

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.P.No. 61/2015

I.A.No. 14/2016

CORAM:

Shri V. P. Singh
Hon'ble Member (J)
Shri S. Vijayaraghavan
Hon'ble Member (T)

In the matter of Sections 111, 235, 111A, 397, 398, 399, 402, 403 and 407 the Companies Act, 1956 and Sections 56, 58, 59, 210 of the Companies Act, 2013;

AND

In the matter of:

1. Arvind Parasramka
2. Bhubnesh Commercial Pvt. Ltd.
3. Siemens Syntex Pct Ltd.
4. Meghdoot Services Ltd.

..... Petitioners

-VERSUS-

1. Calcutta Investment Co. Ltd.
2. Ramesh Chandra Tapuriah
3. Pushpa Devi Goenka
4. Jyoti Goenka
5. Sandhya Goenka

..... Respondents

Date of concluding the hearing: 14/09/2016

Date of pronouncing the Order: 6-10-2016

Sd/-

Sd/-

Parties on Record :

Mr. Arvind Parasramka, Petitioner No.1 appeared in person

Ms. Noelle Banerjee, Advocate	]	For Petitioner Nos. 2
Mr. Avijit Dey, Advocate	]	and 3

Mr. Jishnu Chowdhury, Advocate	]	For Respondent No.1
Mr. Nikhil Jhunhunwala, Advocate	]	

Mr. Debnath Ghosh, Advocate	]	For intervenor
Mr. Nirmalyo Ghosal, Advocate	]	Lucky Trading
Ms. Anindita Ghosh, Advocate	]	
Mr. Rajesh Upadhyay, Advocate	]	

ORDER

Per Shri Vijai Pratap Singh, Member (Judicial)

As per averment in the petition, Petitioner no. 1, Mr. Arvind Parasramka has contended that he has 500 shares which he acquired by purchase from the respondent no. 6 amounting to 0.91% of the total issued equity shares in the Respondent No. 1 Company. Petitioner no. 2, Bhubnesh Commercial Private Limited has purchased 1700 shares in respondent no. 1 company from respondent no. 7 being 3.01% of the total issued equity shares. Petitioner no. 3, Siemen Syntex Private Limited, has purchased 1800

Sd/-

Sd/-

shares in respondent no. 1 Company from respondent no. 8 being 3.28% of total issued equity shares. Meghdoot Services Limited, the petitioner no. 4 is holding 3,875 equity shares in the respondent no. 1 company being 7.05% of the total issued equity capital. It has been stated that the respondents have purportedly showing that the petitioner no. 4 is holding 2,875 equity shares instead of 3,875 equity shares.

The petitioners have contended that they are holding 14.25% of equity shares in the respondent no. 1 Company and contended that the petitioners are entitled to file petition under Section 397 and 398 of the Companies Act 1956 in accordance with Section 399 of the Companies Act.

It has been stated in the petition that the respondent Nos. 2, 3, 4 and 5 are the Directors of the Respondent No. 1 Company and are principal persons in control of management and affairs of the respondent no.1 within the meaning of Section 6 of the Companies Act, 1956. The respondent nos. 4 and 5 together jointly holding 5000

Sd/-

Sd/-

equity shares in the company amounting to 10% of the total issued share capital.

Respondent nos. 6, 7, 8 and 9 have sold the shares of the respondent no. 1 company to the petitioner Nos. 1, 2 and 3 and they have executed Share Transfer Form after accepting the consideration for the same. But the respondent No. 1, Calcutta Investment Company Ltd. in collusion with respondent Nos. 2, 3, 4 & 5 are wrongfully withholding the transfer of shares in the names of petitioner Nos. 1 to 3.

The petitioners have also contended that the petitioner no. 4, Meghdoot Services Limited is holding 3,875 equity shares in the respondent no. 1 Company but the Annual Return 2014 shows the number of shares as 2,875 shares only held by Meghdoot Services Limited. It has also been stated that the petitioner no. 4 has not been receiving notices of Annual General Meeting, Annual Reports, etc. and the share certificates have been not received by them; the petitioner no. 4 intimated the same to the Respondent No. 1 company but the respondent no. 1 failed to respond to the same.

