

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, MUMBAI  
COMPANY APPLICATION NO. 11 OF 2015  
IN  
TCP NO. 41/397-398/CLB/MB/MAH/2014**

In the matter of

HITECH AUTO EMISSION CONTROL LIMITED, )  
A Company incorporated under the provisions )  
of Companies Act, 1956 and having its )  
Registered Office at Ganga Sadan, )  
Malwani CHurch, Marve Road, Malad (West), )  
Mumbai 400 095, Maharashtra. ) .. Applicant  
(Original Respondent No.1)

V/s

KAMAL KISHORE SHARMA, )  
adult, Indian inhabitant of Mumbai, )  
having his address at Kamal Kunj, )  
Behind St. Anthony High School, )  
Chikuwadi Road, Malwani Church, )  
Malad (West), Mumbai 400 095, Maharashtra. ) .. Respondent  
(Original Petitioner)

SECTION: 397-398 of the Companies Act, 1956 and 241-242 of the Companies Act, 2013.

**Order delivered on 6<sup>th</sup> October, 2017**

Coram:

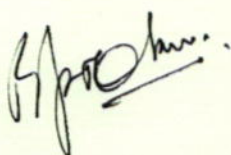
**SHRI M.K. SHRAWAT, HON'BLE MEMBER (JUDICIAL)**

**SHRI BHASKARA PANTULA MOHAN, HON'BLE MEMBER (JUDICIAL)**

For the Applicant / Respondent: Mr. Ajay Kumar,  
Practising Company Secretary

For the Respondent / Petitioner: Mr. Gautam Ankad, Nishta Mohanty and  
Niket Jani, Advocates,  
i/b Dhruve Liladhar & Co.

PER: SHRI BHASKARA PANTULA MOHAN, MEMBER (JUDICIAL)





**ORDER**

1. This is an Application filed under Regulation 44 of the Company Law Board Regulation, 1991 read with Section 399 of Companies Act, 1956 challenging the "Maintainability" of the Petition i.e. CP No. 41 of 2014. The main ground on which the Petitioner / Respondent had contested the matter is that the Original Petitioner is not a shareholder of the Company on the date of filing the Petition i.e. 6<sup>th</sup> May, 2014. In support of the same, a few documents have been filed along with the Application.

2. The Company Petition has been filed under Section 397-398 of the Companies Act, 1956 alleging oppression and mismanagement purported to have been committed by the Petitioners who are arrayed as Respondents in the Original / Main Company Petition. A reply dated 14<sup>th</sup> July, 2014 was filed by the Respondents denying the various allegations, contentions and statements made in the Main Petition. Subsequently, a Rejoinder was also filed by the Petitioners. Hon'ble Company Law Board considered the prayer of the Petitioners in the Company Petition for interim relief at the hearing held on 29<sup>th</sup> September, 2014 and granted various reliefs by an order dated 1<sup>st</sup> October, 2014. The interim order contains as follows:-

*"4. Hon'ble Bench of Company Law Board considered the prayer of the Respondent (Petitioner in the Company Petition) for Interim Reliefs at the hearing held on 29.09.2014. The Order granting the following Interim Reliefs was passed on 01.10.2014.*

*a) Pending the hearing and final disposal of the Petition, the Respondents are restrained from acting upon the alleged resolution dated 31.07.2013, thereby removing the Petitioner from the office of Director of the Respondent No.1 Company and not giving effect to the purported letter of retirement dated 19.10.2005 in any manner whatsoever. However, it is clarified that the Company may remove the Petitioner as a Director by adopting due course of law.*

*b) Pending the hearing and final disposal of the Petition, the Respondents are further restrained from selling, encumbering, transferring or mortgaging the immovable assets of the Company, save and except there is legal necessity of the Company to do so and that too with the prior permission of the Company Law Board.*

*c) Pending the hearing and final disposal of the Petition, the Respondent No.1 Company shall maintain its shareholding pattern as it exists today.*

*Spencer:*

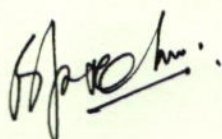


*d) The Company shall invite the Petitioner in the Board Meeting, Annual General Meeting or EOGM to held by the Company and will serve notice thereof through recorded delivery.*

*e) The Company shall also provide inspection of its statutory records to the Petitioner in his capacity as its shareholder and a Director, for which the Petitioner shall serve an advance notice of 7 days indicating date and time and the documents sought to be inspected by him."*

