



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 08.07.2022

Date of decision: 29.07.2022

+ **CO.A(SB) 21/2016 & Co.Appl. No. 1343/2019**

DINESH JHUNJHUNWALA

..... Appellant

Through: **Mr.Ranjana Roy Gawai and
Mr.Vineet Wadhwa, Advs.**

versus

CITIXSYS TECHNOLOGIES LTD. & ORS.

.....Respondents

Through: **Mr.Darpan Wadhwa, Sr. Adv. with
Mr. VedantaVarma,Mr.Vibhor
Kush and Mr.Akhil Kumar Gola,
Advs. for R-1.
Mr.NikhilSinghvi and Mr.Mohit
Seth, Advs. for R-2.**

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

1. This is an appeal filed under Section 10-F of the Companies Act, 1956 (hereinafter referred to as the “**Act**”) by the Appellant, challenging the order dated 29.12.2015 passed by the then Company Law Board (hereinafter referred to as the “**CLB**”), New Delhi in Company Petition



(CP) No.130(ND) of 2015 (hereinafter referred to as the “**Company Petition**”).

2. By the Impugned Order dated 29.12.2015, the learned CLB was pleased to dismiss the Company Petition filed by the Appellant herein under Section 397/398 of the Act, on the ground that the Appellant, along with the other shareholders of the Respondent no. 1-Company from whom also he had taken consent to file the Company Petition on their behalf as well (hereinafter referred to as the “**Consenters**”), had failed to constitute 1/10th of the total number of members of the Respondent no. 1-Company as on the date of filing of the Company Petition. Liberty was granted to the Appellant to proceed on the same cause of action before the learned CLB after obtaining approval under Section 399(4) of the Act or before the Civil Court.

3. The Appellant had filed the abovementioned Company Petition before the learned CLB, *inter alia*, contending his locus and claiming to have satisfied the eligibility conditions to file the said Petition under Section 399 of the Act, by stating that the Appellant, along with “Consenters” No. 1 to 5, collectively held and represent 2.37% of the equity share capital of the Respondent no. 1-Company. It was alleged as per the filings made by the Respondent no. 1-Company with the Registrar of Companies, that there were approximately 36 shareholders in the Respondent no.1-Company and thus, the Appellant along with the five Consenters collectively constitute more than 1/10th of the total number of members of the Respondent no.1-Company and, therefore, are qualified



in terms of Section 399 of the Act to institute the said Company Petition under Section 397/398 of the Act.

4. The learned counsel for the Appellant submits, and the same is also reflected from the Impugned Order dated 29.12.2015, that on the date of mentioning of the Company Petition before the learned CLB, an objection was taken by the Respondent no.1-Company that the Appellant along with the five Consenters, did not satisfy the 10% threshold as required under Section 399 of Act. It was alleged that one of the consent letters annexed with the Company Petition appeared to have been taken before preparing the draft of the Company Petition and, in fact, these very consent letters were used by the Appellant even in the earlier Company Petition filed by him, which were later withdrawn. It was contended that as on the date of filing of the Company Petition, there were 87 members continuing as shareholders in the Respondent no. 1-Company and, therefore, even if the consent letters are assumed to be correct, the Appellant's group does not constitute 1/10th of the total number of members of the Respondent no.1-Company and, therefore, the Company Petition is liable to dismissed.

5. As far as the objection on the consent letters is concerned, the learned CLB, vide its Impugned Order dated 29.12.2015 did not find any merit in the arguments of the Respondent no.1-Company and rejected the same. There is no challenge of the respondents to this finding and no submission in this regard has been urged before this court.

6. As far as the objection on the Appellant not constituting 1/10th of the total number of members is concerned, even taking into account the



consent letters, the learned CLB, after perusing the original register of the members disclosing that there were 87 members in the Respondent no. 1-Company as on 27.03.2015, held that as the Appellant's group admittedly constituted only six members, and as such they did not fulfill the condition as prescribed under Section 399 of the Act to maintain the Company Petition under Section 397/398 of the Act.

7. In reaching the above conclusion, the learned CLB observed that on perusal of the original register of members, it was evident that the last entry made with respect to transfer of shares was on 27.03.2015, whereas the Company Petition was filed on 18.12.2015. The Appellant was, therefore, under an obligation to know the actual number of members soon before the filing of the Company Petition, which the Appellant did not do by asking the Respondent no.1-Company, and instead filed the Company Petition relying upon Form SH-11 filed by the Respondent no.1-Company in the year 2014. The learned CLB observed that it was not the case of the Appellant's group that the Respondent no.1-Company manufactured the register. Even if it is presumed that the contention of the Appellant's group is that the Respondents manufactured the record to disqualify the Appellant's group for filing this Company Petition, then also, that being a fabrication, the remedy lies before the Civil Court to prove that the record is fabricated.

