IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPEAL NO.52 OF 2014
IN
CLB/COMPANY APPLICATION NO.141 OF 2012
IN
CLB/COMPANY PETITION NO.52/397-398/CLB MB/2013

Sai Etco Developers & Realty Pvt. Ltd. & Anr.….Appellants

V/s.

Mr.Hemant Parekh & Ors. ....Respondents

Mr.Shyam Mehta, Senior Advocate a/w Adv. Sophia Pinto for the appellants.

None for the respondents.

CORAM : K.R.SHRIRAM,J
DATE : 4.2.2016

P.C.:-

1 The respondents have filed a company petition being Company Petition No.52 of 2012 before the Company Law Board for various reliefs. We need not, for the purpose of this order, go into those reliefs. The appellants filed a Company Application No.141 of 2012 on the preliminary issue of maintainability of the petition on the ground that the petitioner (respondent no.1 herein) is not qualified to file the petition in terms of the provisions contained in Section 399 of the Companies Act 1956, on the ground that respondent no.1 has not paid the dues on the shares that he had agreed to subscribe in the memorandum.

2 According to the respondent no.1, the company was

incorporated on 2.8.2006. One of the subscriber to the memorandum was respondent no.1 subscribing to 5000 equity shares of 10 each. Therefore, by virtue of being a subscriber, in terms of section 41 of the Act, to the Memorandum of Association, he ipso facto becomes the member of a company since its incorporation and therefore, he is entitled to maintain the petition. The interim application came to be dismissed by the impugned order dated 20.6.2013. Though earlier the respondent no.1 was being represented, during the course of last few hearings, nobody has appeared for the respondent no.1. Even today nobody appears for respondent no.1.

3 The admitted fact is that the respondent no.1 is a subscriber to the Memorandum of Association and hence is a member in terms of section 41 of the Act. It is however, contended by the appellants that until he pays the consideration for the shares, he cannot be treated as a member for the purpose of section 399 of the Act. The records annexed to the appeal memo viz. copies of the balance-sheet for the year ending 31.3.2007, 31.3.2008 & 31.3.2009 show the respondent no.1 as a debtor of the company to the extent of Rs.50,000/-. It reads as under :-

> “<u>LOANS & ADVANCES</u>
> (UNSECURED & CONSIDERED GOODS)........
> Hemant Parekh- Shares : 50,000.00”

4 There is also a confirmation of account annexed to the

appeal wherein the respondent no.1 has confirmed that he owes towards share capital issued, paid up, subscribed to the company a sum of Rs.50,000/-. Shri Mehta learned counsel for the appellants submitted that the respondent no.1 not having paid "sums due on the share, as required under Section 399 of the Act", the appeal is not maintainable.

5 Section 399 sub-section 1(a) of the Companies Act reads as under :-

> *"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 members 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 ;"*

6 Therefore, in a company having share capital, a member who is holding not less than one-tenth of the issued share capital of the company has a right to apply under Section 397 or 398. But this comes with a rider i.e., such a person or applicant shall have paid all calls and other sums due on his shares. The counsel for the appellants submitted that the issue of paying all calls in this case did not arise and what we need to look is only whether "other sums due on the shares has been paid". The point for consideration therefore, is if the applicant

even though has subscribed to the shares but owes sums due on the shares to the company, can an application under Section 397 or 398 be maintainable till he has paid all sums. The Company Law Board dismissed the contentions of the appellant on the basis that even though it appears from the perusal of balance-sheet and other documents that the money paid towards the impugned shares was advanced for purchase of shares by the company, it cannot be said by any stretch of imagination that the share money was not paid. The Company Law Board went on to say that whether the amount advanced by the company to the petitioner stand repaid or not may be a disputed question but is totally irrelevant for the purposes of section 399 of the Act. In my view, it is totally relevant. It is not the appellants' case that the money has not been paid or subscribed. The money has been paid by the company towards the impugned shares but it is the case of the appellants that this amount of Rs.50,000/- was due on the shares admittedly from respondent no.1 and therefore, the petition is not maintainable in terms of section 399 of the Act. They also relied upon a judgment of Allahabad High Court in [1]Kedar Nath Khetan & Ors. Vs.Lakshmi Devi Sugar Mills (P) Ltd. & Ors. where the High Court has dealt with a similar matter.

7 The Company Law Board has proceeded on the basis that the share subscription amount has been paid and therefore, the objection is not sustainable. What the Company Law Board should

1 AIR 1966 All 119

have considered is, the fact that the respondent no.1 admittedly not having paid the amount payable under these (impugned) shares, would it come under the words “other sums due on their shares”. The Company Law Board has not considered this issue. To that extent, the matter requires to be remitted back to the Company Law Board and it is hereby remitted to Company Law Board to decide :-

(a) Whether the fact that the petitioner (respondent no.1) not having paid the subscription amount of Rs.50,000/- on these shares, would that be covered under “and other sums due on their shares” as per the terms of section 399 ?

(b) If the answer to the above issue is in affirmative, whether the petition is maintainable ?

8 The appeal accordingly stands disposed. Interim applications if any, also accordingly stand disposed.

(K.R.SHRIRAM,J)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/Order.

KJ