NATIONAL COMPANY LAW TRIBUNAL: ALLAHABAD

Company Application 23 of 2016

(In Company Petition 68/ND/2010)

Dated Friday, the 18th Day of November, 2016

Coram
Mr. V. S. R. Avadhani (Member-Judicial)
&
Mr. H. P. Chaturvedi (Member Judicial)

Between

Vinod Kumar Sharma

.....Non-applicant (Petitioner in Company Petition 68/ND/10)

And

1. Bhawani Cold Storage Pvt Ltd, having its regid. Office at Village Hajipur, Hapur Road, PO Ghosipur
2. Mr. Narain Das Maheshawari , Managing Director S/o Late Shri Chinranji Lal Maheshwari, 248, Lal Das Street, Meertu City-250002
3. Mr. Brij Mohan Maheshwari, Director, S/o Late Shri Mansukh Das JI, 310, Brahampuri, Meerut City-250002
4. Mr. Pooran Chand, Director, S/o Late Shri Kunj Bihari Lal, House No. 2, Braham Puri, Ward 36, Meerut City-250002
5. Mr. Rajeev Kumar, Chartered Accountrant, 104, Luxmi Nagar, Suraj Kund, Meerut City-250002
6. Mr. Vishal Mittal, S/o Shri S. K. Mittal, 90, Akand Nagar, Krishna Nagar, Kankhal, Hardwar (Utranchal)
7. Mr.Jai Prakash Maheshwri S/o Late Shri Mansukh Dassji, AC-32C, Shalimar Bagh, Delhi-110088
8. Mr. Vishal Maheshwari, S/o Shri Narain Das Maheshwari, 140-141, Mayur Vihar, E-Block, Shastri Nagar, Meerut-250002

....Applicants (Respondents in Company Petition 68/ND/10)

The above Company Application came before this Bench for hearing on various dates and finally on 27-102016 in the presence of *Shri Siddhartha Varma*, Counsel for non-applicant (Petitioner) and *Shri Pushkar Mehrotra*, Counsel for the applicants (Respondents) and having stood till day before us for consideration, we deliver the following:

ORDER
(Per Mr. V.S.R. Avadhani, Member-Judicial)

1. The Company Application is filed by the Respondents in the Company Petition, with a prayer to dismiss the Company Petition as the Petitioner (non-applicant) does not qualify the essential prerequisites mandated by Sec. 399 of the Companies Act, 1956. For convenience, the parties will hereafter be referred as 'applicant' who is the respondent in the CP; and 'non-applicant' who is the Petitioner in the CP.

2. The Company Petition has been filed under Sections 397, 398, 402, 403 and 406 of the Companies Act, 1956 on the allegations of oppression and mismanagement of the affairs of the company for various reliefs but the main reliefs are (1) to declare the resignation of the Petitioner as null and void; (2) to declare the transfer of 10 equity shares of the petitioner in favour of *Mr.*

Vishal Mittal (6th Respondent) as null and void and to restore the Petitioner's 25% in the equity; (3) to order for giving back 2 *Pacca Bighas* of land of the petitioner; and (4) to declare the allotment of all shares made other than subscribed through Memorandum of Association as null and void. The other reliefs are either supplementary or ancillary/consequential to the above core reliefs.

The contesting respondents in the CP seem to have filed the present application under Regulation 44 of the Company Law Board Regulations, 1991 before the Company Law Board (CLB) New Delhi, on 25.11.2013. That application was not registered and it is available in the record received by this Tribunal from CLB, after abolition of CLB.

3. The objections taken by the contesting respondents on the maintainability of the Company Petition are: (1) The Petitioner does not meet the basic criteria of having one tenth of the share capital or 1/10 of the membership as prescribed by section 399; (2) the Petitioner approached the Tribunal 20 years after his resignation and 15 years after sale of his shares; (3) The petitioner filed a civil suit in the Civil Court at Meerut with regard to some of the matters stated in the Company Petition and suppressed the fact that his suit was dismissed. (4) There was no understanding to return 2 *pacca bighas* of land and the petitioner has not approached the Tribunal with clean hands.

The learned Judicial Member *Shri H.P. Chaturvedi*, while he was sitting single on 26.08.2016 ordered that the application under Regulation 44 has to be first disposed off and ordered to list the matter on 22.9.16. We have directed the Registry to allot CA Number to the application forthwith. In those circumstances, the bench is taking up the Company Application for disposal.

4. In the Company Application, the main contention of the applicants is that the non-applicant is not having one tenth of the equity or 1/10 strength of the members as envisaged by Sec. 399 of the Companies Act, 1956 to maintain Company Petition under sections 397 and 398 of the Act. This is on the foot of the fact that because the non-applicant has resigned to his post as Director in 1989 and transferred his shares to *Vishal Mittal* as shown in the annual return dated 28.09.1996, and even according to the averments in the Company Petition made by the non-applicant, he is ceased to be a 'member' on his own showing on the date of filing the Company petition, and is not qualified to maintain the same under Sections 397 and 398 of the Companies Act, 1956.

The non-applicant pleads that he has not resigned to the directorship and has not transferred any of his shares to any other else much less *Mr. Vishal Mittal*. He has also contended that contrary to the understanding, the applicants failed to provide shares for the sum of 2, 80, 000/- invested by him in the Company and also failed to show the sum of Rs. 30, 200/- in the books of account. According to him, after receiving the sale consideration of Rs. 2, 80, 000 from the applicants for sale of 5 bighas of his land, on the same day the amount was withdrawn and paid to the Company on the assurance of the applicants to allot shares for that amount, besides the depositing of Rs. 30, 200 representing the registration charges, with the Company.

