

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

(APPLICATION UNDER COMPANIES ACT, 2013 – 241, 244(1) AND 59 OF THE
COMPANIES ACT, 2013)

CP-178/241-242/ND/2021

IN THE MATTER OF:

MR. VASHISTH RAI SHARMA
253-A, KIRAN VIHAR
BACKSIDE KEYS HOTEL
PAKHOWAL ROAD, LUDHIANA

...Petitioners

Versus

1. KUIPER BIO MATRIX PRIVATE LIMITED
N-57B, 3RD FLOOR, KIRTI NAGAR
NEW DELHI-110015
Email- biokuiperpvt@gmail.com

...Respondent 1

2. KUSUM SHARMA N-57B, 3RD FLOOR,
KIRTI NAGAR
NEW DELHI-110015
Email- biokuiperpvt@gmail.com

...Respondent 2

3. KANIKA SHARMA D/O LATE SH. SHAM SHARMA,
N-57B, 3RD FLOOR, KIRTI NAGAR NEW DELHI-110015
Email- biokuiperpvt@gmail.com

...Respondent 3

4. REGISTRAR OF COMPANIES, DELHI 4TH FLOOR,
IFCI TOWER 61, NEHRU PLACE NEW DELHI-110019
roc.delhi@mca.gov.in

...Respondent 4

CORAM:

SHRI MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Counsel for Petitioner : Mr. Milan Singh Negi and Mr.
Nikhil Kr. Jha, Advs.

Counsel for Respondent : Mr. Karan Luthra, Adv Mr.
Naman Gowda, Adv for the
Respondent Nos. 1 to 3

ORDER

PER- MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

Order Delivered On: 05.07.2024

1. This is an application which has been filed under Section 244(1) of the Companies Act, 2013 for waiver of the requirement specified in Clause (a) of Section 244(1) of the Companies Act, 2013, by the Applicant/Petitioner Shri. Vashisht Rai Sharma against the Respondents which include the Company Kuiper Bio Matrix Private Ltd., Ms. Kushum Sharma, Kanika Sharma and the Registrar of Companies Delhi. The limited issue of maintainability of the Petition under Section 241-242 of the Companies Act is to be adjudicated herein i.e., whether the Applicant can be granted waiver of the requirements of Section 244(i) (a) in the facts and circumstances of the case.
2. The Applicant has made the following contentions:
 - (i) It has been submitted by the Petitioner that the R-1 Company was incorporated on 22.06.2007 with its registered office in Delhi as a family concern with the Petitioner and Mr. Sham Sharma

(now deceased) who were the only Directors and equal shareholders of the Company with 5,000 equity shares each.

- (ii) The Petitioner/Applicant has alleged oppression and mismanagement of the Company by the Respondents which include holding a Board Meeting for which no notice had been issued and for appointing R-2 who is the wife of Mr. Sham Sharma as Additional Director illegally. It has also been alleged that the Petitioner was illegally removed as Director of the Company by forging the signature of the Petitioner on some false letter of resignation. Further, the MoA of the R-1 Company was illegally amended, R-2 was illegally regularized as Directors etc.
- (iii) The Petitioner has also contended that his 5,000 equity shares were illegally transferred to R-2 (Kushum Sharma) wife of Late Sham Sharma.

3. The Respondents have submitted that this is a case of “opportunity litigation” wherein the Petitioner after the demise of his real brother (Mr. Sham Sharma) is seeking to make illicit gains by filing the present case against his sister-in-law and niece. The Respondent No. 1 has submitted that the Petitioner was not interested in continuing as a Director and shareholder of the Respondent No. 1 Company and decided to part ways and that on 30.03.2019, the Petitioner voluntarily submitted his resignation as the Director of the Respondent No. 1 Company. The Respondent further claims that the Petitioner transferred his 5,000 shares in the Company to Respondent No. 2 for a consideration of Rs. 50,000/- (calculated at the face value of Rs. 10 per

share). The Share Transfer Form was prepared by the Company Secretary of the Respondent No. 1 Company and was executed between the Petitioner and Respondent No. 2 and the Petitioner was paid consideration of Rs. 50,000/- in cash for transfer of his shares. The Respondent has however only been able to submit a Bank Statement of Mr. Sham Sharma showing withdrawal of cash of Rs. 50,000/-. The Respondents have also submitted that they are unable to trace the signed Share Transfer Form and original signed Share Transfer Form which they claim may be in the position of the Petitioner.

4. We have heard the Counsel for both the parties and perused the records. The limited issue in this matter is that of adjudicating with respect to the maintainability of the petition under Section 241-242 and whether waiver can be granted from the requirements of Section 244(1) (a). Section 244(1) of the Companies Act, 2013 reads as below:

The following members of a company shall have the right to apply under Section 241, namely:-

(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, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or 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:

Provided that the Tribunal, may on an application made to it in this behalf, waive all or any of the requirements specified in Clause (a) or Clause (b) so as to enable the members to apply under Section 241.”

