

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA

CORAM

Shri V. P. Singh  
Hon'ble Member (J)

Shri S. Vijayaraghavan  
Hon'ble Member (T)

Interlocutory Application No.32/2016

In the matter of :

A Company petition under sections 111, 235, 237, 397,  
402, 403 and 405 of the Companies Act, 1956

And

In the matter of:

An application for interim reliefs under Rules 11 and Rule  
32 of the National Company Law Tribunal Rules, 2016

And

In the matter of:

Durga Ray, residing at 29, Nirvana Way, Mount Roskill,  
Auckland 1041, New Zealand

... Petitioner/Applicant

-Versus-

1. T.D.Kumer and Bros. Ltd.
2. Mala Ghosh,
3. Madhurima Bhattacharya
4. Poonam Chakraborty,
5. Rana Bhattacharya
6. Bijan Mohan Kundu
7. Kshirode Chandra Ghosh and Sons Pvt. Ltd.
8. Ruma Roy
9. Ruma Guha Roy

... Respondents

Parties on Record

- |                                   |   |                            |
|-----------------------------------|---|----------------------------|
| 1. Mr. Aniruddha Roy              | ] |                            |
| 2. Mr. Nirmalya Dasgupta          | ] | For Respondent nos.2,3 & 4 |
| 3. Mr. Dibanath Dey               | ] |                            |
|                                   |   |                            |
| 1. Mr. V.V.V.Sastry, Advocate     | ] | For the Petitioner         |
| 2. Ms. Nikita Chowdhury, Advocate | ] |                            |

Date of Concluding the hearing : 29.11.2016

Date of Pronouncing the order : 13/11/17

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**ORDER**

**Per Sri Vijai Pratap Singh, Member(J)**

I.A. No.32/2016 has been filed in connection with the Company Petition no.399/2012 by the Applicant. The petitioner has filed this petition for the reliefs that the Board of Directors of the company be superseded and an administrator be appointed to take charge of the management of the affairs of the company. Alternatively, the committee be constituted by this Board consisting of representatives of the petitioner to function as such Administrator for the management and control of the affairs of the company. The petitioner has also sought declaration that the Board meetings held on 31.03.2007 and 24.09.2008 be declared as illegal, null and void. The petitioner has also sought that an injunction restraining the respondents from interfering with the management and affairs of the company be issued. A scheme be framed for management and control of the company and running of operation thereof. In this company application, the petitioner has stated that he has filed this petition on 27.07.2012 and after that in October, 2012, it has come to the knowledge of the petitioner that the name of the respondent no.1 has been struck off by the Registrar of Companies since October, 2012. The petitioner has submitted that the fact of striking off the name of the respondent no.1 was not brought to the knowledge of this Tribunal.

The petitioner has further submitted that there has been a failure on the part of the respondent nos.2,3,4 and 5, who were at all material times in management and control of the company have failed to carry out their duties prescribed under the Companies Act by filing the necessary balance-sheet,

audited accounts and other relevant forms as required from time to time. The petitioner has further submitted that the liabilities of the respondent company has increased over the period of time and post 2007 no balance-sheet or annual records have been filed, which is contrary to the provisions of the Companies Act. The petitioner has further submitted that alleged act of the respondents in having name of the company struck off from the Register and records of the MCA are also an attempt to deal with, dispose of and siphoning off the assets of the company. This is more so because the company is no more existent and hence the respondent nos. 2,3,4 and 5 are acting in a collusive manner and have taken all efforts to siphon off the funds of the company and also sold all the assets of the company to various third parties, which is also a challenge made in the present company petition that the liability of the Directors to the creditors and other interested persons continue to exist, even if the name with the company is struck off. The petitioner has moved this I.A. with a prayer that the respondent directors be directed to render accounts in dealing with the funds and properties of the respondent no.1 company from the date of the filing of the Company Petition till striking off and also prayer has been made for issuing directions to the respondent nos. 2,3,4,5 and 8 to disclose all statutory records, balance-sheet and profit & loss account and annual return to the petitioner. The petitioner has also requested that an investigation be made in respect of dealings and transactions of the respondent nos. 2,3,4,5 and 8 in connection with the management and affairs of the company and any independent auditor be appointed by this Tribunal to carry out such investigation.





