

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

IA No.80/2017 in

CP No.44 /2017

UNDER SECTIONS 241/242 OF CA, 2013

IN THE MATTER OF EROFAB EXPORTS PRIVATE LIMITED & OTHERS

V.

GARTEX INSTA APPARELS PRIVATE LIMITED & OTHERS

Coram: Hon'ble Shri.Ratakonda Murali, Member Judicial.

Hon'ble Dr Ashok Kumar Mishra, Member Technical.

Order delivered on 14th September, 2017

For the Applicant: Shri P. K. Pande, PCS.

For the Respondents: Shri Saji P. John of M/s. SPJ Legal, Advocate.

Per Hon'ble Shri Ratakonda Murali, Member (J):

ORDER

This IA is filed on behalf of applicants alleging that the Respondents herein have filed a false information through a fictitious AOC-4 and MGT-7 for the financial years 2014-15 and 2015-16 with the ROC without the approval of the Board of Directors and the shareholders of the Company, which is against the provisions of law. The discrepancies found in the E-forms are listed and marked as Annexure-A/1 to this application. Thus, it is stated that the respondents have given wrong information. Therefore, the applicants have prayed the Tribunal to pass an order of restraint on the Respondents from taking any Corporate action without the presence of the applicants and file any returns, E-forms and papers with the ROC or with any other regulatory authorities and to further give an interim direction to ROC not to take on record the E-forms AOC-4 and MGT-7 for the above two financial years and further a direction to conduct the Board meeting and AGMs afresh from the date of induction of the applicants No.2 and 3 on the Board of the Company, i.e., from 18.08.2015 and to declare the AGMs if any, held without intimation to the applicants as illegal. The application is accompanied by an affidavit.

The respondents have filed their objections to the main petition as well as to the Interlocutory application. In other words, the objections are to be treated as objections for the main petition as well for this application.

The averments made in the objections in brief as far as reliefs prayed for are that petitioners have no locus-standi to file this petition as they are neither shareholders nor members of the Respondent No.1 company. The petitioners have entered into an Memorandum of Understanding on 03.05.2015 with the Respondent No.2 for sale of shareholding of Respondents No.2 and 3 in the Respondent No.1 company. The Memorandum of Understanding provides for payment of sale consideration as stated below:

Sl. No.		Amount (in Rs.)	Period
1.	1 st Trench	3 Crores	On execution of the MOU whereupon the Petitioner was provided access to the books and records for the 1 st Respondent
2.	2 nd Trench	12 Crores	Cumulative payment for share Transfer
3.	3 rd Trench	3 Crores	To be paid within 31/12/2015 or 6 months from the date of conformity with Clause 5 (d) of the MOU.
4.	Apart from the above considerations, after payment of the 3 rd Trench a further amount of 6% of the sales made by the company was also to be given to the Respondents No.2 and 3 for a further period of 2 years commencing from 01/01/2016.		

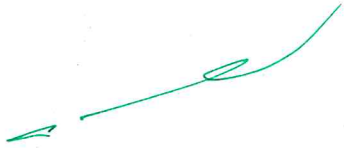
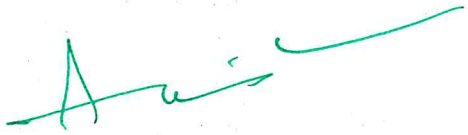
It is stated that in terms of the Memorandum of Understanding, the Respondents have executed necessary forms to enable transfer of 5000 shares and the transfer was effected on 11.05.2015. It is stated that the Petitioner No.1 has executed a letter undertaking that in case the Petitioner No.1 fails to pay Rs.15.00 crores towards the sale consideration, then the 5000 shares would be transferred back to the same persons from whom they were transferred. The letter of undertaking is marked as Annexure-R/1. It is alleged that the Banks did not sanction any loan. Therefore, the petitioners have failed to pay the balance sale consideration. Therefore, the Memorandum of Undertaking got terminated by efflux of time and the shares automatically got transferred. Hence, now the petitioners are no longer the shareholders. Therefore, the present petition is not maintainable including this application.




