

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH,
MUMBAI

Transfer Company Petition No. 04/2012

Coram: B. S. V. Prakash Kumar Member Judicial & V Nallasenapathy
Member Technical

In the matter of Companies Act 2013 under Sections 241-242 and 111A of
the Companies Act, 1956.

Between

Mr. Ashwinkumar Gupta

..... Petitioner

Versus

M/s. Visagar Polytex Ltd.

.... Respondent

Present on behalf of the parties:

1. Mr. Chirag Balsara, Advocate for the Petitioner.
2. Dr. S.K. Jain, Practising Company Secretary for the Respondent.

ORDER

(Heard on 10.11.2016)

(Dismissed on 25.11.2016)

The Petitioner filed this Company Petition u/s 111-A of the Companies Act 1956 against the Respondent Company (in short the **Company**) namely Visagar Polytex Ltd., seeking reliefs as follows: -

- a) *To direct the Respondent Company that 1000 shares on folio number 787 showing in the name of Nand Kishor Tekriwala be transferred in the name of the petitioner and for issuing of fresh share certificates on the basis of reduction in face value of shares effected by the Respondent Company;*
- b) *To direct the Respondent Company to rectify the Register of Members showing him as holder of impugned shares in the place of Nand Kishor Tekriwala;*
- c) *To direct the Respondent Company to handover to the petitioner the original shares in respect of the impugned share certificates of*

impugned shares after affecting the transfer of the said shares and/or after issuing fresh share certificate in the name of the petitioner;

- d) To direct the Respondent Company to deliver dividend declared over the impugned shares to the petitioner from the date of execution of transfer deeds;*
- e) And other reliefs which may deem fit and proper in the circumstances of the case.*

2. The case of the Petitioner is that the Company has originally incorporated as Barasia Holding & Trading Company Ltd; later has changed into Visagar Polytex Ltd., (R) on 27-11-2006. Initially, the Company issued 2,47,930 shares of ₹10 each in November 1983, thereafter on 22-4-2008, rights offer was made to issue of 4,96,000 equity shares at ₹10 each to the existing equity shareholders in the ratio of two equity shares for every one existing share. On 08-01-2010, the shares of ₹10 were split in 10 shares of the face value of ₹1 each.

3. He further submits he lodged a request with the Company Transfer Agent namely, M/s Adroit Corporate Services Private Limited (in short **Adroit**) on 30-7-2011 for registering transfer of 1000 shares of the company in the petitioner's name in the place of transferor Nand Kishor Tekriwala with immediate effect. He sent share certificates for those 1000 shares and transfer instrument along with the lodgement letter dated 30-7-2011. When there was no action from the Transfer Agent – Adroit – in reference to the request made by him, he sent reminder on 28-9-2011 about lodgement of share certificates and transfer instrument for transfer of impugned shares, then Adroit confirmed through a letter dated 10-10-2011 that they were forwarding his request to the Company for doing the needful at their end. When there was no response even after lapse of two months, the petitioner filed this Company Petition seeking the reliefs as mentioned above.

4. The Company filed reply with an opening defence that this Petition is hopelessly barred by limitation for he filed this Petition after a lapse of 18 years from the date of the presentation of this Transfer deed before RoC, i.e., 24.06.1994. The petitioner has not stated anywhere as to how he acquired the impugned shares, not annexed any document to prove his entitlement to the shares. The impugned shares were allegedly traded on 21.10.1994 through a broker namely Mahesh N. Kothari – (46 (Bom) SEBI Registration No. INE 010015718). There were further transactions on Bombay Stock Exchange thereafter. Now, for the first time, this Petitioner lodged the share certificates and transfer instrument for transfer by letter dated 30.07.2011 to Adroit. The Company further submits that these impugned shares were dematerialised long before i.e., on 25.05.2009, thereby the physical forms were cancelled as per Regulation 54(5) of SEBI (Depository Participants) Regulation. The Company submits that the provisions of Section 111 (A) of the Act 1956 or 58 of the new Act 2013 are applicable only to shares still in circulation in physical form.
5. As to discrepancies emerging out of this CP, the Company submits that this Petitioner himself annexed Form 7-C for extension of time u/s 108 (1-D) signed by one Sudhir Kumar H. Gupta showing himself as transferee and one Dwarka Prasad Tekriwala as transferor with date of execution as 24.06.1994 in contrast to the details given in the CP and the transfer instrument, and further disclosing that having transfer instrument and share certificates remained lying in the custody of the petitioner's deceased father until his demise, they have just been sorted after their father demise. The mode of payment is shown in Form-7C as cash transaction.
6. From these details, the Company noted that the transfer was shown as taken place on 24.06.1994 in the name Sudhir Kumar H Gupta, not in the name of the petitioner, likewise, the transferor name is shown