3. It is mainly contented in this Application that the Respondent / Petitioner had already transferred his entire 45,510 equity shares of Rs. 10/- of the Respondent Company to the Respondent No.2 in the main Company Petition i.e. Mr. Vijay Sharma on 5<sup>th</sup> April, 2011. The original Transfer Deed was executed on 5<sup>th</sup> April, 2011 and duly signed by the Petitioner i.e. Mr. Kamal Sharma as Transferor and Mr. Vijay Sharma as Transferee along with original share certificates. A Board Resolution dated 25<sup>th</sup> April, 2011 is also annexed to the Application. It is also contended that the Respondent / Petitioner has filed the Company Petition without enclosing the original share certificates and by suppressing the material fact that the original share certificates are not in his possession. He had not approached the Hon'ble Company Law Board with clean hands.

4. In Reply, it is contended, Respondent / Petitioner have distorted the facts of the case and have committed illegal and fraudulent acts of forging and fabricating the documents with a view to deceive the Hon'ble Company Law Board. Further, it is also stated that the issue of maintainability was not raised in any of the pleadings filed by the Respondents in the Company Petition. The Interim Order of the Hon'ble Company Law Board dated 1<sup>st</sup> October, 2014 was passed after hearing both the sides. It is also contended that the Respondent / Petitioner had furnished the DIN to the Petitioner / Respondents in the Company Petition and upon receipt of DIN in a clandestine manner and with a sole view to deprive the Original Petitioner of his rights, title and interest and shareholding, committed the blatant illegal acts of fabricating and forging the documents as annexed to this present Application by effecting fraudulent transfer of the entire shareholdings of the Original Petitioner in the Company in their favour. It is contended that the Respondent Petitioners had filed police complaint dated 23<sup>rd</sup> January, 2015 for the offences committed by the Petitioner / Respondent. It is also categorically stated in the Reply that the





Original Respondents have in their pleadings before the Hon'ble Company Law Board, not made any averment that in the year 2011 they owned the entire shareholding of the Original Petitioner. The Petitioner in the Original Company Petition has also filed the Affidavit-in-Rejoinder to the Reply of the Applicant / Respondent in the Company Petition and made a categorical averment with respect to the shareholding of 45,510 shares.


5. It is further replied by the Respondent / Petitioner that the Applicant / Respondent have committed forgery and fabricated documents to effect fraudulent transfer of shares.

6. A Rejoinder was filed by the Applicants / Respondents to the Reply of the Respondent / Petitioners in which they stated that a valid consideration was paid by them in respect of the transfer of 45,510 shares on 5<sup>th</sup> April, 2011 which was signed by both the parties. Further, a copy of an "Understanding" dated 5<sup>th</sup> April, 2011 was enclosed to the Rejoinder which contains the following:-

*"We (i) Kamal Kishore Sharma & (ii) Vijay B. Sharma Partners of Kaushal Enterprises, a Partnership Firm mutually agree as under:*

- (1) Mr. Kamal Kishore Sharma owes some amount to Mr. Vijay B. Sharma as partner of Kaushal Enterprises which will be calculated after finalisation of accounts of the said firm.*
- (2) Pending the calculation of exact amount due to Mr. Vijay B. Sharma, as per mutual understanding between us, Mr. Kamal Kishore Sharma, has agreed to make a part payment of Rs. 5,00,000/- by transferring his 45510 shares of Rs. 10/- each amounting to Rs.4,55,100/- in Hitech Auto Emission Control Ltd. to Mr. Vijay B. Sharma and a cash payment of Rs. 44,900/- to him as part payment out of the total amount payable to him. The balance amount due to him will be paid after finalisation of accounts of Kaushal Enterprises."*

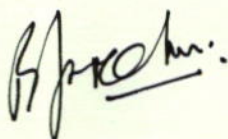
7. It is also further contended that the Respondent / Petitioner had resigned as Director with effect from 19<sup>th</sup> October, 2005 and he had withdrawn himself from the business of the Company and since he was not a Director on 25.04.2011, the question of sending Notice of the Board Meeting for passing





the Resolution approving the transfer of his 45,510 shares does not arise. Further, it is contended that if at all there was any delay in filing necessary documents with Registrar of Companies, the Applicant / Respondent had filed the necessary forms in the Company Law Settlement Scheme, 2014 providing for condonation of delay in Form 210-B, Form 21, Form 23-AC, etc. with the Registrar of Companies for granting immunity of prosecution and was charged an additional fee of 25% of the actual additional fees payable under the said Scheme. The Applicant / Respondent also contended in the Rejoinder that the Power of Attorney dated 24<sup>th</sup> March, 2012 was drafted by the Respondent / Petitioner himself and the Applicant / Respondent signed the same in good faith not realising the fact he had shown himself as Director in the said document.

