

**BEFORE THE COMPANY LAW BOARD, MUMBAI BENCH, MUMBAI**

**Present: Shri. Ashok Kumar Tripathi  
Member (Judicial)**

**C.P. No. 22 of 2014**

**Under Sections 397, 398, 399,  
read with Sections 402 & 403 of  
the Companies Act, 1956.**

**In the matter of:**

**Mr. Mohan Mahavirprasad Shah**

**...Petitioner**

**V/s**

**M/s Indian Silk Mfg. Co. Pvt. Ltd. & Ors.**

**....Respondents**

**Petitioner:**

**Mr. Mohan Mahavirprasad Shah**

**Respondents:**

- 1. M/s Indian Silk Mfg. Co. Pvt. Ltd. (R-1)**
- 2. Mr. Sohan Mahavirprasad Shah (R-2)**
- 3. Mr. Rohan Sohan Shah (R-3)**

**Counsel appeared on behalf of the Parties :-**

1. Mr. K. Padmashri, Advocate i/b M/s Kulkarni & Associates, Advocates for the Petitioner.

2. Mr. Peter Lobo, Advocate, i/b M/s I.R. Joshi & Co., Advocates for the Respondents.

**JUDGMENT**

(Reserved on March 25, 2015)

(Delivered on March 31, 2015)

1. The above captioned Company Petition has been filed by the Petitioner under Sections 397, 398 read with Section 402 of the Indian Companies Act, 1956 (hereinafter referred to as "the Act" in short) complaining therein various acts of oppression and mismanagement purportedly committed by the Respondent Nos.2 and 3 in the conduct of the affairs of the Respondent No.1 Company (hereinafter referred to as "the Company" in short). The Petitioner has sought various reliefs as set out in the Petition.



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2. In nutshell the facts of the case are as under:-

2.1 The Company was incorporated on 26/5/1969 under the provisions of the Act. The Petitioner is the former director and currently the shareholder of the Company and the brother of Respondent No.2. The Respondent No.3 is the son of the Respondent No.2.

2.2 It is the case of the Petitioner that he being a non-resident Indian retired as the director of the Company in view of the applicable laws in or around 1978. However, the Petitioner, though retired as the director, continues to hold 50% of the equity share of the Company. The Respondent No.2 and the Petitioner were the subscribers to the Memorandum and Articles of Association of the Company.

2.3 It is further alleged that the Respondent Nos.2 and 3 are presently in possession and control of the Company. It appears that the disputes arose between the parties relating to the conduct of affairs of the Company as well as on other issues. The Petitioner, therefore, approached this Board by way of filing the instant petition complaining therein the following acts of oppression and mismanagement purportedly committed by the Respondent Nos. 2 and 3 in the affairs of the Respondent No.1 Company.

2.4 The main grievances ventilated by the Petitioner are that at his behind, the Respondent No.2 unilaterally, in contravention of the provisions of the Companies Act, and the Articles of Association of the Company and without convening a valid shareholders' meeting and without notice to the Petitioner with malafide purpose to gain control over the affairs of the Company, issued further shares from time to time. According to the Petitioner, his shareholding has thus reduced from 50% to 30% in the Company.

a. On 29/8/1993, the Respondent No.2 to fulfill his ill-designed motives had appointed one Mr. Mautik Gandhi as the director on the Board of Directors of the Company without the knowledge of the Petitioner and without following due process as laid down in the Memorandum of Association.

b. The next grievance of the Petitioner is that the Respondent No.2 has appointed his son, the Respondent No.3 herein, as director of the Company



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in the year 2010 without consent of the Petitioner and without following due course of law.

c. The Petitioner has further alleged that the Respondents never issued any communication to him regarding the AGM of the Company nor paid the bonus nor dividends to him.

d. It is further alleged that the Respondent No.2 has illegally sold off the property belonging to the Company at F/6, Shreeniketan, Shiv Sagar Estate, Worli, Mumbai- 400 018 to one M/s Millennium Developers Pvt. Ltd. for inadequate price, for his own benefits and without giving any details to the shareholders of the company. Further, the Respondent No.2 has also misappropriated the funds borrowed from the Central Bank of India to the tune of Rs.12 crores.

2.5 Further, the Petitioner was shocked to know that the funds of the Company are being diverted /siphoned off by the Respondent No.2 to his wife's proprietary firm namely, M/s Aquarius Impex, who carries a similar business to that of the Respondent No.1 Company. In addition, the office premises, plant, machinery as well as staff of the Respondent No.1 is also being used by the Respondent No.2's wife for her business without paying any compensation and /or rent to the Petitioner. It is, therefore, alleged that the affairs of the company are being mismanaged by the Respondent No.2.

2.6 Based on the aforesaid complaints the Petitioner has sought the following reliefs:-

- a. To hold the appointment of the Respondent Nos.3 as Directors of the Respondent No.1 as illegal and to remove the Respondent No.3 as the Directors of Respondent No.1.
- b. To remove the Respondent No.3 as the Director of the Respondent No.1 and in his place to appoint the Petitioner as Director or an independent director as this Board may deem fit.
- c. To hold the purported allotment of equity shares by the Respondent No.1 to himself as illegal and to cancel the same.
- d. To direct the Respondent No.1 not to issue any cheques or any other instrument towards remuneration and/or other financial benefits to the Respondent No.2 and 3.

