

(2013) 04 MAD CK 0013

In the Madras High Court

Case No : Comp. Appeal No. 1 of 2013 and M.P. No. 1 of 2013

Kamal Babbar

APPELLANT

Vs

M/s. Aruna Hotels Ltd. and Others

RESPONDENT

Date of Decision : 08-04-2013

Acts Referred:

Companies Act, 1956 — Section 111A, 235, 237, 397, 398

Citation : (2013) 115 CLA 145 : (2013) 178 CompCas 17 : (2014) 1 CompLJ 540

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Advocate : Dhananjay for M/s. Chennai Law Associates, for the Appellant; P.S. Raman, S.C., for Mr. T.K. Bhaskar for R1 to R3, for the Respondent

Final Decision : Dismissed

Judgement

Vinod K. Sharma, J.—This appeal is directed against the order dated 24.12.2012 passed by the learned Company Law Board, Chennai

Branch in C.A. No. 194 of 2012 in C.P. No. 86 of 2012. Mr. Kamal Babbar, S/o. Late Mr. Ram Prakash Babbar filed Company Petition u/s

111A, 235, 237, 397, 398, 402 and 403 of the Companies Act, 1956, praying therein as under:

i) To implement the resolutions passed by the Board of Directors at the meetings held on the 30th January 2009 and the circular resolution of 12th

March 2012 and to direct the Company to rectify the Register of Members of the Company duly recording the shares issued thereby;

ii) To appoint an reputed, independent from of auditors to carry out a special audit of the books of accounts of the Company to ascertain the

amount drawn in excess of the remuneration approved and to determine the extent of loss occasioned to the Company as a result of acts of

misfeasance and misapplication of funds and properties of the Company.

iii) To surcharge each of the Respondents No. 2, 3 and 7 for the loss caused by each of them to the Company and to direct them to make good

the losses;

iv) To recast the accounts of the Company on the basis of findings of the independent audit firm and adopt the revised accounts at a general

meeting to be called specifically for the said purpose;

v) To declare that Respondents No. 2 and 3 have acted in an oppressive manner, contravened their fiduciary duties and in a manner prejudicial to

the interests of the Company and to declare that Respondent No. 2 and 3 have lost their directorship pursuant to operation of law as they have

failed to disclose their interest in relation to several related party transactions;

vi) To declare that Respondents No. 5 and 6 have not acted in a manner expected of them as independent directors.

vii) To reconstitute the Board of Directors of the Company with at least two board seats to the Petitioner and further and reputed professional

directors as the company is a listed company with a lot of public interest;

viii) To direct Respondent No. 8 to clear all encumbrances and convey the property being the 2nd floor of the annex building to the Company;

ix) That such further orders may be passed as the Hon''ble Bench may deem fit in order to render justice in the interests of Respondent No. 1 and

to provide adequate and necessary relief to the aggrieved Petitioner.

2. On notice, respondents/applicants filed C.A. No. 194 of 2012 in C.P. No. 86 of 2012 under Regulation 44 of the Company Law Board

Regulations, 1991 to dismiss the company petition as not maintainable. It was the submission of the respondents/applicants, that the company

petition filed by Mr. Kamal Babbar, was not maintainable, as the 1st respondent/1st applicant did not fulfill the criteria for eligibility to file or

maintain the petition.

3. That the authorized share capital of the 1st applicant company M/s. Aruna Hotels Limited, is Rs. 32,00,00,000/- (Rupees Thirty Two Crores

only) divided into 2,40,00,000 equity shares of Rs. 10/- each and 8,00,000 redeemable cumulative preference shares of Rs. 100/- each. The total

paid up share capital of the 1st applicant company is as under:

S.No. Types of Shares No. of Shares Amount (in Rs.)

1. Equity Shares of Rs. 10/- each (There 90,00,000 9,00,00,000(2,13,000)

are calls in arrears of an amount of Rs.

