BENCH-II

**NATIONAL COMPANY LAW TRIBUNAL**
**KOLKATA BENCH**
**KOLKATA**

C.P No. 892/2011

**CORAM: Hon'ble Member (J) Ms. Manorama Kumari**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING ON 28th July, 2017, 10.30 A.M**

| | | | |
|---|---|---|---|
| Name of the Company | Shri jayanta Guha<br>-Vs-<br>M/s Adam Elevator Company Pvt Ltd | | |
| Under Section | 397-398 | | |
| Sl. No. | Name & Designation of Authorized Representative (IN CAPITAL LETTERS) | Appearing on behalf of | Signature with date |
| | SWAPNA CHOUBEY, ADV<br>SIDHARTHA SHARMA, ADV | Petitioners | 28/07/2017 |

28_07_2017 – CP No.892/2011 – Shri Jayanta Guha Vs. M/s Adam Elevator Company Pvt. Ltd.

## ORDER

Ld. Lawyers on behalf of the petitioner is present.

C.P.No.892/2011 is disposed off. The order given separately is kept on record.

Sd.
MANORAMA KUMARI
MEMBER(J)

28/7/17

**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**KOLKATA BENCH, KOLKATA**

**CP No. 892/2011**

*In the matter of :*

*The Companies Act, 1956 Section 397, 398,*

*And*

*In the matter of :*

*Shri Jayanta Guha*
*- Petitioners*

*Vs.*

*M/s. Adam Elevator Company Pvt. Ltd.*
*- Respondents*

***JUDGMENT DELIVERED ON :*** 28.07.2017

***Coram : Ms. Manorama Kumari, Member(Judicial)***

***For the petitioners :***

Mr. Ratnanko Banerjee, Advocate
Ms. Swapna Chaubey, Advocate
Mr. Sidhartha Sharma, Advocate
Ms. Devisree Adhikary, Advocate

**For the Respondents :**

Mr. Sourjya Sadhan Bose, Advocate
Mr. Abhijit Sarkar, Advocate
Mr. Ratul Das, Advocate



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**Per Ms. Manorama Kumari, Member(Judicial)**

**ORDER**

The petitioner herein moved this petition on 01-12-2011 against the respondent(s) under Section 235, 397/398, 399, 402, 403 & 406 of the Companies Act, 1956 on the ground of oppression against him who is holding around 25% of the share capital of the company and also on the ground of mismanagement in the affairs of the Company.

1. The fact of the case is that the father of the petitioner, late RN Guha and one Anjan Kr. Dutta started a partnership business to manufacture and trade of elevators and escalators. Thereafter, the Respondent NO.2 and 3 joined in the partnership firm started by the father of the petitioner and Anjan Kr. Dutta. This firm was converted into private limited company on 15-05-1986 with 25% shareholding of each of these partners. Since petitioner's father requested him to continue the business, he used to assist his father in business from 1996 to 2004. In 2004, the father of the petitioner added him as a joint shareholder with regard to his 25% shareholding i.e.1850 shares.

2. From 2004, the father of the petitioner, RN Guha(now deceased) was not keeping well and he died on 16-11-2007. Since the petitioner was residing outside Kolkata, he kept himself apprised of the developments of the company, for he had full faith and confidence on the remaining directors, the

company remained continuing in the management of Respondent No.2, Respondent No.3 and Anjan Kumar Dutta. In the year 2009, Anjan Kr. Dutta also passed away.

3. The Respondent No.2, Respondent No.3 and Anjan Kr. Dutta, vide letter dated 19-12-2007, wished to sell their cumulative 75% share to OTIS without any offer to the petitioner.

The Articles of Association envisages selling the same to the member(s) of the company, if at all he/she is interested. On 29-12-2007, the petitioner made it clear to the Board of Directors that he was not willing to sell his shares to any other party(A 4 – Page 89 of the petition). On 11-03-2008, the petitioner also made it clear that he was interested to purchase the shareholding of the remaining members of the company at a fair value in the manner prescribed in the Articles of Association (A 6, Page -20 of the petition).

4. It is contended by the petitioner that after 15 months, Annual General Meeting for the years 2007, 2008 and 2009 were held. The financial position of the company came down, but the board of Directors gave no explanation for such poor performance, instead of giving explanation, the Respondent No.2 and respondent No.3 reiterated their inability to run the affairs of the company.

