

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA 109/2017 in T.C.P. No.19/2015

Under Section 59 of the Companies Act,
2013 and 239, 397, 398, 402 & 403 of
1956.In the matter of
Mr. Lakhmiah Gidwani & Ors.
'Jyoti', 341/A, Revenue Colony
Nr. Market Yard,
Sangli – 416 416.

..... Petitioner

v/s.

Rohan Packaging Products Ltd. & Anr.
Off. No. 6, 3rd Floor, Dealing Chambers
Deccan Gymkhana, J.M. Road,
Pune, Maharashtra

..... Respondent

Judgment delivered on: 14.08.2017

Coram:

Hon'ble M.K. Shrawat, Member (Judicial)

Hon'ble Mr. Bhaskara Pantula Mohan, Member (Judicial)

For the Petitioner : Anagha Anajingaraju, Adv.

For the Respondent : Mrunalini Panchal, Adv. i/b MRK Law Associates (R1-5).
Sheeja John, Adv. (R9).*Per Bhaskara Pantula Mohan, Member (J)***ORDER**

This is an Application under Rule 32 read with Rule 11 of the National Company Law Tribunal Rules 2016 on maintainability of Company Petition No. 19/2015 filed by the Respondents in the main Company Petition before the erstwhile Company Law Board and now transferred and pending before this Hon'ble Tribunal.

2. The present application has been filed by the Respondent No. 4 in the main Company Petition in as much as he claims that he is a Director of the R1 Company and filed this Company Application challenging the maintainability of the very



Company Petition. It is stated, the main Company Petition has been filed by the Petitioner No. 1 who is the first Promoter of the R1 Company, the Petitioner No. 2 the Promoter and the first Director of the R1 Company. Petitioner No. 3 is the Promoter and first Director of the R1 Company and Petitioner No. 4 who is the subscriber to the Memorandum of Association of R1 Company holding 100 equity shares of Rs. 10 each which constitutes 14.29% of the issued, subscribed and paid up capital of the Company. It is stated in the main Company Petition that the Petitioners put together hold 400 equity shares of Rs. 10/- each i.e. 57.14% of the total issued, subscribed and paid up capital of the Company.

3. It is stated, as regards the particulars of the Respondents in the main Company Petition, it is stated that the R1 is the Company incorporated with an object to carry on the business of manufacturing of all kinds of packaging products, duplex boards, triplex boards, heavy carved boards, base boards, card boards, etc. R2 presently appears as Director of the Company as per the list of Signatories on the MCA portal and allegedly holds 25,000 equity shares of the Company as per the purported allotment of shares dated 20.11.1995 and 27.01.2013. R3 presently appears as Director of the Company as per the list of signatory on the MCA portal and allegedly holds 25,000 equity shares of the Company as per the alleged allotment dated 20.11.2995 and 27.01.2013.

4. It is further stated, R4 presently appears as a Director of the Company as per the list of signatories on the MCA portal and has been allegedly appointed as such on 08.08.2005 and he holds 200 equity shares of the Company. R5 presently appears as Director of the Company as per the list of the signatory on the MCA portal and allegedly holds 100 equity shares of the Company. R6 is a Chartered Accountant by profession, proprietor of the firm J.H. Ghumara & Co. having Registration No. 103185W and appears to be statutory Auditor of the R1 allegedly appointed by the Respondent. R7 is a private limited company which is dormant as per the MCA portal and has been used by the Respondent to sell immovable property of the Respondent Company i.e. land.

5. R8 is the Ministry of Corporate Affairs which has been arrayed as Respondent No. 8 due to the wrongful filing system and automatic taking on records of the documents filed through e-filing allowed through the MCA portal. R9 is a Chartered Accountant who has certified the e-forms filed by the Respondent Company. R10 allegedly holds 100 equity shares of the Company.



R11 allegedly holds 100 equity shares of the Company. R12 allegedly holds 100 equity shares of the Company.

6. It is stated in the Petition that the Respondent Company had acquired certain extent of land at Bamni, Miraj, Sangli with an intention to set up a paper factory. The said land which is to the extent of about 8.6 hectares was purchased for a consideration of Rs. 1,34,500/- in February 1996 and the entire amount required for the purchase of the said property i.e. land was contributed entirely by the Petitioner No. 1, 2 & 3 along with their family members and it is further stated in the Petition that the company could not set up the desired paper factory due to various reasons and also they could not get loan for starting the said project. As they lost all the hopes to set up the factory and to commence business the R1 Company become stagnant and the formalities required to be involved with respect to the Companies Act could not be fulfilled due to ignorance and inadvertence.