In reply to the above company application, the respondents have filed their objection wherein they have stated that the instant company petition is not maintainable and accordingly subsequent application is also not maintainable in the eyes of law. The petitioner is not a shareholder of the respondent no.1 company and therefore no locus to institute the proceeding. It was also urged that there is a partition suit pending in respect of entire estate and late Shri N.C.Ghosh, the deceased father of the applicant herein and hence applicant states that respondents are attempting to enforce the family settlement by filing this instant company petition to coerce the respondents. The respondents have also submitted that the Company Petition has been filed beyond the statutory period of limitation and hence the Company petition is not maintainable. The respondents have also taken this ground that the petitioner does not have the share qualification in terms of section 399 of the Companies Act and the Company petition is therefore, not maintainable.

Heard the arguments of the Ld. Counsels of the petitioners and the respondents. The main point which has been argued by the respondents is regarding the maintainability of the company application, as the respondents have claimed that the petition is not maintainable and the respondent's claim is based on two grounds. Firstly, that the petitioner is not a shareholder of the respondent no.1 company. Therefore, the petitioner has no locus to institute a proceeding and second ground that the respondent has pressed is regarding the pendency of partition suit in respect of entire estate left by late Shri N.C. Ghosh who happens to be deceased father of the applicant/ petitioner. The

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respondents have also taken the ground in respect of share qualification under section 399 of the Act.

In reply to the above, the petitioner has submitted that she is entitled to 6774 equity shares of Rs.100/- each which is equivalent to 11.6% of the paid up share capital of the company. The petitioner claims that she is the daughter and successor-in-interest of late Shri N.C. Ghosh who was holding 16,462 equity shares in the company in her own name. Late Shri N.C.Ghosh died intestate on 24.08.2007 leaving behind four children including the petitioner. Therefore, the petitioner is entitled to 6774 equity shares, which is 11.6% of the paid up share capital of the company. The petitioner has also relied on the case law of the Hon'ble Supreme Court in the case of M/s. World Wide Agencies Pvt. Ltd. -vs- Margarat T. Desor, AIR 1990 S.C. page 737, wherein the Hon'ble Supreme Court of India has laid down that the legal representative of the deceased members whose names are still on the register of members are entitled to petition under section 397 and 398 of the Act. In the above case, the Hon'ble Supreme Court has further held that in such case it is not necessary to see whether on the date of the petition, the petitioner was a member of the company and held that in such a situation, the decision of the Supreme Court in the matter of Rajamundhry Electric Supply Corporation Ltd. -vs- Nageswara Rao & Ors. 1956 (Vol.26) Comp. Case page 91 (SC) were not required to be considered. The respondents/ applicants have relied on the proposition of the said case, which, in view of the judgment in the case of Margaret T. Desor is not applicable. Thus, in view of the ratio laid down by the Hon'ble Supreme Court in the above-mentioned case, the petitioner claims that the petition is





maintainable by the legal representative of deceased member whose name is still on the register of members. The petitioner has further submitted that section 399 of the Companies Act requires either 10% shareholding in a company to maintain an application under section 397 and 398 of the Act or 1/10<sup>th</sup> of the total number of members of a company. In view of the petitioner having a shareholding equal to 11.6% of the paid up share capital of the company, the petitioner's claim that she is qualified under section 399 of the Companies Act to bring a petition under section 397 and 398 of the Act.

The petitioner has further stated that the question of maintainability was raised by the respondents earlier through a demurrer application no. 362/2012, wherein an order was passed on 21.11.2014 and direction was issued that point of maintainability shall be first considered in the final order while disposing of the company petition and no appeal has been preferred against that order. Therefore, this issue of maintainability cannot be raised at this stage.

The petitioner has further stated that once the company petition is admitted then the maintainability of the same cannot be challenged and more over when the demurrer application has been disposed of in the year 2014, and in a situation when the name of the respondent company was struck off. Regarding pendency of Civil Suit, petitioner's claim that the partition suit was not instituted by the petitioner and the subject matter of the present company petition is relating to the company T.D.Kumer & Co. and its management and administration. The question of oppression and mismanagement of the company T.D.Kumer & Co. is not in question before the Civil Court. The respondents have claimed that the entire claim of the petitioner is based on the



basis of entitlement of 6774 number of equity shares of and in the said company which is allegedly equivalent to 11.6% of validly issued, subscribed and paid up share capital of the said company and accordingly reliefs were claimed in the said company petition.

