

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CAPP No. 28 of 2014 (O&M)

Date of decision : 04.5.2015

Triangle Builders and Promoters Private Limited .. Appellant

versus

CPI India Real Estate Ventures Limited and others .. Respondents

Coram: Hon'ble Mr. Justice Rajesh Bindal

Present: Mr. U. K. Chaudhary, Senior Advocate with
Mr. Hemant Saini, Mr. Himanshu Vij and
Mr. Umang Gupta, Advocates, for Triangle Builders &
Promoters Private Limited and Vital Construction
Private Limited.

Mr. Ashok Aggarwal, Senior Advocate with
Mr. Hemant Saini and Mr. Mukal Aggarwal, Advocates,
for -Native Buildcon Private Limited.

Mr. Sunil Gupta, and
Mr. Anand Chhibbar, Senior Advocates with
Mr. Prashant Mishra, Mr. J. S. Bhatia, and
Mr. Gaurav Mankotia, Advocates,
for respondent no. 1- CPI India Real Estate Ventures Limited.

Rajesh Bindal, J.

1. This order will dispose of CAPP Nos. 28 to 30 of 2014, as the same arise out of common order.
2. Company Appeal No. 28 of 2014, has been filed by Triangle Builders and Promoters Private Limited (for short, 'Triangle').
3. Company Appeal No. 29 of 2014 has been filed by Vital Construction Private Limited (for short, 'Vital').
4. Company Appeal No. 30 of 2014 has been filed by Native Buildcon Private Limited (for short, 'Native').
5. Some of the respondents before the Company Law Board (for short, 'the Board'), in a petition filed by respondent no. 1/ petitioner under Sections 397 and 398 read with Sections 402 and 403 of the Companies

Act, 1956 (hereinafter to be referred as 'the Act'), have approached this Court impugning the interim order dated 5.3.2014, passed by the Board.

6. The petition was filed by respondent no. 1 before the Board claiming that it is a company registered in Mauritius, which invested ₹ 123,57,03,000/- in the Perpetual Infracon Private Limited- respondent no. 2 (hereinafter to be referred as 'Perpetual'). CPI India Real Estate Ventures Limited- respondent no. 1 (for short, 'CPI') was to hold 50% shares of newly incorporated Perpetual, whereas Five Star Promoters Private Limited- respondent no. 3 (for short, 'Five Star'), was to hold 49.90% shares. Ocean Build Mart Private Limited – respondent no. 4 (for short, 'Ocean'), was to hold 0.10% shares. Perpetual was to have four Directors, two nominated by CPI and two nominated by Five Star and Ocean. The petition was filed by CPI alleging oppression and mismanagement.

7. Mr. U. K. Chaudhary and Mr. Ashok Aggarwal, learned senior counsels for the appellants submitted that the interim order passed by the Board directing audit of the accounts of the appellant- Triangle and restraining it from creating any third party rights over the company's land and directing to maintain status quo over the shareholding, board pattern and fixed assets is totally beyond the scope of Sections 397 and 398 of the Act.

8. The appellants are independent companies having no direct connection with respondent no. 1/ petitioner. The petition under Sections 397 and 398 of the Act could be filed against a company either by its members or share holders. Respondent no. 1/ petitioner is neither the member nor a share holder in the appellants-companies. Respondent no. 1 is not even share holder in BPTP Limited or Vital Construction Private Limited or Native Buildcon Private Limited, hence, a petition filed by respondent no. 1/ petitioner regarding oppression and mismanagement of the appellants companies was not maintainable. Respondent no. 1/ petitioner could invoke his rights, if available, against Perpetual in which it had made investments. All the decisions were taken by the Board of Directors of Perpetual with the consent of all the Directors, including the ones nominated by respondent no. 1/ petitioner.

9. The appellant- Triangle is FDI compliant subsidiary of BPTP Limited, which has no concern with respondent no. 1/ petitioner. The investment on purchase of land was made by the appellant much before even respondent no. 1/ petitioner had invested money in Perpetual, hence to claim that the money invested by respondent no. 1/ petitioner in Perpetual was siphoned off to the appellant and misutilised, is misconceived. Respondent no. 1/ petitioner was allotted 2,46,670 Cumulative Convertible Preference Shares (CCPS) in the appellant company namely Triangle Builders & Promoters Private Limited on 31.3.2009. The aforesaid investment by respondent no. 1/ petitioner was in terms of a resolution of the Board.

