

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH, CHENNAI

Arguments heard on 31.01.2017

Order passed on 17.03.2017

C.A.No.14/2016
(Under Regulation 44 of CLB Applications)
In
TCP No.147/2016
(Under Sections 397 and 398 of the Companies Act, 1956)

Mr.Ajay Kumar Bishnoi – Applicant/R3
Vs

M/s.Avigo Trustee Company Pvt Ltd – R1/P1
M/s.Avigo Venture Investments Ltd. – R2/P2
M/s.GET Power Private Ltd. --R3/R1

Represented by : Shri K.Gowthamkumar, Counsel for Applicant/R3
Shri Aditya Tiwari, Counsel for R1/P1 & R2/P2

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ANANTHA PADMANABHA SWAMY & CH MOHD SHARIEF TARIQ, MEMBERS (JUDICIAL)

ORDER

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

Under reference is C.A. No.14/2016 that has been filed by Applicant/R3 against petitioners by R1/P1, R2/P2 and R3/R1. The issues that have been raised in the C.A. by the Applicant/R3 are as under:-

- (i) The company petition No.60 of 2014 has not been verified by authorised signatory;
- (ii) The verifying affidavit is defective and not in conformity with the CLB Rules;
- (iii) The petition is a joint petition which has been filed without seeking required leave; and
- (iv) The accompanying documents were not attested.

Based on the above grounds, the Applicant/R3 has prayed that the C.P. No.60 of 2014 is liable to be dismissed in the interest of justice. In this matter, the Applicant/R3 raised primary objection about the maintainability of the company petition by filing preliminary reply statement wherein the same grounds were taken. To the preliminary reply statement filed by Applicant/R3, a rejoinder has been filed by R2/P2 wherein it has been specifically mentioned under Para 6 that Mr.Pratap Mohan Srivastava was not Vice President (Finance and Legal) of Avigo Capital Partners Private Ltd and it has been admitted that Para 1 of the verifying affidavit inadvertently stated Mr.Pratap Mohan Srivastava as Vice President (Finance and Legal) and it has been submitted that the same has happened due to inadvertent typographical error and preliminary objection raised by Applicant/R3 were denied *in toto*. It is on record that the affidavit filed by Mr.Pratap Mohan Srivastava had some mistakes. Therefore, R2/P2 has filed fresh affidavit in support of the company petition through Mr.Pratap Mohan Srivastava by rectifying the defects, However, Applicant/R3 in C.A.No.14 of 2016 has raised an issue that Mr.Pratap Mohan Srivastava does not have necessary and valid authority to institute the said C.P and the rejoinder that has been filed through Mr. Pratul Gupta is not as per the procedure prescribed. Because he is answering the allegations on behalf of Mr. Pratap Mohan Srivastava and it has been averred in the C.A. under reference that the issues that have been raised by Applicant/R3 goes to the root of the entire case and the petition is liable to be dismissed *in limine*.

2. We have heard both of the sides and perused the records placed on file. There are Board resolutions which are placed on record authorising Mr.Pratap Mohan Srivastava to make proper application before the then CLB that the said resolution came to be passed by the Board of Directors on 5.8.2014 and 7.8.2014 and the liquidator of R2/P2 appointed Mr.Pratul Gupta in accordance with the Power of Attorney dated 5.11.2015 to act

for and on behalf of R2/P2 to represent him. A copy of the Power of Attorney dated 5.11.2015 is also placed on record.

3. The Applicant/R3 referred to a case that has been decided by the High Court of Madras titled K.S.Sankaranarayanan and another Vs Shree Consultations and Services Private Ltd and Others reported in MANU/TN/0077/1994, wherein under Para 14 of the judgement, it has been observed that if a petition filed under Section 397 or 398, there cannot be a blanket consent to the member consenting other members filing the petition unless the member should have known what was the action to be taken, what was the relief to be prayed for and what was the ground to be asked in support of the relief sought. In other words, the members giving the consent should have applied their mind to the question before them. However, the court concluded that on combined reading of Sections 399(1) &(3) or Rule 88 of Companies (Court) Rules, it does not appear that the members giving consent should have the petition before them. Further under Para 18 of the same judgement, it has been observed that compliance with Section 399 of the Companies Act, 1956, should be at the time of filing the petition and any subsequent compliance with Section 399 of the Act will not cure the initial infirmity. In the said case, no resolution was passed by the Board of Directors, but in the case in hand, the Board of Directors has passed a resolution authorising Mr.Pratap Mohan Srivastava, whereas the affidavit filed by him supporting the petition was found defective. Therefore, this ruling cannot be made applicable to the facts of the present case, which are distinguishable.

4. Counsel for R2/P2 has referred a case titled M/s.Paharpur Cooling Towers Ltd Vs Anuradha Masala Udhyog Private Ltd decided by the High Court of Allahabad reported in MANU/UP/1733/2007 wherein a reference has been made to the decision of the Apex court in Malhotra Steels Syndicate Vs Punjab Chemi-plants Limited reported in 1993(3)SCC565. In this case, it has been laid down that the affidavit filed

in support of the company petition should substantially comply with the form and verification as provided in Companies (Court) Rules 1959 and if there is any defect in the affidavit, the same is a mere irregularity. So, an opportunity should be given to the petitioner to rectify the same and if fresh affidavit is filed then such affidavit relates back to the date of filing of the petition.

5. R2/P2 also referred two more rulings, one passed by the High Court of Bombay at Goa titled M/s.Morgan Ventures Limited Vs Blue Coast Hotels and Resorts Limited and Others reported in MANU/MH/3481/2015 and the other one passed by CLB, PB, titled Surinder Singh Manchanda and Others Vs Satguru Investments Private Ltd and Others reported in MANU/CL/0004/2010. In these two judgements, the courts have laid down the same principle that has been laid down in Malhotra Steels Syndicate Case (supra). Therefore, on a similar issue that has been raised in the C.A. by Applicant/R3, a consistent view has been taken by various courts that non-compliance with any procedural requirements relating to the pleadings, Memorandum of Appeal or application or petition for relief should not entail automatic dismissal or rejection unless the relevant statute or rule so mandates. In other words, the curable procedural defect or irregularity should not be allowed to defeat the substantial right, and such defect should not be made a tool to deny justice.

6. In the light of the facts and circumstances of the case and the case law discussed herein above, and in view of the fresh affidavit that has been filed by R2/P2 rectifying the defect, the C.A.14 of 2016 is liable to be rejected and the same is dismissed. There is no order as to costs. The matter is posted for further hearing of the main company petition on 24.03.2017. Accordingly, the Registry is directed to inform the parties.


ANANTHA PADMANABHA SWAMY
MEMBER(JUDICIAL)


CH MOHD SHARIEF TARIQ
MEMBER(JUDICIAL)