8. The learned counsel for the Appellant submits that the learned CLB has erred in dismissing the Company Petition filed by the Appellant merely by perusing the register of the shareholders produced by the Respondent no. 1-Company/Respondents. No opportunity to rebut the



contents of the register and/or to raise the plea that the transfer of shares to increase the number of members of company was fraudulent, was provided to the Appellant by the learned CLB. Even a copy of the register of the Respondent no.1-Company was not given to the Appellant and the contents thereof were presumed by the learned CLB to be genuine enough to dismiss the Company Petition filed by the Appellant.

9. Placing reliance on the judgment of this Court in *M/s Dayagen Pvt. Ltd. vs. Mr. Rajendra Dorian Punj & Anr.*, 2008 (105) DRJ 29, she submits that the Company Petition could have been dismissed on a demurrer only if the claim put forward by the appellant cannot be established, even if all the allegations made in the petition are accepted to be true. In the present case, the Appellant had clearly pleaded, based on the documents of the Respondent no.1-Company, that there were 36 members in the Respondent no. 1-Company. In fact, if the Respondent no. 1-Company was to dispute the same, the learned CLB should have called upon the Respondent no. 1-Company to file an appropriate application in this regard and should have given an opportunity to the Appellant to rebut the same and/or challenge any transfer made by the Respondent no. 1-Company merely to defeat the right of the Appellant to institute and maintain a petition under Section 397/398 of the Act. In support of her submission, she also places reliance on the judgment of the Supreme Court in *Ramesh B. Desai and Ors. vs. Bipin Vadilal Mehta and Ors.*, (2006) 5 SCC 638.

10. She further places reliance on the order of the learned CLB in *Mrs. Farhat Sheikh vs. Esem Metal Chemicals Pvt. Ltd. & Ors.*, (1996) 87



Comp Cas 290 (CLB) and *Mrs. Shieila Anne Mcfarlane vs. Gaffino Resorts and Motels P. Ltd. &Ors.* (2007) 140 Comp Cas 313 (CLB); of the Supreme Court in *Dale & Carrington Invt. (P). Ltd. &Anr. vs. P.K. Prathapan and Others*, (2005) 1 SCC 212; of the Madras High Court in *M/S S.V.T. Spinning Mills Pvt. Ltd. &Ors. vs. M. Palanisami &Ors.* (2009) 151 Comp Cas 233 (Mad); and of this Court in *Umesh Kumar Baveja&Ors. vs. IL&FS Transportation Network Ltd. &Ors.* 2013 (138) DRJ 597, to submit that the very act of transfer of shares to defeat the right of the Appellant to maintain the Company Petition under Section 397/398 of the Act would be an act of oppression, which can be and should have been adjudicated upon by the learned CLB, instead of dismissing the Company Petition *in limine*.

11. On the other hand, the learned counsel for the Respondents submit that the Appellant made no endeavor to discover the number of members of the Respondent no. 1-Company by seeking inspection of the record of the Respondent no. 1-Company or calling for the details thereof from the Respondent no. 1-Company. In absence of any such effort and there being no challenge to the transfer of shares recorded by the Respondent no. 1-Company, which had resulted in the increase of number of its members, the learned CLB has rightly dismissed the Company Petition as there was no dispute to be adjudicated regarding such transfer.

12. I have considered the submissions made by the learned counsels for the parties. Section 399 of the Act reads as under:-

Section 399 of Companies Act, 1956



“(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.

(2) For the purposes of sub- section (1), where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(3) Where any members of a company are entitled to make an application in virtue of sub- section (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.

(4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the [Company Law Board] under section 397 or 398, notwithstanding that the requirements of clause (a) or (b), as the case may be, of sub- section (1) are not fulfilled.

(5) The Central Government may, before authorising any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable for the payment of any costs which the [Company Law Board] dealing with the application, may order such member or members to pay to any other person or persons who are parties to the application.”



13. For maintaining a petition under Section 397/398 of the Act, the Appellant must show that it constitutes not less than one hundred members of the company or not less than 1/10th of the total number of its members, whichever is less or is holding not less than 1/10th of the issued share capital of the company. In the present case, the Appellant in the Company Petition filed by him before the learned CLB, had pleaded as under:-

“2.10 As per the filings made by Respondent Company with the Registrar of Companies, there are approximately 36 shareholders in Respondent Company and thus Petitioner group collectively constitute more than 1/10th of the total number of the members of the Respondent Company and thus duly qualified in terms of Section 399 of the Act to institute the present Petition under Section 397/398 of the Act.”

