NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

TP No. 27/397-398/NCLT/AHM/2016 (New)
CP No. 49/397-398/CLB/MB/2012 (Old)

Coram: **Present: Hon'ble Mr. BIKKI RAVEENDRA BABU**
MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 2.1.2017

Name of the Company: Kusum Tibrewal & Ors.
V/s.
Prabhakar Processors Pvt. Ltd. & Ors.

Section of the Companies Act: Section 397-398 of the Companies Act, 1956

S.NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.				
2.				

ORDER

None present for both parties.

Order on preliminary issue pronounced in open court. Vide separate order attached.

List the main TP along with all pending Applications on 1.2.2017.

2.1.17

(BIKKI RAVEENDRA BABU)
MEMBER JUDICIAL

Dated this the 2nd day of January, 2017.

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

CORAM: SRI BIKKI RAVEENDRA BABU, MEMBER (JUDICIAL)

T.P. No. 27/397-398/NCLT/AHM/2016 (New)
C.P. No. 49/397-398/CLB/MB/2012 (Old)

1. Kusum Devi Tibrewal
2. Saurav Ashok Tibrewal
3. Anjudevi Agarwal
4. Rachna Agarwal
5. Manisha Agarwal
6. Rambilash Agarwal
7. Rishi-Nidhu Tradelink
8. Navpad Fabrics Limited..... Petitioners

v.

1. Prabhakar Processors Private Limited
2. Anand Poddar
3. Vikash Poddar
4. Anand Filaments Private Limited
5. Ritu Poddar
6. Purshottam Poddar
7. Vipin Poddar..... Respondents

The preliminary issue whether Petitioners are members of first Respondent company or not having come up for hearing before this Tribunal on 17.11.2016 in the presence of Mr. Ashok Mehta, PCS for Petitioners and Mr. S. Suriyanarayan, Advocate for Respondents and having stood over for consideration till this date, this Tribunal pronounced the following order on preliminary issue on 2.1.2017.

ORDER ON PRELIMINARY ISSUE

1. The Company Law Board, Mumbai by its order dated 23.4.2015 held that it is just, proper and appropriate that the preliminary issue as to whether Petitioners are the members of the Respondent company or not is required to be decided first and thereafter the pending Applications and further proceedings may go ahead.

2. In view of the above-said order passed by the CLB on 23.4.2015, the arguments of both sides on the above said preliminary issue were heard. The Company Petition is filed under sections 397, 398, 399, 402,403 and 406 of the Companies Act, 1956 alleging certain acts of oppression and mismanagement.

3. According to the Petitioners, they collectively hold 27,190 equity shares of Rs. 100/- each constituting 55.07% of the shares in the paid-up share capital of Respondent no. 1 company comprising 49,370 equity shares of Rs. 100/- each. The Respondents were collectively holding 16450 equity shares of Rs. 100/- each constituting 33.32% of paid-up share capital of first Respondent company comprising 49,370 equity shares of Rs. 100/- each. According to the Petitioners, Respondents 2 and 3 illegally and fraudulently without offering any shares to the Petitioner and without the knowledge of the Petitioner made an allotment of 20,000 equity shares of Rs. 100/- each on 9.9.2011 to Respondents 2 and 3 with an ulterior motive to increase their shareholding from 33.32% to 52.54% and thereby reducing the shareholding of the Petitioners from 55.07% to 39.19%.

4. The main plea of the Respondents 1 to 8 as can be seen from Reply filed by first Respondent, Reply filed by Respondents 2 and 3 which is adopted by Respondents 4 to 8 is that there was a Memorandum of Understanding (MOU) on 16.4.2011 between Tibrewal Group and Poddar Group. It is stated that the said MOU was between Mr. Rakesh Agarwal, Mr. Mukesh Agarwal and Mr. Ashok Tibrewal referred to as the Tibrewal Group and Mr. Vikas Poddar and Mr. Anand Poddar referred to as the Poddar Group. According to the Respondents 1 to 8, it was decided between the Tibrewal Group and the Poddar Group that Bhaskar Mills Pvt. Ltd. shall be taken over by the Tibrewal Group whereas Prabhakar Processors Pvt. Ltd. shall be taken over by Poddar Group with effect from 15.1.2011. It is also stated that in terms of the said MOU, the Directors Mr. Ashok Tibrewal and Mr. Mukesh Agarwal resigned from Prabhakar Processors Pvt. Ltd. and consented for appointment of Mr. Vikas Poddar as Director in Prabhakar Processors Pvt. Ltd. It is also alleged

