

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.A. No. 924/2015

in

C.P.No. 25/2015

CORAM :

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

In the matter of: Sections 284, 397, 398, 399, 402, 403 and 406 of
the Companies Act, 1956 and Section 169 of the Companies Act,
2013;

AND

In the matter of:

Trafalgar Investment Mauritius Limited ... Petitioner
Versus

1. Eden Reality Ventures Private Limited
2. Arya Sumant
3. Kunal Sharma
4. Rajesh Prasad

... Respondents

Parties on Record :

Mr. Debnath Ghosh, Advocate]	
Mr. Manoj Kumar Tiwari, Advocate]	For Petitioners
Mr. Sanjoy Ginodia, Advocate]	
Mr. D. N. Sharma, Advocate]	For Respondent
Mr. D. Jain, Advocate]	Nos 1 to 3
Mr. Sachchida Nand Pandey]	For Respondent No.4

ORDER

(Date of hearing : 15-09-2016)

This application is for amendment of the C.P.No. 25/2015 between Trafalgar Investment Mauritius Limited –versus- Eden Realty Ventures Private Limited which has been moved on behalf of the petitioner-applicant praying that M/s. Eden Infrastructure Private Limited and Shri Indrajit De be added as respondent Nos. 5 and 6 in the Company Petition No. 25 / 2015.

1.1 Brief facts of the case are that petitioner has filed this petition under Sections 284, 397, 398, 399, 402, 403 and 406 of the Companies Act alleging that issued, subscribed and paid-up share capital of M/s. Eden Infrastructure Private Limited is Rs. 44,599,410/- comprising of 9,99,971 equity shares of Rs. 10/- each and 3,45,997 cumulative convertible preference shares of Rs. 100/- each and the petitioner's holding in M/s. Eden Infrastructure Private Limited is 66.67%. The respondent No. 1's holding is 30.08% and one Michael

John Ezra holding is 3.25%. The respondent no. 1 company is a company incorporated under the Companies Act, 1956 which had entered into a Joint Venture Agreement with the petitioner for a housing project known as 'Bonhooghly Housing Project'. The respondent nos. 2 and 3 have colluded with respondent no. 4, to wrongfully and illegally change the constitution of the Board of Directors of M/s. Eden Infrastructure Private Limited. The respondent no. 4 is the practising Chartered Accountant.

1.2 The petitioner had entered into a joint venture agreement with respondent no. 1 herein. Eden Infrastructure Private Limited ("EIPL") was the special purpose vehicle which was formed to execute the Bonhooghly Project. EIPL is a joint venture company between Eden Realty Ventures Private Limited (ERVPL) and the petitioner herein, Trafalgar Investment Mauritius Limited (TIML). The FDI partner Michael John Ezra is holding 3.25% equity shares in EIPL. The petitioner is the majority partner holding 66.67% equity shares

and all the funds required to be brought in for the said Bonhooghly Housing Project (BHP) were brought by the petitioner.

1.3 As per averments of the applicant, M/s. Trafalgar Investments Mauritius Limited, has filed an application against the respondents alleging oppression and mismanagement of the Company, namely, Eden Infrastructure Private Ltd. and for wrongful and illegal removal of company's Director, Indrajit De and for wrongful and illegal appointment of the respondent nos. 2 and 3 as Directors of the said Company. There are only three shareholders of the company, namely, the petitioner holding 66.67% equity shares, respondent no. 1 holding 30.08% equity shares and one Michael John Ezra holding 3.25% equity shares. The legally constituted Board of Directors of EIPL consists of only three directors, viz., (1) David Cohen, (2) Michael John Ezra and (3) Indrajit De. In view of the illegality committed by the respondents in appointing the respondent no. 2 and 3 as directors of EIPL and wrongfully and illegally removing Indrajit De as Director from the Board of Directors

of the said EIPL and fabrication of Form DIR 12 by the respondents by using digital signature of Indrajit De an application has been filed in the Learned Company Law Board alleging oppression and mismanagement of the said EIPL by the respondents.

1.4 In the C.P.No. 25/2015 it has been specifically stated that the instant Company Petition relates to M/s. Eden Infrastructure Private Ltd. (EIPL). However, in arrays of the respondents the name of EIPL and the nominee director of the company (EIPL) Indrajit De has been omitted due to inadvertence and/or oversight. The applicant has stated that in the Company Petition the cause of action has been made out by the petitioner against the respondent for the wrongful and fraudulent and illegal removal of the nominee director, Indrajit De from the Board of Director of the Company. The said company (EIPL) and the said Indrajit De has not been added as respondents in the Company Petition due to oversight or mistake. M/s. EIPL and Shri Indrajit De are necessary party in the Company Petition and therefore an application has been filed for impleadment of EIPL and

Indrajit De as respondent nos. 5 and 6 in the Company Petition No. 25/2015.