as Dwarka Prasad Tekriwala, not Nand Kishore Tekriwala who was shown in the pleadings as transferor. Another controversy is, in page no. 71 of CP, the transferor was described as Nand Kishore Tekriwala, the transferees are HBG and AKG i.e. father of the petitioner and the petitioner, but in the petition, the petitioner claimed as sole claimant and sole transferee to these shares, his father is nowhere in picture, except an averment of Sudhir Kumar H Gupta saying that he located them only after his father's death.

7. The Company submits that it is evident on scrutiny of the transfer deed that the transfer could not be on 26.04.1994 as the shares were last traded on 21.10.1994 as evident from the broker stamp affixed on the reverse side of the share transfer form by a broker called Manish N Kothari, so the details given in Form-7C filed by Sudhir Kumar are in total variance to the details reflecting in the transfer deed.
8. The Company further submits that since the shares were dematerialised in the year 2009, now they have become fungible after 2009, they cannot be held in physical form therefore these shares cannot be registered in the name of Nand Kishore (P) basing on these alleged transfer deed, hence sought for dismissal of this Company Petition.
9. The petitioner filed rejoinder stating that the very purpose of providing remedy u/s 111A is to provide an efficacious and speedy remedy to the transferee who is aggrieved by the denial of registering impugned shares in favour of the petitioner. The time prescribed u/s 111A is only meant to deter the companies against withholding the transfer of shares for an indefinite period without any valid reasons. The petitioner further submits that the Company has not denied its transferring agent (Adroit) receiving share certificates and share transfer forms from the petitioner in respect to the impugned shares, and for the transfer deed being revalidated by the Competent Authority on 19-7-

2011, the same cannot be rejected on the ground that the impugned transfer is time barred. As to Annexure E attached to the CP, the petitioner says that the said documents have inadvertently come along with the petition; therefore, it should not be taken into consideration as if the petitioner relied upon the said documents. He further submits that the Company is making roving and fishing enquiry to go deep down into the matter by asking contract note, bill of broker, mode of payment. The date 24.06.1994, in respect to presentation of Transfer deed, will not have any relevance, for revalidation of the share transfer form has been done on 02.08.2011 by the prescribed authority. As to dematerialisation of shares, the petitioner submits that as long as physical share certificates are not surrendered to the company for dematerialisation, if any dematerialisation has carried out without surrender of physical share certificates, such dematerialisation has to be held invalid and shares are to be transferred in the name of the transferee basing on the transfer deed and physical share certificates lodged with the company. The petitioner further says that since he has already lodged transfer deed along with share certificates, the company has to register the transferee name i.e. the petitioner's name in the place of original registered share holder disregarding the names reflecting in the de-mat account in respect of these shares. The petitioner repudiated the proposition Company propounded saying that Sec111A is not applicable to the shares already in demat form.

10. The Company filed sur-rejoinder submitting that whenever shares are transferred through broker, it is obvious that there will be a contract note, bill of broker, and mode of payment. This petitioner has not filed any of those documents which normally come into existence when shares are transferred through broker, since these shares have been shown as passed through broker, had it been real, this petitioner should certainly

be in possession of these documents, but not filed for the reasons best known to him. The Company further submits that it is evident from the copy of the transfer deed that date of transaction is showing as 21.10.1994, revalidation was given on 19.07.2011 to a transfer deed with date of execution as blank and the name of the transferor as Nand Kishor Tekriwala basing on Form 7-C (page No.67 of the CP) seeking extension u/s 108 (1-D) of the Act 1956 reflecting transferee as Sudhir Kumar Gupta, transferor as Dawarka Prasad Tekriwala and date of execution of transfer as 24.06.1994 – all are in contrast to the particulars of the transfer deed sought for revalidation. But somehow revalidation was obtained to this impugned transfer instrument. This petitioner has come up with the revalidation done by the prescribed Authority without even looking into the details of Form 7C basing on which revalidation given.