8. A Sur-Rejoinder was filed on behalf of the Respondent / Petitioner in which the contentions, allegations and statements made by the Applicant / Respondent were rebutted. The Respondent / Petitioner in their Sur-Rejoinder clearly stated that the filing of Application on maintainability after the pleadings are over in the Main Company Petition is clearly an afterthought. Further, since the Applicant / Respondent in the Main Company Petition is his own brother and the business of the Company is a family business, the share certificates of the Respondent / Petitioner were always kept in the safe custody with him in good faith. But, unfortunately, the Applicant / Respondent misused his position and forged documents by illegally transferring to himself the entire shareholding of his brother. Further, it is clearly stated that the Respondent / Petitioner never signed on 5<sup>th</sup> April, 2011 for transfer of his shares. It is further stated that the flat, which is projected as the address of the witness and the transferee, as provided in the Transfer Deed, was, in fact, sold by the Applicant / Respondent in 2005. There is no reason for using the same address of a flat in a document executed in the year 2011 which he had sold in the year 2005. And, it is said, this is an evidence of fabrication of document as the building in which the witness and the transferee have claimed their residence was under redevelopment at the relevant time. Moreover, under no stretch of imagination the witness and the transferee could be residing in the said addresses as stated in the alleged Transfer Form.





9. It is denied that there was any consideration, much less a valid consideration, given by the Applicant / Respondent to the Respondent / Petitioner. It is stated that the letterhead on which the "Understanding" is made belongs to M/s. Kaushal Enterprises, which was an unregistered partnership firm and ceased to carry out any business activities since the year 2005. It is further stated that the alleged "Understanding" dated 5<sup>th</sup> April, 2011, which was annexed to the Rejoinder, was never signed by the Respondent / Petitioner. And further, it is stated that no money was payable to the Applicant / Petitioner as contended in the said document and the said document, which is titled as an "Understanding" dated 5<sup>th</sup> April, 2011, is a forged document. It is also clearly stated that the Board Meeting claimed to have been held on 25<sup>th</sup> April, 2011 could not have been held at the registered office of the Applicant / Respondent i.e. Ganga Sadan, Malvani Church, Malad (West), Mumbai. It is stated that at the relevant time the said registered address was leased out to run and operate a public call office. Therefore, there could not have been any Board Meeting held at the registered address of the Applicant / Respondent as alleged by the Applicants.

10. The Applicant / Respondent had filed a Sur-Sur-Rejoinder to the Sur-Rejoinder of the Respondent / Petitioner and rebutted the statements made by him.

11. The Applicant / Respondent had relied upon the following cases:-

"(i) *Ram Gopal Patwari & Ors. V/s. Patwari Exports (P.) Ltd. & Ors* [2008]85 CLA 208 (CLB);

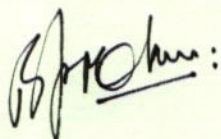
(ii) *Jiwan Mehta V/s. Emmbros Metals (P.) Ltd. & Ors.* [2008] 84 CLA 206 (CLB);

(iii) *Smt. Poonam Sharma & Anr. V/s. Professional Biotech (P.) Ltd. & Ors.* [2007] 80 CLA 414 (CLB);

(iv) *Srikanta Data Narasimharaja Wadiyar V/s. Sri Venkateswara Real Estate Enterprises (P.) Ltd. And Others* [1992] 7 CLA (Snr.) 19 (KAR)"

And, on the other hand, the Respondent / Petitioner had filed the following case laws:-

"(i) *P. Venugopal Versus Union of India*, (2008) 5 Supreme Court cases 1;





(ii) *Bhagwati Developers Private Limited Versus Peerless General Finance Investment Company Limited and Others*, (2013) 5 Supreme Court Cases 455;

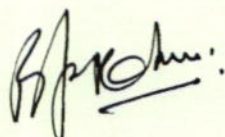
(iii) *Tayabhai M. Bagasarwalla and another, v. Hind Rubber Industries Pvt. Ltd., etc.* (Civil Appeal Nos. 16662-66 of 1996, D/- 19-2-1997;

