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BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.A.NO. 306/2016

In
C.P.No. 370/2010

CORAM:

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

In the matter of Companies Act, 1956 : ... Section 397 and 398
In the matter of : Adbhut Vincom Pvt. Ltd. ... Petitioner
Versus
Hotel Birsa (P) Ltd. & Ors. ... Respondents.

And

In the matter of: **Libra Retailer Pvt. Ltd.** ... Applicant

Parties on Record:

Mr. Jishnu Saha, Advocate
Mr. Anirban Roy, Advocate
Mr. Sourav Ghosh, Advocate
Mr. Prithwiraj Sinha, Advocate
Ms. Ishani Sengupta, Advocate
Ms. Mudrika Khaitan, Advocate

For Petitioner

Ms. Swapna Chowdhury, Advocate

For Respondent No.1

Mr. Reetobroto Kumar Mitra, Advocate
Mr. Patita Paban Bishwal, Advocate
Mr. Kuldip Mallick, Advocate

:For Libra Retailers Pvt. Ltd.,
the applicant

ORDER

The instant C.A.No. 306/2016 is filed by the applicant, M/s. Libra Retailers Pvt. Ltd. for intervention in main C.P. No. 370/2010 filed under section 397 and 398 of the Companies Act, 1956.

The applicant herein states that on 27th January 2016 they came to know that C.P. 370 of 2010 has been instituted by the petitioner, Adbhut Vincom Pvt. Ltd. against M/s. Hotel Birsa (P) Ltd. & Ors. in 2010 before the Company Law Board, Kolkata.

Immediately thereafter the applicant through its Advocate on Record on 5th, April, 2016 approached the Company Law Board, Kolkata Bench for a certified copy of the petition. However, as the applicant is not a party to the said C.P.No. 370/2010 they were not provided with Certified Copy thereof.

The applicant in the said CA.No. 306 / 2016 states that they have entered into a MOU dated 29th September 2009 for acquisition of 2,08,250 fully paid up equity shares of the total face value of Rs. 2,08,25,000/- owned by the petitioner in C.P.No. 370 of 2010 in the Respondent No. 1 company with right of allotment or further allotment and the applicant will purchase such shares for a valuable consideration.

However, in 2013 Adbhut Vincom Pvt. Ltd. had instituted a Title Suit No. 172 of 2013 (M/s. Adbhut Vincom Pvt. Ltd. –versus- M/s Libra Retailers Pvt. Ltd.) before the Civil Judge (Senior Division) – I at Ranchi relating to the MOU dated 29/09/2009 claiming various reliefs as stated in the said Title Suit No. 172 of 2013.

The applicant states and submits that the applicant has acquired right and interest through the said MOU dated 29/09/2009 as they have already made a part-payment of the total consideration as mentioned in the said Memorandum of Understanding.

The applicant further submits that the applicant is still ready and willing to purchase the present share holding of the petitioner in the respondent no. 1 company and the petitioner has deliberately filed this instant proceeding to defraud the applicant and to avoid the transfer of the shares in favour of the applicant.

In view of the above the Applicant prayed for leave be granted to intervene in the C.P.No. 370/2010 filed by the petitioner before the Hon"ble Bench otherwise they will suffer irreparable loss and injury.

The Petitioner has stated that the Applicant is admittedly not a shareholder of the Company and as applicant has started impleadment on the basis of a MoU, dated 29th September, 2009, entered into with the Petitioner, in terms of whereof it has agreed to buy 49% shareholding in the Company at or for a consideration of Rs.5,11,00,000/- and in terms of MoU, the Applicant paid a sum of Rs. 1,00,00,000/- to the Petitioner. The Petitioner has further stated that the Applicant failed to make any further payment within the period stipulated in the MoU or within the period, as extended by the Petitioner i.e. 30th January, 2010. In the circumstances, the Petitioner was compelled to terminate the MoU.

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The question as to whether the Applicant should be allowed to intervene or be impleaded is dependent on the possibility of any prejudice being suffered by – (a) locus standi, (b) prejudice be suffered by it & (c) its right to agitate any grievance with regard to MoU.

As not a single share was transferred to the Applicant and the Applicant does not own a single share in the Company, it has no locus and consequently has no right to participate in the Company petition,



which has been filed by the Petitioner alleging oppression and mismanagement by the Respondents, essentially under the provision of Section 397 & 398 of the Companies Act, 1956. The action being a shareholder's action, a non-shareholder and a non-member cannot seek to assert any right or to agitate any grievance in the same.

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As the Applicant is not a shareholder or a member of the Company, it cannot possibly suffer any prejudice either in the event of reliefs as prayed for in the company petition being granted or not, which are in the nature of cancellation of allotment of shares illegally made and removal of directors illegally appointed. The Applicant has asserted a right over the Petitioner's share on the basis of the MoU, in the event of Petitioner succeeds in the company petition, the Applicant will suffer no prejudice.

As is evident from the instant application, the Applicant has sought to assert a right to obtain the Petitioner's shares in the Company on the basis of a MoU. This being a private dispute under an independent contract between a shareholder and a prospective purchaser of its shares, such dispute cannot be adjudicated in this company petition, as the same cannot in any manner concern the company or its affairs or relate to any oppression or mismanagement.



In case of Udit Narayan Singh Malpahari – vs- Additional Member, Board of Revenue, Bihar 1963 supp(1) SER 676, the Hon'ble Supreme Court laid down the law that " to ascertain the necessary and proper party in the proceedings, the law is well-settled. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for complete and final decision on the question involved in the proceeding."

In case of Vidurimpex & Traders (P) Ltd. – vs. – Tosh Apartment (P) Ltd. (2012) 8 SCC 384 at page 414, the Hon'ble Supreme Court has laid down the broad principles which should govern disposal of an application for impleadment. These are as :

1. The court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit.

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2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court.
3. A proper party is a person whose presence would enable the court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.
4. If a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.
5. In a suit for specific performance, the court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.
6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation

of the restraint order passed by the court or the application is unduly delayed then the court will be fully justified in declining the prayer for impleadment.

On the basis of the law laid down by the Hon'ble Supreme Court in the aforementioned cases, it is clear that application for impleadment can only be allowed, if a party is a necessary party without whom no order can be made effectively or a proper party in whose absence an effective order cannot be made and whose presence is necessary for complete and final decision on the question involved in the proceeding. In this case, the Applicant has applied for impleadment in a company petition filed under Section 397/398 under Companies Act, 1956. The action being a shareholder action, a non-shareholder and a non-member cannot seek to assert any right or to agitate any grievance in the same. If application is not allowed, he will not suffer any prejudice in the event of reliefs as prayed for in the company petition being granted or not. In the present case, the Applicant has sought to assert a right to obtain the petitioner's shares in the company on the basis of MoU. This being a private dispute under an independent contract between the shareholder and prospective purchaser of his shares in Company, which is not a dispute which comes under the purview of the company petition filed under 397 & 398 of Companies Act, 1956. Thus, it is clear that the Applicant is neither a necessary party nor a proper

party, and whose presence in the company petition is not essential for a complete and final decision on the question involved in the company petition filed under section 397 & 398 of the Act. Therefore, this Court has no jurisdiction to order impleadment of applicant especially against the wishes of the Petitioner. Hence, Applicant's prayer for impleadment is rejected.

List for hearing on C.P. on 21st September, 2016.

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Sd -

(Vijai Pratap Singh)

Member (J)

Sd -

(S. Vijayaraghavan)

Member (T)

Dated, the 24th August, 2016.

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