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- e. To restrain the Respondent Nos.2 and 3 from acting as the Directors of the Respondent No.1 and/or from participating in any manner whatsoever in the affairs of the Respondent No.1.
- f. To restrain the Respondent Nos.2 and 3 from drawing any further remuneration/commission from the Respondent No.1.
- g. To restrain the Respondent Nos.2 and 3, their officers, agents etc from drawing up or withdrawing from or in any other manner operating the bank accounts of the Respondent No.1 without the prior approval of this Board and on such terms and conditions as this Board may deem fit.
- h. To direct the Respondent No.2 and 3, Respondent No.1, its officers, agents etc. to deposit the daily cash receipt received by the Respondent No.1 from its various sources in a separate bank account and further to permit operation of such bank account on such terms and conditions as this Board may deem fit.
- i. To restrain the Respondent Nos.2 and 3, the Respondent No.1, its officers, servants, agents etc. from allotting any further equity shares of the Respondent No.1 and to further restrain from appointing any further Directors of the Respondent No.1.
- j. To appoint an independent Chartered Accountant to prepare afresh the books of accounts of the Respondent No.1 and to place the report before this Board.
- k. To appoint a Commissioner to make inventory and to take possession of the stocks, assets and records of the Respondent No.1 including, but not limited to, its books of accounts, supporting vouchers, its statutory registers, minute books in presence of the Petitioner and their lawyer/Chartered Accountant/Company Secretary and to place the report of the Commissioner before this Board and further to direct the Commissioner to take into his custody all the statutory records and accounts of the Respondent No.1.
- l. To direct the Respondent Nos. 2 and 3 not to alienate, mortgage, encumber, transfer or deal with or dispense with the assets and stocks of the Respondent No.1 in any manner whatsoever.
- m. To direct the Respondent No.1 and the Respondent Nos.2 and 3 to give to the Petitioner all necessary supporting documents/details in respect of the payments made and/or received by the Respondent No.1 with effect from the incorporation till date and further to direct the Respondent No.1 and the Respondent Nos.2 and 3 to give fortnightly details of the payments made and/or received by the Respondent No.1 along with necessary supporting documents.
- n. To direct the Respondent No.2 to produce the books of accounts of M/s Aquarius Impex owned by his wife, in particular, the ledger accounts of dealing with the respondent No.1 right from 1983.
- o. To direct the Respondent Nos.2 and 3 to declare on oath the details of the assets of the Respondent No.1.
- p. To restrain the Respondent Nos.2 and 3 from holding any Board Meetings or any General Meetings without prior permission of this Board.



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3. Pursuant to the notice, the Respondents appeared and filed their reply. In their reply, they raised preliminary objections thereby assailing the maintainability of the petition and seeking its dismissal, *inter alia*, on the grounds, firstly, that the Petitioner has no locus to file the petition, secondly, the petition is hit by the provisions of law of limitation and thus it is barred by time, thirdly, the Petitioner's conduct is malafide and he has filed this petition with ulterior motive and for collateral purpose and lastly that the petitioner has approached this Bench with unclean hands and therefore, the petition deserves to be dismissed. On merits, the Respondents have denied all the allegations levelled against them by the Petitioner with respect to the alleged acts of oppression and mismanagement. It is also submitted that the conduct of the Petitioner is malafide. It is further alleged that the Petitioner's own actions have been detriment to the interest of the Company. Therefore, the petition deserves to be dismissed on this ground also.
4. To the reply, a Rejoinder was filed by the Petitioner on 17/10/2014. The Respondents filed their Sur- Rejoinder on 24/11/2014.
5. I have heard the Ld. Counsel appearing for the parties and perused the record.
6. Before I proceed to consider the rival submissions, it is pertinent to mention here that the Respondents had filed a Company Application, being C.A No.195 of 2014, challenging the maintainability of the petition and seeking its dismissal contending that the Petitioner has no locus under Section 399 of the Act, to file the present petition under Section 397/398 of the Act. After completion of the pleadings in the above mentioned C.A., an order dated 25/09/2014 came to be passed by the CLB and the C.A. was dismissed having found no merits in it. Against the said order, an Appeal was preferred by the Respondents before the Hon'ble High Court, being Company Appeal No. 87 of 2014 in which the Hon'ble High Court passed the following order :-
2. "1. Heard the Ld. Advocates for the parties and by consent, the following order is passed:-
- (i) The Appellants shall be at liberty to file a suit claiming that the disputed shares have been gifted to them by the Respondent No.1 herein and to also seek ad-interim/interim reliefs therein.



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(ii) In the event of such suit being filed by the Appellants, the parties shall be at liberty to raise all their contentions and the said suit as well as the Application/s taken out therein shall be disposed of on merits without being influenced by any of the observations made in the impugned order qua the alleged gift.

(iii) The Company Law Board shall place the Company Petition No.22 of 2014 for hearing and final disposal on or after 02-02-2014 and endeavour to pass necessary orders on or before 15-03-2015.

(v) All contentions of the parties are kept open.

(vi) The Company Appeal is accordingly disposed of."

7. It is further pertinent to mention here that, at the request of the parties, the Hon'ble High Court has extended the date of disposal of the C.P. upto 7/4/2015.

8. Now, firstly, I proceed to deal with the preliminary objections raised by the Respondents. The first preliminary objection raised by the Respondent is that the Petitioner is not eligible to file the present petition in terms of Section 399 of the Act, and therefore, on this ground the petition is not maintainable and deserves to be dismissed. In this connection, it was argued that the Respondents had taken out a Company Application, being C.A. No.195 of 2014, for dismissal of the petition on the said ground. However, this Board dismissed the said application vide order dated 25/9/2014 holding that as there is no compliance of Section 108 of the Act with respect to the transfer of 1950 shares purportedly held by the Petitioner in the Company, is still holding 1950 shares constituting 26.7% of the total paid-up capital of the Company and thus, the Petitioner being eligible under Section 399 of the Act is entitled to file the present petition. The Ld. Counsel for the Respondents pointed out that they preferred an appeal against the said order dated 25/09/2014 before the Hon'ble High Court of Bombay. According to him, although the said Appeal was dismissed, the Hon'ble High Court of Bombay kept the contentions of the parties open, including the one raised by the Respondents in the Application to the effect that the Petitioner is not competent to maintain the said petition being not a shareholder of the Company as on the date of filing of the petition. The Ld. Counsel further submitted that the Petitioner had gifted the shares held by him in the Company in 1976-77 in favour of the