Sd/-

Sd/-

Being aggrieved the petitioner No. 4 has lodged this petition before this bench.

The petitioners no. 1 has stated that during November 2014 he was appointed as Director of the petitioner no. 4 Company and stated that the petitioners together qualified as PAC (Persons Acting in Concert) in terms of SEBI Regulations.

The petitioners upon acquisition of 4000 shares from respondent nos. 6, 7, 8 and 9 had intimated SEBI and the Calcutta Stock Exchange in terms of the Exchange Regulations. It has been stated in the petition that the respondent no. 1 company refused to issue receipt of such disclosures to the petitioner and had to forward the same by Speed Post.

It has been contended by the petitioner no. 1 that the respondent no. 1 company has not been transferring the shares to petitioner nos. 1, 2 and 3. However, the petitioner has stated that the respondent no. 1 company mentioned about pre-existing contract or agreement for transfer of share is in subsistence and

Sd/-

Sd/-

hence the shares could not be transferred in favour of the petitioner. The petitioner nos. 1, 2 and 3 have also alleged there have been instances of siphoning of funds and the valuable real estate property has been shown at negligible value in the books and it is being used for the personal benefit of the respondent nos. 3, 4 and 5 without any benefit to the company or to its other shareholders.

The petitioner has also stated that there is substantial siphoning and/or diverting of fund and has contended that the affairs of the company may be investigated by the Central Government. It was also contended that the respondent nos. 2, 3, 4 and 5 should be removed as Directors and should be restrained by orders or injunction to act on behalf of the Company.

The petitioners have prayed for amongst other reliefs that injunction be issued restraining the respondents from holding or convening any meeting of the Board of Directors, or AGM or EOGM or from dealing with or disposing of or encumbering or alienating and/or transferring the assets and properties of the respondent no.1

Sd/-

Sd/-

company or creating any third party interest or from changing the nature or character in any form or manner whatsoever in respect of the assets of the respondent no. 1 company with suitable directions for registering the transfer of shares and to make necessary entries in Register of Members the name of the petitioners and to provide the petitioners access to the records and register thereof.

The petitioners have further prayed that appropriate orders be passed restraining the respondent Nos. 2, 3, 4 and 5 from operating the bank accounts of the respondent no. 1 company and/or interfering with or intermediating in the management and affairs of the company in any manner whatsoever with necessary direction for appointment of a Special Officer/Administrator to take charge of the management and affairs of the respondent no. 1 company.

The petitioners also prayed that an order be passed appointing an inspector/investigator for investigation into the affairs of the respondent No. 1 company u/s. 235 of the Companies Act and upon submission of report by inspector/investigator necessary orders be

Sd/-

Sd/-

passed u/s. 406 of the Companies Act, 1956 as well as appropriate reliefs be made in accordance with Sections 402 and 403 of the Companies Act, 1956.

The Respondent No. 1 opposed the maintainability of the petition on the ground that the petitioners jointly did not hold 10% of equity share capital in the Company. The respondent nos. 2, 3, 4 and 5 have also contended that the petitioner No. 4 has not enclosed any documentary evidence as to its shareholding in respondent no. 1 Company.

The Respondent no.1 has contended that they have received Share Transfer Forms for 2,875 equity shares from the Petitioner no. 4, Meghdoot Services Limited. However, since the relevant share transfer form was an old one and not in accordance with the form prescribed under the Companies Act, 2013, hence the transfer of the shares sought was not registered and the documents returned. As such the petitioners together, therefore, do not hold the requisite shareholding under Section 399 of the Companies Act for the

Sd/-

Sd/-

purpose of maintaining an application under Section 397 and 398 of the Companies Act, 1956.

The respondents have also stated that the said application is contrary to the provisions of the Companies Act, 1956 and other applicable provision of Companies Act, 2013 as well as the Company Law Board Regulation. Respondent No. 1 has also contended that the petitioner no. 4 Company has no *locus standi* to maintain the present application because its name has been struck off in the year 2007.

The Respondents have contended that it is the intention of the petitioners to prevent smooth function of the respondent No. 1 Company and as such the said application is a vexatious proceeding made on the basis of clever and crafty drafting and the same is liable to be nipped in the bud. Furthermore, on a plain reading of the company petition it is evident that the same does not disclose any cause of action and reason whereof the said application is liable to be dismissed.

