



CORPORATE MOOT PROBLEM

BEFORE THE COMPANY LAW BOARD, SOUTHERN REGION BENCH, CHENNAI

IN THE MATTER OF THE COMPANIES ACT, 1956 - Sections 397/398

BETWEEN:

APRENSIVO S.R.L

.....Petitioner

AND

1. NEW COMPANY TWO P.LTD

2. AGRECIVE MANUFACTURING (P) LTD

.....Respondents

1. Aprensivo S.R.L was one of the first few Argentine companies to enter the Indian Investment scenario in 2004. Formed in the year 1999, the company was engaged in the manufacture of parts and accessories for boilers, prime movers and other such heavy machinery, catering to both domestic and export markets. From the year 2002 onwards, Aprensivo started looking at markets beyond South America in search of investment opportunities with low risk and assured returns. With the encouraging signs of a growing demand from the Indian sub-continent, Aprensivo found an avenue to exploit its inherent technical and creative strengths and a joint venture cum-technology transfer agreement (JV1) with DynamiK Marketing (P) Ltd - Aprensivo's Indian import partner- materialized in January 2004.

2. JV1 was initially entered into for an experimental period of one year, with an option of renewal for further periods, either on the same or modified terms, as may be determined by mutual consent. According to JV1, both partners owned 50% shares in the new entity, New Company One P. Ltd, which was incorporated in February 2004. The Indo-Argentine partnership proved to be a huge success from the word go and it was evident that the relationship would continue beyond the initial period (which expired on December 31, 2004). However, confirmation of renewal of JV1 on the same terms till 2007 could be executed by both parties only by April 2005, without, however, at any point interfering with or causing disruption of the business of the New Co. One P Ltd.

3. In mid-2006 however, differences arose between JV1's partners. This was magnified by the fact that Aprensivo was being approached by other Indian companies with tempting offers of partnership for technical assistance. One such offeror was Agrecive Manufacturing (P) Ltd., a small but ambitious company incorporated in the year 1997 under the Companies Act, 1956 in the state of Tamilnadu. By the end of 2006, an agreement between Aprensivo S.R.L and Agrecive Manufacturing (P) Ltd. (JV2) was executed resulting in the incorporation of New Company Two P. Ltd with a 25-75-shareholding in favour of the Indian partner. It was understood between the JV2 parties that Aprensivo will gradually withdraw from & exit JV1 when it comes up for renewal and infuse additional capital into New Company Two P. Ltd by such time.

4. The beginning of 2008 saw a surge in projects involving heavy machinery, which triggered a huge demand for parts and accessories. The time seemed ripe for making further investments and a proposal to issue further capital (to be subscribed by both partners of JV2) was mooted in the Board Meeting of New Company Two Pvt. Ltd on 24.04.2008. However, the Argentine camp on the Board was unwilling to commit to an investment at that stage and no decision could be reached due to Section 7.3 of the JV2 agreement. As per the said section (as well as Article 21 of the Articles of Association), all decisions or actions taken by the Board required the affirmative majority vote of the Directors present at the meeting, provided that any decision on certain specified matters could be taken only on the affirmative votes of two directors, one nominated by each JV2 partner resulting in a total of 2 affirmative votes (1 from each side), apart from the majority.

And among the specified matters, clause (c) read as follows:

“(c) the authorization, creation, allotment or issuance of any shares, or classes or series of shares, in the capital of the Company or any securities or debentures of the Company (other than the allotment and issuance of Shares pursuant to Section 2.2 and Section 2.3), the issuance or grant of any option over the unissued share capital of the Company, or any change in the capital structure of the Company or the rights, preferences and privileges of any shares, or classes or series of shares, in the capital of the Company;”

5. At the next Board Meeting held on 16.06.2008, the resolution could once again not be passed due to the persistent refusal of Aprensivo nominee directors to consent to the contribution of additional capital. In a subsequent Board Meeting on 01.08.2008, the Aprensivo representative sought leave of absence and a change of nomination for the purpose of Section 7.3 of JV2 could not be made in time. Just when Agrecive began ruing possible missed opportunities, the global financial crisis broke out. In the wake of the crisis, the already skeptical Argentine partner refused to participate in any talks of fresh investment.

6. With the Indian domestic market for their products almost isolated from the impact of the crisis, Agrecive continued to nurse hopes of a revival and possible further expansion. On 30.9.2008, the Board of Directors convened an extraordinary general meeting at which meeting, (held on 21.10.2008), a resolution to allot further shares to the tune of 2 crores to Agrecive was passed along with special resolutions for altering several provisions in the Articles of Association which originally incorporated sections in JV2.

7. Aggrieved by this unilateral action, Aprensivo filed a petition before the Company Law Board, Chennai under Section 397/398 of the Companies Act, 1956 for oppression and mismanagement. It was contended by Aprensivo that the shareholders usurping the powers of the Board of allotment of shares at the general meeting is a clear violation of the demarcation of the powers of the Board of Directors and Shareholders under the provisions of the Companies Act, 1956. Furthermore, Aprensivo claimed that the:

- i. Allotment of additional share capital to the exclusion of the Petitioners particularly when there was no impending need for the same;
- ii. Alteration of the Articles in breach of the joint venture agreement between the parties (JV2); and
- iii. Complete standstill in the business of the company with no new projects/contracts since the beginning of 2008

amounted to acts of oppression and mismanagement warranting the grant of relief under Section 397 and 398 of the Companies Act, 1956.

