

**IN THE NATIONAL COMPANY LAW TRIBUNAL
(SPECIAL) CUTTACK BENCH
CUTTACK**

IA (Companies Act) No. 71/CB/2022

In

CP. No. 44/CTB/2022

In the matter of:

An application filed under Rule 11 of NCLT Rules, 2016.

-And-

In the matter of:

- 1. Shree Vishnu Power & Energy Pvt Ltd.** Through director Mr. Deepak Danga
24, Lakholi Road, Rajnandgaon, Chattisgarh- 491 441;
- 2. Mr. Deepak Daga**, Lakholi Road , Ranjnandgaon, Chhattisgarh 491 441;

...Applicants

-Versus-

Sanjay Nilkanth Derkar, Jatra Road, Near Masjid, Wani, Dist Yavatmi,
Maharashtra- 445 304;

...Respondent

In

CP. No. 44/CB/2022

Sanjay Nilkanth Derkar, R/O- Jatra Road, Near Masjid, Wani, Dist: Yavatmal
(M.H), Maharashtra- 445 304;

...Petitioner

-Versus-

- 1. Shree Vishnu Power and Energy Pvt. Ltd.;** 24, Lakholi Road, Rajnandgaon,
Chhatisgarh- 491 1441;
- 2. Manoj Dega**, 24, Lakholi Road, Rajnandgaon, Chhatisgarh- 491 1441;
- 3. Deepak Daga;** 24, Lakholi Road, Rajnandgaon, Chhatisgarh- 491 1441;
- 4. Kanhiya Daga;** 24, Lakholi Road, Rajnandgaon, Chhatisgarh- 491 1441;

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5. **Sushil Kumar Mutha**, Shivaji Chowk, Near Ram Mandir, Wani Dist:
Yavatmal (M.H)

...Respondents

Coram:

Shri P. Mohan Raj : **Member (Judicial)**
Shri Satya Ranjan Prasad : **Member (Technical)**

Appearances:

For the Applicant : Ms. Prachi Johri, Adv.

For the Respondent : Mr. Swayamjit Rout, Adv.
Mr. Rajiv Ku. Virmani, Adv.
Mr. Arjun Agarwal, Adv.

Order reserved on: 13.03.2023

Order pronounced on:19.02.2024

ORDER

1. This demurer application is filed under Rule 11 of NCLT Rules, 2016 by the applicants, they are 1st and 3rd respondents in main company petition No.44/CB/2022 for dismissal of company petition.

2. Brief contents of the petition are as follows: The company Shree Vishnu Power & Energy Pvt Ltd was incorporated in the year 2008 and engaged in the business of power generation. The company was admitted into CIRP in section 9 of IBC 2016 petition filed by operational creditor ISGEC, by the order of this Tribunal dated 27.09.2019 passed in T.P.No. 105/CTB/2019. When the company was under CIRP the Share Purchase Agreement dated 5.10.2020 was entered between the promoter Directors of the company and respondent/petitioner and others by which the promoter Directors agreed to sell 68% of paid-up equity shares. The company was relieved from the rigors of CIRP

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on 21.06.2021. After the withdrawal of CIRP order, then the respondent sent e-mail on 4.07.2021 to appoint him and Shri Abhay Mutha as directors of the company. In EOGM held on 25.10.2021 shares were Transferred however in the minutes it was recorded that further modifications are necessary, thus share transfer was not completed. On 1.11.2021 the parties entered into an amendment to SPA where by it was agreed to transfer 68% of shares to the respondent and Mr. Abhay Mutha further it required that the Board of directors shall accept the transfer. The SPA also has an arbitration clause and the applicant invoked the arbitration clause vide notice dated 10.09.2021. Section 244 of Companies Act 2013 requires not less than one hundred members of the company or not less than one-tenth of the total numbers of its members which ever less as condition to file petition under section 241 and 242 for oppression and management. The 1st respondent/petitioner without having eligibility filed C.P.No.44 of 2022. The shares are not transferred in his favour, the grievance of the respondent/petitioner is he was wrongly removed as the director of the company. He has failed to state that when the 33.8% of sharers transferred to him. The register of members of the company is never modified and the Board of Directors never passed the requisite resolution to amend the register of members of the company. The mere execution of share transfer deed does not complete the transfer of shares. A person becomes a member of the company only when his name reflects in the register of company. The respondent/petitioner is not a member of company; therefore, he cannot maintain a petition filed under section 241 and 242 of Companies Act 2013 hence the petition is liable to be dismissed.

