

**NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH**

I.A.No.06/2017
In
T P No.26/2016
(C P No.80/2000)

Under Section 397/398 of the Companies Act, 1956

In the matter of:

Kamakhya Kumar Roy

... Petitioners

-Versus-

M/s Bogidhola Tea & Trading Co. Pvt. Ltd. &
Others

... Respondents

Coram:

Hon'ble Mr Justice P K Saikia, Member(J)

For the petitioners: Mr S. Chakraborty, Advocate

For the respondents: Mr B. Kaushik, Advocate (for R1 & R4)
Mr N.B.P. Singha, Advocate (for R3)

.....

ORDER

Date of Order: 22nd December 2017

This proceeding has been initiated seeking following reliefs:

- a) *Pass an order allowing substitution application of applicants as petitioner being a nominee of the deceased petitioner Sh Kamkhya Kumar Roy.*
- b) *Pass such an order or further directions as this Hon'ble Bench may deem fit in the facts and circumstances of the case.*

Facts, necessary for the disposal of the present proceeding, in short, are
that:

1. Kamakhya Kumar Roy, predecessor, in the interest of the petitioner had filed a petition under Section 397/398 of the Companies Act of 1956 (in short, Act of

1956) against M/s Bogidhola Tea & Trading Company Pvt. Ltd. and other respondents alleging oppression and mismanagement in running the affairs of the said company.

2. In due course, the respondents entered appearance and filed reply. During the course of proceeding, respondent No.3 died and his legal heir got substituted in place of respondent No.3.

3. In the month of December 2016, the proceeding was transferred to this Bench of the National Company Law Tribunal for disposal in accordance with law.

4. After the receipt of the proceeding from CLB, the original petitioner died on 09.01.2017. Thereafter, on 13.02.2017, an application has been filed under Rule 53 of the National Company Law Tribunal Rules, 2016 (hereinafter, referred to as the Rules of 2016) seeking substitution of the applicant in the cause title of the connected company petition in place of his deceased father. The notice of this proceeding was served on the respondents/non-applicant.

5. The respondent/non-applicant Nos.1, 2 & 4 filed reply objecting the prayer made by the applicant on several grounds. Against such reply, the applicant has filed rejoinder disputing the claim made in the reply. The applicant, in his application under Rule 53, stated that during his lifetime, the original petitioner nominated the applicant to inherit the shares which he held in the company, same being 90 shares out of total 360 shares in the company.

6. In that connection, necessary nomination was made in the prescribed format and same was sent to registered office of the company in 2014 which was delivered to the postal department on 05.11.2014 and the postal department delivered the same to the registered office of the company on 07.11.2014 and the same was received by one R. Saikia, Office Assistant of the Bogidhola Tea Trading Company Pvt. Ltd.

7. Therefore, on the death of his father, the applicant filed the present application seeking substitution of his name in place of his father in the cause title of the petition and he wants his name to be so substituted in the cause title of the connected company petition as being nominee of his deceased father.

8. It has been contended that the father of the applicant had made the nomination, aforesaid in accordance with the prescription rendered under Section 72 of the Companies Act, 2013. Since the application for substitution of the applicant in

place of his deceased father was made by the applicant well in time and since there is no other impediment in preferring the application under Rule 53 of the Rules of 2016, the applicant has prayed for the reliefs mentioned above.

9. The respondents, as stated above, resisted such an application on grounds more than one. It was first contended that in order to prefer an application under Rule 53 of the Rules of 2016, he must satisfy all the conditions specified in **Section 72 and 244 of the Act of 2013. Section 244** of the Companies Act, 2013, amongst other things, provides that in order to file a petition under Section 241/242, (corresponding to Section 397/398 of the Companies Act, 1956), the petitioner/applicant must be a member of the company.

10. One of the modes of becoming member of a company, he must acquire share or shares in the company. But then, in order to prefer a company petition, he must have requisite share qualification, so prescribed in Section 244 of the Companies Act of 2013. For ready reference, Section 244 is reproduced below:

"244. Right to apply under section 241.—(1) *The following members of a company shall have the right to apply under section 241, namely:-*

- (a) *in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;*
- (b) *in the case of a company not having a share capital, not less than one-fifth of the total number of its members:*

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

Explanation.—For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(2) *Where any members of a company are entitled to make an application under sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them."*

11. According to the respondents, the applicant, evidently, not being a member of the company, has no locus standi to file the application seeking substitution of his name as petitioner in place of his deceased father. In support of such a

contention, the respondents have relied on the decision of **Beena Barua and Ors. Vs. Dalowjan Tea Company (P) Ltd. and Ors., 191 1 GLR 55.**

12. It has also been contended that during the lifetime of the original petitioner, relationship between the applicant and his father was extremely inimical and was at the lowest ebb. The relationship was so worse that the applicant had even driven his father out of the house forcing him to take shelter at the residence of his daughter where he lived till his death.