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Respondent No.2 and, therefore, the Respondents may be given an opportunity to lead evidence to prove the factum of gift. The Ld. Counsel submitted that, as per the settled proposition of law, this Board has power to record oral evidence, and the principles of natural justice also require that an opportunity be given to the Respondents to prove their case by documentary as well as oral evidence. Therefore, the Respondents submitted that they may be granted liberty to prove the fact by giving an opportunity to lead evidence to this effect and permitting them to cross examine the Petitioner that he had gifted his shares to the Respondent No.2. The Ld. Counsel further submitted that on the date of filing of the petition the Petitioner did not hold any shares and hence, the petition deserves to be dismissed for want of qualification as required by law under Section 399 of the Act. It was also argued that the provision contained in Section 108 of Act is the procedural aspect dealing with updating the record of the Company and merely for non-compliance of the provisions of Section 108 of the Act, it cannot be held that the transfer by way of gift was not valid in the eye of law. According to the Ld. Counsel, this cannot destroy the effect of transfer of shares as a result of gift and despite procedural requirement of Section 108 of the Act, which is directed towards the Company, the act of gift is binding on the Petitioner and the Respondent No.2, and the Petitioner, as a donor, is estopped from taking any action now as a shareholder after he gifted the shares to the Respondent No.2.

9. On the other side, the Ld. Counsel appearing for the Petitioner refuted the contention of the Respondents that the Petitioner had gifted the shares to the Respondent No.2. The Ld. Counsel appearing on his behalf vehemently denied this fact, and there is no proof of gift. It was also brought to the notice of this Board, in the course of submissions, that pursuant to the observations of the Hon'ble High Court in the Appeal, the Respondent No.2 moved to the Civil Court to get a decree for declaration as to his entitlement of shares by way of gift and filed a civil suit, in which he has failed to get any interim order. However, having now filed a suit he has no right to lead oral evidence or right to cross examination in this petition as contended by the Petitioner. It was further urged that in view of the said civil suit, the Respondents impliedly admitted that the Petitioner is owner of 1950 shares as on the date and therefore their preliminary objection as to the maintainability of the petition deserves to be rejected.



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10. Having considered the rival submissions, I do not find any substance in the case of the Respondents. As per own admission by the Company, by way of showing the Petitioner's shareholding in the Annual Returns filed until 2012, this fact is very clear that the Petitioner was holding 1950 shares in the Company. It is needless to say that the admission is the best evidence against the party who makes it. Therefore, in my opinion, the Respondents cannot be allowed to assert the fact that the impugned shares were transferred in favour of the Respondent No.2 in 1976-77 by way of gift. In addition to the above, it is a well settled law that for a lawful transfer of shares the execution of transfer deeds, as provided in Section 108(1) of the Act, is a must, as held in the case of **Manalal Khetan V/s Kedar Nath Khetan & Ors. [1977] SCC 185 Vol 47**. In the present case, the Respondents have failed to produce any transfer deeds to show that the Petitioner has transferred the shares in favour of the Respondent No.2, as alleged by them. The compliance of Section 108 of the Act is mandatory. In the case of its non-compliance, the transfer of shares cannot be held valid in the eye of law. Furthermore, it is also a well established proposition of law that, while determining the maintainability of the petition in terms of provisions contained in Section 399 of the Act, the last disputed position is required to be examined by the CLB. As stated hereinabove, until 2012, according to the own showing of the Company, the Petitioner was holding 1950 in the total paid-up capital of the Company which constitutes 26.7% shareholding of the Company. I, therefore, hold that the Petitioner is competent under Section 399 of the Act to file the petition under Section 397/398 of the Act. This preliminary objection is rejected accordingly.

11. The second preliminary objection raised by the Respondents is that the petition is barred by law of limitation and therefore, it deserves to be dismissed on this ground also. According to the Ld. Counsel appearing for the Respondents, the Petitioner has filed the petition under Section 397/398 of the Act on the ground of oppression and mismanagement, wherein the Petitioner made a complaint that the Respondent No.2 had appointed one Mr. Mautik Gandhi as a director on 29/08/1993 without following due course of law and in violation of the Articles of Association of the Company as well as without notice to the Petitioner. It is, therefore, contended that the Petitioner having not taken any action since 1993, now cannot challenge the appointment on the ground that it was bad and /or illegal, particularly, when such act is not of a continuing one. The Ld. Counsel further contended





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that another complaint of the Petitioner is that the Respondent No.2 has appointed his son, the Respondent No.3, herein as the director of the Respondent No.1 company in the year 2010 without consent of the Petitioner and without following due course of law. The Ld. Counsel submitted that the said complaint is also four years old. Therefore, the petition is barred by law of limitation. In this regard, the Ld. Counsel appearing for the Respondents has relied upon the following decisions in the cases of :

- a. *Surinder Singh Bindra And Ors. Vs M/s Hindustan Fasteners Ltd. and Ors. [1990] AIR, Delhi 32,*
- b. *Kerala State Electricity Board Vs T.P.Kunhaliumma reported in AIR 1977 SC 282 and*
- c. *Hungerford Investments Trust Ltd. Vs Turner Morrison and Co. Ltd. [1972] ILR 1 CAL 286.*

12. The Ld. Counsel pointed out that in the aforesaid cases it has been held that if the events that have been complained of happened more than 3 years prior to the filing of the petition, the same could not be looked into. It was further held in the said decision that Article 137 of the Limitation Act, 1963 which prescribes limitation of 3 years applies to the petition under Section 397/398 of the Act. Therefore, the present petition, being time barred, deserves to be dismissed on this ground alone.

