

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

T.C.P. No. 79/2010

Under section 397, 398, 402 & 111 of
the Companies Act, 1956

In the matter of
Pravin Jain -(P-1)
Bharti Pravin Jain -(P-2)
Anuj Pravin Jain -(P-3)
....Petitioners

v/s.

Diastar Jewellery Pvt. Ltd. -(R-1)
Pramod Jain -(R-2)
Rachana Srimal -(R-3)

....Respondents

Order delivered on 01.12.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioners : Mr. Pramod Bhosle, Adv.

For the Respondent : None.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Order Pronounced on 20.10.2017

The Petitioners, claiming themselves as holding 52.94% shareholding in R1 Company viz. Diastar Jewellery Pvt. Ltd., filed this Company Petition u/s 397, 398, 402 & 111 of Companies Act, 1956 against the Respondents viz. Diastar Jewellery Pvt. Ltd., (R1) Pramod Jain (R2) and Rachana Srimal (R3) assailing the acts of R2 as oppressive and prejudicial to the interest of the Petitioners, hence sought the reliefs as follows:

1. To remove R2 and R3 from the Board of Directors of R1 Company and then to appoint professional directors on the Board of R1 Company.

2. To direct R1 company to transfer 40,77,600 equity shares of late Kishanlal Jain (father of P1, R2 & Pradeep Jain) in favour of P2 (wife of P1) and P3 (son of P1).
3. To direct R2 and R3 to repay the losses arising from their conduct upon the report being submitted by a Commissioner to this Bench in terms of Interim Relief sought for appointment of the Commissioner.

2. The case of the Petitioners in brief is that aforementioned Kishanlal Jain has three sons i.e. P1, Pradeep Jain and R2. P1 says that his brothers i.e. Pradeep Jain and R2 have left to United States of America in early eighties and ever since they have been continuing as residents of USA. R1 Company was incorporated in the Year 1987 primarily for manufacturing and export of Gold and Diamond Jewellery. To run this business, Gala G-5 admeasuring 9500 sq. ft. was allotted on rental basis in SEEPZ SEZ, Andheri (East), Mumbai. That P1 and his father were the founder directors of R1 Company, wherein the Petitioners together were holding 19.60%, likewise R2 and Pradeep Jain were also holding 19.6% each, whereas their father Kishanlal Jain holding 47,77,600 equity shares amounting to 33.31%. Looking at the growth of R1 from 1988 to 1992, R1 was allotted Plot-58 at SEEPZ admeasuring 35,000 sq. ft., upon which, R1 Company constructed factory to carry out its manufacturing activities, soon thereafter R1 acquired five more properties in Mumbai.

3. Since R2 and his another brother Pradeep Jain have already have become citizens of USA, they have incorporated a Company by name Diastar Inc USA for doing similar business, in which, R2 was the President. R2 and another brother Pradeep Jain, being family members, R1 imported modern and mechanized technology from Diastar Inc USA (herein after referred as Diastar Inc) by obtaining necessary approvals from the authorities. The business plan of R1 is to manufacture diamond and gold jewellery basing on raw material

and designs supplied by Diastar Inc and in turn to re-export the said material to Diastar Inc. The said arrangement had worked well for the benefit of entire family, but owing to differences within the family, P1 resigned as Director of R1 but the Petitioners have continued as Shareholders of R1. Ever since he resigned as director, for R2 has been controlling R1 Company, it has led R1 into losses, by which it has been heavily burdened by financial liabilities.

4. In the meanwhile, their father Kishanlal Jain executed Gift Deed dated 16-10-2007 transferring his 40,77,600 shares (33.31% shareholding) to P2 and P3 by simultaneously executed Transfer Deeds, thereafter they were lodged with R1 for registration of the same. In pursuance thereof, the Board of R1 passed a Resolution on 16-10-2007 authorizing transfer of shares in the name of P2 and P3, however till date; the names of P2 and P3 have not been entered in the records of R1 Company.

