

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****COMPANY APPEAL(AT) NO.194 OF 2018**

(ARISING OUT OF JUDGEMENT AND ORDER DATED 23.02.2018 PASSED IN COMPANY PETITION NO.47/59/HDB/2017 BY NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HYDERABAD)

IN THE MATTER OF:**Before NCLT****Before NCLAT**

Vis-Ram Financial Services Pvt Ltd
Shristi Crescendo,
24, Desika road, Mylapore,
Chennai-600004

Petitioner

Appellant

Vs

1. M/s Pioneer Distilleries Ltd
Roxana Towers, Ground Floor,
M.No.7-1-24/1/RT/G1 & G2,
Greenlands, Begumpet
Hyderabad TG 500016

1st Respondent1st Respondent

2. K. Sudhir Rao,
8-2-674/2/B/8 Sainagar Housing Society
Banjara Hills,
Hyderabad 500034

And at
Plot No.530/A Road No.86,
Jubilee Hills,
Hyderabad 500033

2nd Respondent2nd Respondent

3. United Spirits Ltd
UB Tower Level 6
24 Vittal Mallya Road, UB City,
Bengaluru 560001

3rd Respondent3rd Respondent

For Appellant:- Mr. Shailesh Poddar, Ms Mehak Huria and Mr. Arnav Dash, Advocates.

For Respondents: - Mr. Nikhil Jain and Ms Shreya Kohli, Mr. Y. suryanarayana, Advocates for R2.

Mr. Akshat Hausarua and Ms Etisha Srivastava, Advocate for R1 and R3.

JUDGEMENT**BALVINDER SINGH, MEMBER (TECHNICAL)**

The present appeal has been filed by the appellant under Section 421 of the Companies Act, 2013 against the impugned order dated 23.2.2018

passed by the National Company Law Tribunal (NCLT), Hyderabad Bench, Hyderabad whereby and whereunder the company petition filed by the appellant was dismissed.

2. The appellant is a Private Limited Company carrying on business of trading as well as loans and investments. The appellant is a shareholder of the 1st respondent company. Appellant stated that 1st respondent made an Initial Public Offer (IPO) of shares in 1996. The issue price was Rs.10/- per share, Rs.5/- per share was to be paid on application and Rs.5/- on allotment. It is stated that the concept of applying to shares in IPO by availing loans had become popular at that time and in the IPO of 1st respondent many individuals had taken loan from M/s Phil-Alpha Investments (Pvt) Ltd (PAIPL) for applying to the shares of 1st respondent. The basis of allotment of shares was finalised as per guidelines issued by SEBI. As per the basis of allotment, the individual who had applied for less than 1000 shares were allotted the entire shares applied and the individuals who had applied for more than 1000 shares were allotted shares equal to 0.8756 times the number of shares applied, the same being rounded to the nearest 100 shares.

3. Appellant stated that 1050 applicants had availed loans from PAIPL for applying of shares. Appellant claimed that he himself and protecting the interest of 146 applicants had filed the petition and are now filing the present appeal against the impugned order dated 23.2.2018. These 146 applicants had applied for over 1000 shares in the IPO and they were allotted 600 paid shares of Rs.10/- of 1st respondent and were also allotted some partly paid shares. Appellant stated that if an applicant who had applied for 4700 shares were allotted only 4100 shares. The proceeds paid for the 600 unallotted

shares were adjusted by the 1st respondent as payment of allotment money on 600 of the 4100 shares allotted making the 600 shares fully paid and balance 3500 shares were partly paid. In this way the 146 applicants were allotted 87600 fully paid up shares.

4. Appellant stated that PAIPL, who had advanced the loan to these individuals, had sold these shares to VIL and thereafter the legal interest therein was transferred to VIL by way of a Deed of Assignment dated 21.9.2003 from which time VIL was the owner of the loans as well as the Constituted Attorney entitled to deal with the Powers of Attorney in respect of fully paid shares of 1st respondent allotted to the 146 named borrowers. VIL had thereafter transferred the ownership of the loans to the appellant herein by Deed of Assignment dated 14.3.2017 together with Deed of Assignment from PAIPL to VIL (Page 72). Appellant stated that the appellant as assignee of the loan was entitled to all securities/collateral related to the loan and therefore sought to obtain the share certificates in respect of 87600 fully paid shares of 1st respondent allotted to the 146 persons financed by PAIPL. The appellant stated that as assignment having been executed in its favour, the appellant is the sole owner of the loans and wholly entitled under law to enforce its rights under the loans in its name including in respect of the fully paid up shares allotted to the said borrowers in view of being the Constituted Attorney entitled to deal with the shares.