5. On 24-06-2010. The petitioner was informed that an Extra Ordinary General meeting was to be held on 19-07-2010 to appoint Respondent No.4 and Respondent No.5 as whole time directors and also to create and issue 300 new equity shares of Rs. 100/- each to Respondent No.4 to Respondent No.6.

6. On 11-07-2010 itself, the petitioner raised an objection to make Respondent Nos.4 and 5 as Directors of the company and also about a proposal for allotment of 300 shares to Respondent Nos.4 to 6, but this allotment was made in favour of Respondent No.4 to 6 reducing the petitioner's shareholding from 25% to 24.02%, the petitioner also protested appointment of Respondent No.7 in the firm as statutory auditors of the company. The objection raised by the petitioner with regard to the appointment of director is revealed from the resolution which is put in writing (Annexure 9 page 110 of petition). By 31-03-2010, the company posted a loss of Rs.1.12 crores and the net worth of the company was negative, it is evident from the statement of account and audit report of the company. On 21-08-2001, a notice was given to the petitioner about holding of AGM on21-8-2011. A notice was given to the petitioner about holding of the AGM on 16-09-2011 with various special resolutions under the head of special business, of the company and 4 others as directors, for increasing shareholding of the company from 15 lakhs to 25 lakhs and for allotment of 9000 shares to Arjun De who is a non-member of the company.

The petitioner herein, submits that this company was initially started by his father, thereafter it came to a stage at one point of time, when OTIS offered to purchase his company at a value of Rs.3600 per share, but whereas today, the respondents herein colluding with Arjun De proposed to increase the shareholding and allotting 900 shares to a non-member at a value of Rs.100/- at par. This was purposely done to reduce the shareholding of the petitioner

around 25% to around 11% in a company where his father late RN Guha and late Anjan Kr. Dutta were the founder member of the company.

The petitioner further submits that in case the resolutions proposed by the Board are approved, then the petitioner will be put to oppression by reduction of his shareholding and the proposals mentioned in the **notice dated 21-08-2011 are in violation of Articles of Association.**

7. The Ld. Lawyer of the respondents vehemently objected to the argument advanced by the Counsel of the petitioner stating that the petitioner has never participated in the affairs of the company. The resolutions that are passed by the Board of Directors to be approved in the AGM to be held on 16-09-2011 at 5-30 p.m. were only to take out this company from the financial crisis it has been suffering and also get investments which is an urgent requirement to meet the dues of around Rs.1.85 crore to be paid to the Government of India, Govt. of West Bengal, Govt. of Jharkhand and gracious payment of staff.

8. The Respondent (further submitted that the Respondent No.4 to Respondent No.6 already infused 75 lakhs of rupees in the company to meet the urgent requirement of the company. They further submitted that there is no article of association restraining the Board of Directors from increasing and allotting shares of the company as the Board wishes. Indeed, Article 7 of the Articles of Association clearly indicates that the shares shall be at the control of Board of Directors who may allot or otherwise dispose of the same to such

persons on such terms and conditions and at such times as the directors think fit.

9. The Ld. Lawyers further submitted that the petitioner has also approached the then CLB for getting interim order against the issuance of notice for convening 25th Annual General Meeting issued by the Company.

10. The then CLB Bench observed vide order dated 16-09-2011 "that it is evident that initially the father of the petitioner and one Anjan Kr. Dutta started this company. It is also evident that the company posted a loss of Rs.1.12 lakhs and net worth of the company is negative as per the version of the petitioner himself. Thereby it is clear that it is immediately required to infuse funds to run the business of the company.

It is also evident that if any increase of shareholding is made without making any allotment to the petitioner, his shareholding will certainly be reduced. On seeing the need of investments to the company and also on seeing the effect that comes upon the petitioner, if at all share allotment is made as mentioned in the notice dated 21-08-2011, the Respondents were directed to keep on hold allotment of shares proportionate to the shareholding of the petitioner unless disposal of this case.

It also further directed whatever resolutions that are to be approved under the head of special business in the AGM to be held on 16-09-2011, shall be subject to the final outcome of this petition".

