(2010) 08 BOM CK 0009

In the Bombay High Court

Case No : Company Appeal No''s. 10 and 11 of 2009 and Company Application No''s. 61 and 62 of 2009

Crystal Island Park Private Limited	APPELLANT
Vs	
Mr. Ashok Chawla and Mr. Mark William Rodrigues Mr. Mark William Rodrigues through P.O.A. Mary Pereira Vs Mr. Ashok Chawla and Crystal Island Park Private Limited	RESPONDENT

Date of Decision : 13-08-2010

Acts Referred:
Companies Act, 1956 — Section 10F, 155, 235, 397, 398

Citation : (2010) 08 BOM CK 0009

Hon'ble Judges : A.S. Oka, J

Bench : Single Bench

Advocate : Sudipto Saikar, Ciccu Mukhopadhya, Abhijeet Sinha and M.S. Sonak, in Company Appeal No. 10/2009 and A.N.S. Nadkarni and H.D. Naik, in Company Appeal No. 11/2009, for the Appellant; O.S. Bajpai and J. Godinho, in Company Appeal Nos. 10, 11/2009, A.N.S. Nadkarni and H.D. Naik, in Company Appeal No. 10/2009 and Sudipto Saikar Ciccu Mukhopadhya, Abhijeet Sinha and M.S. Sonak for Respondent No. 2 in Company Appeal No. 11/2009, for the Respondent

Judgement

A.S. Oka, J.—These two appeals u/s 10F of the Companies Act, 1956 (hereinafter, referred to as "the said Act") take an exception to the Order dated 2nd July, 2009 passed by the learned Member of the Company Law Board, Principal Bench, New Delhi. In these two appeals, notice for final disposal was issued by this Court.

2. The appeals arise out of the Company Petition No. 61/2006 filed by the first respondent in these two appeals. The first respondent filed a petition under Sections 397 and 398, read with Sections 235, 402 and 403 of the said Act before the Company Law Board against the company M/s. Crystal Island Park Pvt. Ltd., (hereinafter, referred to as "the said Company") and one Mr. Marc William Rodrigues (hereinafter referred to as the said Marc Rodrigues). In the said Company Petition, the said Company filed Company Application No.

325/2006 for challenging the maintainability of the Company Petition. The said Marc Rodrigues filed Company Application No. 201/2009 in the said Company Petition for challenging the maintainability of the Company Petition. By the impugned Order, the learned Member of the Company Law Board held that the Company Petition was maintainable and that the first respondent in these appeals had requisite qualification u/s 399 of the said Act to maintain the Company Petition under Sections 397/397 of the said Act. Accordingly, Company Applications No. 325/2006 and 201/2009 were dismissed.

3. It will be necessary to briefly refer to the facts of the case. The said Company was registered and incorporated on 21st January, 1999. Vide order dated 17th February, 2006, passed by this Court, M/s. Zuari River Agrotech Pvt. Ltd., merged with the said Company. Prior to the merger, a Memorandum of Understanding (hereinafter referred to as "the MOU") dated 9th February, 2006 was executed by and between the first respondent and the said Mark Rodrigues. According to the case of the first respondent, as per the MOU, the share holding pattern of the first respondent and the said Mark Rodrigues was to be 50% each in the said Company. The first respondent has set out various terms and conditions of the said MOU. According to the first respondent, it was agreed that he would be the Chairman of the said Company and the said Mark Rodrigues would be the Managing Director.

4. According to the case of the first respondent, though his shareholding in the said Company ought to be 50% as per the said MOU, the same was mischievously reduced to 25.5 %. The first respondent issued a legal notice dated 8th May, 2006 to the said Mark Rodrigues by which the said Mark Rodrigues was called upon to appoint his father as a Conciliator or in the alternative, it was stated that the notice be construed as notice invoking arbitration clause under the MOU and the name of one Mr. Ajit Kerkar was suggested by the first respondent as the Arbitrator. It was pointed out in the Company Petition that the said Mark Rodrigues is the Managing Director of the said Company.