Sd/-

Sc

The respondents nos. 2, 3, 4 and 5 have contended that the petitioners together hold less than 10% of the total equity shareholding of the petitioner no. 1 Company and they do not have the requisite percentage as stipulated under Section 399 of the Companies Act, 1956 to file petition under Section 397 and 398 of the Companies Act, 1956. Therefore, petition is not maintainable on this ground.

The respondents have contended that the name of the petitioner no. 4, Meghdoot Services Ltd. was struck off from the Registrar of Companies, West Bengal in 2007. But the name was again restored by the erstwhile Company Law Board's order. However, Hon'ble High Court allowed the appeal and recalled the order dated 13/11/2014 passed by the erstwhile Company Law Board. This order was again challenged before Division Bench of the Hon'ble High Court but that appeal was also dismissed by the Hon'ble High Court. Hence, petitioner no. 4 is not a legal entity on the date of filing the petition (i.e. 09/03/2015).

Sd/-

Sd/-

After hearing the Ld. Counsels for the parties and perusing the records it appears that the respondents counsel has raised objection regarding the maintainability of the petition on the ground that for filing petition u/s 397 and 398 of the Companies Act, 1956 (hereinafter to be referred as "the Act") requirement of section 399 of the Act should be fulfilled. Section 399 of the Act says that following members of a company shall have the right to apply under Sections 397 and 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 applicant or applicants have paid all call and other sums due on their shares;"

One thing that Section 399 of the Act makes it clear that for filing a petition under section 397 or 398 of the Act a member or

Sd/-

Sd/-

members should not have less than one-tenth of the total number of members or they should not have less than one-tenth of issued share capital of the company.

In the particulars of the petitioners it is mentioned that petitioner No. 1, Shri Arvind Parasramka is holding 500 shares in the respondent No.1 Company which has been purchased from Proforma Respondent No. 6 and the same is about 0.91% of the total issued equity shares of the respondent No. 1 Company. The petitioner No. 2 Bhubnesh Commercial Private Limited is holding 1700 Shares of the respondent No. 1 Company which he claimed to have purchased from Proforma Respondent No. 7 and the same is about 3.01% of the total equity shares of the respondent no. 1 company. Petitioner No. 3 Siemen Syntex Private Limited having holding 1800 shares of the respondent no. 1 Company which has been purchased from Proforma Respondent Nos. 8 and 9 and the same is about 3.28% of the total equity shares of the respondent no. 1 company. Petitioner No. 4, Meghdoot Services Ltd. is having 3875 equity shares of the .respondent No.1 company which is equivalent to 7.05% of the total issued equity shares of the respondent no. 1 company.

Sd/-

Sd/-

As per averments in the petition, petitioners' holding together is 14.25% equity shares of and in the respondent no. 1 Company. The petitioners have also mentioned by the reason of the aforesaid holdings the petitioners have more than one-tenth of the issued and paid up share capital of and in the Company out of the total number of valid shareholders of and in the respondent no. 1 company. Therefore, petitioners are entitled to apply under Section 397 and 398 of the Act in accordance with the provisions of Section 399 of the said Act.

The respondents counsel has contended that the petitioner Nos. 1 to 3 are not recorded shareholders of the respondent no. 1 company. Therefore, simply on the basis of purchasing the shares of respondent No. 1 company petitioner Nos. 1 to 3 do not get the right to file a petition under Section 397 and 398 of the Act.

The respondent counsel has emphasized on the annexure 11 of the petition which is a copy of Annual Return of respondent No. 1 Company on the basis of AGM held on 30th September, 2014. In the said Annual Return total equity shares of the respondent no. 1 company has been shown as 55,000 of Rs. 100/- each and total

Sd/-

Sd/-

issued share capital has been shown as Rs. 55,00,000/-. At page 207 list of all the shareholders of the petitioner no. 1 company is given wherein out of all the petitioners only the name of the petitioner no. 4, M/s. Meghdoot Services Ltd. is mentioned among the other shareholders and it is also mentioned that Meghdoot Services Ltd. holds 2875 shares of the respondent No. 1 company. In this list of shareholders total number of shareholders and their holdings are also mentioned. Names of the petitioner Nos. 1 to 3 are not mentioned.

