

(2013) 09 SC CK 0143

In the Supreme Court Of India

Case No : Petition(s) for Special Leave to Appeal (Civil) No(s). 12753 of 2008
(From the judgement and order dated 25/04/2008 in CA No.8/2007 of
The High Court of Bombay)

M/s. Northern Projects Ltd.

APPELLANT

Vs

Blue Coast Hotels & Resorts Ltd.

RESPONDENT

Date of Decision : 30-09-2013

Acts Referred:

Companies Act, 1956 — Section 397, Section 398, Section 399, Section 41, 41(1),
41(2), 41(3)
SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 — Section 11
Constitution of India, 1950 — Article 136

Citation : (2014) 3 SCJ 649

Hon'ble Judges : Mr. G.S. Singhvi and Mr. C. Nagappan, JJ.

Bench : Division Bench

Advocate : Mr. M.K. Sreegish and Mr. A. Venayagam Balan, Advocates, for the
Petitioner; Ms. Suparana Srivastava, Advocate, for the Respondent

Final Decision : Allowed

Judgement

1. This petition is directed against order dated 25.4.2008 passed by the learned Single Judge of the Bombay High Court in an appeal filed by the petitioner under Section 10F of the Companies Act, 1956 (for short, "the Act").

2. The petitioner was incorporated under the Act in March, 1983. It acquired 3,15,000 equity shares and 6,55,000 equity shares of respondent no.1 on 24.2.2004 and 5.3.2004 respectively. After some time, the petitioner filed an application under Section 397 and 398 read with Sections 402, 405 and 406 of the Act impleading the respondents as parties and made the following substantive prayers:

"(a) Pass an order declaring the allotment of 4150000-10% redeemable cumulative preference shares of Rs.100/- each aggregating Rs.41,50,00,000/- during the financial year 2002-03 to the promoters/promoters group is illegal,

null and void and be set aside and struck down.

(b) Pass an order declaring the allotment of further 40,00,000-1% redeemable cumulative preference shares of Rs.100/- each aggregating Rs.40,00,00,000/- during the financial year 2005-06 to the promoters/promoters group is illegal, null and void and be set aside and struck down.

(c) Pass an order restraining the promoters/promoters group from exercising any voting rights on 41,50,000-10% redeemable cumulative preference shares of Rs.100/- on any resolution at the forthcoming Annual General Meeting and/or any other or subsequent meeting of the members of the Company.

(d) Pass an order declaring that the remuneration proposed to be paid to Respondent No. 2 & 3 is illegal, null and void and if already paid, the same be set aside.

(e) Pass an order declaring that the Respondents No.2 to 8 have been guilty of diverse acts of oppression against the petitioner and mismanagement of the Respondent No.1

(f) Pass an order restraining the Respondents from reappointing Respondent No.2, 3 & 8 as Chairman & Managing Director, executive Director and Director, respectively.

(g) Pass an order restraining the Respondents No.3 to 7 to exercise their powers as directors of the Respondent Company and appoint independent directors on the Board to run the day to day affairs of the Company.

(h) Pass an order directing that a Scheme be framed for the future administration and management of the Company.

(i) Pass an order freezing the books of accounts and other relevant documents, records and other materials and get a Special Investigating Audit (SIA) conducted by an independent & reputed firm of Chartered Accountants at the cost of the Respondent Company and immediate authentication of all the books and records of Respondent No.1 by any persons appointed by this Board so that the same may not be further falsified by the Respondents and provide immediate inspection of all records and books to the Petitioner."

3. The Company Law Board dismissed the application on the ground that the petitioner was not holding 1/10th of the issued share capital of respondent No.1.

4. The appeal filed by the petitioner was dismissed by the learned Single Judge by recording the following observations:

"26. The appellant's contention that only persons holding equity shares can be members of the Company in terms of Section 41(3) of the Act needs to be considered only to be rejected. As rightly pointed out on behalf of the Company originally Section 41 of the Act provided for two categories of members, namely a person who is a subscriber to the memorandum of association in terms of sub-

section (1) of Section 41 and secondly a person whose name is entered in the register of members in terms of Section 41(2) of the Act. As rightly pointed out on behalf of the Company it appears that sub-section (3) was brought on the Statute book w.e.f. 20-9-1995 to meet the requirements of the equity share holders holding shares in the electronic form and thereby a third category was added by the introduction of the Depositories Act, 1996. As rightly pointed out on behalf of the Company sub-section (3) of Section 41 of the Act specifically mentions shares in the electronic form and therefore any reliance placed on the said sub-section to buttress the case of the Appellant appears to be erroneous, misleading and legally incorrect. As rightly pointed out on behalf of the Company, the Depositories Act, 1996 was enacted for the purpose of facilitating the transactions of shares in demat form thereby introducing the paperless transaction in the market and thus it covers the third category of equity shareholders who are neither subscribers as contemplated by sub-section (1) nor whose names are entered in the register of members as contemplated under sub-section (2) of Section 41. sub-section (3) of Section 41 is therefore only in addition to section 41(1) and Section 41(2) and not in derogation or substitution of the first two sub-sections. It appears that the word "shareholder" and "member" is used in the same connotation under the Act, as rightly submitted on behalf of the Company.

27. From the aforesaid discussion, and from whatever angle one looks at the expression "issued share capital" of the Company it is very clear that the expression "issued share capital" can only refer to the preference share capital as well as equity share capital of the Company and the appellant was required to hold one-tenth of the total of this issued share capital before he became eligible to maintain a petition under Section 397/398 of the Act. The appellant at no time held more than 2.01% of issued share capital. It did not have it when it became a member or shareholder. It did not have the requisite percentage on the date of filing of the petition. The appellant might be having 14.8% of equity shares, but that is not the criterion to make an application. The petition was therefore rightly dismissed.

28. Since the appellant did not qualify to maintain the petition in terms of Section 399 of the Act, the petition was rightly rejected. Admittedly, the issue of the preference shares as being violative to the proviso to Section 11 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 has not been gone into by the learned CLB on the ground that past and concluded transactions cannot be impugned in a petition under Section 397/398 of the Act."

5. We have heard learned counsel for the petitioner and perused the record.

6. In our view, the reasons recorded by the Company Law Board and the learned Single Judge of the High Court for holding that the application filed by the petitioner under Sections 397 and 398 of the Companies Act was not maintainable are correct and the order under challenge does not call for interference under Article 136 of the Constitution.

7. The special leave petition is accordingly dismissed.

8. It is needless to say that the petitioner shall be free to avail any other remedy which may be available to it under the law of the land.