BEFORE THE COMPANY LAW BOARD, NEW DELHI BENCH
AT NEW DELHI
C.P. No. 89(ND)/2009

Present: B.S.V. Prakash Kumar, Member (Judicial)

In the matter of:

Companies Act, 1956 Sections 397, 398 read with Sections 402 & 403

And

In the matter of:

Ravinder Kumar Magoo ..... Petitioners

Versus

M/s AMA Enterprises Pvt. Ltd & Ors. .....Respondents

Present:

The counsel for the Petitioners:
Shri Rakesh Kumar, Shri Aditya Nayyar, Shri Parmod Sachdeva, Advocates

The counsel for the Respondents:
Shri U.K. Choudhary, Sr. Advocate, Shri Himanshu Vij, Shri Abhimanyu Singh, Shri Satwinder Singh, Shri Nidin Gera, Advocate,

Order
(Heard and pronounced on 18-12-2014)

The petitioner filed this Company Petition u/s 397, 398, 401 & 402 of the Companies Act, 1956 against R1 company and its another Director Mr. Alessandro Malavolti (R2) alleging that second respondent sold the land of the Company at undervaluation and purchased new land without consent and knowledge of the petitioner, indulged in siphoning the funds of the company, diluted the petitioner into minority and not holding any valid Board meeting in the company. The petitioner submits, since the above acts of R2 being prejudicial to the interest of the petitioner and oppressive against him, he filed this CP seeking the reliefs as mentioned in the CP.

2. The petitioner submits that R1 Company, M/s AMA Enterprises Pvt. Ltd, was incorporated on 26.2.1999 having its registered office situated at Ludhiana (Punjab), with an authorised share capital of Rs.6 Crores, divided into 60 lac equity shares of Rs. 10/- each for carrying business of manufacturing tractor parts. The petitioner submits that he, being a Science graduate, having vast experience, started a partnership business for producing and selling engineered goods. While he was on that business, he came in contact with R2 an Italian citizen, who is also incidentally engaged in the business of producing, importing and selling engineered goods and equipments including tractor linkage parts, auto parts etc. And R2,s company called AMA Enterprises has a strong presence in many countries of the world. Since second respondent evinced interest in setting up his business in India as well, R2, along with the petitioner and another man called Mr. M.K. Chopra, set up a Joint Venture Company i.e. R-1 company, with 50% participation of R2, 25% participation each by the petitioner and Mr. M.K. Chopra. In pursuance thereof, these three entered into a JV Agreement, ever since the petitioner was running the management and financial affairs of R1 Company. However, in the year 2004, R2 advised the petitioner that it would be better if a permanent Chief Executive Officer was appointed for R1 company to manage the administrative and financial affairs in a more professional manner. Having the petitioner trusted R2, all of them mutually decided to appoint Mr. Rajvir Singh Rally as first CEO of R1 Company in the year 2004. However, in course of time, the petitioner realised that his role in the company gradually came down whereby he could not even assess as to what was happening in the company since 2004. Thereafter, in the year 2008, one Mr. K.S. Rekhi was appointed as the new CEO of R1 company in place of the erstwhile CEO Mr. Rajvir Singh Rally.

3. The petitioner further submits that R2, to elbow out the petitioner altogether from the company, made an offer for purchase of shareholding of the petitioner in R1 Company for USD 740,000 taking the aid of the Indian business partner Mr. M.K. Chopra on 7.5.2008. When the petitioner did not agree to the aforesaid proposal of R2, then R2 made this offer to another partner, Mr. M.K. Chopra, to achieve his objective of acquiring the shareholding of Indian partners in R1 company. Ultimately, R2 succeeded in acquiring the shareholding of Mr. M.K. Chopra. Not only this, R2

instructed the CEO of the company to report directly to R2 in respect to the financial and administrative affairs of R1 Company so that the petitioner would also ultimately transfer his shareholding to R2. In furtherance of his plans, R2 sent notice to the petitioner intimating that EoGM would be held on 8.9.2008 or 9.8.2008 to consider the relocation of factory unit and for selling the land and building of R1 Company situated at Village Rajgarh Road, G.T. Road, Doraha, Ludhiana, India. In the said EoGM, a resolution was passed for the relocation of the factory unit of R1 company authorising R2 to sell the existing land and building of R1 Company.