10. While referring to judgment of Allahabad High Court in Life Insurance Corporation of India vs Hari Das Mundhra and others (1966) 36 Comp Cas 371 (All) and Madras High Court judgment in Shankar Sundaram vs Amalgamations Limited, Chennai (2002) 111 Comp Cas 252 (Mad), it was submitted that the provisions of Section 399 of the Act have been interpreted to include subsidiary of a holding company against which allegations of oppression and mismanagement could be made. That too, if the subsidiary company is a kind of branch where entire control and management is with the holding company. Even if the case of the respondent no. 1/ petitioner is stretched to any limit, the appellants have no direct relation with respondent no. 1/ petitioner. The appellants are not the subsidiaries of Perpetual, the company in which respondent no. 1 made investment of ₹ 123,57,03,000/-. Hence, to rope in the appellant in the case of alleged oppression and mismanagement of Perpetual is totally misconceived. The Board while directing audit of the accounts of the appellant- Triangle Builders & Promoters Private Limited and also passing other restrain orders has exceeded its jurisdiction. It has travelled beyond the scope of Sections 397 and 398 of the Act. Rather the provisions have been re-written, in the sense that instead of 'the company', the concept of the person managing the company has been brought in, which is totally alien to the provisions of the Companies Act.

11. It was submitted that Sections 397 and 398 of the Act provide that a petition can be filed against a company for oppression and

mismanagement. The person, who has the right to file the petition under Sections 397 and 398 of the Act, has been defined in Section 399 of the Act. In the case of a company having a share capital, not less than 100 members of the company or not less than 1/10th of the total number of its members, whichever is less, or any member(s) holding not less than 1/10th of the issued share capital of the company, can apply.

12. In the case in hand, there is nothing in the petition filed by CPI showing that it is the member of the appellant-company being a share holder. Primarily the pleadings before the Board are with reference to respondent nos. 1 to 6 in the petition. It is sought to be alleged as to how the money travelled from perpetual to other companies and ultimately allegedly misutilised. The investment made by the Perpetual with other companies was in terms of the provisions contained in Article of Association and also the resolution of Board of Directors. In fact, no investment was made by the Perpetual with the appellants. Hence, in terms of the contentions raised in the petition filed before the Board, the same was not maintainable against the appellants in the aforesaid appeals.

13. It was further submitted that the present appellants filed CA Nos. 97 to 99 of 2013 in October, 2013 before the Board making a prayer for deletion of their names as the petition under Sections 397 and 398 of the Act was not maintainable against them. Despite the fact that the arguments for interim relief in the petition filed by CPI were heard much after that but the applications were not decided. The same were required to be decided before taking up the prayer for interim injunction in the petition filed before the Board as prayer for interim relief had been made even against the present appellants. Further contention is that even though no specific interim order as such has been passed against the present appellants, who were respondent nos. 8 and 9 before the Board in the petition filed by CPI, but still certain observations / findings have been recorded which could not have been recorded before deciding the application filed by the present appellants for deletion of their names, in the petition filed alleging oppression and mismanagement. In fact, with the observations /findings recorded by the Board against the present appellants, the prayer made in the applications for deletion of their names filed by respondent nos. 8 and 9,

before the Board have in a way been rendered infructuous. The Board was required to record a specific finding that the petition filed by CPI against the present appellants was maintainable in terms of Section 399 of the Act.

14. A perusal of the impugned order passed by the Board shows that it was proceeding totally beyond the provisions of the Act and in fact has re-written the same. The jurisdiction under Sections 397 and 398 of the Act could not be expanded to the extent it has been done. Section 399 of the Act clearly defines as to the persons, who are entitled to invoke the same. Even for recording the findings regarding alter ego, no reason as such has been assigned. If one person is controlling 10 companies, it will not mean that with the filing of a petition under Sections 397 and 398 of the Act against one company in which investment had been made by the petitioner, all other companies can also be arrayed as respondents merely for the reason that these are controlled by one person and there may be some inter-se investments. In support of the arguments, reference was made to judgments in Foreshore Co-operative Housing Society Limited, Bombay vs Praveen D. Desai and others 2009 (2) Civ.CC 219 (Bombay), Deepa Sharma and others vs Raj Kumari Devi and others 2006 (2) RCR (C) 796, P. M. Gopalasamy vs C. Senpagam 2009 (5) RCR (C) 469 and Ved Parkash and others vs Iron Traders (Private) Limited, Delhi and others 1960 PLR 553.

