

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
CHANDIGARH BENCH, CHANDIGARH**

**CP NO. 121 (ND)/2015
RT NO. 09/2016 AND
CA NO. 91/C-I/2016**

Date of order: 09.01.2017

In re:

Shree Virender Kapoor & others.

..... Petitioners.

Vs.

United Cycle and Parts Manufacturers Association Respondents.
(UCPMA) and Ors.

Present: Mr. Sanjay Mishra and Mr. Geetesh Meena, Advocates
for petitioners.

Mr. Rakesh Kumar and Mr. Vaibhav Sahni, Advocates
for respondent.

**Coram: HON'BLE MR. JUSTICE R.P. NAGRATH,
MEMBER (JUDICIAL).
HON'BLE MS. DEEPA KRISHAN, MEMBER (TECHNICAL).**

DEEPA KRISHAN, MEMBER (TECHNICAL).

Judgement

This order will dispose of CP No. 121 (ND)/2015 / RT No. 09/2016 filed by the petitioners under Section 397, 398 read with section 402 of the Companies Act, 1956. The respondent No. 1 namely United Cycle and Parts Manufacturers Association (UCPMA) (hereinafter referred to as UCPMA) is a non-profit organisation under Section 25 of the Companies Act, 1956.

2. The petitioners who are stated to be members of R-1 have filed this petition to bring before the bench the irregularities, illegalities and unlawful actions being adopted by the management committee of R-1. The allegations made in the Company Petition mainly deal with the

Deepa

[Signature]

election of the management committee held in Sept. 2015. As per the Memorandum and Articles of Association, R-1 is managed by the management committee which consists of 1/25th one each from the companies/proprietorships/partnerships. The management committee is elected for a period of two years. The previous management committee was elected in 2013 for a period of 2013 to 2015 and the instant petition concerns the election of management committee for 2015 to 2017. Briefly, it is stated in the petition that notice for elections of the management committee for R-1 for 2015-2017 was issued vide circular dated 31.08.2015 by the committee for the elections to elect a new executive committee of UCPMA and the elections were scheduled to be held on 12.09.2015. The petitioners have alleged that the issuance of this circular with the subject "Election of office bearers for the next term "2015-17" was without any authority and is also null and void as it had not been issued in terms of article 9 of the registered Articles of Association of the Society (hereinafter referred to as A of A). It is also stated that the nomination fees previously was fixed at Rs. 10000/- but at the time of filing nomination along with the nomination form the nomination fee was illegally reduced to Rs. 5000/-. Further the nomination fee was not accepted on the plea that receipt will be issued only after scrutiny of forms by the Presiding Officers and the returning officers of the Election Committee.

2.2 The petitioners in the Company Petition have stated that the election circular was issued on 31.08.2015 with the following agenda on it :-



S. No.	Particulars.	Date.
1.	Last date of clearance of dues to become a valid voter	03.09.2015
2.	Publication of draft voter list (1890)	05-09-2015
3.	Objection of draft voter list if any.	06-09-2015
4.	Publication of final voter list.	07-09-2015
5.	Nomination paper (proposal) filing.	09-09-2015
6.	Scrutiny of nomination	09-09-2015
7.	Withdrawal of nomination.	10-09-2015
8.	Holding of election (polling)	12-09-2015
9.	Counting of votes.	Immediately after election

2.3. The petitioners have challenged the said election for 2015-2017 on the following grounds:-

- i) Circular for holding elections was issued on 31.8.2015 stating that the elections were proposed to be held on 12.9.2015 whereas the Articles of Association required one month notice for the same.
- ii) The circular for holding election was issued without any resolution in the AGM that was held on 22.8.2015 and without finding place in the Agenda of the AGM nor in any other meeting.
- iii) The dues from members were accepted after the appointed date of 03.09.2015 as mentioned in the circular dated 31.8.2015.



