

In the National Company Law Tribunal
Mumbai Bench.

CP No.05/397-398/CLB/MB/MAH/2016

Under Section 397-398 of Companies Act 2013

In the matter of

Shri Hemant Mahabala Kotian : Petitioner

V/s

Batto Green Batteries India Private Limited : Respondent

Order delivered on: 8th January, 2018

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)

For the Petitioner(s): : 1. Mr. Chirag R. Sonecha, Advocate.

For the Respondent(s): : 1. Ms. Anagha Anasingaraju, PCS
2. Mr. Mahesh Athavale, PCS.

Per M.K. Shrawat, Member (Judicial).

ORDER

1) This petition is filed on 23 June,2016 before NCLT, thereafter fixed for hearing for the purpose of 'Admission' on 18th Aug. 2016. The Petition was '**Admitted**' for due adjudication and an Interim order was passed on that day. During the pendency of the completion of pleadings the Respondents have challenged the "**Maintainability**" of the Petition. However, vide another Interim order dated 17-11-2016 it was held that the Petition is maintainable and to be decided on merits. On completion of pleadings, thereafter, listed for final hearing.

2) **Facts in Brief:-** The Company was **incorporated on 24th Feb.2011**, having its address at Kondwa Road, Pune. The Company was formed to carry out the business of manufacturing, buying and selling of Automotive Batteries. Petitioner No. 1 Mr. Hemant M Kotian resident of Pune was allotted at the time of incorporation 5,000 Fully Paid up Equity Shares. Likewise, Respondent No.2 was allotted 5,000 Equity Shares fully paid up at the time of incorporation. Undisputedly, Petitioner and Respondent No.2 were the Promoter Directors by holding equity of 50% each. It may not be out of place to mention here that there was an alleged change in the Shareholding pattern. The present

position of the shareholding, as mentioned but also objected in the Petition, is that the Petitioner was shown in the Annual Return for the year 2011-12 and 2012-13 holding 3,333 Shares (33.33%). Likewise, for the year 2013-14 and 2014-15 Respondent No. 2 was declared holding 3,334 shares (33.34%). One Mr. Avinash S Dhumal (R-3) was appointed as Addl. Director on 17th May, 2012. The Petitioner has stated that as on that date R-3 was not holding any shares, however, as per Annual Return 2013-14 and 2014-15 he was shown as holding 3,333 shares (33.33%). In fine, the **first major controversy** raised in this Petition is about the correctness of the present position of shareholding of the Petitioner, on one hand, and by the Respondent No.2 & 3, on the other hand.

2.1) **PLEA OF THE PETITIONER :** - That the claim of the Petitioner is that the land of the Company was purchased by him (Petitioner) and Respondent No.2. The construction on the land was started in the year 2011 and completed in May, 2014. The claim of the Petitioner is that for the amount paid for purchase of the land and investment for construction was contributed by the Petitioner. As per the facts narrated, for further expansion and to run the business, as well as to get help in the business, it was proposed by R-2 to induct Mr. Avinash S Dhumal (R-3), who had also agreed to invest a sum of Rs.1,30,00,000/-. In the Petition it is stated that the amount contributed by R-3 was invested in procurement of machinery and used as working capital of R-1 Company. Additionally, the Company also took term loan of Rs.50,00,000/- from Baramati Sahakari Bank Ltd. For obtaining the loan a charge was created in favour of the Bank vide documentation dated 9th Apr. 2014 by offering land owned by the Petitioner and R-2 as a security. The Term Loan Documents were undisputedly signed by the Petitioner as well by the Respondent. The manufacturing of the Batteries was started in Aug. 2014. The Petitioner was assigned to look after the sales and R-2 and R-3 have been assigned the duty to look after the manufacturing activity and also day to day management affairs of the Company. The **second major controversy** is that whether the capital contribution of the Petitioner is at par with the contribution made by the Respondents No. 2 & 3 in the Company.

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2.2) As per the Petition it was decided to give distributorship of batteries to Petitioner. The Petitioner has informed that the power to operate Bank account was given to R-2 and R-3. The allegation of the Petitioner is that there was mismanagement of the funds and misuse of the bank account by the Respondents. This is also one of the controversy.

2.3) Next, that the allegation in the Petition is that while Petitioner was executing sales of batteries in the market he came to know from the dealers that the batteries sold/ supplied by R-1 (Company) were having manufacturing defect. According to him the customers have complained that inferior quality of batteries were supplied. The Petitioner has alleged that the batteries have been returned to the Petitioner for replacement as he was also acting as a Distributor of the batteries manufactured by R-1 Company. It was informed to the Respondent and requested to replace the batteries as well as to rectify the defect. According to the Petitioner in spite of repeated calls / e-mails the defective batteries were not replaced. So the grievance of the Petitioner is that due to the negligence of the Respondents the defective batteries were supplied under his distributorship as a result he had to suffer the credibility in the market and that the returned/discarded batteries have not been replaced by the Respondent Company causing financial loss to the Petitioner. This is the **Third controversy** about the '**Mismanagement**' by the Respondents.