14. The Appellant had filed the Company Petition relying on Form-SH-11 filed by the Respondent no.1-Company with the Registrar of Companies. The Appellant had further pleaded that prior to the filing of the Company Petition, the Appellant vide e-mail dated 02.09.2015, requested the Respondent no.1-Company to provide the Audited Financial Report for the year 2014-15 to the Appellant, including the Balance-Sheet and Profit and Loss Statement. The same, however, had not been supplied by the Respondent no.1-Company.

15. It is also relevant to note that before the filing of the Company Petition in question, the Appellant had earlier filed another Company Petition being CP No. 12/2015, which was, however, dismissed as



withdrawn on 10.02.2015, with liberty to file a fresh Company Petition on the same cause of action. The learned counsel for the Appellant explains that the same was withdrawn as some *lacuna* was pointed out by the Respondents in the Consent Letters obtained by the Appellant from the other five shareholders for filing of the said Company Petition. The Appellant filed another Company Petition being CP No. 123/2015, which was also dismissed as withdrawn on 14.12.2015, again with liberty to file a fresh petition and to take back the original consent letters filed along with the additional affidavit of the Appellant. The learned counsel for the Appellant submits that the said Company Petition had to be withdrawn on account of a clerical error, as the Consent Letters were not filed in original along with the said Company Petition. It is thereafter that the Appellant filed the Company Petition, which has been dismissed by the Impugned Order dated 29.12.2015. Therefore, the Appellant has been pursuing this cause of action since January 2015. The Impugned Order dated 29.12.2015 records that no transfer of shares has taken place from 27.3.2015, however, does not state if any transfer of shareholding had taken place after January 2015, when the first petition was filed by the Appellant.

16. Though it may be correct that the Appellant, before filing of the Company Petition, should have verified the number of members from the Respondent no.1-Company, however, it is also well settled law that the Appellant could have maintained the Company Petition before the learned CLB, if by having knowledge of such transfers, it had challenged



such transfers before the learned CLB in the Company Petition as being oppressive.

17. In *M/s Dayagen Pvt. Ltd.* (Supra), this Court considered the challenge to an order passed by the learned CLB wherein the learned CLB had refused to dismiss the Company Petition at a preliminary stage on the ground that the very issue of additional shares was in question in the Company Petition therein. This Court held that a petition can be dismissed at a preliminary stage only if the claim put forward by the applicant cannot be established even if all the allegations made in the Company Petition are accepted to be true. The test is whether, even if the facts pleaded by the Petitioner in his petition under Sections 397 and 399 of the Act are assumed to be true, the Company Petition filed by him can be held to be not maintainable. This test is similar to the test applied by a Civil Court while dealing with the issue of rejection of the plaint under Order VII Rule 11CPC. The reduction of the percentage of shareholding of an existing member to a miniscule minority has been recognized as an act of oppression. If an allotment of shares, increase in the issued share capital, or increase in the number of members is done with the sole aim of gaining control over the management of the Board/Company and to defeat the legitimate right of other shareholders, the Court can always set aside such an increase or allotment.

18. In *M/s S.V.T. Spinning Mills Pvt. Ltd. &Ors.* (Supra), the High Court of Madras agreed with the learned CLB that the issues of locus of rights and interests of the Applicant in the Company Petition should be



decided in detail while hearing the main Company Petition and not as a preliminary issue of an applicant challenging such maintainability.

19. This Court in ***Umesh Kumar Baveja & Ors.*** (Supra), placing reliance on the judgments of the Madras High Court in ***M/sS.V.T. Spinning Mills (P) Ltd. vs. M. Palanisami*** (Supra) and of the Supreme Court in ***World Wide Agencies Pvt.Ltd., vs. Margarat. T. Desor*** (1990) 1 SCC 536, held that while considering maintainability of the Petition, construction which furthers the purpose intended to be fulfilled by such petitions filed against oppression and mismanagement and would facilitate the solution of problems in the case of oppression, has to be adopted. I may only quote from the said judgment, as under: -

18. In S.V.T. Spinning Mills (P) Ltd. v. M. Palanisami, (2009) 95 SCL 112, the Madras High Court held as under: -

"The applicability of sections 397 and 398 of the Companies Act is an equitable jurisdiction which is intended to protect the minority members of the company from any oppression and mismanagement at the hands of majority members. It is in that background, the Supreme Court has held that the wider meaning of the term 'member' should be given in the context of sections 397 and 398 of the Companies Act. On the facts and circumstances of the case, especially in the circumstance that the respondents filed a composite application, viz., the company petition seeking reliefs including the issuance of duplicate share certificates, I am of the considered view that the claim of the respondents herein in the company petition cannot be thrown out at the



threshold without even going into the merits of the issue raised by the respondents under the guise of deciding the question of maintainability as a preliminary issue."