3. Brief contents of reply are as follows: The applicant company was admitted into CIRP. In COC SBI SAM Branch was the sole financial creditor with 100% voting. On 29.06.2020 SBI SAM Branch agreed for the settlement of OTS for Rs.41,00,00,000/- For an operational creditor ISGEC a sum of Rs.3,33,12,002/- was due. On 05.10.2020 a Share Purchase Agreement was executed, where the 1st respondent agreed to extend financial assistance to the

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applicant company by making payment to SBI SAM Branch towards the agreed OTS in lieu of ownership, management and control of applicant company by acquisition of issued equity shares. The SPA envisaged an upfront payment of Rs.11,25,00,000/- to SBI SAM Branch towards the OTS and accordingly the payments was made to SBI and cleared the debt. The respondent and his associates on behalf of investors made payment to ISGEC in terms of SPA. In view of the efforts and payment made by the respondent/petitioner and his associates the CIRP was withdrawn by order of this Tribunal dated 21.06.2021. That on 04.07.2021 the respondent/petitioner along with Abhay Mutha requested the applicant to comply the terms of the SPA and appoint the respondent and Mr.Abhay Mutha as directors of 1st applicant company, however the applicants refused to full fill their obligation and denied execution of any SPA. Feeling cheated by the applicant the respondent and Mr.Abhay Mutha filed a police compliant on 22.07.2021 against the 2nd applicant and Mr.Manoj Daga. After lodging police compliant Extraordinary General Body Meeting was held on 25.10.2021, SPA was ratified and it was resolved that the board of directors shall comply with necessary compliance to give effects to the terms of SPA. In EOGM members of 1st applicant company accorded for transfer of 68% shares of respondent company. That on 1.11.2021 an addendum to share purchase agreement dated 5.10.2020 was duly executed between the respondent, Mr.Abhay Mutha and Mr.Manoj Daga and others wherein certain conditions of the SPA were revised without altering the transfer of shareholding to the respondent/petitioner and Mr. Sushil Kumar Mutha. On 1.11.2021 Board meeting of 1st applicant was held and accorded to record, approve and endorse the transfer of shares to the respondent/petitioner and Mr. Sushil Kumar Mutha. On 1.11.2021 share transfer deeds SH4 were duly executed between the transferor and transferee and affixed applicable stamp duty. Share certificate were handed over to the respondent/petitioner. The 2nd applicants and Mr. Manoj Daga have miserably failed to perform their obligations and have not made necessary endorsement on the SH1. In the meeting held on 2.11.2021 it was resolved to

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appoint respondent/petitioner and Mr. Abhay Mutha as directors of the 1st Applicant company and they were inducted as authorized signatories of the applicant company. On 12.04.2022 respondent/petitioner and Mr. Abhay were received auto moted e-mail dated 12.04.2022 from MCA informing them that they have been removed from the director ship of the 1st applicant company. The respondents later came to know the fraudulent acts of the 2nd applicant and Manoj Daga which leads to filing of company petition. In pursuant of EoGM dated 25.10.2021 consent of member was accorded for the transfer of 68% share of the company and in the meeting held on 1.11.2021 consent of Board was accorded to record and approve the transfer and endorse the transfer of shares of the company. In the same meeting directors were authorized to transfer the shares to the transferee whose name was to be entered in the register of the company. Further concern directors were also authorized to and obligated to make necessary endorsements on share certificates and entries in the register of company. The applicants failed to do so hence they should not be allowed to take advantage of their own wrongs. The respondent till filing of this application he was under the bonofide belief that entire formalities in respect of share transfer were completed. After knowing the information with respect to share transfer the respondent /petitioner is in the process of filing application under section 59 of the companies Act 2013 for the rectification of register of members of 1st applicant company. With regards to arbitration clause mentioned in SPA, it is held by various High courts the position of law is that this Tribunal alone have jurisdiction to entertain the company petition. In the circumstances this application is liable to be dismissed.

4. The point for consideration is:

1. Whether the respondent/petitioner has any locus stand to file the petition under section 241 and 242 of the companies Act 2013?

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5. **Point No.1:** The respondent has filed C.P. No.44/CB/2022 to frame a scheme and reinstatement of respondent and Mr. Abay Kumar mutha as directors of the 1st applicant company and for other reliefs under section 241 and 242 of the companies Act 2013.

6. The main challenge made in this demurer application is the respondent being a non-member of the 1st applicant company he is not entitled to file the company petition under section 241 and 242 of the Companies Act 2013.

7. This application can be decided even on the admitted facts of the case by both sides. The respondent submitted that when the 1st applicant company was under CIRP he and his associates extended financial assistance to 1st applicant company to come out from the rigors of the CIRP. In consideration of the financial assistance extended by the respondent and others the 2nd applicant and Manoj Daga agreed to transfer shares in the company and appoint them as directors. Even though the share transfer deeds were executed, respondents name not entered in the registers of 1st applicant company. The respondent now has filed the petition under section 59 of the companies Act 2013 for rectification of register of members of the company.

8. As per section 241 of companies Act 2013, only a member of the company can file a petition. Section 241 of companies Act 2013 begins with “**Any member of a company who complains**” further section 244 of companies Act 2013 prescribed the eligibility criteria to file the petition under Section 241 of Companies Act 2013.

Section 244 of the Companies Act 2013 runs as follows:

244. Right to apply under section 241. —

(1) 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

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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: 153 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.

