

(2008) 04 BOM CK 0102
In the Bombay High Court
Case No : CO Appeal No. 8 of 2007

Northern Projects Ltd.

APPELLANT

Vs

Blue Coast Hotels and Resorts Ltd.

RESPONDENT

Date of Decision : 25-04-2008

Acts Referred:

Companies Act, 1956 — Section 10F, 2(46), 397, 398, 399
English Companies Act, 1948 — Section 210
Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 — Regulation 11, 11, 11
Securities Contracts (Regulation) Act, 1956 — Section 2

Citation : (2009) 148 CompCas 279 : (2010) 2 CompLJ 361 : (2008) 88 SCL 74

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : V.B. Nadkarni, M.S. Sonak and P.S. Rao, for the Appellant; U.K. Chowdhari, Rahul Srivastava, Savrabh Kalia, S.G. Dessai and Shivan Dessai, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—Challenge in this appeal, filed u/s 10F of the Companies Act, 1956 (Act, for short) is to the Order dated 3-5-2007 of the Company Law Board (CLB, for short), Principal Bench at New Delhi by which the appellant's petition filed u/s 397/398 of the Act has been rejected, holding that the appellant did not qualify to file the said petition in terms of Section 399 of the Act as the appellant held less than 1/10 of the "issued share capital".

2. Some undisputed facts are required to be stated to dispose off the appeal.

3. The Respondent-company was first incorporated on 27-7-1992 and after it changed its name several times, it is now registered in its present name, having its registered office at Arossim, Cansaulim, Goa.

4. The Appellant is a company incorporated on 4-3-1983 having its registered office at 6, Old Post Office Street, 4th Floor, Kolkata-700 001.

5. The authorized capital of the Respondent (company, for short) is Rs. 100,00,00,000 (Rs. One Hundred Crore only) divided into 1,85,00,000 (One Crore, Eighty Five Lakh) equity shares of Rs. 10 each and 81,50,000 (Eighty One Lakh, Fifty Thousand) preference shares of Rs. 100 each, and thus the issued, subscribed and paid up capital of the company is Rs. 88,05,28,000 (Rs. Eighty Eight Crore Five Lakh and Twenty Eight Thousand only) consisting of 65,52,800 (Sixty Five Lakh, Fifty Two Thousand Eight Hundred) equity shares of Rs. 10 each and 81,50,000 (Eighty One Lakh Fifty Thousand) preference shares of Rs. 100 each as per the latest audited balance sheet of the company as on 31-3-2006.

6. The company is mainly engaged in running a hotel in the name and style of "Park Hyatt Goa Resort and Spa".

7. As on 31-3-2002 the company had issued Rs. 6,55,28,000 equity shares of Rs. 10 each. Thereafter on 30-10-2002 the company issued 41,50,000 10 per cent cumulative redeemable preference shares of Rs. 100 each to the promoters group.

8. On 24-2-2004 the appellant acquired 3,15,000 equity shares and again on 5-3-2004 acquired another 6,55,000 of equity shares and thus the appellant acquired 9,70,000 of equity shares of Rs. 10 each. On 28-10-2004 the company allotted another 30,00,000, 1 per cent preference shares and again on 29-3-2005 another 10,00,000, 1 per cent preference shares were allotted. These shares were allotted to the promoters group against the money brought in by them towards the project cost of the Hotel. According to the appellant, since the appellant holds 9,70,000 fully paid equity shares of Rs. 10 each he holds 14.80 per cent of the total issued, subscribed and paid up equity share capital of the company, and, this on the assumption that the expression "issued share capital" of the company in Clause (a) of Sub-section (1) of Section 399 of the Act means issued "equity share capital" and which in turn should mean only "legally valid share capital".

9. As per the company, with the successive issue of preference shares, the appellant's holding in the issued share capital came down to 2.01 per cent on 30-10-2002 to 1.24 per cent on 28-10-2004 and to 1.10 per cent on 28-3-2005 and thereafter, and, as such the appellant at no time held more than 2.01 per cent share capital in the company and as such neither on the date when the appellant became the member nor on the date of filing the petition before the CLB, the appellant held more than 1/10th allotted share capital of the company. That was in brief the controversy before the CLB which came to be decided against the appellant.

