

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, CHENNAI.

Arguments heard on 04.11.2016

Orders passed on 24. 11. 2016

CA No.155 of 2012

In

CP No.57 of 2012

(T.C.P.No.99 of 2016)

(Under Sections 397, 398, 111, 402 and 403 of the Companies Act, 1956 and
Schedule XI and other applicable provisions)

Applicants : M/s. Jehova Exim Private Ltd. and 4 others
Represented by Dr.K.S.Ravichandran, PCS and
Ms.S.Manjula Devi, Advocate

Vs

Respondents : Shri. M.Robert and 5 others,
Represented by Shri S.Sathish, Advocate

CORUM:

K. ANANTHA PADMANABHA SWAMY, MEMBER (JUDICIAL)
CH.MOHD.SHARIEF TARIQ, MEMBER (JUDICIAL)

ORDER

Present: **K.ANANTHA PADMANABHA SWAMY, MEMBER (JUDICIAL)**

This application is filed by the applicants, who are respondents 1 to 5 in the Main company petition, under Section 403 of the Companies Act, 1956 read with Regulation 14 of the Company Law board Regulations 1991.

It is the case of the applicants that applicant No.1 is the Company and that applicants 2 to 5 are the present shareholders of the company and the management is under their control. The petitioners 1 and 2 in the main company petition are not shareholders of the Company and therefore they have no locus at all to invoke the statutory rights of shareholders under Section 397/398 of the Companies Act, 1956 (for short, the "Act"). The petitioners in the company petition state that their entire shareholding of 10,000 shares of Rs.10/- each in the Company have been transferred to petitioners 3 to 6.

It is further stated by the applicants and as stated in the company petition by the petitioners that petitioners 1 and 2 could not bring in funds to pay vendors of certain properties purchased by the company. One of the averments in the company petition is that petitioners 3 to 6 have brought in the necessary funds and therefore it was decided by the petitioners 1 and 2 to transfer the shares of

the company in their favour. It is stated by the applicants that the petitioners also alleged in the company petition that they were the directors of the company and there is shred of evidence with respect to the shareholding of petitioners, particularly in respect of shareholding of petitioners 3 to 6. It is also stated that the petitioners have not furnished any proof with respect to their shareholding. It is further stated that petitioners 3 to 6 were in control of the board of directors and they held all the shares in the company and still they have not been able to show any material to show that they were and are shareholders of the company at any point of time.

The applicants further state that the petitioners 1 and 2 having transferred 10,000 shares Rs. 10/- each to petitioners 3 to 6, the company petition cannot be maintained with those two people as petitioners. At the best they could have been added only as respondents. Further petitioners 3 to 6 have not shown any proof about their alleged purchase of shares of petitioners 1 and 2 and in the absence of the same that they were and are shareholders of the company, the company petition fails in view of failing to prove their eligibility under Section 399 of the Companies Act 1956.

The Applicants pray for dismissal of the company petition on the sole ground that the petitioners in the company petition have not established their eligibility to maintain the company petition.

The respondents herein, who are petitioners in the main company petition, filed counter, reiterating the averments made by them in the main company petition *inter alia* except stating that respondents 6 and 7 in the company petition have neither been shown as applicants or respondents in the present application and as such the present application is not maintainable for non-joinder of necessary parties. The respondents herein alleged about the acts of oppression and mismanagement of these applicants and accordingly pray for dismissal of the application.

The respondents relied on a judgement dated 3.9.2008 made by the Hon'ble Supreme Court in M/s.J.P.Srivastava vs H.K.Srivastava (D) Th.Lrs. & ors on 3.9.2008.

In reply the applicants filed rejoinder almost denying all the allegations made in the counter filed by the respondents herein.

The point for consideration is:-

Whether the present application filed by the applicants, who are respondents 1 to 5 in the main company petition, under Section 403 of the Companies Act, 1956 read with Regulation 14 of the Company Law Board Regulations, 1991 is maintainable or not ?