The respondents have given the details of terms and conditions of the Memorandum of Understanding. Petitioners No.2 and 3 were on the Board. But, when the Memorandum of Understanding got terminated, the petitioners No.2 and 3 have ceased to be the Directors and their appointment was also not confirmed in the AGM. It is averred that the petitioners have failed to comply the terms and conditions of the Memorandum of Understanding as balance consideration of Rs.15.00 crores was not paid and that the shares stood transferred to the respondents from whom they were transferred to the 1st petitioner and that the 1st petitioner ceased to be the member and therefore, the petitioner cannot maintain not only the main petition, but also this IA.

The petitioners have filed further reply to the objections. It is stated that the Petitioner No.1 Company is holding 50% shares in the Respondent No.1 Company and the shares were duly transferred. It is stated that Annexure-R/1 will not enure to the benefit of respondents. The contention of petitioners that the question of further payment of Rs.15.00 crores would arise only when the 1st Respondent Company becomes the owner of the landed property. A detailed reply is given by the petitioners.

The details in the reply to the objections will be discussed in the course of order. The PCS for petitioner has filed written submissions and cited rulings. The counsel for respondents has also filed written arguments. The points urged in the written arguments will be dealt in the course of the order.

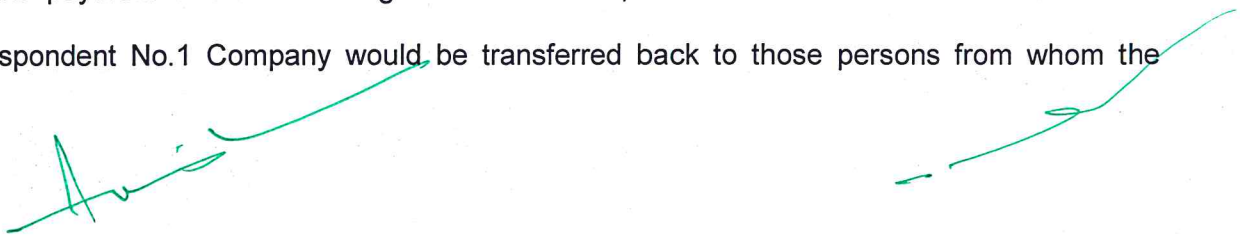


The petitioners have filed the main petition seeking the relief of directing the respondents to transfer the remaining 50% shares and also for other reliefs. Apart from the main reliefs, the petitioners have sought for interim reliefs. Pending enquiry, the petitioners have filed IA No.80/2017.

In this Interlocutory Application, the petitioners have sought for three interim reliefs. The interim reliefs prayed in the Interlocutory Application are different from the reliefs prayed for in the main petition. The interim reliefs if any, shall be in aid of the main reliefs prayed. The present interim reliefs sought for in the Interlocutory application are nowhere in the aid of reliefs prayed in the main petition.

The admitted facts are that on 03.05.2015, the first petitioner has entered into a Memorandum of Understanding with Respondent No.2 for the sale of shareholding of Respondent No.1 Company. According to the Memorandum of Understanding, the first petitioner had to pay Rs.3.00 crores at the first instance and after exercising due diligence in about 30 days, the first petitioner has to pay further Rs.12.00 crores and the remaining Rs.3.00 crores was to be paid on or before 31.12.2015 or six months from the date in conformity with clause 5 (d) of Memorandum of Understanding. Respondents No.2 and 3 were to execute necessary forms to enable transfer of 5000 shares. Accordingly, after receiving Rs.3.00 crores, the Respondents No.2 and 3 have transferred 5000 shares in favour of first petitioner which was effected on 11.05.2015.

It is the case of the respondents that the first petitioner had executed a letter of undertaking indicating that it had acquired 5000 shares from the shareholders of the Respondent No.1 Company and further gave an undertaking that, in the event of failure to make payment of the remaining Rs.15.00 crores, the shares of the shareholders of the Respondent No.1 Company would be transferred back to those persons from whom the



shares were purchased. The counsel for respondents has relied on Annexure-R/1, signed by Shri R.S. Swamy, on behalf of first petitioner company. There is a clear indication in this Annexure-R/1 that the shares will be returned back to the persons from whom they were acquired in the event of failure to pay the consideration amount of Rs.15.00 crores.