5. Though P1 had resigned from R1 in the Year 2001, he did never precipitate the disputes between the Petitioners and R2, because their father during his lifetime kept assuring the Petitioners that he would amicably resolve the disputes between P1 and R2. Honoring the word of his father, P1 had never raised any dispute, but to his misfortune, Kishan Jain expired on 07-04-2009.

6. In or around 2008-2009, P1 came to know that Diastar Inc was to remit ₹1822.64lacs to R1 for the jewellery supplied by it to the orders come from Diastar Inc. However, till date, Diastar Inc has not remitted the proceeds of the exports made by R1. Since huge money that was indebted to R1 Company has not come from Diastar Inc, since the Year 2001, the balance Sheets of R1 started showing decline. Not only this, R1 failed to meet the statutory commitments such as payment to Provident Fund, Gratuity, Professional Tax and Income Tax which together has come to around ₹50 to ₹60lacs. From one side, R1 was suffering with losses, as against this, R2 and R3

kept on taxing R1 with Travel expenses of their families pushing it to loss of ₹969.96lacs as on 31-3-2008. The mismanagement of R1 by R2 went to such an extent that R2 not only defrauded the shareholders but also violated FEMA regulations under Rules applicable to SEZ. The Petitioners have also come to know that Diastar Inc, having gone into losses, sought protection under bankruptcy laws of US. Since this Diastar Inc has gone into Bankruptcy proceedings, R1, without initiating any recovery proceedings Daistar Inc, wrote off all its receivables from Diastar Inc in breach of regulations of RBI and FEMA. To protect himself and Diastar Inc, R2 has been trying to sell away the assets of R1 Company to pay off/discharge the liabilities of Diastar Inc on exclusion of the Petitioners from the management of R1. For the conduct of R2 had gone to hilt, P1 sent various emails to R2 since April 2010, but no reply came from R2. Then the Petitioners called upon R2 for the balance sheets and financial statements of R1 Company and information in respect to the price in which the jewellery is sold, details of the payments received in cash and of entities with which R1 doing business, but none of the information has been given to the Petitioners. Despite the Petitioners collectively hold 64,79,600 equity shares amounting to 52.4% shareholding in the Company, no notice of AGM was served upon the Petitioners. Though the petitioners' shareholding is more than 50%, they have not been given any representation on the Board. In the light of the above facts, the Petitioners, being majority, issued notice u/s 169 of Companies Act, 1956 on 26-08-2010, calling for EGM to be held on 10-10-2010, but till date the Board of Directors of R1 have not replied to the said Notice.

7. The petitioners submit, for all these acts of R2 being oppressive and prejudicial to the interest of them, they filed this Company Petition for the reliefs abovementioned.

8. In reply, R2 submits this Petition is wholly misconceived and filed for ulterior purpose to get the shares previously held by their

father in the name of P2 and P3 despite those shares have already been continuing in the name of the R2 and his wife.

9. R-2 submits that it is true R1 was incorporated on 23-10-1987 and since it was new in the field of jewellery, all technology for manufacturing mechanized jewellery, including plant and machinery was supplied under a Collaboration Agreement with Diastar Inc. Basing on that Collaboration Agreement approved by RBI, Diastar Inc. supplied machines as consideration towards 40% equity of R1 company. Since P1 is in India, total management of R1 was entrusted to him making him as Managing Director since incorporation i.e., from 1987 up to 2001, thereafter continued as Joint Managing Director up to 2004. P2 being wife of P1, at that point of time, she also continued as a Director, their father Kishanlal used to continue as Chairman of R1 Company.