15. Alter ego is not a legal term which can be used in law. Under Section 293 (1A) of the Act deals with loans and advances, whereas Section 372 (A) of the Act controls and regulates the affairs of the company.

16. Section 291 of the Act provide that the company operates through resolution. One man show is not the criteria. A company is always controlled by the Board of Directors. Merely because Kabul Chawla is a share holder in different companies, it is the company as an independent identity which is to be seen with reference to Section 397 of the Act and not the persons behind. The Act talks about the juristic person, whereas the CLB in its impugned order has referred to human mind behind.

17. It was further submitted that once a party has been unnecessarily impleaded in any proceedings and no final relief can be granted against it, even no interim relief should be granted against it. Not only this, even observations cannot be made against it in any order passed.

In fact the maintainability of any petition was required to be considered at the threshold to avoid unnecessary litigation. Rule 2 (4) CPC and Rule 6 of the Company (Court) Rules, 1959 were referred to contend that the provisions of CPC are applicable. It was further submitted that the Company Law Board Regulations, 1991, do not provide for non-applicability of CPC or the principles thereof.

18. Order VII Rule 11 CPC provides for rejection of plaint. The same principles are applicable in the proceedings before the Company Law Board. Once the issue regarding maintainability was raised, the same should have been decided first. In fact, it is the duty of the Court to examine that issue at the very first instance not only before issuance of notice or at any stage thereafter but even before registration of the case. In support of his plea, reliance was placed upon T. Arivandandam vs T. V. Satyapal and another (1977) 4 SCC 467 and Church of Christ Charitable Trust and Educational Charitable Society vs Ponniamman Educational Trust (2012) 8 SCC 706.

19. On the other hand, Mr. Sunil Gupta, learned Senior Counsel appearing for CPI India Real Estate Ventures Limited, respondent no. 1, submitted that it is not in dispute that the application under Sections 397 and 398 of the Act has been filed against Perpetual Infracon Private Limited. He did not dispute the fact that such an application can be filed by a party on fulfillment of conditions laid down in Section 399 of the Act. However, he submitted that many times to examine the affairs of the company with reference to oppression and mismanagement, its dealings, contracts, agreements with other individual(s), companies or its relations with shareholders, directors are also required to be examined. In those circumstances, they become necessary parties. In case the petitioner before the Board fails to implead them, the Board is duty bound to do that for grant of effective relief. Wide powers have been conferred on the Board under Sections 397-398 of the Act. He further submitted that Section 402 of the Act gives wide powers to Board to pass any order, which is just and equitable with reference to the affairs of the company. Section 402 of the Act also confers powers on the Board to terminate / set aside/modify any agreement arrived at between the company on the one hand and the

Managing Director, Director, Manager or any other person, however, such an exercise can be done only after notice to the party concerned. The conduct of the company's affairs in future can also be regulated.

20. Section 403 of the Act gives wide powers to the Board to grant any interim relief as is considered just and equitable in the circumstances of the case. Even the provisions of Memorandum and Articles of Association can also be altered.

21. Section 405 of the Act provides for addition of respondents in the proceedings under Sections 397 and 398 of the Act, which is in very wide term including any other person. Hence, to state that in an application filed under Sections 397 and 398 of the Act, only the company can be impleaded as respondent is totally misconceived. The other companies which are nothing else but face of Kabul Chawla or alter ego have been impleaded as respondents as the money invested by the petitioner in Perpetual is to be tracked in the process of examining oppression and mismanagement of the company.