11. Being not satisfied with the findings of then CLB vide order dated 16-09-2011, the petitioner(s) made an appeal before the Hon'ble High Court, Calcutta and **the Hon'ble High Court observed :**

**"First of all, I notice that the shareholding of the appellant is protected to some extent by the impugned order. The meeting has already been held and the newly appointed Directors are in Office. The appellant admittedly never took part in the management of the company.**

**But nevertheless the appellant might be able to establish a pre-emptive right to take the increased share capital at the trial of the company petition. His other rights as urgent in the company petition will also be decided at that state.**

**This is a small closely held company. The appellant has a chance of establishing his above rights in the company petition. Therefore, while substantially upholding the impugned order, the following further protection is called for to be given to the applicant :**

a) **Before deciding to make any transfer of any undertaking or its fixed capital assets, the company should take leave of the Company Law Board.**
b) **The Company be directed to file monthly accounts in the registry of the Company Law Board which the appellant will be entitled to inspect and take copies with the leave of the Company Law Board.**
c) **The company petition should be disposed of within three months from date."**

With the above observation, the Hon'ble High Court disposed of the appeal filed by the petitioner.

12. Heard both sides at length, seen the petition, reply and rejoinder thereon. Also seen the case laws relied upon by both side, but each case turns to its own facts. There is allegation and counter allegations also.

The main disputes involved in the instant case are (i) Issuance of share and thereby reduction in the share of the petitioner in violation of the Articles of Association, Clause 9 ; (ii) appointment of Directors i.e. Respondent No. 4 and 5 as also the Auditor.

Before proceeding further, it seems useful to refer Clause 9, 7, 24, 25, 33, 34 and 35 of the Articles of Association : viz.

**Clause 9 :**

Subject to the provisions contained in these presents no share shall be transferred to a person who is not a member so long as any member or any person selected by the Directors, as one, whom it is desirable in the interest of the company to admit no membership is willing to purchase the same at a fair value.

**Clause 7 :**

The shares shall be at the control of the Board of Directors who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit.

**Clause : 24**

The Board of Directors shall have power to appoint any person as an Additional Director but the total number of Directors shall not any time exceed the maximum fixed. Any such additional Director shall hold office until the next following Annual General Meeting of the Company and shall be eligible for election.

**Clause 25 :**

At every third Annual General Meeting all the Directors except those mentioned in Clause 22 hereof shall retire from Office. The retiring Directors shall be eligible for re-appointment unless they are disqualified under the provisions of these presents of the Act.

**Clause 33 :**

Subject to the provisions of the Companies Act, 1956, the business of the Company shall be managed by the Board of Directors who may pay all such expenses of preliminary and incidental to promotion, formation establishment and registration of the Company, as they think fit, and may, exercise all such powers of Company, and do on behalf of the Company all such acts as may be done by the Company and as are not by the statutes or by these articles required to be exercised or done by the Company in General Meetings, subject nevertheless to any regulations of these articles to the provisions of the statutes and to such regulations, being not, inconsistent with the aforesaid regulations or provisions, as may be prescribed by the Company, if General

Meeting. But no regulation made by the Company in General Meeting shall invalidate any prior act of the Board of Directors, which would have been valid, if such regulation had not been made.

**Clause 34 :**

The Directors may from time to time raise or borrow any sum or sums of money or make any arrangement for finance for the purpose of the Company. The Directors may raise or secure the payment of such manner and upon such terms and conditions in any respect as they think fit and in particular by making, drawing, accepting. Endorsing on behalf of the Company any Promissory Note or Bill of Exchange or by giving or issuing any other security of the Company or by the mortgage or charge of all or part of the assets of the Company including its uncalled capital or by issue of debentures of the Company.

**Clause 35 :**

The Board of Directors may, from time to time, appoint one or more of them to be Managing Director or Managing Directors or the Company for such period and upon such terms and conditions and with such powers as the Board may think fit and such Managing Director or Managing Directors shall not be liable to retire by rotation.

Thus, on bare perusal of the Articles of Association of the Company, it reveals that the Articles are self-contradictory.

13. In the light of above clauses of the Articles of Association of the Company, the resolution passed in the Extraordinary General Meeting dated 19-07-2010 may be illegal in the sense that it contravenes the Clause 9 of the Articles of Association but at the same time, it appears to the perfectly legal looking to Clause No.7, 33, 34 and 35 of the Articles of Association of the Company.

14. Any contravention of law and/or in Articles of Association may not per se be oppressive for the Section of 397 of the Companies Act, 1956, provided such action is in the interest of the Company and its share holders.

15. Upon careful examination of the petition and the rejoinder filed by the petitioner, it is found that the statements made by the petitioner are self-contradictory.