5. It is pointed out in the Company Petition by the first respondent that in the Company Petition decided by this Court by Order dated 17th February, 2006, the share holding of the said Mark Rodrigues is shown as 86.93 % and the share holding of the first respondent is shown as 13.07%. It is alleged that the said share holding shown is contrary to the terms of the MOU. It is pointed out in the annual return of the said Company submitted by the said Mark Rodrigues to the Registrar of Companies, the first respondent was shown to be holding 25.5 % of the total share of the said Company and whereas the said Mark Rodrigues was shown as holding 74.5 % of the total shares. It is contended in the Company Petition that the said Mark Rodrigues took undue advantage of the fact that the first respondent was a resident of Delhi and blocked the notices of the Company Petition No. 11/2005 filed in this Court. It is, therefore, contended that the first respondent could not raise any objections before this Court to the said Company

Petition. It is alleged in the Company Petition filed by the first respondent that there were several instances of mismanagement and oppression. It is alleged that the said Mark Rodrigues denied access to the petitioner to the documents and the books of accounts of the said Company. One of the prayers made in the Company Petition is that the forfeiture of shares/change of share holding of the first respondent be declared to be illegal. A direction is sought against the said Mark Rodrigues to transfer so much shares of the said Company to the first respondent, so that his holding will be 50%. A direction is sought against the said Mark Rodrigues to provide access to the first respondent to all the documents and books of accounts of the said Company. A direction is sought for holding an independent inquiry and investigation into the affairs of the said Company.

6. In Company Application No. 325/2006 filed by the said Company, a prayer is made for dismissing the Company Petition on the basis of preliminary objections. It was contended in the said application that an application u/s 397 of the said act can be made only by any member of the Company. It is submitted that the first respondent is neither a member nor a shareholder of the said Company. It is contended that the entire shareholding of the said Company has been acquired by M/s. Grandeur Real Estates Private Limited. It is contended that the first respondent suppressed the fact that he had sold all his shares of the said Company against receipt of agreed consideration paid in full and final settlement of the transfer of the said shares. It is submitted that the first respondent executed Share Transfer Deeds and handed over the same to M/s. Grandeur along with the original share certificates and that the transfer form along with the share certificates were lodged by M/s Grandeur with the said Company for transfer. It is stated in the application that the transfer was approved by the Board of the said Company. It is pointed out that the said Mark Rodrigues who is made the second respondent in the Company Petition is also neither a member nor a shareholder of the said Company. It was contended that the entire Company Petition proceeds on the footing that the said Mark Rodrigues has committed breach of the terms and conditions of the said MOU. It is contended in the application that the said Company is not a party to the MOU and the real dispute, if any, is between the first respondent and the said Mark Rodrigues. It is submitted that the allegations in the Company Petition are based on the disputes between the first respondent and the said Mark Rodrigues. It was stated that as per the Scheme of Amalgamation sanctioned by this Court, M/s. Zuari River Agrotech Pvt. Ltd., merged with the said Company and shareholdings of M/s. Zuari River Agrotech Pvt. Ltd. and said Company were accordingly apportioned amongst the shareholders of the said Company and M/s. Zuari River Agrotech Pvt. Ltd. On the basis of the sanctioned scheme of amalgamation, the shares of the said Company were apportioned in a manner that the shareholding of Mark Rodrigues was to the extent of 86%. A share certificate dated 22nd February, 2006 was issued in favour of the first respondent for 20,970 shares of the said Company. Reliance is placed on Minutes of Meeting of the Board of Directors of

the said Company held on 17th February, 2006 in which in the presence of the first respondent and the said Mark Rodrigues, the Board agreed to transfer the entire the shareholding of the said Company to M/s. Grandeur. In fact the transfer notices were issued by the first respondent and the said Mark Rodrigues in favour of M/s. Grandeur and in fact, the nominee of M/s. Grandeur was admitted as an additional Director of the said Company in the aforesaid meeting of the Board. The first respondent tendered his resignation and necessary Form 32 pursuant to the first respondent''s resignation was also filed. The first respondent''s shareholding was bought by M/s. Grandeur for a consideration of Rs. 1.51 crores, which was duly paid to the first respondent and a receipt for the sum of Rs. 1.51 crores has been issued by the first respondent. It is contended that as the first respondent was not a member or the shareholder of the said Company, he had no locus to file the petition.