2,13,000 as at 31.03.2011) 8,97,87,000

2. 14% Redeemable Cumulative 60,000 60,00,000

Preference Shares Rs. 100/- each

3. 17.5% Redeemable Cumul Preference 50,000 50,00,000

Shares of Rs. 100/- each

4. 16.5% Redeemable CumulPref Shares 2,00,000 2,00,00,000

of Rs. 100/- each

Grand Total of paid up share capital (not excluding the calls in 12,10,00,000
arrears)

Net paid up Share Capital (excluding the calls in arrears) 12,07,87,000

4. It was the case of respondents/applicants, that the above mentioned 2,00,000
(16.5%) Redeemable Cumulative Preference Shares of Rs. 100/-

each, amounting to Rs. 2 Crores, were issued to PNB Capital Market Services
Limited ("PNB Cap") pursuant to the loan of Rs. 2 Crores

provided by Punjab National Bank. That though these shares were eligible for
redemption in 1997, it has not been redeemed and PNB Cap

continued to hold the said preference shares even as of date.

5. The stand of respondents/applicants was, that by virtue of Section 80 of the
Companies Act, 1956, the preference shares can be redeemed only

out of the profits of the company or out of proceeds of fresh issue of shares for
the purpose of redemption.

6. In 2005, the 1st applicant company, being a loss making entity, was unable to
redeem the shares in 1997, because it had no profits, nor could it

make any fresh issue of shares.

7. Punjab National Bank, being the creditor of the 1st applicant company, advised
that the 1st applicant company should pay Rs. 2,00,00,000/-

(Rupees Two Crores only) to PNP Capital Market Services Company as loan. The
request was accepted and the company paid Rs.

2,00,00,000/- (Rupees Two Crores only) to PNB in 1998-1999 and since then it
was accounted as "Loans and Advances" in the books of the

1st applicant company.

8. It was pleaded that perusal of balance sheet of the company shows, that the said preference shares have not been redeemed and are still shown

as part of the share capital schedule and the Asset side the schedule of loans and advances includes the above amount of Rs. 2,00,00,000/-

(Rupees Two Crores only). The case therefore was, that the stand of 1st petitioner/respondent, that 2,00,000 Redeemable Cumulative Preference

Shares, already stood redeemed, was not correct. In the application, it was pleaded, that 1st respondent/petitioner did not fulfil the criteria to

maintain the petitioner u/s 399 of the Companies Act. The application was therefore claimed to be an attempt to harass the applicants/respondents

with malafide intention.

9. It was the positive stand of the respondents/applicants, that Mr. Kamal Babbar, petitioner in C.P. 86 of 2012 was the signatory to the audited

balance sheets, which were being questioned by the petitioner. The audited balance sheets for the years 2008-2009, 2009-2010 and 2010-2011

were signed by Mr. Kamal Babbar.

10. The stand of the respondents/applicants before the Company Law Board was, that Mr. Kamal Babbar holds 12,00,000 equity shares of Rs.

10/- each, which aggregates to 9.9348% of the paid up share capital of the company, which is less than statutory 10% as stipulated u/s 399 of the

Act to maintain the present petition.

11. The application was opposed by the appellant, by contending that the issue with regard to redemption of preference shares required detailed

enquiry by going into books of accounts, records and documents, therefore, the company petition cannot be dismissed in limine, as submitted by

the respondents herein.

12. It was also the stand of Mr. Kamal Babbar, that signing of financial statements of the company for the financial year 2009-2010 and 2010-

2011 will not disentitle him to invoke the jurisdiction of learned Company Law board, as he came to know about the diabolic fraud of the

respondents, when he had to interact with Punjab National Bank in response to the notice under the SARFAESI Act.

13. It was submitted, that Mr. Kamal Babbar became a Director of company in 2008 and Joint-Managing Director in the year 2010. He was

denied access to all crucial books of accounts, which were exclusively retained by Mr. M. Sivaram in his office, labelled and named as corporate

accounts, which included all the activities of the Company. Mr. Kamal Babbar, as Joint-Managing Director, had only limited access to the

accounts relating to day-to-day functioning of the hotel and its management, that too on repeated protests by him.

