

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CORAM

Shri V. P. Singh
Hon'ble Member (J)

Shri S. Vijayaraghavan
Hon'ble Member (T)

Company Application No.552/2013 in C.P. No.41 of 2013

In the matter of The Companies Act, 1956:
Sections 397,398,399,402 and 403 of the said Act

And

In the matter of :

IOT Utkal Energy Services Ltd. (IOT UTKAL);

-And-

In the matter of :

IVRCL Ltd. (formerly known as IVRCL Infrastructure &
Projects Ltd.)

.... Petitioner

Versus

1. IOT Utkal Energy Services Ltd., (IOT-UTKAL)
Having its registered office at Plot No.452/18, Near
BSNL Tower, Tarinigada, Paradip
2. IOT Infrastructure & Energy Services Ltd. (IOTL),
having its registered office at 103, Spectra,
Hiranandini Business Park, Powai, Mumbai-
400076
3. Oiltanking GmbH having its registered office at
Admiralitaestrasse 55, 20459, Hamburg, Hamburg
4. Mr. Debashis De, Director & CEO of IOT-Utkal,
nominated by IOTL, Kolkata
5. Mr. Ashutosh Kaushik, Director of IOT-UTKAL,
nominated by IOTL residing at Thane West,
Maharashtra

6. Jayanta Bhuyan, Director of IOT-UTKAL,
nominated by IOTL and Chairman of the Board,
residing at Powai, Mumbai
7. Kapil Kailashchand Jain, Director of IOT-UTKAL,
Mumbai, Maharashtra
8. Sitaraman Ramachandran, Director of IOT-UTKAL,
nominated by IVRCL, Hyderabad, Andhra Pradesh
9. Venkataraghavan Rangachari, Director of IOT-
UTKAL, nominated by IVRCL, Hyderabad, A.P.

.... Respondents

Parties on Record:

Ms. Anirban Ray, Advocate]
Ms. Nupur Jalan] For Petitioners
Sayani Das]

Mr. K. R. Thakkar, Advocate]
Mr. Amit Kumar Nag, Advocate] For Respondents
Mr. Ujjwal Pramanik]

Date of Concluding the hearing : 22.11.2016

Date of pronouncing the order : 20 - 12 - 2016

ORDER

Per Sri Vijai Pratap Singh, Member(J)

This Company Application has been filed in C.P. no.41/2013 for amendment of the Company Petition.

Brief facts mentioned in the application are that the Company Petition was filed for injunction restraining the respondents from giving any effect to the resolution passed at an EOGM of the company held on 31st December, 2012 and Board meeting of the company held on 1st August, 2012 and 31st August, 2012. The Company Petition was moved and *ex parte* order of injunction was passed by the Company Law Board on 1st March, 2013. After a lapse of two and half months on 30th May, 2013, the respondent no.1 namely, IOT Utkal Energy Services Ltd. filed



an application for vacating the order of injunction dated 1st March, 2013. The petitioner submits that the application filed by the respondent no.1 at the time of hearing shows that several communications exchanged between the parties have not been disclosed by the respondent no.1 in the application for vacating the injunction order.

The Petitioner submitted that till the institution of the said petition and passing of the order dated 1st March, 2013 by the Hon'ble Board, no copy of the Minutes of the Meeting of the Board of Directors held on 31st December, 2012 was served upon the petitioner. Subsequent to passing of the order, by an e-mail dated 11.03.2013, the respondents while sending a notice for Board meeting scheduled to be held on 26th March, 2013 forwarded to the petitioner a draft of the Minutes of the Board meeting held on 31st December, 2012. Upon perusal of the same, the petitioner noticed that various incorrect recordings have been made in the said draft minutes of the Extra Ordinary General Meeting to the detriment of the interest of the petitioner. On perusal of the application filed by the Respondent no.1, it also became clear to the petitioner that the respondent no.1 was relying on the Minutes of the Board meeting and Minutes of EGM held on 31st December, 2012. The petitioner had contended before the erstwhile Company Law Board that the Minutes of the Board meeting held on 31st December, 2012 were not made available to the petitioner, when the order of injunction was passed on 1st March, 2013. The said Minutes were not subsequently sent to the petitioner by e-mail dated 11.03.2013. It is also the case of the petitioner that the Minutes of the EGM held on 31st December, 2012 were never made available to the petitioner and was disclosed for the first time in the vacating application filed on 30.05.2013. From the application of the respondent, the petitioner has stated, it further came to the knowledge of the petitioner that the respondent no.1 was relying on the notices of the

EGM and Board meetings which are available to challenge in fact and in law. The petitioner has also mentioned that he vehemently denies the allegations made in the application given by the respondent no.1 for vacating the interim order. Since the respondent no.1 has produced and relied upon documents which have come to the knowledge of the petitioner for the first time, it is necessary that the company petition is suitably amended to deal with the same. The documents relied upon by the respondent related to the facts and event which have already been pleaded in the Company Petition.