5. It is needless to say that the applicants dispute the correctness of the understanding and depositing of amounts as above for taking equity.

According to the own showing of the non-applicant, that amount of Rs. 2, 80,000 is shown in the books of accounts of the Company as unsecured debt in the name of the non-applicant. Regarding deposit of Rs. 30, 200 propounded by the non-applicant, the case of the applicants is total denial.

The Ld. Counsel for the applicants *Shri Pushkar Mehrotra* argues that the Company Petitioner filed the CP on the assumption of having requisite shares to qualify the criteria under Sec. 399 on the pretext of an understanding to allot shares and in the absence of any proof to that fact, at least prima facie, having sold the 10 shares initially held by him, the non-applicant lost his right to complain oppression or mismanagement in the CP. He would further contend that the allegations of forgery of documents to create transfer of shares or resignation are the complex questions of fact which cannot be enquired into and decided by the Tribunal in a summary procedure. His next line of attack on the maintainability of the Company Petition is that the non-applicant's long silence and approaching the Tribunal more than 20 years after the transactions in question, with a hypothetical dispute cannot be entertained by the forum. His submission is that by seeking to enforce an alleged 'understanding' not evidenced by any document, the company petitioner cannot invoke the summary jurisdiction of the Tribunal and adjudication of that question is in the exclusive sphere of a civil court. He has taken us through various pleadings and documents of the Company Petitioner to sustain his contention that the Petition for the reliefs under Sections 397 and 398 of the Act is not maintainable and the same has to be dismissed *in limine*.

Ld Counsel for the applicant *Shri Pushkar Mehrotra* placed strong reliance on the decisions of Company Law Board, wherein the Board has considered similar issues of fact and explained the law thereon, viz., ***Ram Gopal Patwari and others vs. Patwari Exports (P) Ltd and others***[1]; ***P.L.G. Manu & another vs. Shashi Distilleries (P) Ltd and others***[2]; and of P & H High Court in ***S. Sukhdeep Singh Jhikka vs. S. Ajit Singh Deogan***[3]. The Ld. Counsel *Shri Mehrotra* has also filed his written submissions in addition to his oral arguments.

6. *Shri Siddhartha Varma*, Ld Counsel for non-applicant (Company Petitioner) also submitted oral and written arguments. His contentions are that mere delay and latches is no ground to refuse adjudication of dispute under Sections 397 and 398 of the Act and that while answering the question whether the Company Petitioner has requisite shares to qualify the test of Sec. 399, the Tribunal has to take into notice what was his holding prior to the acts of oppression and mismanagement complained of against the Respondents in the CP-the applicants in the present CA. He submits that according to the Articles of Association, the first directors are life time directors and so they cannot resign and this fact will palpably falsifies the theory of resignation of the non-applicant to the Board. He argues further that because it is a company brought into existence by close friends and relatives, the principles of partnership have to be applied and the fact that the non-applicant has invested his amount in the Company and parted with valuable land free of cost to the Company for construction of cold storage and his standing as personal guarantor for the loan advanced by the Bank would

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[1] (2010) 160 CompCas 116 (CLB)
[2] (2010) 94 CLA 408
[3] (2009) 93 SCL 212 (P&H

cumulatively establish the fact that there was no reason for the non-applicant either to resign to the Board or to sell his equity shares to an unknown person, the 6th Respondent who remain un-served. *Shri Varma*, Ld. Counsel placed reliance on ***A. V. Papayya Sastry vs. Govt of A.P and others,***[4] ***Dinesh Sharma vs. Vardaan Agrotech (P) Ltd.,***[5] ***Mrs. Raju Grover vs. Kelati Constructions (P) Ltd***[6]***(; Vijayan Rajes vs. MSP Plantations (P) Ltd.,***[7] and ***A.P Jain vs. Faridabad Metal Udhyog.***[8]

7. From the arguments addressed by both the Ld Counsel and after scrupulous consideration of pleadings and documents, we are of the opinion that the questions raised before us have to be analyzed and rejoined in two different viewpoints, namely, one-whether the Company petition is not maintainable on the ground that Company Petitioner is not having sufficient equity holding or number strength as per sec. 399 of the Act; and secondly, whether the questions involved in the case can be answered by this Tribunal. To that end, we lead ourselves to answer the above two broad questions by framing the following points for consideration.

(i) Whether the Company Petitioner has no *locus standi* to maintain the Company Petition under Sections 397, 398, 402, 403 and 406 of the Companies Act, 1956?
(ii) Whether the Tribunal is not competent to decide certain issues of fact involved in the matter?
(iii) Whether there is any delay or latches on the part of the Company Petitioner in approaching the Tribunal?

8. Point No.1: In the first instance, we refer to the disentitlement ascribed to the non-applicant on the basis of his selling the equity shares to *Vishal Mittal*, who is shown as Respondent No. 6 who did not appear in the proceedings. There is no dispute-originally at the time of incorporation, out of 40 equity shares, the non-applicant was having 10 shares, which represents 25% of the equity. In the affidavit filed by the non-applicant in support of the CP, he has sworn to the fact that he is the first Director appointed through Articles of Association of Company and also subscriber of Memorandum of Association of the Company for 10 equity shares of Rs. 100/. The Company was incorporated on 25.05.1988.