in the Reply of Respondent no. 1 that the Bank guarantees given by Bhaskar Mills Pvt Ltd. have also been released.

5. It is further stated that in view of the MOU entered into by both the groups of the two companies which was approved in the Board of Directors Meeting, Petitioners have no right or interest in the shares of the first Respondent company.

6. Respondents 9 to 12 in their Reply stated that no grievance is made out or relief is sought against them. Respondents 9 to 12 stated that they are not relying on the purported MOU dated 16.4.2011. It is stated that the validity or enforcement of the said MOU can be subject matter of Civil Court and the same cannot be agitated before this Tribunal. It is further stated that the purported MOU dated 16.4.2011 is null and void, non-est, inchoate and not enforceable in law. It is also stated that no consent letters were given by shareholders and as such the MOU is not binding and valid. It is also stated that Respondents 2 and 3 represented to them that they would obtain consent letters of all shareholders and therefore these Respondents were made to sign the MOU on good faith since it was assured that MOU will become operative only after receiving consent letters from all shareholders of both the companies. It is also stated in the Reply of first Respondent that the close relatives of Petitioners signed and they were representing the Petitioners, but the said allegation is denied. It is also stated that pursuant to the purported MOU there was no change in the shareholders of Prabhakar Processors Pvt. Ltd. Petitioners have not transferred their shareholding. No consideration was paid to the Petitioners or Respondents 9 to 12.

7. In the Rejoinders it is mainly stated that Petitioners have not signed on the MOU and they have not given any consent letters to the persons who signed on the MOU. It is also stated that Petitioners have not transferred their shares. It is further stated that the definition of the term, "relative" as given in Section 2 (41) read with Section 6 and Schedule 1A of Companies' Act 1956 has been

given in context of disclosure requirement under Section 299 of Companies' Act 1956.

8. The preliminary issue that needs to be decided is as follows-

Whether Petitioners are members/shareholders of the first Respondent company in view of the MOU dated 16.4.2011?

9. Learned PCS appearing for Petitioners contended that MOU dated 16.4.2011 is nothing but an agreement between parties who signed that agreement and it cannot be construed as transfer of shares of Petitioners in first Respondent company. In support of his contention, he relied upon the decision of the Hon'ble Supreme Court in *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.* (2010) 7 SCC 1, decided on 7.5.2010. In that decision, there was a MOU between the two Reliance companies not only about their businesses but also for their family issues. It is held in that decision that the said MOU did not fall under the corporate domain and neither approved by the shareholders nor was it attached to the scheme. It is held that technically the MOU is not legally binding.

10. On the other hand, Learned Advocate appearing for Respondents relied upon decision in *VLS Finance Ltd. v. Sunair Hotels Ltd. & Ors.* [2007]137CompCas434(Delhi). In that decision, the CLB without taking into consideration the MOU dated 11.3.1995 which is foundation and substratum of the Appellants' case passed the impugned orders. In that case the MOU was signed by both the parties to the proceeding. But in the case on hand, the MOU is not signed by the Petitioners and no consent letters of the Petitioners filed.

11. Another decision relied upon by Learned Advocate for Respondents is *M. Sampath v. A.K.M.N. Cylinders (P.) Ltd.* [1998] 29 CLA 455(CLB) wherein there was a MOU to transfer shares and accordingly transfer of shares was effected and the necessary forms filed with the Registrar. In those facts and circumstances, the Company Law Board, Chennai held that the Applicant did not fulfil the eligibility criteria as provided in Section 186 of the Companies

Act. In the case on hand, the facts are totally different. There was no transfer of shares pursuant to MOU dated 16.4.2011.