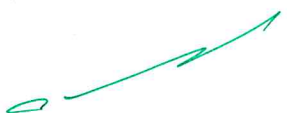

It is not in dispute that till this day, the balance amount of Rs.15.00 crores was not paid by the first petitioner to the respondents. Now, the contention of the PCS for petitioners that the first petitioner is the shareholder and Petitioners No.2 and 3 are the Directors. The PCS would contend that the names of petitioners No.2 and 3 are found on the records of ROC, Karnataka as Directors of the Company. It is the contention of the PCS that the first petitioner is holding 50% shares and the share certificates are shown as Annexures-A/2 to A/6 and the shares are duly transferred. The PCS would contend that the undertaking letter relied upon by the respondents will not help the case of respondents. The PCS contended that the Respondents had to discharge certain obligations in terms of Memorandum of Understanding which they have failed to do. Therefore, the respondents cannot contend that the petitioners have ceased to be the shareholders or Directors. It is the contention of the PCS for petitioners that land over which the Respondent No.1 company plant is situated is yet to be transferred in the name of the Respondent No.1 Company. The PCS further contended that the respondents, without performing their part of obligation, cannot contend that the applicants have failed to perform their obligation. The PCS would also contend that obligations are on both sides as per the Memorandum of Understanding and that the petitioners have paid Rs.3.00 crores and that the land is yet to be transferred in the name of the Respondent No.1 Company. Therefore, the first petitioner is the shareholder and Petitioners No.2 and 3 are the Directors and that they are entitled to participate in the management of the Company and that they are entitled for the interim reliefs.

The contention of the learned counsel for the respondents that as per the terms of Memorandum of Understanding, if the first petitioner fails to pay the amount agreed, then the



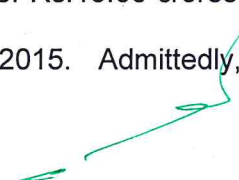
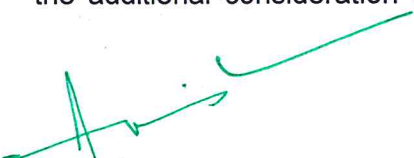
shares held by the first petitioner stands automatically transferred to the shareholders from whom they are acquired by operation of law. It is also the contention of the learned counsel for respondents that the present petition is not maintainable as any dispute arising under the Memorandum of Understanding, the matter is to be referred to the Arbitrator. Therefore, the Counsel would contend that this Tribunal cannot entertain the main petition as the dispute, if any, is to be decided by the Arbitrator. He submitted that he has also filed a separate application bearing I.A. No.121/2017 under Section 8 of the Arbitration and Reconciliation Act, to refer the matter to an Arbitrator. The said application is pending.

The next contention of the learned counsel for the respondents is that the first petitioner is no longer the shareholder and therefore, he cannot maintain this petition under Sections 241-242 of Companies Act, 2013. The same contention of the counsel for the respondents is that the first petitioner has tried to obtain loan from the Banks to pay the balance sale consideration. But, the Banks refused to sanction loan as the net worth of the first petitioner Company is not in a sound condition. The crucial question is that only Rs.3.00 crores was paid by the first petitioner to the Respondents under the terms of Memorandum of Understanding. The balance amount, admittedly is not paid. The terms of Memorandum of Understanding provides that if the balance of payment is not made, the 50% of shareholding transferred to the first petitioner, automatically gets re-transferred to the original shareholders by operation of the terms of Memorandum of Understanding. Therefore, this needs to be decided in the main petition. Consequently, the contention of respondents is that the 1st petitioner has failed to perform its part of the obligation at the first instance and therefore, it cannot maintain the present petition as it is no longer a shareholder of the Respondent No.1 Company. Thirdly, any dispute arising under the Memorandum of Understanding is to be decided by an Arbitrator. When maintainability is challenged, then the petitioners are not entitled for the interim relief.



The petitioners are claiming their rights said to have been acquired by virtue of Memorandum of Understanding dated 03.05.2015 marked as Annexure-A/8. This is the main document for the petitioners basing on which they claim that they are entitled for the interim reliefs as prayed. The question is that this document is only an understanding between the 1st petitioner and the respondents. Certain obligations are imposed on both sides before the respondent No.1 Company stand transferred to the first petitioner. The main contention of Respondents that the first petitioner has failed to adhere to comply the payment schedule as per MOU. The contention of Respondents is that except payment of Rs.3.00 crores, the 1st petitioner has not paid the balance consideration as per the terms of understanding. There is no dispute that the first petitioner has paid only Rs.3.00 crores out of the total consideration of Rs.18.00 crores. The balance payable is rs.15.00 crores. It is an undisputed fact that the balance amount was not paid by the first petitioner as per the time schedule of the understanding. The first petitioner is throwing his blame on the respondents contending that the respondents did not cooperate with the first petitioner company to exercise due diligence. Secondly, the transfer of land and building over which this unit of Respondent No.1 Company is located stands in the name of the wife of Respondent No.2, which is not yet transferred in the name of the Respondent No.1 Company. Further, the contention of petitioners that the Board meeting of Respondent No.1 Company was not held to facilitate the first petitioner to raise loan from the Banks.