10. The case of the appellant, in brief, was that the said cumulative preference shares were issued by the company with the sole objective of diminishing the voting rights available to the appellant and other equity shareholders of the company to virtually nil and with a view to usurp more than 90 per cent of voting rights to the detriment of the appellant and other shareholders. As per the

appellant, the same also violated the provisions of SEBI (Substantial Acquisition and Takeover) Regulations, 1977 in that, by virtue thereof the Promoters/Directors held more than 55 per cent of the voting rights in the company without complying with the requirements specified under the said Regulations. In fact the proviso to Regulation 11 of the said Regulations stipulates that no acquirer shall acquire shares or voting rights, through market purchases and preferential allotment pursuant to a resolution passed u/s 81 of the Companies Act, 1956 or any other applicable law, which (taken together with shares or voting rights, if any, held by him or persons acting in concert with him) entitle such acquirer to exercise more than 55 per cent of the voting rights in the company. The next proviso stipulates that if the acquirer has acquired shares or voting rights through such market purchases or preferential allotment beyond 55 per cent of the voting rights in the company, he shall forthwith disinvest the shares acquired in excess of 55 per cent and shall be liable for action under these Regulations and the Act. The appellant also alleged several acts of gross mismanagement which are not necessary to be reproduced herein for the purpose of disposal of this appeal. However, a preliminary objection having been taken, on behalf of the company, in the light of Section 399 of the Act, the appellant's petition came to be rejected.

11. The learned CLB in rejecting the appellant's petition came to the conclusion that (a) the expression "issued share capital" would include both equity and preference share capital and as the appellant held less than 1 /10th of the "issued share capital" the petition was not maintainable; (b) the Act did not visualize challenging the past acts and that too before the person became Member of the company; (c) the principle laid down by the CLB in the case of *Mega Resources v. Bombay Dyeing & Mfg. Co. Ltd.* [2002] 36 SCL 100 (Delhi) did not apply to the facts of the case.

12. Since the entire controversy is centred round. Clause (a) of Sub-section (1) of Section 399 of the Act it would be relevant to reproduce the said section. That the Appellant had other remedies in terms of Sub-sections (3) and (4) is not at all in controversy in this appeal. Clause (a) of Sub-section (1) of Section 399 reads as follows:

399. Right to apply under Sections 397 and 398.- (1) The following members of a company shall have a 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.

13. I have heard the learned Senior Counsel appearing on behalf of the parties at

length.

14. The object behind the provisions of Sections 397, 398 has been set out in *Mohanlal Ganpatram Vs. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd.*, on which extensive reliance has been placed on behalf of the appellant, and it has been stated by the learned Single Judge of that Court that Sections 397 and 398 are part of a fasciculus of Sections commencing from Section 397 and ending with Section 407 and this fasciculus of Sections occurs in Section A dealing with Powers of Court under Chapter VI headed "Prevention of Oppression and Mismanagement". u/s 397 any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to any member or members including any one or more of themselves, may petition the Court which, if satisfied that the company's affairs are being conducted in a manner oppressive to any member or members and that the facts justify the making of a winding up order on the ground that it is just and equitable to do so but that this would unfairly prejudice such member or members, may make such order as it thinks fit with a view to bringing to an end the matters complained of. This Section corresponds to Section 210 of the English Companies Act, 1948. Section 398 considerably enlarges the scope of the remedy by providing that any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to the interests of the company or that a material change has been taken place in the management or control of the company, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interests of the company, may apply to the Court and the Court may, if it is of the opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, make such order as it thinks fit with a view to bringing to an end or preventing the matters complained of or apprehended. It is obvious that this remedy provided by Section 398 is of a much wider nature than the remedy u/s 397, since unlike the remedy u/s 397, it is not limited by the requirement that the facts must be such as justify the making of the winding up order against the company on the ground that it is just and equitable to do so. The question of construction which arises for determination on these provisions is as to what is the extent of the power of the Court u/s 397 or 398. Does the power of the Court extend to the making of an order, setting aside or interfering with past and concluded transactions between a company and a third party which are no longer continuing wrongs or is the power of the Court confined to the making of an order preventing future oppression or mismanagement. Mr. S.B. Vakil, learned advocate appearing on behalf of the petitioners, pleaded for former construction on the ground that such construction would enlarge the power of the Court rather than limit it and in support of this plea he relied on the well-known rule of interpretation that in the case of provisions of a remedial nature, which Sections 397 and 398 undoubtedly were, the construction to be made should be such as