2.4) That the next allegation is that a notice dated 30th Nov.2015 of Sales Tax Office of a demand of Rs.6,34,697/- was intimated through Axis Bank. The Petitioner alleged that he was never taken into confidence and without his information, the Sales Tax liability was imposed on the Company. He has demanded explanation but received no response. The allegation is that R-2 and R-3 have not shown any transparency in the business transaction. They have not given complete information to the Petitioner about the business of the Company. When the Petitioner demanded the details of the business transaction the Respondents started harassing him, as alleged in the Petition.

2.5) That knowing the intention of R-2 and R-3, the Petitioner approached Baramati Sahakari Bank and Axis Bank to make the changes in the signing authority to operate the bank account of R-1. He has asked the Banks to accept the signatures of all the three

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Directors to operate the Bank accounts instead of two Directors. According to the Petitioner the Banks have accepted his application.

2.6) That the next allegation revolves around the main controversy and the reason for filing the Petition is that on **13th Dec. 2015** the Petitioner had received an E-mail from R-2 informing date of Board meeting to be held on 16th Dec. 2016. The allegation is that in that meeting the Petitioner was present but he was abused and frightened by the Respondents. The **fourth allegation** is about the '**Oppression**' of the Petitioner by the Respondents.

2.7) That on 4th Jan.2016 Petitioner received a notice dt. 2nd Jan.2016 in which it was intimated that a meeting was going to be conducted on **28th Jan.2016** with the Agenda to **remove the Petitioner from the Directorship** of the Company. Petitioner sent a legal notice opposing the removal. In spite of the legal notice, meeting was conducted on 28th Jan. 2016 attended by the Petitioner. According to the allegation a quarrel started and the Petitioner walked out of the meeting. According to the Petitioner no business was carried out and no decision was taken except dispute between Directors. Therefore, the Petitioner preferred to walk out of the meeting. The Petitioner was shocked to know that he was removed from the Directorship by submitting e-form DIR-12 to ROC on 13th Jan.2016. Removal from Directorship is the '**Fifth major controversy** pertaining to 'Oppression'.

2.8) That on further enquiry he came to know that not only he was removed from the Directorship but out of holding of 5000 Equity Shares few shares were transferred to R-3 and his shareholding was reduced to 3,333 by transferring 1,667 shares in favour of R-3. The contention of the Petitioner is that the said transfer was without his knowledge and not a single Rupee was paid as consideration for the impugned transfer. The Petitioner has stated that the transfer of share was allegedly taken place on 5th of Jan.2014 as intimated in the Annual Return for the year 2013-14 and thereupon came to the notice of the Petitioner. The said Annual Return was filed in ROC Office on 12 Feb. 2016. According to the Petitioner no document was signed by him and no consideration was received. According to the Petitioner, the Share Certificates in original were never

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issued to him. The original share certificates were in the Registered Office of R-1, hence in the possession of the Respondents.

2.9) That on 27th April 2016 there was a news in the News Paper that the consumers of the battery have taken action against R-1 and its directors for selling defective/ inferior quality batteries. The said article published in Times of India and Kesari News Paper are annexed with the Petition. The grievance of the Petitioner is that his reputation in the market got maligned for none of his fault but due to negligence of the Respondents.

To sum up, the complaint is that by transferring of shares and by removing the Petitioner the Respondents have "Oppressed" the rights of the Petitioner. That by supplying defective batteries the name of the Company and the name of the Petitioner was maligned. Mismanaged the affairs of the Company. Decisions taken by the Respondents were detrimental to the interest of the stakeholders.

3) **PRAYER :** - The main relief sought and addressed in the Petition are reproduced below :-

- " a. *That this Hon'ble Tribunal be pleased to pass appropriate orders restoring the correct shareholding of the Petitioner i.e. 5,000 (Five Thousand) equity shares from 3,333 (Three Thousand Three Hundred and Thirty-three) equity shares by ordering transfers dated 5th January 2014 as void.*
- b.
- c. *That this Hon'ble Tribunal be pleased to pass appropriate directing the Respondents to restore Petitioner, as director of the Respondent No. 1 company.*
- d.
- e.
- f. *This Hon'ble Tribunal be pleased to pass order declaring title of the properties/assets."*