5. Appellant stated that he had caused VIL which was the legal owner of the loans since 2003 in respect of 146 persons who were allotted fully paid shares in 1st respondent to seek the inspection of the Register of Members of 1st respondent. After inspection VIL had applied for certified copy of the

extracts of the Register of Members in respect of 146 persons. Appellant stated that on receipt of copies it was evident that the Register of Members of 1st respondent has been fraudulently and without cause modified in respect of 146 persons. Appellant stated that the entire 600 fully paid shares fo 1st respondent allotted to 146 applicants in the IPO has been removed from the Folio records by wholly modifying the register of members and needless to say without sufficient cause to reflect as though they were somehow allotted to 2nd respondent in Folio PDL00187. Appellant stated that it is unambiguous that the Register has been modified so that the fully paid shares allotted to 146 individuals have been shown as though instead allotted to 2nd respondent in fraud and the same has been evidently got done by 2nd respondent as he was a Key managerial person of the said 1st respondent and in a position to make such fraudulent alteration in the records behind the back of the appellant and its predecessors in interest. Appellant stated that he issued notice dated 25.7.2016 (Page 80) to 1st and 3rd respondent. 1st and 3rd respondent merely replied vide replies dated 23.8.2016 without adverting to merits claiming as though the issue is time barred. Appellant prayed that the 1st respondent be restrained by injunction from causing any change to be made to the Register of Members in so far as it pertains to the 87600 shares; 1st respondent be restrained by injunction from in any manner making or allowing any transfer or dematerialisation of any equity shares of it held by 2nd and 3rd respondent; 2nd and 3rd respondents be restrained from in any manner dealing with or seeking to deal with any shares held by them in 1st respondent irrespective of whether the said shares are held in physical form or in dematerialised form.

6. In reply the 1st respondent has stated that the allotment was made in 1996 and the petition has been filed after 21 years. 1st respondent further stated that the appellant purchased only 1 share in 1st respondent just before filing the company petition and that the appellant cannot challenge the events and acts that have taken place in the company prior to his becoming a member of the company. Respondent further stated that the appellant claiming to be power of attorney holder has not even filed a Power of Attorney which is the basis of the entire petition. Respondent prayed that petition be dismissed.

7. After hearing the parties the Ld. NCLT passed the impugned order 23.2.2018. The relevant portion of the impugned portion is as under:-

***“22. In view of the above submissions of the Respondents, the observations of the Bench as discussed supra, all the prayers of the petitioner are not tenable, not eligible, without any merit/basis and we reject all the prayers of the petitioner, accordingly, the CP is liable to be dismissed. Accordingly, the CP No.47/59/HDB/2017 is dismissed.*”**

8. Being aggrieved by the said impugned order dated 23.2.2018 the appellant has preferred the present appeal praying therein the following reliefs:

a) That the order dated 23.2.2018 of the Hon’ble National Company Law Tribunal Hyderabad Bench dismissing CP/47/59/HDB/2017 be set aside and each of the reliefs sought therein be allowed in favour of the Petitioner.

b) Such other reliefs and directions as the Hon'ble Appellate Tribunal may find necessary in the facts and circumstances herein.

9. The appellant stated that the individuals who had applied for more than 1000 shares in 1st respondent were allotted shares to the extent of 0.8756 times shares applied for and such shares allotment rounded off to nearest 100 shares. The allotment made was partly in the form of fully paid shares and rest as partly paid shares.

10. The appellant stated that relief of rectification of Register of Members is sought in respect of 146 individuals. That appellant stated that the appellant is entitled to seek the relief as Section 59 of the Companies Act 2013 permits any member, not necessarily being the individual whose shareholding requires rectification, to seek such rectification. The appellant further stated that the appellant is also entitled to seek such rectification on the ground that it is aggrieved by the removal of names of the 146 persons from the Register of Members as holder of 87600 fully paid shares without cause, in view of the said 87600 shares being the security for loans recoverable by it to the 146 persons. The appellant stated that Section 59 of Companies Act, 2013 not only permits any member of the company to seek rectification and further also permits any party aggrieved by the incorrectness of the Register of Members seek rectification.

11. The appellant stated that these 146 persons were allotted 600 shares each fully paid apart from partly paid up shares and the allotment duly reflected the records and at some stage thereafter the 87600 fully paid up shares allotted to these 146 individuals were deleted from the Register of

Members and shown as though held by 2nd respondent, promoter and then MD of 1st respondent.