The respondents herein filed the main company petition under Section 397,398,402, 403 and 111 of Companies Act, 1956. The prayers read thus:-

- i) Declare that the acts set out and complained of herein are illegal, invalid, and oppressive to the Petitioner.
- ii) Declare that the following forms in respect of the 1st Respondent company filed with the registrar of companies, MCA portal are illegal and invalid
 - a) Form 32 dated 17.02.2006 relating to alleged appointment of 2nd and 4th Respondent (P.Ramasundaram & K. Ravi) and alleged resignation of 1st Petitioner-Mr.Robert
 - b) Form 32 dated 20.02.2006 pertaining to alleged appointment of 3rd and 5th Respondent (T. Pannerdas and T.Selvaraj) and alleged resignation of 2nd Petitioner-Mr.Simson
 - c) Form 32 filed vide SRN 84162593 on 30.04.2010
 - d) Form 2 filed in the year 2010 relating to the alleged allotment of shares on 27.01.2006

- e) All the Form 20B and 23 AC pertaining to the 1st Respondent Company signed by the 2nd Respondent
- f) All and any other eforms/manual forms pertaining to the 1st Respondent Company signed by the 2nd to 5th Respondent
- iii) Declare that the 3rd Petitioner is the Managing Director of the company
- iv) Declare that the 4th, 5th and 6th Petitioners are Directors of the 1st Respondent company
- v) Declare the appointment of 2nd and 3rd Respondents as directors of the company is illegal, invalid and consequently set aside such appointment and permanently restrain the 2nd and 3rd Respondent from functioning as a Director of the 1st Respondent Company
- vi) Declare that the allotment of 4000 shares to the Respondents (2nd Respondent 15,000 shares, 3rd Respondent- 5000 shares, 4th Respondent – 15,000 shares, 5th Respondent-5000 shares) vide Form 2 filed in the year 2010 relating to the alleged allotment of shares on 27.01.2006 is illegal and invalid and set aside such allotment
- vii) Declare the alleged transfer of 10,000 shares of the 1st and 2nd Petitioner (5000 shares each) in the name of 2nd to 5th Respondents (2500 shares each) is illegal and invalid.
- viii) Permanent injunction restraining the respondents 2 to 6 from altering the shareholding pattern of the 1st respondent company by bringing in any fresh investors or by allotting shares to themselves or any other members/persons.
- ix) Permanent injunction restraining the respondents 2 to 6 from in any manner alienating, encumbering, entering into agreement of sale in respect of the property held in the name of the 1st Respondent company.
- x) For a permanent injunction restraining the 2 to 6 respondents from unilaterally alienating any of the assets of the 1st respondent company.

- xi) For a declaration that the sale deed dated 30.03.2006 registered as document no. 715 in favour of the Mr.J.Robin (7th respondent) executed by the 2nd Respondent as alleged director of company is without any authority and consequently illegal.
- xii) For a declaration that the affairs of the 1st respondent ought to be investigated and a direction to carry out such an investigation.
- xiii) And to pass such further or other order or orders as this Hon'ble Company Law Board may deem fit and proper in the circumstances of the case and thus render justice.

The main contention of petitioners in the company petition are that the petitioners 1 and 2 have transferred their entire shareholding of 10,000 equity shares of Rs.10/- each in respondent 1 company in favour of petitioners 3 to 6 in the company petition and made petitioners 3 to 6 as directors of the company. It is averred in the company petition that respondents have played fraud and committed various irregularities and removed petitioners 1 and 2 as directors and petitioners 3 to 6 as additional directors. The Petitioners in the company petition sought to show various irregularities in the actions of respondents and prayed for protection under Section 397 of the act.

Per contra, the learned representative of the applicants herein contends that the petitioners have no locus standi under Section 397 of the Act since admittedly, petitioners 1 and 2 have transferred all their shareholdings to petitioners 3 to 6 and petitioners 3 to 6 have not filed any evidence to show that they are shareholders. We find lot of force in this contention.

