

BEFORE THE COMPANY LAW BOARD
CHENNAI BENCH
AT CHENNAI

CA No. 4/2014
IN
CP No. 11/2013

Present: SHRI KANTHI NARAHARI, JUDICIAL MEMBER

IN THE MATTER OF THE COMPANIES ACT, 1956 (1 OF 1956)
SECTIONS 397 AND 398
AND

IN THE MATTER OF M/S MYSORE REALTY PRIVATE LIMITED

BETWEEN

1. M/s. Mysore Realty Pvt Ltd
No.1031/1, Gitanjali Layout
HAL 3rd Stage, Bangalore – 560 075.
Karnataka.
2. Alfred Michael Arambhan
501 – Orchid Palace,
Dr. Peter Dias Road,
Bandra West, Mumbai – 400 050.
Maharashtra.
3. Yaron Yosef Gelbhart
No.101A, Mrumilan,
1st Floor, 13th Road,
Opp Khar Gymkhana,
Khar West, Mumbai – 400 052.
4. Yosef Cimer
24 Sadia Ofri,
Petach – Tiqwa,
Israel, 24,
Israel.

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5. Isaac Silberman
Shoshanim
5 Ramat Gan, 53583,
Israel.
6. Shaul David Lotan
128, Lamerchav St,
Ramat Hasharom, 47226,
Israel.

... Applicants/Respondents

AND

1. Mr H.P Basavaraju
195/A, 17th Main
Saraswathi Puram,
Mysore – 570 009.
Karnataka.
2. Mr. Ramakrishna Chikkachaniah
18/A, NGOS Colony,
Rajendra Nagar,
Mysore – 570 007.
Karnataka.

... Respondents/Petitioners

PARTIES PRESENT:

- | | |
|--|---------------------|
| 1. Shri. K. Gowtham Kumar, Advocate | ... For Applicants |
| 2. Shri. P.H Arvinth Pandian, Sr. Advocate] | |
| 3. Shri. Cibi Vishnu, Advocate] | ... For Respondents |

ORDER

The present application is filed by the respondents praying this Bench to reject the main petition as being not maintainable for the reasons non-joinder of necessary parties, delay and laches. The counsel appeared for the respondents submitted that the main petition is not tenable in law or on the facts for the aforesaid reasons and the same is liable to be dismissed. He submitted that the **first point** for consideration is **Non-joinder of necessary parties**. It is a settled position of law that allegations of oppression and mismanagement are *inter se* majority and minority shareholders. The original respondents in the main

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petition, however, are merely the nominee directors in the company. The original petitioners have deviously chosen not to make the foreign investors in the company, who are the majority shareholders, as parties to the main petition. It is submitted that Lev-India Pvt Ltd, India Accelerated Growth Real Estate, Cyprus, Sulam Management L R Ltd and India Accelerated Growth Real Estate, Mauritius (collectively referred to as the "Majority Shareholders") invested in the company by way of a shareholders agreement, entered into *inter alia* with the original petitioners, on 30.07.2008. The applicants crave leave to rely upon a copy of the aforesaid shareholders' agreement in course of their submissions. The majority shareholders have invested significant amounts in the company from time to time, and their aggregate contribution to date is approximately Rs.26,26,35,491/-. The details of the amounts invested by the majority shareholders and the securities acquired by them in the company are set out below:

Name of Shareholders	No. of voting equity shares	Face Value (Inr)	Amount Paid	Percentage of Shareholding
Lev-India Pvt Ltd	5,39,800	Rs.10	5,398,000	53.98
India Accelerated Growth Real Estate, Cyprus	77,100	Rs.10	771,000	7.71
Sulam Management L R Ltd	77,100	Rs.10	771,000	7.71
India Accelerated Growth Real Estate, Mauritius	77,100	Rs.10	771,000	7.71
Total	77,11,00		7,711,000	77.11

Name of Shareholders	No. of voting equity shares	Face Value (Inr)	Amount Paid	Percentage of Shareholding
Lev-India Pvt Ltd	5,355	Rs.10	53,550	26.78
India Accelerated Growth Real Estate, Cyprus	3,315	Rs.10	33,150	16.58
Sulam Management L R Ltd	7,65	Rs.10	7,650	3.82
India Accelerated Growth Real Estate, Mauritius	7,65	Rs.10	7,650	3.82
Total	10,200	Rs.10	102,000	51



