

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
CHENNAI BENCH

Arguments heard on 21.9.2016.

Orders passed on 5.10.2016

T.C.A Nos. 1 & 2 of 2015

in

T.C.P. 156 of 2016 (CP 4/2015)

Applicant/Respondents : Jagannath Textile Company Ltd. and
Another rep. by their counsel Shri. Vidhya Shankar

-- Vs --

Respondent/petitioner : Gangotri Textiles Ltd. rep by
Dr.K.S.Ravichandran, Practising Company Secretary.

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ANANTHA PADMANABHA SWAMY
MEMBER (JUDICIAL)

CH MOHD SHARIEF TARIQ
MEMBER (JUDICIAL)

ORDER

CH MOHD SHARIEF TARIQ, MEMBER (JUDICIAL) :- (ORAL)

Under adjudication are the twin company applications i.e. No.1 and No.2 of 2015 which came to be filed by the Applicant/Respondent in CP No.4 of 2015 which stood transferred to NCLT, Chennai Bench and re-numbered as TCP 156 of 2016. C.A.No.1 of 2015 was filed on 29th January 2015 which pertains to Section 8 of the Arbitration and Conciliation Act, 1996 r/w Company Law Board Regulations, 1991. The C.A.No.2 of 2016 has also been filed by Applicant/Respondents on the same date, challenging the maintainability of the Company Petition. Both of these applications are taken together for disposal by way of passing common order.

2. Both the sides have been heard. The second application, relating to the maintainability, is taken up first for reasons that the order in relation to the maintainability will have a bearing on the first application.

3. It is contended by the counsel for the Applicant/Respondent in the Application for maintainability of the main petition that the petition in reality has been filed by the creditor, i.e. State Bank of India in form and in substance. It is not the shareholders' action but an action by the creditor of the petitioner for recovery of dues. The Applicant/Respondent further stated that the real motive in filing the CP is for a collateral purpose namely, recovery of money from the Applicant/Respondents through ingeniously disguised company petition directed against them and such motivated petition for achieving a collateral purpose cannot be entertained.

The counter has been filed by the Respondent/petitioner wherein the contentions of the Applicant/Respondents were denied stating that extension of time for redemption of preference shares is made unilaterally, oppressively and in a unlawful manner. Further, the increase in the share capital of the 1st Respondent company is sufficient cause of action for filing the petition. The counsel for Respondent/Petitioner contended that though the voting right vested in the Respondent/petitioner to the extent of 45.57% of the total voting rights in a general meeting of 1st Respondent company, yet without issuing notice of its general meeting, holding and conducting general meeting is totally oppressive and unlawful. The AGM purportedly held on 14th September 2013 is without notice and without considering the voting rights of the Respondent/petitioner.

It has further been alleged by the Respondent/Petitioner that increase in the share capital and further issue of shares have also been made without there being any genuine need and in utter disregard of shareholders' rights. The resolution authorising such a further issue is not only oppressive of the rights of the Respondent/petitioner as a shareholder but is also invalid due to inadequate explanatory statement, lack of notice and invalidity arising from the fact that without the support of the preference shareholder no special resolution could be passed at all. It is further contended that the company petition carry substantial questions springing from statutory rights of shareholder which cannot be

brushed aside without looking into the facts and detailed enquiry in accordance with the well settled principles. This gives a cause of action for invoking the jurisdiction of the Company Law Board under sections 397 and 398 of the Companies Act, 1956, now the NCLT. In addition, it has been pleaded by the Respondent/petitioner in the reply that filing of application under Section 8 per se is sufficient to dismiss the application in relation to challenging of maintainability of the main petition.

4. The perusal of the application in relation to maintainability of the main petition clearly suggest that Respondent/Petitioner No.1 is holding 45.57% of the total issued, subscribed and paid up capital of 1st Respondent company and is legally entitled to present the company petition under Section 399 of the Companies Act, 1956 that confers statutory rights upon the preference shareholders also. Even though in view of further allotment made on 18th September 2013 this stake has been reduced to 39.56%. The extension of the date pertaining to the redemption of the preference shares held by Respondent/Petitioner and the increase in equity share capital is stated to be oppressive, illegal and invalid as no notice was issued to the holder of the preference shares who are entitled to voting rights on every resolution. The fact pertaining to the extension of the date for redemption of the preference shares and the increase in the equity share capital are the two aspects which are required to be probed into by this Tribunal in exercise of the powers conferred under the Companies Act, 2013.

5. In the light of the above stated facts and circumstances, we are of the opinion that the Company Petition cannot be dismissed at the threshold without going into the merits of the case. We draw strength from the case law cited as under :

Woodbriar Estate Ltd and Ms.Vs V.N.A.S.Chandran on 16.12.2005.
Equivalent citations : 2007 137 Compas 709 CLB, 2007 78 SCL
398 CLB Bench: K.Babu

Shri Dinesh Sharma And Smt. Bina... Vs Vardaan Agrotech Pvt Ltd.
On 29th August 2006. Equivalent citations : 2007 135 Compas 133
CLB (2007) CompLJ 155 CLB.

6. Therefore, the application filed by the Applicant/Respondents challenging the maintainability of the petition is hereby rejected and the petition is held to

be maintainable under section 399 of the Companies Act, 1956 as it came to be filed under the provisions of the Act, 1956.