13. Responding to the above contentions, it was argued on behalf of the Petitioner that the Petitioner has retired as a Director in the year 1978 in view of the reason that he was staying in USA and had become a Non-Indian resident, and therefore, to avoid the violation of the FERA and FEMA Regulations, he had to resign as a Director. However, the Petitioner continued to be a 50% shareholder in the Company. According to Ld. Counsel, the Petitioner's main grievance is that the Respondents, without convening a valid shareholders' meeting and without notice to the Petitioner, issued further equity shares thereby reducing his shareholding from 50% to 26.7%. The Ld. Counsel submitted that this reduction in the shareholding of the Petitioner was made by the Respondents with oblique and malafide motive to gain control over the affairs of the Company. It is further submitted that the Petitioner, thereafter, came to know recently that the Respondents have, in collusion with each other, now transferred his entire shareholding and he has not been shown as a shareholder of the



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Company in the latest Annual Returns filed with the ROC. The Ld. Counsel appearing for the Petitioner pointed out that the Petitioner was holding 1950 shares of Rs.100/- of the total paid-up capital of the Company during the period 2006-2012, as per own showing of the Company in the Annual Returns. The shares were never parted with by him. Although, the Petitioner did not have physical possession of the share certificates in 1993, he applied for issuance of duplicate share certificates and the same were issued to him by the Company. According to the Ld. Counsel, until 2012 he was being shown as a shareholder of the Company. When the Petitioner found that his name is missing in the latest Annual Return, he immediately, tried to know as to why his name is not being shown in the annual returns of the Company. On enquiry, he was shocked to know that the Respondent No.2 and his family members claimed that the Petitioner had gifted his all shares to the Respondent No.2 Therefore, he is no more owner of the impugned shares. The Ld. Counsel appearing for the Petitioner submitted that the shares cannot be transferred or gifted merely by physical delivery. The Ld. Counsel further submitted that for a valid transfer of shares the compliance of the provisions contained in Section 108(1) of the Act is mandatory, for which a transfer deed is required to be executed and registered by making payment of stamp duty at the market value of the shares. According to him, in this case, there is no compliance of Section 108 (1) of the Companies Act, and hence, for the said reason, there is no valid transfer. The Ld. Counsel, therefore, submitted that depriving the Petitioner from his shares on a false pretext and claiming the ownership of he impugned shares by the Respondent No.2, is an act of oppression and this being a continuous cause of action, the Petitioner's petition is within the period of limitation. Further, according to Ld. Counsel, it is a well settled law that the provisions of the Limitation Act do not apply to the proceedings filed under Section 397/398 of the Act.

14. In addition to the above, it was also argued that the Respondents, without adopting the due course of law, issued further shares with malafide intent to gain control over the company without notice, consent and knowledge of the Petitioner, which is a continuous cause of action, and therefore, the present petition is within time.

15. I have considered the submission and perused the record. As regards the limitation, it is an established proposition of law as held in the cases of



*Sangramsinh P. Gaekwad & Ors. v. Shantadevi P. Gaekwad (dead) through L.Rs & Ors. (2005) 11 SCC 314* that an act of oppression is a continuous wrong until it is brought to end by passing an appropriate order. In the case of *Pearson Education Inc. V/s. Perntice Hall India (P) Ltd. & Ors. (2006) DLT 450*, it was held that if the act complained off amounting to oppression has a continuing effect, in that case, the question of limitation does not arise. In the case of *Ramashankar Prosad V/s Sindri Iron Foundry (P.) Ltd., [1966] AIR Cal 512*, it was held that a petition under Section 397 would be maintainable if the effect of the alleged act of oppression persists indefinitely. In the case of *Suhasini P. Kurkure v. Metalurgical Laboratories (P) Ltd. & Ors [2012] SCC 112 (CLB)*, it has been laid down as follows :

*"The doctrine of laches is based on equitable consideration and depends on general principles of justice and fair play. There is no presumption that delay is deliberate. To be the laches delay should be such that it could be said that the petitioner is not entitled to relief on account of gross negligence or inaction or for want of bonafide imputable to him or that he has given up (waived) his right by acquiescence or by his conduct or neglect. Further, this Board has consistently taken the view that in case of allotment of shares, even if it is a single act, since it has continuous effect allegations relating to the same can be entertained in a petition under Section 397. In a 397 petition, if the alleged act of oppression has a continuous effect, then the issue of limitation is of no consequence." (Emphasis supplied)*

16. In my view, taking into consideration the ratio laid down in the said cases, and having regard to the facts of the case, this petition is not hit by the provisions of the Limitation Act. It may be added here that the question of limitation, delay and laches and its effect on this petition is a mixed question of facts and law which requires consideration and appreciation of evidence led by the parties. It is, therefore, necessary to examine the facts and circumstances of this case, to determine the question as to whether the delay is of such nature that the Petitioner is not entitled to the reliefs sought for, on account of gross negligence or inaction or want of bonafides on his part or he has given up / waived his rights by acquiescence or by his conduct or neglect. In the present, admittedly, the Petitioner is shown in the Annual return of the Company as a shareholder until 2012. Therefore, the cause of action lastly arose in his favour in the year 2013 when he came to know that the Company has not shown him as a shareholder. Therefore, the petition since is filed well within 3 years, it is well within the limitation. I, therefore, reject the objection of the Respondents that the petition is not



well within the period of limitation, and hold that it also does not suffer from any delay and laches as contended by the Respondents.

17. The next preliminary objection raised by the Respondents is that the petitioner has not approached this Bench with clean hands and he has suppressed material and vital facts and the documents which disentitle him for grant of any reliefs sought for from this Bench. It is further submitted that the petition is filed as an abuse of process of law with malafide intention, ulterior motive and collateral purpose and therefore, it deserves to be dismissed on these grounds also.