4) **PLEA OF RESPONDNET :** - From the side of the Respondent in the Reply it is stated that Mr. Dharmesh R. Rajput (Respondent No.-2) was in the business of manufacturing and marketing of batteries under the brand name of "Eagle Battery" since 2006. The business of his Proprietary concern Devansh Sales was growing well during the period from 2006 to 2009. Therefore, R-2 had decided to expand his business and

for that purpose obtained '**Batto Green**' trade mark from Trade Mark Registry under Trade Marks Act 1990 for the automotive and inverter batteries vide a certificate dated 21/03/2011 issued in favour of Devansh Sales being a manufacturer and merchants. On the other hand, the Petitioner Mr. Hemant Kotian was procuring the raw batteries from the local market and after branding those batteries as Arco, Lava, Alto etc. selling in the market. Being in the same business both got introduced. According to the Respondent (2) the Petitioner had realized that the Respondent had expertise in designing & manufacturing batteries, hence saw an opportunity to develop his brands which he had been marketing. Respondent already had the plans to expand his business and the Petitioner had offered his support to promote 'Batto Green' brand thus joined hands.

4.1) In the year 2011, R-2 and the Petitioner had acquired 14 Guntha land in **village Kondhanpur** to start the operational activities. The said **plot was purchased for a price of Rs. 3,70,000/-**. It is stated that the consideration was contributed equally by a sum of Rs. 1,85,000/- of both the sides. There is no controversy about this equal contribution. Respondent has annexed a Bank statement.

4.2) It is stated in the Reply that the Petitioner and the R-2 have formed the company **Batto Green Batteries India Pvt. Ltd. as promoter directors**. However, it was realized that it would take more than 2 years to complete the project hence as a time gap arrangement formed a **Partnership Firm 'D.H. Industries'** and arranged a readymade shed on rental basis to continue the business jointly. A shed on rent in Sai Industrial Estate, Pune was acquired and started manufacturing Arco, Lava, Alto batteries. However, for starting the project of 'Batto Green' it is stated by the Respondent that the Petitioner had backed out from his commitment of arranging finance and suggested to take bank loans. Respondent -2 was against the idea of bank assistance because of high finance cost. In the absence of expected support from the Petitioner, Respondent -3 was approached, who had agreed to finance the Company. The conditions of R-3 were **i)** R-3 be appointed a director **ii)** R-3 be given one third shareholding, **iii)** R-3 be given equal ownership in the Kondhanpur Land, **iv)** To close down operations of D.H. Industries once production of Batto Green batteries commenced and **v)** Finance to be looked after by R-

3, manufacturing by R-2 and marketing / sales by Petitioner. According to the Respondent all these terms were agreed upon by the Petitioner and he had also committed to sell two thousand batteries per month.

4.3) A board meeting was held on **17/5/2012** and **R-3** was appointed as **Additional Director**. The Petitioner had signed the said Board resolution. Further, as per Respondent, the **name of R-3 was included** in the ownership of the land by way of sale deed, stated to be registered on **24/12/2013**. As agreed, **R - 3** was also given **one third shares** in the paid up capital of the Company. The said transfer of shares was approved by the **Board of Directors on 05/01/2014**. Post transfer of shares the shareholding was 3,333 shares respectively by each three Directors. Accordingly, **R-3 had contributed Rs. 1,27,00,000/-** and the construction commenced. It is explained that after the re-arrangement the position as on 31.3.2015 was under:-

Name	Amount in Rs	Nature	Percentage
Mr. Hemant Kotian Petitioner	33,330 26,241 ----- Sub Total	Share Capital Credit Balance in Current Account	0.41%
Mr. Dharmesh Rajput Respondent No. 2	33,340 11,39,809 ----- 11,73,149 Sub Total	Share Capital Unsecured Loan	8.00%
Mr. Avinash Dhumal Respondent No.3	33,330 1,27,45,413 6,45,589 ----- 1,34,24,332 Sub Total	Share Capital Unsecured Loan Credit balance in Current account	
Total	1,46,57,052		100%

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4.4) The argument of the Respondents is that 99% contribution was made by R-2 and R-3. As against that the stake of the Petitioner was negligible 0.41%. After commercial operation started it was realized that the Petitioner was not keeping his commitment of selling at least 2000 batteries per month. It was also noticed that the Partnership D.H. Industries had also not been closed down. It was explained that due to kidney ailment the Petitioner could not work for the Company. The Petitioner had also refused to close down the operations of the firm D.H. Industries. The allegation of the Respondent is that the Petitioner had other three firms, names mentioned, through which purchased the batteries of the Company manufactured worth almost of Rs. 10 Lakhs on credit and in spite reminders failed to make the payment. Copy of few Invoices raised on the said three firms of the Petitioner along with ledger extract are annexed. Few emails sent to the Petitioner has also been annexed with the Reply. Due to non-payment the Respondent Company had **stopped supplying the goods after November 2015**. A proposal was made by the Petitioner to sold the D.H. Industries firm and one prospective buyer had offered to purchase the old machinery for a sum of Rs. 7.50 Lakhs which were originally purchased for a sum of Rs. 15 lakhs. It was agreed upon by Respondents so an agreement dated 01/06/2015 was executed. It is alleged that the cheque was dishonored. It is alleged that the Petitioner had refused to take any action against that person namely Mr. Borawale. A dissolution deed was executed on 29/04/2015 copy annexed with the Reply. The Petitioner carried the business from the premises of the said Firm but under a new name and carried the manufacturing of a brand 'Acro' batteries. A proof using the same premises is also annexed with the Reply. Due to competitive business the Respondents have suggested the Petitioner to resign form the Company and thereafter only could carry on his own business.