The petitioner further states that on or about 2nd week of July, 2013, the petitioner came to know that in inspite of order dated 1st March, 2013 passed by the Hon'ble Board, the respondent nos. 2 to 7 had wrongfully proceeded to enhance the authorised share capital and had also issued and allotted additional shares in favour of respondent nos.2 and 3. By such wrongful issue of allotment, the shareholding pattern of the respondent no.1 company was sought to be altered by reducing the petitioner from 37.5% to 23.08% shares in issued and subscribed shareholding of the company.

The petitioner also came to know that Mr. Debashis De, the respondent no.4, has since resigned as Director and CEO of the Company and in his place, one Jatin Jamandas Mavani has been nominated by the respondent no.2 as Director in the Board of the respondent no.1 company. On this ground, the petitioner has prayed that Jatin Jamandas Mavani be added as a party respondent in the present company petition.

The petitioner has further stated that for proper adjudication of the issues involved in the present proceedings, it is necessary to adduce evidence as well as further documents to show the acts of suppression and mismanagement on the part of the respondent nos.2 to 7 and 10 in

respect of the affairs of the respondent no.1 company. The subsequent facts as well as the correspondence exchanged between the parties are relevant for the purpose of adjudication of the issues involved in the petition. The amendments as prayed for are necessary in view of **subsequent event as well as subsequent discovery of the issues** which are relevant for the purpose of adjudication of the issues involved in the instant proceedings.

The petitioner has also submitted that the amendments sought for would not introduce a new cause of action or change in the nature and character of the company petition as filed by the petitioner.

On the above basis, the petitioner has sought permission to amend the Company Petition in the manner as indicated in green ink in the Company Petition which has been annexed as Annexure "B" by the petitioner. The petitioner has sought leave to incorporate further documents as shown and disclosed in the copy of the petition being Annexure "B" and the petitioner has also sought to add Mr. Jatin Jamandas Mavani as respondent in the instant petition.

In reply to the above application, respondent no.2 has submitted that the EGM was held on 31st December, 2012 and resolution was passed for increasing the authorised share capital from Rs.200 crores to Rs.540 crores by creation of additional equity shares of Rs.340 crores. Clause V of the Memorandum of Association of the Company was amended in respect of the increased authorised share capital. Subject to all statutory formalities, the Board was authorised to offer, issue and allot equity shares to be subscribed for an amount not exceeding Rs.340 crores.

The Respondent no.2 has further submitted that Shri Sitaraman Ramachandran being the respondent no.8 in the company petition has all

along being the nominee director of the petitioner and has been representing the petitioner in the Board meetings and also otherwise. At all material times, the petitioner held out and represented to all concerned that Mr. Sitaraman Ramachandran had the authority to represent the petitioner and all concerned acted on such basis as will appear from various correspondences and other documents enclosed to this application.

The Respondent no.2 issued a letter dated 6th February, 2013 to the petitioner intimating that in view of the continuing defaults committed by the petitioner towards infusion of funds towards shareholders loan, the Respondent no.2 decided to take steps under provisions of clause 19.1 of the Shareholders Agreement and Articles of Association of the Company to suspend the rights of the Petitioner under the said clause.

The Respondent no.4 (Debashis Dey) sent an email on 21st February, 2013 to the Petitioner demanding payment of outstanding balance shareholders loan for an amount of Rs.56.75 crores by 25th February, 2013.

All of sudden on or about 28th February, 2013, the Petitioner had filed the said Company Petition no.41/2013. The Petitioner had on or about 1st March, 2013 moved the said application and had obtained an *ex parte* order in their favour, *inter alia*, direction to put on hold the implementation of the action as proposed in the letter dated 6th February, 2013 till the next date of hearing of the said petition. The Petitioner was directed to serve a copy upon the Respondents along with the copy of the said petition. The copy of the said application along with the Order dated 1st March, 2013 was served upon the Respondents. In the meantime, a notice convening the meeting of the Board of Directors scheduled for 6th March, 2013 was issued on 15th February, 2013.