13. That apart, in the twilight years of his life, the original petitioner in connected company petition, had not been in good mental health and, therefore, there was no question of his appointing the applicant as his nominee in respect of the shares in and of the company. However, taking advantage of such a situation, the applicant had fabricated the nomination in question showing the same to have been executed by his deceased father and did so in order to deprive the other children of the original petitioner in C P No.80/2000.

14. The fact that the father of the applicant had never sent such nomination to the registered office of the company on his own, the fact that the company did not know about the existence of such a nomination during the life time of the original petitioner and the fact that the company and the other respondents came to know about the existence of such a nomination only after their entering into the present proceeding make such a conclusion inevitable.

15. Even if one assumes for the sake of argument for a moment that the said nomination was made by the father of the applicant --yet then--- no action can be taken thereon in view of the same being not presented in accordance with the prescription of Section 72 of the Act of 2013 as well as Section 9 of the Companies Shares and Debenture Rules, 2014. On this ground also, the application filed in the present proceeding is required to be rejected.

16. It has also been contended that when the application was filed by the applicant seeking substitution of his name in place of his father as petitioner in the connected company petition, he had withheld some very vital information. In that connection, it has been stated that the applicant was one of the 5 legal representatives of his deceased father. The other 4 heirs are his sisters. But such vital information was not placed on record while preferring the present application.

17. The applicant chose to divulge such information only when the respondents have placed on record such fact having filed reply. This is a clear instance of suppression of material facts. It is settled law that one, who seeks equitable relief, must come with clean hands. The reliefs, which are sought in the proceeding in hand, are undoubtedly equitable relief. Unfortunately, the above episode shows that it was not so in the case of the applicant herein.

18. The applicant having filed rejoinder disputed such contention stating that it is not true that an application under Rule 53 of the Rules of 2016 cannot be preferred unless he is a member of the company. Rather referring to Rule 53 of the aforesaid Rule, he submits that in a proceeding of this nature, it is not necessary for the applicant to establish that he is a member of the company. It is enough, if he could show i) that the person in whose place he has sought to be substituted was a member of the company, ii) that he having requisite qualification had fled the application under Section 397/398 and iii) that he/she is the legal representative of the deceased member.

19. In the present case, there is no dispute that the father of the applicant was the member of the company having requisite qualification to initiate the proceeding under Section 397/398 as well as that evidently and admittedly, the applicant is his only son. That being position, the applicant has all the qualifications to enable him to file a proceeding under Rule 53 of the Rules of 2016.

20. In regard to the contention that the nomination in question was false and fabricated and as such, no action should be taken on it, it has been contended that this Tribunal in the present proceeding cannot adjudicate such a matter. Such a matter can be adjudicated by appropriate court in a proper proceeding. Therefore, such a dispute, not being the subject matter of the present proceeding, this Tribunal cannot and should not venture to decide such a dispute.

21. In regard to the contention that Section 72 and Rule 91 of the Rules of 2014 requires that a person, acting under Section 72, to send such nomination to the company himself, it has been submitted that such a contention is a far-fetched one. Neither Section 72 nor Rule 91 casts such a duty upon a person acting under Section 72. A bare perusal of the same would make it more than clear.

22. In regard to the contentions that the nomination was received by one R. Saikia on 07.11.2014 in the office of company whereas said R. Saikia was dismissed from service way back on 14.05.2012, thereby demonstrating a clear forgery in the receipt of aforesaid nomination in the company, it has been contended that such a contention is without any substance. This is because of the fact that there was indisputable proof to the effect that the nomination under registered post with A/D was delivered to the postal department on 05.11.2014 and the postal department too delivered the same to the registered office of the company on 07.11.2014.

23. The postal receipt, issued by the postal department regarding the acceptance of nomination by it as well as delivery slip showing the delivery of the same to the office of the respondent No.1 company on 07.11.2014 coupled with the acknowledgement letter, issued by R. Saikia, an employee of the company, established beyond any shadow of doubt that the company did receive the nomination aforesaid on 07.11.2014 and such presumption would continue to hold the field unless the same is refuted by adducing unimpeachable evidence.