will suppress the mischief and advance the remedy and add force and life to the cure and remedy according to the time intent of the makers of the Act, *probonopublico*. Now Mr. S.B. Vakil is certainly right in his submission that Sections 397 and 398 being designed to suppress an acknowledged mischief, they should receive liberal interpretation and the Court should give such construction as will advance the remedy, but even applying this principle of interpretation, it is not possible to accept the construction contended for on behalf of the petitioners.

15. It has also been stated in the aforesaid decision that the object and purpose of the remedy was to cure the mischief of oppression or mismanagement on the part of controlling shareholders by bringing to an end such oppression or mismanagement so that it does not continue in future. The remedy was intended to put an end to a continuing state of affairs and not to afford compensation to the aggrieved shareholders in respect of acts already done which were no longer continuing wrongs. Sections 397 and 398 thus clearly postulate that there must be at the date of the application a continuing course of conduct of the affairs of the company which is oppressive to any shareholder or shareholders or prejudicial to the interests of the company and it is this course of oppressive or prejudicial conduct which would form the subject-matter of the complaint in the application, The remedy is not intended to enable the aggrieved shareholders to set at naught what has already been done by controlling shareholders in the management of the affairs of the company. If such were the intention of the Legislature, which as I will presently show it could never have been, the language of Sections 397 and 398 would have been different and the Legislature would not have confined the power of the Court by limiting the purpose for which it can be exercised under the sections.

16. The object behind Section 399 of the Act has been set out by the Apex Court in the case of *J.P. Srivastava & Sons (P.) Ltd. v. Gwalior Sugar Co. Ltd.* [2004] 56 SCL 1 wherein the Apex Court has stated that the object of prescribing a qualifying percentage of shares in petitioners and their supporters to file petitions under Sections 397 and 398 is clearly to ensure that frivolous litigation is not indulged in by persons who have no real stake in the company. 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.

17. It is the appellant's contention that the expression "issued share capital" in

Section 399 of the Act has to be interpreted by applying the rule of interpretation of "Noscitur a Sociis" to mean the share capital of the member only i.e., equity share capital inasmuch as in Section 41(3) of the Act only the persons holding the equity shares can be said to be the members of the company. As per the appellant, the expression "issued share capital" appearing in Section 399 has to be interpreted to mean only "issued equity share capital" which can only mean "legally, valid issued share capital" and certainly not inclusive of any share capital, which is ah initio null and void and which consequently necessarily will have to be ignored for the purpose of calculating the percentage thereof as postulated in Section 399 of the Act. According to the appellant, the requirement of 10 per cent of "issued share capital", even assuming without conceding includes both kinds of share capital namely the equity share capital and preference share capital it has necessarily to be 10 per cent of the validly issued total of the two kinds of the share capital and after applying the aforesaid tests and in case the issue of 41,50,000 preference shares is held to be void and consequently ignored, the appellants will be eligible to maintain the petition u/s 397/398 of the Act as its percentage of holding would be 14.70 per cent of the validly issued share capital of the company.

18. On behalf of the appellant, it is therefore submitted that the impugned order be set aside and the matter be remitted to the Company Law Board to give its decision whether 41,50,000 preference shares are null and void in view of the violation of the proviso in Regulation 11 of the SEBI (Substantial Acquisition and Takeover) Regulations, 1997 so as to satisfy the eligibility requirement as stipulated in Section 399 of the Act to maintain an application u/s 397/398 of the Act. It is also contended that the Company Law Board committed a gross error in law in applying the rule of literal construction in interpreting the provisions of Section 399 of the Act. It is the contention of the appellant that the term "issued share capital" was nowhere defined in the Act and therefore the CLB was not right in concluding that the said term was defined under the Act. On the rule of interpretation of "Noscitur a Sociis" reliance has been placed on behalf of the Appellants in the case of *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, and *Norman J. Hamilton v. Umedbhai S. Patel* [1979] 49 Comp. Cas. 41 (Bom.).