11. The Petitioner now disowns the details in Form-7C, but relying on the revalidation given by the prescribed authority. The petitioner cannot approbate and reprobate over his own facts and documents. It is not his case that revalidation has not been done basing on the above Form7-C.

12. The Company submits that the physical share certificates of all listed Companies were cancelled/mutilated/shredded as per Section 54 (5) of the D.A.P. Guidelines of SEBI. It is further submitted that Adroit is SEBI registered Registrar and Share Transfer Agent – it maintains records both for physical and demat shares. Accordingly, the Company prays this Bench for dismissal of this Company Petition.

13. The professional on the Respondent side relied upon *C. Mathews v. Cochin Stock Exchange Limited [(1998) 91 Comp Cas 344 CLB]*, *Harbaksh Singh Batra v. M/s Larsen and Toubro Ltd. & Ors* to say that this CP is liable to be dismissed on the ground of inordinate delay; relied upon *Shah Moolchand and Co. Ltd. V. Jawahar Mills Ltd. [(1953) AIR 98 SC]*, *Vishnu Miglani & Anr v. Reliance Industries Ltd. (judgement of*

Delhi High Court dated 18.12.2010 para 18), Smt Krithika Mullengada v. Wipro Ltd [(2004)52 SCL 564 CLB] to say that non joinder of parties fatal to the case.

14. On hearing submissions of either side this Bench has carved out the points for consideration as follows: -

1. *Whether this petition is hit by limitation or not or delay and laches;*
2. *Whether non-joinder of transferor as party is fatal to the case or not;*
3. *Whether this case is maintainable u/s 108 of the Companies Act 1956 or not;*
4. *Whether the petitioner is to prove his case or not;*
5. *Whether this petitioner is entitled to the reliefs as sought in his Company Petition.*

1st Point: Whether the reliefs sought by the petitioner is hit by limitation or not or delay and laches.

15. Before going into the facts born out of the material available, let us see what the pleading of the petitioner is – he has not stated anywhere in his petition about transfer by the transferor to him, except saying he lodged share certificates and transfer instrument with Transfer Agent (Adroit) of the Company on 30.07.2011 and the company failed to register those shares in the name of him. The transferor's name for the first appears in the relief to "direct the Respondent Company that 1000 shares on Folio 787 presently showing the name of Nand Kishore Tekriwala as the Member and more particularly described in Annexure-A (lodgement letter (self-explanatory document) disclosing Folio number, Transferor name, the petitioner name as transferee, certificates numbers, distinctive numbers of shares and number of shares).

16. Since the date of transfer and the name of the transferor is crucial for considering the relief to ascertain as to whether the procedure carved out u/s 108 is followed by the petitioner in obtaining transfer instrument and thereafter in lodgement of such transfer instrument with the company, it is sine qua non to give those details in his pleading, but that has not been done.

17. The only fact that the petitioner heavily relied upon is revalidation of transfer instrument u/s 108 (1-D) for one month since 19th July 2011, this fact is not revealed in his pleading to say that since the instrument is revalidated u/s 108 (1-D) on 19th July 2011, this instrument is not hit by limitation, otherwise the instrument shall be lodged with the company within 12 months from the date of presentation of the transfer instrument before prescribed authority, here in this case, it was presented on 24.6.1994.