18. In this regard, it has been argued on behalf of the Respondents that in the pleadings, the Petitioner has alleged that he had resigned as a director but he continued to be a shareholder, which has been denied by the Respondents in their pleadings and it has been contended that since 1976-1977 after the gift of the said shares the Petitioner did not remain even as a shareholder and, therefore, no notices of the meetings and/or Annual Reports were forwarded to him from 1977. This proves and supports the Respondent No.2's case of the gift, because if the Petitioner has not received any notices of AGM so many years he was not supposed to sleep over the matter for all those years and ignored the same from 1977, but on the contrary, he ought to have protested against the same from 1977 and taken some actions against the Respondents which he did not do so, but instead he filed the present Petition for the first time in March 2014. This, itself shows that the Petition is filed for ulterior motives as an abuse of process of law as will be discussed hereinafter.

19. It is then argued that the grounds of oppression and mismanagement, as alleged, are of 1977, 1993 and February 2010 but till March 2014 he did not do anything in that respect and he filed the Petition in March 2014 as a pressurizing tactic for ulterior motive and this is apparent from the fact that for the first time he tried to stake a claim on the flat of the Respondents in Sonawala Building, Marine Drive in May 2013 by filing a suit in City Civil Court and as a consequence whereof the Respondents have to file a declaratory suit in the Small Causes Court in November 2013, and it is in pursuance of the Petitioner's said ulterior motive of claiming the share in the flat that he as and by way of pressurizing tactics, filed the present Petition. The Ld. Counsel submitted that it has been held in the case of *Vijaya Rajesh Vs. MSP Plantation*



[1999] (9) 19 SCL 106 CLB Chennai, that motive of the Petitioner was to bring pressure on Respondent to transfer Respondent's building to the Petitioner and it is established legal position that the petition under Sections 397 and 398 was filed with ulterior motive and collateral purpose. It was, therefore, argued that such a Petition deserves to be rejected.

20. Referring to the case of *Shrikant Dutta Vs. Venkatesh Real Estate Enterprise [1991] 70 Company Cases 211 Kerala* wherein it is held that the Petition under Sections 397 and 398 should be filed in good faith and there must be honest intention on the part of the Petitioner to get the reliefs. It was argued that the conduct of the Petitioner should be tested, not only with regard to his conduct in the Petition that has been filed by the Petitioner, but also taking into consideration the other parallel legal proceedings adopted by the Petitioner. It has been submitted that in the present case the conduct of the Petitioner in the Petition itself raises doubts as to his bonafide and good faith as no case has been made out with regard to the oppression and mismanagement, but, on the contrary, his conduct to wait for such a long period of years and to file the Petition only in March 2014, shows that he has filed the Petition at a late stage with ulterior motive. According to the Ld. Counsel, this is further established by the parallel proceedings that the Petitioner has adopted in the civil court to claim share in the Sonawala flat. According to the Ld. Counsel, this establishes his motive and that he has filed the Petition to exert pressure on the Respondent No.2 to submit to the Petitioner's wrongful demand or claim in the flat at Sonawala building. Further, except making bald allegations, the Petitioner has not produced any documentary or other evidence satisfying the ingredients of Sections 397 and 398 under Companies Act, and this aspect of making bald allegations without documentary evidence also shows that the Petition is filed as an abuse of the process of law.

21. Refuting the aforesaid submission, it was argued on behalf of the Petitioner that he has approached this Bench by way of filing this petition under Section 397/398 of the Act on account of infringement of his rights as shareholder of the company. The Ld. Counsel submitted that the Petition is bonafide and the Petitioner has sought the reliefs as contained therein from this Bench under Section 402 of the Act, which are well within the power of the CLB.



22. I have considered the rival submission. In my view, the contentions of the Respondents are misplaced. On a bare perusal of the petition, it is evident that the Petitioner has invoked his right as a shareholder. He has expressed various grievances and has made complaints in the capacity of he being a shareholder of the Company. There may be certain family disputes, but I am not inclined to accept that on account of these disputes the Petitioner has filed the instant petition. The Respondents have failed to show as to how the Petitioner's 1950 shares are not shown in the last annual returns filed by the company. The stand of the Respondents that the impugned shares were transferred by way of gift cannot be accepted for the reasons discussed hereinabove. I don't dispute the law cited by the Respondents' Counsel to the effect that if a party approaches this Bench by way of filing a petition under Section 397/398 of the Act with malafide, ulterior motive and collateral purposes, it deserves to be dismissed. But, in my opinion, the decisions cited by the Respondents do not apply to the present case having regard to its facts. Each case has to be examined on its own merits and the law applies depending upon the facts of the given case. In the present case, the laws cited by the Respondents do not apply. I, therefore, reject their contention that the petition is filed with malafide intention, ulterior motive and collateral purposes

23. I have also considered the other preliminary objection put-forth by the Respondents that the Petitioner being guilty of suppression of material facts and documents and approaching this Board with unclean hands, the petition ought to be rejected. According to the Ld. Counsel, in the insolvency proceedings before the USA Court, the Petitioner had filed a declaration in which he did not disclose his shareholding in the Company. The Ld. Counsel for the Respondents, therefore, contended that the petition deserves to be dismissed on this ground.