24. However, no such evidence was found forthcoming to dispute the presumption, so established by aforesaid postal receipt qua acceptance of nomination under consideration by the company on 07.11.2014. Being so, attack mounted on this count to dislodge the application in hand, slips into oblivion without even causing any scratch on it ---- contends the applicant.

25. In regard to the contention that the relationship between the applicant and his father had remained inimical till the death of the latter as well as the accusation that father of the applicant was not in sound state of mind during the twilight years of his life, it has been argued that such a dispute too has no relevance in so far as the adjudication of the dispute in the present proceeding is concerned since in the proceeding in question, dispute relates to substitution of the applicant in place of his deceased father.

26. For the above reasons, the applicant had urged this Bench to allow the application on rejecting all the allegations from the side of non-applicants/respondents. The respondent No.2, in his argument, reiterated what has already been argued by the learned counsel for respondent Nos.1 & 2.

27. I have considered the rival submissions. Before proceeding further, I find it necessary to consider the allegation that the present proceeding is bad since the nomination was made in total violation of the direction in section 72 of the Act of 2013 as well as Rule 91 of the Rules of 2014. I have considered such submission in the light of the law and Rules holding the field in question and have found that such a contention has appropriately been dealt with by the applicant and therefore, I have found very valid reason to accept the same. Consequently, the attack, mounted on this count to derail the proceeding in hand is found wholly unequal to the task assigned to it.

28. In regard to the contention that since the deceased petitioner had five children and since only one of them, he being the applicant herein, is seeking substitution in place of his father without ever obtaining any NOC from the other legal representatives of the deceased shareholder, the application under consideration is required to be rejected, I have found that such plea too does not carry any conviction.

29. I have found that that present proceeding has been pending before different Tribunals since 2000. I have also found that parties to the proceeding are close family relatives. Therefore, the pendency of the present proceeding since 2000, its transfer to this Tribunal in 2016 as well as the death of the petitioner in the connected company petition, must have been known to all those persons including the daughters of the deceased petitioner.

30. But then, though a considerably long period has elapsed since the time of the death of the aforesaid petitioner, none of the siblings except the present applicant had approached the court seeking substitution. In the face of such revelations, it may be concluded, at least for the purpose of present proceeding, that the other siblings of the deceased shareholders are not interested in substituting their names in place of their father. In that view of the matter, alleged lapses, so pointed out by the respondents, aforesaid, cannot come in the way of the present proceeding.

31. In regard to the contention that nomination aforementioned, is bad in law for it allegedly being afflicted with the vices, cited from the side non-applicants/respondents, I have found that such contention cannot be adjudicated upon in the proceeding in hand. Same needs to be adjudicated by appropriate forum as and when necessary petition/application is filed before such authority.

32. So situated let me consider the most vital question in this proceeding, same being, if the application under consideration is required to be rejected for the applicant not being a member of the company. However before addressing such a query, I find it necessary to look into the judgment rendered by the Hon'ble Delhi High Court in the case of **Worldwide Agencies (P) Ltd. and Others. vs. Marketing T Desor And Others, reported in 1990 67 Comp Cas 589 Delhi** since such a decision has enormous bearing on the outcome of the proceeding in hand.

33. The facts leading to the aforesaid proceeding have been narrated in paragraphs 5, 6, 7, 8, 9, 10, 11 & 12. For ready reference, same are reproduced below:

"5. It is asserted in the said petition that on March 12, 1985, Mr S.K. Desor's widow, Mrs Margaret T. Desor, who is a British subject, applied as a legal heir to the board of directors for transmission of 850 shares held by her husband. (Mr Yash Pal Malhotra's shares having been bought by Mr S.K. Desor). She also furnished an affidavit of her daughter Ms Kim Paul, relinquishing her claim to the shares of her late father. It is further asserted that, in view of this application, the board of directors resolved that they had no objection to the transmission of the shares held by Mr S.K. Desor, but that the actual transfer would take place on Mrs Margaret T. Desor obtaining the Reserve Bank of India's permission and a succession certificate. Further, Mrs Margaret T. Desor's application for allotment of five shares her letter of the same date was allowed and it was resolved that in view of the allotment of these shares and her interest in the shares of her late husband, she be appointed a director of the company, subject to the Reserve Bank of India's permission. At the said meeting, the board of directors also recorded their deep appreciation of the services rendered by the late Mr S.K. Desor as managing director-cum-chairman of the company and mourned his passing away. The quorum of this meeting was of two, Mrs Amrit Gupta and Mrs Savitri Devi Kohli.