12. The appellant stated that all the shareholders who were allotted shares in the Public Issue have continuous running folio numbers; certificate and distinctive numbers both flow continuously; an individual who had applied for more than 1000 shares were allotted fully paid and partly paid shares but now these 146 individuals are shown as having been allotted only partly paid shares which is only due to removal from Register of Members of the fully paid up shares allotted to them; 146 individuals have 6 certificates of 100 shares each; the removal of 87600 shares of 146 persons is a fraud.

13. The appellant stated that the respondents have not placed the factual position from the records with it before the Tribunal but have merely chosen to take technical objections setting out as the claim of the appellant is barred by limitations, laches of delay or in some manner by non-production of records such as loan document and Power of Attorney and also the appellant does not have locus to maintain the claim for rectification.

14. The appellant stated that the knowledge of fraud in register of members having come to be known in 2016 to appellant when certified copy of the same was furnished there can be no laches nor limitation bar in a company petition filed in 2017.

15. The appellant stated that all the 146 individuals were borrowers of PAIPL having availed loans for their application. The right in the said loans now stands assigned to the appellant. The assignment deed is also duly registered though such registration is not mandatory. The appellant stated that by fraudulent removal of 87600 shares in the Register of Members, the

appellant has lost its only security which was the said shares to recover the loan dues. The value of these shares are worth approx. Rs.1.5 crores.

16. The appellant stated that the case for adjudication is a mere question of facts of what was the allotment of shares made to 146 persons by 1st respondent for which 1st respondent's records held now by 3rd respondent will provide complete answer.

17. As last the appellant prayed that the Hon'ble Appellate Tribunal may summon the records and based on verification of the actual allotment to the 146 persons allow the prayer for rectification.

18. In reply the respondent has stated that the appeal is not maintainable on the ground that the company petition was filed after the period of limitation had expired and the appellant is now seeking to rectify the Register of Members of the 1st respondent with respect to allotment of shares that took place on 19.6.1996. The respondent stated that there has been an inordinate delay for a period of 21 years.

19. The respondent stated that the appellant has now changed his stand by stating that he has filed the company petition as a shareholder. Respondent further stated that the appellant is taking new ground only for the reason that the NCLT had dismissed company petition on the ground that there was no declarations/authorization filed alongwith the company petition, as mandated under Section 89 of the Companies Act, 2013.

20. The respondent stated that the procedure of allotment of shares as stated by appellant is false and erroneous. It is stated that the appellant has also failed to produce any records which would establish the proportion in which the shares were allotted.

21. The respondent stated that the appellant had stated that PAIPL had received a Power of Attorney from the 146 shareholders to take all necessary action in relation to the shares applied by them in 1st respondent but the appellant has not placed any such Power of Attorney on record.

22. The respondent stated that the appellant has also stated that its assignor, VIL had beneficial interest in the shares of 146 shareholders as PAIPL through an assignment deed. The respondent stated that assuming that there is an assignment deed executed in favour of VIL, PAIPL could not have delegated the right to VIL to sue on behalf of the shareholders unless the original Power of Attorney given an explicit right to PAIPL to delegate the power to any other person. The respondent stated that the appellant has not placed on record the copy of the assignment deed and the power of attorney.

23. The respondent stated that the allegation of fraud can not be decided by the Appellate Tribunal under Section 59 of the Companies Act, 2013 but has to be decided by a Civil Court. The respondent stated that the averments with respect to the fraudulent removal of the concerned 146 shareholders from the Register of Members is devoid of any merits. The respondent further stated that the appellant has filed to put on record the allotment letter, share certificate or any other documents to verify the claim.

24. We have heard the parties and perused the record.

25. Learned counsel for the appellant argued that the NCLT has dismissed the petition only on the ground of limitation and has not decided the petition on merit. Learned counsel for the appellant argued that the petition was filed by himself as well as on behalf of 146 members who were originally allottee of shares in public issue in 1996. Learned counsel for the appellant argued that

the alteration of record came to his knowledge in 2016 and thereafter he filed the company petition and the company petition filed is within limitation.

26. Learned counsel for the respondent argued that the appeal is not maintainable on the ground that the company petition was filed by the appellant after the period of limitation had expired. Learned counsel for the respondent argued that the appellant is now seeking to rectify the Register of Members that took place on 19.6.1996 and there has been a delay of 21 years.

