.D.Chandrasekar Raja v. Jayabharath Textile P. Ltd. and Another (2013) 181 Comp Cas 472 (Mad)*** to say that the Doctrine u/s 10 of CPC is applicable to the present case, but on seeing the facts of those cases, I have not noticed that the facts in those cases are similar to the facts of this case, hence, I hereby hold that the doctrine u/s 10 of CPC is not applicable to the present case.

25. In view of the reasons mentioned above, this application is hereby dismissed as misconceived.

Sd/-

(B.S.V. PRA[illegible] KUMAR)
Member (Judicial)
(signed on 05-04-2016)

New Delhi