

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**MUMBAI BENCH, COURT-I**

**Company Petition No. 4173/MB/C-I/2018**

*Under section 58 of the Companies Act, 2013*

*In the matter of*

**Mihir Desai**

**...Petitioner**

**Versus**

**Gosu Investments and Finance Private Limited & Ors.**

**...Respondents**

**Order Delivered on: 28.06.2024**

***Coram:***

Hon'ble Member (Judicial) : Justice V.G. Bisht (Retd.)

Hon'ble Member (Technical) : Mr. Prabhat Kumar

***Appearances:***

For the Appellant : Mr. Navroz Seervai, Senior Advocate i/b  
Crowford Bayley and Co.

For the Respondent No.3 : Mr. Gauraj Shah a/w Ms. Mamta  
Magare i/b Bagkar and Co. Advocate

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This Petition has been filed under Section 58 of the Companies Act 2013 ("Act") for appropriate directions to Respondent No. 1. *inter alia* to recognize Petitioner as its shareholder and register the transmission of shares bearing

distinctive nos. 001 to 125, 27526 to 43000 and 77501 to 80000 ("Shares") in favour of Petitioner.

2. The dispute in the present matter emanates from refusal of the Respondent No.1 to register transmission of shares pursuant to sale of Flat No.10 on the 1st Floor of Satsang Building admeasuring 850 square feet carpet area situated at Plot No. 85, 1st Road, NPD Scheme, Vile Parle (West), Mumbai-400049 ("Flat") attached to the Shares.
3. In order to ascertain the issue before us, it is essential to outline a brief overview of the facts. Ms. Kalpana Shah was the shareholder of Respondent No. 1 and held the impugned shares. It is the Petitioner's case that Kalpana Shah was owner of and fully entitled to the said flat as shareholder of the Respondent Company. Somewhere in October 2010, one New India Co-operative Bank Ltd ("Bank") granted a loan aggregating to Rs.15 Crores ('loan') to one M/s Pasad Impex Ltd. ("Borrower"). Ms. Kalpana Shah was a director of the Borrower and stood guarantor/surety in respect of the loan availed by Borrower. The said loan was also secured by creation of mortgage over the said impugned Flat and Shares.
4. In furtherance of his contention Petitioner submits that Respondent No. 1 vide letter dated 21<sup>st</sup> November 2010 gave its consent and permission for creation of mortgage in favour of the Bank and confirmed that Kalpana Shah was the (i) owner of the Flat and Shares and (ii) was in possession of the Flat.

- Thereafter, owing to default in repayment of loan by the Borrower, the loan account was classified as Non-Performing Asset ("NPA") by 1<sup>st</sup> October 2014.
5. The Bank thereafter initiated recovery proceedings under the SARFAESI Act. Pursuant to issuance of demand notice and failure to repay the loan by the Borrower, a possession notice was issued by the Bank in Free Press Journal on 05<sup>th</sup> May 2015. Thereafter, the Bank obtained possession of the Flat on 17<sup>th</sup> October 2016 with the assistance of the Chief Metropolitan Magistrate, Esplanade Court ("CMM Esplanade") by taking recourse to Section 14 of SARFAESI Act.
  6. The Bank issued two public notices on 27<sup>th</sup> March 2017 and 25<sup>th</sup> April 2017 for public auction of the Flat. Public auctions failed since the Bank did not receive any favorable bids. Pursuant to both failed public auctions, Petitioner approached the Bank and offered to purchase the Shares along with the attached Flat for a total consideration of Rs.2.50 Crore. It is submitted that the Borrower as well as Kalpana Shah gave their No Objection to the Bank for sale of Shares and Flat by private treaty to the Petitioner.
  7. On 14<sup>th</sup> July 2017, a sale certificate was issued by the Bank evidencing title of Petitioner to the Shares and Flat. Thereafter, on 17<sup>th</sup> July 2017, a sale deed was executed between the Petitioner and Bank. The sale deed was even registered with the Sub-Registrar of Assurances, Mumbai. Accordingly, Petitioner was put in possession of the Flat by the Bank on 17<sup>th</sup> July 2017 and

is now the absolute owner having complete right, title and interest in the said Shares and Flat.