The petitioner in person stated that names of the petitioner Nos. 1 to 3 are not mentioned in the list of shareholders of the company inspite of the fact that after purchasing the shares Share Transfer Deed has been submitted to the respondent no. 1 company but the shares have not been transferred in the name of the petitioners. But the petitioner have enclosed copy of Shares Transfer Deed as annexure A-4 to A-6 along with the petition.

Sd/-

Sd/-

When the arguments was part heard then an application by Lucky Trading Company has been filed which has been numbered as I.A.No. 14/2016 praying that applicant be added in the array of the petitioner in C.P. 61 of 2015 (Arvind Parasramka & Ors. V. Calcutta Investment Co. Ltd. & Others). It is mentioned in the application that applicant holding 2500 shares of the respondent no. 1 company which constitute more or less 4.55% of the total shareholding of the petitioner no. 1 company and as such is a necessary and proper party to be joined in the instant proceeding. The petitioner/applicant have also mentioned that they will also be a member for relief in respect of or arising out of the same act or transaction or series of acts or transactions which exists in the instant proceedings.

The applicant has stated that he is a necessary and proper party and have more or less identical grievance as against the respondents and without the applicant, if any, order is passed in the instant proceeding the applicant will suffer irreparable loss.

Sd/-

Sd/-

It is also mentioned in the application that applicant fears in the light of present application, respondents may seek to increase the capital of the company in their favour with the intent to reduce the applicant and petitioners to a hopeless minority and, therefore, ineligible to seek redressal under sections 397 and 398 of the Act for the benefit of minority shareholders and qualification for the same.

Ld. Counsels for both the petitioners and respondents relied on the case law of Hon'ble Bombay High Court in **Killick Nixon Limited -versus- Bank of India and Others 1985 (57) Company Cases 831, Bombay**. The petitioner's counsel has relied on the above ruling and emphasized that Hon'ble Bombay High Court has laid down the law as is mentioned below:

"The company, however, recognized only the person who is its member as a shareholder. In the other words, the rights that may exist between the company and its members or shareholders can be exercised only by members. Similarly the company can only look to its members for the discharge of their obligations to the company as its shareholders. The only person, therefore, who is entitled to

Sd/-

Sd/-

exercise these rights and privileges or discharge these obligations is the transferor. The transferee is an outsider as far as the company is concerned and is only right is to have the transfer registered and thus to get himself accepted as a member and shareholder of the company. If the transferee is denied this right, he has a remedy under ss. 111 and 155 of the Companies Act. (cf. Ved Prakash v. Iron Traders (P) Ltd. [1961] 31 Comp. Cas 122 (Punj)). He cannot, however, claim to exercise the rights or privileges as a member of the company or to discharge any obligations as a member or as a shareholder of the company. He can only exercise such rights through the transferor who is constructive trustee."

In the above case law Hon'ble Bombay High Court have clearly laid down that the company recognize only the person who is its member as a shareholder and the transferee of shares is an outsider as far as company is concerned and his only right is to have the transfer registered and just to get himself accepted as a member and shareholder of the company.

Sd/-

Sd/-

Hon'ble Supreme Court while applying the above case in the case of **Howrah Trading Co. Ltd. V. CIT [1959] 36 ITR 215; 29 Company Case 282** has observed that the transferee cannot claim any benefit which a shareholder may be having. In the above case Hon'ble Bombay High Court has further held that a transferee of shares cannot compel a transferor to file a petition under section 397 and 398 of the Act. In this case Hon'ble Bombay High Court has held that where a transferor has agreed to exercise all his right as a holder of shares in question at the behest of the transferee and has in fact given a power of attorney for this purpose to the transferee.

Hon'ble Bombay High Court has further held that basically constructive trustee is required to carry out all just and reasonable requests of the beneficiary. In that case transferee of shares has not to be put to any loss or hardship in filing the petition because everything in connection with the filing of the petition has been done by the transferee who holds a power of attorney from the transferor.

