
(2010) 07 KAR CK 0043
In the Karnataka High Court
Case No : U.S.A. No. 46 of 2009

Miss Chandra Pardhanani, Mrs Man1 Pardhanani (a. Mani
Hariradamani) Rajashri Co-operative Housing Ltd. and M B
Pardhanani Rajashri Co-operative Housing Ltd. APPELLANT

Vs

Mac Charles (India) Ltd. and Sri. C.B. Pardhanani Chairman RESPONDENT
Mac Charles (India) Ltd.

Date of Decision : 15-07-2010

Acts Referred:

Companies Act, 1956 — Section 397, 398

Citation : (2010) 07 KAR CK 0043

Hon'ble Judges : N. Kumar, J;B.V. Nagarathna, J

Bench : Division Bench

**Advocate : Udaya Holla, for Holla and Holla, for the Appellant; P.B. Appaiah, for
R1 and R2, for the Respondent**

Final Decision : Dismissed

Judgement

N. Kumar, J.—This appeal is against the order passed by the learned Company Judge holding that the petition under Sections 397 and 398 of the Companies Act, 1956 (hereinafter, referred to as "the Act", for short) is not maintainable as the Appellant do not hold 10% of the shares out of the total shares issued by the company.

2. The first Respondent is a public limited company incorporated on 28.9.1979, having its registered office at No. 28, Sankey Road, Bangalore-560 052. The company is carrying on its business of hotel, restaurant room and lodging house keepers, licensed victuallers, wine, beer and spirit merchants, brewers, masters, distillers and manufacturers of aerated mineral and artificial waters and other drinks, purveyors caterers for public amusements and other objects as set out in the memorandum of association of the Company filed with the Registrar of Companies.

3. According to the Appellants, the authorized capital of the company is Rs. 8.00

crores divided into 80,00,000 shares of Rs. 10/- each and the issued subscribed (sic) paid up capital of the company is Rs. 4.87 crores divided (sic) 70,000 equity shares of Rs. 10/- each. The Appellants are the shareholders and contributories of the (sic) first and second Appellants hold 200 equity (sic) each in the compact in his individual name (part value of Rs. 11,01,400/-), 1,02,460 equity shares in the joint names of himself and his wife and in the name of his minor daughter (Part value of Rs. 11,00,000/-). Amongst the shares owned and possessed by the Appellants are the shares bearing distinctive numbers 222701 to 322700. Apart from this, as per written agreement between the Appellant and the second Respondent, 25% of the shareholding of the promoters of the company, namely 30,00,000 equity shares worth Rs. 3.00 crores was to be held benami in the name of the 2nd Respondent and is so held. This means that the shares held by the Appellant No. 3 in his own and benami in the name of the 2nd Respondent are Rs. 7,50,000 equity shares worth Rs. 75.00 lakhs. The Appellants herein together hold more than 10% of the equity shares of the company and therefore, according to them they are entitled to file a petition u/s 399 of the Companies Act, 1956.

4. In the body of the petition, they have set out the allegations of oppression and mismanagement and therefore they sought for winding up of the company or in the alternative for removal of the second Respondent from the Chairmanship as well as Directorship of the company and for other consequential reliefs.

5. The Respondents filed statement of objections to the petition. In para 2(B) of the statement of objections, they clearly set out the shares held by the Appellants which worked out to 3.96% and therefore, they contended that the petition filed under Sections 397 and 398 is not maintainable in view of Section 399 of the Act.

6. The Appellant filed an application for amendment to grant an additional prayer inasmuch as to direct the second Respondent to transfer the shares of M/s. Mc Charles (India) Ltd., to the third Appellant of the face value of Rs. 75.00 lakhs as per instructions indicated in para 1 of the memorandum of understanding dated 12.3.1986 and grant such other further reliefs as there was a dispute regarding the holding of the share.

7. The Company Court permitted the parties to adduce evidence in respect of the respective contentions on the maintainability of the petition. Accordingly, on behalf of the Appellants the third Appellant was examined as PW1 and the first Appellant was examined as PW2 and eight documents were marked as Exs. P-1 to P-8. On behalf of the second Respondent, two witnesses were examined i.e., PW1 and PW2 and 23 documents were produced and marked as Exs.R-1 to R-23. Learned Company Judge on appreciation of the aforesaid oral and documentary evidence on record and after hearing the parties held that it is an admitted fact that as per the statutory records, the Appellants do not qualify to maintain the petition. As there is a dispute regarding transfer of certain shares in favour of the wife and daughter of the second Respondent even if ignored and the benefit of

the share holding in respect of those disputed shares is held in favour of the wife and daughter of the third Petitioner, assuming that they consent to the petition though they are not parties, yet the Appellant would not be qualified to bring the petition under Sections 397 and 398 of the Act. Therefore, he dismissed the petition. Aggrieved by the said order, the Appellants are before this Court.