24. It is a well settled proposition of law that if a party approaches a court for redressal of his grievances under equitable jurisdiction, he must come with clean hands and, in case, such party conceals any material facts or suppresses the relevant documents, he is not entitled to the discretionary reliefs from the court. However, elaborating the aforesaid proposition of law, it has been held by various courts that the ground of alleged suppression cannot arise unless it is demonstrated that (i) firstly, the fact was "vital and material" to the issue to be decided in relation to the



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reliefs claimed; (ii) secondly, that such vital fact was not to the knowledge of the Respondents or that the document could not have been in the knowledge of the Respondents, or that the document was not a public document and (iii) lastly, that by suppression of such fact, orders were obtained which would not have been granted if the correct and true facts were pleaded. In this regard, the following decisions and the relevant observations therein are relevant to be cited :-

**(i) Enercon GmbH Vs. Enercon (India) Ltd. And Ors : {2008} 143 Comp Cas 687 (CLB).**

*"In the present case, no relief has been granted as yet and whether the documents which are alleged to have been not been disclosed are material documents is a matter yet to be determined. Once the other side has produced all the documents, then, the question of suppression of material documents to apply the decision of the Supreme Court does not arise ....."*

**(ii) Dhanraj Mills Pvt. Ltd. and Anr. V. Global Trust Bank Ltd. and Ors : (2003) 105 BOMLR 609.**

*"But it is not the law that if particular document is not filed court should immediately draw an inference that there is intention to suppress. This document is before the Court. No order interim or otherwise was even sought nor obtained by Respondent No. 1 G.T.B. by suppression of this document."*

**(iii) Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad (2005) 11 SCC 314, where the Supreme Court has held:**

*"196. The Court in an application under Sections 397 and 398 may also look to the conduct of the parties. While enunciating the doctrine of prejudice and unfairness borne in Section 459 of the English Companies Act, the Court stressed the existence of prejudice to the minority which is unfair and not just prejudice per se.*

*197. The Court may also refuse to grant relief where the petitioner does not come to court with clean hands which may lead to a conclusion that the harm inflicted upon him was not unfair and that the relief granted should be restricted. (See London School of Electronics, Re [1986] Ch. 211)*

*200. It is now well-settled that a case for grant of relief under Sections 397 and 398 of the Company Act must be made out in the petition itself and the defects contained therein cannot be cured nor the lacuna filled up by other evidence oral or documentary. (See In re Bengal Luxmi Cotton Mills Ltd. (1965) 35 Comp Cas 187 (Cal))."*

**(iv) P.L.G. Manu and another v. Shashi Distilleries P. Ltd. and others [2010] 160 Comp Cas 236 (CLB) Pg. 266, the Company Law Board, Additional Principal Bench at Chennai held:**

*"It is well-settled principle that when the petitioners approach this Bench for grant of discretionary reliefs under section 397/398 of the Act, they should come with*



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clean hands. The very fact that the petitioners have filed the present petition belatedly itself would indicate that they have not come with clean hands."

(v) **S.P. Chengalvaraya Naidu vs Jagannath AIR 1994 SC 853**, the Hon'ble Supreme Court has held:

"A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party." (Emphasis supplied.)"

(vi) The above principle has been reiterated in a recent judgment of the Supreme Court in the case of **Dalip Singh vs State of U.P.[2010] 2 SCC 114** wherein it is inter alia held:

"1. ... it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

25. In light of the above proposition of law, I have examined the facts referred to by the Respondents claiming to be suppression of alleged material fact and vital document by the Petitioner and the misconduct on his part.

26. In my opinion, non- disclosure of the shares of the Company by the Petitioner is not fatal to the case. The explanation offered by the Petitioner that he did not disclose his shareholding in the proceeding before the USA Insolvency Court thinking that the Company was a defunct Company, is a good reason. Moreover, this is not a case where this Board was misled by the Petitioner by suppression of the said fact in order to obtain an interim order/ protection in this case. Furthermore, the insolvency proceedings filed by the Petitioner before the USA court have no bearing on the outcome of this petition. This objection as to suppression of vital facts and documents, therefore, rejected accordingly.

27. Now, I enter into adjudication of the issues arising out of the pleadings of the parties in respect of the acts of oppression and mismanagement. Inviting my attention to the Exhibit "C" of the petition, i.e. Form No.20B filed by the company in respect of Respondent No.1 Company, the Ld. Counsel appearing for the Petitioner pointed out that the authorised share capital of the Company was Rs.30,00,000/- as in the year 2006. The Petitioner since 2006 to 2012 is shown to have held 1950 equity shares and the Respondents are shown to have held 5350 shares in the Company.





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Thereafter, in the Form No.20B, the Petitioner's name is not shown as a shareholder. According to the Ld. Counsel for the Petitioner, this act of the Respondent No.2 amounts to a gross act of oppression.

28. The case of the Respondents is that the company was established in the year 1969 by the Respondent No.2 and Petitioner, both having 1 share each. Thereafter, further shares were issued within the limits of the authorised capital on 5/7/1972 by Issued and Paid-up 500 shares to the Respondent No.2 and the Petitioner each. On 23/10/1973, further shares were issued in equal proportion i.e. 699 shares to the Respondent No.2 and 699 shares to the Petitioner. Therefore, on 23/7/1973, the Respondent No.2 and the Petitioner had equal shareholding, namely, 1200 shares each.

29. According to the Respondents, in 1973 the Foreign Exchange Regulation Act, (FERA in short) was amended and by Section 29 thereof, it was provided that no foreign nationals/ NRI could hold more than 40% shares in an Indian Company. The Petitioner was an NRI at that time, and therefore, he came within purview of Section 29 of the FERA. Further, according to the Respondent's Counsel, need arose to issue further capital and on 6/11/1974, with the consent of the Petitioner, further 1000 shares were issued to the Respondent No.2 and no shares at that time were issued to the Petitioner as the same could not be done in view of the provisions of Section 29 of FERA and this issue of 1000 shares to the Respondent No.2 was with the consent, knowledge and approval of the Petitioner as the Petitioner and the Company did not want to violate the FERA provisions. Thereafter, on 20/11/1974 further capital was raised by issuing 2000 shares, out of which it was found that if 750 shares were allotted to the Petitioner, he would be within the limitation of 40% and there would not be any violation of the FERA provisions and thereon on 20/11/1974 out of 2000 shares, 1250 shares were allotted to the Respondent No.2 and 750 shares allotted to the Petitioner within the rule, resulting that in 1974 the Respondent No.2 held total 3450 shares working out to 63.9% shareholding of the Company and 1950 shares by the Petitioner which worked out to 36.1% shareholding of the Company within the permissive limits of the FERA provisions.

