

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.89 of 2018

[Arising out of order dated 27.10.2017 passed by National Company Law Tribunal, Ahmedabad in IA No.32 of 2017 in TP No.119/397-398/NCLT/AHM/2016 (New) and CP No.23/397-398/CLB/MB/2015 (Old)]

IN THE MATTER OF:

Dhiren Pratapmal Bhandari
Flat No.203, Twins Corner, CHS Ltd.,
Plot No.1, Sector 17, Nerul, Navi Mumbai,
400706

...Appellant
(Original Petitioner)

Versus

1. DB Shapriya Construction Ltd.
08, Sakal Homes, Near Simran Bunglow,
Chandkheda, Ahmedabad

2. Kishor D Shapriya
27-28 Nyerere Road, PO Box 3221,
Dar Es Salaam, Tanzania

3. Amish Kishor Shapriya
9, Linden Lea, Westfield Park,
Pinner Middlesex, HA 54 JH,
United Kingdom

4. Ashish Laxmiswarup Srivastava
972, Sector A, Pocket P,
Vasant Kunj, New Delhi – 110070

5. Dipackumar Chandrakant Kotak
Plot No.872, Upanga, Dar Es Salaam,
Na, Tanzania

6. Dr. BS Sreekumar
254, Alykhan Road,

Dar Es Salaam, 948,
Tanzania

...Respondents
(Original Respondents)

7. (Respondent No.7 - Regional Director, MCA, deleted as per Order dated 06.07.2018)

For Appellant: Shri Shivek Trehan and Shri Pranay Govil, Advocates

For Respondents: Shri Rajnish Singh, Shri Nikhil Jain and Ms. Sakshee Sharma, Advocates (Respondent Nos.1, 2, 3, 5 and 6)

Respondent No.4: Served by Public Notice

ORAL JUDGEMENT

28.09.2018

A.I.S. Cheema, J. : This Appeal has been filed by the Appellant – original Petitioner whose Company Petition has been dismissed at preliminary stage in view of the IA 32/2017 filed by the Respondent No.1 objecting to the maintainability of the Company Petition on the basis that the Appellant – original Petitioner held neither 1/10th of the issued share capital of the Company, nor was 1/10th of Members as required by Section 399 of the Companies Act, 1956.

2. The learned counsel for the Appellant has submitted that admittedly the Appellant was holding only one equity share of Rs.10/- constituting 0.001% of the shareholding at the Company. He filed the Company Petition raising various disputes relating to oppression and mismanagement and which included one of the disputes regarding he being removed as a Director. According to him, the Appellant was Director, shareholder and Chief

Executive Officer (CEO) of the Respondent No.1 Company and due to the oppression and mismanagement of the Respondents, he was removed illegally on 31st March, 2015. According to him, he came to know about such removal only in May, 2015. The Counsel refers to the Company Petition which was filed. Copy of the Company Petition is at Page – 63 of the paper book. The Counsel referred to the fact that it was mentioned in the Company Petition that he held only one equity share but that it was also mentioned in Para – 8 regarding the shareholding pattern of the Company as on 31st March, 2014. His submission is that in his petition in this paragraph, it was clearly mentioned by Petitioner that as per his knowledge based on the last Annual Return submitted for the year 2013 – 2014, there were 5 shareholders as named (in this paragraph) and 3 others as mentioned in the chart. Thus, there were only 8 shareholders and the counsel submits that the Petition had clearly made out a case in favour of the Petitioner to maintain the same.

3. It is submitted on behalf of the Appellant that the Form 20B as available at Page – 171 shows (at Page – 179) 8 shareholders, which was the last Annual Return available at the time of filing of the Company Petition on 5th October, 2015. On that date, the new Companies Act of 2013 had not come into force and thus, the petition was maintainable under the Companies Act, 1956. It is stated, and not challenged, that till the Company Petition was filed, Annual Return subsequent to 2013 – 2014 was yet not due or filed.

4. According to the Appellant, the Respondent Company filed Annexure – A2 (Page – 389) IA 32/2017 challenging maintainability of the Company Petition on the basis that the Appellant held only one share and he was not

qualified due to such holding as it was less than 1/10th of the shareholding of the share capital. It is stated that when such challenge was raised, Respondent did not claim that the Appellant did not qualify even on the basis of being less than 1/10th of the total number of members. According to the Counsel, in Reply filed to such IA, the Appellant contested the claims of the Respondents and it was only in the Rejoinder filed to the IA by the Applicants/Respondents (Annexure – A-4 Page – 406 at Page – 411) that the Respondents for the first time came up with a case that out of the earlier 8 shareholders, one Dr. B.S. Sreekumar who had 2502 shares earlier had transferred 50 shares to 5 other persons and thus, the Appellant could not claim maintainability on the basis of total number of members also. The learned Counsel submits that although the Respondents claim that the shares had been transferred by Dr. B.S. Sreekumar on 31st March, 2015 (for which the Respondents are now showing Board Resolution [true copy of which Resolution is at Page – 432]), such fact was not in the knowledge of the Appellant. According to the Counsel, such transfer and accepting of new members is suspicious as according to the Counsel when Reserve Bank of India sent letter (Annexure - A-5) dated 10th August, 2015 seeking compliances from the Company regarding the allotment of shares to such NRI like Dr. B.S. Sreekumar, the Respondents in Reply dated 23.10.2015 (Page – 448) (which is subsequent to filing of the Company Petition) annexed format relating to the shares issued to Dr. B.S. Sreekumar without mentioning any further transfer and he was still shown as holding 2502 shares. The argument is that in spite of such documents being there before NCLT, the NCLT did not

consider the matter in proper perspective and has wrongly dismissed the Company Petition as not maintainable.

