

**(2016) 07 CAL CK 0044**

**In the Calcutta High Court**

**Case No : A.C.O. 82 of 2015 and A.P.O No. 229 of 2015**

M/s. Metro Infrastructure Development Limited

APPELLANT

Vs

M/s. Bengal Tools Limited

RESPONDENT

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**Date of Decision : 27-07-2016**

**Acts Referred:**

Companies Act, 1956 — Section 108, Section 111, Section 111A

**Citation :** (2016) 199 CompCas 412

**Hon'ble Judges :** Soumen Sen, J.

**Bench :** Single Bench

**Advocate :** Mr. Ratnanko Banerji, Senior Advocate Mr. Shaunak Mitra and Mr. Tarun Aich, Advocates, for the Respondent; Mr. Anurag Bagaria, Advocate, for the Appellant

**Final Decision :** Allowed

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## **Judgement**

Soumen Sen, J. - The question of law raised in this appeal filed under Section 10F of the Companies Act, 1956 is trivial.

2. This is the second round of litigation.

3. In the first round, the appellant was unsuccessful in resisting the rectification of the Register of Members of M/s. Metro Infrastructure Development Limited.

4. One M/s. GNB Credit Private Limited (hereinafter referred to as "GNB") filed a petition under Section 111A of the Companies Act, 1956 against the appellant company seeking reliefs of rectification of Register of Members regarding share certificates covering 90 shares in the name of the petitioner by setting aside the refusal of registering the transfer of the said 90 ordinary shares. The Company Law Board (in short "CLB") refused registration of the transfer of shares on the ground that the conduct of one of the shareholders is detrimental to the benefit and interest of the company and has relied upon Article 5 of the Memorandum and Articles of Association which empowers the Board in the name of the petitioner. The company further contended that the transfer forms were not duly

stamped and they were not submitted to the company within two months from the date of presentation as envisaged under Section 108(1A)(b)(ii). A dispute was raised with regard to the character of the company, that is to say, the public limited company or the private company and depending on an answer to such questions the determination of the applicable Section. The Company Law Board held that the Company being a public limited company, as to rectification of register of shareholders, Section 111-A of the Act is applicable but not Section 111 of the Act. The Company Law Board also held that companies converted into public companies under Section 43A of the Act covered under Section 111 of the Act, such power of refusal being conspicuously absent under Section 111-A of the Act, such power of refusal cannot be, at any stretch of imagination, extended to the transfers taken place in the companies covered under Section 111-A of the Act. The objection with regard to deficiency in the transfer forms was also negated.

5. The objection with regard the transfer forms having lodged beyond two months after presentation of the forms to the Registrar of Companies was considered and it was held by the Company Law Board that the lodgment of shares for effect of transfer is defective. However, it was held that the appellant Company being a public limited company, the shares are freely transferable under Section 111A of the Act and in view thereof, the respondent cannot refuse effecting of transfer by invoking Article 5 of the Articles of Association. At the same time, the respondent is also to comply with the provisions of Section 108 of the Act for effecting transfer in its name, unless and until that mandatory requirement is complied with, the company is not under obligation to effect the transfer. In an appeal preferred in the said order, a co-ordinate Bench of this Court by a judgment dated 19th April, 2012 upheld the order passed by the Company Law Board. It was held that the right conferred by Article 5A of the articles of association was subject to the right of appeal of the would be shareholder under Section 111 of the Act. Since, upon the appellant becoming a public limited company, Section 111 does not apply to it, the article appears to be a dead wood in the articles of association of the company. In effect, it decides that Section 111A would apply for rectification and for all intents and purposes, Article 5A becomes otiose upon the company becoming a public company.

6. In view of the failure on the part of the Company to rectify the Register consequent upon the order passed by the Company Law Board since affirmed by the High Court in its judgment and order dated 19th April, 2012, an application under Section 634A was filed by the petitioner for enforcement of the order dated 10th August, 2010.

