

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL**

**Review Application (AT) No. 01 of 2017**

[In view of order of the Hon'ble Supreme Court dated 21<sup>st</sup> August, 2017 passed in Civil Appeal No. 11007 of 2017 (D. No. 16856/2017)]

**IN**

**Company Appeal (AT) No. 22 of 2017**

[Arising out of Order dated 18<sup>th</sup> November, 2016 passed by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench, Allahabad in C.A No. 23 of 2016 (in C.P. No. 68/ND/2010)]

**IN THE MATTER OF:**

**Mr. Vinod Kumar Sharma**

**...Appellant**

**Vs.**

**M/s. Bhawani Cold Storage Pvt. Ltd. & Ors.**

**...Respondents**

**Present: For Appellant:- Mr. U.K. Uniyal, Senior Advocate with Mr. Dhananjay Garg, Mr. Abhishek Garg, Mr. Deepak Mishra and Mr. Deepak Garg Advocates.**

**For Respondents:- Mr. Pushkar Malhotra and Mr. Somesh Tiwari, Advocates.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

This Review Application has been preferred by Applicant/Appellant in view of the observations made by the Hon'ble Supreme Court vide order dated 21<sup>st</sup> August, 2017, passed in Civil Appeal No. 11007 of 2017, relevant portion of which reads as follows:

*“It is submitted by Mr. Uniyal after drawing our attention to page Nos. 121 and 126 of the paper*

*book that the tribunal at the first instance has recorded a finding that the appellant has 14.017% shareholding, but has rejected it and the National Company Law Appellate Tribunal, New Delhi, by the impugned order, has not properly appreciated the same because it has not adverted to the same.*

*Regard being had to the said submission, we are inclined to grant permission to the appellant to file an application for review before the National Company Law Appellate Tribunal within three weeks hence. On such application being filed, the same shall be dealt with on merits without rejecting the same at the threshold on the ground of limitation.*

*With the aforesaid liberty, the civil appeal stands disposed of.”*

2. Before deliberating on the issue, it is desirable to observe that there is no provision made under the ‘Companies Act, 2013’ or ‘National Company Law Appellate Tribunal Rules, 2016’ to file or entertain a review petition against a final order passed by this Appellate Tribunal. The Hon’ble Supreme Court in some other case has also observed that this Appellate Tribunal has no inherent jurisdiction. However, in view of the observations made by the Hon’ble Supreme Court, which is binding on all Courts and this Appellate Tribunal, we have decided to entertain this

review application and for the said reason, we recall the earlier order dated 9<sup>th</sup> February, 2017 passed by this Appellate Tribunal in Company Appeal (AT) No. 22 of 2017.

3. We have heard learned counsel for the Applicant/Appellant and the Respondents on merit of the main case, as was pleaded before the National Company Law Tribunal (hereinafter referred to as 'Tribunal') and in the appeal and perused the records.

4. The main question requires to be determined in this appeal is whether the Applicant/Appellant is eligible to file an application under Sections 397 & 398 of the Companies Act, 1956 (now Section 241 of the Companies Act, 2013).

5. Section 399 of the Companies Act, 1956 (hereinafter referred to as "Act, 1956") stipulates the eligibility, relevant portion of which is as follows:

***"399. RIGHT TO APPLY UNDER SECTIONS 397***

***AND 398.— (1) The following members of a company shall have the right to apply under section 397 or 398:***

*(a) in the case of a company having a share capital, not less than one hundred members of the company or, not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less*

*than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;*

*(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.”*

6. As per Section 434 of the Companies Act, 2013 (hereinafter referred to as “Act, 2013”), if any application was preferred before the erstwhile Company Law Board under Act, 1956, on its transfer, the same is required to be heard by the Tribunal as per the present Act (Companies Act, 2013), as apparent from Section 434 (1)(a), which reads as follows:

**“434. Transfer of certain pending proceedings. —**

*(1) On such date as may be notified by the Central Government in this behalf, —*

*(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10E of the Companies Act, 1956, immediately before such date shall stand*

*transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act”*

7. As per the present Act (Companies Act, 2013), the eligibility to file application under Section 241 is prescribed under Section 244, as quoted below:

**“244. Right to apply under section 241. – (1) The following members of a company shall have the right to apply under section 241, namely: —**

*(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;*

*(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members:*

*Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.*

*Explanation.—For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.*

*(2) Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.”*

8. From the aforesaid provision, it is clear that the eligibility criteria provided in Section 399 of the Act, 1956 remain the same under Section 244 of the Act, 2013.