4.5) There is an allegation raised by the Respondents that the Petitioner had issued notices to the Company's Banks viz. Axis Bank & Baramati Sahakari Bank to stop the banking transaction of the Company without the signatures of three directors. It is noticed that the Petitioner himself also attached the copies of the letter issued to the Banks. As per Respondents the Bank had stopped the transaction due to which the Company has suffered in servicing the loan facilities availed form the bank.

5. Rejoinder filed by the Petitioner

The Petitioner filed his Rejoinder and denied some of the facts stated in the reply filed by the Respondents, as follows:-

5.1. According to the Petitioner, Respondent No.2 was a 'battery trader' and Petitioner was a 'manufacturer'. Arco, Lava and Alto were the new brands of the Petitioner.

5.2. The Petitioner has admitted that he and the Respondent No.2 came together and formed 'D H Industries', but were manufacturing and selling batteries of EAGLE and A-STAR brands. They were doing sound and peaceful business. It was their mutual decision to approach the Banks for financial assistance, although they could not get the required assistance due to land not being done N.A. (Non-Agriculture). Petitioner stated that Respondent No.2 had introduced Respondent No.3 who was ready to finance the Respondent No.1 Company which was also supported by the Petitioner. Thereafter, it was decided amicably and unanimously that Respondent No.3 would be made the Director of the Respondent No.1 Company. Only in the late year 2013 it was decided to transfer some ownership of land to Respondent No.3. It was also decided to close down operation of 'D H Industries' after the production started at Batto Green. It was also agreed that the finances to be looked after by Respondent No.3, manufacturing to be looked after by Respondent No.2 and marketing and all India sales part to be taken care of by the Petitioner.

5.3 He has further stated that the facts mentioned in Para No.12 of the Reply to the Petition are incorrect and stated that no such conditions were ever put by the Respondent No.3 except what had been decided between the parties, as stated in the rejoinder.

5.4 The Petitioner has denied the facts stated in para No.13 of the Reply to the Petition except the fact that the Respondent No.3 was appointed as Additional Director and name of the Respondent No.3 was included in the ownership of the land. Petitioner stated that it was never decided to give one-third share to Respondent No.3 in the Paid Up Capital of the Respondent No.1 Company. He has also stated that no intimation of the Board Meeting of 05th January, 2014 was ever given to him, and if at all held, was held without the knowledge of the Petitioner.

5.5 The Petitioner reiterated that since incorporation of Respondent No.1, he was the true and absolute owner of 50% of the ownership of Respondent No.1 Company, holding 5000 equity shares.

5.6 The Petitioner further denied the contents of para no.16, 17 and 18 of the Reply to the Petition stating he was not included in the management of the Respondent No.1. **He has, however, admitted that Respondent No.2 and 3 have invested amount in Respondent No.1 by way of loans.** The Petitioner claimed that he is the owner of land which is mortgaged for loan and which the Respondent No.1 Company is using. Therefore, he contended that he should have been a part of management of the Respondent No.1 Company. He has further alleged that the Respondents have thrown him out of the Respondent No.1 Company without following the prescribed procedure as laid down in the Company Law and also without observing the principle of natural justice. Such acts of the Respondents have defeated the rights of the Petitioner.

5.7 In his further denial, the Petitioner has stated that the facts mentioned in Para No.19 of the Reply to Petition were false, wrong and misleading except the fact that Respondent No.1 became operational by the year 2014. He has also denied that there was a commitment of sale of a fixed number of batteries, from his side.

5.8 He further stated that 'D H Industries' was an "unregistered partnership firm" between Petitioner and Respondent No.2, holding equal number of shares. If Respondent No.2 wanted to stop the 'D H Industries', he should have given notice to the Petitioner for closing it or he could have simply closed it on its own. On the contrary, Respondent No.2 was not willing to close down 'D H Industries'.

5.9 Petitioner also denied the facts stated in para no.20 of Reply to Petition and stated that he continuously strived to grow the business of Respondent No.1 despite his Kidney ailment in the year 2014.

