

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
DB, CHENNAI

Arguments heard on 23.01.2017
Orders passed on, 10.02.2017

CA No.1 of 2016

In

C.P.No.84 of 2015

(Under Sections 111A, 237, 397, 398, 402 and 403 of the Companies Act,
1956 of the Companies Act, 1956)

Applicant No.1/R-2 : Shri Buhari Abdul Khader Khalid
Applicant No.2/R-3 : Shri Abdul Cader Junai Yaseen Mohammed
Applicant No.3/R-4 : Shri Abdul Qadir

Represented by : Shri K.Gowtham Kumar, Advocate

Vs

Respondent/Petitioner : M/s.Emirates Trading LLC
Represented by : Advocate Shri S.Aravindan for M/s.Fox
Mandal & Associates

Respdt No.2/Respdt No.1: M/s.ETA Engineering Private Ltd.
Represented by : Advocate Shri. Satish Parasaran
for M/s.Vishnu Mohan & K.Rohan Cherian

CORUM

ANANTHA PADMANABHA SWAMY & M.S.TARIQ, MEMBERS (JUDICIAL)

ORDER

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

Under adjudication is Company Application No.1 of 2016 filed in C.P.No.84 of 2015. The C.P. has been filed before the CLB which stood transferred to NCLT and renumbered as T.C.P.No.91 of 2016. The company petition has been filed under Sections 111A, 237, 397, 398, 402 and 403 of the Companies Act, 1956, by M/s.Emirates

Trading Agency LLC, through authorised signatory Mr.Bartholomew Kamyia against M/s.ETA Engineering Private Ltd and 7 others. The petitioner alleged against the respondent that their various acts constitute oppression against petitioner and amount to mismanagement of R1 company and prays, *inter alia*, to declare that the acts of Respondents 2 to 7 are oppressive against the petitioner and prejudicial to the interest of both the petitioner and R1 company. It has further been prayed to declare that the resolutions passed by the Board of Directors of R1 company during the meetings held on 08.09.2015 and 08.10.2015 pertaining to the impugned issue of shares on rights basis and actions taken pursuant thereto including the letter of offer dated 11.09.2015 are null, invalid, *void ab initio*, fraudulent, *non est* and illegal and consequently prayed to set aside all the forms, returns filed pursuant to the said resolution.

2. Applicant No.1/Respondent-2, Applicant No.2/Respondent-3 and Applicant No.3/Respondent-4 have filed the company application against Respondent/Petitioner, Respondent-2/ Respondent-1, Respondent-3/ Respondent-7, Respondent-4/ Respondent-8 stating therein that the company petition does not disclose cause of action and the authorisation on the basis of which the company petition has been filed is incorrect and cannot be used to initiate proceedings under Sections 397 and 398 of the Companies Act, 1956. Therefore, the petition deserves to be rejected on this basis alone.

3. The Applicants in the company application have submitted that the petition has been signed by Mr.Bartholomew Kamyia who is described as senior legal counsel and the letter of authorisation to him which is produced with the petition has been signed by

Mr.Showkat Ali Mir, in the capacity of the General Manager of the petitioner company. Mr.Showkat Ali Mir derives his power as the General Manager of the petitioner Company being appointed on the basis of "Appointment of Manager's Resolution" dated 4th June 2014. It has further been averred in the application that the "Appointment of Manager's Resolution" is the resolution of M/s.ETA ASCON Holding LLC (the holding company of the petitioner company) which is based on "Shareholders' Resolution" notarised on 5th November 2013. It has been stated in the application that no Board resolution of the petitioner company appointing Mr.Showkat Ali Mir as the Manager is produced. As per Article 235 of the Dubai's Federal Law No.8 of 1984 as amended by Federal Law No.(13) of 1988 Commercial Companies, the Manager shall be appointed under the Company Memorandum of Association or a separate contract for a limited period. In the event of failure to appoint the Managers in the above mentioned manner, they shall be appointed by the Partner's General Assembly. The applicants state that as per the procedure, there is no Board resolution of the Petitioner's company wherein Mr.Showkat Ali Mir could be stated to have been validly appointed as Manager even as per Dubai Law. However, under para 8 of the application it has been admitted by the Applicant/ Respondents that the powers given to the Manager are for appointing lawyers and legal advisors to protect the company's interest and defending the company in the proceedings instituted against it. The applicants state that the same cannot be construed as the powers to issue or initiate litigation on behalf of the company. Thus, it lacks the specificity required under law for undertaking an act as critical as suing on behalf of the company or person. Based on this, the