4. For having R2 had a mind to take over the full control of the company, he convinced the petitioner that the factory unit would need to be relocated to another location for setting up a plant with modernised machinery. Since the petitioner had absolute faith on R2, he agreed for relocation of the factory unit and for the sale of the existing land and building of the factory. The petitioner further submits when the company took a decision of sale of land and building of R1 company, the petitioner sent an e-mail on 9.7.2008 making an offer to R2 stating that he was ready to buy the land and building of the factory unit of R1 company for Rs. 5 Crores and further stating that in case higher bid was received by the company, the same might be intimated to the petitioner so that he could revise his minimum offer of Rs. 5 Crores to the land and building already agreed to sell. However, to the surprise of petitioner, on the same day i.e. on 9.7.2008, it came to his notice that R2 has already sold the land of the company to Mr. M.K. Chopra. On hearing R2 already sold the land to M.K. Chopra, the petitioner wrote another mail to R2 reiterating his stand for purchasing the property mentioned above. To which, he was given an impression that R2 was still looking for a suitable buyer to sell the property because R2 stated that the discussion with Shri M.K. Chopra was not intended for selling the land to Mr. Chopra. In the next sentence, the petitioner says that the correct fact was that R2 had already made a preliminary agreement for sale of the said land of R-1 company with M.K. Chopra on the date of EoGM without taking the petitioner into confidence as mandated in the said EGM. The petitioner submits he again communicated to the Board of Directors vide email dated 02.02.2009 that he was still willing to buy the Plant/Land of R1 company making an offer of Rs. 4/- Crores

and he was ready for negotiations. It was then the petitioner received a reply from R2 vide email dated 20.3.2009 informing that the said land and building of R1 company has already been sold to Mr Chopra. He submits that R2 sold the property without the consultation of Board of Directors and without disclosing the identity of the person to whom it was sold and the price at which it was sold. The petitioner says that he later came to know that this building was sold to none other than the erstwhile Indian partner Mr Chopra in October 2008 for Rs. 4, 28, 00,000/- which was less than the amount offered by the petitioner in July 2009.

5. The petitioner further submits that R2 purchased 25% shareholding of another Indian partner M.K. Chopra, in derogation of the terms and conditions of JV Agreement, especially against the Agreement that foreign investors should not hold more that 50% shareholding in the company. The petitioner further submits R2, despite the petitioner raised objection to this transfer, calmed the petitioner at that time saying that it was a temporary arrangement and in place of outgoing Indian partner, another Indian business partner be inducted in R1 Company. On his assurance, the petitioner agreed to allow the transfer of shares in favour of R2 without knowing the fact that transfer of M.K. Chopra's shareholding to R2 would dilute his shareholding. On seeing the unilateral and arbitrary approach of R2, the petitioner again wrote another email to R2 on 20.3.2009 to sell his shareholding to R2 and take an exit from R1 Company if consideration was paid on fair valuation. However, R2 had not responded to the offer, the petitioner says it might be with a view to create a situation that he would sell his equity to R2 at a distress sale.

6. The petitioner further submits he received an email from the CEO stating that Board meeting be held on 5.9.2009. When the petitioner asked for the Agenda of the notice, the CEO of the company sent an email on 4.9.2009 intimating holding of Board meeting on 5.9.2009 without annexing Agenda along with notice sent to him. When he attended the meeting, he raised objection against the Agenda of the meeting on seeing first item splitting the share certificates and transfer of those shares to AMA SPA Italy. The petitioner further submits that said agenda is contrary to the provisions of JVA, because JVA stipulates, if any transfer or split of shares is to take place, at least three months notice in advance has to be given to other

parties. No such notice had been given. The notice to the meeting dated 5-9-2009 not being supported by any Agenda, the meeting held on 5.9.2009, the petitioner says, is invalid in the eyes of law.

7. The petitioner further submits that R2 managed to file Form 8 with the help of digital signature of the petitioner lying with the company to show as if the petitioner himself filed Form by modifying charge over the property of the company.

8. The respondents' side replied to the submissions of the petitioner stating that the petitioner himself was a party to the decision, the company has taken a decision to sell the land of the company and authorising R2 to relocate the company, in the meeting held on 9.7.2008. R2 further says the petitioner and another Indian partner Shri Chopra were fighting against each other before this petitioner initiated this litigation. Since they were fighting against each other, Shri Chopra sold away his shareholding to R2, which the petitioner himself approved in the meeting held on 14.1.2009. Therefore, it will not now lie in the mouth of the petitioner to say that the transfer of shareholding in favour of R2 is without the consent of the petitioner.