8. Sri. Udaya Holla, learned Senior Counsel assailing the correctness of the impugned order contended, firstly that, if the application for amendment had been allowed and the shares held by the second Respondent herein for and on behalf of the Appellants to the extent of 25% of the total issued share capital was taken into consideration, the Appellants would have held more than 10% of the shares, and hence the petition is maintainable. The Company Judge committed a serious error in not considering the application for amendment filed by the first Petitioner before passing the orders on merits. Secondly, he contended that the exclusory clause in any statute has to be strictly and narrowly construed. In a petition under Sections 397 and 398 of the Act equitable consideration should weigh. In view of the evidence on record, which clearly disclosed that Appellants were entitled to 25% of shares and ought to have held that the petitions are maintainable. Lastly, he contended that it is not necessary, that on the date he presented the petition, the Appellants should have held more than 10% of shares. The shares held by the second Respondent which is 25% is for and on behalf of the Appellants should have to be taken into consideration. Hence, the petition is maintainable. Therefore, he submits that the impugned order requires to be set aside.

9. Per contra, Sri. Appaiah learned Counsel appearing for the second Respondent submits that the memorandum of understanding on which reliance is placed has been marked as Ex.P-7 which is disputed. What is admitted in the evidence is yet another memorandum of understanding entered into on the same day marked as Ex.P-10 where the second Respondent had agreed to transfer 25% of the shares held by him. But on the date the petition was filed, no consideration was paid and shares were not transferred to the Appellants and therefore the petition under Sections 397 and 398 was not maintainable much less an application for amendment at prayer. Therefore, these facts were taken note of by the company court and rightly recorded a finding, which is strictly in accordance with law and supported by legal evidence and no case for interference is made out in this appeal.

10. In the light of the aforesaid facts and rival contentions, the point that arises for our consideration in this appeal is as under:

Whether in the facts and circumstances of this case, the Appellants can be said to hold not less than 1/10th issued share capital of the company so as to make a petition under Sections 397 & 398 of the Act as maintainable?

11. Section 399 of the Act deals with the right of a member of a company to apply under Sections 397 & 398 of the Act which reads as under:

Section 399 . Right to apply under Sections 397 and 398: (1) The following members of a company shall have the right to apply u/s 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 (I), 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 (I), 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 so, authorise any member or members of the company to apply to the Tribunal u/s 397 or 398, notwithstanding that the requirements of Clause (a) or Clause (b), as the case may be, of Sub-section (I) 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 Court dealing with the application may order such member or members to pay to any other person or persons who are parties to the application.

12. In order to maintain a petition under Sections 397 and 398 of the Act, Sub-section (1) of Section 399 mandates that the member or members who apply should hold not less than 1/10th of the issued share capital. They should have paid all calls and other sums due on the shares. The expression "issued capital" represents the total amount of the capital issued by the company. The possession- of certificate is a prima facie evidence of the fact that the Petitioner is a shareholder. However, the mere possession of share certificates without any authority by way of transfer instruments or authority letter would not be sufficient to confer the right to petition u/s 397 or 398 of the Act. The shareholders in whose favour share certificates are issued can exercise rights as members of the company notwithstanding the omission of their names from the register. But the company by not entering in the register the name of a person entitled to be entered therein as member, cannot take advantage of its own wrong and plead that he is not entitled to apply. A person who was holding shares by operation of law and who had been recognised by the company all

along as shareholder for all purposes, is entitled to apply, though his name was not there in the register of members. The particulars entered in the register of members are not conclusive.

13. The word "transferred" requires at least that a proper instrument of transfer should have been executed and delivered to the transferee or the company in respect of the shares in question. Transmission by operation of law means some act in the law by which the legal estate passes even though there be some further act such as registration, to be done. The mere right to get shares under agreement would not entitle the shareholder to maintain a petition u/s 397 & 398 of the Act. If there is only an agreement to transfer shares on payment of consideration and if consideration is not yet paid, transfer in accordance with law has not yet taken place. The persons entitled to shares but whose names are not entered in the register cannot apply.