The cardinal principle of eligibility to file petition under Section 399 of the Act reads as follows:

S 399. Right to apply under section 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 member 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.

Petitioners 1 and 2 have averred in the company petition that they have transferred their entire shareholding of 10,000 equity shares in the 1st respondent company to petitioners 3 to 6. Surprisingly, the date of transfer is not furnished anywhere. However, it is their vehement contention that the said shares stand transferred to petitioners 3 to 6. However, petitioners 3 to 6 have not brought on record in evidence to show that either they are transferees of the said shares or hold the said shares.

The petitioners 1 and 2 claimed that they have been in control of the Company since inception and petitioners 3 to 6 are directors since 25.11.2005, for which Form 32 is said to have been filed on 7.12.2005. If that be so, they ought to have filed at least annual returns periodically to reflect the changes and the petitioners have not produced any record to that effect. Therefore, it is difficult to accept the contention of petitioners that petitioners 3 to 6 are holding any shares in respondent No.1 Company. Therefore we hold that the petitioners are not holding any shares of the Company and they have no locus to file the company petition.

The case law relied by the respondents herein is not applicable to the present application, as the facts and circumstances of that case or otherwise. Accordingly, the applicants, who are respondents 1 to 5 in the main company petition, succeeded the application.

Therefore, we allow the application and consequently the main company petition stands dismissed. There shall be no order as to costs.



K. ANANTHA PADMANABHA SWAMY
(MEMBER (JUDICIAL))

Ch Mohd Sharief Tariq, Member (Judicial) (Oral)

1. I have the privilege of going through the order passed by my Learned Colleague, Member (Judicial). I am proceeding to pass a separate order.
2. Under adjudication is an application numbered as C.A.155 of 2012 filed in C.P.No.57 of 2012 before the CLB. The C.P. which came to be transferred to NCLT was renumbered as T.C.P.No.99 of 2016. The C.A. has been filed by the Applicants/Respondents-1 to 5. The issue raised in the C.A. is with regard to the maintainability of the Company petition.

The applicants/respondents have pointed out that it has been stated in the Company Petition that Respondents 1&2/Petitioners have transferred their shares in favour of Respondents 3 to 6/Petitioners. In other words, Respondents 1&2/Petitioners are not the members of the Applicant No.1/R1 Company. Therefore, they are not legally entitled to invoke Sections 397 and 398 of the Companies Act, 1956.

3. Respondents 3 to 6/Petitioners have not stated anything about their shareholdings in the Company Petition. However, an insignificant statement has been made in the company petition that the alleged illegal transfer of shares of the respondents/petitioners in the name of the Applicants/respondents is also challenged. As per the contentions made in the company petition, it reveals that during the period of purported transfer of shares made by respondents 1&2/Petitioners to respondents 3 to 6/petitioners, the respondents/petitioners were directors in the Applicant-1/R1 company. But there are no documents to prove that the Respondents 1&2/Petitioners have ever transferred their shares to Respondents 3 to 6/petitioners. Therefore, there does not appear any transfer of shares by operation of law which means some acts in the law by which the legal estate passes on, even though there may be some further acts like entry in the Register of the members/issuance of share certificates. In the prayer part of the company petition, one of the reliefs that has been sought for by the respondents/petitioners is as follows:-

“(vii) declare the alleged transfer of 10,000 shares of the 1st and 2nd petitioners (5000 shares each) in the names of 2nd and 5th respondents (2500 shares each) is illegal and invalid.”

But, neither in the company petition nor in the counter filed to C.A.No.155 of 2012 the Respondents/petitioners have adduced any shred of evidence to prove that the Respondents 3 to 6/Petitioners have ever become the members of Applicant 1/R1 company.

