

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY APPEAL NO. 13 OF 2015
IN
CLB COMPANY PETITION NO. 2/111A/CLB/MB/2013

Shakti Insulated Wires Pvt.Ltd. & Ors. ...Appellants
vs.
Great View Properties Pvt.Ltd. & Ors.Respondents

Mr.Mustaf Doctor, Senior Advocate with Mitesh Naik I/b. Dhru & Co. for Appellants.
Mr.Astad Randheria with Ms.Sujata More I/b. Desai Desai Carrimjee & Mulla for Respondents.

CORAM : S.C. GUPTE, J.

RESERVED ON : 30 OCTOBER 2015

PRONOUNCED ON : 1 MARCH 2016

JUDGMENT :

The company appeal impugns an order of the Company Law Board, Mumbai Bench ("CLB") allowing the petition of the first Respondent, under Section 111 of the Companies Act, 1956 ("Act"), declaring it to be the owner of 1980 shares of the Petitioner company and directing the latter to rectify the register of members accordingly.

2 The facts of the case may be briefly stated, as follows :

One Jayalaxmi Holdings Pvt.Ltd. ("JHPL") held 1980 shares of the Appellant company ("subject shares"). In pursuance of a scheme of amalgamation sanctioned by this Court, all assets and liabilities of JHPL were transferred to the first Respondent. The assets included the subject shares. The first Respondent, thereafter, applied for registration of such transfer and inclusion of its name in the register of members. The Appellant rejected the application on the ground that the transfer of shares was in breach of the relevant Articles of Association providing for a right of pre-emption. This rejection was challenged by

the first Respondent before the CLB under Section 111 of the Act. The CLB allowed the petition and directed rectification of the register.

3 Learned Counsel for the Appellants submits that the CLB has erred in law by treating the transfer of shares under the scheme of amalgamation as a case of transmission by operation of law, whereas transfer of assets by a scheme of amalgamation is considered as a voluntary transfer between the transferor and transferee companies. He relies on the Articles of Association of the Appellant company and contends that all voluntary transfers come within the pre-emption clause of the Articles. Learned Counsel submits that the subject transfer was in breach of these Articles and was, thus, rightly rejected by the Appellant company.

4 Articles 21 to 43 of the Articles of Association of the Appellant provide for transfer and transmission of shares. Article 22 restricts transfers of shares except after exhaustion of rights of pre-emption provided in Articles 23 to 38 which follow. Article 39 provides for a 'transmission clause', where a person becomes entitled to shares other than by transfer in accordance with the foregoing Articles. In case of a transmission, the Articles providing for rights of pre-emption do not apply. The controversy between the parties really involves the nature of the transaction as between JHPL and the first Respondent under the sanctioned scheme of amalgamation. Does it amount to 'transfer of shares' or is it equivalent to 'transmission of shares', within the meaning of the Articles of the Appellant. For if it is 'transfer', then alone the pre-emption clause would apply and not otherwise.

5 The relevant Articles concerning 'transfer of shares' are quoted below:

“(22) Except as hereinafter provided, no shares in the Company shall be transferred unless and until the rights of preemption hereinafter conferred shall have been exhausted.

(23) Except where the transfer is made pursuant to article 29 or Article 38 hereto, the person proposing to transfer any share (hereinafter called “the Proposing Transferor”) shall give notice in writing (hereinafter called “a Transfer Notice”) to the Company, that he desires to transfer the same. Such

notice shall specify the sum he fixes as the fair value and shall constitute the Board of Directors his agent for the sale of the share to any member of the Company or person approved or selected by the Board of Directors who is willing to purchase the share (hereinafter called "the Purchasing Member") at the price so fixed, or at the option of the Purchasing Member at the fair value to be fixed by the Auditors of the Company in accordance with Article 25 hereof. A Transfer Notice may include several shares and in such cases shall operate as if it were a separate notice in respect of each. A transfer Notice shall not be revocable except with the sanction of the Directors.

(24) If the Company shall within the space of 28 days after being served with a Transfer Notice find a Purchasing Member and shall give notice thereof to the Proposing Transferor he shall be bound upon payment of the fair value in accordance with Article 25 thereof, to transfer the share to the Purchasing Member..