9. It is not in dispute that the Company has a share capital and the appeal has not been filed by one-tenth of the total number of its members, which is one of the eligibility criteria. As per the other eligibility criteria, it is to be found out whether the Applicant/Appellant is a member holding

not less than one-tenth of the issued share capital of the Company or not.

10. It is submitted by the Applicant/Appellant, who is a member holding more than one-tenth share capital of the Company as noticed by the Tribunal, which was also brought to the notice of the Hon'ble Supreme Court, that the Tribunal recorded a finding that the Applicant/Appellant has 14.017% shareholding.

11. On the other hand, according to the Respondents, the observations of the Tribunal do not amount to a finding that the Appellant has 14.017% shareholding but that was one of the contention which was advanced on behalf of the Applicant/Appellant and noticed by the Tribunal.

12. Learned counsel for the parties relied on pleadings made by Applicant/Appellant, who is the Petitioner before the Tribunal. We will be referring to relevant paragraphs of the pleadings made by Applicant/Appellant (Petitioner) in the Company Petition preferred before the Tribunal in regard to the share capital.

13. The case of the Applicant/Appellant (Petitioner) as pleaded are as follows: -

*“(xv) That the petitioner had contributed to one of a basic module of a project economics by transferring his and his mother (consenting Party) 5 Pacca bighas*

(15125 Sq. Yards) of land located at Khasra No. 64 village Hajipur at the Main Highway Road, Hapur Road, Meerut. In actual only 3 Pacca Biga (9075 Sq. Yards) of land was agreed to transfer for the purpose of project. And 2 Pacca Biga (6050 Sq. Yards) have been assured by the Respondent 2, 3 & 4 to return back to the petitioner. This was due to a reason that the land of less volume could not be sold/registered because of restriction given in Section 168 of the U.P. Zamindari Abolition Act 1952 for commissioning a project of the company. The promise of the Respondent 2, 3 & 4 remain a promise from the last 20 years. Annexed hereto and marked as **Annexure-P12** is the copy of **sale deed in favour of respondent 1.**

(xvi) That while finalizing the sale price of said land, No amount was decided among the promoter directors because the transaction was fully based on mutual trust and commitment. The land have been transferred at a the statutory circle rate of approx. Rs. 56000 per Pacca Biga. There was a perfect understanding among the partners and the said price was decided without considering a market price @Rs.



*150 per Sq. Yard of Rs. 1361250/- at that time. In a clear understanding the petitioner was only supposed to give 3 Pacca Biga of land against 25% of his share. Though the petitioner has transferred the 5 Pacca Biga of total value of Rs. 2268750/- in good faith to see the implementation of project commissioning which was otherwise impossible to start.*

*(xvii) The company on such transfer of 5 Pacca Biga of Land gave the petitioner a cheque of Rs. 2,80,000=00 having No. 540302 dated 03-06-1988 as full consideration at Allahabad Bank, Khair Nagar, Meerut, which the petitioner had deposited in his new Open Bank Account No. 10866/85/14 & reciprocally had given a cheque of the total amount of Rs. 2,80,000-00 on the same day reverting back to the Company. Even the cost of said registration of land of Rs. 32200-00 was paid by the petitioner of which he gave the cheque of Rs. 32,200-00 of Allahabad Bank dated 03-06-1988. The respondent No. 1 has failed to carry the amount given by the petitioner to record it in the books of Accounts. Annexed hereto and marked as **Annexure-P 13** is the copy of **Pass Book of Allahabad Bank.***