Sd/-

Sd/-

In the above mentioned case the Hon'ble Bombay High Court has clearly laid down the law that a transferee can file a petition on the basis of power of attorney given by the transferor of shares. Hon'ble Bombay High Court specifically laid down **that only way in which a transferee of shares can redress his grievances** against the company is by acting through the transferor, who holds the share for the benefit of transferee. The transferor, therefore, when he applies under sections 397 and 398 of the Act is acting in the interest of his beneficiary and he is seeking to redress the grievances of his beneficiary.

In this case admittedly petitioner nos. 1 to 3 are not recorded shareholders of the respondent no. 1 company but the petitioner nos. 1 to 3 have claimed their right on the basis of transferee of shares of the respondent no.1 company. But in fact petitioner nos. 1 to 3 have not filed this petition through a power of attorney given by the transferor of the shares. Therefore, as per law laid down by the Hon'ble Bombay High Court in the above mentioned case the petitioner no. 1 to 3 have no right to file a petition under section 397

Sd/-

Sd/-

and 398 of the act because they are not member or shareholder of the respondent no. 1 company, and recorded shareholders who are holding shares as trustee for the benefit of transferee have not given the authority to the transferee of shares through a power of attorney. Petitioners in person have submitted that their company petition is not only under section 397 and 398 of the act but also under sections 111 and 111A of the Act. Therefore, petition cannot be rejected on this ground as prayers have also been sought for rectification of the register of transfer of shares in respect of the shares they have purchased. The above justification does not hold good to bring a petition under sections 397 and 398 of the Act, where only a member or members of the company have a right provided, they qualify^y the conditions given in section 399 of the act. 2

Sd

In this case the petitioner nos. 1 to 3 are admittedly only transferee shareholders of the respondent no. 1 company but transferor have not given any authority to file petition on their behalf under Section 397 and 398 of the Act.

Sd/-

Sd/-

Ld. Counsel for the petitioners has relied on the case of Hon'ble Supreme Court reported in (1990) 1 SCC 536 [M/s. World Wide Agencies Pvt. Ltd. & Anr. v. Margarat T. Desor & Anr.] wherein it was laid down that a composite petition under sections 397 and 398 and 433(f) of the act is maintainable. Averments which a petitioner would have to make to invoke the jurisdiction of sections 397 and 398 should not be destructive of the averments, which are required to be made in a case for winding up under section 433(f), on the just and equitable ground, that they may appear. The petition must proceed upto certain stage which is common to both winding up and though there may be some difference in procedure to be adopted, it is not such which is irreconcilable and cannot simultaneously be gone into.

Here in this case the petitioners have filed joint petition under section 111 and 111A and 397 and 398 of the Act. To bring a petition under section 397 and 398 of the Act it is the necessary requirement that only a member can bring a petition provided he holds minimum 10% of the shareholding of the company or one-

Sd/-

Sd/-

tenth in number of the total members of the company. Whereas a petition under section 111A of the Act has a provision for rectification of the register of transfer of shares when a company without sufficient cause refuses to register transfer of shares within stipulated period. Both the requirement of Section 111A and the Sections 397 and 398 of the Act cannot be reconciled at this stage. To bring a petition under section 397 and 398 only a member of the Company have a right, but for bringing a petition under section 111A a transferee of shares can bring a petition, who have undoubtedly cannot be termed as a member of the company, because before the transfer of shares, a transferee cannot be treated as member of the Company. Therefore, a joint petition under section 111A and sections 397 and 398 of the Act is not maintainable as per law laid down by the Hon'ble Supreme Court in the above case and the petitioners arguments cannot hold good, that inspite of the fact that they are not shareholders of the respondent no. 1 company, petition is maintainable because it is a joint petition under sections 111A and Sections 397 and 398 of the Act. No authority has been adduced that in same situation and contingency a "member" may be different

Sd/-

Sd/-

from "holder". A "member" may be holder of shares but "holder" may not be a "member". A transferee of shares may be treated as holder of shares but he cannot be treated as a member of the company, so he does not have a right to bring a petition under section 397 and 398 of the Act.

Hon'ble Supreme Court in (2005) 1 SCC 212 [Date & Carrington Investment P. Ltd. v. P.K.Prathapan] has held that a joint petition under Sections 397, 398 and 111A of the Act is maintainable provided the petitioners who were registered as shareholders of the company on the date of filing of the petition together held the requisite number of shares in the company.

