

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

IA No.16/2017 IN

T.P. No.82/ 2016 IN CP 81/2015

UNDER RULE 11 OF NCLT RULES, 1956

IN THE MATTER OF RAMAKRISHNA MEENAJI HADGAL & ANR.

Vs.

SHREE AASHRAYA INFRA-CON LIMITED & 10 ORS.

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

Hon'ble Dr Ashok Kumar Mishra, Member Technical.

Order delivered on 23rd October, 2017

For the Petitioner: M/s. KSR & CO. COMPANY SECRETARIES LLP,

For the Respondents M/s. Roshan Raikar & Associates, PCS.

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

ORDER

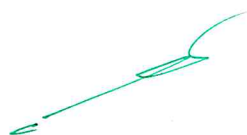
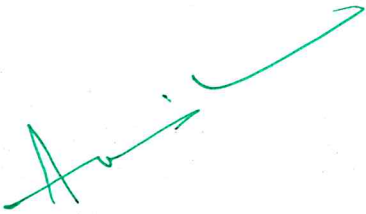
This application is filed by the petitioners under Section 242(4) of Companies Act, 2013, read with Rule 11 of NCLT Rules, 2016, praying for amendment of the petition.

The averments in the application supported by affidavit that the applicant/petitioners have found that the Articles of Association of Respondent No.1 Company were altered in the AGM allegedly held on 30.09.2015. The petitioners are challenging the alleged AGM for making alterations to the Articles of Association. The right to renunciation of shares which the members of the Company were having was taken away which is an important right available to the members. It is averred that Article 9 of the old Articles of Association provided for such right which was taken away by way of amendment. Further, it is averred that the explanatory statement for the AGM held on 30.09.2015 is inadequate and misleading. The next contention of the applicant/petitioners is that the rights issue was made on 15.12.2016 basing on the order of this Tribunal. Before the rights issue, the total shares of the Respondent No.1 company was 1,68,025 shares. Post rights issue of 7,56,288 shares, the total number became 9,24,313. The shareholding of the petitioners came down to 2% from 9.07%. Even though



the Tribunal has permitted the company to go for rights issue, yet the same has not passed the test in the angle of oppression and mismanagement. It is contended that the respondents have transferred certain shares to Respondents No.5 and 6, Shri Jambulingappa Gurusiddappa Hosmani and Shri Vinay Nitin Jadav. It is further contended that the Respondents have sold the company property situated in Belgaum by executing the sale deed dated 13.03.2016 at Rs.61,28,160/- which is far below the market price. Thus, the petitioners wanted to amend the petition by including additional paras shown in Schedule-'A' and additional reliefs based on the amendment shown in Schedule-'B'. Thus, the petitioners pray to permit them to amend the petition to include additional paragraphs containing the above details shown in Schedule-'A' and further to amend the prayers as shown in Schedule-'B'.

The respondents have filed their reply affidavit contending that the petitioners were served with notice of AGM as per the provisions of Companies Act, 2013. The petitioners could have raised objections in the AGM if they had any grievance for the adoption of new set of Articles of Association. The drafts of the Articles of Association were also communicated to the petitioners prior to AGM. However, the petitioners did not attend the AGM and raised their objections if any. Therefore, they cannot raise any objection at this stage. Further, the petitioners have failed to show how the right of renunciation of shares is a vital right. Every information required was provided in the explanatory statement which was attached to the notice of AGM. No provision of law was violated for the adoption of the new set of Articles of Association by the company and other respondents. It is contended that the rights issue was made to all the shareholders and no extra shares were offered/allotted to any shareholder. The rights issue was made at par and no premium was collected. In fact, the respondents have obtained order from this Tribunal in IA NO.08/2016 to go for rights issue. If the petitioners are aggrieved, they have to prefer appeal against the order of the Tribunal but not by way of seeking amendment to the petition. The shares were allotted to Respondents No.5 and 6 Shri Jambulingappa Gurusiddappa Hosmani and Shri Vinay Nitin Jadav as per the provisions of



Companies Act, 2013. Respondents No.5 and 6 are duly appointed as Directors in the EGM held on 25.08.2015.

The respondents have also averred that there is no fraud in the sale of property. It was sold at a fair market value and more than the guidance value of the Sub-Registrar. The main business of the company is doing real estate. The sale proceeds were utilised for discharge of debts. Thus, the petition is liable to be dismissed.

The counsel appearing for petitioners has filed the written arguments and cited the following decisions.

1. Judgment of the Hon'ble Apex Court in the case of State of A.P. and Ors. Vs. Pioneer Builders, AP [MANU/SC/8520/2006] regarding amendment of pleadings under Rule VI Rule 17 C.P.C;
2. Judgment of the Hon'ble Supreme Court in the case of Rajesh Kumar Aggarwal & Ors. Vs. K.K. Modi & Ors [MANU/SC/8043/2006];
3. Again judgment of the Hon'ble Supreme court in the case of Sampath Kumar Vs. Ayyakannu & Anr. [MANU/SC/0812/2002].