- iv) The respondents have elected a chairman even when there is no post of chairman in the Articles of Association of R-1.
- v) The respondents did not send the circular to all the members.
- vi) The nomination fee has been reduced from Rs. 10,000/- to Rs. 5,000/- and the same was accepted and receipt issued only after scrutiny of the nomination form by the President and Election Committee.
- vii) The presiding officer rejected the nomination form of 18 members out of the 28 nominations for the various posts.
- viii) The circular dated 31.8.2015 stated that voting in the election will strictly be by use of biometric card. However, only, 900 biometric cards were issued.
- ix) The withdrawal of P-1 from the post of General Secretary is stated to be illegal.
- x) Sh. Gurmit Singh Kular who had filed his nomination for the post of President is also stated to be withdrawn. He was subsequently declared as Chairman.

2.4 After rejection of 18 nominations and withdrawal by two candidates out of the total 28 nominations received, there were only eight valid nominations, one each for each of the eight posts. On 10.9.2015, these persons were declared elected unopposed.

2.5 The petitioners being aggrieved by the election of these eight persons to the management committee, sent a notice dated 14.10.2015

to the ROC with the subject line – (1) “Unconstitutional notice issued by General Secretary of United Cycle and Parts Manufacturers Association dated 31.08.2015 is (2) illegal rejection of the nomination forms of eighteen candidates.”

2.6 The petitioners have further alleged that after the elections, the message was circulated on SMS and WhatsApp on 16.10.2015 “that a Special AGM is going to be held soon for the few amendments in the constitution of the UCPMA. Send your suggestions in written if any to UCPMA office Gen. Sec.”

2.7 It is further alleged that again on 19.9.2015, another message was circulated on SMS and WhatsApp that “Please send your written suggestion at UCPMA by 19th of September for amendments in UCPMA constitution. Special AGM to be held soon. Gen. Secretary.”

2.8 The petitioners have stated that the respondents are indulging in unfair and inequitable activities and it would be just and equitable to wind up the respondent R-1. It is further stated in the petition that however as the winding up of R-1 will not be in the interest of the R-1 of the company and the petitioners, the petitioners are praying for equitable reliefs, which are reliefs other than winding up the company, under Sections 397 and 398 read with Sections 401, 402, 403 and 406 of the Company Act 1956.

2.9 The petitioners have also alleged siphoning of the funds of R-1 company as well as forgery and fabrication. It is also alleged that the Barat Ghar at the R&D centre has been leased out and amount received in cash for the same has not been reflected in the books of accounts.

R. V. S. Reddy


2.10 The respondents have also filed details of cash transactions vide letter dated 14.3.2016. however, both the petitioners and respondents did not argue the same.

3. The following reliefs are sought in the Company Petition: -

- a) Set aside the illegal elections conducted by the Respondents and order for the fresh election to be conducted under the observation of the Court appointed observer.
- b) Restrict the respondents from altering the Articles of Association and/or amended bye-laws purported to have been approved since long, amended bye-laws if any as ultra-vires; and
- c) To declare the adoption of the new elected post of the Chairman illegal and against the Articles of Association.
- d) To declare any decision of the EOGM / AGM and meeting of the MC of the respondent No. 1 Company, which had been taken in pursuance of the unapproved bye-laws / unapproved Articles of Associations in the Respondent 1 company as null and void; and
- e) To declare that it is the prerogative of the members of the Respondent No. 1 company to take appropriate decision with respect to the alteration of the Articles of Association as well as to the membership and election bye-laws in accordance to the applicable rules and procedures prescribed under the Companies Act, 1956; and
- f) Permanently debar the respondents from the membership of the respondent No. 1 company



g) Issue any other appropriate order or directions as this Hon'ble Board deems fit and just in the facts of the case.