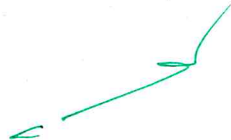

On the other hand, the contention of respondents that the first petitioner has failed to pay the 2nd instalment of Rs.12.00 crores within 90 days from the date of expiry of due diligence period of 30 days. Here, it is necessary to go through the MOU dated 03.05.2015 marked as Annexure-A/8 by the petitioners. Clause 4 deals with other payment method and shareholding. It prescribes due diligence within 30 days. Clause 5 provides the management will be transferred to the first petitioner company only after payment of Rs.15.00 crores and the additional consideration of Rs.3.00 crores to be paid by 31.12.2015. Admittedly, the



balance amount of Rs.15.00 crores was not paid even to the date when the petitioners filed the main petition which is nearly 2 years after entering into MOU.

Now, the petitioners are contending that the immovable property and the buildings are not transferred in the name of Respondent No.1 Company. Now, it is the contention of the respondents that the same was transferred in the name of Respondent No.1 Company.

As seen from the MOU, Clause 7 (a) of the memorandum provides that shares transferred in the name of the first petitioner company will be reverted back to the promoters of the Respondent No.1 company in the event of rejection of loan by the Bank or default of the promoters of the first petitioner company in payment of the balance consideration as per sub-clause (c) of Clause 7. Admittedly sub-clause (c) of Clause 7 is not complied. Now, the contention of petitioners that in spite of this clause, the first petitioner continues to be the 50% shareholder of the Respondent No.1 company and the petitioners No.2 and 3 are the additional directors. If any dispute arises between the parties under the MOU, clause 19 provides the same shall be referred to the Arbitrator who shall be appointed by mutual consent. Now, the petitioners are raising a dispute that the first petitioner is a shareholder and petitioners No.2 and 3 are the Directors notwithstanding that they failed to comply the payment schedule. This aspect needs to be decided in the main petition. The question whether the first petitioner ceased to be a shareholder by virtue of Clause 7(a) as sub-clause(c) of Clause 7 was not adhered to. The petitioners No.2 and 3 are Additional Directors till their appointment is approved in the next AGM. The board resolution is marked as Annexure-A/12 dated 11.05.2015. The resolution clearly says that they will hold office upto the date of ensuing AGM. Admittedly, there is no resolution of AGM appointing petitioners No. 2 and 3 as Directors. Thus, a serious question is raised by the respondents that the first petitioner is no longer a shareholder as the shares are reverted back by operation of Clause 7 (a) of MOU and that the petitioners No.2 and 3 ceased to be the Directors, as no resolution is passed by



AGM confirming their appointment as Directors. The Respondents have raised a serious objection that the petitioners have nothing to do with the management and that they have no right to seek any interim relief. As already stated, the respondents have also filed a separate application under Arbitration and Reconciliation Act to refer the dispute to the Arbitrator and it is still pending. The respondents are questioning the maintainability of the petition by the petitioners on the ground that the first petitioner ceased to be the shareholder and the petitioners No.2 and 3 are not the Directors. Therefore, in the light of these contentions and further the first petitioner has failed to adhere to the payment schedule, it is not possible to grant interim relief in favour of the petitioners as prayed. The first petitioner is yet to establish its rights over the shares said to have been transferred in the light of Clause 7(a) of the MOU and also in the light of undertaking letter executed by the first petitioner marked as Annexure-R/1 to the objections.