(iv) *Ravi S. Naik Versus Union of India and Others with Civil Appeal No.3309 of 1993*

(v) *Sanjay Bandekar and Another Versus Union of India and Others Civil Appeal No.2904 of 1993 with C.A. No. 3309 of 1993"*

12. We have heard the arguments of both the representatives appearing on both the sides. Firstly, on the issue of transfer of shares by the Respondent / Petitioner to the Applicant No.2 on 5<sup>th</sup> April, 2011 against the consideration of the transfer of shares as part payment towards the earlier loan, the document of which was executed on the letterhead of M/s. Kaushal Enterprises and titled as "Understanding" had ceased its business activities long before. This creates any amount of doubt that whether consideration had really been paid for the purported transfer of shares. Apart from that, even the transaction pertaining to the shares held by the Respondent / Petitioner in the Main Company Petition to the Respondent No.2 is not a small and simple transaction without there being any flow of consideration. If at all the Respondent / Petitioner had really transferred his entire holding of 45,510 shares on 5<sup>th</sup> April, 2011 to the Applicant / Respondent No.2 and had he really paid the consideration in a proper manner, obtained the documentation from the Respondent / Petitioner, the situation would have been unambiguous and without any discrepancies. On the other hand, the material on record clearly shows that there was no flow of proper consideration to the Respondent / Petitioner as regards the transfer of his entire 45,510 equity shares to Applicant / Respondent No.2. Therefore, this Bench is not satisfied with the answer or the argument on maintainability and the same has to be decided in favour of the Respondent / Petitioner.

13. As regards the address mentioned in the Transfer Deed / Form, which again is apparently an invalid address. The premises with the said address mentioned in the Transfer Deed was, in fact, given for redevelopment long ago and if the Applicant / Respondent is really serious of purchasing shares of the Respondent / Petitioner, he would have taken appropriate measures by writing the correct address of the parties on the document in a proper manner. It again creates a doubt in our minds whether such a silly and casual documentation





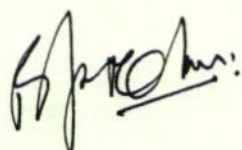
would take place when a person really invests huge amounts for the purchase of shares. Therefore, this Bench is of the view that the Transfer Deed, again, is a doubtful document and the reasons given are not convincing.

14. Further, on the issue of retirement of the Respondent / Petitioner as Director way back in the year 2005 and giving effect to the same as and when it is convenient in the year 2011 onwards is absolutely absurd and unbelievable. A question has arisen as to why the resignation was given retrospective effect for which the answer given by the representative appearing for the Maintainability Application is not convincing. On the issue of resignation of directorship by the Respondent / Petitioner in the year 2005, this Bench is of the view that the same cannot be considered as the reasons given are, again, not convincing.

15. Apart from that, various issues / points raised by the Applicant / Respondent in this Maintainability Application and the filing of documents afresh with every pleading even though the pleadings have been already completed in the Original Petition, which in our view, is not a sound way of dealing with the case, if at all the contentions of the Applicant / Respondent are really correct.

16. The cases cited by the Applicant / Respondent are very much appreciable, but for the fact that the same are not relevant to the present case for the reason that the Application on the maintainability, which was filed at a belated stage, does not fit into the category of cases as relied upon. On the other hand, the cases relied upon by the Respondent / Petitioner are more applicable and appropriate to the facts of the case.

17. Having gone through the exhaustive pleadings in the Company Application on the maintainability and having seen the documents annexed to the said Application, Reply, Rejoinder, Sur-Rejoinder and the Sur-Sur-Rejoinder, we are of the opinion that the issue is clearly a mixed question of facts and law, whilst the facts as appearing from the documents annexed to the pleadings, at the moment, do not support the case of the Applicant on the





issue of maintainability and on the other hand the Respondent Petitioners have a clear edge in demanding for the complete hearing of the main Company Petition itself.

18. We, therefore, hold that the Company Application No.11 of 2015 in TCP No. 41/397-398/CLB/MB/MAH/2014 is dismissed without there being any order as to costs.

19. The observations made in this Order do not, however, influence the further proceedings in the Main Company Petition.

Sd/-

**BHASKARA PANTULA MOHAN**  
Member (Judicial)

Sd/-

**M.K. SHRAWAT**  
Member (Judicial)

Dated: 6<sup>th</sup> October, 2017

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