3.2 The petitioners also prayed for interim relief. The Hon'ble Chairman of erstwhile CLB New Delhi Bench vide order dated 8.12.2015 ordered that "in the meanwhile status quo with regard to assets of Respondent No. 1 co. shall be maintained". Subsequently vide order dated 1.2.2016, this order was modified to the extent that "status quo shall not apply to the payment of labour dues and other statutory expenses. The bank account to that extent be operated."

3.3 Along with the petition, a final voter list of 1988 members has been filed as Annexure 14. This list bears the seal of R-1 company. The petition has been signed by 9 petitioners and has a list of 175 members who are stated to have supported the petition.

4. In their reply dated 28.1.2016, the respondents denied all the averments, contentions and allegations made by the petitioners in the CP alleging various acts of oppression. It is also stated that the petitioners have not approached the CLB/Tribunal with clean hands. It has further been stated that several members have given their letters to the R-1 stating that they were given wrong information and they do not support the present petition. Certain signatures are also stated to have been forged and certain members listed in annexure 3 (attached with the petition) that are stated to support the petition are not even members of R-1 company. One petitioner No. 9 is stated to have submitted his affidavit to R-1 company withdrawing its consent from the instant petition.



The respondents have referred to Section 399 (1) (b) and stated that the present petition does not fulfil the requirements therein.

Section 399 of the Companies Act, 1956 is reproduced for reference:

"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 member 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;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(2) For the purposes of sub-section (1), where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(3) Where any members of a company are entitled to make an application by virtue of sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

(4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the Tribunal under section 397 or 398, notwithstanding that the requirements of clause (a) or (b), as the case may be, of sub-section (1) are not fulfilled.

(5) The Central Government may before authorising any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable, for the payment of any costs which the Tribunal dealing with the application, may order such member or members to pay to any other person or persons who are parties to the application."

5. This issue has been subsequently raised in CA No. 91/C-I/ 2016.

The respondents have also stated that P-1 has sold his factory in 2010 and is no longer engaged in running any unit or factory manufacturing cycle parts and hence cannot be members of R-1 co. The respondents have given a detailed reply to the allegations made by the petitioners in the CP. It is also stated that information regarding elections to be held

@A/R
R

on 12.09.2015 was published in newspapers on 5.8.2015 and hence more than 30 days notice was given.

5.2 It is also stated that P-1 and others participated in all the functions before and after the elections. Newspapers cuttings showing their presence have also been attached with their reply.

5.3 During the course of oral arguments, R 15 filed a separate reply stating that he was appointed as an election officer for elections for the period 2015-2017. In this reply dated 2.8.16, he has specifically not denied that the elections for tenure for 2015-2017 were not held in the manner as per the rules/bye-laws and democratic manner of R-1 company as carried on in the elections held prior to 2015.

6. In their rejoinder to the reply given by the respondents, the petitioners have stated that the petition complies with the provisions of Section 399 of the Companies Act, 1956 as the petitioner has consent of more members apart from the consent received from 184 members filed with the petition. In their oral arguments also, the petitioners have argued that the list of voters filed as Annexure 14 with the petition contains 1988 names and 424 of those have filed the petition and/or given their consent for the same. Hence the requirement of 20% of the members as per section 399 (1) (b) has been fulfilled. It is further stated that the members who are stated to have given their consent upon misrepresentation of facts by the petitioners have done so under pressure by the R-1 co. It has also been stated that P-1 was and is a member of R-1 and his having sold his factory/unit is not relevant. It has also been averred that P-1's withdrawal of his nomination was taken fraudulently by the respondents.

Prakash
R

6.2 While denying that P1 and others participated in all the functions before and after the elections, it is stated that they were left with no other option but to keep an eye on the respondents and take legal action. It has been denied that there was any malafide intention on behalf of the petitioners in filing the co. petition.

6.3 It has also been stated that new members admitted in the R-1 co. cannot be considered as members as they were not admitted in a fair and transparent manner as per the rules and bye-law of A of A. It is averred that the old members are the only valid members of the R-1 co./association.