(xviii) That the loan documents signed by the Petitioner along with respondent No. 2, 3 & 4 duly acknowledged the said net worth of the petitioner that the petitioner has made an investment in Bhawani Cold Storage as equity to the tune of Rs. 3.13 (Cash for shares Rs. 01 lack, Cost of land Rs. 2.80 lacs & cost of registration Rs. 32 lacks by the petitioner thus total investment was Rs. 3,13,000-00 on 31-03-1990. Though it valued at Rs. 10.33 at Bank papers while the other three directors had contributed Rs. 5,88,000-00 for all purposes and economically. It was largest and major contribution of the petitioner in the affairs of the new company. The audited balance sheet of 31<sup>st</sup> March 1988 shown the list of Shareholders.

PARTICULARS	AMOUNT	AMOUNT	%Shareholding
<u>As Per B/S</u>	<u>In Real</u>	<u>In Real</u>	
1.Narayan Dass	2,61,000/-	2,61,000/-	30%
2.Brij Mohan	1,96,000/-	1,96,000/-	21.77%
3.Pooran Chand	1,31,000/-	1,31,000/-	14.55%
4.Vinod Kumar	<u>1,000/-</u>	<u>3,12,200/-</u>	34.68%
	<u>5,89,000/-</u>	<u>9,00,200/-</u>	

So its clear evident that the petitioner had contributed 34.68% of the Equity at that time as per their own

*signed Balance sheet but the same was shown as 0.16%. his equity was intentionally taken to Unsecured Loan for Rs. 280000/-. The whereabouts of Rs. 31200/- paid in cash is unknown. However, in real money terms, the contribution of the Petitioner was almost four times of the other contributors. The total capital exposure of the Company from the first year goes as follows, which clearly indicates the continuation of 25% contribution towards capital.*

<u>PARTICULARS</u>	<u>AMOUNT</u>	<u>AMOUNT</u>	<u>the Petitioner Cap.</u>	<u>%</u>
<u>As Per B/S</u>	<u>In Real</u>	<u>In Real</u>	<u>In Real</u>	
31.03.1988	5,89,000/-	900200/-	312200/-	34.68%
31.03.1989	5,89,000/-	900200/-	312200/-	34.68%
31.03.1990	5,89,000/-	900200/-	312200/-	34.68%
31.03.1991	5,89,000/-	900200/-	312200/-	34.68%
31.03.1992	5,89,000/-	900200/-	312200/-	34.68%
31.03.1993	8,61,500/-	900200/-	312200/-	26.55%
31.03.1994	8,61,500/-	900200/-	312200/-	26.55%
31.03.1995	8,61,500/-	900200/-	312200/-	26.55%
31.03.1996	8,61,500/-	900200/-	312200/-	26.55% ”

14. If the aforesaid pleading is noticed, then we find that the Applicant/Appellant (Petitioner) is stated to have contributed 34.68% of the equity but in the Balance Sheet it has been shown as 0.16% as long back as on 31<sup>st</sup> March, 1988.

15. Clause 12 of the Articles of Association permits the Directors to allot and issue shares in the capital of the Company, in full or part

payment, for any property sold or transferred, goods or machineries supplied, which reads as follows: -

*“12. The Directors may also allot and issue shares in the capital of the Company, in full or part payment, for any property sold or transferred, goods or machineries supplied or for services rendered to the Company in or about the formation of the Company of the conduct of its business and any such shares may be issued as fully or partly paid up.”*

16. Therefore, there is nothing wrong if the Applicant/Appellant (Petitioner) claimed that against the property he was to be given equity shares. But the question is actually whether such equity share has been allotted in favour of the Applicant/Appellant (Petitioner) or not and if so allotted, whether it was reduced to below 10% prior to filing of the Company Petition.