7. Pursuant to the order dated 16th August, 2011 passed by this Court in an application for amalgamation, M/s. GNB Credit Private Limited has been amalgamated with M/s. Bengal Tools Ltd, the respondent company and all rights, title and interest of the said GNB including the right to continue with any proceeding has been transferred to the respondent company. On the basis of the

aforesaid, the respondent company as successor-in-interest of the said GNB filed an application for enforcement of the order dated 10th August, 2010 before the Company Law Board (hereinafter referred to as "CLB").

8. The GNB purchased 90 ordinary shares of and in the appellant Company and sent the original share certificates along with duly stamped transfer deeds for transfer of the shares in its name, but the appellant company, without sufficient cause, had refused to effect the transfer of shares. The respondent company herein instituted proceedings under Section 111A of the Act for rectification of Register of Members in respect of the said shares and this CLB, vide order dated 10th August, 2010, directed the appellant company to effect the registration of the transfer in the name of the petition after lodgment of the share transfer forms upon due compliance of the provisions of Section 108 of the Act. In terms of the directions of the CLB vide order dated 10th August, 2010, the said GNB, vide letter dated 10th September, 2010, made over the original share certificates along with duly stamped transfer deeds for transfer of 90 shares to the appellant company, but the appellant company has refused to accept and ultimately, the same were submitted on 22nd September, 2010. Subsequently, vide letter dated 28th September, 2010, the respondent company submitted share certificates along with duly stamped transfer deeds for transfer of further 20 shares in the name of the said GNB.

9. It has been pointed out that in or about November, 2010, the appellant company preferred an appeal against the order dated 10th August, 2010 before the Hon'ble High Court at Calcutta being APO No.391 of 2010 in which interim orders were passed and finally, the said appeal was dismissed by an order dated 19th April, 2012. Thereafter, the respondent company, by a letter dated 18th June, 2012, called upon the appellant company to effect the transfer of the said shares in terms of the order dated 10th August, 2010 of this CLB, as confirmed by the order dated 19th April, 2012 of Hon'ble High Court at Calcutta, but the appellant company, by a letter dated 12th July, 2012, asked the respondent company to provide documentary evidence for transfer of assets of GNB to the respondent Company. The respondent Company made over the copies of the orders of amalgamation along with relevant documents to effect the transfer of shares, however, the original share certificates along with share transfer deeds were returned to the respondent Company without effecting any transfer. Since there was no necessity for any further compliance with the provisions of Section 108 of the Act, the respondent Company Advocate, by a letter dated 8th October, 2012, again forwarded the original share certificates along with share transfer deeds for complying with the order dated 10th August, 2010 of this CLB. The respondent Company contended that the appellant company is under the obligation to effect the transfer of 110 equity shares in the name of the respondent company, in terms of the said orders, as the respondent company is the successor-in-interest of the said GNB and is entitled to all right, title and interest of GNB in respect of the said 110 equity shares, but the respondent company has failed to do so. The respondent company is continuing to disobey

the directions contained in the said orders and is committing contempt of the orders passed by this CLB.

10. The appellant appears to have contended before the CLB that the order dated 19th April, 2012 was obtained by GNB by suppression of the fact that it stood amalgamated with the respondent company on and from 1st April, 2010 and also, the 90 ordinary shares stood transferred to and vested in the appellant company on and from the transfer date or the appointed date, i.e., 1st April, 2010. Further, the said GNB had no locus to contest the appeal being A.C.O. NO.157 of 2010 preferred by the appellant company against the order dated 10th August, 2010 passed by this CLB in C.P. No.304 (111A)/ERB/2006. The order dated 19th April, 2012 has been obtained by the said GNB by perpetrating fraud on the Hon'ble High Court at Calcutta and the appellant company. The appellant company refused to effect the transfer of 90 ordinary shares lodged by the said GNB as the mandatory provisions of Section 108 of the Act were not complied with and the promoters and persons in control of GNB were hostile to the management of the appellant Company and were acting against the interest of the appellant company. The appellant Advocate has contended that the respondent company is not entitled to the transfer of shares of GNB as it has not complied with the mandatory provisions of Section 108 of the said Act and the appellant company is not obliged to effect the transfer of any share in the name of the petitioner. Further, the time prescribed for compliance of the said provisions of the Act has lapsed and the company is not obliged to entertain any further application by the respondent company.