5.10 He further denied the facts stated in para no.21 of the Reply to Petition and stated that he was the only Proprietor of 'Plaze Traders'. According to him, he is not connected with the 'New Plaze Batteries' and 'Plaza Batteries'. He has purchased batteries worth

Rs.80 lakhs and paid all the Bills due except dues of Rs.3 lakhs as the Respondents have not replaced batteries worth Rs.15 lakhs to the Petitioner in spite of repeated requests.

5.11 Petitioner also stated that the facts mentioned in para 22 of the Reply to Petition were wrong. According to him, 'D H Industries' had two Partners : the Petitioner and Respondent No.2 and Respondent No.2 did not want to close it down.

5.12 Facts mentioned in Para No.23 is also denied by the Petitioner and stated that he was not acquainted with Mr. Bhalchandra Dinkar Borawale. He further stated that the partnership with the Petitioner and Respondent No.2 was dissolved on 29th April, 2015 and Agreement between Mr. Bhalchandra Dinkar Borawale and Respondent No.2 was entered on 01st June, 2015, that is, clearly after dissolution of Partnership between Petitioner and Respondent No.2. The Petitioner has started his own Company only when he was out of the Respondent No.1 Company and then only started using his brands Charge Plus, Arco, etc. brands.

5.13 The Petitioner stated that he had received some amount from Respondent No.3 on 21.11.2013 but it was not informed that it was the share consideration amount. He reiterated that he was kept in dark regarding the alleged transfer of shares and about the Meeting on 5th January, 2014. He also stated that the Share Transfer Form is untrustworthy and not a reliable piece of evidence as it was a fabricated document.

5.14 The Petitioner has also alleged that there was mismatch in the Share Transfer Forms submitted by the Chartered Accountant along with his written statement and other filed by the Respondents and cited (i) difference in Description of Shares Column; (ii) unfilled Distinctive Number Column filed by the C.A. whereas the same was filled by the Respondents, although there was scratching; (iii) Wrong Registered Folio Numbers in both the share transfer forms; (iv) difference in Occupation, Address, Father's/Husband's name in both the Share Transfer Forms and (v) incorrect value of Stamp affixed on both the Share Transfer Forms. In support of arguments, case laws relied upon by the Petitioner are as under:-

a) M.M. Dua v. Indian Diary and Allied Services Pvt. Ltd. (1996) 86 Comp Cas 657 (CLB).

- b) Mrs. S. Rehana Rao and Another Versus Balaji Fabricators Pvt. Ltd. And Others 2004 SCC OnLine CLB 15 : (2004) 122 Comp Cas 804 (CLB)
- c) A. Arumugam and Others Versus 1. Pioneer Bakeries P. Ltd and Others; 2. Milka Bakers P. Ltd. And Others; 3. Pioneer Bake House P. Ltd. and Others. (2008) 141 Comp Cas 391 (CLB)
- d) M.L. Arora Versus Green Valley Frozen Food Ltd. And Others (2008) 142 Comp Cas 320 (CLB)
- e) Hari Singh Rathore and Others Versus Drishti Media P. Ltd. And Others (2006) 134 Comp Cas 248 (CLB).
- f) G. Govindraj and Another Versus Venture Graphics P. Ltd., and Others 2007 SCC OnLine Mad 71 : (2009) 147 Comp Cas 56.

6. Sur-Rejoinder filed by Respondents :-

The Respondents have filed their Sur-Rejoinder to the Rejoinder filed by the Petitioner, on 3rd January, 2017. In the Sur-Rejoinder, they have claimed that:-

- 6.1. The Petitioner has filed his Rejoinder only to para 4 to 37 of the reply filed by the Respondents to the Petition. They, therefore, hold that the Petitioners have admitted the contents of para 1 to 3 and 38 to 60 of the reply.
- 6.2. The Petitioner has not specifically replied to the averment about trade mark belonging to Respondent No.2.
- 6.3. The contents of para 4 of the Rejoinder are an admission of equal contribution has been made by Respondent No.2 for purchase of land.
- 6.4. In para 5 of the rejoinder, the petitioner has given confirmation of name of the brands which were being manufactured / sold by D H Industries and not to any other denials.
- 6.5. The Petitioner, in para 7 of the rejoinder, has admitted that he supported the decision of bringing in Respondent No.3.
- 6.6. The Petitioner admitted that it was decided to close down operation of 'D H Industries' once production starts at Batto Green. They claim that this itself is a sufficient ground for dismissal of the Petition as it admitted that the Petitioner had gone back on his words and acted against the interest of the Company.

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6.7. The Petitioner has failed to establish that the monetary consideration accepted by the him from Respondent No.3 was not towards transfer of his shares.

6.8 The Respondents claimed that merely being the owner of the land does not confer any right on the owner to be a part of the management of the Company. They claimed that the Petitioner had stated that he had received the notice of the general meeting and that he had even attended the same.