Explanation. —For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member. (2) Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

9. The section shows that only members of the company can file a petition under section 241 of the Companies Act 2013. Who is a member of the company? Section 2(55) of Companies Act 2013 defines member as follows:

2(55) “member” in relation to a company, means-

(i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;

(ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;

(iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;

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10. Thus, a person who is holding share and whose name is entered in the register of the members of the company alone are considered as member. The person merely holding share certificates or share transfer documents are not considered as member of the company. In our case admittedly the name of the respondent/petitioner is not entered in the register of 1st applicant company. The terms “members” and “shareholders” are usually used interchangeably. A person may be a holder of shares by transfer but will not become its member until the transfer is registered in the books of the company in his favour and his name is entered in the register of members. Two conditions must be fulfilled to become a member of the company viz there is an agreement to become a member and that his name is entered in the register of members of the company are cumulative. Both conditions have to be satisfied to enable him to exercise the rights of a member. Section 41,397 & 398 of Companies Act 1956 are pari materia to section 2(55), 241 & 242 of the Companies Act 2013. The Punjab and Haryana High Court while dealing with those sections of companies Act 1956 in **Ved Parkash and others vs Iron Traders (Private) Ltd and others AIR 1960 P&H 427** held as follows:

petition under Sections. 397 and 398 can only be maintained by a person or persons who are shown as members in the register of the Company, and if the persons who wish to file such a petition are not shown as members rightly or wrongly, they must first have the register rectified before they can bring a petition. I accordingly uphold the objection embodied in first of the preliminary issues and do not consider it is necessary to go into the second. I accordingly dismiss the petition with costs to respondents Nos. 1 to 4.

Further the NCLAT in Company Appeals (AT) No.133 and 139 of 2017 **Cyrus Investments Pvt Ltd & Anr. Vs Tata Sons Ltd & Ors** held as follows:

151. Normally, the following factors are required to be noticed by the Tribunal before forming its opinion as to whether the

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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.

The Hon'ble NCLAT-Chennai in Company Appeal (AT) (CH) No. 127 of 2022 **Jithendra Parlapalli vs M/s. Wirecard India Private Ltd, and others** held that a non-member director cannot file petition under section 241 & 242 of the Companies Act 2013 for oppression and mismanagement.

11. On the respondent side relies upon the NCLAT Delhi order dated 4.7.2017 passed in **Yash Golyan and others vs Nulon India Ltd and others (2019) 214 Comp.case 548** In this case son filed a petition under section 397,398, and 111A read with section 402 of the companies Act 1956 against mother and others for declaration that transfer of his shares in the company in favour his mother was illegal and for direction to the company to rectify the register of members of an issue share certificate. There on the respondent side raised two preliminary objections. The first objection is that the petition is not maintainable as there are no allegations of oppression and mismanagement. It is answered by the Tribunal that an act of transferring the share illegally would constitute an act of oppression. The second objection was that the transaction concerning transfer shares rest between son and mother therefore petition is not maintainable. It is answered that the transfer of shares were made by the company, and transfer of shares reflected in the proposed Balance sheet of the company therefore the role of company is there hence it cannot be held as a private affairs between two individuals. In our case in hand there is no averments in the petition filed under section 241 and 242 of the Companies Act 2013 regarding non-transfer of the shares in favour of the respondent/petitioner, in reply to this application the respondent admitted that he was under the bonofide belief that transfer was

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completed, after knowing fact that register of members of 1st applicant company is not rectified he immediately filed petition (C.P.No.11/CB/2023) for rectification of register of members of the company. Here the respondent never become the member of the company, there is no pleadings in C.P.No.44/CB/2022 to decide the entitlement of the respondent and to rectify the register of members of the 1st applicant company. In the company petition the respondent primarily questioning the validity of alleged AGM held on 20.11.2021 and his removal from the post of directorship of the company, as already held that the respondent not being a member of the company as non-member erstwhile director, he cannot maintain the petition. Thus, the supra citation relied by the respondent is not applicable to the facts and circumstances of this application. The another citation relied by the respondent is the Calcutta High Court case **Babulal Madhavji Verma vs New standard Coal Co.Pvt Ltd and Ors 1966 SCC Online Cal 191** this is the citation with regard to share transfer rights of the outsider - purchaser of shares, In an application filed for rectification of the register of members of company, it is held that rights of outsider-purchaser of shares cannot be denied on the ground that there was non-compliance with the Articles of Association of the company. The other citation relied by the respondent is the NCLAT-Delhi order dated 5.1.2023 passed in Company (AT0(insolvency) No.596 of 2022, **Dynamix Growth Avenues Private Limited vs Mr. Partha Sarathy Sarkar**, this citation is pertaining to IBC 2016 and relating to the power of the Adjudicating Authority directing the party to produce the documents under Rule 43 of NCLT Rule 2016, these citations are nothing to do with the present application.

13. For the discussion and reasons stated above it is answered that the 1st respondent/petitioner being non-member of the company has no locus stand to file the C.P.No.44/CB/2022.

14. In the result this Application **I.A.No.71/CB/2022 is Allowed**. In consequence C.P.No.44/CB/2022 is dismissed as not maintainable and status quo order dated 13.12.2022 passed in this matter stands vacated and other pending interlocutory applications are all stand **dismissed**. No cost.

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15. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps,

16. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Satya Ranjan Prasad
Member (Technical)

P. Mohan Raj
Member (Judicial)

Signed on this, 19th day of February, 2024

Supriya. P.S._