(27) If the Company shall not within the space of 28 days after being served with a Transfer Notice, find a Purchasing member and notice in manner aforesaid, the Proposing Transferor shall at any time within there calender months afterwards be at liberty subject to Article 36 hereof to sell and transfer the share (of where there are more shares than one those not placed) to any person and at any price, not being less than the said fair value.

(29) Any share may be transferred by a member to any child or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, cousin, wife or husband of such member and any share of a deceased member may be transferred by his executors or administrators or other legal representatives to any child or other issue, son-in-law, daughter-in law, father, mother, brother, sister, nephew, niece, cousin, widow or widower of such deceased member (to whom such deceased member may have specifically bequeathed the same) and shares standing in the name of the trustees of the will of a deceased member may be transferred upon any change of trustees to the trustees for the time being of such Will and restrictions in Articles 22 to 28 hereof shall not apply to any transfer authorised by this Article.

(38) The executors or administrators of a deceased member or the holder of a succession certificate of deceased member (such deceased member not being one of several joint-holders) shall be the only person recognised by the Company

as having interest in or title to the shares registered in the name of such member, and the Company shall not be bound to recognise such executors, administrators or holder of succession certificate unless such executors, administrators or holder of succession certificate shall have first obtained Probate or Letters of Administration or a Succession Certificate, as the case may be, from a duly constituted Court in India.”

The relevant Article providing for transmission is quoted below :

“(39) Subject to the provisions of Article 38 any person becoming entitled to shares in consequence of the death, lunacy or insolvency of any member or by any lawful means other than by transfer in accordance with these presents, upon producing such evidence that he sustains the character in respect of which he proposes to act upon this Article or of his title as the Directors thinks sufficient, may, with the consent of Directors (which they shall not be under any obligation to give), be registered as a member in respect of such shares, or may, Subject to the regulations as to transfer hereinbefore contained, transfer such shares. This clause is hereinafter referred to as “The Transmission Clause.”

6 The main plank of the Appellant's case is that transfer of assets in the case of a scheme of amalgamation between transferor and transferee companies is a voluntary transfer and not an involuntary transfer by operation of law. Learned Counsel for the Appellant relies on the judgment of the supreme Court in the case of **General Radio & Appliances Co.Ltd. vs. M.H. Khader (dead) by L.Rs.**¹. No doubt transfer of assets and liabilities between a transferor and transferee company in the case of amalgamation is by volition, but what is important to remember is that such transfer is not of individual assets or liabilities separately but of interest in a going concern. As explained by a Division Bench of our Court in **Li Taka Pharmaceuticals Ltd. vs. State of Maharashtra**², by an amalgamation scheme, what the transferee company in effect purchases is the transferor company or its undertaking for a specified sum which is ordinarily paid in the form of allotment of shares of the transferee company to the shareholders of the transferor company. The valuation is based on the net of the transferor

1 **AIR 1986 Supreme Court 1218**

2 **AIR 1997 Bombay 7**

company's assets and liabilities. This aspect would have an important bearing on the question which we are considering, as I have explained below.

7 If one has regard to the Articles of the Appellant, Articles 21 to 38 apply when any shareholder proposes to transfer his shares. There may or may not be any proposed transferee at that stage. The proposing transferor has to give a notice in writing ('transfer notice') to the company that he desires to transfer his shares. The transfer notice must specify the sum he fixes as a fair value. Upon such notice, the Board of Directors of the company is constituted as an agent of the proposing transferor for sale of the subject shares to any member of the company or person approved by the Board of Directors, who is willing to purchase the shares at the price or at the option of the purchasing member at a fair value to be determined by the auditors of the company in accordance with Article 25. That is the purport of Article 23. If the company is served with a transfer notice, as provided in Article 24, it has to find a purchasing member and give a notice thereof to the proposing transferor within the space of 28 days. In case of any difference between the proposing transferor and purchasing member as to the fair value of the shares, the auditor of the company is, on the application of either party, required to certify in writing the sum which may be termed as fair value. The proposing transferor is then to be bound to transfer the shares at this fair value. In case the proposing transferor makes a default in transferring the shares, the company has an option to receive the purchase money, in which case the proposing transferor is deemed to have appointed any one Director or Secretary of the company as his agent to execute the transfer to the purchasing member and upon execution of such transfer, the company shall hold purchase monies in trust for the proposing transferor. In such a case the name of the purchasing member has to be entered in the register as the holder of the shares. Under Article 27, if the company fails to find a purchasing member and give notice within the space of 28 days, the proposing transferor shall, at any time, within three calendar months be at liberty to sell and transfer the shares (subject to Article 36) to any person and at any price, not being less than the said fair value. As these Articles clearly indicate, transfer of shares as part of a scheme of amalgamation between a transferor and a transferee company cannot possibly