6.9. In its further submissions the Respondent No.2 has stated that he has given number of opportunities to the Petitioner to close down "D H Industries" and work together for the Respondent Company.

6.10. The Respondents further stated that the New Plaza Batteries is run by the Petitioner through his Father, Shri Mahabala Kotian.

6.11 The Respondents have also denied that Mr. Borawale is a good friend of Respondent No.2. He is only a business acquaintance. The no objection certificate for starting Charge Plus Industries was not given by either of the Respondents. They have also denied that the Petitioner started his own business only after he was thrown out of the Respondent Company.

6.12 The contents of para 20 of Rejoinder are also denied by the Respondents in their Sur-rejoinder. They stated that the Petitioner, by his own admission, had received the notice, replied thereto and attended the general meeting for his removal. They have further alleged that the Rejoinder did not indicate as to which other procedure was required to be followed by the company.

6.13 The Respondents submitted that the Petitioner was well aware that the Company was not required to and did not have the practice of maintaining attendance sheet of board meetings. They stated that the Articles of Association of the Company did not require the Company to maintain attendance sheets and the Petitioner, being one of the subscribers to the Memorandum and Articles, ought to be in the know of this. The Respondents have also denied that there was any direction from this Hon. Bench to produce share certificate no.1 and 2. These certificates were cancelled when they were

split. The respondents have already produced share certificate nos.3, 4, 5 and 6. The Respondent alleged that the Petitioner was now trying to deny the share transfer since his hidden agenda of working against the respondent company should not be completed.

6.14 According to the Sur-rejoinder, the Respondent No.3 has given Rs.16,670/- which is exactly matching to the consideration for the 1,667 shares transferred by the Petitioner to Respondent No.3.

6.15. The case laws relied upon by the Respondent are listed below:-

- a. Atmaram Modi vs ECL Agrotech Ltd and ors [1999] 98 CompCas463(CLB)
- b. Shanti Prasad Jain vs Kalinga Tubes Ltd. [1965] 35CompCas351(SC)
- c. Hanuman Prasad Bagri & Ors. Vs. Bagress Cereals Pvt Ltd & Ors [2001] 105CompCas493 (SC)
- d. Col. Kuldip Singh Dhillon and ors vs. Paragaon Utility Financiers P. Ltd. And ors. [1986] 60CompCas 1075(P&H).

6.16. The Respondents crave that the Petitioner has not made out any case of oppression and/or mismanagement and therefore submitted that the Petition ought to be dismissed with cost to Petitioner.

Finding

7) On careful perusal of the pleadings and the arguments of both the sides, we have noted that mainly there are Five issues for which the petitioner had sought relief. The **first relief** claimed by the Petitioner is to pass appropriate order directing to restore the shareholding of 5000 equity shares of the petitioner which were allegedly diluted to 3333 shares through a transfer stated to be held on 5th January, 2015. The **second relief** is that the petitioner being removed as director hence the prayer is to pass an order to restore the petitioner as a Director in the Respondent Company. The **third prayer** is to direct the respondent to furnish correct accounts of the respondent No. 1 company and the statutory records/accounts be furnished with the concerned authorities. And the **fourth prayed** is that to supervise the affairs of the company an independent director may be appointed.

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7.1) The discussion herein below shall confine within this narrow compass. The company was **Incorporated in year 2011** to manufacture and trade in the automotive batteries. The company was **promoted by two Directors namely Mr. Hemant M. Kotian (Petitioner) and Mr. Dharmesh R. Rajput (Respondent No. 2)**, each having **50 % shareholding by making allotment of 5000 shares each**. There was a proposal for construction of manufacturing unit and for that purpose a land was purchased jointly by the petitioner and Respondent No. 2. Thereafter for further expansion more investment was required and due to that reason one Mr. Avinash S Dhumal (Respondent No. 3) was introduced in the company. He had agreed to make an investment of Rs. 1,30,00,000/- (As appearing in Capital A/c in round figure). It appears that from that point of time a mistrust had developed. The allegation of the Petitioner is that without his knowledge the shareholding pattern was disturbed. Facts of the case have revealed that the shareholding of the Petitioner was diluted from 5000 equity shares to 3333 equity shares. As per the facts, although disputed by the Petitioner, his shareholding of 1667 shares were transferred in favour of respondent No. 3 Mr. Dhumal. On one hand the Petitioner has alleged that the introduction of Mr. Dhumal and allotment of shares was an arbitrary action on the part of the Respondent No. 2, however, on the other hand the Ld. Counsel of the respondent has vehemently argued that considering the overall circumstances prevailing at that time it was necessary to expand the business and for that reason on demand/request Respondent No. 3 had joined the hands. No prejudice was caused to the company because the company earned better profit on joining of Respondent No. 3. In our opinion, prima facie there was **no illegality in the alleged allotment of sharers in favour of Mr. Dhumal (R-3)**. The allegations in respect of conveying the meeting without proper notice are in the nature of bald allegation because the admitted factual position was that the petitioner had attended the meeting however did not take part in the decision making and left the meeting without comment. Rest of the allegation of **creating ruckus** by the Petitioner in the meeting remained uncorroborated in the absence of direct dependable corroborative evidence. We are not concerned about other accusation of alleged misbehavior because for that a separate legal remedy is available under other Statutes. At the outset, we may also like