10. In the year 2004, when P1 was suffering from serious illness of brain stroke and mental imbalance, P1 met with Car accident, besides this, he had started fighting with the workers of R1 factory. Going through this entire unhappy situation, their father called upon R2 to look after business as P1 was relieved from the position of MD. In the AGM, when P1 was removed, P2 was also present. All along their father was alive, there was no allegation against the Respondents until before their father expired on 7th April 2009, but after his demise, P1 started sensitize R2 by writing abusive letters and emails to R2, but R2 remained quite hoping that peaceful discussion would resolve the problem. He says it is not true that the Respondents denied entry to the petitioners into the premises of R1.

11. As to the allegation of R2 making an attempt to sell the assets of the company, R2 submits that the factory premises being located in the notified area, it can't be sold without permission of the Government, therefore the allegation that the Respondents trying to alienate the premises of the factory would not arise, because the

factory premises is not free for sale as canvassed by the petitioners. As to other fixed assets such as land, building plant and machinery, they are already mortgaged to the Banks by way of deposit of title deeds. And current assets such as stock in trade and the stock in process of finished goods, book debts and receivables and spares were long before hypothecated to consortium banks led by Bank of India. It is pertinent to mention that it is P1 and P2 are the persons hypothecated and mortgaged the assets of the Company in their tenure. The Respondents have only been continuing the borrowings made by the Petitioners. He says, in fact, the Petitioners withdrew their personal guarantees given for the credit facilities availed by the Company, which led R2 to give his and his other brother personal guarantees. When the Banks asked for the pledge of the equity shares as further security against their outstanding, the Petitioners bluntly refused to pledge their equity shares. These Petitioners have been still using the Company Car which was given to their father even after demise of their father, because the car was given to their father in his life time.

12. As to the notice given u/s 169 of Companies Act, 1956 for calling AGM, had the Petitioners being really interested in calling AGM u/s 169 of the Act 1956, R2 wondered what prevented them to proceed with holding such a meeting when the Board failed to reply to the notice given u/s 169 of Companies Act, 1956. Since the shares of the Respondents including the shares gifted by their father to the Respondents family have been pledged with the Banks, the Petitioner cannot seek a relief for transfer of those shares. It is pertinent to mention that R1 made growth due to import of modern technology from Diastar Inc., on the said strength only, the land was allotted to R1 Company by SEEPZ authorities. All five flats and factory building were mortgaged to consortium banks led by Bank of India SEEPZ Branch as security for the term loan given to R1.

13. R2 further submits that it is a fact that their father Kishanalal already executed Gift Deed settling his shares in R2 and his wife Anita

Jain on 10th December 2002 and share Transfer Deed since executed on 24th April 2003, those shares were transferred in the joint names of Promod Jain and Mrs. Anita Jain. To substantiate same, Board Minutes dated 26th April 2003 is attached with this Reply. The Respondents categorically denied the allegation of father Kishanlal further transferring his shares to P2 & P3. As against this transfer mentioned above, even by assumption, it could not be said that Kishanlal himself transferred those shares to P2 & P3, because title vested with the father was conveyed to R2 & his wife in the year 2002 itself.

14. A Memorandum of Understanding (MoU) being executed on 12th December 2002 transferring 33% shareholding of Kishanlal Jain in favor of R2 and R3, these petitioners could not have made any such claim upon 33% shares previously held by Kishanlal Jain. There were no financial irregularities in the accounts for the year 2008-09, since there was world-wide depression in diamond and jewellery market, R1 was also affected by such depression. In the audited balance sheet of 2008-09, it has nowhere been reflected that financial mismanagement or siphoning of the funds taken place in R1 Company. R1 indeed discharges PF liability and other liabilities to some extent, apart from this, R2 contributed unsecured loans to R1 so as to ensure that company is recovered from the losses incurring.

15. After the death of Shri Kishanlal Jain, P2 and P3 never approached R1 Company with requisite documents for register 33% previously held by Kishanlal Jain in their name. Since Kishanlal Jain already gifted 33% of his shareholding, pursuant to which, executed Transfer Deed in the name of R2 and R3, the respondent group shareholding as on the date of filing this petition has come to 72.5%, whereas the petitioner group shareholding remains at 19.63%.