It is significant to note that while arriving at the aforesaid view the Madras High Court referred to both the judgment of the single judge of the Karnataka High Court (supra) and the judgment of the Gujarat High Court (supra). It is also to be noted that the judgment of the Supreme Court referred to by the Madras High Court in the quoted paragraph of its judgment is that in World Wide Agencies v. Margarat T. Desor, (1990) 1 SCC 536. In the case before the Supreme Court; an objection was taken that in view of the specific provisions of Section 41(2), a member is one whose name is entered in the register of members. In that case, the member/shareholder of the company was one S. K. Desor. His name was entered in the register of members. On his death, his name continued to remain in the register. The names of his legal heirs had not been entered in the register when the applications were moved by them under sections 397-398 of the Act. The Supreme Court, following certain English authorities, opined that having regard to the scheme and purpose of section 397 and 398, it would be a proper construction to hold that the legal heirs of late S. K. Desor were members within the meaning of these sections. The overriding considerations, in the opinion of the Supreme Court were that this construction would further the purpose intended to be fulfilled by petitions filed against oppression and mismanagement and would facilitate solution of problems in case of oppression of the minorities when the member is dead and his heirs or legal representatives are yet to be substituted. It would be an equitable and just construction and therefore, it was held that it should be adhered to. It



seems to me that the ratio of the judgment of the Supreme Court, so far as sections 397 and 398 are concerned, is that given the facts and circumstances of a particular case, and having regard to the requirements of justice and equity in the background of the facts and circumstances of the case, it would be open to the Court to relax or overlook the condition imposed by section 41(2) and hold that the person bringing the action and who claims to be a member or shareholder of the company, need not be entered in the register of members in order to maintain the action.

19. It seems to me in light of the authorities cited above that the interpretation to be placed on section 41(2) vis-a-vis petitions filed seeking relief from oppression and mismanagement should be governed not strictly by the requirements of the sub-section, so long as in substance and effect the person complaining of acts of oppression and mismanagement has been recognised or treated as shareholder/member by the conduct of the company, and that in giving effect to the remedies against the grievance, considerations of equity and justice should be allowed to prevail.

20. Applying the above test to the facts of the present case, the Respondents merely produced the Register of Members before the learned CLB. It did not even file any application before the learned CLB challenging the maintainability of the Company Petition. The learned CLB placed reliance on the register of members so produced, without giving any opportunity to the Appellant to challenge the entries made therein. In fact, even a copy thereof was not supplied to the Appellant. Once it is accepted that the Appellant can also challenge the transfer of shareholding as being oppressive and as being intended only to defeat the



right of the Appellant to maintain his petition under Section 397/398 of the Act, an opportunity should have been granted to the Appellant to peruse the register of members and, if so advised, challenge the same in accordance with law. The Company Petition, on the averments made in the Petition itself, could not have been thrown out at the threshold without granting such opportunity to the Appellant. As noted hereinabove, the learned CLB should have considered if the transfer of shares was made after the filing of the first Company Petition by the Appellant in January, 2015 and atleast *prima facie* showed any *mala fide* intent of the Respondent no.1-Company to record such transfer only to defeat the right of the Appellant to maintain the Company Petition under Section 397/398 of the Act.

21. In view of the above, in my opinion, the learned CLB has acted in haste in dismissing the Company Petition filed by the Appellant without affording an adequate opportunity to the Appellant to satisfy the learned CLB on the maintainability of the Company Petition, by amending the Company Petition, if so required.

22. Accordingly, the Impugned Order dated 29.12.2015 is set aside and the Company Petition is restored back to its original number.

23. It is however, made clear that this court has not expressed any opinion on the Register of Members or any challenge that the appellant may lay to the transfer of shareholding recording in the Register of Members. These issues are left open to be considered by the appropriate forum in accordance with law.



24. There shall be no order as to costs.

NAVIN CHAWLA, J

JULY 29 , 2022/rv/DJ/Ais