8. It is submitted that after Petitioner took legitimate possession of the Flat, Respondent No. 1 vide letter dated 21<sup>st</sup> September 2017 disputed the transaction between the Petitioner and the Bank and alleged non-issuance of any consent or permission to Kalpana Shah for mortgaging the Flat. On 25<sup>th</sup> September 2017, Petitioner called upon Respondent No.1 to recognize Petitioners' ownership of the Flat and Shares in its records and issue the requisite allotment in his name. Respondent No.1 by letter of 30<sup>th</sup> November 2017 *inter alia* alleged collusion between Kalpana Shah, Bank and Petitioner and sought to reclaim possession of the Flat. Thereafter, between March 2018 to September 2018 several correspondences were exchanged between parties wherein Respondent No. 1 repeatedly sought details, clarification and documents from Petitioner.
9. The Petitioner acquired the Shares and Flat pursuant to enforcement proceedings initiated by the Bank under the SARFAESI Act. Such acquisition of shares tantamount to transmission of shares in favour of Petitioner by operation of law. It is submitted that Petitioner purchased the Shares and Flat for valuable consideration. Admittedly, the sale deed was executed and registered by the Bank pursuant to an order passed by a Court recognizing the right of the Bank to sell the Flat under SARFAESI. Therefore, the Petitioner has become the owner of the Shares and Flat by operation of law and hence

Respondent No.1 ought to have registered the transmission of Shares in favour of Petitioner.

10. It is contended by Respondent No.1, that no transfer of shares can take place without exhausting the pre-emptive rights stipulated in the Articles of Association of Respondent No. 1 ("Articles"). To this extent, it is submitted by the Petitioner that the present case being transmission of Shares and not transfer, the sale certificate issued by the Bank pursuant to the order of a competent court would fall within, the ambit of transmission of Shares by operation of law and not based upon volition of the parties.

#### **Submissions advanced by the Respondents**

11. At the outset, the Respondents submits that the present Petition is barred by Limitation. Admittedly the application for transmission of shares is made by the Petitioner vide letter dated 25th September, 2017. It is submitted that on 30th November, 2017 the company took a very clear stand and has clearly rejected the application made on 25th September, 2017 in line with the earlier communication dated 21<sup>st</sup> September, 2017. The present Petition has been filed on 30<sup>th</sup> October 2018, whereas the time expired on 30<sup>th</sup> December, 2017. The Respondents submits that the Appeal provided under section 58 (3) is to be filed within a period of 30 days from receipt of notice of refusal or if no notice has been sent within a period of 60 days on which the instrument of

transfer was delivered to the Company. Therefore, the appeal u/s 58 (3) of the Companies Act, 2013 is barred by Limitation.

12. The Respondent submits that the Petitioner has failed to join Ms. Kalpana Shah as a party to the present proceedings. It is further submitted that the shareholding in the company and being director entitles such a member to only utilize and occupy a flat in the building and land owned by the Company. Article 8(i) has not been incorporated in AOA, much less has the Resolution been updated with ROC.

13. It is further alleged that Ms. Kalpana Shah has played a fraud on the Company along with third parties including the Bank and the Petitioner viz. Mr. Mihir Desai. The Respondent No.1 has filed the following proceedings against the Petitioner.

- I. Company Petition No.2970 of 2019 u/s 213, 214, 242, 447, 448 filed by Respondents nos. 1 to 4.
  - i. Against the present Petitioner Kalpana Pradip Shah, Pradip Manilal shah, Pasad Impex Pvt. Ltd, New India Co-operative Bank, Himanshu Vajubhai Gokani, Milan Vajubhai Gokani, being the necessary parties for the acts of operation and mismanagement and for maintaining status-quo in respect of shares of the company claim by the Petitioner herein.
  - ii. Despite advance service of the proceedings the petitioner has not bothered to answer the said Petition and is pressing for hearing in

the present petition to avoid adjudication. The next date of the said matter is 10<sup>th</sup> July, 2024.

II. HIGH COURT SUIT NO.1033 OF 2019

The Respondent has filed the Writ Petition challenging the following documents, which forms the basis of the transaction and to declare that the Share Certificate issued to the Kalpana Pradeep Shah, does not create any right, title, interest and/or ownership right in the suit Flat in favour of the Kalpana Pradeep Shah.

- i. The Agreement for Sale dated 10/02/2003 and Deed of Declaration dated 19/07/2007 executed and registered under No.6563/2007 between Uday Vajubhai Gokani and Smt. Kalpana Pradeep Shah.
- ii. No Objection Letter dated 21/11/2010 allegedly addressed by the Company to New India Co-operative Bank Ltd.
- iii. Letter dated 20/04/2017 addressed by M/s. Pasad Impex Pvt. Ltd. to New India Co-operative Bank Ltd.
- iv. Sale Deed dated 17/07/2017 executed registered under No.6154/2017 between New India Co-operative Bank Ltd. and Mr. Mihir Desai is illegal.

III. The company has filed the criminal case against Kalpana Pradip Shah, the bank and the Petitioner

- i. Complaint by Company CC No. 1000508/2018 MMC 10th Court Andheri challenging NOC given to the Bank dated 21/11/2010 for creating mortgage.