17. The Company records, as enclosed by Applicant/Appellant (Petitioner) show share capital of the previous year against liability shown in Chartered Accountant's Report dated 16<sup>th</sup> August, 1991 as 'Rs.5,89,000/-' against share application money amount of 'Rs.2,72,500/' has mentioned, relevant portion of which is quoted below:

"S.K. KUMAR & CO.  
Chartered Accountants

M/s. BHAWANI COLD  
**BALANCE SHEET**

PREVIOUS YEAR AMOUNT		LIABILITIES	CURRENT YEAR AMOUNT	
Rs.	P.		Rs.	P.
<u>20,00,000-00</u>		<b><u>SHARE CAPITAL:</u></b>		
		<b><u>AUTHORISED:</u></b>		
		20,000 Equity Shares of Rs. 100/- each	<u>20,00,000-00</u>	
		<b><u>ISSUED, SUBSCRIBED &amp; PAID UP:</u></b>		
5,89,000-00		5,890 Equity Shares of 100/- each fully paid up	5,89,000-00	
95,000-00		<b><u>SHARE APPLICATION MONEY:</u></b>	2,72,500-00	
-		<b><u>BEAERVS AND SURPLUS</u></b>	-	
3,64,183-87		<b><u>INVESTMENT ALLOWANCE RESERVE:</u></b> (Created during the year)	3,64,183-87	
42,98,375-72		<b><u>SECURED LOAN FROM:</u></b>		
		<b><u>ALLAHABAD BANK, BUILDING LOAN A/C</u></b> (Secured against land building of the Co.)	22,62,918-27	
		<b><u>ALLAHABAD BANK, MACHINERY LOAN A/C</u></b> (Secured against Plant & Machinery of the Co.)	24,57,093-18	
		<b>Allahabad Bank, Co. A/c Meerut City.</b>	3,45,744-00	
		<b>Allahabad Bank C/A, Garh Road.</b>	<u>79,922-45</u>	51,45,677-90
9,09,106-55		<b><u>UNSECURED LOAN:</u></b>		
		From Directors	3,63,606-55	
		From Share Holders	-	
		From Others (As per list attached)	<u>4,43,000-00</u>	8,06,606-55
54,279-98		<b><u>CURRENT LIABILITIES:</u></b>		
		<b><u>SUNDRY CREDITORS:</u></b>		
		M/s Shyam Lal		
		Prem Prakash	9,788-70	
		M/s Dharam Dass		
		Hardwari Lal	<u>30,255-00</u>	40,043-70
				1,50,500-00
1,95,400-00		<b><u>ADVANCE RENT RECEIVED:</u></b>		
		<b><u>EXPENSES PAYABLE:</u></b>		
		Electricity Payable	1,03,877-03	
		Salary Payable	4,700-00	
		Audit Fee Payable	<u>2,500-00</u>	<u>1,11,077-03</u>
<u>65,05,346-12</u>				<u>74,79,589-05</u>
PLACE: <u>MEERUT.</u> DATE: 16.8.1991		(DIRECTOR)		<u>AU-DITOR'S</u> In terms of our separate

18. The said Chartered Accountant in the list of 'unsecured loans' as on 31<sup>st</sup> March 1990 has shown a sum of Rs. 2,80,000/- against one Shri Pooran Chand Sharma and not the Applicant/Appellant (Petitioner) Mr. Vinod Kumar Sharma, relevant portion of the same, is as follows:

**"MESSRS: BHAWANI COLD STORAGE PVT. LTD.**

**LIST OF UNSECURED LOANS AS AT 31<sup>ST</sup> March 1990**

<u>PARTICULARS:</u>	<u>AMOUNT</u>	
<u>FROM DIRECTORS:</u>		
Shri N.D. Maheshwari	60,000=00	
Shri Brij Mohan Maheshwari	23,606=55	
Shri Pooran Chand Sharma	<u>2,80,000=00</u>	3,63,606=55
<u>FROM OTHERS:</u>		
Shri Ved Prakash	25,000=00	
Shri Ashok Kumar	47,500=00	
Shri Deewan Chand	75,000=00	
Smt. Kela Devi	30,000=00	
Smt. Veena Devi	10,000=00	
Smt. Raj Kumari Maheshwari	18,000=00	
Shri Prakash Chand	30,000=00	
Shri Raj Kishore	50,000=00	
Shri Naresh Kumar	20,000=00	
Shri Mukesh Chand	20,000=00	
Smt. Shashi Devi	20,000=00	
Shri Budh Prakash Vaid	1,00,000=00	
Shri Sat Prakash	50,000=00	
Shri Rajeev Sharma	<u>50,000=00</u>	<u>5,45,500=00</u>
	TOTAL Rs.	<u>9,09,106=55"</u>