4. Suppose the entire shareholdings of Respondents 1&2/petitioners have been transferred to respondents 3 to 6/petitioners, then as to how in the above mentioned prayer, it is shown that the alleged transfer of the shares of


respondents 1&2/petitioners have taken place in the names of 2nd and 5th Applicants/ respondents. If we look at the pleadings as a whole, one can see that there is a material contradiction in the same. There does not appear any material evidence by which it could be established that at any point of time respondents 1&2/petitioners have got their shares transferred to respondents 3 to 6/petitioners. Thus, the respondents 1&2/petitioners and respondents Nos.3 to 6/petitioners failed to satisfy the requirements of Section 399 of the Companies Act, 1956 for being entitled to file company petition under Sections 397 and 398 of the said Act. So the contention of the applicants/respondents raised in the C.A. appears to be plausible because the respondents/petitioners did not discharge the burden of proving that they held the required number of shares in Applicant-1/R1 Company. In Prafulla Kumar Rout Vs Orient Engineering Works (P) Ltd [60 Comp case, 65(Ori)]1986, it is held that the petition under Section 397/398 is not maintainable as the petitioner did not discharge the burden of proving that he held shares in the company.

5. There is a paid up share capital in Applicant-1/R1 Company which falls within the purview of Section 399(1)(a) of the Companies Act, 1956. Section 399 (1) (a) provides that the members of a company shall have the right to apply under Sections 397 and 398 when there are 100 members of the company or 1/10th of the total number of members whichever is less or any member(s) holding 1/10th of the issued share capital of the Companies provided the applicant(s) has/have paid all the calls or other sums due on their shares. But in this case, the respondents 3 to 6/petitioners did not fulfil the said requirements. In Syed Musharraf Mehdi Vs Frontline Soft Ltd. [2007] 75 SCL 329, Chennai, the CLB, Chennai, after having surveyed the precedents, confirmed that the object of prescribing a qualifying percentage of shares in petitioners and their

supporters to file petition under section 397 and 398 clearly ensures that frivolous litigation is not indulged in by persons who have no stake in the company.

6. We know that the term “member” defined under Section 2(27) and 41(2) of the Companies Act, 1956 [Section 2(55) of the Companies Act, 2013] came to be interpreted by various judicial authorities liberally and it has also been held that a company petition cannot be thrown out at the threshold where the issue of maintainability may not be capable of being treated as a preliminary issue. In other words, when the very challenge of the transfer of shares is made in the company petition, the C.P. cannot be dismissed without making any enquiry into the matter complained of. But in this case, it is not the case of the Respondents 3 to 6/Petitioners that in any manner their shares have been transferred illegally to the applicants 2 to 5/Respondents, because they themselves have not been able to show that at any point of time they have been holding the shares in ^{applicant} ~~petitioner~~ R1 company after the purported transfer of shares by respondents 1 & 2/Petitioners. Therefore, there appears to be ulterior motive to file the Company Petition. In Vijayan Rajes Vs M.S.P. Plantations (P) Ltd [1999] 19 SCL, it has been held that it is settled legal position that when a petition under Sections 397 and 398 is filed with a view to achieve some ulterior objective/collateral purpose, such a petition should not be encouraged. Further, in Ramesh Bhajanlal Thakur Vs Seaside Hotel (P) Ltd, [2000] 23 SCL 164 (CLB-New Delhi), it has been held that it is settled principle of law in proceedings under Sections 397 and 398 of the Act that the relief sought is to put an end to the acts of oppression/mismanagement and not for any oblique purpose.

7. In the light of the facts and circumstances, and the legal position stated above, the C.A.155 of 2012 filed in C.P.No.57 of 2012 [renumbered as T.C.P.No.99 of 2016] is succeeded. Therefore, the company petition [T.C.P No.99 of 2016] is held not maintainable, the same stands dismissed and the interim order if any also stands vacated. There is no order as to costs. The file shall be consigned to record after due completion.


(Ch Mohd Sharief Tariq)
Member (Judicial)