7. The Respondents vide CA-91/CHD/2016 filed an application dated 28.1.2016 for dismissal of the CP on the grounds of non compliance of Section 399 of the Companies Act, 1956. It is stated in this application that initially there were nine direct petitioners in addition to 175 consented petitioners i.e. a total of 184 members. They have also questioned the averments made in the CP that there are only 1988 members of R-1 company as given in annexure 14 of the CP. The respondents have stated that there are about 2200 members.

8. During the course of oral arguments, NCLT vide order dated 6.9.2016 directed the respondents to file along with affidavit their contention regarding the constitution of the election committee and to clarify as to the final composition of the election committee.

9. In response to the NCLT directions dated 6.9.2016, the respondents filed an application on 26.9.2016 giving a list of total no. of members as being 2419 in the R-1 Association . This list though

Dayra
[Signature]

unsigned is accompanied by an affidavit signed by the president of R-1 co. Both the petitioners' and respondents' counsels did not attempt to reconsider or explain the difference between the numbers of total members (2419) in this list and the numbers appearing in the voter list (1988).

9.2 The petitioners in the rejoinder to CA 91/C-I/2016 have questioned the affidavit filed along with this application. They have also referred to the Supreme Court judgement in the case J.P. Srivastava and Sons Pvt. Ltd. and others Vs. Gwalior Sugar Co. Ltd. and others (AIR 2005 SC83), where the Supreme Court observed that *"the object of prescribing a qualifying percentage of shares in petitioners and their supporters to file petitions under Sections 397 and 398 is clearly to ensure that frivolous litigation is not indulged in by persons who have no real stake in the company. However, it is of interest that the English Companies Act contains no such limitation. What is required in these matters is a broad common sense approach. If the Court is satisfied that the petitioners represent a body of shareholders holding the requisite percentage, it can assume that the involvement of the company in litigation is not lightly done and that it should pass orders to bring to an end the matters complained of and not reject it on a technical requirement. Substance must take precedence over form. Of course, there are some rules which are vital and go to the root of the matter which cannot be broken. There are others where non-compliance may be condoned or dispensed with. In the latter case, the rule is merely directory provided there is substantial compliance with the rules read as a whole and no prejudice is caused."*

Handwritten signature

9.3 However, the petitioners have stopped short of giving any cogent reasons that requirement under Section 399 (1) (b) of the Companies Act, 1956 have been fulfilled and the direct petitioners and the consented petitioners are not deficient from 1/5th members as required.

9.4 In support of their case, the petitioners have cited Supreme Court judgement in the case of Bhagwati Developers Pvt. Ltd. Vs. Peerless General Finance (2013 (5) SCC 455) wherein it was held that "*Section 399 of the Act 1956, neither expressly nor by implication requires, that the consent to be accorded therein, should be given by a member personally, as the same can also be given by the Power of Attorney holder of such a shareholder. Furthermore, the issue of consent must be decided on the basis of a broad consensus approach, in relation to the avoidance and subsistence of the case. The same must be decided on the basis of the form of such consent, rather on the substance of the same. There is hence no need of written consent, or even of the consent being annexed with the Company Petition. (Vide: P. Punnaiah and Ors. V. Jeypore Sugar Co. Ltd. and Ors., AIR 1994 SC 2258; and J.P. Srivastava and Sons Pvt. Ltd. and Ors. V. M/s. Gwalior Sugar Co. Ltd. & Ors., AIR 2005 SC 83)*"

10. The respondents cited CLB judgement dated 18.12.2012 in the case of Abid Hussain Khan Vs. M/s. Himalayan Petro Products and Allied works Pvt. Ltd. and others (MANU/CL/0072/2012) wherein it was held that the petition under Section 397, 398 and 402 of the Companies Act, 1956 is not maintainable under Section 399 (1) (b) because the shares held by the petitioners fall much below the percentage of shareholding

W. P. S.
[Signature]

required under Section 399 for filing the petition under section 397 and 398 of the Companies Act, 1956.