Applicants/Respondents have prayed that the CP is not maintainable for being filed without proper authorisation and the same may be rejected. To the above said application, the Respondent-1/Petitioner has filed an objection. But on perusal of the objection it appears that the issue which has been raised in the Company Application has not been controverted properly, except the averment that the application cannot be entertained and heard separately unless those issues involved in the company petition are not decided. The Applicants/ Respondents has also filed a rejoinder wherein the stand taken in the application has been reiterated and prayer is made to reject the Company Petition *in limine*.

4. Now for the sake of convenience, it is necessary to reproduce the text pertaining to the “Appointment of Manager’s Resolution” dated June 04, 2014, which is as follows :-

Appointment of Manager’s Resolution
By virtue of this Resolution, I, the undersigned, Constantin Salameh – Swiss National, holder of Passport No. (X2463450), in my capacity as Chief Executive Officer of ETA ASCON Holding LLC, Commercial License No.(590790), issued by the Department of Economic Development in Dubai, and pursuant to a Shareholders’ Resolution notarized by the Notary Public Ref. No.201277/1/2013 on 05/11/2013, in its capacity as owner of more than (99%) in the capitals of the following companies, hereinafter referred to as the “companies”
(1)Emirates Trading Agency LLC, Commercial License No. (201682), issued by the Department of Economic Development in Dubai,

(2)ETC Windows LLC, Industrial License No. (507802), issued by the Department of Economic Development in Dubai,

(3)ETA PCS Switch Gear Manufacturing LLC, Industrial License No. (300388), issued by the Department of Economic Development in Dubai,

Appoint Mr. Shaukat Ali Mir – Indian National, holder of Passport No. (Z2178908), as a General Manager for each of the Companies, and vest in him the following powers and authorities, within UAE and abroad

- 1) To do all such acts and deeds as permitted by law to conduct Companies' daily business and execute its papers and documents before all Federal and Local Governmental Ministries, Departments, and Authorities such as Departments of Economic, Lands Departments, Municipalities, Labour Departments, Health Authorities, Customs, Tourism Authorities, Public Prosecutions, Police Departments/Stations, immigration & Naturalisation Departments.. etc. as well as other Federal & Local Governmental Departments and Corporations, such as Electricity and Water Authorities, Road and Transports Authorities, Airports, Ports, Emirates Post Group, and Semi and Non-Governmental entities, such as Chambers of Commerce & Industry, Telecommunication Companies, Companies, Establishments and individuals to do whatever secures and achieves the objectives and interests of the Companies.

<p>2) To represent the Companies before all Governmental, federal or local departments, companies, establishments and individuals in anything, matters, cases, disputes that may affect the Companies or the Companies' interest, rights or obligations, in all matters mentioned in Article (58/2) of the Civil Procedure Code.</p>
<p>3) To appoint Lawyers and legal advisers to protect the Companies' interests with regard to its dealings and defending the Companies and its interests before all stages of the courts of law including the Cassation Court and Federal Supreme Court and arbitration tribunals and centers.</p>
<p>4) To sign, execute, amend and terminate contracts, agreements, tenders and such other written instruments as may be necessary and requisite for the aforesaid in the name and on behalf of the companies.</p>
<p>5) To appoint employees of the Companies to carry out acts and duties of the Companies and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises to all intents and purposes of the Companies.</p>
<p>6) The General Manager has the right to delegate all or part of the authorities vested in him by this resolution to whomever he deems appropriate.</p>
<p>7) The appointment of the General Manager shall be valid from the notarization date of this resolution, until the companies decide otherwise.</p>
<p>This resolution supersedes all prior resolutions and/or power of attorneys related to the content of this resolution.</p>