In the above case Hon'ble Supreme Court was of the view that on the date of presentation of the petition petitioner, P. K. Prathapan and his wife Pushpa was recorded shareholders of the company and they hold requisite number of shares in the company on the date of presentation of the petition under section 397 and 398 of the Act. Therefore, Hon'ble Supreme Court has held that a joint petition in

Sd/-

Sd/-

that case is maintainable. But in the instant case petitioner nos. 1 to 3 are not recorded shareholders on the date of presentation of the petition and the petitioner no. 4 has no legal entity also on the date of presentation. Therefore, petitioner no. 4 has no right to file a petition. Petitioner nos. 1 to 3 were neither recorded shareholders of the respondent no. 1 company nor they have requisite number of shares on the date of presentation of the petition.

In the case of Bhagwati Developers (P) Ltd. v. Peerless General Finance Investment Co. Ltd. reported in (2013) 5 SCC 455 Hon'ble Supreme Court has held that in order to meet the requirements of holding one-tenth of total shares is to be examined in light of whether such a number was in fact attained and maintained on the actual date of presentation of the company petition in the court.

Same view was taken by the Hon'ble Supreme Court reported in AIR 1954 SC 251 [Rajahmundry Electric Supply Corpn. Ltd. v. State of Andhra]. Therefore, requisite ^{Qualification} ~~clarification~~ of holding 1/10th

Sd/

Sd/-

Sd/-

shareholding is to be seen on the date of presentation of the petition. In this instant case on the date of presentation of the petition, petitioner nos. 1 to 3 were not members of the respondent no. 1 company, who were only transferee of shares and transferor of shares had not authorized the petitioner nos. 1 to 3 to file a petition. Therefore, petitioner nos. 1 to 3 have no right to file and bring a petition under section 397 and 398 of the Act. It is also relevant to mention here that aggregate shareholding of petitioner nos. 1 to 3 only comes to 7.2% of the total shareholding. Therefore, it is clear that they do not fulfill the requisite number to bring a petition under section 397 and 398 of the Act. As regards the petitioner no. 4 holding is concerned, his share holding, i.e., 7.05% of total shares, cannot be considered for reckoning the requisite number of shares because their name has been struck off w.e.f. 2007. Therefore, on the date of presentation of the petition in 2015 petitioner no. 4 has no legal existence. So they were not authorized to file a petition.

As regards I.A.No. 14/2016 is concerned which has been filed by Lucky Trading Company in the midst of arguments for adding him

Sd/-

Sd/-

as a party in the case is also not maintainable, because the proposed applicant/petitioner contends that they hold 2500 shares of the respondent no. 1 company, which is more or less 4.5% of the total shareholding of the respondent no. 1 company. Petitioner nos. 1 to 3 were not found to be member of the company on the date of presentation of the petition, petitioner no. 4 was not a legal entity, therefore, only proposed applicant with a holding of 4.55% shareholding, out of the total shareholding of the respondent no. 1 company, does not have requisite number to bring a petition under section 397 and 398 of the Act. Therefore, impleadment application also deserves to be rejected.

It is also pertinent to mention that this company petition has been filed in the year 2015 and date for reckoning of the requisite qualification is the date of presentation. If M/s. Lucky Trading Company is at all added as a petitioner in this case, this will also not change the situation for presenting petition u/s 397 and 398 of the Act. Only members, who were on the date of presentation of the petition, were entitled to bring a petition. Subsequent to that date if

SA/-

SA/-

any member is added then their shareholding cannot be counted for reckoning the requisite qualification for filing a petition under sections 397 and 398 of the Act as is required under Section 399.

Therefore, it is clear that C.P. no. 61/2015 and I.A.No. 14/2016 are not maintainable, hence dismissed. C.A.No. 836 of 2015, which has been not pressed by the applicant-respondents, is also dismissed.

There is no order as to costs.

Sd/-

(S. Vijayaraghavan)
Member (T)

Sd/-

(Vijai Pratap Singh)
Member (J)

Signed on this 6th day of Oct 2016