22. In the case in hand, CPI India Real Estate Ventures Limited is a foreign institutional investor. It had invested ₹ 123,57,03,000/- in Perpetual in the year 2008 for the purpose of setting up of Special Economic Zone in I.T. Sector at Faridabad. The other investors in the company, namely, Five Star Promoters Private Limited, Ocean Build Mart Private Limited were to contribute land to start the project. It was claimed by the two investors that the land is available with respondent nos. 10 to 20 (before the Board), which are controlled by Kabul Chawla. It was understood that the aforesaid land shall be transferred in the name of the company and the Perpetual shall take exemption from payment of stamp duty for transfer of the land. Nothing was done. No steps were taken to seek exemption for a period of about three years. Even business plan was not prepared. The entire amount was transferred and invested by Perpetual in the form of Cumulative Convertible Preference Shares (CCPS) in March, 2009 with Triangle Builders. Then Triangle invested money in Native and Vital, which they invested back in Triangle. All these companies are controlled by Kabul Chawla. This is the reason that they have been impleaded as party to the proceedings. They are necessary parties. It was nothing else but round of

tripping. The result of the aforesaid transactions by the Company was reduction in value of the investment made by CPI India Real Estate Ventures Limited.

23. It was further submitted that the appellants have been impleaded as parties to the proceedings before the Board so that they may not have grievance that any order was passed at their back. They are being afforded due opportunity of hearing. It was for the reason that they are likely to be affected by the order which could be passed by the Board. They were necessary parties to assist the Board in the petition filed by CPI India. There was no information supplied by the company for the 3-5 years. CPI was not having track of money invested by it. The Board had merely directed for auditing the account of Perpetual and Triangle and stay of sale of properties by respondent nos. 10 to 20. Respondent nos. 10 to 20 before Board are not even aggrieved of restrain order passed against them, though these are also the companies controlled by Kabul Chawla. Respondent nos. 2 to 6 have been directed to cooperate. Even Five Star and Ocean, who were the investors in the Company along with CPI also have no grievance against the order passed by the Board. Meaning thereby the facts as stated by CPI are not being disputed as these are in the knowledge of the Company. It is only the affairs of the company which are being examined by the Board and for that purpose only its financial transactions with other two companies are being looked into.

24. Learned counsel further submitted that the provisions of English Companies Act, 1948, as replaced by 1985 Act and further replaced by 2006 Act are para materia to Sections 397 and 399 of the Act. In support of his submissions, reliance was placed upon judgment of Hon'ble the Supreme Court in Needle Industries (India) Limited and others vs Needle Industries Newey (India) Holding Limited and others (1981) 3 SCC 333, Chancery Division (Companies Court) judgments in Company (No. 007281 of 1986), Re (1987) B.C.L.C. 593; BSB Holdings Limited (Joinder) (1993) B.C.L.C. 246; 320 Re Fahey Developments Limited (1996) B.C.C. 320; 286 Apex Global Management Limited vs FI Call Limited (2014) B.C.C. 286, and Madras High Court judgments in AIDQUA Holdings (Mauritius) Inc. vs Tamil Nadu Water Investment Company Limited 2014 (1) CTC 808, State

Bank of India vs P. Narayanasamy and others (2014) 3 MLJ 442.

25. It was further argued by Mr. Gupta that in case the plea raised by counsel for the appellants is accepted to the extent that even where the issue raised is with reference to Sections 402 and 404 of the Act, still maintainability of the petition has to be seen in the light of Section 399 of the Act, the same will make the provisions unworkable. It is settled principles of interpretation of statutes that plain language given in section is to be seen and nothing is to be added or deleted.

26. While referring to Section 402(e) and (f) of the Act, it was submitted that the aforesaid section provides that the order passed by the Board can provide for termination, setting aside or modification of any agreement between the company and any person besides, managing director, director or manager. The person has been defined to be a company as well. No such order could be passed without affording opportunity to the person concerned.

27. Certain conditions have been laid down in section 399 of the Act for maintainability of a petition against the Company only to avoid frivolous litigation. In support of the arguments, reliance was placed upon judgments of Hon'ble the Supreme Court in Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552 and J. P. Srivastava and Sons (P) Limited and others vs Gwalior Sugar Company Limited and others (2005) 1 SCC 172.