7. Company Application No. 201/2009 was filed by the said Mark Rodrigues. The said application was for challenging the maintainability of the Company Petition. The said Mark Rodrigues adopted the objections raised by the said Company in Company Application No. 325/2006. It must be noted here that the first respondent filed a reply to the Company Application No. 325/2006. It was denied that the first respondent has transferred all his shares of the said Company in favour of M/s. Grandeur before filing of the Company Petition. It was contended that new shares were not issued on the basis of the said MOU after merger of M/s. Zuari River Agrotech Pvt. Ltd. It was contended that the first respondent continues to be one of the Directors of the said Company and, therefore, it cannot be said that he is neither a member nor shareholder of the said Company. It was submitted that the said Company should produce evidence regarding transfer of shares by the first respondent. It was contended by the first respondent that he was in possession of the share certificates which were issued for his shareholding in M/s. Zuari River Agrotech Pvt. Ltd. By the impugned order, both the applications raising preliminary objections have been rejected. The learned Member of the Company Law Board found that as per the own case of the present appellants, the first respondent was allotted 13% share. A prima facie finding was recorded that the order of amalgamation was passed by misleading this Court. Therefore, by the impugned order, Company Applications No. 325/2006 and 201/2009 were dismissed.

8. Learned Senior Counsel appearing for the appellant in Company Appeal No. 10/2009 has made extensive submissions. He pointed out that the first respondent had transferred his entire shareholding in the said Company and on the date of filing of the Company Petition he was not the shareholder of the said Company. He pointed out that the name of the first respondent did not appear in the statutory register of members, maintained by the said Company. On the date on which the Company Petition was filed, the first respondent was not shown as a member in the Register of Members. The learned Senior Counsel submitted that the documents showing transfer of all the shares of the said Company to the third party have been placed on record. The learned Senior Counsel appearing

for the Company submitted that the issue whether 13% shares of the first respondents were fraudulently transferred or not cannot be decided in the said Company Petition. He submitted that there is no application for rectification of the Register of membership. He submitted that the order of this Court sanctioning the Scheme of Amalgamation operates in rem. Therefore, the said order cannot be assailed in collateral proceedings. The learned Senior Counsel invited attention of this Court to the findings recorded by the learned Member of the Company Law Board. He pointed out that the learned Member of the Company Law Board has gone to the extent of holding that the fraud vitiates all acts, including the orders of this Court. He submitted that in any case, the entire grievance made in the Company Petition is as regards nonperformance of the terms and conditions of the MOU by the second respondent and the same is not covered by ambit of Sections 397/398 of the said Act. He submitted that the learned Member has gone to the extent of observing that the order of amalgamation of the companies passed by this Court stands vitiated by the acts done in a fraudulent manner. He submitted that the Company Law Board had no jurisdiction to hold that the order of this Court sanctioning the scheme of amalgamation stands vitiated by the fraud. The learned Senior Counsel, therefore, submitted that the inferences drawn by the learned Member of the Company Law Board are completely erroneous and the impugned order deserves to be quashed and set aside. The learned Senior Counsel submitted that the objection to the maintainability of the Company Petition has not been dealt with on merits. The learned Senior Counsel appearing for the said Company has placed reliance on various decisions of this Court and the Apex Court in support of his contentions.