14. Where membership of the Petitioner is disputed because his name was not borne out of the company's register of members, whether membership should be recognised for the purpose of petition, three factors should weigh with the Court. Firstly, whether the Petitioner is in possession of relevant share certificates, secondly, whether there are independent records to establish membership and thirdly, whether the company has been treating the Petitioner as a member. If these conditions are satisfied, even if the name of the member is not entered in the register, petition is maintainable.

15. It is in this background, we have to appreciate the facts of this case. The shareholding pattern of the Appellants is clearly set out in the petition. In the statement of objections filed by the Respondents, they admit that the Appellants hold 3.96% of the shares in first Respondent-company. They dispute the shareholding in the name of wife and minor daughter of the third Appellant. Even if that disputed share holding is also taken into consideration, it is not in dispute that shareholding of the Appellant does not exceed 6% of the total share capital issued by the company. Therefore, the Appellants contend, in addition to the aforesaid shareholding, under a written agreement between the Appellant and the second Respondent, 25% of the shareholding of the promoters of the company is held by the second Respondent on their behalf. If that is taken into consideration, the company petition filed is maintainable as their shareholding would exceed 10% of the total issued shares of the company.

16. The agreement under which this 25% shares as claimed by the Appellants is marked in the case as Ex.P-7 which is dated 12-3-1986. It is a memorandum of understanding which does not bear the signature of either of the parties. However, there is yet another document which is styled as further memorandum of understanding which is duly signed by the parties where they have referred to the memorandum of understanding dated 12-3-1986. The second Respondent contends that memorandum of understanding referred to therein is one which is marked in the case as Ex.R-10. The recitals in the memorandum of understanding dated 12-3-1986 on which the Appellants rely reads as under:

1. Mr. C.B.P. confirms that he is holding equivalent to Rs. 75 lakhs (Rs. Seventy Five lakhs only) face value shares for and on behalf of Mr. M.B.P. for which Mr. C.B.P. has invested full amount in U.A.E. Currency which is equivalent to 1 USD=3.673 Dhiram. The actual price of such share can be arrived at any date the total amount paid by C.B.P. to date for the project divide by 4 and thereafter add interest @ 12% computed every six months. Repayment in U.S. Currency.

4. At the time of right issues offered by M/s. Mac Charles (India) Ltd, to its share holders, Mr. C.B.P. agrees to transfer 25% of such rights of Kapi Investment Ink Ltd. to any one or number of persons as per directions from Mr. M.B.P.

17. The memorandum of understanding dated 12-3-1986 which is admitted by the second Respondent reads as under:

1. Mr. C.B.P. confirms that out of his total investment of Rs. 3 Crores (Rupees Three Crores only) as a goodwill gesture, he is agreeable to sell Rs. 75 lakhs (Rs. Seventy Five Lakhs only) face value shares for and on behalf of Mr. M.B.P. for which Mr. C.B.P. has invested full amount in U.A.E. Currency which is equivalent to 1 USD = 3.673 Dhiram. The actual price of such share can be arrived at any date the total amount paid by C.B.P. to date for the project total cost divided by 4 and thereafter add interest (a. 12% computed every six months, repayment to be made by Mr. M.B.P. in U.S. Currency. This offer to Mr. M.B.P. is valid only for the period upto 15th February 1987 which must be implemented on or before this date failing which this offer will lapse automatically.

18. Clause (4) is common in both the agreements. If the agreement relied on by the second Respondent is taken into consideration, the consideration is not yet paid for transfer of 25% of shares. If the agreement referred to by the Appellants is looked into, it gives an impression that consideration is already paid. But, under both the agreements, it is clear that transfer of shares is yet to take place. In the application filed for amendment of the prayer column, the relief sought for was for a direction to the second Respondent to transfer to the third Petitioner the aforesaid 25% of shares. Therefore, it is not in dispute that transfer has not taken place. On the day the company petition is filed, there was no transfer of these 25% of the shares in favour of the Appellant. In which event, hardly less than 6% was the shareholding of the Appellant. Therefore, the petition was not maintainable.