Besides these 10 shares, the non-applicant propounds the theory of certain understanding between himself and the other promoter directors including the 2nd Respondent in the CP, who is the applicant in the present CA. This understanding, according to the non-applicant is that he should transfer 5 *bighas* of land and the consideration he has received has to be invested in the company towards equity. In the written arguments submitted by the Ld. Counsel *Shri Siddhartha Varma* for the non-applicant it is stated:

> "3. It would also be relevant to state that the petitioner was given 10 shares out of 40 shares of the Company. This meant that he was a share holder of 25% of the share capital...His share capital was thus, Rs. 2, 80, 000/+ Rs. 32000. Of course the land on which the Cold Storage today stands was given free of cost to the Company."

[4] 2007 (4) SCC 221
[5] (2007) 73 SCL 338 (CLB, New Delhi)
[6] (2014) 52 TaxmannCom 455 (CLB, Mumbai)
[7] (2010) 98 SCL 383 (Kar) (DB)
[8] (2005) DLT 114 (Delhi)

The relevant plea in support of the above argument, made in the CP reads as below:

> "(xvi) That while finalizing the sale price of the said land, no amount was decided among the promoter directors because the transaction was fully based on mutual trust and commitment...There was a perfect understanding among the partners and the said price was decided without considering a market price @ 150 per Sq Yard of Rs. 13, 61, 250/..."

In that way, the non-applicant's case is that a sale deed was executed by him and his mother as if they are selling 5 *bighas* of land to the Company and the amount of sale consideration as per the basic value register at Rs. 2, 80, 000 was remitted to his bank account and the said amount was transferred to the company immediately. This is the plea contained in para (xvii) of the CP. It reads:

> "(xvii) The Company on such transfer of 5 pacca bighas of land gave the petitioner a cheque of Rs. 2, 80, 000 having No. 540302 dated 03.06.1988 as full consideration at Allahabad Bank, Khair Nagar, Meerut, which the petitioner had deposited in his new Bank Ac Company.. 10866/14 and reciprocally had given a cheque of the total amount of Rs. 2, 80, 000 on the same day reverting back to the company. Even the cost of said registration of land of Rs. 32, 200 was paid by the petitioner of which he gave the cheque of Rs. 32, 200 of Allahabad Bank dated 03.06.1988. The Respondent No. 1 has failed to carry the amount given by the petitioner to record it in the books of account..."

It is very pertinent from not only the above paragraph of the CP but also from any other paragraphs, one could not find any positive and specific assertion made by the non-applicant that the sum of Rs. 2, 80, 000 and Rs. 30, 200 was agreed to be for equity investment. But in the oral arguments and also in the written submissions, the Ld. Counsel for the Company Petitioner-non applicant canvasses that those sums are taken by the Company towards equity shares to be allotted to the non-applicant. In the written submissions, it is assertively stated:

> "2....at the inception stage of the Company the endeavor was to make the Company take off, the nominal amount of Rs. 2, 80, 000 which was paid to the petitioner on 3.6.1988 was invested in the Company as share the capita on that very same date..."

9. Thus, the pleading in the CP is short of proper plea that there was a agreement between the promoter directors to accept the monies other than Rs. 1000 from the non-applicant towards the equity shares. However, to support his contention that the amounts are shown in the books of account of the Company, the non-applicant placed reliance on Annexure P22, the audited accounts filed before the Income Tax Department for the Assessment Year 1993-94. In that annexure (collectively), at page 133, in the list of unsecured loans against the name of *Shri Pooran Chand Sharma*, a sum of Rs. 2, 80, 000 is shown. It is the claim of the non-applicant that his name is wrongly shown as *Pooran Chand Sharma* instead of *Vinod Kumar Sharma*. However, there cannot be any dispute that a sum of Rs. 2, 80, 000 was paid by him through cheque to the Company. At page 135 of the same annexure, however, it is clearly shown that in the list of share holders as below:

Shri Narayan Dass	2, 61, 000=00
Shri Brij Mohan	1, 96, 000=00

Shri Pooran Chand	1, 31, 000=00
Shri Vinod Kumar	1,000=00
Total Rs	5, 89, 000=00

The above Annexure which is also containing the Assessment Order passed by the Assessing Officer, incidentally indicates the fact that the paid-up capital of the assessee (Company) was increased to Rs. 8, 61, 500 as against Rs. 5, 89, 000 during the period under consideration and no explanation has been tendered by the assessee for the increase in the paid-up capital by a sum of Rs. 2, 72, 500. From this document filed by the non-applicant itself, it is made clear that the initial paid up capital of Rs. 4000 at the time of incorporation has been increased to Rs. 5, 89, 000 and by the Assessment Year1993-94 (accounting year 1992-93) it was at Rs. 8, 61,500 and even by then, the non-applicant's equity remained at Rs. 1000. The amount of Rs. 2, 80, 000 was shown as 'unsecured debt' and there is nothing on record as to the other sum Rs. 30, 200.

10. Now, to claim that he is holding equity of more than one tenth to meet the qualification test of sec. 399, the Petitioner in the CP computes his equity on the following basis:

i) Rs 1000=00 (10 shares subscribed and allotted as per Memorandum and Articles of Association)
ii) Rs. 2, 80, 000 (On the assurance of giving equity but shown as unsecured debt)
iii) Rs.30, 200 (taken on the assurance of giving equity shares but has no where shown in the company books)

11. Keeping the above facts in our view, in order to examine the *locus standi* of the Company Petitioner to have 10% of the equity, we would like to appraise ourselves the legal provision of Sec. 399 of the Companies Act, 1956, under which the present CP was filed.