7. The Petitioners were consulting one Mr. Vinod Bhate who was advising them on various issues including the incorporation formalities, etc. Only the land as said supra was existing on behalf of the Company and the entire project was stagnated for the aforementioned reasons and in the meanwhile Mr. Vinod Bhate passed away and R2, R3 and R4 are the legal heirs of late Vinod Bhate who hatched up an evil conspiracy taking advantage of the information about the company and technical knowledge of the Company Law related matters.

8. In the year 2013 when the demand for repayment of money to the investors was made, the Petitioners considered it desirable to transfer/sell parts of the land. The Petitioners also advertised, as a first step, for such repayment to the investors. Through an agreement for sale of land admeasuring 1 hecter 10 Are was transferred by R1 company through its directors i.e. Petitioner No. 1 in the name of Kripal Gidwani, the son of Petition No.1. The said sale was made after issuing public notice dated 08.10.2013 which was published in local newspaper 'Prabhat' along with its English translation. It is stated that nobody raised any objection in response to the said public notice and subsequently the land was sold and necessary mutation entries was made in the revenue records. After the said transaction the Petitioners thought it fit to go ahead with the sale of balance land. To carry out the transaction of sale a public notice was given in the local newspaper 'Pudhari' on 14.02.2014. To the utter shock of the Petitioner, two replies were published in the local newspaper 'Pudhari' and 'Sakaal' dated



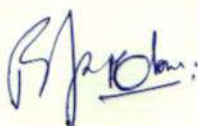
22.02.2014 in reply to the notice issued by the Petitioners. The said replies contended that the R7, M/s. Shree Harsh Finance and Trading Pvt. Ltd. Was the absolute owner of the plot/land bearing GAT No. 95 total admeasuring 2.79 acres, POT Kharaba 11 Are and GAT No. 96.2 total admeasuring 2.16 Are, POT Kharaba 16 Are situated at village Bhami, Taluka Miraj, Dist. Sangli vide sale deeds dated 3.9.2012. The reply to public notice further declares that the Petitioner No. 1 was not Director of the R1 Company and he was misrepresenting himself as such. The notice further cautions the general public in dealing with the said properties. The Petitioner was further shocked to learn that office of the Company was now situated at 106, Marine Chambers, Mumbai.

This precisely is the background of the case.

9. The Respondents have filed their replies inter-alia contending that they were in lawful possession of the property in their respective capacities. Apart from that a separate application on the ground of the maintainability was filed which is the subject matter of the present Petition. The main grounds on which the maintainability application is filed that the Petitioners in the main Company Petition does not fulfill the principle condition as required by Section 399 of the Companies Act, 1956 and hence do not have the right to file the Company Petition to agitate under Section 397 and 398 of the Companies Act, 1956. The Petitioners have no *locus standi* to file this Company Petition as they are neither directors nor shareholders of the Company. The contention of the Petitioner was that they collectively hold 67.14% is a misrepresentation and is a false statement.

10. It is also contended in the said motion to the application that there is a huge delay and several latches in filing the said Company Petition and further it is seriously contended that the Petitioner has not come to the Court with clean hands. It is further contended in the main Company Petition that on 13.10.1995 the Petitioner ceased to be shareholders of the Company and on 16.10.1995 ceased to be directors of the Company. It is further stated that on 20.11.1995, 10,000 shares have been allotted and on 30.01.2003 40,000 shares were allotted to the Respondents. It is contended that the subject land was sold in 2005 for a consideration of Rs. 16 lakhs and on 3.09.2012 a sales deed was also executed.

11. To sum up, the maintainability application was filed on three grounds. One is that the Petitioners do not hold any shares in the company and there are serious



latches and delay in filing the said Petition and further the Petitioners have not approached the Court with clean hands.

12. In response to the above maintainability Petition, the Respondent/Petitioners have filed their reply and stated that they never sold their shares and the Respondents had not produced any evidence to prove that their shares have been transferred. Eventhough the necessary formalities pertaining to the filing of returns with the Registrar of Companies, holding of Board meetings, General meetings, etc. have not been complied with in the past, they still have the entire shares with them and the Company Petition cannot be dismissed at the threshold. Further, it is also contended that the period of limitation does not apply in the present case for the reason that the acts of oppression and mis-management are continuing.

13. This Bench had carefully perused the application and the replies filed therein and the rejoinder filed by the Petitioner/Respondent in the said case. Both the sides have relied upon the following case laws:

I. Cases relied upon by the Applicant/Respondent

(a) Order dated 01.10.2010 by the Hon'ble CLB, Delhi Bench

In the case of Dr. (Mrs.) Nirmal Thakkar

vs.