19. The problem of interpretation is a problem of meaning of words and their effectiveness as medium of expression to communicate a particular thought. The rule of construction "Noscitur a Sociis" simply means that the word is to be judged by the company it keeps. It is a rule wider than the rule of ejusdem generis. This rule according to Maxwell, means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general (Maxwell: Interpretation of Statutes, 11th Edition, page 321). It must be borne in mind that "Noscitur a Sociis" is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been

deliberately used in order to make the scope of the defined words correspondingly wider. It is only where the intention of the Legislature is associating wider words with words of narrower significance is doubtful, or otherwise not clear that the said rule of construction can be usefully applied.

20. In the first case of *State of Bombay (supra)* the Apex Court has stated that when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense and they take as it were their colour from each other that is, the more general is restricted to a sense analogous to a less general. It was further held that expressed differently, it means that, the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. In *Norman J. Hamilton (supra)* this Court was dealing with the expression securities as defined u/s 2(h) of Securities Contracts (Regulation) Act, 1956. Securities were defined to include (i) shares, scripts, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate; (ii) Government securities, and (iii) rights or interests in securities. This Court referred to the judgment of the Apex Court in *State of Bombay (supra)* and applying the doctrine of *Noscitur a Sociis* held that it was permissible to read the definition of "securities" so that it applies to only securities which are marketable, that is to say, those securities which enjoy a high degree of liquidity and can be freely bought and sold in the open market. At the cost of repetition, it may be reiterated that the doctrine of *Noscitur a Sociis* means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. Expressed differently, it means that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated to it.

21. On the other hand the rule of literal construction simply means that the words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary. (Emphasis supplied)

22. On behalf of the Company, it is contended that a bare reading of Section 399(1)(a) of the Act clearly provides that in order to maintain a petition on the basis of the shareholding, a member must hold, not less than 1/10th of the "issued share capital" of the company and this provision is amply clear and has got to be interpreted by applying the rule of strict or literal interpretation since there is no ambiguity and the provision has got to be read as it is. In particular on behalf of the company reliance is placed on *Raghunath Rai Bareja v. Punjab National Bank* [2007] 76 SCL 117 wherein the Apex Court has held that:

The rules of interpretation other than the literal rule would come into play only if

there is any doubt with regard to the express language used or if the plain reading meaning would lead to an absurdity. Where the words are unequivocal, there is no scope for importing any rule of interpretation. It is only where the provisions of a statute are ambiguous that the Court can depart from a literal or strict construction.

23. The literal rule of interpretation really means that there should be no interpretation. In other words, we should read the statute as it is, without distorting or twisting its language. The Apex Court has further stated that the literal rule of interpretation is not only followed by Judges and lawyers, but it is also followed by the layman in his ordinary life. To give an illustration, if a person says "this is a pencil", then he means that it is a pencil; and it is not that when he says that the object is a pencil, he means that it is a horse, donkey or an elephant. In other words, the literal rule of interpretation simply means that we mean what we say and we say what we mean. If we do not follow the literal rule of interpretation, social life will become impossible, and we will not understand each other. If we say that a certain object is a book, then we mean it is a book. If we say it is a book, but we mean it is a horse, table or an elephant, then we will not be able to communicate with each other. Life will become impossible. Hence, the meaning of the literal rule of interpretation is simply that we mean what we say and we say what we mean. On the same aspect reliance has been placed on behalf of the company on some other judgments to which no reference is required to be made. As per the Company the expression "issued share capital" would mean "issued capital" which would include equity and preference share capital and not otherwise. Hence, the word "issued share capital" cannot be read or understood as "issued equity share capital" to the expression "issued share capital".