30. It is further submitted on behalf of the Respondents that the further shares were issued on 17/3/1975, 22/9/1975, 21/1/1977 and 18/2/1977 as tabulated here under, within the knowledge, approval and consent of the



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Petitioner and this is evident from the fact that he never raised any objection to the above position since 1971.

Date	No. of shares issued to the Respondent No.2	No. of shares issued to the Petitioner
Total as of 1974	3450	1950
17/03/1975	600	-
22/09/1975	1000	-
21/1/1977	100	-
18/02/1977	200	-
Total as of 1977	5350	1950
% of Shareholding as of 1974	73.3%	26.7%

31. It is submitted that all the aforesaid shares were issued only to the Respondent No.2 with consent of the Petitioner and rightly so because considering provisions of the Section 29 of the FERA, no further capital could be issued to the Petitioner. The Petitioner was very well aware of the same. It is further submitted that since 1957 the Petitioner has permanently shifted from Bombay and he had no intention to return to Bombay when he first shifted to Kolkata in 1952-1953 and then to USA in 1957, and today also he is residing in U.S. and even the business of the Company was also in trouble and he could not take part in the management of the Company at that time, and considering the cordial relations between the Respondent No.2 and the Petitioner as brothers the Petitioner decided to gift his entire shareholding to the Respondent No.2 out of natural love and affection, and in furtherance of the said decision, he handed over the original share certificates of all his shares and his title of total shareholding to the Respondent No.2 with intention to gift the said shares to the Respondent No.2 sometime in 1976-77 and as of today even the original shares are lying with the Respondent No.2 and by physical delivery of share certificates which represent the title to his shares, the said gift came to be completed and thereafter as from the said date, the Respondent No.2 become the sole owner of all the shares of the Petitioner and as on the date of the said gift, with a view to maintain minimum 2 persons membership to the limited Company, two shares of the Company were issued to HL Financial Consultants and since then, i.e. 1976-77, the Petitioner ceased to be shareholder of the Company. In the circumstances aforesaid, from 1975-76 the Petitioner had no stake in the Company and he is not even the shareholder of the Company and since then the Company is belonging to the Respondent Nos. 2 and 3 only. The aforesaid factual position and the facts which have been admitted by the Petitioner on his own in his declaration dated 7/10/2005 made on oath by him before the United States



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Bankruptcy Court, Southern District of New York wherein he has clearly stated that he did not hold any property.

32. It is next submitted on behalf of the Respondents that if the Petitioner had held the shares of Respondent No.1 Company, he would have stated so in his Declaration. However, his statement of holding no property was only made by him in view of his gift of the said shares of the Company to Respondent No.2. In as much as if the Petitioner was the shareholder, as on that date, he ought to have declared the said shares as his property before the Bankruptcy Court in U.S.A. He has failed to do so. This itself proves on his admission that he had no stake in the Company as shareholder or otherwise, and he had no shareholding in the said company as he has already gifted the said shares to Respondent No.2, in the circumstances as stated above.

33. Furthermore, according to the Ld. Counsel for the Respondent No.2, the very same fact has been once again reiterated and admitted by him even subsequently in his Affidavit dated 28th August 2009 filed by him before the Superior Court, Guilford County-North Carolina, in which he has clearly and unambiguously stated that the Company belongs to Respondent No.2 and the Petitioner was permitted to stay in the Apartment belonging Company because of his old age and difficult financial circumstances faced by the Respondent No.2. This statement of his own on solemn affirmation even on 28/8/2009 reiterates that he has no shareholding in the Company and he was not a shareholder. It is submitted that this is because of the consequence of gift of the shares as stated above. The aforesaid statement of facts was further reiterated, ascertained and once again admitted by the Petitioner in his another affidavit dated 31/8/2009 filed before the Superior Court, Guilford County-North Carolina, in which he has also stated to the said effect that the Company belongs to the Respondent No.2 and as such he has no stakes and the said flat in which he stays also belongs to the Respondent No.1 Company. According to the Respondent's Counsel, the aforesaid statements were deliberately made by the Petitioner being conscious of the fact that he had already gifted the said shares to Respondent No.2 in 1975, and thereafter he had no shareholding in the Respondent No.1 Company. This fact is even borne out by his own conduct in-as-much-as after the said gift, he had not bothered to inquire about or take part in the business and affairs of the company and he had not done



any act with regard thereto. This is so because after gifting of shares he had nothing to do with the Company.

34. It was further submitted that somehow or due to procedural aspect or through inadvertence the Petitioner could not effect of the transfer of the shares in the record of the Company, and this is particularly in view of the fact that relations between Respondent No.2 and the Petitioner were very cordial, they being real brothers, and nobody bothered about the same.

35. From the narration of the facts by the Respondents as stated in the preceding paras, it is evident that the Respondents have not disputed that the Petitioner initially was holding 50% shares. Subsequently, his shareholding was reduced to 36.1% for the reason that he had become an NRI. It is further admitted that the Petitioner was holding 1950 shares constituting 26.7% shareholding in the Company. However, as discussed hereinbefore, the Respondents have failed to prove the factum of gift of the said number of shares in favour of the Respondent No.2. Their plea that these shares were gifted by the Petitioner thus has not been proved by the Respondents. Therefore, depriving the Petitioner from his shares with malafide motive and for no valid reason, in my opinion, amounts to grave act of oppression. It is continuous wrong and is still persisting. In my opinion, this singular act of oppression is enough to grant appropriate reliefs to the Petitioner in this case.