come within these provisions. In the first place, in case of amalgamation there is no general proposal for transfer of shares. The transfer, which takes place upon sanction of the scheme of amalgamation, is not of shares at any particular value. Secondly, the transfer occurs upon or subject to the court sanctioning the scheme of amalgamation. In a given case, the Court may not sanction a scheme, in which case there would be no question of transfer of any shares. In the premises, whenever a scheme is proposed it would be absurd to expect the transferor company to actually give a notice of transfer within the meaning of Article 23 and then subject itself to transfer to a purchasing member found by the Board of Directors at a fair value to be determined by the auditors of the company in accordance with Article 25. The transfer proposed is, in the first place, transfer of the company or its undertaking as a going concern and not of any individual assets including shares held by the transferor company. Secondly, in such a case it would only be permissible to it to transfer the shares as part of the scheme of amalgamation in the event of Article 27 coming into play, that is to say, the company not finding within 28 days of the transfer notice a purchasing member or giving a notice in accordance with Article 24. Even then the transfer must be at a price not below the fair value determined by the auditors of the company. This again is unfeasible and unwarranted within the framework of a scheme of amalgamation. A proper reading of the Articles seems to be that any transfer of shares occasioned by a scheme of amalgamation sanctioned by the court is not a transfer of shares within the meaning of Article 21 to 38 but a case of under Article 39 of transmission of shares 'by any lawful means other than by transfer in accordance with' the earlier Articles. After all the 'transmission clause' contained in Article 39 does not necessarily apply to the case of an involuntary transfer which is by operation of law. It rather provides for a case where the entitlement of any person to the shares arises on account of any lawful means other than by transfer in accordance with the foregoing Articles. Such transmission merely requires production of evidence that the claimant sustains the character in respect of which he proposes to act under Article 39 or has the requisite title. In other words, all entitlements to shares other than by virtue of transfers in pursuance of Articles 21 to 38 are covered by Article 39 and must abide by it.

8 The CLB is, accordingly, perfectly justified in coming to the conclusion that the transfer of shares occasioned in the present case is under the transmission clause of Article 39 and not transfer of shares under Articles which precede it. The only question is, however, of the relief that can be granted to the first respondent on this finding. Even if its case be covered under the transmission clause of Article 39, it can be registered as a member in respect of the shares only with consent of the Directors. The Directors are not under any obligation to give such consent. If the Directors refuse to give such consent, the first Respondent would be free to invoke the regulations which apply to transfer of shares. Accordingly, the CLB had to give an option to the Board of Directors of the Appellant to register the first Respondent as a member or in the alternative, to purchase the shares through any purchasing member or otherwise at a fair value to be determined by the auditors of the company within the meaning of Article 25.

9 Accordingly, whilst the findings of CLB in the impugned order are not disturbed, the operative order passed by CLB is modified by substituting Clause 'C' of para 21 of the impugned order by the following clause

“**C** The Appellant company at its option shall either register the first Respondent as a shareholder in its register of members or allow the first Respondent to sell 1980 shares held by the first Respondent in accordance with the Articles of Association to a person named by the first Respondent or buy the said shares through a purchasing member at a fair value to be determined by the auditors of the Appellant company in accordance with Article 25. Such option shall be exercised within 28 days from today.”

10 Until either of these options is exercised, the Appellant Company shall maintain status-quo in respect of the Company and its fixed assets in accordance with the ad-interim order dated 23 December 2014 operating till date.

(S.C.GUPTA J.)