5. The counsel has relied on the case of “**Mrs. Farhat Sheikh versus Esemen Metalo Chemicals Pvt. Ltd. and Others**” reported in *1994 SCC OnLine CLB 6* where with similar facts, in that matter, CLB had observed:-

“The maintainability of the petition in Esemen has been questioned, consequent to the issue of additional 5,000 shares by the company in 1990 and the transfer of some shares by some of the respondents by which the total number of members has been increased to 11. It is a fact that the petitioners were not aware of these two developments one in 1990 and the other in 1993. As regards the issue of shares, it has become the subject-matter of the petition by means of a subsequent application taken out by the petitioner and is being considered as one of the acts of oppression. In this background, in our opinion, it is not justified to disqualify the petitioner under Section 399. Apart from this, the respondents have not been able to establish that the total number of shareholders was 11, much before the filing of the petition. The transfer is of a small quantity of 30 shares which gives the clear indication of the intention of the respondents to increase the total number in order to disqualify the petitioner under Section 399 of the

Companies Act, 1956. In view of this, we hold that the petition as regards Esemen is maintainable.”

5.1 It is argued that in the present matter also, the position is similar and the petition should have been treated as maintainable, and could not have been dismissed on the basis of increase in number of members from 8 to 13, which Appellant was not aware of and which act Appellant is now disputing, as the claim is made by Respondents post filing of the Petition.

6. Against this, the learned Counsel for the Respondents 1 to 3, 5 and 6 submitted that the Appellant was required to make out a case of maintainability in the Company Petition itself and in the Company Petition, the Appellant clearly mentioned regarding his one share and did not claim that because of the number of members, he was entitled to maintain the Company Petition. It is stated that even when such objections were raised in the IA 32/2017 that the petition was not maintainable, the Appellant did not raise any specific claim that because of the number of members he was entitled to maintain the petition. It is stated that if the Respondents wanted to ante date any transfer, it could have been shown by them at the time of filing IA itself that in terms of number of members also the Appellant was not entitled to maintain the petition. It is argued that even if Return after 2013 – 2014 had not been filed, the Appellant could have taken inspection of the records of the Company but he did not do so and thus the Appellant cannot maintain the Company Petition. With reference to the letter of the Reserve Bank of India, the Counsel submitted that the Reserve Bank had asked specific query to the Company regarding compliances with regard to the

allotment to the NRIs and thus the Company was liable to answer only to that extent and that is what had been shown in their reply sent by Company and it cannot be stated that only because the subsequent transfer as pointed out by the Respondents was not shown, transfer had not occurred.

7. Having heard counsel for both sides and having gone through the record, it appears to us that the Company Petition which was filed, although it referred to the Appellant having just one share, did refer to the fact that the shareholding was of a particular type giving the number of shareholders. The Company Petition referred to 5 shareholders by name and in front of the 5th name added "& 3 others". Although it does not appear that specific pleading was put to show the basis for maintaining the Company Petition, the averments were there in the Company Petition itself and the Company Petition would have to be read as a whole. If after filing of the Company Petition, the Respondents have come up with a case that subsequent to last Annual Return there has been a subsequent transfer which the Respondents claim is before filing of the Company Petition, it would have to be established, including that Appellant had knowledge.

7.1 The Appellant was admittedly a Director till 30th March, 2015 and the Respondents are claiming that on 30th March 2015, the Appellant had sent an e-mail, copy of which is at Page – 292 where the Appellant claimed that because of the state of affairs, he was putting in his resignation from the post of Director. This e-mail is dated 30th March, 2015 and the time shown is of 19.11 hours. It is argued for Appellant that on the very next date of 31st March, 2015, Board Meeting was shown as held at Tanzania where the

transfers of shares from Dr. B.S. Sreekumar were recorded in favour of 5 persons. It is argued that if till the earlier evening, the Appellant was the Director, it would be a matter to be considered at the time of deciding the Company Petition whether the necessary notice or other compliances had been done for the meeting at Tanzania on 31.03.2015. The Company Petition has pleadings of Appellant not being given opportunity before removing him from directorship and that he had no Notice of the Board Meeting dated 31.03.2015. It is argued that these factors being under dispute, the Petition could not at preliminary stage be rejected on the basis that Petitioner was less than 1/10th of the Members.

8. Going through the material available, we find that Appellant has an arguable case and the Appellant should have been given opportunity to amend the Company Petition with regard to the facts which have come on record in the Rejoinder to application filed by the Respondent Company to IA 32/2017. Even without the pleadings with regard to shares of Dr. B.S. Sreekumar, the Petition is maintainable but in interest of both sides, Appellant may be allowed to make specific submissions.

9. Reading the Company Petition as it is, we find that the Appellant – original Petitioner must be held to be entitled to maintain the Petition and the disputed facts between the parties as raised by Respondents can be decided at the time of deciding the Company Petition on merits.

10. For such reasons, we set aside the Impugned Order as regards its decision regarding IA 32/2012 and the dismissal of TP 119/2016.

11. We reject I.A. 32/2012 and restore the Company Petition TP 119/397-398/NCLT/AHM/2016 (New) and CP No.23/397-398/CLB/MB/2015 (Old). We hold that the Company Petition is maintainable and not hit by Section 399 of the Companies Act, 1956. The Appellant will be given one opportunity to amend the Company Petition for making specific averments with regard to the alleged transfer of shares from Dr. B.S. Sreekumar.

12. Parties to appear before NCLT on 22nd October, 2018. Disposed accordingly. No Orders as to costs.

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

[Balvinder Singh]
Member (Technical)

/rs/nn