

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
COMPANY PETITION NO. 52/397, 398/CLB/MB/2012**

CORAM:

SHRI M. K. SHRAWAT
MEMBER (JUDICIAL)

In the matter of Sections 397 & 398 of the Companies Act, 1956 and 241,
242 of the Companies Act, 2013.

BETWEEN:

Mr. Hemant Parikh

... Petitioner

Versus

M/s. Sai Etco Developers And Realty)
Private Limited & 8 Ors.)

... Respondents

PETITIONER:

1. Mr. Hemant Parikh

RESPONDENTS

1. M/s. Sai Etco Developers And Realty Private Limited
2. Mr. Ramesh Shah
3. Mr. Vijay Shantilal Mehta
4. Mr. Rajendra Ratilal Mirani
5. Mr. Jayesh Vinodkumar Tanna
6. Ms. Heena Jayesh Tanna
7. Mr. Sandip Vinodbhai Tanna
8. Mr. Vivek Jayesh Tanna
9. Ramesh Dahyalal Family Trust

PRESENT ON BEHALF OF THE PARTIES:

FOR THE PETITIONERS

None present from the Petitioner's side.

FOR THE RESPONDENTS

Ms. Sophia Pinto Advocate for R-2 & R-9 present.

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ORDER

Reserved on: 21.10.2016
Pronounced on: 18.11.2016

A. Past History

1. The main Petition was filed way back on 2nd July, 2012 by the Petitioner i.e. Mr. Hemant Parikh, stated to be **an Architect by profession**. In the Petition, he has alleged oppression and mismanagement on the part of R-2 i.e. Mr. Ramesh Shah and others. In the Petition, it was mentioned that the authorized share capital of the Company (R-1) as on 31st March, 2012 was ₹25,00,000/- by issuing 2,50,000 equity shares of ₹10/- each. It has also been intimated that the paid up capital as on 31st March, 2012 was ₹1,00,000/- against issue of 10,000/- shares. It is informed that only 5,000 shares @ ₹10/- each were respectively issued to the two promoter Directors. In the Petition, the shareholding pattern as admitted by the Petitioner was as under:

A. At the time of Incorporation

(Source: Memorandum of Association and Annual Return filed for the year 2007-08 and 2008-09)

Name of Shareholder	No. of Shares	Percentage of Holding
Ramesh Shah (R-2)	5,000	50%
Hemant Parikh (Petitioner)	5,000	50%
Total	10,000	100%

B. Shareholding pattern as on date:

(Source: Annual Return filed for the year 2009-10)

Name of Shareholder	No. of Shares	Percentage of Holding
Ramesh Shah (R-2)	5,000	10%
Jayesh Vinodkumar Tanna	10,000	20%
Ramesh Dahyalal Family Trust	5,000	10%
Sai Siddhant Realities Pvt. Ltd.	30,000	60%
Total	50,000	100%

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2. The Petitioner has also informed that at the time of incorporation, he was one of the Directors, but later on, as per the information gathered, he was not reflected in the record as one of the Directors of the Company. To decide the question of law now raised, only the relevant information that too in respect of the shareholding pattern is herein above mentioned and rest of the allegations in the Petition need not to be addressed presently.

2.1 The Respondent has filed an **Application numbered as C.A. No. 141/2012** challenging the "**maintainability**" of the Petition on the ground that the Petitioner was not holding the alleged 5,000 shares because the **consideration had not been paid** for purchase of the said shares. Without going further in detail, it is hereby placed on record that the said Application No. 141/2012 was dismissed by the Ld. CLB, Mumbai Bench, Mumbai vide an Order dated 20th June, 2013. It was held in the said order that the money was allegedly advanced by the Company to the Petitioner for purchase of the shares, therefore, it could not be held that the share money was not paid. On the other side it was explained that only the entries have been made in the books of account of the Company but no physical transfer of money had taken place. Since the impugned legal preliminary objection was rejected, the said Order was challenged by the Applicant before the Hon'ble Bombay High Court. In the interregnum, the Hon'ble Bombay High Court has stayed the proceedings of Company Petition No. 52/2012 vide an interim Order dated 4th March, 2014 and the Appeal was thereupon listed for hearing. Thereafter, the final Order in respect of Company Application No. 141/2012 was passed by the **Hon'ble Bombay High Court vide an Order dated 4th February, 2016.** The matter was restored back for reconsideration after framing the following questions: -

"(a) Whether the fact that the petitioner (respondent no.1) not having paid the subscription amount of Rs. 50,000/- on

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these shares, would that be covered under "and other sums due on their shares" as per the terms of section 399?

(b) If the answer to the above issue is in affirmative, whether the petition is maintainable?'

2.2 Since the matter is now remitted back for *de-novo* consideration, C.A. No. 141/2012 in C.P. No. 52/2012 is afresh enlisted for hearing.

3. At this juncture, it is worth to mention that number of notices were issued to the Petitioner Mr. Hemant Parikh by the Registry of NCLT, Mumbai Bench and also previously by the CLB Bench, Mumbai, but not responded by the Petitioner. On the last occasion i.e. on 16th September, 2016 when this issue was fixed for hearing, no one was present from the side of the Petitioner of the main Petition. Therefore, the Bench has directed the Respondent to issue notice to the Petitioner. Side-by-side, the Registry was also directed to issue show cause notice intimating that in case of non-appearance the questions framed by the Hon'ble Bombay High Court shall be decided on merits as per law. Under these compelled circumstances when the Petitioner Mr. Hemant Parikh is not willing to participate in the proceedings, it is hereby decided to proceed ex-parte *qua* the Petitioner of the main Petition.