18. The copies of share certificates and the instrument of transfer show the name of the Company as Basira Holding & Trading Co. Ltd, which was changed into present name i.e., Visagar Polytex Ltd on 27.11.2006. According to the petitioner himself, this name change of the company happened on 27.11.2006. After this change, the company issued shares to the then existing shares in the ratio of two equity shares for every equity share, later on in the year 2010, one share of ₹10 each was split into ten shares of ₹1 each, it means these one thousand shares should have multiplied into many shares. So, in these 17 years of time after alleged purchase by the petitioner or by his deceased father, for there being several corporate actions, there could not be any chance to these shares remain as they are. When the company name changed, shares would have been issued with new name, when extra shares were issued on 27.11.2006, those share should have been issued by the Company with its new name, when the share with face value of ₹10 split into ten with one

rupee face value, new share certificates obviously would have been issued by calling back old shares of ₹10 each. Here for these shares are showing as demated by 2010, these split shares would go to respective demat accounts. On top of all these, since it is a listed company since beginning, the shares certainly would dematerialise; account has already gone into the maintenance of Depository. For a Court or a Tribunal could not visualise any situation which is not put forth in evidence, we therefore will keep to ourselves saying that this issue has popped up only after split shares were issued by the company, which normally invalidates undivided shares.

19. It is disquieting to mention that RoC Mumbai, may be because of rush of inflow of transfer instruments for revalidation, blindly revalidated even without verifying the Form 7-C details basing on which revalidation has been given to an instrument purportedly come into existence in the year 1994. In the petition and the Transfer Instrument, the transferor name is Nand Kishor Tekriwala, whereas in Form 7-C the transferor is Dawarka Prasad Tekriwala and the transferee is Sudhir Kumar H. Gupta. In the same Form 7-C, the reason for delay is that the above Sudhir Kumar H. Gupta noticed the fact of this transaction only when he sorted out the papers of his deceased father estate. When the details of Transfer Form are in variance to the details in Form 7C, particularly when revalidation is asked for validating a transfer of 17 years old, minimum care should have been taken while revalidating the share transfer form.

20. On perusal of the facts mentioned above, the petitioner could not take a cover under mechanically given revalidation without going into any of the aspects such as whether the transferor is still continuing as registered holder of the shares as on the date of filing Form 7C. When the authority has not even gone into the details of Form 7C itself, there is no

point in expecting prescribed authority taking cognizance of mismatching details and in finding whether transferor still continuing as registered shareholder in the register of the company. However, leave of limitation point considering the mechanically given revalidation without application of mind, the action on this alleged instrument being taken almost 17 years after execution of the transfer instrument, we hereby hold it is hit by delay and laches.

Point 2: Whether non-joinder of transferor as party is fatal to the case or not.

21. This test of fatality of non-joinder of the necessary parties is always dependent on the facts of the case, sometimes it becomes fatal, and sometimes it is not, we cannot see it as straight jacket formula either to dismiss the plea or to allow it, let us see how facts travelled in this case.
22. The petitioner has not made the alleged transferor as party to the proceeding on the ground he is not a necessary party for the relief is aimed at the Company forgetting the fact that the relief claimed is based on the contract between the petitioner and the transferor and not in between the company and the petitioner. He must not get lost sight of the fact that this alleged transferor is not reflecting as registered shareholder as on the date of filing this company petition. Especially when title over these shares were already shown in names other than this registered share holder (transferor) before dematerialisation, this petitioner is not only obliged to show the transferor he is showing as registered shareholder, but also the persons who ever held title over these shares for some time, at least until they continued in physical form.
23. To decide this relief, especially in the present case, it has to be seen as to what the transferor did with the shares subsequently issued and thereafter whether share certificates were not changed when the company name was changed, whether the transferor not delivered the

share certificates to the company when the company split share with ₹10 face value into ten shares with face value of ₹1 each. When the company shares have gone into demat account, how these certificates for 1000 shares remained with the transferor. Whether these share certificates are presumed to be cancelled when share split happened. What is the validity left to these share certificates after share split? Since the Company placed proof showing these shares were already dematerialised on submission of impugned physical shares by somebody else, how could it be assumed that the share certificates presently filed by this petitioner are valid unless it is proved by him through the transferor that these shares were never dematerialised? The parties must realise that judges are not magicians and courts are not magic boxes to give out orders just for being asked ignoring basic tenets and probabilities lying in the case. In this case, proper and necessary parties are not being impleaded and no evidence is let in proving that probabilities are in the petitioner's favour, therefore non-joinder of the transferor and other subsequent holders is certainly fatal to the case filed by the petitioner.