> Section 399 - Right to apply under sections 397 and 398: (1) The following members of a company shall have the right to apply under section 397 or 398:-
>
> (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 members or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on 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.
>
> (2) For the purposes of sub-section (1), where any share or shares are held by two or more persons jointly, they shall be counted only as one member.
>
> (3) Where any members of a company are entitled to make an application in virtue of 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.
>
> (4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the[1][Tribunal] under section 397 or 398, notwithstanding that the requirements

of clause (a) or clause (b), as the case may be, of sub-section (1) are not fulfilled.

(5) The Central Government may, before authorising any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable, for the payment of any costs which the[1][Tribunal] dealing with the application may order such member or members to pay to any other person or persons who are parties to the application.

The section is self explanatory. The requirements in the case of a company having share capital, a Company Petition for reliefs under Section 397 and 398 can be filed by not less than 100 members or in the alternative by one member who is having one tenth of equity. If in any case, these two qualifications are not satisfied, the Central Government may permit the person to file Petition. The share capital of the Company is 20, 00, 000, admittedly. The Company Petitioner claims to have more than the requisite percentage of shares on the premise of an understanding. But there is no written document and on the other hand the documents of the Company shows that the claimed sum of Rs. 2, 80, 000 as 'unsecured debt' even to his own knowledge, since 1988 and at no point of time, he made endeavor to request the company to allot shares to him converting the debt into equity.

12. Further the Contract or understanding, whatever the expression may be, it is purely between the promoter directors or persons in management of the Company and not between the 'Company' as such and the Directors *interse*. The Company was incorporated on 25.05.1988. The non-applicant and his mother executed the sale deed in favour of the Company, admittedly on 03.06.1988 (Annexure P12). The non-applicant received the consideration for the sale of 5 *bighas* of land by remittance into his Bank Account (Annexure P13) on 03.06.1988 and on the same day it was paid to the Company.

Evidently, had there been any understanding between the applicants and non-applicants regarding sale of land on paper and the amount of Rs. 2, 80, 00 and Rs. 30, 200 was agreed to be taken by the Company as equity, that understanding should be between the company and the non-applicant. There was no plea taken by the non-applicant that on behalf of the Company, the applicants have entered into that contract with him. We think, there is no necessity of reminding ourselves the distinctive line between the company as a juristic person and the persons who happened to be its directors. The Company if agreed to provide equity to the non-applicant in lieu of the value of the land taken from him, ought to have entered into a contract with the petitioner through its directors, who have to hold a meeting, adopt a resolution authorizing themselves to enter into contract for allotment of equity to the non-applicant. That is absent in this case. In other words, what we intend to emphasize is, a contract or covenant between the promoters after incorporation of the company, i.e. post incorporation agreements between the promoters, does not bind the company. After incorporation, the allotment of shares to anybody including the promoters shall be on the decision of the Board on behalf of the Company.

13. We look at this issue from another angle also. This is, whether the so called understanding of allotting equity to the non-applicant in lieu of value of land is probable in the light of the other plea taken by the non-applicant. The case propounded by him is that that understanding is including to re-transfer 2 *bighas* of land out of 5 *bighas*. The relevant portion of the pleading is as follows:

> "(xv) That the petitioner had contributed to one of a basic module of a project economics by transferring his and his mother 9consenting party) 5 pacca bighas (15125 Sq. Yards) of land located at.....In actual only 3 pacca Biga (9075 Sq. Yards) was agreed to transfer for the purpose of project. And 2 pacca bigha (6050 Sq. Yards) have been assured by the Respondent 2, 3 and 4 to return back to the petitioner...The promise of the Respondent 2, 3, and 4 remain a promise from the last 20 years..."

That means, 3 *bighas* only was agreed to be taken as value to be redelivered in the shape of equity and the other 2 bighas land has to be re-delivered physically to the non-applicant. When the title of the land was transferred to the Company under a registered sale deed, there cannot be any contract between the persons personally in respect of re-transfer of that land. Company is not a party to that re-transfer covenant. These pleas are therefore mutually destructive and did not inspire confidence as to their probability. There is no sufficient pleading to accept the probability and there are no supporting documents to prove a binding contract on the company as such. At best, had there been any such contract that has to be enforced against the Respondents 2, 3, and 4 by the non-applicant in a civil court.

14. Therefore, we accept the contention of the applicants, that the non-applicant has no sufficient share holding in the records of the Company and the Register of Members, with reference to Rs. 2, 80, 000 and Rs. 30, 200 respectively. The amount of Rs. 2, 80, 000 is reflected in the books as unsecured debt even according to the Company petitioner's own showing.

15. Then, we examine the other part of the equity holding of the non-applicant. He was admittedly having 10 shares out of 40, at the incorporation of the Company. It is not his case that he has been allotted with any other or more number of shares subsequently. It is a different case if the Company has accepted subscription from him but failed to allot the shares. The CP is silent on that aspect. The present authorized capital of the Company at the time of filing the CP is Rs. 20, 00, 000/- divided into 20, 000 equity shares of Rs. 100. The Company Petitioner's holding comes to 0.05%. Even these 10 shares also were said to have been transferred by the Company in favour of 6th Respondent. The Company Petitioner's case is that he did not execute any transfer deed and that he has never sold the 10 shares to anyone else.