36. Now coming to the aspect of siphoning of funds alleged by the Petitioner. In this regard, the Petitioner has alleged that the Respondent No.2 diverted the siphoned funds and the Business of the Company to the sole proprietary firm M/s Aquarius Impex, owned by the wife of Respondent No.2. The business carried out by the said Company is also similar to that of the Respondent No.1, whereby the Company started incurring huge losses. The Respondents in their reply to the Company Petition have admitted the fact that the firm, M/s Aquarius Impex, owned by the wife of Respondent No.2 is being run in the premises of the Company since last 30 years. The Petitioner's Counsel submitted that the office premises, plant and machinery of the Company is also being used by the Respondent No. 2's wife for her business without paying any compensation and rent to the Company. Furthermore, the staff of the Company was made to work for M/s Aquarius Impex under the directions of the Respondent No.2. According to the Ld.



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Counsel, the Respondents in their Reply to the Company Petition admitted that the Company premises is used by M/s Aquarius Impex since 1983.

37. It was submitted on behalf of the Petitioner that the Respondent no 2 has sold the property belonging to the Respondent No.1 Company situated at F/6 Shreeniketan, Shiv Sagar Estate, Worli, Mumbai-18 to one M/s Millennium Developers Pvt. Ltd for an estimated sum of Rs.66 lacs in or around the year 2000 when the market value of the said property was already more than twice as much. Half the consideration may have been received in cash, which never accounted for by the Respondent No.2, who misappropriated the funds received and accounted for therefrom, since the same were shown in the accounts as advances payable from the purchaser namely- Millennium Developers Pvt. Ltd. According to the Ld. Counsel, the funds received from said sale do not reflect anywhere in financial statements submitted to the ROC as revenue earned. The Ld. Counsel submitted that instead the same was reported by the auditor as advances payable and not as revenue earned nor was any tax paid on the consideration received, which the Petitioner suspects was done deliberately to defraud the tax authorities. The Ld. Counsel added that this transaction was effected at a time when there were DRT proceedings already initiated against the Company. Hence, the Company also cheated the banks which rightfully should have received the consideration as setoff towards its loans outstanding.

38. It is next argued by the Petitioner's Counsel that the Book of accounts maintained by the Company are unscrupulous. Further, that from the year 2000, the amount of consideration received from M/s Millennium Developers Pvt. Ltd. is shown as accounts payable in the books of accounts under the pretext that a suit is filed by the Petitioner and pending whereas the same was dismissed in the year 2000-2001 itself. Thus, the Respondent No.2 in connivance with the auditor has been claiming in the Director's report that the amount received from M/s Millennium Developers is payable back since the suit filed by the Petitioner is still pending, whereas immediately on dismissal of the Appeal No. 136 of 2001, the Respondent No.1 ought to have accounted for the consideration amount and hence, the profitability of the company ought to have gone up and dividends ought to have been declared.



39. The Petitioner's Counsel next alleged that the Respondent No. 2 has also misappropriated/ siphoned off the funds to the tune of around Rs.12 crores borrowed from the Central Bank of India for business purpose. The Petitioner submits that due to non-repayment of the loan amount to Central Bank of India, the Bank auctioned the Company's factory premises situated at Vapi, Gujarat and the plant and machinery lying therein, below the market value.

40. Responding to the aforesaid allegations, on behalf of the Respondents it was argued that the said allegation is incorrect. It is the Petitioner who mismanaged the assets of the company and he was privy to the act for the sale of properties of the company for his own benefits.

41. I have considered the submissions. Since the Petitioner has not impleaded M/s Aquaries Impex and the purchaser of the property i.e. M/s Millennium Developers Pvt. Ltd., the allegation with respect to siphoning off the funds, in my opinion, cannot be looked into at this stage. This issue is answered accordingly.

42. Lastly, it was alleged on the behalf of the Petitioner that the Respondents have not served statutory notice for the meetings. There is nothing on record to show that the petitioner was served any notice, with respect to the General meetings, or EOGM held by the Company, as required by law.

43. The Respondents have failed to rebut the said allegation and failed to produce any evidence that notices with respect of AGM/ EOGM etc. as required under law were served upon the Petitioner.

44. It is a settled proposition of law that where any shareholder is denied his most valuable rights in utter disregard of the statutory provisions, the making of a winding of order, on the ground that it is just and equitable would be justified. Therefore, having regard to the facts of the case in hand, the necessary ingredients of the provision contained in Section 397 which provides that: *"to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just a equitable that the company should be wound up; also stands proved.*



45. Based on the overall discussion above, I have come to the conclusion, in so far as to the allegation of illegal transfer of 1950 shares of the Petitioner in favour of the Respondent No.2 is concerned, the Petitioner has succeeded to prove the same as an act of oppression. Although, this is a single act, yet looking to the seriousness of gravity the said act of oppression, the effect of which is still persisting, in my view, the Petitioner is entitled to the relief with respect to the impugned shares. The petition, therefore, is disposed of in the following manner :-

**Order**

- a. The Company is directed to restore 1950 shares in the name of the Petitioner thereby maintaining the *status quo ante* as on 29/09/2012.
- b. The Company is also directed to file statutory form with the ROC concerned, showing the above shareholding of the Petitioner in the Company within 30 days hereof.
- c. The Company is further, directed to issue duplicate share certificates to the Petitioner in respect of these shares on making an application by the Petitioner within 90 days hereof.
- d. The Company is directed to serve statutory notices upon the Petitioner, as required by law in the capacity of he being a shareholder through R.P.A.D for the General Meetings, EOGMs etc., to be held in future, at the addresses provided by the Petitioner within 90 days hereof.
- e. The remaining reliefs are hereby declined.
- f. The C.P stands disposed of in the above terms.
- g. Interim order, if any, stands vacated. Pending C.A., if any, stands disposed of.
- h. No order as to costs.
- i. Copy of the order be issued to the parties.

sdl-

(A.K.Tripathi)  
Member (Judicial)

Certified True Copy  
Copy Issued "free of cost"  
On 01/04/2015

Dated this March 31, 2015.



Bench Officer  
Company Law Board, Mumbai Bench  
Government of India