The respondents have further stated that the company petition was moved in the year 2012 when the Company Law Board had refused to pass any interim order. The respondents have further submitted that the petitioner does not hold a single share in the respondent no.1 company. Therefore, the petitioner does not have requisite qualification for filing the present petition. The respondents have relied on the case law of the Hon'ble Supreme Court in the case of State of Orissa –vs- Madan Gopal Rungta AIR 1952 Vol. 39 (SC) page 12 and in the above-mentioned case, the Hon'ble Supreme Court has laid down that question of maintainability of the main proceedings goes at the root of the Jurisdiction including the *prima facie* case and the Hon'ble Supreme Court has issued direction that when the question of maintainability has been disputed then it should be decided first before granting any relief in the said petition. The respondents have also submitted that the name of the respondent no.1 company has been struck off from the Register by the Registrar of Companies. Therefore, the petitioner and the respondents both have filed necessary application before the Hon'ble Calcutta High Court under section 560 of the Companies Act, 1956 to restore the name of the company in the records/registers of the Registrar of Companies. Therefore, the company is not a legal entity at all and on this basis the present company petition is not maintainable and liable to be dismissed.



The respondent's main objection is that the petitioner has no locus to maintain the company petition. The petitioner has filed the said company petition on the basis of her alleged notional entitlement in the estate of her father which includes the shares in the said company. Not a single share stands in the name of the petitioner. The name of the petitioner is also not appearing in the share register of the company or in the annual report of the company. The petitioner is not at all shareholder of the said company. The petitioner in any event does not have the share qualification to maintain the company petition as prescribed under the Statute. The respondents claim that the company petition should be dismissed in limine. In reply to the above, the petitioner claims that she is entitled to 6774 equity shares of Rs.100/- each, which is equivalent to 11.6% of the paid up share capital of the company. The petitioner is the daughter and successor-in-interest of late Shri N.C. Ghosh holding 16,462 equity shares in the company in her own name and 12,138 and 9,314 equity shares jointly with her son who is also deceased. Late Shri N.C. Ghosh died intestate on 24.08.2007, leaving behind four children, and the petitioner is therefore, entitled to 6774 equity shares, which is 11.6% of the paid up share capital of the company. The alleged entitlement of shareholding that the petitioner claims, is regarding her entitlement of shares. The respondents' main objection is that this notional entitlement does not meet the requirements of section 399 of the Companies Act, 1956. In respect of above, the petitioner's Counsel has relied on the case law of Hon'ble Supreme Court 1990 SCC (Tax) 171 at page 547 World Wide Agencies Pvt. Ltd. -vs- Margaret T. Desor. In the above-mentioned case, the Hon'ble Supreme Court has laid down the law that



*"it appears to us that to hold that the legal representatives of a deceased shareholder could not be given the same right of a member under section 397 and 398 of the Act, would be taking a hyper technical view, which does not advance the cause of equity or justice. The Hon'ble High Court in its judgment under appeal, proceeded on the basis that legal representatives of a deceased member represent the estate of that member, whose name is on the Register of members. When the member dies, his estate is entrusted in the legal representatives. When, therefore, this vestings are illegally or wrongfully affected the estate through the legal representatives, must be enabled to petition in respect of oppression and mismanagement, and if the estate stands in the shoes of the deceased member. We are of the opinion that this view is a correct view. It may be mentioned in this connection that successor is not kept in abeyance and the property of the deceased member vests in the legal representative on the death of the deceased and they should be permitted to act for the deceased member for the purpose of transfer of shares under section 109 of the Act".*

The respondents' second contention is that Interlocutory Application can only be filed and interim relief can only be prayed for only in aid of the main proceeding. Reliance has been placed in judgment of the State of Orissa –vs- Madan Gopal Rungta reported in AIR 1952 SC page 12. The case cited by the respondent's Counsel does not apply in this case, as the same was passed in a proceeding under Article 226 of the Constitution of India, whereas the Court lays the criteria for granting reliefs where breach of fundamental rights are alleged. In the present case, the petitioners have in their interim application urged this Tribunal to pass interim directions pending disposal of the company petition and more so, when for a period of four years the companies name was struck off and the assets of the company were allegedly being siphoned off. In the above-mentioned case, the Hon'ble Supreme Court has laid down the law that when the Court declines to decide on the rights of the parties and expressly held that they should be investigated more properly in a Civil Suit, it could not, for the purpose of facilitating the institution of such suit, issue



directions in the nature of temporary injunction, under Article 226 of the Constitution of India. In our opinion, the language of Article 226 does not permit such an action. On that short ground, the judgement of Orissa High Court and their plea cannot be upheld".