8. Agrecive, on the other hand, contended that the so-called standstill in business contended by Aprensivo was only temporary and that too, due to the financial crunch faced by the company, which in turn, was Aprensivo's own default as neither did the Argentine partner agree to contribute funds nor did it allow its Indian counterpart to do so. This, according to Agrecive, was evidenced by the deadlock in the Board at consecutive meetings, which compelled the shareholders to exercise the power delegated to the Board in the interests of the company. It was further argued that the alteration in the Articles of Association was perfectly justified in view of the fact that JV 2 was void ab initio by virtue of Press Note 1/2005 issued by the Department of Industrial Policy and Promotion (Secretariat for Industrial Assistance), that required prior government approval in case the foreign investor had an existing JV i.e. JV1 in India as on the date of the Press note. This, Agrecive argued, came to light recently and coupled with Section 1.4 of JV2 which read as follows, it invalidated the entire JV agreement (JV2) from the very beginning - therefore, there could be no question of any breach:

"1.4 Conditions Precedent:

1.4.1 This Agreement shall be conditional upon and shall become effective as between parties subject to:-

a) The procuring of all the necessary approvals of the Government of India and/or its regulatory agencies such as the Reserve Bank of India, FIPB etc.

b) The incorporation of the Joint Venture Company (JVC) in the form agreed upon by the Parties hereinafter.

1.4.2 Parties shall endeavor to expeditiously secure the due compliance and satisfaction of the conditions as stated in Clause 1.4.1 above."

9. In response to the argument regarding validity of JV2, Aprensivo took the stand that no existing JV was in place as on 12.1.2005 within the meaning of Press Note 1/2005 read with Press Note 3/2005. Also, Aprensivo countered the issue of deadlock with Section 7.12 of JV2 which defined a deadlock as below and provided the sole remedy of winding up, in such an event:

"7.12. Deadlock and Remedy

7.12.1 As used in this Agreement, "Deadlock" shall mean that:

- at two consecutive meetings of the Board a formal vote of the Directors is taken on any of the matters set forth in Section 7.2 or 7.3 and that the vote taken on each such occasion is 2-2 if such votes are taken under Section 7.2 or less than the required number of votes to pass such a decision as per Section 7.3, or

- at two consecutive shareholder meetings a formal vote of the shareholders of the Company is taken to approve matters specified in Section 7.3 is less than the required majority to carry the resolution as passed.

7.12.2 In the event of any Deadlock, then, unless each party expressly waives its rights under this Section 16.2 within thirty (30) days after the vote resulting in such Deadlock:

(a) The Company shall be dissolved, and the parties, in their capacities as shareholders of the Company, shall promptly take all such actions as may be required to cause the Company to expeditiously wind up their affairs and dissolve.....

10. The very maintainability of a petition under Section 397/398 of the Companies Act, 1956 was also challenged by Agrevice on the ground that JV2 provided for the resolution of any dispute arising out of or in connection with the agreement to be resolved by arbitration according to the rules of Arbitration of the International Chamber of Commerce. Section 14.3 of JV2 is reproduced hereunder for reference:

“14.3 Dispute resolution

14.3.1. If parties should fail to agree with respect to the interpretation of any of the matters mentioned in this Agreement, they shall consult together amicably for satisfactory settlement in accordance with the principles of faith and integrity.

14.3.2 Any dispute arising in connection with this Agreement which can not be settled by mutual or amicable agreement shall be settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules. The venue of the arbitration shall be Chennai. The decisions and the award arising from such arbitration shall be final and binding on the parties. Judgment upon arbitration may be rendered by any court of Competent Jurisdiction, or an application may be made to such court for a judicial acceptance of the award and for an order of enforcement. In the event an action for judgment or execution is brought before a court of competent jurisdiction on the arbitration award or the judgment rendered thereon, the parties waive all rights to object thereto insofar as permissible under the applicable laws.”

11. In view of the above conflicting arguments/contentions, the Company Law Board has framed the following issues for adjudication:

1. Maintainability: Whether the petition under Section 397/398 is maintainable in view of the arbitration clause contained in Section 14.3 of JV 2?
2. Validity of JV2: Whether JV2 was void ab initio in view of Section 1.4 read with Press Notes 1 and 3 of 2005?
3. Validity of exercise of powers of the Board by Shareholders in the General meeting: Whether the cardinal rule of demarcation of powers between the Board and the shareholders was violated or the said act of passing a resolution for further allotment came within the purview of exceptions to the rule?
4. Case of Oppression and Mismanagement: Whether the acts complained of made out a case for oppression and mismanagement warranting the grant of relief?
5. Relief: What is the nature of relief to be granted, if any?

12. You are required to substantiate the allegations of the parties with applicable case laws and statutory provisions and also decide as to what relief the respective parties should pray for.