19. However, the said amount of Rs. 2,80,000/- has been shown as 'unsecured loans' as on 31<sup>st</sup> March, 1994 against the name of Mr. Vinod Sharma Maheshwari (here the name of the Appellant is Mr. Vinod Kumar Sharma), relevant of which, as quoted below:

"1<sup>st</sup> Floor, Usha Complex  
Near N.A.S. College  
Shivaji Road,  
MEERUT-250 001  
Ph. : 540041

**S.K. KUMAR & CO.**  
CHARTERED ACCOUNTANTS

**M/S BHAWANI COLD STORAGE PRIVATE LIMITED**  
**List of Unsecured loans as at 31.3.94**

<b><u>From Directors</u></b>		
<b><u>Particulars</u></b>	<b><u>Amount</u></b>	<b><u>Amount</u></b>
N.D. Maheshwari	7,55,000.00	
Brij Mohan Maheshwari	23,606.55	
Vinod Sharma Maheshwari	<u>2,80,000.00</u>	10,58,606.55
<b><u>From Others</u></b>		
Sh. Ved Prakesh	25,000.00	
Smt. Raj Kumari Maheshwari	18,000.00	
Sh. Satya Prakesh	50,000.00	
M/s Mansuk Dass & Sons	30,000.00	
M/s. Meerut Credit Leasing P. Ltd.	50,000.00	
Sh. Budh Prakesh	50,000.00	
Sh. Kela Devi	<u>34,000.00</u>	<u>2,57,000.00</u>
		 <u>13,15,606.55</u>

**List of Sundry Debtors as at 31.3.94**

<b><u>Particulars</u></b>	<b><u>Amount</u></b>
M/s. Frick India L	27,066.43
Sh. Noor Mohd.	10,000.00
Sh. Om Prakesh	8,000.00
Sh. Raghubir Singh	6,000.00
Sh. Anup Singh	10,000.00
Sh. Rafik	1,500.00
Sh. Ajab Singh	4,000.00
Electricity under dispute	48,642.00
Income Tax	<u>898.93</u>
	 <u>1,16,107.36</u> ”

20. The aforesaid documents have been enclosed by the Applicant/Appellant (Petitioner). On 17<sup>th</sup> November, 2017, when the case was admitted and heard in part, the Applicant/Appellant (Petitioner) was allowed to file additional affidavit enclosing the copy of the Company Petition, including annexures thereto and was also asked to state as to whether any share certificates were issued in favour of the Applicant/Appellant (Petitioner) by the Company. Though the documents have been filed, but no copy of the share certificates has been filed by the Applicant/Appellant (Petitioner) and in the additional affidavit no statement has been made that any share certificates was issued by the Company in favour of the Applicant/Appellant (Petitioner).

21. Learned counsel has also admitted that there is no share certificate available with the Applicant/Appellant (Petitioner). Therefore, we have a doubt whether any share certificate was issued in favour of the Appellant or not. Merely on the basis of some statement made by somebody in the year 1989 or calculation, it is not possible to hold that the Applicant/Appellant (Petitioner) holds more than 10% of the share certificates of the company.

22. Now, the question arises how this matter has been looked into by the Tribunal and whether Tribunal has given any finding in favour of Applicant/Appellant (Petitioner) that it holds 14.017% shares, as was argued on behalf of the Applicant/Appellant before the Hon'ble Supreme Court.