5. The perusal of the language used in the “Appointment of Manager’s Resolution” indicates that Mr. Shaukat Ali Mir, has been authorised within UAE and abroad giving powers as are enumerated in the above said resolution which specifically provides that Mr. Shaukat Ali Mir, is authorised to represent the companies before all the governmental, federal or local departments, companies, establishments and individuals in anything, matters, cases, disputes that may affect the companies or the companies’ interest, rights or obligations, in all matters, and to appoint lawyers, legal advisors to protect the companies’ interest, with regard to its dealings and defending the companies and its interests before all stages of the courts of law. The rights to delegate all or part of the authorities which Mr. Shaukat Ali Mir possesses are also given to him, as mentioned in the “Appointment of Manager’s Resolution” whomever he deems proper. In pursuance of the said powers vested in Mr. Shaukat Ali Mir, he had, on 14th October 2015, given an authorisation letter to Mr. Bartholomew Kamyia which reads as follows :-

“Emirates Trading Agency LLC,

ETA (Limited Liability Company – Paid up capital AED 45,500,000/-)

October 14, 2015

“AUTHORISATION LETTER

Pursuant to the powers vested resolution notarised on June 04, 2014, I, the undersigned, hereby authorise Mr. Bartholomew Kamyia, Senior Legal Counsel (with passport No.510845158, date of birth – May 23, 1979 and employee ID No.99192853), to represent Emirates Trading Agency LLC (“Company”) in the proposed litigation in respect of the rights issue of ETA Engineering Private

Limited vide or pursuant to Letter of offer dated September 11, 2015 and all other ancillary matters arising from the Company's direct shareholding and indirect shareholding through its subsidiary Electromechanical Technical Associates Limited, Mauritius, in ETA Engineering Private Limited, against all necessary respondents including but not limited to the directors and officers of ETA Engineering Private Limited.

In this regard, Mr. Bartholomew Kamya is authorised to engage counsels, sign petitions, applications, clarifications, vakalatnamas, submissions, appeals, affidavits, complaints, counters, and any other documents on behalf of the company for any application or form made or submitted to the High Court of Judicature at Madras, other courts or tribunals of appropriate jurisdiction and any other judicial, quasi-judicial, regulatory or statutory authorities including the Company Law Board, Chennai and to do all such acts and deeds as deemed expedient to give effect to this authorisation.

A true copy of the resolution notarised on June 04, 2014 as stated above is enclosed herewith.

For and on behalf of Emirates Trading Agency LLC

Sd/Name : Shaukat Ali Mir,

Designation : General Manager.”

6. The authorisation letter makes it clear that Mr. Bartholomew Kamya is authorised to sign petition and other documents on behalf of the company for any application submitted to the High Court of Judicature at Madras and other courts or tribunals of appropriate jurisdiction including the CLB, Chennai. Therefore, the authority

given to Mr.Bartholomew Kamyia flows from the “Appointment of Manager’s Resolution” dated June 04, 2014, that was drawn on the basis of the “Shareholders’ Resolution” notarised by the Notary Public Ref No.201277/1/2013 on 5.11.2013, under which the Chief Executive Officer of ETA ASCON Holdings LCC, has been empowered to appoint the General Manager. In pursuance of the “Shareholders’ Resolution”, the Chief Executive Officer, by way of “Appointment of Manager’s Resolution” appointed Mr. Shaukat Ali Mir as General Manager for each of the companies i.e. Emirates Trading Agency LLC, ETA Windows LCC and ETA PCS Switch Gear Manufacturing LCC.

7. Before we proceed further, it is necessary to mention the case law referred by the counsel for Applicant/Respondent which is as follows :

- i) *Deutsche Bank AG Vs Prithvi Information Solutions Ltd.* reported in [2012] 171 CompCas 116(AP)
- ii) *Mohanlal Mittal & Ors Vs Universal Wires Limited and Ors,* reported in [1983]53 CompCas36 (Cal)
- iii). *M/s.Canara Workshops Ltd Vs Shri Mantesh* reported in 2014 (1) Crimes 316 (Karnt)

A single citation referred by the counsel for Respondent/Petitioner is pertaining to *Aloys Wobben Argestrasse rep. by his power of Attorney holder Mr.Balan Kombi Vs Enercon (India) Limited and Intellectual Property Appellate Board rep. by its Deputy Registrar* reported in 2010 (4)APLJ(HC)40.