The applicant contends that the non-applicant has transferred his 10 equity shares and it was also notified in the annual returns. The Annual Return, at page 87 of Paper Book, is to the effect on 08.09.1996 AGM was held and page 97 thereof shows that 10 shares of the non-applicant *Mr. Vinod Kumar Sharma* were transferred on 6.4.1996. The contention of the non-applicant is that the transfer is false. Ld. Counsel for the non-applicant argues that the applicant did not produce the original or copy of the transfer deed and from that circumstance the court can deduce that there is no transfer deed and that plea of the applicant is not plausible. He

has also argued the questions whether or not the transfer of shares is true and whether the transfer was made according to procedure and whether the non-applicant has any reason to transfer his shares have to be decided on merits and the Company Petition cannot be thrown away at the threshold.

The Ld. Counsel for the non applicant further contends that soon after the search report given by the Chartered Accountant *Mr. Amresh Vashisht* on 30.3.2010 (AnnexureP2), the non-applicant came to know about the transfer of his shares and issued a notice to *Vishal Mittal* but it was not served and therefore Vishal Mittal is not a genuine transferee of the shares. The Ld. Counsel therefore urged to dismiss the CA mainly because the question whether the transfer of shares is true is a pure question of fact and has to be enquired into in the main CP only.

16. This argument seems missing force for the particular reason, the Company Petitioner who claims that he had never sold 10 shares, failed to file the original share certificate along with his affidavit. He did not explain in the entire pleading as to what happened to that original share certificate. Therefore, the natural presumption is that he might have parted with the share certificate. It is for the Company Petitioner to explain in the Petition this adverse circumstance.

In ***Ram Gopal Patwari & others vs. Patwari Exports (P) Ltd & others***[9] it has been observed that the prima facie evidence to the shares could be either the share certificate or even the register of members and in the absence of share certificates or entry in the register of members, if a person could establish that certain shares have been allotted to him, then for the purpose of section 399 of the Act, he could be treated as a member. Even though the context is different, the share certificate is the best evidence to prove the Company Petitioner is holding those shares in the absence of any other event or contingency. This circumstance is vital because, even according to the non-applicant's own showing the Register of Members is not showing his holding of any shares from 1996 onwards.

17. In addition to the above circumstance, the Ld. Counsel for the applicants brought to our notice that the Petitioner made a complaint to the Department of Company Affairs in the year 2003 making allegations against the applicants, including the transfer of shares and therefore, it is not for the first time in the year 2010, the non-applicant came to know about the transfer through the search report of Chartered Accountant, and thus, the non-applicant having slept over the matter for a long time, approached the Tribunal with unclean hands and at any rate, the non-applicant did not have 10% of the equity to maintain the petition as on the date of its filing before the CLB. No doubt one of the questions to be decided in the CP is the purported share transfer by the company from the non-applicant to the 6th Respondent. The applicants, no doubt, admit that before 6.4.1996 the non-applicant was having 10 shares of Rs. 100 each. But it is on record, the Company's authorized share capital is 5, 00, 0000 divided into 5, 000 equity shares of Rs. 100 and the subscribed share capital of 2,00, 000 stands at 20, 000 equity shares of Rs. 100 on the date of filing of the Company Petition. In the light of Sec. 399, even if the contentious issue of transfer of 10 shares is not considered, the non-

[9] (2010) 160 CompCas 116 (CLB-New Delhi)

applicant is possessing less than 10% of the subscribed share capital and he did not obtain permission of the Central Government to file Petition under Sections 397 and 398, having equity of less than 10%. It is in the light of this circumstance, we have to analyze the documents.

18. The Petitioner cannot contend that till 2010 he does not know about the share transfer because, any such contention will be belied by his own documents. He made a complaint to the Under Secretary, Department of Company affairs, New Delhi in the year 2003, complaining that he was removed illegally as Director of the Company, and as member of the Company and the opposite parties have misrepresented his equity capital. (Annexure P30) He states in that complaint-

> "I was holding 25% of the share holding of the company as given in the copy of enclosed Memorandum & articles of Association...Not only the directorship, the complete fraudulent act of the directors is to shown transfer of my shares on their sweet - will, at their sweet- time, without backed by any legality, without having a statutory prescribed form thus making a complete 420 in my case"
>
> "This is to mention here with oath that I have never sign any share transfer form in any one's favour"
>
> "I made an investment in Bhawani Cold Storage as equity to the tune of Rs. 3.13 (Cash for shares Rs. 01lack, Cost of land Rs. 2.80 lacks & cost of registration Rs. 032 lacks). My total investment was Rs. 3, 13, 000.00 on 31.03.1990 though it valued at Rs. 10.33 while the other three directors had contributed Rs. 5, 88.000 for all purposes..."