9. Learned Senior Counsel appearing for the appellants in First Appeal No. 11/2009 invited my attention to the application dated 21st April, 2010. He pointed out that no order has been passed by the learned Member of the Company Law Board on the said application. He supported the submissions made by the learned Senior Counsel appearing for the appellant in Appeal No. 10/2009. He submitted that the Company Petition at the instance of the first respondent was not maintainable.

10. The learned Senior Counsel appearing for the first respondent in both the appeals submitted that whether the facts pleaded give rise to or constitute oppression of the minority, is a question which is essentially a question of fact and, therefore, at this stage, the said question cannot be decided. He submitted that an appeal u/s 10F of the said Act is available only on a substantial question of law. He submitted that the act of reducing a majority shareholder to minority shareholder by malafide acts of the company or by the Board of Directors has to be considered as an act of oppression against the said shareholder. He placed reliance on the decision of the Apex Court in the case of Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others, . He submitted that in a petition invoking Section 397 of the Act what is to be seen is whether the conduct is burdensome, harsh and wrongful. He submitted that in the present

case what is alleged is lack of fair dealing to a member. He placed reliance on a decision in the case of Banford Investment Ltd. v. Magadh Spun Pipe Ltd. 1998 Comp Cas 685 (CLB). He submitted that the main issue raised by the appellants in these appeals is that the first respondent was not a shareholder or a Member and his name was not appearing in the Register of Members. He submitted that the first respondent is still in possession of the shares. He submitted that it is an admitted position that at one point of time the first respondent was holding more than 13 % shares of the said Company. He submitted that the first respondent has still in his custody the original share certificates and an inquiry will have to be made by the Company Law Board, after ascertaining from the records whether the first respondent continues to be a member. He submitted that a fraud has been played by the appellants and that the purported transfer of the shares is an fraudulent act. He submitted that the fraud vitiates the transfer and as the first respondent was admittedly in possession of more than 13 % shares, he had locus to file the petition. He submitted that any judgment and order obtained by fraud is void and an issue of nullity can be raised even in collateral proceedings. He placed reliance on a decision of the Apex Court in the case of A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, and another decision of the Apex Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, . He submitted that the Company Law Board has not decided the petition on merits, but only prima facie findings are recorded for the purposes of determining the issue of maintainability of the Company Petition. He, therefore, submitted that no interference is called for on the merits and even on the ground that no substantial question of law is involved. The learned Senior Counsel appearing for the appellant submitted that the learned Member of the Company Law Board has gone to the extent of holding that the order of this Court in the amalgamation proceedings is null and void. He submitted that as this Court is a Court of Record, the Company Law Board has no jurisdiction to record such a finding. He submitted that the petition was not maintainable.

11. I have given careful consideration to the submissions. The petition filed by the first respondent is under Sections 397/398, read with Section 235, 402, and 403 of the said Act. The case made out in the petition, in short, is that M/s. Zuari River Agrotech Pvt. Ltd. merged with the said Company vide Order dated 17th February, 2006 passed by this Court. It is his contention that the said amalgamation took place on the basis of the MOU dated 9th February, 2006 executed by and between the first respondent and the said Mark Rodrigues. According to the case of the first respondent, he along with the said Mark Rodrigues were to hold 50% shares each in the said Company. According to the case of the first respondent he was holding 10,998 equity share of M/s. Zuari River Agrotech Pvt. Ltd. and the same was the shareholding of the said Mark Rodrigues. According to the case of the first respondent, as per the MOU dated 9th February, 2006, the first respondent was to become the Chairman and the said Mark Rodrigues was to become the Managing Director of the said Company.

The case made out in the petition is that the shareholding of the first respondent was reduced to 25.5 % and the said act of reduction was made mischievously. According to him, he had complied with the terms and conditions of the MOU dated 9th February, 2006.