24. In my view, there is absolutely no scope for applying the rule of *Noscitur a Sociis* in interpreting the expression "issued share capital" of the company in Section 399(1) of the Act as the said expression is a wide expression in itself. It is a wide expression deliberately used by the Legislature with a view to include both equity and preference share capital issued by the Company. It keeps no company to other words and it must be interpreted and understood in its natural, ordinary or popular meaning. The learned CLB who must be dealing in cases of this nature day in and day out was certainly right when it stated that it is well known and well understood that the said expression includes both types of share capital i.e., equity and preference. Share has been defined by Section 2(46) of the Act to mean a share in the share capital of a company, and includes stock except where a distinction between stock and shares is expressed or implied. It is common knowledge that capital of a company could come from shares both preference and equity and from loans and advances. That is how the appellant understood it when the appellant stated in Clause (c) of the petition to the CLB that "the issued, subscribed and paid up capital of the Company is Rs. 88,05,28,000 consisting of 65,52,800 equity shares and 81,50,000 preference shares. That is how the Madras High Court understood it, in the case of *M.F.R.*

D'Cruz v. K.N. Viswanathan AIR 1941 Mad. 806 when it stated that the capital of the company included both preference shares as well as ordinary shares, and, if that is so, the expression "issued share capital" can only mean both preference and equity shares capital. That is how the Apex Court also understood it, when it stated in J.P. Srivastava & Sons (P.) Ltd. (supra) that Section 399, Sub-section (1) requires the petitioner to have 10 per cent of the total issued share capital which would include preference shares and that the share holding claimed by the petitioners did not amount to 10 per cent of such total. The aforesaid observations of the Apex Court cannot be wished away by contending, as contended on behalf of the appellant that is not the ratio of the decision. It may be so but certainly it is at least the dictum of the Apex Court and which also needs to be followed. Therefore, the learned CLB was right in holding that the expression "issued share capital" means both equity and preference share capital of the company.

25. That apart, I am also unable to accept the contention raised on behalf of the appellant that there is no explicit intrinsic clue to suggest that the issued share capital would be total of the two kinds of share capital. Such clue can be now found in Section 86 of the Act which with effect from 13-12-2000 provides that the share capital of a company, limited by shares shall be of two kinds only, namely (a) equity share capital and (b) preference share capital. Preference shares, as their name implies, carry some preferential rights in relation to other class of shares, namely, equity shares. There must be two kinds of shares for one to be preference. This class is given preferential treatment over the other. Section 86 of the Act deals with kinds of share capital and Sub-section (1) of Section 86 defines preference share capital and Sub-section (2) defines equity share capital. Sub-section (1)(a) of Section 87 of the Act deals with voting rights of equity shareholders and Sub-section (2)(b) deals with voting rights of equity shareholders and Sub-section (2)(b) deals with voting rights of preference shareholders. Having regard to the provisions of Sections 85, 86 and 87 of the Act, the expression "issued share capital" in Section 399(1) of the Act can only refer to and refer only to the share capital which could be issued ie., both equity and preference share capital and therefore the expression "issued share capital" refers to both preference and equity share capital of the company. In other words, these Sections can be used as tools of interpretation of the said expression.

26. The expression "issued share capital" can have no doubt about it when considered in relation to other provisions of the Act. Inserting the word "equity" after the word "issued" and before the words "share capital" will be adding a word which the Legislature clearly did not intend and to interpret it further as "legally valid issued share capital" would be doing violence to the section. The Court cannot read anything into a statutory provision which is plain and unambiguous. Interpreting the expression in a manner suggested on behalf of the appellant will amount to creating a mischief rather than preventing it and thereby leave out a class of shareholders who have subscribed to the capital of

the Company i.e., by way of preference shares. It is to be noted that a statute is an edict of the Legislature and the language employed in a statute is the determinate factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the Legislature itself. The question is not what must be supposed and has been intended but what has been said. It is again to be noted that while interpreting a provision the Court only interprets the law and cannot legislate it. Doing what is suggested on behalf of the appellant would not only be doing violence to the Section but will amount to legislating a provision in a manner not at all intended by the Legislature.

27. On behalf of the Company it is submitted that the expression "issued share capital" is amply clear from the various treatises which have opined as the sum total of equity and preference share capital. Particular reference has been made to Company Law by Robert R. Pennington LL.D. Butterworths 1985, Fifth Edition, and, Palmers Company Law, 22nd Edition, Volume I. In the first treatise it is stated:

Nominal (authorized), Issued, Paid up, Called up and Resen'e Capital": A Company's issued capital is the total of the nominal values of the shares which have so far been allotted to shareholders, and it follows, of course, that the difference between the Company's nominal and issued capital is its unissued capital.