8. We have heard both of the sides and perused the record placed on the files. The core issue that has been raised by the Applicants/ Respondents in their application is that for filing a petition under sections 397, 398 of the Companies Act, 1956 there requires under law that the same right is to be exercised by members/shareholders and the manager has no right to file the petition by way of delegating powers vested in him to the authorised signatory viz. Mr.Bartholomew Kamyia. By keeping in view the facts and circumstances, first we proceed to discuss the case law referred by both of the counsels and ascertain as to whether or not the company petition has been filed by a duly authorised person, viz. Mr.Bartholomew Kamyia.

9. The first case that has been referred by the counsel for Applicant/ Respondent is pertaining to the ruling given in *Deutsche Bank AG Vs Prithvi Information Solutions Ltd. reported in [2012] 171 Compcas 116(AP)*. The issue involved in the said case was that a winding up petition was filed based on the power of attorney which was given to Mr.Sudarsan Sridharan and Mr.Damodaran Sreenivasan but in the said Power of Attorney, there was no mention of their competence to initiate winding up proceedings against the Respondent company on behalf of the bank. The Andhra Pradesh High Court has held that it is nowhere indicated in the Power of Attorney that Mr.Sudarsan Sridharan and Mr.Damodaran Sreenivasan are authorised to initiate winding up proceedings against the Respondent company, and therefore, it was held that the petition has not been validly instituted. For the said reason, the company petition was dismissed.

But, this authority is not much helpful to the case of Applicants/Respondents because the issue under discussion in the present matter is not pertaining to the power of attorney. The factual position contained in the present petition and that of the above referred case law are quite different and distinguishable.

10. The Second ruling is pertaining to Mohanlal Mittal & Ors Vs Universal Wires Limited and Ors, reported in [1983]53 CompCas36 (Cal) that has been given by the High Court of Kolkatta in a Company petition filed under Sections 397 and 398 of the Companies Act, 1956. In the said matter, the issue involved was as to whether the letter that has been signed by the Secretary on the instructions of one of the directors is a valid consent to file a petition under section 399 of the Companies Act, 1956. It was held that the Secretary had no authority to issue a letter of consent on the instructions of one of the Directors unless a Board resolution is passed to that effect. But in the present petition, there is no involvement of any letter which could be stated to have signed by the Secretary on the instructions of any one of the directors. Therefore, the circumstances involved in the present petition are different and distinguishable.

11. The third ruling is pertaining to the case titled M/s.Canara Workshops Ltd Vs Shri Mantesh reported in 2014 (1) Crimes 316 (Karnt), Dharwad Bench. In the said case, it was held that unless the powers are conferred by the Board of directors by passing a resolution to authorise the institution of suit or other proceedings on behalf of the company, no proceedings could be instituted on the basis of General Power of Attorney which was in respect of a civil litigation and there was no specific authority to file a complaint under

Section 138 of the Negotiable Instruments Act. This ruling is also not supporting the case of applicants/Respondents because the facts and circumstances involved in the present matter are totally different, as the “Authorisation letter” dated Oct 14, 2015 issued to Mr.Bartholomew Kamyia includes CLB, Chennai.

12. The counsel for the Respondent/Petitioner has relied upon the decision that has been delivered by the High Court of Madras in *Aloys Wobben Argestrassse rep. by his power of Attorney holder Mr.Balan Kombi Vs Enercon (India) Limited and Intellectual Property Appellate Board rep. by its Deputy Registrar* wherein the primary issue raised before the Tribunal was pertaining to the locus standi of one Mr.Yogesh Mehra to maintain the application for revocation. Mr.Yogesh Mehra relied upon a Board resolution dated 27.4.2007 which authorised him to institute suits and proceedings on behalf of the company and the said resolution was controverted by the writ petition stating that the same is void and non est and the issue was raised whether the Managing Director of the company has right to maintain the application for revocation before the tribunal, wherein it was essential that the factual aspects have to be gone into. The High Court of Madras referred the ruling of the Apex Court given in *M/s. Fomento Resorts and Hotels Ltd.’s* case reported in 1985, 2SCC152 and held that the Hon’ble Supreme Court, while laying down the practice and procedure to be adopted observed that where several issues are raised before the court and there is possibility of appeal, the court must deal with all issues instead of disposing of the case on only one issue. In the present petition, the issue that has been raised is that the authorisation on the basis of which the company petition has been filed is incorrect and cannot be

used under Sections 397 and 398 of the Companies Act, 1956. The issue is also required to be gone into in order to know the factual aspects with other issues raised in the company petition.