11. Mr. Ratnanko Banerjee, the learned Senior Counsel appearing on behalf of the company has submitted that the respondent company being successor-in-interest of GNB by the reason of the Scheme of Amalgamation sanctioned by the Hon'ble High Court, is entitled to all right, title and interest in respect of the properties held by the said GNB including the right to the shares. There has been devolution of interest by operation of law and the respondent company is entitled to pursue the instant company petition for enforcement of the rights of GNB. The Scheme of Amalgamation was sanctioned vide order dated 16th August, 2011 and the said GNB was finally dissolved by an order of the Hon'ble High Court at Calcutta dated 24th September, 2012. Further, the allegation of non-compliance of Section 108 or that the promoters and persons in control of GNB were hostile to the management of the appellant company or were acting against the interest of the company, are barred by principles of res judicata. Further, the original share certificates and the original transfer deeds are lying in the possession of the respondent company and it is under a duty and obligation of the appellant company to transfer the said shares in the name of the respondent company and return the duly endorsed share certificates.

12. The allegations have been made recklessly and are without basis and no reliance should be placed thereon. The repeated requests and demands have been made by or on behalf of the petitioner to the appellant company for

compliance of the orders of this CLB as well as Hon''ble High Court at Calcutta, but the appellant company deliberately failed to comply with the same.

13. The appellant appears to have contended before the CLB that the orders dated 10th August, 2010 and 19th April, 2012 are in respect of 90 shares, whereas the respondent Company has sought relief in respect of 110 shares. The fact of merger of GNB with the respondent company has neither been disclosed to the appellant company nor was it brought to the notice of the Hon''ble High Court during the pendency of the appeal being APO No.391 of 2010. It was the duty of GNB and the respondent Company to inform the Hon''ble High Court in seisin of APO No.391 of 2010 about the order dated 19th April, 2012 and the scheme of Amalgamation for the merger of GNB with the respondent Company. The appellant Company was informed by the respondent company for the first time about the merger of GNB with the respondent Company in June, 2012. GNB did not have the locus to contest APO No.391 of 2010 on and from 19th April, 2012. The order dated 19th April, 2012 is in executable and the CLB has acted illegally in directing the appellant to register the shares in favour of the respondent Company.

14. The CLB in the impugned judgment allowed rectification on the ground that by operation of law the company is entitled to claim rectification.

15. The company loses corporate personality or is deemed to be destroyed on amalgamation from a date declared by the Competent Authority under the Companies Act. When two companies merge into one, the transferor company ceases to exist. In that event, the transferor company is to apply to the company for their registration on the Company's Register of Members. The amalgamation of the two companies was effected pursuant to the order of the High Court in proceedings under Section 391 read with Section 394 of the Companies Act. Under the scheme of amalgamation, GNB stood dissolved on September 24, 2012 and ceased to be in existence thereafter. In amalgamation, two or more companies fused into one by merger or by taking over by another. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending Company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. The transferor company under the order of amalgamation ceased to be in existence in the eye of law and it effaced itself for all practical purposes. After the amalgamation of the two companies, the transferor company ceased to have any entity and the amalgamated company acquired a new status.

16. The position is akin to the death of last holder of share. There is a difference between transfer of a share which is a voluntary act of a shareholder and transmission which is by operation of law.

17. Transmission means with regard to shares that on the death of the last

holder of shares there is by operation of law on instantaneous transfer of ownership to the heirs of the last holder, and the property therein must vest in the heirs from the moment of death onwards. This position is recognised by the enactment of the second proviso to Section 108(1). (Mrs. Margaret T. Desor and Ors. v. Worldwide Agencies (P.) Ltd. and Ors. reported at (1989) 66 Comp Cas 5; Hemendra Prasad Barooah and Anr. v. Bahadur Tea Co. P. Ltd. reported at (1991) 70 Comp Cas 792 (Gau) and Maheshwari Khetan Sugar Mills (P.) Ltd. and Ors. v. Ishwari Khetan Sugar Mills and Ors. reported at AIR 1965 Allahabad 135 @ 140).