However, due to preoccupation of the various Directors, the meeting got postponed and was finally held on 1st April, 2013 in which the nominee Director of the Petitioner was also present and on 30th March, 2013, the Petitioner wrote to the Chairman of the Respondent no.1 company wherein the following issues were raised:

- a) No allotment of shares can take place;
- b) The Petitioner shall continue with 37.5% stake as was originally conceived in SHA;
- c) The amount due from the Petitioner towards funding be adjusted against the Petitioner's entitlement to receive money against its alleged claims; and
- d) Any enhancement of share capital shall be with the positive vote of the Petitioner.

The Respondent has further submitted that the Petitioner has been trying to evade the obligation of funding under the SHA by adopting different tactics at various points of time. The respondent has further submitted that despite attending the EGM, the Petitioner purely as a matter of afterthought and wilful disregard to the facts on record not only objected and denied the resolutions passed in the EGM on 31st December, 2012 but also initiated the instant proceedings against the Respondent no.1 before this Hon'ble Tribunal alleging oppression and mismanagement by the Respondent no.1 by suppression of facts and misleading statements.

Being aggrieved by the *ex parte* interim order dated 1st March, 2013, which was obtained by the Petitioner by suppressing material facts, the Respondent no.1 filed an application in C.A. no.274 of 2013 for vacating the said interim order. The Petitioner has suppressed several material facts in the company petition which was placed before the



Hon'ble Company Law Board by the Respondent no.1 in the vacating application. The whole basis of the case made out and reliefs claimed by the Petitioner in the company petition gets negated in view of the following facts, which were deliberately suppressed by the Petitioner in the Company Petition.

- i) The petitioner was present in the Board meeting held on 31st December, 2012 and accorded its consent to the resolutions adopted without raising any objection whatsoever.
- ii) The minutes of the meeting held on 1st August, 2012 and the resolutions passed therein was confirmed in the Board Meeting held on 31st December, 2012 with consent of the Petitioner.
- iii) The Petitioner was present at the EGM which was held on 31.12.2012 and accorded his consent to the resolutions adopted without raising any objection whatsoever.
- iv) It was the offer/request of the Petitioner to reduce the shareholding pattern of the Petitioner to 20%.

Since the Company Petition is liable to be dismissed in view of the material facts being placed before this Hon'ble Board in the vacating application by the Respondent no.1 for vacating the interim order, which were deliberately suppressed by the Petitioner in the said company petition, the Petitioner purportedly filed the said application to defend the specific case of the Respondent no.1 made out in the vacating application for suppression of material facts in the said company petition. The Respondent has submitted that the amendments sought for in the said application would reverse the pleadings made in the Company Petition and thereby change the nature and character of the said Company Petition. The Respondent has further submitted that the proposed amendments have been sought to be made with an oblique

motive to resile from admission of certain facts by the Petitioner in the said Company Petition and to cure the defect of suppression of material facts in the said company petition. The purported acts of oppression as alleged by the Petitioner in the said company petition are false, motivated, thoroughly misconceived, frivolous, vexatious, harassive and devoid of merits in view of suppression of material facts.

The Respondent has further contended that the Board at its meeting held on 1st August, 2012 increased the authorised share capital of the company from Rs.200 crores to Rs.540 crores and the minutes of the meeting was confirmed on 31.12.2012 with consent of the Petitioner. Similarly, the contention of the Petitioner that the Board at its meeting on 1st August, 2012 increased the project cost without recording the details of increase is baseless and since the details are recorded and the minutes of the meeting was confirmed on 31.12.2012 with the consent of the Petitioner.

The Respondent has further contended that the contention of the Petitioner that the decisions taken in the Board meeting on 1st August, 2012 relate to reserved items, which requires positive vote of the Petitioner, cannot be acted upon due to absence of petitioner's vote is untenable since the minutes of the meeting was confirmed on 31st December, 2012 with consent of the Petitioner.

The contention of the Petitioner that the e-mail dated 27th July, 2012 from the Respondent no.2 to the Petitioner proposing a course of action is inimical to the interest of the Petitioner and in derogation of its rights as a Member of the Company is untenable since the Petitioner never objected to the said e-mail and went on trying to pursue the other shareholders to amicably settle the issues. The contention of the petitioner that the Board at its meeting held on 1st August, 2012 named



the Petitioner as Defaulting Shareholder and the Respondents proposed to suspend the rights of the Petitioner under Clause 19 of SHA is untenable as it is on record as evidenced by the minutes of the said meeting, which was confirmed on 31.12.2012 by the Petitioner's representative.