24. Indeed, the petitioner ought to make transfer agent as party to the proceeding because this petitioner has not contacted or put to the notice that his claim over the impugned shares on the ground the transferor executed transfer instrument in favour of the petitioner, so refusal from the Respondent Company is technically not present. The petitioner made correspondence with Registrar-cum-Transfer Agent, response also came from the Transfer Agent, when the petitioner believed that correspondence with the Transfer Agent is triggering point for filing this case, the petitioner should have made Registrar cum Transfer Agent as also party to the proceeding because it is proper party for adjudication of this issue.

Point-3: Whether this case is maintainable u/s 108 of the Companies Act 1956 or not.

25. When a case is filed on refusal of registration of transferee's name against the impugned shares in the place of registered holder, it comes into existence with statutory force conferred upon that transfer instrument from section 108 of the Companies Act 1956. Here, the Company was/is listed company governed by listed Agreement with its Depository. It is a judicial notice that all listed companies' shares, after enactment of Depositories Act 1996, were over a period of time, dematerialised. In this process, the present impugned 1000 shares were also dematerialised on 25.05.2009 and the shares held in physical form were cancelled and they are no more in existence, meaning thereby, they have gone to demat account even before split of shares. When this Company wrote a letter about these shares to its Transfer Agent, Adroit, it has written a letter to the Company on 10th February 2012 stating that after dematerialisation of these shares, physical share certificates were cancelled as per section 54 (5) of DIP guidelines of SEBI, they are not in a position to provide the Company with the copies of physical shares. A chart is also given by the Company showing one Lekhraj Jain demated 150+300 shares on 25.02.2009, one Shobha Jain demated 100+250 shares on 25.02.2009, one Urmila J Salvia demated 30.01.2009, so it is evident that in the year 2009 itself, all these 1000 shares were demated and now they have become fungible, there is hardly any possibility to locate these shares.

26. The petitioner now cannot claim title over these shares which have already gone into the hands of beneficial owners covered by Depositories Act holding out these share certificates and transfer instrument dated 21.10.1994 with erstwhile name of the Company, for the reason – these shares by the time he filed this petition were already split, then they are

deemed as cancelled, no value, no legal tender to them, because shares are always freely transferable, since split shares are in market, there won't be any legal force to these undivided share certificates. If the petitioner tenders them with such force u/s 108, he has to prove it to the hilt. That has not been done. When title to immovable asset itself would lose force after 12 years when adverse party continues in possession for immediate 12 long years before possession, can it even be imaginable that a claim stale for 17 years enforceable over shares which circulating in the market like currency? We honestly believe it is not.

27. The transferor, having admittedly not continuing as registered shareholder in the shareholders register of the company, for these shares being already dematerialised in the year 2009 itself by somebody else, not by this alleged transferor, we believe, they are hit by Section 108 (1-D) (3), which runs as follows:

"Section 108 (1-D)

(3) Nothing contained in this section shall apply to transfer of security effected by the transferor and the transferee both of whom are entered as beneficial owners in the records of the company"

28. It is right this transferor and the transferee are never reflected as beneficial owners of these shares, but in the year 2009 itself, these shares were dematerialised as mandated, then it is obvious that presumption lies in favour of the people continuing as beneficial owners. Therefore, this petitioner cannot claim title over these shares by claiming this summary procedure u/s 108 of the Act to throw the beneficial owners without even making them as parties. For this alleged transferor was not on the rolls of share register since before 2009, and the split shares being claimed by respective owners, may be beneficial owners, now this petition is in any way not maintainable u/s 108 of the Act 1956.

Point.4:- Whether the petitioner is to prove his case or not.