28. In support of his plea regarding alter ego and lifting of veil, reliance was placed upon judgments of Hon'ble the Supreme Court in New Horizons Limited and another vs Union of India and othes (1995) 1 SCC 478 and Balwant Rai Saluja and another vs Air India Limited and others (2014) 9 SCC 407. While going through the impugned order passed by the Board, Mr. Gupta submitted that at the very outset a preliminary objection was raised by the appellants that the petition against them was not maintainable. Subsequently formal applications were also filed. The Board in its order has dealt with all the issues in detail. Merely because specific number of the applications filed by the appellants have not been mentioned in the order, the same will not make any difference, as the contentions raised by them have been discussed in detail and dealt with. While going through

the affairs of the company on merits, import of Clause 13.3.1. of the Articles of Association is also to be considered. It is in that process that the accounts of the Perpetual and Triangle have been directed to be audited by a professional company of international repute. When the project for setting up of a Special Economic Zone by the company could not take off may be for any good reason, the money invested by CPI will have to come back. The audit does not mean going into the affairs of the company. The Board can modify or re-do the arrangement. Clause 11.3.1. of the Articles of Association may be altered. It is a case where the money was invested by a foreign institutional investor. In the present scenario, we need to re-build their confidence as well so that the money being invested by them is not misappropriated by keeping them entangled in cobweb of litigation.

29. As far as the contention raised by learned counsel for the appellants that the money was invested by Perpetual in Triangle in terms of the resolution of the Board of Directors of Perpetual, in which both the share holders had two Directors each, hence, could not raise a grievance, cannot be gone into at this stage as the same is the issue to be considered by the Board at the time of final disposal of the petition. The shield to justify the investment by Perpetual in Triangle is Clause 11.3.1 of the Articles, deletion/modification of which is also the subject matter of dispute before the Board, hence, this court would not like to opine on the same at this stage.

30. Besides the investment of about ₹ 123.5 crores made by CPI in Perpetual, the CPI made following investments in other companies controlled by Kabul Chawla, i.e., ₹ 93 crores in Jubilant Infracon Pvt. Ltd.; ₹ 91 crores in Gallant Infrastructure Pvt. Ltd.; ₹ 25 crores in BPTP SEZ Pvt. Ltd. and ₹ 98 crores in Green Star Infratech Pvt. Ltd.

31. Heard learned counsel for the parties and perused the paper book.

32. The relevant provisions of Sections 397 to 405 of the Act, are extracted below :-

“397. Application to [Tribunal] for relief in cases of oppression. (1) Any members of a company who complain that the affairs of the company are being

conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the [Tribunal] for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the [Tribunal] is of opinion-

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and

(b) 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 and equitable that the company should be wound up ;

the [Tribunal] may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

398. Application to [Tribunal] for relief in cases of mismanagement.- (1) Any members of a company who complain -

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company ; or

(b) that a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by an alteration in its Board of directors or manager or in the ownership of the company's shares, or if it has no share capital, in its

membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; may apply to the [Tribunal] for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the [Tribunal] is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the [Tribunal] may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

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

- (a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;
- (b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(2) For the purposes of sub-section (1), where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(3) Where any members of a company are entitled to make an application in virtue of sub-section (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.

(4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the [Tribunal] under section 397 or 398, notwithstanding that the requirements of clause (a) or clause (b), as the case may be, of sub-section (1) are not fulfilled.

(5) The Central Government may, before authorising any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable, for the payment of any costs which the [Tribunal] dealing with the application may order such member or members to pay to any other person or persons who are parties to the application.

400. Notice to be given to Central Government of applications under sections 397 and 398. - The [Tribunal] shall give notice of every application made to it under section 397 or 398 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing a final order under that section.

401. Right of Central Government to apply under sections 397 and 398.- The Central Government may itself apply to the [Tribunal] for an order under section 397 or 398, or cause an application to be made to the [Tribunal] for such an order by any person authorised by it in this behalf.

402. Powers of [Tribunal] on application under section

397 or 398.- Without prejudice to the generality of the powers of the [*Tribunal*] under section 397 or 398, any order under either section may provide for -

- (a) the regulation of the conduct of the company's affairs in future ;
- (b) the purchase of the shares or interests of any members of the company by other members thereof or by the company;
- (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;
- (d) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely :
 - (i) the managing director,
 - (ii) any other director,
 - (iii) and (iv) [omitted}
 - (v) the manager,upon such terms and conditions as may, in the opinion of the [*Tribunal*], be just and equitable in all the circumstances of the case ;
- (e) the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned ;
- (f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the

application under section 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

- (g) any other matter for which in the opinion of the [Tribunal] it is just and equitable that provision should be made.