The said complaint was forwarded by the Department to the Registrar of Companies vide letter dated 22.10.2003, with an advice to exercise powers under Sec. 234 of the Act. Record further shows, as per the documents filed by the non-applicant before the CLB and available on record, the ROC summoned the Managing Director of the Company by the letter dated 25.11.2003 to produce certain records for inspection., viz., Minutes Book of members' meeting' Minutes Book of Directors' meeting & Board's Committee, if any; Dispatch Register, Documentary proof as to the notices sent to all the directors and members in case of all the meetings, fixed assets register, cash book and ledges and Share Transfer Registers. On 9.11.2011, Regional Director issued proceedings thus:

> "Hence, sanction is hereby accorded for filing prosecution under Sec. 234 (4) of the Companies Act, `956 for the said company for non-compliance of section 234 (1) & 234 (3A) of the Act, if no reply to your letters has been received from the Company/directors so far and furnish your report within 20 days hereof"

19. Thus, the inference of his equity holding calculated by the non-applicant is encompassing the amount he has remitted to the Company viz., Rs. 2, 80, 000 (land value) on the understanding of returning 2 *bighas* of land and Rs. 32, 200 the costs of Registration agreed to be shown as equity but never reflected in the books of account. At the time of incorporation the subscribed capital is 40 shares of Rs. 100 each out of the authorized capital of 20, 000 shares. The non-applicant was given 10 shares admittedly. When the paid up capital was raised to Rs. 19, 97, 500 out of authorized capital of 20, 00, 000, as shown in Form 20B as on the date AGM 29.09.2008, the non-applicant's holding of 10 shares worth Rs. 1000 comes to 0.05%. If the sum of Rs. 32, 200 is also taken as his equity, he will get another 322 shares. Then the total holding comes to 332 shares

and on that hypothesis, his holding comes to 1.63% only. However, since the incorporation of the Company, the sum of Rs. 32, 200 was never reflected in the records of the company. If the investment of 2, 80, 000 is also accepted as his equity, it gives him 2800 shares and the total comes to 2800+10=2810, then only the non-applicant 's equity holding comes to 14.017%.

20. The contention of the non-applicant is that non production of the original documents relating to the share transfer by the applicants is fatal to their case and adverse inference has to be drawn. There is logic in his submission but, in an enquiry into the maintainability of the Company Petition, the Tribunal shall have to take into consideration the pleadings and the documents filed by the Company Petitioner only and it cannot rely upon the defence of the opposite parties or their evidence. This enquiry is akin to the enquiry by a Civil Court in application filed by defendant under Order VII Rule 11 of the Code of Civil Procedure. Explaining the scope of such enquiry the Supreme Court in more than one occasion has laid down the law that the court is precluded from considering the defence of the defendants and their evidence. The view of the Apex Court is that plain language of Order VII Rule 11 of the Code shows that for determination of an application under this provision, the Court has to look into the plaint. At the stage of considering the case for rejection of plaint the stand of the defendants in the written statement or in the application they made under Order VII Rule 11 is wholly immaterial. In all other situations, the claims will have to be adjudicated in the course of the trial only.(Vide: ***P. V. Guru Raj Reddy rep by GPA Laxmi Narayan Reddy vs. P. Neeradha Reddy; Bhau Ram vs. Janak Singh & Others.***[10]

Therefore, if on a meaningful, not formal, reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order VII Rule 11 of the Code taking care to see that the grounds mentioned therein ~~is~~ are fulfilled.

For that reason, while importing the principles of the Code of Civil Procedure, we are not examining the flaws or otherwise merits or demerits of the case of the Respondents in the Company Petition, who are the applicants herein. We are relying and examining the merits of the Company Petition only for the limited purpose of disposing of the Company Application filed under Regulation 44 of the Company Law Board Regulations, 1991, which are similar to Rule 11 of the National Company Law Tribunal Regulations, 2016 as well as Sec. 151 of the Code of Civil Procedure. It is no more *res-integra* whether the Tribunal is competent to reject a Company Petition at the doorsill. ***Ram Gopal Patwari*** (supra) is a case where the Company Law Board considered the application raising the objection as to the qualification under sec. 399 of the Act to file the Company Petition and dismissed the CP upholding those objections.

21. As we have observed in the earlier paragraphs of the order, even according to the non-applicant, the sum of Rs. 2, 80, 000 was shown in the records of the company as unsecured debt and not as equity from the very inception. His case that it was understood at the time of sale of land to the Company, the amount of sale consideration is paid to the company

[10] (2012) 8 SCC 701

as his equity investment cannot inspire confidence as his another plea that the applicants agreed to return 2 *bighas* of land to him subsequently. If the total consideration of Rs. 2, 80, 000 was taken as equity, returning part of the land purchased by the Company from the non-applicant does not arise. If that land is returned, accepting the sale consideration for the total land of 5 *bighas* will not arise. Thus, the plea of the non-applicant is mutually destructive.

Therefore, the non-applicant's stand that he has possessed 10% quantitative equity eligibility to maintain the Company Petition is sheer hypothesis. The Company Petition itself discloses on its very face that the Company Petitioner does not own 10% equity prescribed by Sec. 399 of the Act. He will get that qualified percentage of equity only when the Tribunal declares that the investment made by him and shown as 'unsecured debt' in the Company records is in fact towards the equity. The fact, however, remains is that the Company has not issued him shares for that sum of Rs. 2, 80, 000 and even though the sum is shown as unsecured debt, there is nothing on record to show that he had demanded the Company to issue shares to him prior to his complaint to the Department of Company affairs in the year 2003.

22. *Shri Siddhartha Varma*, Ld. Counsel for the non-applicant would submit that the holding of the Petitioner prior to the date of acts of oppression has to be taken into consideration for sustaining the invocation of jurisdiction of the Tribunal under Sections 397 and 398. He placed reliance on the Division Bench decision of Karnataka High Court in ***Vijayan Rajes vs. MSP Plantations (P) Ltd (2010) 98 SCL 383.*** The division bench while considering the ambit of qualifications under section 399 made the following observation at para 32 of the report.