Blue Bird Enterprises (P) Ltd. & Ors.

(Comp cas): [2012] 172 COMP. CAS28 (CLB)

(b) Order dated 10.08.2009 by the Hon'ble CLB, Chennai Bench

In the case of PLG Manu & anr.

vs.

Shashi Distilleries (P.) Ltd. & ors.

[2010] 94 CLA 408 (CLB)

(c) Order dated 06.05.2010 by the Hon'ble CLB, New Delhi Bench

In the case of Ram Gopal Patwari & ors.

vs.

Patwari Exports (P.) Ltd. & ors.

(Comp cas): [2010] 160 COMP. CAS. 116 (CLB)

(CLJ): [2011] 1 COMP. LJ 84 (CLB)

II. Cases relied upon by the Respondents/Petitioners

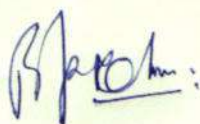
(a) Order dated 09.02.2010 by the Hon'ble High Court of Madras

In the case of N.S. Nemura Consultancy India P. Ltd. & Anr.

vs.

A. Devarajan

[2010]155 CompCas175(Mad)



(b) Order dated 21.11.2016 by the Hon'ble NCLT, Delhi Bench
In the case of Suhas Chakma
vs.
South Asia Human Rights Documentation Pvt. Ltd. & Ors.
[2017]137CLA40

(c) Order dated 31.07.2009 by the Hon'ble High Court of Madras
In the case of S.V.T. Spinning Mills Pvt. Ltd. & Ors.
vs.
M. Palanisami & Ors.
[2009]151 CompCas233(Mad), (2009)6MLJ821, [2009]95SCL112(Madras)

(d) Order dated 31.03.2015 by the NCLT, Mumbai Bench
In the case of Mohan Mahavirprasad Shah
vs.
Indian Silk Mfg. Co. Pvt. Ltd. & Ors.
[2016]131CLA42(CLB), [2016]194CompCas285(CLB)

14. In the course of hearing, this Bench had questioned the Ld. Professional arguing the maintainability application, whether any share certificates or deed of transfer have been filed in the Court in support of their contention. The Ld. Professional appearing for the maintainability application responded by saying that the same shall be produced in a sealed cover. He has also contended that the share certificates and the deed of transfer have been already surrendered by the Petitioners long ago and they are in their possession. This is a case wherein the basic documents on which the maintainability application lies, have not been produced and as a result of which an adverse inference can be drawn and the Petition can be dismissed. The contention on the delay and laches in filing the Company Petition cannot be accepted for the reason that the acts of oppression and mismanagement are continuous as it could be seen from the record with respect to delay in filing the Company Petition.

15. This Bench further questioned the Ld. Professional whether the formalities of filing of statutory returns and holding of meeting were complied with by them since they are claiming to be in the management of the company since 1995. The Ld. Professional answered that though they have not filed the returns and fulfilled the formalities, they filed all the forms and complied with the requirements at a later date. They admitted that they did not fulfill the formalities quite a long time. That means both the Petitioners and respondents did not bother to fulfill statutory requirements for a long time which means both were at fault. The doctrine of '*in pari delicto*', which means when both the parties are equally at fault, one party cannot take advantage against the other. So, the Respondents cannot contend

Approved:

that there is lot of delay in filing the Company Petition and seeks the dismissal of the same on the ground of delay in filing. Further, the contention of the Applicant/Respondents that the Respondent/Petitioners have not come to Court with clean hands cannot be accepted at this stage of the Petition as there no grounds to say so. As of now, this Bench had not seen any of the contentions raised in the maintainability application having been substantiated with any sound proof or support. As stated supra, the case law relied upon by the Applicant/Respondent does not apply to the facts and circumstances of this case. Having gone through the entire record and the reluctance on the part of the Applicant/Respondent of the maintainability application in producing the necessary supportive documents would necessitate this Bench to strike down the application of maintainability as it does not substantiate any of the contention raised therein. Before we part with, it is hereby placed on record that notwithstanding the fact that the application arising the question of maintainability is dismissed but no pre-judice shall be caused to the either side by any of the observations made herein above on the merits of the main Petition yet to be decided.

16. Therefore, the maintainability Application is dismissed.

17. The Company Petition now is posted for hearing on 21.09.2017.

Sd/-

Bhaskara Pantula Mohan
Member (Judicial)

Date:- 14th Aug. 2017

Sd/-

M.K. Shrawat
Member (Judicial)