16. In paragraph No.(O) of the petition at page No.11, the petitioner categorically stated that **"having his own employment and bona fide believing that the respondent No.2 and 3 would supervise the affairs of the company, did not interfere in its daily running or management."**

17. On the other hand, in paragraph No.(n) at page 11 of the petition, **the petitioner submitted that, "he (the petitioner) was not approached to participate in the affairs of the company and on such approach, expressed a keen interest in management, but there was no response from the Directors."**

18. The plain reading of the above paragraphs itself reflects the lack lustre approach of the petitioner towards the company.

Further it reveals from the record that the petitioner has left the Company in 2004 to pursue his own career. As also admitted by the petitioner.

19. The company was facing financial distress and was unable to renew consequent upon which, statutory liability increased considerably. Due to such liability and default, the directors have to face criminal prosecution as is admitted by the Respondent No.2 and respondent No.3. to take out the Company from the financial distress, proposal was taken to induct the Respondent No.4, 5 and 6 as shareholders of the company by issuing and allotting 300 equity shares to them and to appoint them as directors. The Respondent No.4 to 6 also promised to infuse requisite funds into the Company. Accordingly, the Respondent No.2 and 3 sold their shares for valuable considerations between the period from July, 2010 to May, 2011.

20. The said share transfer has also been recorded in the books of the company. The Respondent No.2 and Respondent No.3 also resigned as a member of the Board of Directors of the Company with effect from 17th September, 2011. Since then till this date, the Company is running.

21. Thus, even if for the time being, it is presumed that there is any violation of Articles of Association but the same were/are done for the interest of the Company not for any individual interest. However, as per clause 7 of the Articles of Association, "the shares shall be at the control of the Board of Directors who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit".

22. The action so taken by the Respondents caused a minuscule effect on the shareholding of the petitioner i.e. it gets reduced from 25% to 24.02% for the interest of the company.

23. It is a well established principle that the decisions of directors/shareholders must be in the interest of the Company as a whole. Therefore, any departure would not amount to deviation from the fiduciary standing of the director.

24. The proceeding under Section 397/398 of the Companies Act, 1956 are alternative to winding up with view to ensuring the continuity of the Company's existence i.e. interest of the company is paramount in moulding the relief.

25. So, in my opinion, there are, as alleged, violation of Clause 9 of the Articles of Association but it was done purely in the interest of the Company and/or for revival of the Company from winding up, it is, therefore, justified.

26. Further, the petitioner failed to satisfy the requirement of oppression as specified in Section 397 of the Companies Act, 1956 i.e. oppressive behaviours and circumstances justifying winding up on just and equitable grounds. An isolated incident may not be enough for grant of relief, when the Company is doing good business, after infusion of fund by the Respondent Nos. 4,5 and 6 as Director.

27 Lack of confidence in the respondent is not enough to attract oppression. The oppression must involve at least an element of lack of probity or fair dealing with a member in the matter of his proprietary rights as a

shareholder. There should be sufficient evidence and proof that the affairs are being managed in an oppressive manner or prejudicial to the interest of the company or public interest.

28. When there existed an inter se dispute between the members/shareholders and the Company, each accusing the other for non-co-operation and breach of trust, under such circumstances, it is no other than the interest of the company will suffer in discharging its statutory obligations, which on the other hand, cause impact not only upon the economy, but may compel to wind up.

29. The remedy under Section 397 and 398 of the Companies Act, 1956 is of preventive nature so as to bring to an end the to the complaints. That apart, without prejudice to generality of the powers under Section 397 and 398 and under Section 402 of the Act, very wide powers have been given to the Bench for regulating the conduct of the Company's affair in future and pass, upon such terms, conditions/ any order which may just and equitable in all the circumstances of the case to bring to an end to the matter complained of.

30. Based on the above discussions, I come to the conclusion that the main grievance of the petitioner is the reduction of the share from 25% to 24.02% and also the induction of Directors vide resolution dated 19th July, 2010, with allotment of share to Respondent Nos.4 to 6.

31. Looking to the interest of the Company, I am not inclined to pass any such order/orders which will set aside past and concluded transaction. Let the

business of the respondent Company to continue with better co-ordination and co-operation amongst the petitioner and the respondents and hence hold that :

(i) Share of the petitioner be restored to its original i.e. to 25% from the last financial year ;

(ii) On restoration of share of the petitioner, the respondent company is hereby directed to make alteration in all its statutory books of accounts.

32. The Company petition is disposed of with above directions.

33. The Company application, if any, stands dismissed.

34. No order as to costs.

Sd/-

(MANORAMA KUMARI)
MEMBER(JUDICIAL)