12. The alleged instances of mismanagement and oppression have been set out in the petition. It is alleged that the shareholding pattern of the said Company after amalgamation was done with ulterior motive, without sanction of the Board Meeting and without the consent of the first respondent. It is alleged that in the annual return of the said Company submitted to the Registrar of Companies, it was shown that the first respondent was holding 25.50% shares out of the total shares of the said Company and the remaining shares were shown to have been held by the said Mark Rodrigues. It is alleged that there were only two Directors of the said Company. Change in shareholding pattern should have been only with the consent of the first respondent. It is alleged that the notices of amalgamation petition were blocked, taking undue advantage of the fact that the first respondent was resident of Delhi. It is alleged that the said Mark Rodrigues is not interested in the welfare and well-being of the said Company and his conduct shows lack of probity and fairness. Various prayers have been made, including a prayer for declaration that the change of shareholding pattern of the first respondent be declared as illegal. The second prayer is for a direction to the said Mark Rodrigues to transfer requisite shares to the first respondent for bringing the share holding of the first respondent to the level of 50%. Various directions have been sought such as an independent inquiry and investigation into the affairs of the said Company.

13. Now, it will be necessary to consider the preliminary objections raised by the said Company. It is contended that the first respondent is neither a member, nor a shareholder of the said Company. The second contention raised is that there is suppression of material fact that the entire shareholding of the said Company has been acquired by M/s. Grandeur. It is contended that the first respondent has sold all his shares of the said Company against receipt of agreed consideration for which share transfer deeds were duly executed and handed over to M/s. Grandeur along with share certificates. It is contended that M/s. Grandeur lodged transfer forms along with share certificates and transfer of the shares is approved by the Board of Directors of the said Company. It is contended that the allegations essentially made in the petition are against the said Mark Rodrigues. It is contended that in any case, the said Company is not a party to the MOU dated 9th February, 2006. It is pointed out that as per the scheme of amalgamation sanctioned by this Court, the shares of the said Company were apportioned between the first respondent and the said Mark Rodrigues. It is stated that the first respondent got 20,970 shares of Rs. 100/- each and the said Mark Rodrigues got 29,030 shares. It is stated that the shareholding of the first respondent was 14 % pursuant to the scheme of amalgamation. Reliance is placed on 42nd Board Meeting held on 17th February, 2006 which was allegedly attended by the first respondent, in which the Board

agreed to transfer the entire shareholding of the said Company to M/s. Grandeur. It is contended that the shareholding of the first respondent was bought by M/s. Grandeur and the entire consideration of 1.51 crores was paid to the first respondent, for which a receipt has been issued by the first respondent.

14. A reply was filed to the said application by the first respondent. It was pointed out in the reply that the said company is relying upon forged and fabricated documents and therefore, an application for production, discovery and inspection of the said fabricated documents has been made by the first respondent in the pending Company Petition. It was denied that the first respondent has sold the shares to the Grandeur Real Estate Company Pvt. Ltd. before filing the Company Petition. It is submitted that after the merger of the two companies and in terms of the MOU, no new shares were issued and therefore there is no question of transferring the shares in favour of anybody much less the said M/s. Grandur. It is submitted that there is no evidence of transfer of the shares. It is submitted that no documentary evidence has been produced by the said company to show transfer of shares. It is contended that the first respondent had signed certain blank papers in good faith and trust which were used by the said Mark Rodrigues. It is submitted that the document showing the resolution passed by the Board of Directors of transferring the shares is false and fabricated. The first respondent denied various averments made in the application filed by the said company. A rejoinder was filed by the said company in which it was contended that the cashier order was drawn by HSBC in favour of the first respondent from the account of the Grandeur Real Estate Company Pvt. Ltd. in the sum of Rs. 1,51,00,000/-. A reliance was placed in the rejoinder on a statement dated 26th September 2006 issued by the said Bank confirming clearance of the cashier order in favour of the first respondent. Various documents concerning transfer of the shares have been annexed to the application of the said company as well as the said rejoinder.