23. The Tribunal noticed the arguments advanced on behalf of the parties and formulated with regard to the maintainability of the Petition which was the Point No.1, referring to provisions of Section 399 of Act, 1956, the Tribunal observed as follows: -

*“14. Therefore, we accept the contention of the applicants, that the non-applicant has no sufficient shareholding in the records of the Company and the Register of Members, with reference to Rs. 2,80,000 and Rs. 30,200 respectively. The amount of Rs. 2,80,000 is reflected in the books as unsecured debt even according to the Company petitioner’s own showing.*

*15. Then, we examine the other part of the equity holding of the non-applicant. He was admittedly having 10 shares out of 40, at the incorporation of the Company. It is not his case that he has been allotted with any other or more number of shares subsequently. It is a different case if the Company has accepted subscription from him but failed to allot the shares. The CP is silent on that aspect. The present authorized capital of the Company at the time of filing the CP is Rs. 20,00,000/- divided into 20,000 equity shares of Rs. 100. The Company*

*Petitioner's holding comes to 0.05%. Even these 10 shares also were said to have been transferred by the Company in favour of 6<sup>th</sup> Respondent. The Company Petitioner's case is that he did not execute any transfer deed and that he has never sold the 10 shares to anyone else.*

*The applicant contends that the non-applicant has transferred his 10 equity shares and it was also notified in the annual returns. The Annual Return, at page 87 of Paper Book, is to be effect on 08.09.1996 AGM was held and page 97 thereof shows that 10 shares of the non-applicant Mr. Vinod Kumar Sharma were transferred on 6.4.1996. The contention of the non-applicant is that the transfer is false. Ld. Counsel for the non-applicant argues that the applicant did not produce the original or copy of the transfer deed and from that circumstance the court can deduce that there is no transfer deed and that plea of the applicant is not plausible. He has also argued that the questions whether or not the transfer of shares is true and whether the transfer was made according to procedure and whether the non-applicant has any reason to transfer his shares have*

*to be decided on merits and the Company Petition cannot be thrown away at the threshold.*

*The Ld. Counsel for the non-applicant further contends that soon after the search report given by the Chartered Accountant Mr. Amresh Vashisht on 30.03.2010 (Annexure P2), the non-applicant came to know about the transfer of his shares and issued a notice to Vishal Mittal but it was not served and therefore Vishal Mittal is not a genuine transferee of the shares. The Ld. Counsel therefore urged to dismiss the CA mainly because the question whether the transfer of shares is true is a pure question of fact and has to be enquired into in the main CP only.*

16. *This argument seems missing force for the particular reason, the Company Petitioner who claims that he had never sold 10 shares, failed to file the original share certificate along with his affidavit. He did not explain in the entire pleading as to what happened to that original share certificate. Therefore, the natural presumption is that he might have parted with the share certificate. It is for the Company Petitioner to explain in the Petition this adverse circumstance.”*

24. So far as the observations of the Tribunal with regard to 14.017% of the equity is concerned, it was noticed as one of the ways of calculation of the Tribunal and the line of the arguments made by the parties is quoted below:

*“19. Thus, the inference of his equity holding calculated by the non-applicant is encompassing the amount he has remitted to the Company viz, Rs. 2,80,000 (land value) on the understanding of returning 2 bighas of land and Rs. 32,200 the costs of Registration agreed to be shown as equity but never reflected in the books of account. At the time of incorporation the subscribed capital is 40 shares of Rs. 100 each out of the authorized capital of 20,000 shares. The non-applicant was given 10 shares admittedly. **When the paid up capital was raised to Rs. 19,97,500 out of authorized capital of 20,00,000, as shown in Form 20B as on the date AGM 29.09.2008, the non-applicant’s holding of 10 shares worth Rs. 1000 comes to 0.05%. If the sum of Rs.32,200 is also taken as his equity, he will get another 322 shares. Then the total holding comes to 332 shares and on that hypothesis, his holding comes to 1.63% only.***

***However, since the incorporation of the Company, the sum of Rs. 32,200 was never reflected in the records of the company. If the investment of 2,80,000 is also accepted as his equity, it gives him 2800 shares and the total comes to  $2800+10=2810$ , then only the non-applicant's equity holding comes to 14.017%.***