9. As to sale of the property, R2 submits that the company already entered into a sale agreement on receipt of Rs. 1 Crore in the month of October 2008 and balance Rs. 3 Crores in the month of January, 2009 and the same was duly recorded in the provisional Balance Sheet for the quarter ending December 2008 and on the month ending of January 2009. When the petitioner had full knowledge of the deal of sale of land and building to M.K. Chopra, R2 says this litigation was raised with malafide motive.

10. R2 further submits that the petitioner himself signed on two e-forms No. 8 filed with the Registrar of Companies on 06.01.2009 for modification of charge whereby charge created on the said property was vacated and charge on new property was created. Apart from this, as to the allegation of under valuation, the respondent side filed a valuation report during the course of arguments stating that the value of land and building was Rs. 3,22,91,808/- whereas the land and building were sold at Rs. 4 Crores, at a price higher than the valuation determined by the valuer.

11. R2 submits that the averments in relation to siphoning of funds are bald and not supported by any material evidence. The counsel of R2 says that the proposition of law says that the party who asserts fraud against the other has to place all the facts and proof thereof stating that the opposite party indulged in siphoning. There being no such evidence or pleadings, the counsel submit that plea is liable to be dismissed.

12. The respondent counsel further submits the petitioner herein is already a minority in this company, therefore, notwithstanding the fact such transfer is in violation of the terms of the JV Agreement, this transfer is not prejudicial to the interest of the petitioner. He further submits that the said split of share certificates was in full compliance with the provisions of Articles of Association of the company and the relevant provisions of the Companies Act.

13. The respondent counsel further submits that it is not true that Board meetings have not been held in the company because the company has been regularly holding Board meetings with the remaining two Directors. Since the petitioner himself stated that he stopped coming to the Board meetings, he could not say now that no notice was sent to him soon after disputes arose in between the parties.

14. R2 counsel adds further that no resolution so far has been passed by the company causing any prejudice to the interest of the petitioner herein. The petitioner himself has also not placed any resolution so far showing R2 or others caused prejudice to the interest of the petitioner. Therefore, respondent counsel submits that the petitioner is liable to be dismissed.

15. On seeing the pleadings and hearing the submissions of the counsel on either side, the points for consideration before this Bench are-

1. Whether the petitioner has given his consent for transfer of M.K. Chopra's shareholding to second respondent and whether it is valid.

2. Whether the sale made in favour of M.K. Chopra is valid or not.

3. Whether the second respondent indulged in siphoning funds of the company as pleased by the petitioner.

4. Whether the transfer or splitting of shares in the name of the parent company of R1 Company is prejudicial to the interest of the petitioner.

5. Whether relocation of factory to another land purchased by the company is valid.

6. Whether there is any deadlock in holding Board meetings, as pleaded by the petitioner.

Point 1

16. The petitioner signed on the resolution passed by the Company for transfer of Mr Chopra's shares to R2 without raising any objection saying he has pre-emptive right or such transfer would be prejudicial to the interest of him, that time he must have signed to his convenience. Now his grievance is though he signed on the resolution, since such transfer being in violation of certain terms of JV Agreement, the said transfer of shareholding of Chopra to R2 shall be declared invalid. Before going to see whether such transfer is valid or invalid, I must deal with whether this petitioner who is party to the approval of the transfer has any entitlement to question it thereafter. To this, I honestly believe he has waived his right by approving such transfer in the resolution validly passed; he is estopped to question the same after making the transferee and transferor believe that petitioner had no objection to such transfer. This right he agitates has come into existence by an agreement between the parties, if the same has been contravened by their subsequent acts, the party to the earlier and later agreements could not question the subsequent act is in violation of the earlier therefore the same has to be set aside. There is no law saying transfer of shares inter se shareholders or outsiders is prohibited. In view of the same, first point as to transfer of shareholding from Chopra to R2 is decided against the petitioner.