15. The first issue is whether the petition under Sections 397 or 398 of the said Act was not maintainable on the ground that the first respondent was not a member of the said company on the date of filing of the Company Petition. In support of the said contention, reliance has been placed by the said company on the resolution of the Board Of Directors showing the transfer of the shares of the company to the Grandeur Real Estate Company Pvt. Ltd. A reliance is placed on the share transfer forms signed by the first respondent in respect of the shares of the said company held by him. A reliance is also placed on a receipt showing that the first respondent has received a sum of Rs. 1,51,00,000/- from the Grandeur Real Estate Company Pvt. Ltd. The contention of the first respondent is that the said documents are fraudulent and in fact there is no transfer of the shares. It is not in dispute that on the date on which the Company Petition was filed, the name of the first respondent does not appear as a shareholder of the said Company in the requiste register. There is no difficulty in holding that the Company Petition filed by the first respondent will be maintainable provided the first respondent is shown as a member in the register of the said Company. Only

a member cannot file a petition under Sections 397 and 398 of the said Act. The category of members listed in Section 399 of the said Act have right to apply under Sections 397 or 398. The learned Senior Counsel appearing for the first respondent relied upon a decision of the Company Law Board in the case of (1998) 93 CompCas 70 and contended that the possession of share certificates is prima facie proof of being a shareholder. The submission was that the first respondent was still possessing the share certificates showing 13% holding by him. The contention of the first respondent is that the documents showing transfer of the shares held by the first respondent are fraudulent including the receipt issued by the first respondent evidencing the payment of consideration. The finding recorded in the impugned order is that the first respondent''s claim to shares can be considered under Sections 397 and 398 as the first respondent was admittedly holding 13% shares in the said Company which are now shown as transferred. In paragraph 84 of the impugned judgment and order it is recorded that the first respondent is no longer shown as shareholder of the said Company. After holding this, in the impugned order it is observed that the first respondent has made out a prima facie case of manipulation. It is observed that on the eve of merger of the companies, the first respondent had 13% shares and the transfer of the said shares is disputed by the first respondent. It was observed that notwithstanding the fact that the first respondent is not shown as a shareholder, it is not necessary for the first respondent to apply for rectification. It was observed that the claim of the first respondent can be looked into by the Company Law Board. It was observed that merely because the aggrieved person has more than one remedies, including a Civil Suit, it does not mean that such a person should be driven to first exhaust the remedy in Civil Court or any other forum. It was observed that the first respondent lacked requisite knowledge as he was denied access to the statutory records and documents. In the impugned order, it is noted that the case of the first respondent is that there has been a fabrication of records.

16. One factual aspect goes to the root of the matter. From the impugned order it appears that it is an admitted position that on the date on which the said Company Petition was filed, the name of the first respondent was no more shown as a shareholder. The learned Senior Counsel appearing for the first respondent submitted that at one point of time, admittedly the first respondent was holding 13% shares and therefore the action of showing transfer of the said shares itself amounts to oppression of majority. It must be noted here that unless the first respondent was a member of the said Company on the date of filing of the Company Petition, the Petition cannot be legally maintained. Assuming that fraudulent transfer of shareholding of the petitioner in such manner can amount to oppression of minority, it must be noted here that in the Company Petition filed by the first respondent, there is not even an allegation that the alleged transfer of the shares is fraudulent or illegal. In fact in the Company Petition, the fact that all the shareholding of the first respondent was already shown as transferred was not disclosed. There is no challenge in the Company Petition to