The Respondent has filed a Rejoinder affidavit and reiterated the contents given in the Company Application.

Heard the Counsels for the parties and perused the record. By the proposed amendment, the Petitioner wants to add Mr. Jatin Jamandas Mavani, Director nominated by IOTL as Respondent no.10. Mr. Jatin Jamandas Mavani has been nominated as Director of the IOTL. Therefore, inclusion of his name as Respondent no.10 appears to be necessary for just and proper decision of the case.

By the purported amendment, the Petitioner wants to add that in or about July, 2013, the Petitioner came to know that the Respondents collusively converted the loans into shares by issuing additional shares and issued further shares to respondent nos.2 and 3 to wrongful altering the shareholding pattern of the Respondent no.1, despite the said alteration being objected to by the nominated Directors of IVRCL. Upon such wrongful issuance of further shares to respondent nos.2 and 3, shareholding pattern of the Company is wrongfully sought to be altered.

The respondent has filed the reply against the proposed amendments wherein it is mentioned that the petitioners suppressed several material facts in the Company Petition, which were placed before this Hon'ble Tribunal by the respondent no.1 in the vacating application. The whole basis of the case made out and reliefs claimed by the petitioner in the said Company Petition gets negated in view of the facts

which were deliberately suppressed by the petitioner in the said company petition. In the vacating application, the respondent has taken the following points:

- i) The petitioner was present in the Board meeting held on 31st December, 2012 and accorded its consent to the Resolution adopted without raising any objection whatsoever;
- ii) The minutes of the meeting held on 1st of August, 2012 and the Resolutions passed therein were confirmed in the Board meeting held on 31st December, 2012 with consent of the petitioner;
- iii) The petitioner was present in the EGM held on 31st December, 2012 and accorded its consent to the Resolutions adopted without raising any objection whatsoever.
- iv) It was the offer/request of the petitioner to reduce the shareholding pattern of the petitioner to 20%.

On the above, the respondents have submitted that in view of the material facts being placed before this Hon'ble Tribunal in the vacating application by the respondent no.1, which were deliberately suppressed by the petitioner in the said company petition, the petitioner purportedly filed the said company application to defend specific case of respondent no.1, made out in the vacating application regarding suppression of material facts in the company petition. The respondent has further submitted that amendments sought for in the said application would reverse the pleadings made in the said company petition, thereby change the nature and character of the said company petition. The proposed amendments had been sought to be made with an oblique motive to resile from admission of certain facts by the petitioner in the said company petition and to cure the defect of suppression of material facts in the said company petition.

On perusal of the amendment application, it appears that the petitioner has moved this amendment application simply to fill up the lacunae in the petition which has been pointed out by the respondent in the vacating application.

It appears from the petition itself that in the initial petition, the petitioner has not mentioned this fact that he was present in the Board meeting held on 31.12.2012 and accorded its consent to the Resolution adopted without raising any objection whatsoever.

Paragraphs w,x,y,z,aa,bb,cc,dd,ee,ff,ffa,ffb,gg,hh,ii and jj of the proposed amendment application are relating to the proposed amendments which the petitioner wants to add in the petition which were not pleaded at the time of presentation of the petition. In the petition, the petitioner has not mentioned this fact of the Board meeting held on 31.12.2012 and the petitioner according the consent to the Resolution adopted without raising any objection whatsoever. It is also not pleaded by the petitioner that the Minutes of the meeting held on 1st August, 2012 and the Resolution passed therein was confirmed in the Board meeting held on 31.12.2012 with the consent of the petitioner. The petitioner was present in the EGM held on 31st December, 2012 and accorded its consent to the Resolution adopted without raising any objection whatsoever and the petitioner has also not mentioned this fact in the petition that it was the offer /request of the petitioner to reduce the shareholding pattern of the petitioner to 20%.

On perusal of the proposed amendment, these points were pointed out by the respondent in the application given for vacating the interim order, wherein, the respondent has pleaded that the petitioner was present in the Board meeting dated 31.12.2012 and has given consent on the Resolution of the meeting dated 1st August, 2012 and 31st December, 2012. It is also pertinent to mention that on the basis of the

petition, the petitioner has got interim order and when the respondent moved an application for vacating the interim order then the petitioner has moved an amendment application to negate the points taken by the respondent that injunction granted in favour of the petitioner be vacated because it has been obtained on the basis of the petition which has been moved after suppressing material facts in the said company petition.