Company Law by Robert R. Pennington.

In the second treatise it is stated:

302 Nominal Capital- Every Company Limited by shares or limited by guarantee and having a share capital is required to have a nominal capital with which it is registered. This is one of the essential features of the Company's Constitution and must be stated in the memorandum of association. It is equal to the nominal value of shares which the directors are authorized to issue (hence the term "authorized capita"). The nominal capital may be increased above or reduced below, the figure stated in the memorandum.

30.3 Issued Capital.- The nominal capital in its original or altered form sets the limit of capital available, for issue, and accordingly the issued capital of a company can never exceed its nominal capital. The nominal capital is, strictly speaking not "capital" at all since, as we have seen, it is only an authority by the shareholders to the directors to create new capital by the issue of shares. The issued capital, on the other hand, represents the shares which have actually been taken up by shareholder who have agreed to give consideration in cash or kind for the shares issued to them unless those shares are fully paid bonus shares, the issued capital is thus a reality and not merely an authority.

28. Section 41 of the Act gives the definition of "Member". Sub-section (3) of Section 41 came to be inserted with effect from 20-9-1995. Sub-section (1) of

Section 41 provides that the subscribers of the memorandum of a Company shall be deemed to have agreed to become members of a Company, and on its registration, shall be entered as members in its register of members. Sub-section (2) provides that every other person who agrees in writing to become a member of a Company and whose name is entered in its register of members, shall be a member of the Company. Sub-section (3) provides that every person holding equity share capital of a Company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned Company.

29. 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 with effect from 20-9-1995 to meet the requirements of the equity shareholders 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 subsections. 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.

30. 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 u/s 397/398 of the Act. The appellant at no time held more than 2.01 per cent 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 per cent of equity shares, but that is not the criterion to make an application. The petition was

therefore rightly dismissed.

31. 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 u/s 397/398 of the Act.

32. It is the appellants' contention that allotment of 41,50,000 preference shares on 30-9-2002 cannot be said to be a past and concluded transaction but it is a continuing wrong since the acquisition of voting rights by the promoters in excess of 55 per cent became operative for the first time with effect from 30-10-2004 and will continue to be so until dividends u/s 87 of the Act are paid in respect of such preference shares. Reliance has been placed on Mohanlal Ganpatram 's case (supra) wherein it is stated as follows:

...Sections 397 and 398 thus clearly postulates that there must be at the date of the application, a continuing course of conduct of the affairs of the company which is oppressive to any shareholder or shareholders or prejudicial to the interest of the company and it is this course of oppressive or prejudicial conduct which would form the subject-matter of the complaint in the application....

...It is clear that an order can be made under these Sections only for the purpose of bringing to an end such course of oppressive or prejudicial conduct, that is, for the purpose of putting an end to oppression or mismanagement on the part of controlling shareholders so that there may not be in future such oppression or mis-management....

...The language of Sections 397 and 398 leaves no doubt as to the true intendment of the Legislature and it is transparent that the remedy provided by these Sections is of a preventive nature so as to bring to an end oppression or mismanagement on the part of controlling shareholders and not to allow its continuance to the detriment of the aggrieved shareholders of the company.... (p. 99)

On the other hand, it is contended on behalf of the Respondents that the allotment of preference shares is legally valid and not violative of the said Regulations. It is further contended that the voting right on the preference shares have accrued to the preference shareholders by operation of law i.e., in view of the provisions of Section 87(2)(b) of the Act which specifically provides that in case the company does not pay the dividend for 2 consecutive years, the preference shares will have voting rights.

33. It is not necessary for this Court to enter into this controversy since the submissions in this regard are on the merits of the case which are required to be decided, at the first instance by the CLB. Past actions are bound to produce future reactions. Prima facie, the consistent view held by the CLB that past and

concluded transactions cannot be impugned in a petition u/s 397/398 appears to be correct. A view to the contrary can create havoc into running of the companies.