25. However, the aforesaid contention of the Applicant/Appellant (Petitioner) was not accepted by the Tribunal as apparent from the observations made in the next Paragraphs, as quoted below:

*“20. The contention of the non-applicant is that non-production of the original documents relating to the share transfer by the applicants is fatal to their case and adverse inference has to be drawn. There is logic in his submission but, in an enquiry into the maintainability of the Company Petition, the Tribunal shall have to take into consideration the pleadings and the documents filed by the Company Petitioner only and it cannot rely upon the defence of the opposite parties or their evidence.*

*21. As we have observed in the earlier paragraphs of the order, even according to the non-applicant, the*

*sum of Rs. 2,80,000 was shown in the records of the company as unsecured debt and not as equity from the very inception. His case that it was understood at the time of sale of land to the Company, the amount of sale consideration is paid to the company as his equity investment cannot inspire confidence as his another plea that the applicants agreed to return 2 bighas of land to him subsequently. If the total consideration of Rs. 2,80,000 was taken as equity, returning part of the land purchased by the Company from the non-applicant does not arise. If that land is returned, accepting the sale consideration for the total land of 5 bighas will not arise. Thus, the plea of the non-applicant is mutually destructive.*

*Therefore, the non-applicant's stand that he has possessed 10% quantitative equity eligibility to maintain the Company Petition is sheer hypothesis. The Company Petition itself discloses on its very face that the Company Petitioner does not own 10% equity prescribed by Sec. 399 of the Act. He will get that qualified percentage of equity only when the Tribunal declares that the investment made by him and shown as 'unsecured debt' in the Company records is in fact*

towards the equity. The fact, however, remains is that the Company has not issued him shares for that sum of Rs. 2,80,000 and even though the sum is shown as unsecured debt, there is nothing on record to show that he had demanded the Company to issue shares to him prior this complaint to the Department of Company Affairs in the year 2003.

22. Shri Siddhartha Varma, Ld. Counsel for the non-applicant would submit that the holding of the Petitioner prior to the date of acts of oppression has to be taken into consideration for sustaining the invocation of jurisdiction of the Tribunal under Sections 397 and 398. He placed reliance on the Division Bench decision of Karnataka High Court in **Vijayan Rajes vs. MSP Plantations (P) Ltd. (2010) 98 SCL 383**. The Division Bench while considering the ambit of qualifications under section 399 made the following observation at para 32 of the report.

*“On authority it had been established that for the purpose of examining as to whether the petitioning members qualified for maintaining a petition under section 399, the question to be looked into was as to*

*whether the petitioners constituted the requisite number of members or they had the requisite shareholding in the company prior to the acts complained of. If the date of presentation of the petition had to be looked into in a technical way, it could defeat the very purpose of the legislative enactment of sections 397 and 398...”.*

*Even if the above view is taken into consideration, the Company Petitioner’s equity holding was only 0.5%, at the time when the acts of oppression were complained of. Therefore, on the point No. 1, our finding is that the Petitioner in the Company Petition (non-applicant) was not holding one tenth of the equity to be eligible to file the Petition under Sections 397 and 398 of the Companies Act, 1956.”*

26. From the detailed pleadings made by the Applicant/Appellant (Petitioner) and the observations of the Tribunal, as noticed and recorded and as detailed above, and in view of the fact the Applicant/Appellant (Petitioner) does not hold any equity share, we hold:



(i) The Applicant/Appellant (Petitioner) is not eligible to maintain the petition under Sections 397 & 398 of the Companies Act, 1956 (now Section 241 of the Companies Act, 2013) and;

(ii) The Applicant/Appellant (Petitioner) misled the Hon'ble Supreme Court by stating that the Tribunal has recorded a finding that the Applicant/Appellant (Petitioner) has 14.017% shareholding.

We find no merit in this application. We accordingly reject the Review Application (AT) No. 01 of 2017 and also dismiss the Company Appeal (AT) No. 22 of 2017. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Justice S.J. Mukhopadhaya)  
Chairperson

(Mr. Balvinder Singh)  
Member (Technical)

NEW DELHI

7<sup>th</sup> March, 2018

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