7. Now, we come to CA 2 of 2016 which has been filed by the Applicant/Respondents for referring the matter to an Arbitrator in the light of the arbitration clause contained in Articles of Association (AOA) of 1st Respondent company. In this matter neither original nor the certified copy of the Arbitration Agreement has been produced with the C.A.2 of 2016 moved by Applicant/Respondent, which is mandatory under Section 8 of the Arbitration and Conciliation Act, 1996. However, there is no serious dispute between the parties about the existence of the Arbitration clause contained in the AOA. The Arbitration clause reads as follows :

All disputes respecting the interpretation of these articles or among the shareholders inter se or the shareholders vis-à-vis the Directors or the Managing Director shall be referred to the arbitrators, one to nominated by each disputant and their decision shall be binding on the parties concerned. In case the arbitrators are unable to decide amongst themselves on the point or points referred to them, they shall refer them to any umpire to be appointed in accordance with the provisions of the Indian Arbitration Act, 1940.

The language which happened to be used in the Arbitration clause refers to the disputes pertaining to the interpretation of these articles or among the shareholders inter se or the shareholders vis-à-vis the Directors or the Managing Director which shall be referred to the arbitrator. However, it has been observed that no illustration/outline pertaining to the nature of disputes except interpretation of the articles is provided in the Arbitration clause.

8. Looking to the contents of the application moved by the Applicant/Respondents under section 8 of the Arbitration and Conciliation Act, 1996, the efforts are made to establish before the Tribunal the existence of an arbitration agreement and that action initiated by the Respondent/petitioner pertains to the matter which is the subject matter of the arbitration clause contained in the AOA. However, the application of the Applicant/Respondent is mixed with the pleadings made to refer the matter to arbitrator and challenge

to the maintainability of the main petition, which appears that the petitioner/Respondent is blowing hot and cool in the same breath which is not permissive in law.

9. Respondent/petitioner while filing a reply to the application pertaining to Section 8 of the Act, has stated that the subject matter of the petition is not capable of being referred to Arbitral Tribunal. As the petitioner has a right under law to seek statutory relief from the NCLT which alone could be granted in view of the statutory scheme contained in the Companies Act, 2013 and the subject matter of the company petition is outside the purview of the arbitration clause mentioned in the AOA.

10. The contention of the Respondents/Petitioner are plausible. It is otherwise, a settled legal position that where the judicial authority has been entrusted with the job of determining the rights of the parties in the light of the statutory provisions, the same cannot be referred to the arbitral tribunal, because the arbitral tribunal cannot be conferred with statutory powers as are conferred on the judicial authority herein as NCLT. In other words, if the shareholders have got statutory rights and that they have been deprived of their rights by the Directors or the entity, the same cannot be the subject matter of arbitration as the NCLT is conferred with powers to adjudicate upon such matters under the relevant provisions of the Companies Act, 2013. ~~Therefore,~~ ^{hence} the cause/dispute is not arbitrable. We rely upon Booz Allen & Hamilton Inc. Vs SBI Home Finance Ltd. (2011) 5 SCC53. Therefore, the arbitrator will have no jurisdiction to adjudicate upon the issues pertaining to the rights of the shareholders as is applicable in this case.

11. In the light of the discussions made above, we are not inclined to refer the matter to Arbitral Tribunal and the Application under Section 8 stands rejected. Accordingly, both of the CAs are disposed of. ^{The respondent} ~~are directed to file counter in e.p and re-joinder if any, by next date i.e. 19/10/16. T.T.~~

ANANTHA PADMANABHA SWAMY
MEMBER (JUDICIAL)

CH MOHD SHARIEF TARIQ
MEMBER (JUDICIAL)

3/B 1

NATIONAL COMPANY LAW TRIBUNAL
CHENNAI BENCH
CHENNAI

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF CHENNAI BENCH, CHENNAI
NATIONAL COMPANY LAW TRIBUNAL, HELD ON 19/10/2016 AT 10.30 AM

PRESENT: SHRI K. ANANTHA PADMANABHA SWAMY, MEMBER-JUDICIAL
SHRI Ch. MOHD SHARIEF TARIQ, MEMBER-JUDICIAL

APPLICATION NUMBER :
PETITION NUMBER : TCP/156/2016
NAME OF THE PETITIONER(S) : Gangotri Textiles Limited
NAME OF THE RESPONDENT(S) : M/s Jagannath Textile Company Limited & 5 others
UNDER SECTION : 397/398

S.No.	NAME (IN CAPITAL)	DESIGNATION	SIGNATURE
		REPRESENTATION BY WHOM	

1/ A. ABDUL RAHMAAN
Proxy Counsel for
(VIDYA SHANKAR)
Respondents 1 to 6
A. L. Srinivas

2. S. Manjula Devi, Adv.
For KSR & Co company secretaries
CBE
For Petitioner
S. Manjula

ORDER

Ms S Manjula Devi, counsel for petitioner present. Shri A Abdul Rahmaan, proxy
counsel representing senior counsel for respondents present and prayed time for
filing of counter to the main CP. Time extended at request. Put up on **11.11.2016**
at 10.30 A.M.

(Ch. Mohd. Sharief Tariq)
Member (Judicial)

(K. Anantha Padmanabha Swamy)
Member (Judicial)