1.5 The applicant petitioner has further submitted that no effective order can be passed in the absence of proposed respondent M/s. EIPL and Indrajit De; therefore impleadment as respondents are necessary for proper and effective adjudication of the Company Petition.

2.1 In reply to the above mentioned application respondents have submitted that by the purported amendment the petitioner/applicant seeks to take away valuable right which has already accrued in favour of them; even if the amendment as prayed for is allowed the same will still not remove a patent defects and error in the Company Petition which are of fatal nature. The Company petition has been filed for its personal benefit and not for the benefit of the Company.

2.2 Respondents has further alleged the petition has been filed with the allegation of oppression and mismanagement of the Company, viz., Eden Infrastructure Private Limited or can seek any relief for the alleged wrongful and illegal removal of company's director Shri Indrajit De and the appointment of the respondent nos. 2 and 3 as Directors of the Company. In the petition EIPL was not a party in the Company Petition and this inherent defect goes to the very root of the matter and the company petition cannot be proceeded any further. In the absence of EIPL as a party in the company petition, the pleadings in the main petition are defective and cannot be cured by the purported amendment. The company petition discloses no cause of action against the respondent nos. 1, 2 and 3 herein.

2.3 Respondents had also denied and disputed that the petitioner-applicant company holds 66.67% shareholding in the respondent no. 1 company. Respondents has also alleged that no relief can be prayed in the Company Petition by Indrajit De who is not a party in

the Company Petition and even if the purported amendment is allowed, will not be arrayed as one of the petitioner but is proposed to be impleaded as respondent No. 6.

2.4 Respondents have further alleged that it is incorrect to say that name of EIPL and nominee director of the Company Shri Indrajit De have been omitted due to inadvertence and oversight. The respondents have further alleged that the petitioner has not disclosed the purported authority of Indrajit De to represent him in the present proceedings and that the amendment as prayed for by the petitioner is formal in nature or will not change the nature and character of the petition.

3. The petitioner has filed a rejoinder in support of his application.

4. Heard the Learned Counsels for the parties.

4.1 By the proposed amendment the petitioner wants to implead M/s. Eden Infrastructure Private Limited and Indrajit Dey as respondent nos. 5 and 6 in the Company Petition, which has been filed on the ground of oppression and mismanagement against the respondents. As per averments in the application the petitioner has inadvertently or oversight forgot inclusion names of Eden Infrastructure Private Limited and Indrajit De as Respondent Nos. 5 and 6. Respondents in reply have submitted that M/s. Trafalgar Investment Mauritius Limited has filed an petition alleging oppression and mismanagement of the company, viz., Eden Infrastructure Private Limited seeking relief in respect of the alleged wrongful and illegal removal of company's director Shri Indrajit Dey or the alleged appointment of the respondent nos. 2 and 3 as directors of the company. But Eden Infrastructure Private Limited and Indrajit De have not been made party in the Company Petition, which is inherent defect, which goes to the very root of the matter. By amending the plaint and impleading M/s. Eden Infrastructure Private Limited and Indrajit De as respondents, that defects in the

Company Petition cannot be cured. The respondents have also stated on the basis of purported amendment the petitioner/applicant seeks to take away the valuable right which has already accrued in favour of the answering respondents.

4.2 In reply respondents no. 1 has pointed out that in the C.P. petitioner has alleged act of oppression and mismanagement against the company, viz. Eden Infrastructure Private Limited and also alleged against the illegal removal of the company director Indrajit De, but they have not been made party in the Company Petition. So the petition is not maintainable. Therefore, it is clear that respondents have also admitted that M/s. Eden Infrastructure Private Ltd. and Indrajit De ought to have been made parties in this case, but the petitioner failed to make them parties. But the only objection of the respondent is that the defect in the Company Petition case goes to the very root of the matter and the Company Petition cannot be proceeded and such defect cannot be cured by proposed amendment. The respondents other objection is that by

the purported amendment the petitioner/applicant seeks to take away the valuable right which has already accrued in favour of the respondents.

4.3 Respondents main objection is that by the purported amendment petitioner seeks to take away the valuable right which had already accrued in favour of the answering respondents. On perusal of the Company Petition it appears that in the original Company Petition in the name of the parties the petitioner has mentioned the name of the proposed respondent no. 5 Eden Infrastructure Private Ltd. and is also mentioned that this petition is being filed in the matter of Eden Infrastructure, the company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 7, Jawaharlal Nehru Road, Mezzanine Floor, Kolkata, West Bengal 700 013 and in the matter of Trafalgar Invstment Mauritius Limited –versus- Eden Realty Ventures Private Limited. The petitioner has not mentioned the name of Eden Infrastructure Private Limited as respondent. But the petitioner has

shown the cause of action against Eden Infrastructure Private Ltd., a joint venture company, by stating in the petition that the petitioner has entered into a joint venture agreement with the respondent no. 1, Eden Realty Ventures Private Limited. The said company was for the special purpose vehicle which was for executing the Bonhooghly Project. Eden Infrastructure Private Limited is a joint venture company between Eden Realty Ventures Pvt. Ltd and petitioner herein, Trafalgar Investment Mauritius Limited.