14. It was pleaded, that respondent no. 2 had instructed the accounts department to merge the corporate accounts into the books of hotel

accounts only in the year 2011. Therefore, the question whether the preference shares were redeemed or not is basically a fact, that could be

derived from records of the company.

15. It was also the case, set up by the appellant, that the petitioner possesses indefeasible right to get 71 Lakh shares, therefore, would be entitled

to maintain the petition u/s 399 of the Act. The stand therefore was, that for considering the application u/s 399, if the books of accounts are

mechanically examined, then the very purpose of the legislative enactment of Sections 397 and 398 of the Act would stand defeated.

16. It was the case of appellant herein, that in the Board Meeting, which is under challenge in C.A. No. 189 of 2012, the respondents have

surreptitiously manipulated the entry relating to share application money, as it is highly intriguing to know as to how share application money could

be unilaterally transferred to unsecured loan account. Secondly, the company petition seeks a direction to the company to file its Annual Returns

for the last six years. Furthermore, according to law, a Company is required to furnish a complete list of all its shareholders once in five years,

which the company has not complied with.

17. The audited financial statement as on 31.03.2006, showed, that 2,00,000 preference shares were issued on 15.12.1995, which were

redeemable within 15 months from the date of issue, therefore, the preference shares ought to have been redeemed in 1997. It is the admission of

the respondents, that some adjustment was done with PNB Capital Market Services Limited, as a result of which technically redemption had taken

place. Apart from this, the appellant also got necessary clarification from the chartered accountants of the company in response to the request

dated 07.02.2012, wherein it was confirmed that preference shares held by PNB

Capital Market Services Limited, has been redeemed, but only due to paucity of profit, it was not shown as redeemed and was reflected as loans and advances.

18. It was stated, that it was wrong that the company granted a loan of Rs. 2,00,00,000/- (Rupees Two Crores only) to PNB Capital Market

Services Limited. The stand of the applicants/respondents, that the petitioner holds 9.93% of the capital, therefore, would be injustice to the appellant.

19. Learned Company Law Board held, that to maintain petition under Sections 397 and 398, the pre-requisite is, that the member should hold

not less than 1/10th of the issued share capital, and further that, the applicants should have paid all calls and other sums due on their shares.

Learned Company Law Board held, that admittedly the company is a public listed company having more than 20,000 shareholders and the

company petition was filed by a single shareholder, therefore, it did not meet the criteria, that there must be not less than 100 members or not less

than 1/10th of its members.

20. It was further held, that in order to maintain the petition, the appellant was to show, that he held not less than 1/10th of the issued share capital

with fully paid calls and other sums due. It was held, that shares held by the appellant were fully paid, but as the net paid up share capital of the

company was Rs. 12,07,87,000/- (Rupees Twelve Crores Seven Lakhs and Eighty Seven Thousand only). Therefore, in order to maintain the

petition by any member or members, 1/10th of share capital was required, i.e. 1,20,78,700/- (Rupees One Crore Twenty Lakhs Seventy Eight

Thousand and Seven Hundred only), whereas the 1st petitioner/appellant was holding 12,00,000 equity shares of Rs. 10/- each, amounting to Rs.

1,20,00,000/- (Rupees One Crore and Twenty Lakhs only), which was less than 1/10th of required paid up share capital.

21. It was also held by the learned Company Law Board, that the appellant was seeking a direction to implement the circular resolution dated

12.03.2012, whereby the Board of Directors had consented to issue and allot 57,14,285 equity shares at an issue price of Rs. 17.50 per share at

a face value of Rs. 10/- + premium of Rs. 7.50/- share, therefore, with these shares the appellant fulfills the eligibility u/s 399 of the Companies

Act, was not accepted, on the ground, that though paid up share capital of the company was established by producing sufficient material evidence

on record, based on information sought from the Registrar of Companies, Tamil Nadu, as independent evidence.