5. The Respondents have contended that since the Applicant has already sold his 5,000 shares to R-2 he is, therefore, not a shareholder/member of the Company and, therefore, he is not entitled to file a petition of oppression and mismanagement under Section 241-242. They have also contended that the proviso to Section 244(1) by which this Tribunal can waive all or any of the requirements specified in Clause 244(1) (a) will not apply in this case, since the Petitioner is no longer a shareholder of even a single share and, therefore, not a Member of the Company. Respondents have contended that the waiver as to the holding of minimum 10% of the shares by a Petitioner can only be granted if he has a shareholding of less than 10% but not if he does not hold a single share.
6. The issues before us are:
 - (i) In the absence of signed Share Transfer Form, whether the transfer of the 5,000 shares by the Applicant/Petitioner can be considered to have taken place thus leaving the Petitioner with nil shares in the Company.
 - (ii) The Respondent has stated that the payment to the Petitioner in lieu of the transfer of his 5,000 shares to R-2 was done through cash. They have also stated that the cash was withdrawn from the account of Late Sham Sharma and not from the account of

R-2 to whom the shares were transferred. Whether the withdrawal of the amount from the account of Mr. Sham Sharma (who was not the person to whom the shares were allegedly transferred) and payment by cash to the Applicant can be treated as a bona fide transfer of funds for the purchase of shares by R-2 from the Applicant particularly since there appear to be no documents to authenticate the same.

(iii) Whether a person who was undisputedly 50% shareholder of the Company at the time of its incorporation and later transferred his entire shareholding to the other shareholders (which matter is disputed), can such person or member with allegedly no shareholding be granted waiver under Section 244(1) (a) to file Petition under Section 241-242.

7. With respect to the issue as raised above in 6 (i) and (ii), both the above facts (which have not been denied by the Respondents) do not indicate a very bone fide and transparent transfer of shares by the Petitioner/Applicant to the R-2 as claimed by the Respondent. Although, it has been submitted that in the Financial Statement of the year ending 31.05.2020 which was filed by R-2 and Mr. Sham Sharma, for the first time the act of reduction the Petitioner's shareholders from 50% to Nil was depicted, the Petitioner strongly contended that this transfer was done illegally. Without going into the merits of the matter and the allegations, we are inclined to believe that on account of the above itself, this matter needs to be seen in greater detail and adjudicated accordingly.

8. With respect to 6(iii) in support of his contention that he is eligible to be granted waiver under Section 244(i) (a), the Petitioner has cited the following judgments:

(i) The Hon'ble NCLAT in the case of Manoj Bathla & Ors. Vs. Vishwanath Bathla & Ors. wherein it was held as under:

“In the absence of relevant record, being withheld and explanation for such withholding not being found plausible and convincing, Respondent No. 1 cannot be held as having been divested of the status of a ‘member’ of the Company for limited purpose of waiver of the requirement as specified in Section 244(1) (a) of the Act. We are convinced that refusal to grant waiver would amount to adopting of a blood thirsty approach to a case where relief is sought on the allegations of oppression manifesting in the form of manipulation, fabrication and preparation of false record. When the status of Respondent No. 1 being a shareholder with 25% shareholding at the time of incorporation of the Company and also being one of the founding Directors of the Company is admitted it cannot be contended that he ceased to be a “member” upon reduction of his share capital and that too when the transfer of shareholding is alleged to be clandestine and product of fabrication and forgery.”

(ii) In the case of Anup Kumar Agarwal & Ors. Vs. Crystal Thermotech Ltd. and Ors. passed by Hon'ble NCLAT, wherein it was held as under:

“27. A shareholder/member or group of shareholder/members without any notice or information cannot visualize or presume that his/their share(s) will be brought down to their disadvantage, which amounts to oppression and mismanagement. On such anticipation or presumption no petition under Section 397 or 398 of the Companies Act, 1956 (Section 241-242 of the Companies Act, 2013) can be filed.

28. For the reasons recorded above, we hold that in cases where an applicant alleges that his shareholding has been brought down by way of oppression and mismanagement below 1/10th of the total shareholding without notice and knowledge then it is the duty of the Tribunal to determine whether the applicant had 1/10th of the shareholding prior to the date of the alleged oppression and mismanagement. Such petition cannot be dismissed on the ground that the applicants shareholding is below 1/10th of the total shareholding of the company on the actual date of presentation of the company petition.”

In respect of the above Counsel for the Respondents have relied on the judgment of the Hon’ble NCLAT in the case of Cyrus Investments Pvt. Ltd. and Another wherein it was held as under:

“151. Normally, the following factors are required to be noticed by the Tribunal before forming its opinion as to whether the application merits ‘waiver’ of all or one or other requirement as specified in clauses (a) and (b) of sub-Section (1) Section 244:-

(i) Whether the applicants are member(s) of the company in question? If the answer is in negative i.e. the applicant(s) are not member(s), the application is to be rejected outright. Otherwise, the Tribunal will look into the next factor.”

9. In the facts of the case we cannot at this stage categorically hold that the Petitioner is not a Member of the Company and hence the above judgment relied upon by the Respondents may not be applicable in this case. However, the judgments relied upon by the applicants are applicable in the facts and circumstances of this case. In the interest of justice and fair play, we are of the view that waiver should be granted to the Petitioner to pursue his matter of alleged oppression and mismanagement under Section 241-242 since the issue related to transfer of shares and current shareholding of the Petitioner may also constitute an act of oppression and mismanagement. It may be noted that we have not gone into details and merits of the Petitioner's case under Section 241-242 and have left that for adjudication after completion of pleadings in that matter. Waiver having been allowed under the proviso to Section 244(1) (a), the matter CP No. 178/241/242/ND/2021 now be placed for hearing on **05.09.2024**.

Let a copy of this order be served to the parties concerned.

SD/-

(RAHUL BHATNAGAR)

MEMBER (TECHNICAL)

SD/-

(MAHENDRA KHANDELWAL)

MEMBER (JUDICIAL)