18. The decision of a co-ordinate Bench in APO No. 227 of 2014 with ACO No.119 of 2014 (M/s. Jay Bee Properties Private Limited and Ors. v. Sri Pawan Kumar Budhia and Ors.) dated 22nd December, 2015 relied upon by Mr. Ratnanko Banerjee, the learned Senior Counsel appearing on behalf of the Company has considered similar issues.

19. Section 108(1) of the Act of 1956 declares, in its material part, that "A company shall not register a transfer of shares in ? the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transferee, has been delivered to the company along with the certificate relating tot he shares ?, or if no such certificate is in existence, along with the letter of allotment of the shares ?" The first proviso to such sub-section deals with the loss of an instrument of transfer and permits the company to register the transfer by seeking an indemnity, if thought fit. The second proviso to the sub-section excludes the operation of the substantive provision for registering, inter alia, shares "transmitted by operation of law."

20. Section 108(1) is, in essence, a statutory protective shield for the company whose shares are involved in the transfer. That such provision is couched in a negative instruction to the company cannot detract from its purpose. The transfer of any shares in a company amounts to property in such shares passing from one to another. Ideally, the shares should be freely transferable, as the company cannot have any interest as to who would its shareholders or who sells the shares in the company to whom, subject to the requirement in the company's articles of association. But in as much as the transfer of shares from one to another involves the passing of property or title, the company can have complete indemnity in a dispute qua title if it registers a transfer in accordance with the mandate of the provision. The company's action in registering a transfer can only be called into question if it has acted in derogation of such mandate. Section 394 of the Act of 1956, on the other hand, recognizes that when an order thereunder "provides for the transfer of any property ?, then, by virtue of the order, that property shall be transferred to and vest in ? the transferee company?". Ordinarily, the passing of the property in any share in a company is not complete qua the company unless it is registered. The passing of the property from a transferor company to a transferee company under a scheme of

amalgamation or arrangement is complete upon the order sanctioning the scheme and takes effect after the order is filed with the registrar of companies. By virtue of the extraordinary transfer recognised in Section 394(2) of the Act of 1956, the compliance with Section 108(1) thereof becomes redundant. In any event, the negative mandate in Section 108(1) of the Act of 1956 operates on the concerned company and does not affect the transfer of the property in the shares recognised by Section 394(2) of the statute that is completed upon an order sanctioning a scheme of amalgamation or arrangement becoming effective.

21. The legal issue should not have detained either the CLB or this court in view of the clear finding in such regard in the judgment reported at (2007) 136 Comp Cas 160 (Peerless General Finance and Investment Company Limited v. Poddar Projects Limited). In that case, the concerned company resisted an application for rectification of its members' register on similar grounds as cited by the appellants herein. This court held, at page 169 of the report, as follows:

"In my view, when the second application was made by Project to record such transfer Peerless was obliged to record such transfer and their refusal on the ground of non-compliance of section 108 was not tenable and the Company Law Board was right in rejecting such plea. In my view, such application although in technical sense was an application under section 108(1) second proviso read with section 109. The same was nothing but an intimation to the company of the scheme of compromise so that the company could rectify their register. The documentation contemplated in section 108 was not required to be done and such plea of Peerless was not tenable and the Company Law Board rightly rejected the same."

22. In the special leave petition arising from the judgment of this court in Peerless General Finance and Investment Company Limited v. Poddar Projects Ltd. and Anr., the Hon'ble Supreme Court did not address the legal issue and left it open. But the Supreme Court did not set aside the finding on the legal question rendered by this court. The said decision is reported at 2007 (2) SCC 431.

23. The transfer of shares in the instant case occurs automatically by operation of law. The respondent Company acquired an interest in the shares by operation of law without any voluntary act on its part.

24. The question of law is answered with the observation that the transfer of shares in a third company pursuant an order sanctioning a scheme of amalgamation does not require compliance with the provisions of Section 108(1) of the Act of 1956. The order of CLB directing rectification of shares is upheld.

25. The appeal being A.P.O. No.229 of 2015 is dismissed. A.C.O No.82 of 2015 is also dismissed.

26. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance of all requisite formalities.