27. We observe even if we accept that the 146 individuals who were allotted shares in the year 1996, these persons did not bother to ask 1st respondent about the fate of their shares. Appellant who is claiming to be Power of Attorney on behalf of such shareholders and having claimed the shares as “Security” for financing the applicants, have been so casual to wait for number of years to find that there are no shares of the company at all in the name of such shareholders. In this regard we reproduce Section 113 of Companies Act, 1956 which provides as under:

“113.Limitation of time for issue of certificates-(1) Every company, unless prohibited by any provision of law or of any order of any Court, tribunal or other authority, shall within three months after the allotment of any of its shares, debentures or debenture stock, and within two months after the application for the registration of the transfer of any such shares, debentures or debenture stock, deliver, in accordance with the procedure laid down in Section 53, the certificates of all shares, debentures and certificates of debenture stocks allotted or transferred:

Provided that the Central Government may, on an application being made to it in the behalf by the company, extend any of the periods within which the certificates of all debentures and debenture stocks allotted or transferred shall be delivered under this sub-section, to a further period not exceeding nine months, if it is satisfied that it is not possible for the company to deliver such certificates within the said periods.

Xxxx

(2) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues.

Xxxx

Xxxx”

A plain reading of the above Section 113 reveals that every company is bound to deliver the shares within three months after the allotment of shares is made. There are penalties for not making compliance with the requirements and penalties continues for all the period for which the default continues. The company brought public issue in mid 1996 and as per above section the shares were allotted to the allottees on 19.6.1996. The appellants have not agitated that they have not received the shares. The petition was filed in the year 2017 seeking rectification of Register of Members of the 1st respondent, after a period of 21 years. We are, therefore, not convinced that

we have any ground not to be in agreement with the observations expressed by NCLT on this issue.

28. Another issue raised by the appellant that the 1st respondent issued shares by a Public issue through prospectus in 1996 and the persons who had applied over 1000 shares were allotted shares in the ratio of 0.8756 shares for every 1 share applied subject to rounding off to the nearest 100 shares. The appellant argued that as per this formula the persons who applied for 3000 shares were allotted 2600 shares and out of these 2600 shares, 400 fully paid shares were allotted and some partly paid shares were allotted. The appellant further argued that the person who applied for 4700 shares were allotted 4100 shares and out of these 4100 shares, 600 shares were fully paid shares and 3500 shares were partly paid.(Page 106).

29. Learned counsel appearing on behalf of the respondent argued that the basis/procedure of allotment of shares argued by the appellant is false and erroneous and the appellant has not produced any records to establish his arguments. Learned counsel for the respondent has drawn our attention only to the Register of Shareholders as on 31.3.2016 and 31.3.2018 (Page 13 to 70 of the reply).

30. After hearing the parties on this issue we observe that it is not disputed that the 1st respondent issued shares in 1996 through Public Issue. It is also not disputed that when the public issue is oversubscribed then basis/procedure of allotment of shares is finalised in consultation with the concerned Stock Exchange and the basis of allotment so finalised is published in the leading newspapers. We noted that the respondent has only argued that the procedure of allotment argued by the appellant is false and erroneous

but the 1st respondent has not produced/placed before this Appellate Tribunal any document to establish that this was the basis of allotment.

31. Learned counsel for the appellant argued that he is the Power of Attorney holder of 146 persons holding 87600 fully paid shares and whose names have been removed from the Register of Members. Learned counsel for appellant argued that these 146 persons had availed loan from PAIPL and the said PAIPL transferred the legal right of these 146 persons to VIL by a deed of assignment dated 21.9.2003. VIL thereafter transferred the ownership of loan to the appellant by a deed of assignment dated 14.3.2017. Therefore, it is claimed that the appellant is legally entitled to seek rectification on their behalf.

32. Learned counsel appearing on behalf of the respondent argued that the appellant has not placed on record any such Power of Attorney and also have not placed the alleged deed of assignment and the appellant by not placing such a deed has raised questions regarding its existence. Learned counsel for the respondent further argued that though assuming not admitting that there is an assignment deed executed in favour of VIL, PAIPL could not have delegated the right to VIL to sue on behalf of the shareholders unless the original Power of Attorney gives an explicit right to PAIPL to delegate the power to any other person.

33. After hearing both the parties we observe that the appellant has not placed copy of the power of attorney and also the copy of the deed of assignment before the Appellate Tribunal to enable us to come to the definite conclusion. We further observe that the alleged allottees has not placed any shares certificates before the Tribunal. We also observed that the appellant

have also not agitated that the shares certificates have not been received by them. We further observe that the shares are freely tradeable and the same can be transferred. We observe that the appellant is agitating that the shares have been transferred but has not produced any proof to substantiate his version. In the absence of any material on record we cannot reach at a conclusion that the shares cannot be transferred or has not been transferred without adequate reason. Such substantiation has to be done by the appellant and we feel that he has apparently failed to do so both before the NCLT and before us.

34. In view of the above observations and discussions, the appeal has no merits. The appeal is dismissed accordingly. No order as to costs.

(Justice A.I.S. Cheema)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

Dated: 19 -3-2019.

New Delhi

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