IV. Police Complaint Against Himanshu Gokani At Juhu Police Station.

- i. Challenging Minutes Book (1999 to 2014) signed solely by him, Stationery used, No page Numbers (Deed of Confirmation dated 19/7/2007)

14. It is submitted that Kalpana Shah had no title to the flat and she could have not created any rights much less could have given in the said property as a security charge or mortgaged to the bank. Despite there being five directors of the company, she has unilaterally signed NOC claiming that the company being Respondent No.1 would have no objection in creation of mortgage and that too for a stranger company in the name of Prasad Impex while the Company (Respondent No.1) had no interest whatsoever. It is submitted that the company has filed criminal proceedings and other proceedings upon discovering this fraud played by Kalpana Shah.

15. The Respondents submit that upon inspection of documents given by the Advocates of the Petitioner and the Respondent No.5 on 31st August, 2019, it was discovered that:

- a) Minutes Book has no Pagination.
- b) Stationary used for Minutes Book is new in respect of various meetings held on 28<sup>th</sup> October, 2000 and 15<sup>th</sup> November, 2000,



12<sup>th</sup> January, 2001, 15<sup>th</sup> January, 2000, and 21<sup>st</sup> July, 2003. The record is created later on to ante-date, a bogus transaction Kalpana Shah and Respondent No.1 viz. Himanshu Gokani has created a false record to facilitate bogus transaction.

- c) The Landline number shown on stationery on which minutes of the meeting is printed shown is of 8 digits instead of 7 digits in respect of alleged meeting in the year 2000, whereas the 8 digit landline number was introduced in the year 2003. It is therefore very clear that the printing of documents is in the year 2003 or thereafter, when 8 digits number introduced. However alleged meeting recorded in the year 2000, 2001 and 2003.
- d) The Copy of the minutes of meetings offered in inspection is annexed as Exhibit 1, 2, 4, 5, and 6 at Reply filed by Respondent No.5 viz. Himanshu Gokani in the present petition.

16. Further, the Respondents submit that as per Articles of Association of the company there is a Right of First Refusal and the shares of the Company are not freely transferable owing to it being a Private Limited Company comprising of only five shareholders.

17. The present disputed transaction is also based on an amended article in the Articles of Association of the company. The Respondents have verified the Articles no such amendment has been carried out in the articles of the company. Without the consent of all directors/shareholders no transfer of shares can be effected. It was merely a proposal to add clause 8(i) in AOA of the company, it was to be added in AOA of the company once the company

got the permission from MHADA for such proposal, but the company failed to get such permission from MHADA and therefore adding of clause 8(i) in AOA of the company was dropped.

18. A third party M/s. Pasad Impex Pvt. Ltd. is beneficiary to the facility given by the bank. The AoA does not permit Company's asset being mortgaged much less for benefit of 3rd party. The NOC which is purportedly given by Respondent No. 1 company on 21st November, 2010 is premised on alleged Article 8(i). Hence, the entire transaction as claimed fails.

19. The Respondents submit that the Petitioner claims the shares by virtue of having possession and control of the said flat. However, the transaction was qua the flat alone and cannot claim shares of the company along with the flat. It is further submitted that there is no consideration paid for shares. The shares are not even valued as regards the entire company and its assets/valuation.

20. The Respondents submit that Petitioner is not a bonafide purchaser for value and without notice and the company has rightly rejected the application for membership which is also within its powers under Article 9 of the Articles of Association and more so when the transaction is not bonafide. Article 9 reads as under

*“Save when a transfer is made pursuant to the preceding Article, the Directors may in their absolute and uncontrolled discretion and without assigning any reason therefore decline or refuse to register or acknowledge the*

*transfer of any shares, whether fully paid or not to a person of whom they did not approve or any transfer of shares on which the Company has a lien.”*

**Findings:**

21. We have heard the submissions advanced by both sides and perused the record.

22. Before delving into the merits of the matter, it is essential to settle the issue of Limitation. The Respondent submits that the present Appeal is barred by Limitation as it had refused to register the transfer of shares vide letter dated 30.11.2017. The time available with the Petitioner to approach this tribunal is 30 days from the date of refusal or 60 days if no notice of refusal has been sent. In the present case, the Petition is filed on 30.10.2018, which is much later than the time stipulated in Section 58 of the Companies Act, 2013. We have gone through the records and perused extensive communication between the parties regarding transmission of shares, the Petitioner had approached the Respondent in time and was writing constantly to the Respondent No.1 company for the aforesaid transmission of shares. Accordingly, we deem it fit to condone the delay in filing the present Appeal.

23. The issue before us in a nutshell is qua transmission of shares claimed to be acquired by the Petitioner by virtue of acquiring the impugned flat from the bank which was in recovery proceedings under SARFAESI Act. The

Respondent Company has refused to acknowledge the said transaction on the primary ground that Ms. Kalpana Shah had no authorization to enter into the aforesaid transaction as she did not have a proper title to the said flat. The Respondents contend that as the shareholder and director of the company, Ms. Shah was entitled to use and enjoy the flat and was not the owner thereof.