"6. On March 23, 1985, the board of directors held another meeting. The minutes of the meeting of March 12, 1985, were confirmed by the two abovementioned directors. The third director, Mrs Amrit K. Singha, however, objected, as she stated that she had not been informed of the last meeting.

"7. Various averments have been made in the said petition with regard to oppression and removal of certain valuables by Mrs Amrit K. Singh and illegal operation of the bank account, etc. It is also asserted that Mrs Amrit K. Singh is holding the 545 shares benami and that these in fact belonged to Mr S.K. Desor.

"8. A preliminary objection was raised on behalf of Mrs Amrit K. Singh regarding the maintainability of the petition on the ground that the petitioners were not members of the company as their names had not been recorded in the register of members. A further objection was taken that a composite petition under sections 397 and 398 of the Act with an alternative prayer for winding up the company is not maintainable.

"9. The learned company judge dealt with these contentions and after referring to the various decisions cited, came to the conclusion that the petitioners who were the wife and children of the late Mr S. K Desor and had obtained letters of administration under section 290 of the Indian Succession

"However, I am of the opinion that, to protect the interest of the heirs, legal representatives have to come on record immediately after the demise of deceased, or else the precious right of hearing will be lost. There is no mandate under any law saying that LR shall not become a party to the proceedings unless he has become member of the company. Since the parties are at loggerheads for several years, it cannot be construed that company would consider his transmission application immediately after it has reached to the company.

"Therefore, to protect the interest of the LRs and in the interest of justice, the applicant shall be substituted in the place of the deceased as soon as application has come before this Bench independent of his status as member of the company, hence, this application is hereby allowed."

41. In view of what I have discussed above and what has emerged therefrom, I am of the clear opinion that the application under consideration is required to be allowed which I accordingly do, however, leaving the parties to bear their own costs.

42. Resultantly, the applicant is allowed to be substituted in place of his father as his legal representative in the cause title of the connected company petition.

42. Registry of this Bench would do the needful in the line of decision and observation made herein before.



Member (Judicial)
National Company Law Tribunal,
Guwahati Bench,
Guwahati.

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section 41 provides that a member of a company is a person who has applied in writing and "whose name is entered in the register of members". It is correct that the names of respondents Nos.1 and 3 are not yet entered in the register of members, but the name of Mr S.K. Desor is still on the register of members and the requisite shareholding for moving a petition under section 397 and 398 was held by him.

"Consequently, we are of the view that legal representatives of the deceased member whose name is still on the register of members are entitled to present a petition under sections 397 and 398 of the Act as if they are in the shoes of the deceased member."

37. It is found from the aforesaid decision that a legal representative of a deceased shareholder of the company can validly maintain an application seeking substitution of his name in the cause title of the petition in place of deceased shareholder provided the deceased shareholder had requisite qualification to file the application under Section 397/398 of the Act of 1956 and provided the name of deceased shareholder is still in the register of members.

38. Coming back to our case in hand, it is found that the non-applicants/respondents did not dispute the fact that the name of the father of the applicant is still in the register of the members of the company. It is also not the case of respondents/ non-applicants that the deceased shareholder did not have requisite share qualification to initiate a proceeding under Section 397/398 of the Act of 1956.

39. Being so, the case in hand is fairly and squarely covered by the decision rendered in ***Worldwide Agencies (P) Ltd. and Others (supra)*** and, therefore, I have no hesitation in concluding that the applicant is entitled to prefer the application under consideration seeking substitution of his name in the cause title of the connected company petition in place of his deceased father.

40. One may also note here that on the death of respondent No.3, his legal heir has preferred an application seeking substitution in place of deceased respondent. In such an application, similar objection was raised. NCLT had overlooked such objections and allowed the substitution of the legal heir of the respondent No.3 on holding that there is no rule which says that the legal representative of a deceased shareholder cannot be substituted in a petition under Section 397/398 of the Act of 1956 unless his/her name is recorded in the register of members of the company. The relevant part is reproduced below:

"However, I am of the opinion that, to protect the interest of the heirs, legal representatives have to come on record immediately after the demise of deceased, or else the precious right of hearing will be lost. There is no mandate under any law saying that LR shall not become a party to the proceedings unless he has become member of the company. Since the parties are at loggerheads for several years, it cannot be construed that company would consider his transmission application immediately after it has reached to the company.

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