> "On authority it had been established that for the purpose of examining as to whether the petitioning members qualified for maintaining a petition under section 399, the question to be looked into was as to whether the petitioners constituted the requisite number of members or they had the requisite shareholding in the company prior to the acts complained of. If the date of presentation of the petition had to be looked into in a technical way, it could defeat the very purpose of the legislative enactment of sections 397 and 398...."

Even if the above view is taken into consideration, the Company Petitioner's equity holding was only 0.5%, at the time when the acts of oppression were complained of. Therefore, on the point No. 1, our finding is that the Petitioner in the Company Petition (non-applicant) was not holding one tenth of the equity to be eligible to file the Petition under Sections 397 and 398 of the Companies Act, 1956.

23. Point No. 2: To recall the earlier discussion of pleadings, documents and our observations, we have noticed that two kinds of transactions are in dispute. One is transfer of shares of the Company Petitioner and the other is resignation of the Company Petitioner to the Board of Directors. Both the transactions set out by the Respondents in the CP (applicants) are unequivocally denied by the Company Petitioner (non-applicant) claiming that they are forged. In as much as the documents are not before the Tribunal, and in view of the fact that the enquiry in the application

under Regulation 44 shall be confined to examine the pleadings and documents of the Company Petitioner only, we have to examine this point from the stand point of the competency of the Tribunal to enquire into disputed facts.

The jurisdiction conferred on the Tribunal in the Petitions under Sections 397 and 398 and provisions related thereto is summary in nature. Most of the facts either be admitted by the parties; or any fact may be proved by affidavit. When the nature of the document on the basis of interpretation and understanding of their enforceability arises in a dispute, certainly the Tribunal is competent to decide those disputed facts. But, where the execution of the document is asserted by one party and denied by the other; or any document put forth by one party is disputed by the other on the grounds of fraud, misrepresentation or coercion etc., which will vitiate the transaction, those issues require oral evidence and appreciation of that evidence in the light of the principles of Evidence Act. Those are being complex issues of fact a Tribunal holding summary enquiry cannot adjudicate upon them. That is within the realm of a competent Civil Court only.

The proposition that complicated questions of fact cannot be decided by Tribunal within its limited jurisdiction is crystallized by the Apex Court in ***Jai Mahal Hotels Private Ltd vs. Devraj Singh and others.***[11] It has been observed that the cases involving complex questions of title would fall outside the jurisdiction of Tribunal, under sec. 111 (7) of the Companies Act, 1956. However, on facts, the Court pointed out that the cases where the petitioner is having valid Succession Certificate and transfer deed and other documents relating to the shares in his favour, the tribunal can entertain the application for rectification of Register, because there could be no complex issues involved in those cases. In that case, the issue was testamentary disposition. Following that principle laid down by the Apex Court this Bench held in ***Mrs. Sadhna Bagla vs. Upper India Cold Storage Limited***[12] that where there are scores of disputed issues like fraud, manipulation of Registers, and entitlement of shares etc to be resolved by the Tribunal before exercising its jurisdiction to direct rectification of the Register of Members, those intricate issues have to be adjudicated by the Civil Court only and the Tribunal cannot decide them in a summary enquiry. The Company Law Board following its earlier precedents held in ***PLG Manu & another vs. Shashi Distilleries (P) Ltd & others (2010) 94 CLA 408 (CLB, Chennai***) held thus:

> "Complicated questions and serious controversies of facts cannot be decided by CLB in summary jurisdiction and have to the (sic. 'be') tested and adjudicated only by the civil court whose jurisdictions is not barred. On the facts disputes involved substantial rights of parties involving allegations of forgery, fabrication of records etc., which could only be resolved by oral testimony tested by cross examination of witnesses. Such disputes could not be resolved on strength of averments made in affidavits filed by parties defeating purpose of object of summary procedure prescribed by section 397/398 of the Act"

25. In view of that settled position of law, we shall invariably be under obligation to stumble on whether the questions before us are complicated

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[11] (2016) 1 Supreme Court Cases 423

[12] Company Petition No. 115 (ND) of 2014 dated 28.10.2016, NCLT, Allahabad)

and require evidence. The transfer deed and letter of resignation propounded by the applicants to sustain their case that the Company Petitioner has no *locus standi* are substantially material documents, had they been produced during course of hearing into the CP. If they are before the Tribunal, in view of the contention of the Company Petitioner that they are either manipulated or forged, necessarily, the disputed signatures shall be referred for expert opinion, not only as to the handwriting but also in regard to age of paper and ink, because, the other facet of the contention of Company petitioner is they are manipulated. Appreciation of evidence of handwriting expert requires other oral evidence of the persons who are present when the documents were executed on one side and the circumstances showing improbable the execution of the documents on the other side. Then the witnesses have to be cross examined, their demeanors shall be observed by the Court. This exercise has to be undertaken by a Civil Court only as the compass of such nomadic enquiry cannot be comprehended by a tribunal of limited or summary jurisdiction. We therefore endorse our view that those complicated questions cannot be enquired in the Company Petition.

No doubt, as submitted by Shri *Siddhartha Varma*, Ld Counsel for the Company Petitioner, the issues of oppression and mismanagement attributed to the Respondents in the Company Petition can be decided from certain striking circumstances like non service of notices of meetings on the directors or members as the case may be, that the Company Petitioner is a life time Director as per the Articles and so his resignation is impossible, that the Company which has accepted the unsecured debt from the Company Petitioner had never paid him the interest, that a criminal prosecution was also launched against the Directors of the Company for non production of records before the ROC etc are certain circumstantial factors that can come in the aid of the Company Petitioner if once the Tribunal is able to record a finding that the Transfer deed and the Resignation are either forged or otherwise manipulated. In that situation, the principles of burden of proof will have to be applied by the adjudicating forum.