24. It is pertinent to note that the letter dated 21.11.2010 addressed by Respondent No.1 to the bank inter alia records that Ms. Kalpana Shah is in the possession of flat along with shares bearing No. 27526 to 43000 and 77501 to 80000. However, the said letter is disputed by the Respondent No.1 on the ground that the letter is signed by Ms. Kalpana Shah herself and by any other director of the Company.

25. We are of the view that the Petitioner has acquired the said flat from the bank under valid SARFAESI proceedings. In furtherance of the same, the Petitioner has placed on record sale documents. Now, the issue before us pertains to shares attached to the said flat. The schedule of the Sale Certificate dated 14.07.2017 stipulates that the said flat is along with Share Certificate No.23 bearing distinctive nos. 001 to 125, 27526 to 43000 and 77501 to 80000. In furtherance of the same, the share certificate No. 23 issued in favour of Kalpana Shah is placed on record at page 107 of Petition.

26. The Respondents have relied upon one public notice dated 02.01.2017 stated to have been issued to *“warn and inform the public at large not to enter any kind of transaction either with Mrs. Kalpana Pradip Shah or with the New India Co-op Bank*

*Ltd, because the above said Flat No.1 is the property of our company and neither Mrs. Kalpana Shah nor New India Co-op Bank Ltd got any right by allegedly entering fraudulent transaction on company's property.”*

27. We note that the Chief Metropolitan Magistrate, Esplanade vide Order dated 17.10.2016 allowed the New India Co-op Bank Ltd. to take over possession and directed M/s Pasad Impex Private Limited, Mr. Pradip Manibhai Shah and Mrs. Kalpana Shah to deliver possession of the property in question. The public notice dated 02.01.2017 issued by the Respondent clearly indicates that the Respondent had the notice of transfer of this flat being contemplated. However, the Respondents have failed to take any appropriate corrective action before Hon'ble DRT or court of CMM and to bring to their notice the fraud alleged to be perpetrated which came to be later on agitated before Hon'ble High Court in Writ Petition by challenging the Sale to the Petitioner itself as late as in 2019. The continued silence of the Respondents indicate that they had full knowledge of the transactions between New India Co-op Bank Ltd and M/s Pasad Impex Private Limited, Mr. Pradip Manibhai Shah and Mrs. Kalpana Shah. Despite this Respondent conveniently chose to sleep over it. In backdrop of these facts we are not persuaded to hold that the sale of flat by New India Co-op Bank to the Petitioner is tainted on account alleged complicity amongst the parties.

28. It is undisputed fact that New India Co-op bank has published public notice for auction of sale of shares of the Respondent Company as well as the flat

attached to it on 27<sup>th</sup> March 2017 and 25<sup>th</sup> April 2017. Despite these public notices the Respondent failed to take any corrective action to have the mortgage in favour of New India Co-op Bank declared as null. The public notice is deemed to be notice to all and the Respondents cannot plead ignorance of said public notices. The Respondents have contended that the AoA of the Respondent No.1 company contained the Right of first refusal vested in other shareholders, however, non participation of the Respondents in the auction contemplated in public notices dated 27<sup>th</sup> March 2017 and 25<sup>th</sup> April 2017 has resulted into foregoing their right of first refusal. Accordingly, we do not find merits in the contention that the Respondent No.2 to 5 ought to have been accorded another right of first refusal by New India Coop Bank Limited after concluding the transaction with the Petitioner but before execution of sale deed in favour of Petitioner.

29. The Respondent has also contended that there is no consideration paid for shares. The shares are not even valued as regards the entire company and its assets/valuation. On perusal of Sale Certificate dated 14.07.2017 we find that the schedule of immovable property sold to the Petitioner includes the flat as well as Share Certificate No. 23. As regards the contention regarding valuation of the entire company we find that the Petitioner had acquired one flat and the shares which vests the right in the holder of the shares to own and possess that flat. It is undisputed fact that Respondent No.1 company has only 5 flats in the building and all these 5 flats have been given to shareholders of the

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Respondent Company by virtue of their shareholding therein. The Respondent company does not have any other asset, and the residual of the company is owned by these 5 shareholders. Accordingly, we do not find any merit in these contentions as well.

30. In view of the foregoing we direct Respondent No1 to transmit the shares held under Share Certificate No. 23 in favour of the Petitioner within 30 days from the date of communication of this Order.

31. The prayer clause (c) is not pressed by the Petitioner. Hence, the Appeal is partly allowed.

**Sd/-**

**PRABHAT KUMAR**

**Member (Technical)**

28.06.2024

Priyal

**Sd/-**

**JUSTICE V.G. BISHT**

**Member (Judicial)**