

NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, MUMBAI

C.P. No. 148/(MAH)/2017

CORAM:

Present:

SHRI B.S.V. PRAKASH KUMAR  
MEMBER (J)

SHRI V. NALLASENAPATHY  
MEMBER (T)

ATTENDENCE-CUM-ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF  
THE NATIONAL COMPANY LAW TRIBUNAL ON 25.04.2017


NAME OF THE PARTIES: Trinity Capital (TEN) Ltd.

V/s

D B (BKC) Realtors Pvt.Ltd & Ors

SECTION OF THE COMPANIES ACT: 397-398 of the Companies Act 1956 and  
213, 241-242 of the Companies Act, 2013.

S. No.	NAME	DESIGNATION	SIGNATURE
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19	Manik Dogra Counsel unsubscribed By N. Paul, Atlas Law Partners for Petitioner.		
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Mr. Dinyar Madan, Sr. Counsel  
(Respondent No. 1, 3, 4)  
i/b Negandhi, Shah & Himayatullah

Mr. Anshak Dave, Counsel  
(Respondent No. 5, 6, 7, 8)

Ms. Rujuta Patil a/w Ms. Niyathi Kaha  
(Respondent Nos. 2)  
i/b Negandhi, Shah & Himayatullah

Aparajita Sen for Petitioner  
2 to 4.

i/b Desai  
Desai Camimjee  
& Mulla





**ORDER**

CP 148/241-242/NCLT/MUM/MH/2017

On the company petition mentioned by the petitioner Counsel, the Respondents side counsel has moved section 8 application under Arbitration and Conciliation Act 1996, for the petitioner being a foreign shareholder, in case any application to be filed, it has to be filed under section 45 of the Act, not under section 8, thereby same is hereby rejected giving liberty to proceed as per law.

The petitioner counsel has submitted that the petitioner company has invested ₹200crores in the year 2007-2008 with a clause in the Article saying that he has a right to nominate one director on the Board and fulfilment of quorum by the attendance of the nominee of the petitioner. Since the nominee director of the petitioner resigned from the Board, the petitioner, as per articles, has been insisting upon the promoter since 2009, but R2 has never acceded to the petitioner request.

Since years have gone by in between, the petitioner counsel has candidly submitted that he has not sought any interim relief for appointment of its nominee director on the Board but as the petitioners ₹200crores investment has been stuck in the company without any dividend since 2007-2008, at least some interim relief to protect its interest be granted, and he says that the petitioner has an apprehension that his proprietary rights in the company will not be safe unless protected by this Bench. The counsel has also submitted that though money has come way back into the company, R1 Company has not taken up any project for development till date, therefore, to protect its money, rights and

interest in the company, the counsel has sought for injunction against the shareholding and assets of the company and access to the financial information of the company as envisaged in the Articles of Association.

To which, the Respondents counsel has argued that the petitioner nominee director had resigned in the year 2009, ever since the petitioner slumbered all along without taking any action despite nominee has not been taken on Board till date, therefore, the petitioner today could not be permitted to bring any of its nominee directors on the Board at this juncture unless the respondents are permitted to place their reply in this company petition. The Respondents counsel further submits that this petitioner, in violation of FIPB, guidelines transferred 50% of the shareholding to some other foreign investor.

To which the petitioner replied that transfer of shareholding to the other foreign investor is not hit by FIPB guidelines, thereby R1 Company under the cover of that argument cannot write off the rights of the petitioner as a shareholder and its position on the Board.

R1 counsel has made further submission that they have project on hand and they are in the process of vacating the occupants from the lease hold properties, therefore, it cannot be said that development has not been taking place.

That another foreign investor shown as R8 submits that if any order is passed in this case, it will restrict the right of transferability of its shareholding to a third party. It is needless to say that unless a specific

order is passed restricting the transferability of their respective shares, no separate order is required to be passed to say that an order of stay over the shareholding pattern will not affect the right of transfer of shareholding.

On hearing the submissions of either side, it is true that this petitioner invested ₹200 crores in the year 2007-08 with a legitimate expectation that he will have position on the Board with affirmative rights as envisaged in the Articles of Association as well as in the shareholders' agreement. Therefore, when a person comes into a company with some expectations agreed between the parties, the company cannot deny such agreed rights to the shareholders who invested in the company with those expectations as agreed between the parties. The respondent counsel cannot now simply shy away from fulfilling the expectations set out as Articles of Association and say since rights have been created in the contractual agreement with an arbitration clause, the petitioner has to go for arbitration and not come before this bench. It is time and again reiterated that when Oppression is ex-facie apparent on record, if arbitration clause is present authorizing the parties to opt for arbitration, it is up to the aggrieved to opt either for oppression remedy or arbitration remedy, the Respondents side cannot dictate the aggrieved that he should initiate arbitration only not oppression remedy. Of course the Respondent Counsel can plead that this case does not fall u/s 241 and 242 on the ground that the affairs of the company are covered by arbitration clause, hence it has to go before arbitration. But when it appears prim facie that it is a case squarely falling under the head of oppression or mismanagement in a company where investment is made

with an understanding of a position with veto rights on the Board of the company comprised of a very few shareholders, then it is not open to the promoters to deprive the aggrieved from availing the statutory remedy provided u/s 241 & 242 of Companies Act 2013.

In the background of these facts, it appears that it is a fact that the petitioner invested ₹200 crores and the petitioner has not been allowed to bring its nominee on the Board since 2009 on the premise that the petitioner has transferred 50% of the shareholding to some other foreign investor. On this point, the petitioner counsel has put it that this Promoter has not raised any objection when the other foreign investor (R8), just like the petitioner, transferred part of its shareholding to another foreign investor and in fact let R8 continued as director on Board. The petitioner counsel made it clear that when shareholding is transferred one foreign investor to another foreign investor, such transfer is not hit by FIPB Regulations. If at all any such violation is there, it is in between the petitioner and the Regulating Authority, not in between the petitioner and promoter. The respondent company, which availed ₹200crores from the company, cannot say since the violation is under FEMA, this petitioner cannot exercise the rights that have been agreed upon between the parties. It is fairly unfair on the part of the respondents not allowing the petitioner keeping its nominee director on the Board.

However, we are of the opinion that that appointment of nominee director being restorative in nature, relegating that relief to adjudication on main hearing, we are of the view that the petitioner for time being is entitled to be protected to the extent of its shareholding and to have

access to the records of the company as any other director gets an access to the records of the company and also over the assets of the company.

Since R1 Company has not yet started raising any structure on the leasehold property taken by the company and having Respondents counsel categorically stated that R1 Company has been in the process of getting occupants vacated from the premises, it is to be construed that no occasion has yet arisen to create third party rights on the leasehold property acquired by R1 Company, whereby this Bench restrains R1 Company from creating any third party rights over its assets for time being, from changing the shareholding pattern and directs R1 Company to provide the petitioner access to the financial information like any other director is entitled to.

In the meanwhile, R1 Company is hereby directed to file reply within 5 weeks and the petitioner to file rejoinder if any within 2 weeks thereof.

This Bench has rejected the request of R1 Counsel for stay of this order.

List this matter for hearing on 3<sup>rd</sup> July, 2017.

Sd/-  
**V. NALLASENAPATHY**  
Member (Technical)

Sd/-  
**B.S.V. PRAKASH KUMAR**  
Member (Judicial)