B. Facts of the Case

4. The Company in question, as per the records, was in operation w.e.f. 25th December, 2010 when it was renamed as "Sai Etco Developers And Realty Private Limited". Earlier, under the old name the Company was stated to be incorporated on 2nd August, 2006. The main controversy as raised by the Respondents of the Petition by filing an Application (C.A. No. 141/2012) is that the Petitioner Mr. Hemant Parikh has not contributed any money towards purchase of 5,000 shares. Because of non-payment of the consideration, the original share certificates were never delivered to the said Petitioner. Despite

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repeated "calls" made, the Petitioner neglected, rather defaulted, to pay the said amount. Facts have further revealed that a minimum paid up capital of ₹1,00,000/- was required from the promoters of the Company. It is informed that R-2 of the Petition i.e. Mr. Ramesh Shah had contributed his part of consideration by actually making a payment of ₹50,000/- towards subscription of 5,000 shares of the Company. Since the amount remained receivable from the Petitioner, in the Balance Sheets drawn in the year 2007 and onwards have shown under the head "loans and advances" a sum of ₹50,000/- due on Mr. Hemant Parikh under the head "shares". The impugned amount of ₹50,000/- thus remained receivable from Mr. Hemant Parikh. As a result, for the accounting purpose, a 'contra-entry' has been made in the books of account of the Company. On one hand, under the head "share capital" total sum of ₹1,00,000/- in the Balance Sheet was reflected, however, on the other hand, a contra entry has been passed in the books of account wherein an amount of ₹50,000/- was accounted for as loan towards share in the name of Mr. Hemant Parikh.

4.1 The said position of accounts was demonstrated to the CLB. However, the respected Member (Judicial) has opined as under:-

"11. In the present case, admittedly, the Petitioner is a member in terms of section 41 of the Act by virtue of his having subscribed to the memorandum his name having been entered into the register of members. Further, he has been allotted 5000 shares. The Petitioner has produced enough documentary evidence showing that the impugned shares are fully paid up and share application money was fully paid. It appears from the perusal of the Exhibit "A" and the Balance Sheet as on 31/03/2007 at Page 42 of the application that the money paid towards the impugned shares was advanced for purchase of shares by the company but it cannot be said by any stretch of imagination that the shares money was not paid. Whether the amount advanced by the company to the Petitioner stood repaid or not may be a disputed question but it is totally irrelevant for the purpose of section 399 of the Act. I therefore, have no hesitation to hold that the Petition is

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maintainable in terms of Section 399 of the Act and the preliminary objection raised by Respondent Nos. 1 and 2 is not tenable and liable to be rejected."

C. Findings

5. In the light of the factual matrix discussed at length in the foregoing paragraphs, it is worth at the outset to reproduce Section 399 of Companies Act, 1956 (extracted from the Order of the Hon'ble High Court, Bombay):-

"5. Section 399 sub-section 1(a) of the Companies Act reads as under:-

"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 members or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;"

5.1 As per my humble understanding of the term used in the said Section i.e. "paid all calls" denotes actual exchange of money from one hand to another. In other words, the word "paid" means actual transfer of money from one account to another account. As far as the facts of this case are concerned, the admitted factual position is that only "**contra-entry**" has been made. As per the accounts furnished as an evidence, it is evident that on one hand a liability was shown in the name of the Petitioner i.e. Mr. Hemant Parikh in the accounts of the Company, side-by-side, 5,000 shares were shown in his name. In a situation when no money had actually come into the coffer of the Company, it is wrong to presume that the call was materialised by making the payment. The liability was outstanding which was never squared-up by the

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Petitioner. The Hon'ble High Court has made an observation that, Quote "(7) ***The Company Law Board has proceeded on the basis that the share subscription has been paid and therefore, the objection is not sustainable. What the Company Law Board should have considered is, the fact that the respondent no.1 admittedly not having paid the amount payable under these (impugned) shares, would it come under the words "other sums due on their shares". The Company Law Board has not considered this issue. To that extent, the matter required to be remitted back to the Company Law Board....***" Unquote. To answer the question as framed by the Hon'ble High Court, it is essential to take cognizance of other terms used in the Companies Act i.e. "issued capital", which connotes the total amount of the capital issued by the Company which may be much larger than the capital actually subscribed for and paid up. As per the norms duly recognized under the Act are that **unless shares are paid for, there cannot be a subscribed capital**. Further, the word "calls" implies actual payment as demanded. The conjoined reading of all these provisions thus clearly lead to a conclusion that mere subscription is not sufficient unless and until the amount has actually been paid. Otherwise also, as per the terminology used in the accounting practice there is **a clear distinction between the term "paid" and the term "payable"**. The Companies Act has not used the word "payable" but in unequivocal terms used the word "paid". Rather, on number of occasions in the Act itself this distinction has been taken into account by using the expression such as "paid up capital", "issued capital", "subscribed capital", etc. In support of this view, a decision of the Company Law Board, Principal Bench, New Delhi, pronounced in the case of Hiren Harshadrai Desai Vs. Fori India (P.) Ltd. And Others (CP No. 62 of 2006) is relied upon.

6. It is, therefore, pronounced that the Petitioner has not fulfilled the mandatory requirement of actual payment of consideration of ₹50,000/-

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pertaining to 5,000 shares; as prescribed under Section 399 of the old Act. As a consequence, the Company Petition No. 52/397, 398/CLB/MB/2012 is hereby held as not maintainable, thus dismissed. The Application bearing No. 141/2012 is allowed. The Application as well as the Petition both are disposed of accordingly. No Order as to costs.

Dated: 18.11.2016

M. K. Shrawat 18/11
Shri M.K. Shrawat
Member (Judicial)