the transfer of all the shares held by the first respondent. The Company Petition proceeds on the erroneous footing that the first respondent was shown as a member in the register maintained by the company on the date of filing of the said Company Petition. Even assuming that in the petition under Sections 397/398 of the said Act, the Company Law Board can go into the question of fraudulent transfer of the shares of the petitioner therein, in the present case, in the Company Petition filed by the first respondent there is no challenge to the alleged fraudulent transfer of the shares held by the first respondent which transfer is shown prior to institution of the petition. There is prima facie material on record to show receipt of consideration by the first respondent by a cheque. Thus, there is no challenge in the Company Petition filed by the first respondent to the alleged fraudulent transfer of his entire shareholding prior to filing of the Company Petition. Even assuming that the jurisdiction to decide the issue of rectification of membership vests in the Company Law Board in the petition under Sections 397 and 398 of the said Act, in the present case the Company Law Board will not be entitled to do so inasmuch as there is no challenge in the said petition to the alleged fraudulent transfer of the shares. On this aspect it will be necessary to consider a decision of the Gujarat High Court in the case of Gulabrai Kalidas Naik and Others Vs. Laxmidas Lallubhai Patel and Others . This was a case where the petitioners filed a composite petition under Sections 397 and 398 as well as u/s 155 of the said Act. In the said decision, the Gujarat High Court held thus:

Prima facie, reading these sections together, it becomes clear that in order to acquire the status of a member of a company, name of the person seeking to be a member must be entered in the register of members, and only then he acquires the status of a member of a company. It is obligatory upon the company to maintain a register of its members. Now, if a person claims to be a member of the company, and either his name is not entered in the register, or having been once entered in the register, is, without sufficient cause, omitted therefrom, then the person aggrieved or any member of the company or the company may apply to the court for rectification of the register. Such an application can be made, either by a person aggrieved, or by any other member of the company, or company itself for rectification of the register u/s 155. In such an application, the court will have the power to decide any question relating to the title of any person, who is a party to the application, to have his name entered in or omitted from the register, whether the question arises between the members or alleged members or between members or alleged members on the one hand and the company on the other hand. And the court will generally have power to decide any question, which it is necessary to expedient to decide, in connection with the application for rectification. Section 155 thus provides a summary remedy to a person who complains that his name has not been entered or has been wrongly omitted. It also enables the member to complain and seek rectification in respect of the name either wrongly entered or wrongly omitted in respect of some other person. It is true that when complicated question of title arises, it would be open to the company court to direct the parties to a civil suit to establish their title. But it would equally be open to the court having jurisdiction under the Companies Act to decide the question of title to a share, in order to ascertain, whether the person claiming to be a member is in fact a member or not and whether his name has been rightly entered or wrongly omitted. But till the name is entered, it could not be said that he can enjoy the powers of a member conferred by the Companies Act on the members of a company....

One can thus complain of oppression or conduct prejudicial to public interest, if he is member of the company....

Therefore, it is crystal clear that complaint must come forth from a member and it must be a complaint to be made to the court by a member. The prerequisite for invoking jurisdiction under Sections 397 and 398, which has been statutorily provided for in Section 399(1), is that the complaint must come forth from a member. One has to be a member before he can complain of oppression as a member of the company.

Now, if the petitioner''s title to the membership is in dispute, and he has to seek relief u/s 155 for getting his name placed on the register of members to clothe himself with the rights of a member, it would be improper, till that dispute is decided, to permit such a person to maintain a petition under Sections 397 and 398. If the petitioners'' petition u/s 155 fails, obviously, they cannot maintain a petition under Sections 397 and 398, because they are not members. Now, it may be that in a given case, the petitioners invoking court''s jurisdiction under Sections 397 and 398 are in a position to show that even though their names are not to be found in the register of members of the company, yet they have such an indisputable and unchallengeable title to the membership of the company that court may entertain a petition at their instance. But, in the facts of this case, the petitioners themselves admit that they themselves signed blank transfer forms pursuant to a certain understanding with the respondent No. 4 and that respondent Nos. 1, 2, 3 and 8 by a subterfuge have taken their shares from respondent No. 4. It is true that the share certificates are with the petitioners and their associates. But the fact remains that as the record stands today the shares of the petitioners and their associates were transferred from their names to the name of the respondent No. 4 and respondent No. 4, in turn, transferred the shares through his constituted attorneys to the respondents No. 3 and 8. Now, the petitioners will have to satisfy the court that they have not lost their membership, despite the fact that their shares have been transferred to the name of the respondent No. 4 in the first instance, and then to the names of the respondent Nos. 3 and 8. That question is yet to be decided. It would be, therefore, premature at this stage to admit the petition under Sections 397 and 398 at the instance of such petitioners.