12. Learned Advocate for Respondents also relied upon the decision in *Brooke Bond India Ltd. v. U.B. Ltd. & Ors.* [1994] 13 CLA 391 (Bom.). In that decision there was an agreement by the company to sell shares held by it in one company to another company. A suit was filed for specific performance of the agreement between the parties. In that suit, it was held that agreement can be enforced and interim reliefs granted.

But in the case on hand, the controversy is whether Petitioners still continue as shareholders in view of the MOU dated 16.4.2016, therefore the above-said decision is not applicable to the facts of this case.

13. The MOU dated 16.4.2011 is signed by Mr. Rakesh Agarwal, Mr. Mukesh Agarwal and Mr. Ashok Kumar Tibrewal on behalf of the Tibrewal group. Admittedly the signatures of Petitioners are not there on MOU dated 16.4.2011. Although it is stated in MOU that the consent letters of all the shareholders have been attached, no such consent letters are there. No doubt there was resignation of Directors and revocation of Bank guarantees pursuant to MOU. M/s Bhaskar Silk Mills Pvt Ltd and Prabhakar Processors Pvt Ltd. are two different corporate entities. Unless and until in pursuance of the MOU, shareholders in both the companies transfer their shares following the procedure laid down under the Act and Articles of Association, it cannot be said that Petitioners or for that matter any other shareholder who is not a signatory to MOU ceased to be a shareholder of the company. Had the petitioners been signatories to the MOU then the binding nature or otherwise of the MOU can be challenged in a Civil Court. When Petitioners continue to be shareholders of the first Respondent company and they are having required shareholding in the company it cannot be said that they are not entitled to file this Petition for oppression and mismanagement etc.

14. It is contended by Learned Advocate for Respondents that the close relatives of Petitioners signed on MOU dated 16.4.2011 and definition of "relative" in

Section 2(41) read with Section 6 of Companies Act 1956 can be applied to bind the Petitioners although they have not signed on the MOU. This argument of Learned Counsel for Respondents does not merit acceptance for the simple reason that definition given in any Enactment can be applied to the provisions in the Act or by analogy to other Acts but not to agreements between parties in violation of provisions of the Indian Contract Act.

It is obvious that the definition of "relative" in Section 2(41) of Companies Act 1956 is applicable to Section 299 of Companies Act 1956.

15. In the Petition it is alleged that without the knowledge of the Petitioners and without offering shares to them, Respondents 2 and 3 allotted 20,000 equity shares to them only with a *mala fide* view to reduce the shareholding of the Petitioners and to increase the shareholding of the Respondents in the first Respondent company.

16. In the Petition, Petitioners alleged several acts of mismanagement such as: -

i. non service of notice of AGM,

ii. non service of notice of BOD Meeting,

iii. deduction of capital subsidy and excise duty refund received during the year 2010-2011 from gross value of plant and machineries instead of crediting to profit and loss account/ reserve and surplus.

iv. Interest subsidy received during 2010-2011 and deducted from interest paid during the said year.

v. Mismanagement and siphoning of funds of first Respondent company by inflating expenses and other means.

vi. The steep increase in inventories and sundry debtors shows mismanagement in running the first Respondent company.

17. No doubt the truth or otherwise of the above said allegations and whether the said allegations amount to acts of oppression and mismanagement or not has to be decided in the final hearing but not as a preliminary issue.

18. In view of the above discussion, it can only be prima facie held that Petitioners are shareholders in first Respondent company as on the date of filing the Petition in spite of the MOU dated 16.4.2011 and therefore they are entitled to file this Petition since they are having required paid-up share capital.

19. In the result, the finding on preliminary issue is held in favour of the Petitioners and against the Respondents.

2.1.17

SRI BIKKI RAVEENDRA BABU
MEMBER (JUDICIAL)

Dated this the 2nd day of January, 2017