The counsel for respondents has also filed written arguments and cited the following decisions.

1. Judgment of the Hon'ble High Court of Madras in C.R. Priyachandra-kumar Vs. Purasawalkam Permanent Fund Ltd. – [1996] 7 SCL 61 (Mad);
2. Judgment of Hon'ble Delhi High Court in Rajiv Nag Vs. Quality Assurance Institute (India) Ltd. (2002) 37 SCL 25 (Delhi);
3. Judgment of the Hon'ble High Court of Calcutta in Mahaliram Santhalia Vs. Fort Gloster Jute Mfg. Co. Ltd. – (1954) 24 Comp Case 311 (Calcutta).

The points urged in the written arguments will be dealt with in the course of arguments.

Heard both sides.

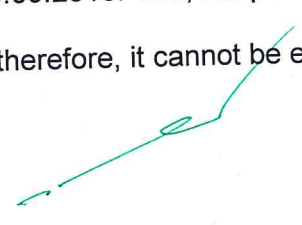
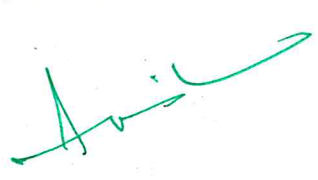
The counsels submitted oral arguments. Besides, they have also filed written submissions. The contention of the learned counsel for petitioners is that the right of renunciation given to a member is an important right. This has been taken away by way of amendment to the Articles of Association. The explanatory statement should contain all details. It is a mandatory requirement. It is contended that the petitioners can advance

evidence to establish how the shareholders rights were oppressed. It is contended that issuing of shares at the face value under the guise of rights issue is an act of oppression. The counsel contended that as far as the law laid down that amendments to be liberally allowed in matters of oppression and mis-management. The Tribunal cannot go into the merits of the amendments at this stage. Hence, it is prayed that the amendment may be allowed.

The learned counsel for respondents would submit that the Tribunal has passed order in IA 08/2016 permitting the Company to go for rights issue. The same cannot be challenged in this Tribunal itself by way of seeking amendment. The explanatory statement cannot be read in isolation. It should be dealt with along with the notice and supporting documents. The petitioners have failed to attend the AGM on 30.09.2015. It is contended that it is totally false and untrue regarding the sale of property that it was sold for a under value. However, the property was sold over and above the market price and guidance value. The major portion of the sale proceeds was utilised for discharging the debts. Thus, it is contended that the petition is liable to be dismissed.

This is an application filed for amendment of the petition by adding the paragraphs shown in Schedule-'A' of the application and consequently for addition of prayers shown in Schedule-'B'. The first amendment sought for is that the respondents have amended the Articles of Association of the Company under which the right of renunciation of shares available to the members was taken away. It is contended that Article 9 of the old Articles of Association of the Company provides for right of renunciation to the members and that the AGM held on 30.09.2015 was also challenged on the ground that the explanatory statement sent with the notice did not contain the details.

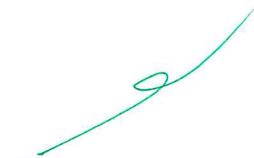

The contention of the counsel for respondents is that the proper forum for the petitioners was to raise the same in the AGM held on 30.09.2015. But, the petitioners did not attend the AGM and if is now raised in this petition and therefore, it cannot be entertained.



The contention of the counsel for the petitioner is that amending the Articles of Association by taking away a right of renunciation is nothing but an act of oppression. Whereas, the contention of the respondents is that the amendment was duly approved by the AGM and it is in accordance with the procedure prescribed. The petitioners have however, contended that taking away the right of renunciation of shares which was available under Article 9 of the old Articles of Association is an act of oppression. Such an amendment can be permitted as the petitioners are minority shareholders. In the light of renunciation said to have been available under the old Articles of Association of the Company which was subsequently taken away by adoption of new Articles of Association. Therefore, this amendment in respect of this development can be allowed.

The second contention of the petitioners/applicant that the company had gone for rights issue and thereby, their shareholding have been reduced from 9.07% to 2% which is again an act of oppression. However, the respondents contended that the Tribunal has allowed the company to go for rights issue and offer was also made to the petitioners to purchase the rights issue. This Tribunal permitted the company in an order passed in IA No.8/16. Such an order cannot be questioned in the main petition by way of amendment. However, the contention of applicants that rights issue is not tested in the angle of oppression and mismanagement though the Tribunal permitted the Company to proceed with the rights issue. It is contended that it is open to the applicants to challenge the rights issue as an act of oppression and mismanagement with a view to gain control over the company.