22. It was in response to the letter of the learned Company Law Board, that the balance sheets of the company for the years 2006-2007, 2008-

2009 and 2009-2010 and schedule of share capital for the year 2010-2011, were placed before the learned Company Law Board, whereby the

paid up share capital of the company was shown as Rs. 12,07,87,000/- (Rupees Twelve Crores Seven Lakhs and Eighty Seven Thousand only),

which was same as per the records available with Bench.

23. It was held, that the appellant holds only 12,00,000 shares of Rs. 10/- each, which was less than 1/10th of the issued, paid up share capital of

the company, and held, that the petition was not maintainable.

24. The learned Company Law Board also held, that Mr. Kamal Babbar, appellant himself had signed the balance sheet and profit and loss

account for the year ended as on 31.03.2011, therefore, was aware of paid up capital of the company. It was further held, that the appellant was

also aware, that the preferential shares issued to the Punjab National Bank had not been redeemed and were shown as part of the share capital.

The mere petition to seek implementation of circular resolution did not give right to maintain petition under Sections 397 and 398, because of bar

u/s 399.

25. The learned Company Law Board further held, that it was not the case of appellant, that due to allotment of share by company, his share

holdings were diluted to defeat the petition. Consequently, application moved by the respondents were allowed and the company petition C.P. No.

86 of 2012 was ordered to be dismissed as not maintainable.

26. Learned counsel for the appellant vehemently contended, that the impugned judgment of the learned Company Law Board cannot be sustained

in law, as it has failed to notice, that the stand of respondent company was such, which defeated the rights of minority shareholders, as inspite of

passing of resolution by the Board of Directors in allotting the shares, no further steps were taken to actually allocate the shares, though the money

stood paid by the appellant.

27. However, at the time of argument learned counsel for the appellant fairly admitted, that so far, shares have not been allotted, as necessary

formalities required to be fulfilled before actual shares are allotted, include statutory permission from the SEBI for allotment of preferential shares.

28. In support of the contention, that the appellant is entitled to maintain the petition, reliance was placed by the learned counsel for the appellant

on the judgment of the Hon'ble Karnataka High Court in Mr. Vijayan Rajes and Mrs. Madhumathi, V. Rajes Vs. M.S.P. Plantations Private

Limited, wherein it has been held as under:

31. Though the Company Law Board did dismiss the petition, it is not precisely on the ground that the petition itself was not tenable, but only after

examining the questions relating to the validity of the redemption process and as a consequence the petitioners being no more members thereafter

i.e. On and after 9.3.1996, they ceased to be members and therefore a petition presented u/s 399 of the Act was held not maintainable at the

instance of the petitioners.

32. The reasoning given by the Company Law Board does not appeal to us. If the finding is to be that the persons presenting the petition do not

qualify for presenting a petition u/s 399 of the Act, no further question arises and the petition was to be dismissed at the threshold. But the

Company Law Board has viewed the working of the Section 399 of the Act in the converse way, which is not a proper understanding of the

provisions of Section 399. But, on authority, it has been established that for the purpose of examining as to whether the petitioning members qualify

for maintaining a petition u/s 399 of the Act, the question to be looked into is as to whether the petitioners constitute 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 should be

looked into in a technical way, it could defeat the very purpose of the legislative enactment of Sections 397 and 398 of the Act, as the overbearing

majority shareholders can simply by highhanded action or even for other purpose and by oppressive methods, dismember minority shareholders

and leave them with no remedies, as the dismembered minority shareholders technically do not qualify for maintaining a petition u/s 399 of the Act,

being not member at all. As the minority shareholders will be complaining only

after the acts occurred and when they have been removed from the membership of the company, the understanding and interpretation to be given to Section 399 is only so as to Author the object of relief to be given in a situation governed by Sections 397 and 398 of the Act and not to foreclose the options to an aggrieved person and to deny the very relief sought to be extended to a complaining minority shareholder/s envisaged under Sections 397 and 398 of the Act.