16. As to sale of properties are concerned, the respondents submit that the apprehension of the petitioners are not correct because P1

is already aware of the fact that the properties of the company have already been mortgaged with consortium banks led by bank of India, therefore, there is no iota of truth in the allegation that respondent trying to alienate the properties of the companies to third parties. It is not true that the petitioners group has not been permitted to enter into the factory premises because the register maintained by the company clearly discloses that the petitioner and his wife visited the registered office of the company on 10.04.2010, thereafter P1 visiting the office on 13.04.2010, again the petitioner and his friends visiting the office on 06.07.2010, thereafter on 10.01.2011. The Respondent's side submits that the petitioners lying about the requisition notice given for AGM on 25th August 2010.

17. On hearing the submissions on either side, now the points for consideration are as follows:

- 1. Whether late Kishanlal Jain's shares were transferred to the Petitioners as stated by the Petitioners?**
- 2. Whether the Petitioners proved that R2 & R3 committed financial irregularities in respect to the funds of R1 Company?**
- 3. Whether the Petitioners proved any material to show that the Respondents made attempts to create third party interest over the assets of R1 Company?**
- 4. Whether these Petitioners are able to prove that the acts of the Respondents are prejudicial to the interest of the Petitioners herein?**

Whether late Kishanlal Jain's shares were transferred to the Petitioners as stated by the Petitioners?

18. It is a fact that P1 and R2 father executed gift deed in favour of R2 and R3 in respect to his 33% shareholding in R1 Company, pursuant to which, father had also executed Memorandum of Understanding on 12.12.2002 in favour of R2 & R3. This Memorandum of Understanding further discloses in principle agreeing for R2 taking management into his control to carry out the business of R1 Company, besides this, father also executed transfer Forms on 24.04.2003 making R2 & R3 as joint owners of his 33% shareholding with beneficial interest to them. Soon after execution of such transfer deeds, the company held board meeting on 26.4.2003 recording Kishanlal Jain making R2 and R3 as joint holders of shares conveying beneficial interest of those shares to R2 and R3, accordingly the Board passed a resolution showing Kishanlal Jain himself as transferor and R2 and R3 as transferees to 33% shareholding of Kishanlal Jain. Since beneficial ownership has already been transferred to R2 & R3 in the life time of Kishanlal Jain and the same has been recorded in the share register of the company, today it could not be said that this Kishanlal Jain subsequently gifted his 33% shareholding to the P1 & P2 on 16.10.2007. When this Bench perused the board resolution purportedly approved by P2 and some other directors, it has nowhere been shown that R2 and Pradeep Kumar Jain present in the meeting. Legally, it is an established proposition that unconditional gift deed executed by any party cannot be revoked unilaterally. Here in this board meeting, where shares were purportedly shown as transferred to P1 & P2, strange things appearing are – one, Kishanlal Jain revoking the gift deed already executed in favor of R2 & R3. Two, a board resolution was shown as held on 16.10.2007 with two directors, one Kishan Lal Jain himself and another director, who has no shareholding in the company and has no DIN number. Three, in the said meeting these shares were shown as transferred with a clause that Kishanlal Jain would continue as first shareholder till his lifetime and after his demise, the shares would be given to P1 as because the shares gifted to R2 and R3 were by then not registered as transferred to R2 & R3 under FEMA. Four, here it is said as transferred in the name of P2 & P3 in 16.10.2007, their father was alive up to 2010, in this interregnum period of three years from 2007 to 2010, these petitioners never tried to lodge the

same with the company to ensure those shares registered in the name of them. Four, had it been true, why father could have remained silent in his life time without getting them registered in the name of P2 & P3? It is not the case of the petitioners that share certificates have been lodged for registration at any point of time. No such lodgment has been placed before the company and it has not even been reflected anywhere that a Board Resolution was approved by Kishanlal Jain and Rachana Srimal recording gifting of the shares to P2 and P3. Five, since there is clear admission from the Petitioners themselves that these shares were already shown as gifted to R2 & R3 in the year 2003 itself, it is the bounden duty of the petitioners to prove to the hilt that these shares were transferred in their names, unless that burden is relieved, these petitioners could not claim themselves as holding 52% shareholding in the company.