Point 2

17. The petitioner himself attached the minutes of EoGM held on 9.7.2008 showing the presence of the petitioner and second respondent to the said meeting. From the said minutes, it is evident that the company accorded its approval to sell the existing land, building, machinery and other assets at Village Rajgarh Road, G.T. Road, Doraha, Ludhiana on fair market value to fund relocation and modernisation of the unit and it was further resolved in the same meeting that R2 has been authorised to take steps with regard to the relocation of the unit and sale of the existing land, building and machinery and other assets at Village Rajgarh and for infusion of funds into the company. The petitioner and R2 signed upon the minutes drawn on 9.7.2008. By seeing the minutes drawn on 9.7.2008, it is apparent that the petitioner agreed for selling the land giving authorisation to R2 to act expediently about relocation of the unit and sale of the existing land. In fact, the petitioner authorised R2 to file copy of this resolution with RoC at Jullundur. For having the petitioner himself took part in the meeting and signed on the minutes authorising second respondent to sell the land on authorisation given by the company and to relocate the factory on the authorisation given by the company, I do not find any merit in the inconsistent submissions of the petitioner saying that he gave consent to sell the property in the meeting dated 9-7-2008, again saying he made an offer to purchase the property for Rupees Five Crores when it came to his notice in the month of October, 2008 that R2 entered into a sale agreement with M.K. Chopra to sell the same property. For having the company already entered into an agreement with M.K. Chopra, how could the petitioner expect the company back out from the agreement already entered with M.K. Chopra by seeing an offer that had subsequently come from the petitioner.

18. The petitioner submits that when he came to know the company entered into an arrangement with M.K. Chopra to sell the property, he sent an offer to the company to purchase the land and building at Rs. 5/- Crores. It appears from the record, for having the company already entered into an agreement with M.K. Chopra to sell the property of the company, and for having the petitioner himself authorised R2 to sell the property, this petitioner could not subsequently say that he would offer more money than the money to which the company already agreed to sell to

M.K. Chopra. Though there are some mails sent by the petitioner to the company saying he would purchase the property for five Crores, for having the company already entered into an agreement with M.K. Chopra to sell the property, the sale already held could not be said as invalid simply by seeing an offer letter come from the petitioner.

19. Moreover, it appears from the record that the petitioner himself filed Form 8 for modification of charge pending against the company. The petitioner counsel denies the digital signatures on the form filed. If at all, the case of the petitioner is that R2 fraudulently filed Form by forging the signature of the petitioner, he should have approached Civil Court to prove the act of fraud alleged to have been played by R2, that he has not done. Whenever anybody makes any allegation of fraud, the burden lies upon such party to prove the other persons indulged in fraud. Mere making statement in a Company Petition will not become a proof to make this Court believe that the other side indulged in fraud in filing forms before RoC. Therefore, this Bench could not believe that R2 filed Form 8 on 9.1.2009 by putting digital signatures of the petitioner to show the petitioner filed Form before RoC.

20. For having the petitioner failed to prove R2 fraudulently filed Form 8 showing as filed by the petitioner, this Bench is obliged to believe the petitioner himself filed form before RoC modifying the charge lying on the company in respect of the property that was sold to M.K. Chopra in the year 2008 itself. Therefore, this point is decided against the petitioner.

Point 3

21. On seeing the Company Petition filed by the Petitioner, it appears the petitioner made bald allegation of siphoning against second respondent without placing any proof. As I already said whenever any party takes a plea of fraud, may be, it is siphoning or some other act, considered as fraud, the asserting party has to proove it. The petitioner made some general allegation saying that the company overvalued the expenditure of the company but he has not made any effort to prove all those allegations made against the respondents.

22. On the allegation of siphoning, the respondent company held a Board meeting on 21.7.2009 and threadbare discussed each and every allegation made by the petitioner right in the presence of him. Thereafter, the petitioner signed on those minutes under general protest, but failed to pin any clause in the explanation given by the company saying his allegations are supported by such and such material. Thereby, it could not be said that the company shied away from giving explanation to the allegations of siphoning made against second respondent. Since the petitioner signed on the Balance Sheets until March 2008 and all the minutes up to 25.7.2009, the petitioner could not come today saying R2 siphoned away the funds without accounting to the company. On seeing the allegations and explanations given by the respondent's side, I do not find any merit in the allegation of siphoning made against second respondent. R2 filed an application that the petitioner wrote letters to the Banks to stop funding to the company, despite the Banks stopped funding the company; it is able to manage under the stewardship of R2 in carrying its business. The points for consideration in Sec. 397 & 398 of the Companies Act, 1956 is whether any prejudice has been caused to the shareholders of the company by the acts of the directors in the management, it does not matter whether any act of the directors is in violation of the provisions of the Companies Act or not. Therefore, this point is decided against the petitioner.