(underlined supplied)

Therefore, the Gujarat High Court proceeded to admit the petition to the extent of relief of rectification of membership and the petition for the purpose of admission of reliefs under Sections 397 and 398 was deferred till the prayer for rectification was decided. There is one more decision which is relevant on this aspect. This Court in the case of National Insurance Co. Ltd. v. Glaxo India Ltd. [1999] 2 Com L.J 205 (Bom), held that it is well settled that insofar as the matters of rectification are concerned it is the Company Court alone which would have jurisdiction. However, it was held that, if issues arise whether the applicant is the owner of the shares or whether there is a fraud or forgery in holding of shares, such issues will be beyond the jurisdiction of the Company Court and will have to be decided by the Civil Court.

17. As narrated earlier, in the present case in the petition under Sections 397 and 398, there is no challenge to the transfer of the entire shareholding of the first respondent either on the ground that the same is illegal or is vitiated by fraud. There is no prayer for rectification. Therefore, till the first respondent establishes that he was a member of the said Company on the date of institution of the Company Petition, the said petition cannot be maintained. In the circumstances, it is not necessary to go into other questions such as whether the Company Law board can grant reliefs prayed in the Company Petition. The said questions are kept open which will have to be decided on merits at the time of final hearing of the Company Petition. Unless the first respondent establishes that he was a member and was qualified u/s 399 of the said Act to maintain a Petition under Sections 397 and 398 of the said Act, the other issues cannot be dealt with. On this aspect, the finding of the Company Law Board that the said Board can go into the question of fraudulent transfer of shares is illegal inasmuch as in the Company Petition there is no challenge to the transfer of the shareholding of the first respondent. In absence of any such challenge, even assuming that the Company Law Board has jurisdiction to go into the question of fraudulent transfer of shares, the Company Law Board could not have decided the said question. Hence, the said finding recorded by the Company Law Board is perverse inasmuch as there is absolutely no basis for the said finding. That is how a question of law clearly arises and in an appeal u/s 10F, this Court will have to interfere.

18. However, the said Company Petition need not be dismissed as it is always open for the first respondent to file appropriate proceedings or to take appropriate steps for challenging the alleged fraudulent transfer of the shares and for establishing that on the date on which the Company Petition was filed, he was a member of the said Company and that he was qualified to file a petition. Therefore, time of twelve weeks deserves to be granted to the first respondent to file appropriate proceedings or to take appropriate steps. Till the expiry of period of twelve weeks, the proceedings of the Company Petition will remain stayed. If such proceedings are filed, the hearing of the Company Petition will remain stayed till conclusion of the said proceedings. If no such proceedings are filed within the stipulated period of twelve weeks, the Company Law Board shall dismiss the Company Petition as not maintainable. All contentions of the parties

as regards the alleged transfer of the entire shareholding of the first respondent are expressly kept open.

19. Hence, the appeals are disposed of by passing the following order:

(i) The impugned order is set aside.

(ii) It is held, in the facts of the case, that unless the first respondent establishes that he was a member of the said Company on the date of filing the Company Petition u/s 397/398 of the Companies Act, 1956, the said petition cannot be entertained.

(iii) It will be open for the first respondent to file appropriate proceedings for rectification or for establishing his membership/shareholding of the said Company.

(iv) The Company Petition filed by the first respondent will remain stayed till disposal of such proceedings.

(v) If such proceedings is not filed within 12 weeks from today, the Company Petition shall stand dismissed.

(vi) The Company Applications No. 61 and 62 of 2009 stand disposed of.

(vii) The appeals are partly allowed on above terms.