403. Interim Order By [Tribunal] .- Pending the making by it of a final order under section 397 or 398, as the case may be, the [Tribunal] may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs, upon such terms and conditions as appear to it to be just and equitable.

404. Effect of Alteration of Memorandum or Articles of Company by order Under Section 397 or 398.- (1) Where an order under section 397 or 398 makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make without the leave of the [Tribunal], any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

(2) Subject to the provisions of sub-section (1), the alterations made by the order shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act ; and the said provisions shall apply accordingly to the memorandum or articles as so altered.

(3) A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall

register the same.

(4) If default is made in complying with the provisions of sub-section (3), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [fifty] thousand rupees.

405. Addition of Respondents to Application under Section 397 or 398 .- If the managing director or any other director or the manager, of a company, or any other person, who has not been impleaded as a respondent to any application under section 397 or 398 applies to be added as a respondent thereto, the [*Tribunal*] shall, if it is satisfied that there is sufficient cause for doing so, direct that he may be added as a respondent accordingly.

33. The provisions of the Sections 397 and 398 of the Act provide for a remedy to the members of a company to file a complaint to the Board regarding oppression and mismanagement of the company. Section 399 of the Act provides eligibility conditions for maintaining such an application. In terms thereof, in case of a company having share capital, such an application can be maintained by not less than 100 members or not less than 1/10th of total members of the Company, whichever is less, or any member (s) holding not less than 1/10th of the issued share capital of the Company. In case of a Company not having a share capital, not less than 1/5th of the total members. Notice of the application is required to be given by the Board to the Central Government. Under Section 401 of the Act, even the Central Government can also apply to the Board for an order under Sections 397 and 398 of the Act.

34. Section 402 of the Act provides for powers, which the Board can exercise on an application under Section 397 and/or Section 398 of the Act. It includes regulation of the conduct of the Company in future, purchase of shares or interest of any member by other members of the Company, purchase of shares by the Company, consequent reduction of its share capital, termination, setting aside or modification of any agreement between the Company on one side and the Managing Director, Director or

Manager on the other side. It also provides for termination, setting aside or modification of any agreement between the Company and any person, however, such a course is possible only after notice to the party concerned.

35. Section 403 of the Act provides for passing of an interim order by the Board. Section 404 of the Act deals with the consequences of an order passed either under Section 397 or 398 of the Act, where the result can be alteration in the Memorandum or Articles of a company. The fact that a clause in the Memorandum or Articles can be deleted or modified by the Board while dealing with application under Sections 397 or 398 of the Act was not even disputed by learned counsel for the parties.

36. Section 405 of the Act gives liberty to the Managing Director, Director or Manager of the company or any other person to move an application for being impleaded as party to the proceedings, in case they are likely to be affected by the order passed.

37. In the case in hand, the relations between the companies, who are party to the litigation, though complicated, are noticed below:-

Total share holding linkage between the
Company-Perpetual and Kabul Chawla

Sr. No.	Name of the company	Shareholding pattern
(i)	Perpetual Infracon Private Limited	CPI 50%, Five Star 49.90%, Ocean holds 0.10%
(ii)	Five Star Promoters Private Limited	BPTP Limited 100%
(iii)	BPTP Limited	Kabul Chawla and the entities controlled by him 88.12%
(iv)	Triangle Builders & Promoters Private Limited	BPTP Limited 100%
(v)	Vital Construction Private Limited	BPTP Limited 41.0730%, Triangle Builders & Promoters Private Limited 33.82%
(vi)	Native Buildcon Private Limited	Triangle Builders & Promoters Private Limited 49.00%

38. Inter-se investment of the companies which has been termed as round tripping is in the following forms:-

Perpetual Infracon Private Limited invested ₹ 123 crores with Triangle Builders & Promoters Private Limited;

Triangle Builders & Promoters Private Limited invested ₹ 86 crores in Vital Construction Private Limited;

Triangle Builders & Promoters Private Limited invested ₹ 51 lacs in Native Buildcon Private Limited;

Triangle invested ₹ 119 crores in Native Buildcon Private Limited;

In the same year, Native Buildcon Private Limited purchased 21.69% preference shares of Triangle Builders & Promoters Private Limited.