13. However, in order to know correct legal position on the issue raised, it is necessary to make a reference to the ruling given by the CLB, PB, New Delhi, in *Pearson Education Inc. (formerly known as Prentice-Hall Inc.) Vs Prentice-Hall of India Private Ltd Shri Asoke K.Ghosh, Mrs.Sagarika Ghosh, Shri K.Sivaramakrishnan and Ms.Pushpita Ghosh*, reported in [2004]56SCL365(CLB). In this case, the issue involved was whether the power of attorney dated 29.05.2013 empowers Shri Ravi Oberoi to file the company petition before the CLB. The CLB after discussing the case law, in para 17 of its order has concluded that the petition under Section 397, 398 of the Companies Act, 1956 that has been signed and verified by Shri Ravi Oberoi is legally valid, as the same is in conformity with the CLB regulations. The CLB relied upon the judgment given in *Killick Nikson Limited Vs Bank of India [1983(2) BomCR631]*, wherein it was argued that a right to apply under Ss 397 and 398 of the Companies Act is a right which is personal to the members. He is required to exercise his own discretion. He cannot delegate his right under Ss 397 and 398 to anybody else. This argument, however, was not accepted by the High Court and held that one of the cardinal principles of law is that an agency can be created for all lawful purposes and all rights can ordinarily be delegated. The court referred that in *Bowstead on Agency, 14th edn., p.23*, it is stated as follows :-

“Article 7. An agent may be appointed for the purpose of executing and deed or doing any other act on behalf of the

principal, which the principal might himself execute, make or do; except for the purpose of executing a right, privilege or power conferred, or performing a duty imposed, on the principal personally, the exercise or performance of which requires discretion or skill, or for the purpose of doing an act which the principal is required, by or pursuant to any statute, to do in person.

26. *Our court in the case of K.K.Khadilkar V. Indian Hume Pipe Co. Ltd. has upheld this principle and state that “The true position is that subject to certain well-known exceptions, every person who is sub-jurist has a right to appoint an agent for any purpose whatever, and he can do so when he is exercising a statutory right no less than when he is exercising any other right.”*

The CLB further observed that the decision given by CLB, Chennai, in *Vikron Fashions Private Ltd's* case, to the proposition that a Power of Attorney should be specifically authorised to file a petition under Sections 397 and 398 of the Act, 1956 that decisions no longer holds good law, since the Madras High Court has set aside the order of CLB, Chennai, on appeal.

14. The factual and legal position stated above, makes it clear that pursuant to the ‘Shareholders’ Resolution’ notarised by the Notary Public Ref.No.201277/1/2013, on 5.11.2013, the Chief Executive Officer of ETA ASCON Holding LLC, by way of “Appointment of Manager’s Resolution” dated June 4, 2014, appointed Mr.Shaukat Ali Mir as General Manager of the petitioner company and vested him with the powers enumerated in the said resolution [which is

already reproduced in Para No.4 above] that included the right to delegate all or part of the authorities. Based on this, Mr.Shaukat Ali Mir has given an "Authorisation letter" to Mr. Bartholomew Kamyia, authorising him to sign the petition that has been filed under Sections 397 and 398 of the Companies Act, 1956 before CLB/NCLT. The source of "Authorisation letter" given to Mr.Bartholomew Kamyia is the 'Shareholders' Resolution' dated 5.11.2013. The authorisation is held to be in accordance with law and hence Mr. Bartholomew Kamyia is competent to sign the petition filed under Sections 397 and 398 of the Companies Act, 1956. Therefore, the C.A.1 of 2016 stands dismissed and the Company petition No.84 of 2016 is held maintainable. There is no order as to costs.

K.ANANTHA PADMANABHASWAMY
MEMBER (JUDICIAL)

CH. MOHD. SHARIEF TARIQ
MEMBER (JUDICIAL)