4.4 On the basis of averments in the petition, the petitioner has clearly stated that the cause of action against the company, Eden Infrastructure Private Limited but due to oversight the name of the proposed respondent nos. 5 and 6 are not mentioned in the case, whereas in the title of the main Company Petition the name of the proposed respondent Eden Infrastructure Private Limited is mentioned. It appears that on account of clerical error or by oversight the petitioner failed to mention the name of the Eden Infrastructure Private Ltd. as respondent. In cause of action the

petitioner has also disclosed this fact that company director Indrajit De has been illegally removed from the Board of Directors and in his place respondent nos. 2 and 3 has been wrongfully inducted as director.

4.5 It is undisputed that that M/s. Eden Infrastructure Private Limited is a holding company and it also appears that Eden Infrastructure Private Limited is a holding company and the petitioner's complaint of oppression and mismanagement is regarding its concern Eden Realty Ventures Private Limited. The petitioner had made only Eden Realty Ventures Private Limited as respondent no. 1 and forgot to mention the name of Eden Infrastructure Private Ltd. as respondent in the Company Petition No. 25 / 2015. It is an undisputed fact that M/s. Eden Infrastructure Private Limited and Indrajit Dey are the necessary party in the case. But the petitioner has failed to implead them as a party in the main Company Petition. The petitioner has relied on the case of **Hon'ble Supreme Court in (2012) 5 SCC 337** (Ramesh Kumar Agarwal –versus-

Rajmala Exports Private Limited and Others). In the above named case the Hon'ble Supreme Court has laid down that while dealing with amendment application Court should adopt liberal approach instead of hypertechnical approach and such amendment seeking to introduce facts/evidence in support of contention already pleaded, is permissible.

4.6 In the above mentioned case Hon'ble Supreme Court further held that if amendment application has been filed immediately after filing of the suit and before commencement of the trial and such proposed amendment would not alter the cause of action, nor would it cause inconsistency so in the circumstances amendment should be allowed.

4.7 In the instant Company Petition No. 25/2015 the petitioner has already shown the cause of action but inadvertently failed to mention their names in the cause list as respondents, so by adding them as respondent nos. 5 and 6 neither it will alter the nature of

the case nor it would be inconsistent of the earlier stand taken in the petition itself.

4.8 Therefore, on the basis of the observation made by the Hon'ble Supreme Court in the above mentioned judgement, (2012) 5 SCC 337 which is also applicable in this case.

4.9 In the case of Udit Narain Singh Malpaharia -versus- Additional Member Board of Revenue, Bihar & Another reported in **AIR 1963 SC 786** Hon'ble Constitution Bench of the Supreme Court had laid down that a necessary party is one without whom no order can be made effective. A proper party is one in whose absence an effective order cannot be made, whose presence is necessary for a complete and final decision on the question involved in the proceedings.

4.10 In this case the petitioner has filed the Company Petition No. 25/2015 wherein it is specifically mentioned that petitioner is

aggrieved by the oppression and mismanagement committed by the respondent, Eden Infrastructure Private Ltd. and it is also mentioned that the respondent with ulterior intention to mismanage the affairs of the said company by oppressing the shareholders of the said company entered into a conspiracy to illegally change the constitution of the Board of Directors of the said Company and by a forged resolution dated 19th November 2013 removed Indrajit De as Director of the said company and appointed respondent nos. 2 and 3 as Director of the said Company.

4.11 Therefore on the very basis of the fact mentioned in the petition it is clear that the Company Petition has been filed against oppression and mismanagement committed by Eden Infrastructure Private Limited. But the petitioner failed to implead Eden Infrastructure Private Limited as a party in the case. Therefore, Eden Infrastructure Private Limited and Indrajit De are necessary and proper parties in the case, and without whom no proper adjudication can be made. Eden Infrastructure Private Limited and Indrajit De's

presence are essential for an effective order and for a complete and final decision on the questions involved in the proceedings.

4.12 On the above basis, it is clear that the Company Application No. 924/2015 deserves to be allowed and M/s. Eden Infrastructure Private Limited and Indrajit Dey be impleaded as respondent Nos. 5 and 6 in the case.

Hence, the Company Application is being allowed and the petitioner is directed to implead Eden Infrastructure Private Limited and Indrajit De as respondent Nos. 5 and 6 in the Company Petition No. 25/2015.

There is no order as to cost.

Sd -
(S. Vijayaraghavan)
Member (T)

Sd -
(Vijai Pratap Singh)
Member (J)

Signed on 15 day of Sept 2016