39. The sum and substance of the arguments raised by learned counsel for the appellants is that application can be filed under Sections 397 or 398 of the Act only against “the company”, whose affairs are to be seen by the Board, whether being oppressive against any member or share holder or the same being mismanaged. The petitioner before the Board being not the member or share holder of the appellants-companies could not file petition impleading them as party. In support of the aforesaid plea, reliance was placed upon the judgment of Madras High Court in Shankar Sundaram's case (supra) and Allahabad High Court in Life Insurance Corporation of India's case (supra), wherein maintainability of the application under Sections 397 or 398 of the Act was stretched to a subsidiary company of the holding company but not beyond that. No final order, much less an interim order, can be passed against the appellants. It was further submitted that the applications filed by the appellants for deleting their names from the array of parties on the aforesaid ground having not been decided, the Board could not proceed to pass any interim order.

40. The stand of respondent No. 1 is that it had invested about ₹ 123.5 crores in Perpetual, which were transferred by Perpetual to other companies. All these companies are controlled by Kabul Chawla. The respondent-company invested the amount in 2008 but till date it has neither

got any return nor even the project was set up, for which the money was invested. CPI is not even being provided the details. The petition under Sections 397/398 of the Act has been filed against Perpetual, the company, as CPI is fully eligible for that in terms of Section 399 of the Act. The other companies have been impleaded as parties as they are likely to be affected by the order, which may be passed by the Board considering the fact that Perpetual had transactions with those companies, which may have to be reversed in case provisions in the Articles of the company are amended or deleted. Section 405 of the Act clearly provides for addition of any such party to proceedings under Section 397 or 398 of the Act.

41. The maintainability of petition against Perpetual has not been disputed by Perpetual. The dispute is sought to be raised by the Triangle, Vital and Native. The grievance of the Triangle is that vide interim order, its accounts have been directed to be audited, whereas the grievance raised by Vital and Native is that certain observations have been made against them.

42. As has already been discussed above while dealing with the petition under Sections 397-398 of the Act, the Board can even terminate, set aside or modify any agreement between the company and the managing director, director, manager or any other person and can even delete or modify any Article of the company. The other respondents impleaded in the petition filed before the Board besides the company, namely, Perpetual, are certainly the necessary parties. The principles of holding and subsidiary company are applicable in a case where the affairs of the company are to be gone into, as it can be stretched only upto a subsidiary company. The prayer of CPI before the Board is not to go into the affairs of the parties impleaded before it, besides the company i.e. Perpetual, whose affairs are to be gone into, rather these have been impleaded for the reason that the dealings of the company with other parties impleaded in the petition before the Board may have to be gone into and in case those transactions are reversed, they may have to be issued some directions. It was to observe principles of natural justice. Hence, to plead that they are not necessary parties, is misconceived, hence, rejected.

43. Section 405 of the Act further provides that even on an application filed by the managing director, director, manager or any other

person which includes a juristic entity, he can be impleaded as a respondent in pending petition under Sections 397-398 of the Act. Hence, it cannot be accepted that in a petition under Sections 397-398 of the Act only the company namely whose affairs are to be gone into, can be the respondent and none else.

44. Even the contention raised by learned counsel for the appellants that the applications filed by them for deleting their names were not decided, hence, the matter may be remitted back, is to be noticed and rejected for the reason that the order passed by the Board discussed the entire matter threadbare. The reasons for rejection of the applications are even available in the order. Hence, it would be an exercise in futile if the matter is referred back to the Board for decision of the applications and thereafter to deal with the case afresh. Hence, the contention is rejected.

45. As far as challenge to the interim order passed by the Board directing audit of Triangle is concerned, I do not find any reason to interfere in that part of the order. CPI being a foreign investor invested huge fund in Perpetual. The money was siphoned off from Perpetual to Triangle and other group companies with no track to CPI. The project for which the money was invested never took off. Justification is being given by the appellants companies before this Court in which the investments were made by Perpetual that it was in terms of decision taken by the Board of Directors of Perpetual. Those decisions and the Article in terms of which those decisions have been taken are subject matter of dispute before the Board. Hence, under these circumstances even if, as an interim measure, the Board has directed for audit of the accounts of Triangle and certain other interim directions have been given, the order cannot be faulted with.

46. No question of law arises.

47. Accordingly, the appeals are dismissed.

04.5.2015
vs

(Rajesh Bindal)
Judge

(Refer to Reporter)