19. It is in this regard learned Counsel for the Appellants submitted that exclusionary clause should be strictly construed, by relying on the judgment of the Apex Court in the case of Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, wherein it was held as under:

It is well to remember that the meaning of the expressions used in the Constitution must be found from the language used. We should interpret the words of the constitution on the same principle of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. A

Constitution is the mechanism under which laws are to be made and not merely an Act, which declares what the law is to be. It is also well-settled that a Constitution must not be construed in any narrow or pedantic sense and that construction which is most beneficial to the widest possible amplitude of its power, must be adopted. An exclusionary clause in any of the entries should be strictly and, therefore, narrowly construed. No entry should, however, be so read as not to rob it of entire content. A broad and liberal spirit should, therefore, inspire those whose duty it is to interpret the Constitution, and the courts are not free to stretch or to pervert the language of enactment in the interest of any legal or constitutional theory. Constitutional adjudication is not strengthened by such an attempt but it must seek to declare the law but it must not try to give meaning on the theory of what the law should be, but it must so look upon a Constitution that it is a living and organic thing and must adopt itself to the changing situations and pattern in which it has to be interpreted. It has also to be borne in mind that where division of powers and jurisdiction in a federal Constitution is the scheme, it is desirable to read the Constitution in harmonious way. It is also necessary that in deciding whether any particular enactment is within the purview of one Legislature or the other, it is the pith and (sic) of the legislation in question that (sic) to be looked into. It is well-settled that the various (sic) in the three lists of the (sic) constitution are not powers but fields (sic) power to legislate is given (sic) three lists of the 7th Schedule (sic) constitution are legislative (sic) of legislation. These (sic) area over which the appropriate (sic) can operate. It is well-settled that widest amplitude should be given to the language of the three entries but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then comes the duty of the court to find the true intent and purpose and to examine the particular Legislature in question. Each general word should be held to extent to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted that the Constitution must be interpreted as an organic document in the light of the experience gathered. In the constitutional scheme of division of powers under the legislative lists, there are separate entries pertaining to taxation and other laws. The aforesaid principles are fairly well-settled by various decisions of this Court and other courts. Some of these decisions have been referred to in the decision of this Court in Civil Appeal No. 62(N) of 1970 *India Cement Ltd. v. The State of Tamilnadu*.

In the instant case, we are not interpreting any constitutional provision. Therefore, the aforesaid principles have no application.

20. The learned Counsel for the Appellants relied on another judgment rendered by the Andhra Pradesh High Court in the case of *N. Satyaprasad Rao and Ors. v. V.L.N. Shastri and Ors.* reported in 1988 (64) C.C. 492, wherein it was held that even if the prescribed register of the company does not incorporate the names of

all its shareholders as members of the company, the particulars so entered in the register are not conclusive. He also relied on yet another judgment of this Court in the case of *Srikanta Datta Narasimharaja Wadiyar v. Venkateswara Real Estate Enterprises (Pvt.) Ltd and Ors.* reported in 1990 (68) C.C.P. 216, wherein it has been held that petition for relief of oppression and mismanagement is not to be thrown out on the sole ground that Petitioner's name is not found in the register of members and that the Court should not exercise its equity jurisdiction on the ground of mere technicality.

21. There is no quarrel with the aforesaid two legal principles. If a shareholder has acquired interest in shares and is holding them, merely because his name is not entered in the register, company can not deny him the right to hold the shares. When once it is admitted that a person holds more than 10% of the shares issued by the company, even in the absence of the said person's name being entered in the books of the company, a petition under Sections 397 & 398 of the Act is maintainable and on such technical grounds, it cannot be thrown out. The entry of the name of shareholder in the books of the company, at best, can be construed as evidence or proof of such shareholding.

22. Learned Counsel for the second Respondent relied on a judgment of the Apex Court in *J.P. Srivastava and Sons Pvt. Ltd. and Others Vs. Gwalior Sugar Co. Ltd. and Others*, where the philosophy behind Section 399 of the Act is explained by the Supreme Court as under:

The object of prescribing a qualifying percentage of shares in the Petitioners and their supporters to file petitions under Sections 397 & 398 is clearly to ensure that frivolous litigation is not indulged in by persons who have no real stake in the company. However, it is of interest that the English Companies Act contains no such limitation. What is required in these matters is a broad common-sense approach. If the court is satisfied that the Petitioners represent a body of shareholders holding the requisite percentage, it can assume that the involvement of the company in litigation is not lightly done and that it should pass orders to bring to an end the matters complained of and not reject, it on a technical requirement. Substance must take precedence over form. Of course, there are some rules which are vital and go to the root of the matter which cannot be broken. There are others where non compliance may be condoned or dispensed with. In the latter case, the rule is merely directory provided there is substantial compliance with the rules read as a whole and no prejudice is caused.