29. On consideration, I find that this judgment has no application to the facts of the present case. It is not the case where shareholding of appellant has been diluted after acts of complaint, so as to hold that company petition was competent, rather it is admitted, that there was no reduction in share capital.

30. The case of appellant on the other hand was, that the appellant are entitled to allotment of additional shares for which resolution of Board stood passed. The prayer in fact was to implement the said decision.

31. It was further not disputed, that the appellant did not have 10% of the paid up capital in the company on the date of filing of the application.

32. Therefore, this Court finds that there is no error in the findings of the learned Company Law Board in holding, that the petition under Sections 397 and 398 was not maintainable, as the petitioning credibility on the date of filing of petition or on the date of act complained off, did not have 1/10th of the paid up share capital.

33. It was also vehemently contended, by the learned counsel for the appellant, that to maintain petition under Sections 397 and 398, it is always not necessary that the petitioners name should be in the Register of Members, as the term Member appearing in Sections 397 to 399 should be understood in the context in which it is used, therefore, merely because name of petitioner is not entered in the Register of Members qua additional shares to be allotted could not be the ground to reject his petition, as the question whether a person is a member or not depends on the circumstances of each case, which could be proved, if the petition was heard on merit.

34. However, this contention of the learned counsel for the appellant cannot be accepted. It is not the case where the stand is that shares have been allotted to the appellant and his name not entered. It was admitted by the

learned counsel for the appellant, that the procedure for allotment was not complete. The letter dated 16.08.2012 on which strong reliance was placed by the learned counsel for the appellant itself showed, that the shares were issued to the appellant only after approval from the AGM and on acceptance of request made to the appellant to waive claim of interest for the financial year 2011-2012.

35. This letter further showed, that the process of allotment was not complete, as the approval of AGM and acceptance of resolution by statutory authority was still required. The appellant, therefore, cannot take any advantage or benefit of resolution passed by the Board of Directors to contend, that he holds 1/10th of share capital to maintain this petition.

36. The remedy to enforce the contract was available to the appellant in the Civil Court, and not before the learned Company Law Board for want of eligibility u/s 399 of the Companies Act, which is mandatory.

37. The second contention of the learned counsel for the appellant was that it is the admitted case, that a sum of Rs. 2,00,00,000/- (Rupees Two Crores only) has been received by the PNB Capital Market Services Limited ("PNB Cap") for allotment of 2,00,000 preferential shares, therefore, this amount was required to be deleted from the share capital held by the company. Therefore, once this amount was deleted from the paid up share capital, then the shareholdings of the appellant company was more than 1/10th on the date of filing of the petition, also cannot be accepted, as admittedly appellant was party to balance sheet of the company showing this amount as loan to the Bank.

38. The contention of the learned counsel for the appellant, that 2,00,000 lakhs preferential shares stood redeemed by PNB Capital Market Services Limited ("PNB Cap"), as admittedly sum of Rs. 2,00,000/- (Rupees Two Lakhs only) was paid back also cannot be accepted, in view of the statutory bar under the Companies Act, stipulating that preferential share can only be redeemed out of profits or by allotment of shares.

39. Admittedly, the company did not have profit to redeem the shares and it was for this reason, that the amount was shown as loan, and showing that the Bank holds 2,00,000 preferential shares. The appellant by his own conduct was estopped from challenging this arrangement for the reason, that it is not disputed that the appellant himself was signatory to signing

of the balance sheet of the company, showing that the PNB Capital Market Services Limited ("PNB Cap") to be holding 2,00,000 preferential shares, and the amount paid to the Bank as loan advance. For the reasons recorded, finding no merit in this appeal, it is ordered to be dismissed. No costs. M.P. is closed.