Similarly, even if the plea of the Company Petitioner that the sum of Rs. 2, 80, 000 is paid by him to the Company as equity is accepted, at best it is on a contract between the partners *interse* which is not binding on the Company, as we have observed in the earlier paragraphs. Furthermore, this contract is denied by the applicants and no document in support of that understanding is produced by the non-applicant. Thus, proof of 'understanding' or a contract among the directors is a matter which has to be decided in a properly constituted civil suit for specific performance of that contract in terms of 'understanding'. Such complicated question of fact cannot be decided by this Tribunal in a précis enquiry. This Tribunal's Jurisdiction has to be invoked on initial admitted facts and any issues relating to the affairs of the company or rectification of Register of Members can be ordered by the Tribunal only on satisfying with the initial *locus standi* of the Company Petitioner for approaching the Tribunal claiming reliefs falling under Sections 397 and 398 of the Act. In other words, the Tribunal's jurisdiction cannot be invoked by a party who has no established status as member passing the test of qualification prescribed under sec 399. The Company Petitioner-non-applicant did not pass that test of qualification of holding one tenth of equity on his own showing.

27. Point No.3: There is yet another impediment on the entertainability of CP, as urged by Shri *Pushkar Mehrotra* Ld Counsel for the applicants. It is delay and latches. In short, we find this ground is not available to the applicant to seek dismissal of Company Petition. Our reasons are as below.

As referred above, the Company Petitioner has approached the Civil Court in the year 1994. In the plaint he has pleaded that that 3 *bighas* sold to the defendants and other 2 *bighas* is in his possession. Further in para 11 of the plaint, (as per the English translation supplied to us) he made a specific averment that the defendants started interfering with his possession of 2 *bighas* of land with a malafide intention to put him to loss and to him from the business. At para 18, the cause of action was shown to have arisen on 12.05.1994 when the defendants denied the plaintiff's right in the land. That suit was admittedly dismissed for default. Similarly, the defendants filed another suit N. 1173/1993 in respect of the 5 *bighas* of land and that was decreed exparte on 2.8.1999. In 2003 the Company Petitioner complained to the Ministry of Company affairs (Annexure P30) stating that

> "I request you to take up my case, which started from a fraudulent resignation letter duly submitted to you for registration. The information required to be furnished had been concealed and in the process you office have also failed to take a note of its illegality...."
>
> "I Vinod Kumar Sharma had been removed by fraud by remaining directors though the removal don't have any legal existence as they were not competent to act in that fashion but it shows the ..."
>
> "The majority of the Directors had not stopped their illegal acts by making a bogus registration (Sic: 'resignation') letter but also gone by transferring my shares in the name of Vishal Mittal on 26.4.1996..."

The above grievance was forwarded by the Department to the ROC, Kanpur on 22.10.2003. So, as rightly argued by *Shri Pushkar Mehrotra*, by October 2003, the Petitioner in the CP has knowledge about the resignation letter and the transfer of his shares. He ought to have approached the competent Court, if not the Tribunal having limited jurisdiction, to challenge the above transactions and to get them set aside. Nevertheless, he had raised his grievance before a statutory authority. He has approached the Tribunal in the year 2010 with the present CP. In ***Ram Gopal Patwari*** (supra) the CLB held that even though the CLB is not precluded from rejecting or dismissing petitions on account of delay/latches in appropriate cases the stigma of delay and latches have to computed from the date of knowledge and the latches or delay should be such that it could said that the petitioner is not entitled to relief on account of gross negligence or inaction or want of bonafides.

28. In the case on hand, we cannot find any is negligence or deliberate inaction demonstrating latches on the part of the Company Petitioner in approaching the Tribunal in 2010, though having knowledge about the fraudulent transactions at least in 2003. It may be noted, even by 1993-94, the terms between the two groups were not affable as evidenced by the civil suits filed against each other in respect of the land. It can be said, at best, the Company Petitioner was not prudent in keeping quite in not filing properly constituted suit for appropriate reliefs, instead of approaching government authorities for redressal. We therefore, reject the contention

of the applicants that the CP is barred by delay and latches, in as much as there is no deliberate inaction on the part of the non-applicant. But the only mistake he has committed is in not selecting appropriate forum for redressal of his grievances against the applicants.

29. **Result:** In view of forgoing discussion and in the light of our observations, we find that the CA is entitled to be allowed on the ground that the Company Petitioner did not possess requisite shareholding in the Company on the date when the acts of oppression and mismanagement were complained of, and the complex issues of forgery and manipulation of records cannot be decided in summary enquiry by this Tribunal and the forum appropriate to enquire and adjudicate upon those issues is civil Court.

30. Hence, Company Application 23/2016 is allowed. Consequently, the Company Petition No. 68/ND/2010 is dismissed. Each party shall bear its own costs.

Typed to dictation by the Law Clerk, corrected by us and pronounced in open Court this Friday, the 18th day of November 2016.

V.S.R. AVADHANI, MEMBER (JUDICIAL)

H. P. CHATURVEDI, MEMBER (JUDICIAL)

DATED FRIDAY, THE 18th DAY OF NOVERMBER 2016