19. In the backdrop of this factual scenario, at the most, it can become a dispute in between the Petitioners and Respondents in respect to title over the shareholding of their father. For which, the Petitioners have to go before Civil Court for adjudication in respect to title over the shareholding held by Kishanlal Jain, but not to opt before this Bench under section 397-398 r/w 111 of Companies Act, 1956. Fact of the matter is, the Petitioners themselves admitted that these shares were gifted to R2 & R3, unless such gift has been declared as void, these petitioners are not entitled to claim themselves as title holders to 33% shareholding admittedly gifted by their father to R2 & R3. A board resolution said to have been passed by Kishanlal Jain and by a Director who has no shareholding and does not have DIN number cannot become a legitimate proof giving approval to the purported gift allegedly made in favour of P2 & P3. R2 has been continuing as MD of the company in the year 2007 as well, strangely this Board Resolution does not reflect R2's presence. Assuming everything has been true, and then also legally it could not be correct because these shares were already gifted to R2 & R3 in father's lifetime, i.e., way back in the year 2002. In view of these reasons, this Bench does not find any merit in the Petitioners seeking declaration that P2 & P3 acquired title over 33% of the shareholding,

which is admittedly gifted to R2 & R3 and registration of same in their name.

20. The Petitioners' Counsel relied upon ***Mrs. Gajarabai M. Patny and Ors. vs Patny Transport (Private) Ltd., (AIR 1966 AP 226)*** to say that whenever illegal transfer of shares takes place in a company then it will amount to an act prejudicial to the interest of the aggrieved, for here there being a transfer of shares causing prejudice to the Petitioners, on the analogy mentioned in the above citation, the acts of the Respondents shall be declared as acts prejudicial to the interest of the petitioners. On perusal of the citation supra, this Bench has not noticed any illegal transfer of shares as happened in the case supra, therefore the ratio decided in the above case is not applicable to the case given.

21. The Petitioners' Counsel relied upon ***Kumar Exporters P. Ltd. and anr. vs Naini Oxygen Acetylene And Gas (1985 58 Comp Cas 97)*** to say that if default is made by the company in entering share transfer in the register, it is open to him to apply to the court for rectification of the register of the company, the Counsel says here also there being a default from the Company side in registering transfer of shares in the name of P2 and P3, on the analogy applied in the case supra, the rectification of register has to be done by entering the names of the petitioners P2 and P3 as against the shares of their father Kishanlal Jain. Looking at the facts of the case supra, it appears it is a dispute on the Respondent failed to register share in the name of the aggrieved on two counts, one - denial of execution of transfer deeds, two - splitting of shares subsequent to execution of transfer deed, whereas in the present case, it is neither about execution of transfer deed nor about splitting of shares, it is purely on the ground shares were earlier gifted to the R2 and R3, subsequent to it, a Gift Deed has shown as come up in a doubtful circumstances gifting by the same person subsequent to execution of earlier gift deed in favour of R2 and R3. It is not the case of the petitioners that earlier gift deed was not executed in favour of R2 and R3. The Petitioners have also not placed any material disclosing that

they pursued in respect to this Gift Deed transferring shares to P2 and P3 as long as their father was alive. It is a fact that R2 has been in the management since 2001 onwards therefore, it is also doubtful as to whether such a resolution dated as executed on 16.10.2007, when the Company has been in the management and control of R2. Normally, rectification of register will happen only when it is a clear failure to rectify the register on the transfer deed admittedly executed. Here it is not the case. In view of the facts distinguishable from the case supra, the ratio decided in the case supra cannot be applied to the present case.