34. Similarly, the view held by the learned CLB that in the case of Mega Resources (supra) was not applicable to the facts of the case also appears to be correct. The Company has assailed the validity of acquisition of the equity shares by the appellant and that controversy appears to be pending before the Delhi High Court. It was agreed that this Court will not go into that controversy. In my view, the decision in the case of Mega Resources (supra) would be inapplicable to the facts of this case but would be applicable in a case where the title to the shares held by the petitioners is challenged on the ground that those shares are not legally acquired and it is in that context that the CLB referred to the case of Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others, wherein it was held that the validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented, cannot, in the absence of a provision to that effect in the statute cease to be maintainable by reason of events subsequent to its presentation. The CLB in the case of Mega Resources (supra) held that if in a petition, the legality of the acquisition of the shares, or the factum of holding shares, the strength of which the petition is filed, is challenged, before proceeding with the petition, the CLB has to examine the same and give its finding, which has to be definitely and necessarily subsequent to the filing of the petition. As already stated the matter as regards the validity of the shares acquired by the appellant is pending before the Delhi High Court. In a case of this nature what would be really relevant is the consistent view held by the CLB in *Om Prakash Gupta v. Hicks Thermometers (India) Ltd.* [1999] 97 Comp. Cas. 356: 21 SCL 94 (Delhi) wherein the CLB observed that they have, in a number of cases taken the view, that when further issue of shares is impugned in a petition and that but for the further issue the petition would be maintainable, then, before proceeding with the other allegations in the petition, the further issue would be first examined to ascertain the maintainability of the petition. It is certainly not the case of the appellant that by issue of the preference shares that his holding of equity shares fell below 10 per cent. As already demonstrated on behalf of the Company the Appellant at no time held more than 2.01 per cent of issued share capital of the Company. The appellant has 14.7 per cent of equity share capital but that does not qualify him to maintain a petition u/s 399 of the Act.

35. Lastly, it must be noted that there was no dispute at all as to facts and being so the CLB was certainly entitled to dispose of the petition on the preliminary issue of law i.e., on the maintainability of the petition. Hence the observations of the Gujarat High Court in *Saurashtra Cement & Chemicals Industries Ltd. v. Esma Industries (P.) Ltd.* [1990] 69 Comp. Cas. 372 are inapplicable to the facts of this case. To the same effect in the case of *Rajkumar Devraj v. Jai Mahal Hotels (P.) Ltd.* [2006] 134 Comp. Cas. 405 : [2007] 73 SCL 328 (CLB - New Delhi). There cannot be quarrel with the proposition of law stated by the Apex

Court in *Exphar SA and Another Vs. Eupharma Laboratories Ltd. and Another, and Scientific Instrument Co. Ltd. v. Rajendra Prasad Gupta* [1999] 95 Comp. Cas. 615 : 19 SCL 451(All) which are otherwise is inapplicable to the facts of this case. In *Exphar S.A.'s* case (supra) the Apex Court stated that when an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the Court does not have jurisdiction as a matter of law. In rejecting a plaint on the ground of jurisdiction, the Division Bench should have taken the allegations contained in the plaint to be correct. In *Scientific Instrument Co. Ltd.'s* case (supra) the Allahabad High Court approved the CLB's view in *Satish Chand Sanwalka v. Tinplate Dealers Association (P.) Ltd.* [1998] 93 Comp. Cas. 701 (Delhi) stating that normally, when the maintainability of a petition is questioned in terms of Section 399, especially, as a preliminary issue, there should be enough material available before them, without having to go through the pleadings in detail to decide the issue. In that case, the issues like whether articles have been violated, whether there were calls due and whether the petitioner failed to pay the calls, whether notice of forfeiture were issued to the petitioner etc., were held to be complicated questions of law and facts requiring a detailed inquiry and it was further held that complicated questions of law and facts cannot be decided at the preliminary argument stage without going through pleadings and hearing. Accordingly, it was held that the maintainability of the petition would be decided after hearing of the petition and, if it was held that the petitioners did not satisfy the requirements of Section 399, they would pass orders only on the maintainability. In case it was held that the petition was maintainable then a comprehensive order would be issued both in terms of maintainability as well as on the merits of the case.

36. As said before, none of the decisions cited hereinabove are applicable to the facts of the case where there was no dispute as to facts at all and therefore a finding on a preliminary issue of maintainability could not be faulted.

37. In view of the above I find there is no merit in this appeal and consequently the same is hereby dismissed with costs of Rs. 2,000 to each of the Respondents.