Point 4

23. As to issue of splitting of shares, the petitioner's contention is he was diluted in the company by transferring one share of the company to the parent company of R1 Company. He also further states that such transfer to a person other than member of the company is in violation of Articles of Association and Joint Venture Agreement because there is a pre-emptive clause in the Articles giving first option of purchase to the existing shareholders. Since the same has not been done, the act of splitting and transferring of one share to parent company is in violation of the articles of the Company. To which, the respondent side counsel submits that R2 holds about 42 lacs of shares of Rs. 10/- each, out of which, only one share was split and transferred to the parental company for administrative convenience in running the company. The petitioner is admittedly minority with only 22% shareholding,

thereby respondent counsel submits transfer of one share to somebody cannot become dilution of the shareholding of the petitioner's holding. For having the petitioner himself consented for transfer of M.K. Chopra's shares to R2 in derogation of the terms of the JV Agreement, this transfer of one share in the name of R1 Company, I believe, will not cause any kind of prejudice to the shareholding of the petitioner. For having, the petitioner himself violated the JV Agreement in agreeing to transfer M.K. Chopra's shareholding to R2, now he could not take a stand that transfer of one share in the name of third party is in violation of the JV Agreement entered between Indian partner and R2 who is a foreign investor. For having the parties already failed to abide by the JV Agreement, including the petitioner, now this petitioner could not take it as a ground to say such transfer of one share is prejudicial to the interest of the petitioner. Therefore, the act of transfer of one share in the name of petitioner to the parent company to R1 Company is not considered as an act prejudicial to the interest of the petitioner or to the interest of the company. Hence, this issue is decided against the petitioner.

Point 5

24. As to relocation of the unit, it is on record the petitioner signed on the minutes drawn on 9.7.2008 authorising R2 to act expediently to relocate the factory on the new land. For having the petitioner himself gave full authority to R2 for relocation of the factory, he could not have subsequently said that land was purchased without bringing it to the notice of the petitioner. It is not the case of the petitioner that the new land was purchased on over-valuation and he says that he is not even aware for how much the land was purchased. It is not his case that the directors in the management ate away the money in purchasing the land. In fact, the company purchased the property for the benefit of the company, since the company has been relocated to new place, since it has been carrying its business and making profit in the financial year 2013-14, the allegations of relocation to some other premises is prejudicial to the petitioner, has no merit, hence this point is decided against the petitioner.

Point 6

25. As to the contention of deadlock raised by the petitioner, the company has been admittedly continuing with three directors, the petitioners attended to the Board meetings in the past, since the petitioner himself agreed for transfer of Mr Chopra shareholding to R2 making him 75% shareholder in the company, R2 has every right to have management in his hands, so I don't find any wrong in having two or three directors on his behalf, one should not ignore a fact that majority is legally, logically and democratically has every right to govern the company at its wish, the only rider under sections 397 & 398 of the Act is majority or for that matter strictly speaking, management of the company should not cause prejudice to minority shareholders or shareholders under the umbrella of either majority or management control, this is important to note the provisions under Chapter VI are not devised to fetter the majority or management to act as per its business prudence to uphold the interest of the company. By going through all this, I do not find any deadlock situation is present in the company, hence, this point is decided against the petitioner.

26. Though the petitioner, however, failed to prove his case, for having already infused about Rs. 5,60,00,000/- as capital to the company as shareholding, since he already made an effort to sell out his shareholding to R2, he is entitled to have an exit from the company on fair valuation. It is needless to say the Company Law Board, to end the litigation and to see the company run smoothly, is authorised to take effective steps despite the petitioner failed to prove his case u/s 397 & 398 of the Act 1956, I believe it will be good to the petitioner as well to take exit on fair valuation.

27. Therefore, the respondents are hereby directed to provide exit to the petitioner on fair valuation as on dated 31.3.2014. This bench has taken cut off date close to the date of disposal for the reason that either side has not infused considerable funding into the company after litigation started, second the Company has been making profits till date, indeed I believe the company has been growing, therefore the petitioner is legitimately expected to have fruits of it until he takes exit from the company.

28. For valuation of the shares of the company, M/s Seema Naresh Bansal & Associates (Mobile No. 9810157418), R-13 & 14, LGF, Ansal Chamber-II, Bhikaji Cama Place, New Delhi are hereby appointed as Valuer with remuneration agreeable to the valuer to value the shares on fair valuation within two months from the date this order is made available to the parties, consideration to the shareholding of the petitioner shall be paid by the company within one month. The remuneration to the valuer has to be borne as per the shareholding held by the parties.

Accordingly, this Company Petition is hereby disposed of.

(B.S.V. PRAKASH KUMAR)
Member (Judicial)

Signed on 2 January 2015.

CERTIFIED TRUE COPY

Vikram Singh 2/1/15

ASHI NIE / VIKRAM SINGH
Branch Office
Company Law Board
Govt. of India
New Delhi