It is an admitted fact that the Tribunal has allowed the company to go for rights issue by an order passed in IA No.8/16. If the applicants/petitioners are aggrieved by the rights issue they should have challenged the same before the appellate forum. However, they remained silent. Now, they cannot challenge the rights issue by way of amendment in the main petition. So, the amendment in so far as this part is concerned cannot be allowed.



The applicants have also challenged the allotment of shares to R-5 and R-6 Shri Jambulingappa Gurusiddappa Hosmani and Shri Vinay Nitin Jadav. The amendment to that extent can be permitted.

Lastly, the applicant has alleged that the company property was sold far below the market price dated 11.03.2016. The sale of property took place during the pendency of the main petition. It is the contention of the applicants that the sale of property is an act of mismanagement. Since it is a subsequent development after filing of the main petition and the applicants have challenged the same as an act of mismanagement. Hence, this amendment can be allowed.

The counsel for petitioner has relied on the principle laid down in the decision reported in Judgment of the Hon'ble Apex Court in the case of State of A.P. and Ors. Vs. Pioneer Builders, AP [MANU/SC/8520/2006]. The Hon'ble Apex Court has held as follows:

"Principles governing amendment of pleadings are well-settled. Order IV Rule 17 C.P.C. deals with the amendment of pleadings and provides that the Court may at any stage of the proceedings allow either party to alter or amend pleadings in such a manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

In the second judgment of relied upon by the learned counsel for the petitioner, in the case of Judgment of the Hon'ble Supreme Court in the case of Rajesh Kumar & Ors. Vs. K.K. Modi & Ors [MANU/SC/8043/2006], the Hon'ble Supreme Court has held as under:

"the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused and it is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court."

The learned counsel for the petitioner has also relied on the judgment of the Hon'ble Supreme Court in Sampath Kumar Vs. Ayyakannu & Anr. reported in MANU/SC/0812/2002. In the said case, the Hon'ble Supreme Court has held as under:

"the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment."

The learned counsel for the respondent has relied on the decision of the Hon'ble High Court of Madras in C.R. Priyachandra-kumar Vs. Purasawalkam Permanent Fund Ltd. – [1996] 7 SCL 61 (Mad):

"Section 173, read with section 166, of the Companies Act, 1956 – Meeting Explanatory note to be annexed to notice – Whether it would be wrong to construe section 173(2) in a rigid manner so as to hamper conduct of business – Held, yes – Whether notice has to be construed in a realistic business-like manner and if it satisfies essence of section 173(2) invalidation of meeting on technical ground would be unjustified – Held, yes – whether a shareholder can complain of insufficiency of notice where he is aware of material facts pertaining to transactions to be carried out at the meeting – Held, no."

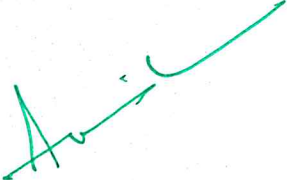
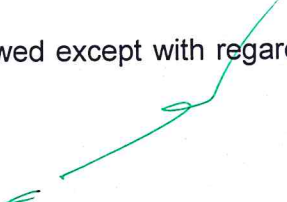
The learned counsel for the respondent has relied on the decision of the Hon'ble Delhi High Court in Rajiv Nag Vs. Quality Assurance Institute (India) Ltd. (2002) 37 SCL 25 (Delhi):

"Section 173 of the Companies Act, 1956 – Meetings – Explanatory note to be annexed to notice – Whether it is correct to say that explanatory statement is not to be read in isolation and it has to be read along with special resolution included in agenda – Held, yes."

The counsel for respondents has relied on the decision of the High Court of Calcutta in the case of Mahaliram Santhalia Vs. Fort Gloster Jute Mfg. Co. Ltd., (1954) 24 Comp Case 311 (Calcutta):

The decision deals with review of shareholder in the meeting.

Here, the Tribunal is not going to consider the merits of the proposed amendment. It is not the stage to consider the merits of amendment before ordering for amendment. The contention of the learned counsel for petitioner that the amendment is necessitated following the subsequent developments. The amendments can be allowed except with regard to the

rights issue. No prejudice will be caused to the respondent if the proposed amendment is allowed as the enquiry in the main petition is yet to be commenced.


Further the respondents will have the right to file an additional reply/counter basing on the proposed amendment. In that view of the matter, the respondents will not be prejudiced if amendment is allowed.

In the result IA No.16/2017 is partly allowed permitting the petitioner to amend the petition by adding paragraphs in Schedule 'A' except paragraph 'H' at para No.3 shown in Schedule 'A' and also permitting the petitioner to amend the pleadings as shown in Schedule 'B' except relief 'R' of Schedule 'B'.

Accordingly, amendment is to be carried out in the main petition by numbering the paragraphs.



(ASHOK KUMAR MISHRA)
MEMBER (TECHNICAL)



(RATAKONDA MURALI)
MEMBER (JUDICIAL)

psp.