Whether the Petitioners proved that R2 & R3 committed financial irregularities in respect to the funds of the company?

22. It is a fact that R1 was incurring losses since 2008-09, it is also a fact that Diastar Inc run by R2 & R3 became bankrupt, whereby the loans given to Daistar Inc were written off in the books of R1 and the same has been recorded in a board resolution of R1 Company. When the receivables were written off in the books of R1 Company against Diastar Inc which already became bankrupt, qua write-off solely cannot become a ground to say that respondents conducted the affairs of R1 prejudicial to the interest of the petitioners, moreover, these petitioners failed to make any specific allegations or to prove that R2 & R3 siphoned the funds of R1, therefore, this Bench, looking at vague allegations made by the petitioners, could not come to a conclusion that the acts of the respondents are prejudicial to the interest of the Petitioners herein.

23. It is not out of context to say here that whenever any case is filed invoking jurisdiction of oppression and mismanagement, it is the bounden duty of the petitioners to prove that the respondents conducted the affairs of the company unfairly so as to cause prejudice to the interest of the petitioners, unless such proof is placed before this Bench, this Bench will not grant this extra ordinary relief by getting drifted away by the pleadings made in the petition, thereby this bench decided this issue against the Petitioners.

Whether the Petitioners proved any material to show that the Respondents made attempts to create third party interest over the assets of R1 Company?

24. As to this allegation is concerned, the Respondents categorically mentioned that all the assets of R1 have been mortgaged to the banks, some time when P1 was managing the affairs of R1 as director, then how could these petitioners today make an allegation that the Respondents created third party interest against the properties of the company to cause prejudice to the petitioners? Even in the rejoinder filed by the petitioners, it is nowhere mentioned that R1 assets were mortgaged, and they have not even placed any material to show that these respondents tried to create third party interest over the assets of R1 except a bald allegation in the pleadings. In view of these facts, we are of the view that these petitioners failed to substantiate the allegation of creating third party interest over the assets of the company, this Bench cannot look into such allegations as substantial enough to invoke jurisdiction under 397-398 of the Companies Act, henceforth, this issue is decided against the Petitioners.

Whether these Petitioners are able to prove that the acts of the Respondents are prejudicial to the interest of the Petitioners herein?

25. As on the date of filing this company petition, the petitioners having 19.63% of the shares of R1, they could not have claimed their shareholding as 52.63%. Since it is the case of the Petitioners that the shareholding said to have been transferred to these petitioners as admittedly being transferred in the name of R2 & R3, these respondents 2 & 3 have every right to defend their title over 33% of the shareholding, to which father made R2 & R3 as beneficial owners in the gift deed executed by himself. Moreover, when a gift deed is executed transferring interest to somebody else, the title over such

interest will transfer along with gift made. Since father has already made them as beneficial owners to those shares, assuming that Kishanlal Jain executed a subsequent gift deed in favour of these Petitioners, it cannot be construed that the subsequent gift deed would give title to the petitioners because by the time second gift deed was executed no absolute title was rest with the donor. In view of this, irreconcilable legal impediment, this Bench cannot come to a conclusion that these petitioners are given entitlement to the title of those shares. As to other allegations, such as financial irregularities, have been held as not proved, the jurisdiction under section 397 & 398 could not be invoked for granting relief to the petitioners. Even assuming all that the Respondents' acts caused prejudice to the petitioners; this Bench could not grant relief until and unless such acts would lead to winding up of the company. This need not will become a point here, because the petitioners failed to prove that these Respondents caused oppression and indulged in mismanagement of the company prejudicial to the interest of the petitioners.

26. For the Petitioners failed to prove the allegations made by them, as to transfer of shareholding to the Petitioners not being considered as allegations falling under 397-398 jurisdiction, this Bench has not found any merit in the company petition, henceforth, this company petition is hereby **dismissed** without costs.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B. S. V. PRAKASH KUMAR
Member (Judicial)