10.2 The respondents have also cited the following judgements in their favour: -

Judgement dated 22.2.2012 -Kailash Nath Roy and others Vs. Bengal Bonded Warehouse Association and others [2012] 111 CLA 134 (CLB)

"Apart from this, the respondent counsel relied upon T.K. Lathika v. Seth Karsandas Jamunadas to state that whenever a maintainability point is raised it must be decided first before merits can be gone into, thereby as per the ratio held in the case supra, he submits that maintainability is to be decided first before going into the merits of the case. By these submission, the counsel urged this Bench to dismiss this petition at threshold itself."

"Since there being no representation by the members holding 10 percent as a whole, the petitioners' representation cannot be construed as not less than 10 percent as mentioned under Section 399 of the Act. For the right under Section 399 being a statutory right, unless and until such qualification is present, no member is authorised to invoke jurisdiction under Section 397/398 of the Act."

10.3 In the case of Syed Musharraf Mehdi and Syed Iqbal Mehdi Vs. Frontline Soft Limited and Ors. [2007] 135 CompCas280(CLB),

it was observed that the nature of provisions of section 399 (1) are not procedural. It is further stated that " this is all the more evident from Sub-section (4) of Section 399, which empowers the Central Government

@ayy


to exercise its discretion to permit a lesser number of members to file an application than that prescribed by sub-section (1) of Section 399. A combined reading of sub-Section (1) and (4) would show that the CLB has no option but to reject the application made under Section 397/398 not being supported by the requisite number of members as at the time of filing the application before the CLB”.

10.4 In the case of Saroj Goenka and Ors. Vs. Nariman Point Building Services (1994) IMLJ 583 it was held that the issue as to the maintainability should be tried as a preliminary issue.

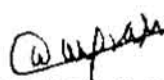
10.5 In the case titled Prem Nath Gangneja Vs. Edwardganj Public Welfare Association and another [1990]69CompCas787 (P&H) – CP No. 72 of 1985, the Punjab and Haryana High Court held that the petition could not be maintained on the ground that it has not been filed by 1/5th of the total number of members of the company.

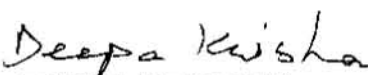
11. After considering all the above mentioned pleadings, oral arguments and judgements cited by both the petitioners and respondents, it is noted that there is nothing on record to show that the company petition was supported by 1/5th of the total members of the R-1 organization. The Company Petition is filed by nine petitioners and there is a list of another 175 consented petitioners. Thus, there are only 184 petitioners who have agreed to file the petition. This is woefully short of 1/5th of the total nos. required as per Section 399 (1) (b) of the Companies Act, 1956 as there are 1988 members as per voter list filed along with the petition. In the rejoinder filed by the petitioner to CA-

Allyn
[Signature]

91/CHD/2016, it is stated that 424 petitioners have consented to file the petition, but no details of such 424 members has been given. The petitioners have also not been able to show as to why the list of 2419 members furnished by the respondents along with 91/C-I/2016 should not be accepted, except for stating that the same is not signed and is accompanied by defective affidavit signed by the President of R-1.

12. In view of the above, the company petition is dismissed on the grounds of maintainability as it does not fulfil the conditions specified in Section 399 (1) (b) of the Companies Act, 1956. Even on merits, there appears to be some substance in the averment made by the respondents that the petitioners have not come with clean hands as their attendance in functions before and after the elections have been shown by way of newspapers cuttings and photographs. The CP No. 121(ND)/2015 / RT No.09/2016 is accordingly dismissed and the CA No. 91/C-I/2016 stands disposed of.


(JUSTICE R.P. NAGRATH)
Member (Judicial)


(DEEPA KRISHAN)
Member (Technical)

January 09, 2017.