23. In fact in the case of *Northern Projects Ltd. v. Blue Coast Hotels and Resorts Ltd. and Ors.* (2010) 2 LJ 361 (Bom), the Mumbai High Court has held that the parliament has used the words "issued share capital" which is a wide expression deliberately used with a view to include both equity and preference share capital issued by the company. In the said case, since the Petitioner had at no point of time held more than 2.01% of the issued share capital, it did not have the requisite percentage on the date of filing the petition. Though the Petitioner may have 14.8% of equity shares that was not the criterion to maintain petition u/s

397 read with Section 398 of the Companies Act and the petition was dismissed. In the case of *S. Varadarajan v. Venkateswara Solvent Extraction (P) Ltd. and Ors.* Vol.80 1994 C.C. 693, it has been held that the requirement as to the share qualification was relevant and material only at the time of filing the petition which is the crucial date for the maintainability of the petition u/s 397 read with Section 398 of the Act.

24. In the instant case, agreement on which Appellants rely on to claim 25% of the shares is dated 12-3-1986. The company petition was filed in the year 1987 and numbered as 110/1987. It is twenty years thereafter the impugned order is passed. In these twenty years, except disposing of the petition for default, application for recalling being dismissed, the matter being taken up in appeal where it was set aside, and the matter being remanded back, nothing has transpired between the parties. No serious effort is made to enforce the agreement under which the Appellants claim right as the Respondents in the proceedings have denied such claim. That apart, even for argument sake, it is taken that the agreement to transfer the shares is not given effect to and the share transfer has not taken place, persons merely being entitled to shares and whose names are not entered in the register after a valid transfer cannot be construed as persons who are holding the shares. Unless transfer of shares takes place in accordance with the provisions of the Companies Act, transferee would not acquire any right or interest in the shares and therefore, it cannot be said that such shareholder holds the shares. As is clear from the wordings of the section, it is only a member of the company "holding" not less than 1/10th of the issued share capital of the company shall have a right to apply under Sections 397 or 398 of the Act. In other words, on the day petition is presented, the Petitioner must be holding not less than 1/10th of issued share capital. A mere right to claim shares under agreement of sale would not confer such right to apply. The object prescribing a qualifying percentage of shares in the Petitioners or their supporters to file petition under Sections 397 and 398 of the Act, is to ensure that frivolous litigation is not indulged by persons who have no real stake in the company. Unless the aforesaid conditions stipulated in Section 399 of the Act is complied with, the Petitioners would have no locus standi to maintain such a petition. They do not possess a right to apply under Sections 397 & 398 of the Act. This is a mandatory requirement which is vital and goes to the root of the matter which cannot be over looked or ignored under the guise of purported exercise of equitable jurisdiction u/s 399 of the Act which the Court exercises, if the petition is maintainable. This requirement is meant to prevent abuse of process of law as contained in Section 397 & 398 of the Act. Therefore, it has to be strictly construed. Unless the Petitioner satisfies the requisite legal requirements, the question of the Court entertaining the petition and therefore exercising its equitable jurisdiction does not arise. In that view of the matter, on the admitted facts in this case, it is not possible to hold that the Appellants were holding more than 1/10th issued share capital of the company, as such, the petition is not maintainable.

25. The other contention canvassed was that, if the application for amendment had been allowed and prayer sought for in the amendment application had been granted, the Appellants share holding thereafter would meet the acquirement of 1/10th of issued share capital. It is like putting the cart before the horse. The question of the Court exercising the power to allow the amendment application would arise only if the petition in which the said application is filed, is maintainable. If the original proceedings itself is not maintainable and is required to be dismissed on that ground, no relief can be granted as sought for by the Petitioner in such petition. Remedy to the Petitioner is to initiate appropriate proceedings for enforcing the said contract and after acquiring the said shares, to approach this Court u/s 397 & 398 of the Act.

26. In that view of the matter, order passed by the Learned Company Judge does not suffer from any legal infirmity which calls for interference. Hence, there is no merit in this appeal and accordingly, the appeal is dismissed.