to add that the fundamental requirement of the Companies Act is to protect the interest of the Company. No prejudice had caused to the Company (R-1) since the business was carried on by the Respondent Directors without the assistance of P-1.

7.2) As far as the removal of the Petitioner as a Director is concerned, there are several allegation and counter allegation revolving around the conduct of the Petitioner. Although every director is expected to attend the business of the company with honesty and transparency amongst themselves, but in a situation when one of the director had either not attended the meetings intentionally or due to non-communication of notice, the controversy remains unresolved due to the admitted position that one of the directors had not attended the meeting causing stalemate in the business activity of the Company. Be that as it was, in our opinion, equity demands to protect the interest of all the stake holders although it may be a possibility that there were few technical lapses. Due to this reason we can express an opinion at this juncture as well, that the Petitioner being a Promoter Director and the first subscriber of the shares of the Company, then his stake in the company deserves to be protected.

7.3 The Petitioner was made responsible for sales of the Batto Green Batteries as a result he was also acting as a Distributor of the company. However, that arrangement had not worked out harmoniously among the parties. The Petitioner had raised the issue of manufacturing of defective batteries. The Batteries were having manufacturing defect by the respondent Company under the supervision of R2 & R3, alleged by the Petitioner. According to the petitioner the customers have raised this objection. On the other hand, the Respondent has alleged that the Petitioner was given the Distributorship on the ground of an undertaking given by the Petitioner to sale at least 2000 batteries every month, which he had failed. **To resolve the controversy our opinion is that the Petitioner being in the business of sale of batteries, hence, his interest is required to be looked after while drawing a conclusion on finalization of the order.**

7.4) In the context of factual matrix narrated above, we have examined the case laws submitted by the Petitioner, already listed supra. The legal ratio laid down in some of

the cases was that transfer of shares without the knowledge of the Petitioner can be considered as an act of 'Oppression'. Naturally there are no two opinions in this regard. If a transfer of shares is patently in violation of the law or not in accordance to the Article of Association naturally such transfer can be held as a void transfer. The company being Private Limited Company has certain restrictions on the transfer of shares. The transfer is permissible only when the conditions prescribed for transfer are complied with.

7.5 Likewise in some of the cases the legal ratio pronounced by the Hon'ble Courts revolve around the issue of non-communication of notice of meeting to the Petitioner. Naturally if it is found beyond doubt that the notice was not communicated then such behavior was held by the Hon'ble Courts as an improper conduct. In the case in hand, the information in respect of the said important meeting where important decisions were taken found to be communicated, however, a **serious commotion erupted** on that occasion. We want to comment that after dealing with so many Petitions of this nature in the past, we have noted that it is obvious that the aggrieved party against whom decision being taken, such as removal of directorship etc., put strong resistances and the result is the confrontation among the directors or members. It appears that the **like nature mayhem had ensued in this case as well**. In a situation when a meeting had been attended by the aggrieved director, although such meeting resulted into a disturbed meeting, nonetheless, resolution passed can be considered as a resolution approved by the majority. In an exclusively Private Limited company the functioning of the directors is undisputedly based upon the doctrine of mutual trust and fiduciary in nature, hence, in a thin margin of shareholding meeting the sanctity of such resolution is questionable. In any event in our considered opinion it is not justifiable to argue, considering peculiar facts and circumstances of the case, that the Directorial dispute was beyond the scope of doctrine of Oppression. This line of argument is not of much help.

7.6 Our main concern while deciding this Petition is to arrive at such conclusion which may help the rival parties in the years to come, on one hand and on the other hand, also the business of the company be fairly protected. Keeping this straightforward principle in mind that the main motive behind the introduction of the relevant provisions in the

Companies Act was to safeguard the business of the Company, we have noticed that the mistrust among the directors is so deep that they cannot sit together and amicably conduct the day to-day business of the Company. A workable solution is therefore essentially required while passing the judgment. For that reason, we have noted that both the main parties, i.e. the Petitioner and the Respondent No. 2 were admittedly having the knowledge of the battery business i.e. one having the knowledge of trading of batteries and the other having expertise of manufacturing of batteries respectively. Initially this was the binding force for incorporation of the Respondent company. **Even if, these two parties have parted-ways, can run their respective business independently in this field.** To gain this objective it is not always necessary to reach on the conclusion of 'Winding- Up' of the Company. There is no benefit to order for 'Winding- Up' of an on-going Company. Such a decision of winding up severely affect the employees, as also has adverse effect on the economic growth. Therefore, the first attempt should be towards the protection and the survival of a running business.

