

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.P.No. 19/2016

CORAM:

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

In the matter of Sections 241, 242 & 244 of the Companies Act, 2013;
AND

In the matter of: 1. Sumer Mal Jain
2. Ajay Kumar Jain
3. M/s. S. M. Saraogi & Sons. HUF Petitioners
Versus

1. Dhanashree Electronics Limited
2. Madan Gopal Maheshwari
3. Sumitra Devi Toshniwal
4. Sunita Devi Toshniwal
5. Chand Prakash Toshniwal
6. Durga Devi Toshniwal
7. Santosh Kumar Toshniwal
8. Veena Devi Toshniwal
9. Nitesh Kumar Toshniwal
10. Abhishek Toshniwal
11. Yogita Toshniwal
12. Saket Toshniwal
13. Pawan Toshniwal
14. M/s. Madan Gopal Maheshwari HUF
15. M/s. Chand Prakash Toshniwal & Sons. HUF
16. M/s. Santosh Kumar Toshniwal HUF
17. M/s. Nitesh Kumar Toshniwal HUF
18. M/s. Abhishek Toshniwal HUF
19. M/s. Nandlal Toshniwal HUF
20. M/s. Frontline Holdings Pvt. Ltd.
21. M/s. Evernew Commondeal Pvt. Ltd.
22. M/s. Bhinwraj Kabra

23. Vijay Kumar Sharma
24. Shrti Toshniwal
25. Securities and Exchange Board of India
26. The Calcutta Stock Exchange Ltd. Respondents

Date of the hearing : 21/11/2016

Date of pronouncing the Order: 20-12-2016

Parties on Record :

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|---|---|-----------------|
| 1. Mr. Jishnu Choudhury, Advocate |] | For Petitioners |
| 2. Ms. Niṭu Poddar, Pr. CS | | |
| 1. Shri Ratnanko Banerjee, Sr. Advocate |] | For Respondent |
| 2. Shri Saheb Ali, Pr. CS |] | Nos. 1 and 9 |
| 1. Mr. Prasanta Dutt, Advocate |] | |
| 2. Mr. Susanta Dutt, Advocate |] | For SEBI |
| 3. Mr., Syamantak Banerjee, Advocate |] | |

ORDER

The instant Company Petition has been filed by (1) Sumer Mal Jain, (2) Ajay Kumar Jain and (3) M/s. S. M. Saraogi & Sons. HUF, the petitioners herein, against the respondents for issuance of further shares to respondent nos. 2 to 21 through the preferential issue mode in order to reduce the petitioners to a minority. The petitioners alleged that the price of the shares at which the shares are proposed to be allotted for the said preferential

issue is also considerably less than the current market value of the shares of the Company. The petitioner further alleged that the entire process of making the preferential issue as well as the process of making the open offer is full of irregularities and in violation of the Companies Act, 2013, Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 and Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011.

The petitioner no. 1, petitioner 2 and petitioner no. 3 are shareholders of the company holding 256900 shares, 261200 shares and 210000 shares respectively in dematerialized form in the company. Therefore, they are holding 3.84%, 3.90% and 3.14% respectively of the issued, subscribed and paid up capital of the company. Together their shareholding amounts to 10.88%. At present the respondent nos. 2, 5, 7, 9 and 10 are jointly holding 36.78% of the issued, subscribed and paid up capital of the company.

The petitioners further stated that on 13th October 2016 upon receipt of the purported offer letter dated 03/10/2016, which is attached to the petition and marked as A-5, the petitioners came to know that the company has made a purported preferential issue of equity shares wherein 75,00,000 equity shares is proposed to be allotted to the existing promoter/promoters

group of the company under the provisions of Section 62 read with section 42 of the Companies Act, 2013 and the relevant rules thereunder and Securities and Exchange Board of India (Issue of Capital and Disclosure Requirement) Regulations, 2009. Due to the said preferential issue, the post-issue shareholding of the promoter / promoter group will increase from 36.78% to 70.20% of the total subscribed and paid up share capital of the Company and will lead to acquisition of 33.42% of the total paid up share capital of the company. Since the acquisition of shares by the promoter/promoter group is more than 5% in a single financial year, the provisions of Regulation 3(2) of the Securities Exchange Board of India (Issue of Capital and Disclosure Requirement) Regulations, 2009 got attracted and the promoter / promoter group have come out with an open offer pursuant to the Securities Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011.

The petitioners have submitted that the entire episode of the purported preferential share issue and the said open offer is only to serve the ulterior motive of the respondents and to acquire the stake of the company at a price which is grossly undervalued.

The petitioners further submit that the pricing done both for the purpose of the preferential issue and the open offer is not showing the true

worth of the company which possesses a massive property, fair value of which is higher than the value accounted in the balance sheet of the company.

The petitioners submit that in case of open offer, the shares of the company which are infrequently traded. As per regulation 8(2)(e) of the Securities Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011, the price of the shares shall be determined taking into account valuation parameters including book value, comparable trading multiplies and such other parameters as are customary for valuation of shares of such companies. However, as is evident from the open offer letter, the price at which the shares are proposed to be acquired is Rs. 12/- only instead of the book value of Rs. 14.50 only. The company has not complied with the provision of the said regulation of the Securities Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011.