It is also clear that amendments sought for in the said application would reverse the pleadings made in the said company petition and thereby change the nature and character of the said company petition. It is also clear that the proposed amendments have been sought to be made with an oblique motive to resile from admission of certain facts by the petitioner in the said company petition and to cure the defect of suppression of material facts in the said company petition.

It is also pertinent to mention that in the proposed amendments whatever the petitioner wants to add in the petition are relating to prior event which happened before filing of the petition. This petition has been filed on 13th September, 2013 whereas the Board meeting dated 31.12.2012 and 1st August, 2012 took place much prior to the filing of this petition and also it appears that it is for the first time, after the respondent gave application for vacating the interim order on the basis that the petitioner himself was present in the Board meeting dated 1st August, 2012 and 31st December, 2012 and gave consent to the Resolution adopted in the said petition without raising any objection whatsoever. Therefore, it is clear that the petitioner has moved this application simply to cure the defect of suppression of material facts in the company petition. At the time of filing of the petition, the petitioner has not mentioned this fact that in the Board meeting dated 31.12.2012, there was a serious dispute between the nominee director of the petitioner and the respondent. As a result of altercation, Mr. Sitaraman Ramachandran



of the petitioner left the Board meeting and left the EGM, which presumably was held thereafter.

The petitioner has not stated any fact about why this fact was not mentioned by the petitioner at the time of filing the petition because it was in his knowledge that Mr. S. Ramachandran represented the petitioner in the Board meeting but left the Board meeting dated 31.12.2012. By the proposed amendment, the petitioner is taking a totally new case. Prior to this amendment, it was not the case of the petitioner that he participated in the Board meeting and confirmed the Resolution of the Board meeting dated 1st August, 2012. And 31st December, 2012 and consent was also given by him by confirming the said resolution but now the petitioner wants to challenge the Board meeting on the ground that there was some altercations between his nominee Mr. S. Ramachandran and the petitioner, so, his nominee Shri S. Ramachandran left the Board meeting. The petitioner has also taken totally new ground that the notice for the Extra Ordinary General meeting has not been forwarded to IVRCL at its registered office either by post or by registered post or through mail. The petitioner is also taking totally new case by the proposed amendment whereby he wants to challenge the Resolution of the EGM held on 31.12.2012 and the Resolution of the Board meeting dated 31.12.2012. It is also pertinent to mention that the petitioner has got *ex parte* interim order at the time of presentation of the petition. The petitioner has not mentioned anything regarding the Board meeting dated 01.08.2012 and 31.12.2012 and confirmed the Resolution of the Board meeting and EGM held on 01.08.2012 and 31.12.2012. All these incidences which took place prior to filing of the petition but the petitioner has suppressed these facts and presented this petition. So it is clear that by the proposed amendment, the petitioner wants to make out totally a new case with an oblique motive to resile from the admission of certain


facts by the petitioner in the said company petition, and to cure the defect of suppression of material facts in the petition, which is not permissible in the eyes of law. The part of amendment application, which relates to adding the name of Mr. Jatin Jamandas Mavani nominated by the IOTL as respondent no.10 deserves to be allowed, because his nomination is subsequent to the filing of the petition and his name has been nominated by IOTL as Director. Therefore, he is a necessary party.

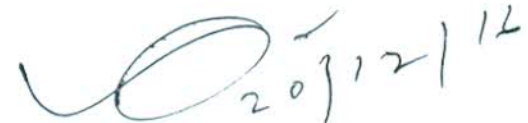
On the above basis, it is clear that C.A. no.552/2013 deserves to be allowed only to the extent of addition of the respondent no.10, Shri Jatin Jamandas Mavani as director nominated by IOTL and rest of the proposed amendment are not acceptable. So, the application for incorporating rest of the amendments deserves to be rejected.

ORDER

C.A. No.552/2013 is partly allowed to the extent of addition of the name Shri Jatin Jamandas Mavani, nominee director of the IOTL as respondent no.10 and application for rest of the proposed amendments is hereby rejected.

Parties shall bear their own costs.


(S. Vijayaraghavan)
Member(T)


(Vijai Pratap Singh)
Member (J)

Signed on this 20th day of December, 2016