7.7 Now the question is that if the Company is to be survived and admittedly the main parties are not in good relations with each other, then the question arises that who will be directed to control the Company and who will be directed to exit from the Company. From our experience and after perusing several case laws we have found that the Hon'ble Courts have taken a balanced view after taken into account the financial involvement of the respective parties coupled with surrounding circumstances. Particularly in this case by introduction of Respondent no. 3, the investment percentage was more, collectively of Respondent no. 2 & 3 ; than the investment of the Petitioner No. 1. This is the **First relevant feature** worth consideration. The **Second aspect** worth consideration is that the manufacturing activity, for which the Company was incorporated, is being undisputedly looked after by the Respondent No. 2 & 3. On the other hand, the Petitioner was assigned to look after the sales of the product manufactured by the Company. **Logically it is equitable, as also justifiable, to draw a line of separation on this basis alone.**

7.8 If a vertical line of separation is to be drawn then one of the parties has to quit or exit from the business of the company, naturally after getting a fair compensation.

In our judgment the Petitioner can be asked to exit from the Company so that he can continue with the business of trading of batteries, which otherwise had not been stopped by him and continuing with sale & purchase under 'DH Industries' entity. We are not much concerned about the Petitioners independent business as far as the equitable segregation of the present business is to be ordered. We are of the view that it shall be fair to evaluate his stake in the business of the Company by not diluting his shareholding which was originally 5000 equity shares. We have taken this view because we are conscious of the fact that the Petitioner had taken a serious objection of alleged transfer of shares. We are also aware that the Respondents have not proved to the hilt the bona-fide of the share transfer by placing on record the physical transfer of consideration in the bank account of the Petitioner and thereafter execution of Share Transfer Deed by the Petitioner in favour of the R-3. Otherwise also the impugned arrangement was made for reallocation of shares when the Respondent No. 3 had inducted the finances. If this segregation of equitable distribution is a workable solution then naturally the Respondent No.2 as also Respondent No. 3, both, shall be satisfied that the investment thereafter be looked after by themselves without any interference. To achieve this workable solution a valuation of the movable and immovable properties of the company is required to be worked out by a professional. The process of valuation is expected to be exhaustive after considering the value of not only tangible but also intangible assets such as goodwill, permits, licenses etc. The rival parties shall also lodge their respective claims before the Valuer to facilitate the process of valuation so as to arrive at a correct figure of valuation acceptable to both the sides. The investment of Respondent No.3 shall be accounted for without 'interest' while arriving at the final settlement figure to be disbursed to the Petitioner.

We, therefore, direct both the sides to amicably appoint a Chartered Accountant as a valuer who can complete the work of valuation. For his assistance a Real Estate Valuer can also be appointed to value the fair market price of the Immovable Property. Valuation report and the final figure is to be communicated to their Legal Representatives

within 30 days on receiving this order. Respective Learned Legal Representatives Mr. Mahesh Athavale and Mr. Chirag R. Sonecha, who have argued this Petition on behalf of the Respondent and Petitioner, hence till the 'settlement' as suggested in this Judgment, shall function as Officers of the Court, needless to say, impartially. Since we have held that the Petitioner has 50% stake therefore the other side shall make the payment to the Petitioner accordingly. On receiving the consideration, the Petitioner shall **exit** from the Company by signing the Share Transfer Deed of 5000 equity shares either in favour of the Respondents or their nominees. By this method on one hand, the Petitioner shall be entitled of his equitable rights in the Company which shall help him to run his independent business of his choice and side by side on the other hand the Respondent shall also be able to carry on the manufacturing activity of automotive batteries without any interference.

7.9 Before we conclude, we would like to add that in such type of litigation when a company is a closely held Company, it is not necessary to hold that one of the parties has oppressed the rights of the other party or mismanaged the affairs of the Company. On these lines, a dispute never gets resolved. To resolve the dispute especially when two friends are involved, it is for the benefit for both for them to have an amiable settlement. The duty of the court is to give a platform for resolution of the dispute hence through this order we have also made an humble attempt to put an end to this dispute. Due to these reasons rest of the Prayers as raised in the Petition have become redundant. The Petition is decided on the terms and directions made therein above. No order as to cost. File to be consigned to Records.

Date : 08.01.2018
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Sd/-

M.K. SHRAWAT
Member (Judicial)