The petitioners further submit that a preferential issue is sought to be made by a company when it is in need of funds and also for the purpose of raising additional capital inter alia for growth and expansion of the business. In the given case, the respondents opted for the route of private placement so as to reduce the petitioners to negligible minority and deprive them of

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their rights and interest. The same is also evident from admissions of the respondents as made in the offer letter.

The petitioners state that the acts of the respondents to issue shares to themselves without offering to the existing shareholders and non-compliance of various provisions of applicable law established the malafide intention of the respondents. The petitioners also state that from the open offer it is found that the company is making the preferential issue only to increase the stake of the existing promoters of the company for effective management. The admissions made by the respondents in the open offer explicitly reflects the malafide intent of the respondents for acquiring complete control over the Company and hence cause oppression to the minority shareholders including the petitioners by reducing them to a negligible minority.

The petitioners submit that there was no reason for the said illegal preferential issue as the net worth of the company is strong. There is no developmental activity currently going on, and there is no loan outstanding as per the books of the company as on March 31, 2015. As such there could have been no reason for making any issue of shares for any commercial reason whatsoever. If the company needed funds the respondent company could have come up with rights issue and the petitioners would have gladly

subscribed to the additional shares even at the actual legitimate price of the shares. The petitioners further states that any money would come to the company by virtue of the said alleged illegal issue of preferential issue to respondent nos. 2 to 21 will be at an undervalued price. It is evident from the admissions of the respondents that the whole object of the issue is to increase the stake of the promoters. The petitioners have invested in the company since the year 1993 with a long term objective and that they had no intention whatsoever of exiting the company and/or to sell their investments in the respondent company. The entire exercise of the respondents is illegal and with an ulterior motive to oust the petitioners out from the company or to reduce them to a negligible minority. The issue of shares vide preferential issue is illegal and constitute a gross act of oppression and mismanagement with regards to the affairs of the company. The respondents are acting with an intention to deprive the petitioners of the petitioners' share in the company and its valuable property as the respondents seek to reduce the petitioners to absolute minority. The shareholding of the petitioners post the said issue will be 5.13% from the present 10.88%. According to the petitioners the proposed allotment of 7500000 equity shares to the respondent nos. 2 to 21 is illegal and null and void and that such allotment would cause irreparable loss to the petitioners

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as also to the company and is not binding upon the petitioners and the company for the reasons that the respondents resorted to such clandestine act for increasing their stake and have illegally sought to allot shares to respondents no. 2 to 21 on preferential basis. The said issue of shares of the company on preferential basis is filed with blatant irregularities and is not in accordance with applicable provisions of laws. The respondents have not only violated the provisions of the Companies Act, 2013 but also the Articles of Association of the company.

The petitioners prayed that an order quashing the illegal issue made by the respondents seeking to reduce the petitioners to a minority by declaring the purported issue made at the board meeting on 25th July, 2016 and the special resolution passed on 22nd July, 2016 is illegal and staying the illegal allotment of shares pursuant to the illegal preferential issue and declaring that any General Meeting and/or Board Meeting purportedly held, if any, wherein the shares were issued, as invalid, illegal, null and void and to stop any proceedings thereto. The petitioners have also prayed for an injunction restraining the respondents company to change the directorship of the company as well as on the execution of the open offer, made by the respondent Nos. 2 to 21 and all connected activities thereto including any



shares tendered by any shareholder pursuant to the open offer be treated as void and illegal.

The petitioners further prayed that an injunction restraining the respondents from dealing with the properties of the company, dealing with or disposing of, encumbering, transferring the assets, or alienating 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 company including issuing or transferring any further shares or securities of the company.

The petitioner Nos. 1 and 2 have also alleged that they were removed in 2004 from the Board of the Company by the Toshniwal Group by wrongly showing that the said petitioners were not present in the 3 consecutive board meetings. The petitioners have stated that they have been granted leave of absence as was always granted to them in the past. They have also stated that they have not got the Notices and Annual Returns and other documents which are to be sent as shareholders. The petitioner Nos. 1 and 2 holds 7,700 and 27,700 shares in physical forms also.


The petitioners have stated that approval of SEBI has been obtained by not providing adequate information. However, they did not enclose any documents including SEBI's observation, if any.



The main grievance made out by the petitioners is that preferential allotment and the open offer would reduce them to a minority shareholder with less than 10% of the shareholding. The respondents have not submitted any reply. However, during the hearing the Ld. Counsel for the respondent No. 1 Company stated that the respondents are willing to allot shares to the petitioners also in terms of the preferential issue sought to be made by the Company.

ORDER

It is considered fair and equitable that to protect the shareholding percentage of the petitioners, they may deposit the required amount with the Company, based on which additional shares will be allotted to them. They may also be allowed to participate in the open offer on the terms and conditions applicable to respondent Nos. 2 to 24. This will be beneficial to the petitioners also since they have stated that the share value is also much more than the value indicated for the preferential allotments i.e. Rs. 12.50 for a share of Rs. 10/-.


(VIJAI PRATAP SINGH)
MEMBER (JUDICIAL)


(S. VIJAYARAGHAVAN)
MEMBER (TECHNICAL)

Signed on this 20th day of Dec 2016