The next aspect of the case in the application, the applicants are seeking three reliefs stated as hereunder:

- (a) Restrain the respondents from taking any Corporate action without the presence of Petitioner-Directors and file any returns, e-forms and papers with ROC and any other regulatory authorities;
- (b) Issue directions to the ROC, not to take on record the e-forms AOC-4 and MGT-7 for the years 2014-15 and 2015-16;
- (c) To hold the fresh and "duly convened" BMs and AGMs from the date of induction of Petitioners 2 and 3 on the Board of the Company namely from 18.08.2015 and treat the AGMs, if any, held without inviting the petitioners No.2 and 3 as improper, illegal and not according to the applicable Secretarial Standards.

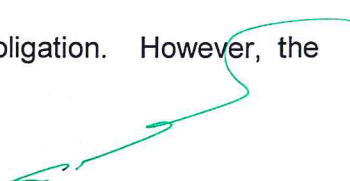
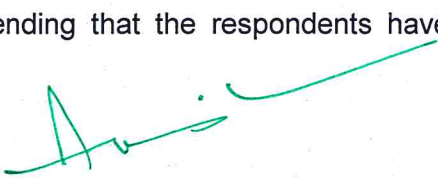
Whereas the other reliefs prayed in the main petition are as follows:

- i. to pass an order directing the Respondents to transfer remaining 50% of the shares after successful completion of Due diligence exercise, after collecting the remaining amount from the Petitioners towards Share Capital, after collecting the debt amount through banking or other source of the Petitioners according to the intentions of the MOU;

- ii. to pass an order directing the Respondents to hand hold the Petitioners during the transitions period by sharing all the operational and cliental information as per the intentions of the MOU;
- iii. to pass an order directing the Respondents to compensate the petitioners for the delay, namely beyond 31st December, 2015 till date for the opportunity cost the petitioners lost due to delay on the part of the respondents;'
- iv. to pass an order to make respondents responsible for contraventions of all the applicable sections of the CA, 1956/2013 and for the consequences in terms of money, penalty or otherwise before and after the induction of the representatives of the petitioner company;
- v. to pass an order directing the respondents to bear all the cost and expenses towards the petitions/litigations compensating the petitioners;

The present reliefs claimed by the petitioners are not in aid of the main reliefs in which case, the petitioners are not entitled for the interim reliefs prayed in this petition. On this ground also the petitioners are not entitled for these interim reliefs.

The contention of the PCS that the first petitioner is unable to pay the balance as the landed property and building of Respondent No.1 Company stands in the name of the wife of Respondent No.2. The contention of PCS is that the Respondent No.2 had in fact, undertaken to get the landed property and building transferred in the name of Respondent No.1 Company. He has relied on Annexure-A/10 filed with the petition. His contention is that till date the building as well as the landed property is not transferred in the name of Respondent No.1 Company as per this undertaking letter Annexure-A/10. It is true that Annexure-a/10 is an undertaking given by Respondent No.2 that the land and building owned by Mrs. Parvathy Subramanian, who is also the Director of Respondent No.1 company shall be transferred to the Respondent No.1 company by way of sale. Now, the PCS has contended that since the property is not transferred in the name of Respondent No.1 company, the question of paying the balance of sale consideration would not arise. This is the main ground on which the PCS is contending that the respondents have not dis-charged their obligation. However, the



respondents have stated that the building and the property has been transferred to the Respondent No.1 Company. This undertaking letter was dated 15.05.2015. The petitioners have not filed any proof like encumbrance certificate from the concerned Sub-Registrar's office that the property still stands in the name of the wife of Respondent No.2.

The petitioners' main document Annexure-A/8 contemplates entering into agreements. MOU is not a final document. The parties have to enter into definite agreements basing on the compliance of the provisions of MOU. Therefore, MOU itself is not a sole document to create rights in favour of the parties. It should be followed by definite agreements.

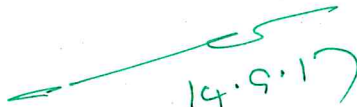
The last paragraph of MOU is as follows:

"The execution of this MOU is intended to constitute a binding obligation on both the parties. This MOU is intended to outline the various points to be included in the definitive agreements. To give effect to the spirit of this MOU, the parties agree to enter into the definitive agreements."

In the light of the above discussions, the petitioners cannot be granted interim relief as prayed for.

In the result, I.A. No.80/2017 is dismissed.


(ASHOK KUMAR MISHRA)
MEMBER (TECHNICAL)


(RATAKONDA MURALI)
MEMBER (JUDICIAL)

psp.