29. It is a fact that mere transfer of shares by transferor will not amount to conferment of title and right in rem over the shares unless the same is registered in the share register of the company. Until dematerialisation has come into existence, Section 111A had held the field over all shares, because all remained in physical form, for that reason only, it has been categorically mentioned that the public company cannot refuse registration of shares unless sufficient cause is there, at the same moment, it is not defined anywhere either in 1956 Act or in 2013 Act what *sufficient cause* is, meaning thereby that discretion is left to the courts to decide test of sufficient cause as against the facts of the given situation. So, refusal of registration unless sufficient cause is shown alternately connotes the company will not and could not register shares without looking into the validity and veracity of transfer of shares. It is evident that share transfer cannot be equated to say a contract qua between two persons is complete once transfer is complete, it can't even be equated to registration of transfer of immovable asset which normally goes to registration for three reasons – one, for fiscal reasons, two for compliance of statutes such as tribal laws and municipal laws and three, for imprimatur of State. Here the reason beyond all this is that share transfer shall be in compliance of Articles, company law and other legal provisions.

30. If we go to basic tenets of test of burden of proof in section 101& 102 of Indian Evidence Act, it is evident that whoever desires any court to give a judgement as to any legal right basing on a set of facts, he shall prove them, if that burden of proof is not discharged, he fails. Here what this petitioner projected is messed up facts waving a transfer deed of 1994 over shares that have become fungible in the year 2009. If the petitioner comes with a transfer from a registered shareholder continuing on the rolls one two months, or one year before, it is understandable that the company has to show cause of refusal, but if a person comes after 17

years for transfer of shares over which bonus shares were issued, shares split into and two three corporate actions have been accrued, we honestly believe such cases should not even travel this long letting pendency pile up before courts, they should be dismissed at threshold, unless all material is placed showing fraud is prima facie entailed. Despite no material to prove Mr Tekriwala is transferor continuing in the register at the time of filing this case or at least his name is removed without sufficient cause, the company took all pains to place before this Bench showing as to who, holding physical shares in the year 2009, and how they got shares dematerialised. RTA categorically mentioned these shares were dematerialised.

31. Preponderance of the evidence can be visualised as a scale representing the burden of proof, with the totality of evidence presented by each side resting on the respective trays on either side will prevail. If the scale does not tip toward the side of the party bearing the burden of proof, that party cannot prevail.

32. In a family case (*Re B [2008] UKHL35*) Lord Hoffman answered the question using a mathematical analogy:

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the Tribunal is in doubt, the doubt is resolved by a rule that one party or other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value 1 is returned and the fact is treated as happened."

33. If we observe the procedure of dematerialisation, several agencies participate in dematerialisation, first the holder of shares (client)

surrenders share certificates by Demat Request Form (DRF) to Depository Participant (DP), then from DP, intimated to Depository through system, then DP submits shares to Register Transfer Agent (RTA) of the issued company, then Registrar confirms DRF, after completion of all this process, Depository updates the Accounts and informs DP, finally DP updates the demat account of the investor. Once this process is over, dematerialised shares do not have any distinctive numbers, they lose their identity by distinctive numbers or folio numbers. The shares listed keep moving from one demat account to another, as money moving from debit side to credit side and credit side to debit side, normally they move in stocks. Perhaps for that reason only, exchange houses are called stock exchanges. All this happened with these impugned shares, now they have become fungible; if at all any order is passed, the company cannot even fathom out them unless they are kept in suspense account. It is on record, they have been dematerialised and they are circulating in the market upon which the company has no control, therefore, the petitioner miserably failed in proving his case. For this long procedure of dematerialisation after undergoing scrutiny of share certificates and signatures of the holders by change of two three hands, it shall be presumed dematerialisation is in compliance of law and acquires a presumption that shares have become fungible and by the time dematerialisation done, this alleged Nand Kishore Tekriwala was not the registered share holder by the time of dematerialisation, therefore it can't assumed that there is an element of truth in the case of the petitioner.

Point 5:- Whether this petitioner is entitled to the reliefs as sought in his Company Petition.

34. For the reasons stated above, this Bench hereby holds that this petition deserves no merit, it is a frivolous attempt throwing vexatious litigation on the company giving pain to this Tribunal to carry this

vexatious litigation this far and spending its time in vain over this misconceived petition, hence the same is dismissed with exemplary costs of Rs 50,000 payable to NCLT Mumbai within 15 days hereof.

sd/-

B.S.V. PRAKASH KUMAR
Member (Judicial)

sd/-

V. NALLASENAPATHY
Member (Technical)