On the basis of above case law, it appears that the above-mentioned case law is not applicable in this case because it relates to the proceeding under Article 226 of the Constitution of India wherein the Hon'ble Supreme Court has laid down the law that Article 226 does not permit such an action for issuing direction in the nature of temporary injunction. The respondent has further contended that the interim application is barred by the Law of Limitation. In this respect the petitioner's Counsel has relied on the case law of the Hon'ble Supreme Court in the case of M.P. Steel Corporation –vs- CCE (2015) 7 SCC page 58. In the above-mentioned case law, the Hon'ble Supreme Court has held that provisions of Limitation Act apply only in respect of proceedings being prosecuted in proper Courts i.e. Court as understood in the strict sense of being part of the judicial branch of the State. Whether principles underlying provisions of Limitation Act may be applied to the branch of the State, whether principles initially may be applied to the quasi judicial Tribunals, as there is not any statutory scheme that rules out or bars applicability of such principles, that Courts always lean in favour of advancing the cause of justice, where a clear case is made out for so doing, since justice and reasons is at the heart of all legislations in the Courts, Tribunals and Special Courts. The respondents have contended that the same dispute is pending before the Civil Court. It is quite clear that Civil Court has no jurisdiction to decide the allegation of oppression



and mismanagement. The question of oppression and mismanagement of a company can only be decided by this Tribunal and the alleged allegations of oppression and mismanagement against the company T.D.Kumer and Bros. Ltd. is not an issue in a Civil Suit, which is pending in Court. Therefore, the respondent's objection in this respect has no force. The respondent's objections are relating to the existence of the company. The respondents claim that the name of the respondent no.1 company is struck off from the list of the Registers of Companies maintained by the Office of the Registrar of Companies. Therefore, the petition is not maintainable. Admittedly, this company petition has been filed on 27<sup>th</sup> July, 2012 and the name of the company has been struck off from the register of the companies by the Registrar of Companies in the year 2012, after filing of the petition. Therefore, it will have no effect on the present petition because on the date of the filing of the petition, company was in existence and it is also pertinent to mention that in the I.A., the petitioner has claimed interim relief for rendering the accounts in respect of dealings with the funds and properties of the respondent no.1 company, from the date of filing of the company petition till striking off. Therefore, the petitioner has not asked any account after the striking off the company. It is also pertinent to mention that directors are also individually responsible. Therefore, the petition is maintainable against directors. It is also necessary to mention that on the date of the filing of the petition, company's name was not struck off and it has been struck off only during the pendency of the petition. The petitioner claims that it is also a proof of alleged act of oppression and mismanagement that company's name has been struck off when the company was under effective management and control of respondent





nos.2,3,4 and 5. In view of the above, it appears that interim application deserves to be allowed.

**ORDER**

I.A. no.32/2016 is hereby allowed and respondent directors are directed to render the accounts in respect of dealings with the funds and properties of the respondent no.1 company from the date of filing of the company petition till striking off and it is also being directed to investigate to make a report in respect of dealings of the transactions of the respondent nos. 2,3,4,5 and 8 in connection with management and affairs of the company by any independent auditor. Parties are directed to give three names of independent auditors within 15 days from today from the date of order. If the parties fail to give names of the independent auditors within 15 days, then the Tribunal itself will appoint the independent Auditor for investigating into the dealings and transactions of the respondent nos. 2,3,4,5 and 8 in connection with the management and affairs of the company. This is purely an interim order to ensure that the assets of the Company are properly accounted for and protected. This Order will have no bearing on the C.P. no.399/2012 or in any other pending Civil Suit.

Parties shall bear their own costs.

  
(S. Vijayaraghavan)  
Member(T)

  
(Vijai Pratap Singh)  
Member (J)

Signed on this 13<sup>th</sup> day of January, 2017