Name of Shareholders	No. of Class A Convertible Preference	Face Value (Inr)	Amount Paid	Percentage of Shareholding
Lev-India Pvt Ltd	13,46,020	Rs.10	134,602,000	55.83
India Accelerated Growth Real Estate, Cyprus	1,92,290	Rs.10	19,229,000	7.98
Sulam Management L R Ltd	1,92,290	Rs.10	19,229,000	7.98
India Accelerated Growth Real Estate, Mauritius	1,92,290,	Rs.10	19,229,000	7.97
Total	19,22,890		192,289,000	79.76

Name of Shareholders	No. of Class B Convertible Preference	Face Value (Inr)	Amount Paid	Percentage of Shareholding
Lev-India Pvt Ltd	1,86,566	Rs.10	40,676,929	65.04
Sulam Management L R Ltd	17,742	Rs.10	3,869,007	6.19
India Accelerated Growth Real Estate, Mauritius	54,397	Rs.10	11,862,381	18.96
India Accelerated Growth Real Estate, Cyprus	28,146	Rs.10	6,124,761	9.81
Total	2,86,851		62,533,078	100.00

The applicants crave leave to produce the relevant share certificates and foreign investment remittance forms before this Hon'ble Board, should the quantum of the investment/shareholding of the majority shareholders be disputed. The applicants submit by way of abundant caution that the shareholding pattern depicted above does not constitute an admission that the shares allotted to the original petitioners are fully or validly paid for by them. The applicants now apprehend that the petitioners have fraudulently obtained the allotment of shares without paying any consideration to the company, and will be taking appropriate remedies in this regard. It is apparent from the table above that the majority shareholders collectively hold about 77% of the voting equity shares and are undisputedly the majority shareholders in the company. The majority shareholders have not been joined as a party to the main petition despite the majority shareholders being directly and substantially interested in the outcome



of the main petition and knowing that they will be affected by any final orders that are passed in the main petition. The applicants submit that the petitioners have not made the majority shareholders party to these proceedings with the intention of defeating the applicant's rights and ousting the applicant from the affairs of the company. Further, it is submitted that by its very definition, "oppression" can only be alleged against a majority shareholders of a company. The Hon'ble Supreme Court of India in a number of decisions including *Shanti Prasad Jain vs. Kalinga Tubes* reported in AIR 1965 SC 1535, and in *Sangramsinh Gaekwad and Ors vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. And Ors* reported in (2005) 11 SCC 314, has held that the very nature of a petition under section 397 for oppression requires petitioners to prove continuous oppression by the majority shareholders. The Hon'ble Supreme Court of India and a number of High Courts have time and again reiterated the concept of proper and necessary parties to legal proceedings. The non-joinder of the majority shareholders to the petition is a fatal omission made by the original petitioners and the main petition deserves to be rejected on this ground alone.

2. The **second point** for consideration is with respect to **Delay and Laches**. It is submitted that the prayers made in the petition relate to resolutions passed on 04.06.2010 and 18.12.2012 and are in relation to matters pertaining to the year 2011 and earlier. The petition is belated, and it is trite law that parties are not entitled to claim equitable reliefs if there is laches and delay, both of which exist in the instant case, without any acceptable reason forthcoming therefor.

3. The **third point** for consideration is in respect of **No cause of action**. It is submitted that there is no cause of action for the petition. It is submitted that the original petitioners have failed in establishing any of the ingredients of oppression under section 397 of the Act and/ or the ingredients of mismanagement under section 398 of the Act. The main petition suffers from



gross suppression of material facts, and is rife with falsehoods. Moreover, the grievance of the petitioner includes their removal as director and relief in this regard is sought in prayer 2 of the main petition. It is settled law that grievances qua directorship are not justiciable before this Hon'ble Board under sections 397 and 398 of the Act. The petition is filed as a tool of oppression with the intention of hurting the company and its shareholders. As such, it is submitted that the main petition is liable to be dismissed on account of no cause of action being made out, and ought to be treated as an abuse of process of this Hon'ble Board.

4. The **fourth point** for consideration is in regard to approaching this Bench with **Unclean hands**. It is submitted that apart from abusing the process of this Board, the original petitioners are guilty of (among other things):

- a. Profiteering at the cost of the company, in direct conflict with their erstwhile position as a directors of the company;
- b. Fraudulently obtaining shares in the company without paying consideration therefor;
- c. Mismanagement of the company and dereliction of their duties as directors while they were in office.

It is submitted that the original petitioners have thus approached this Hon'ble Board with unclean hands and are not entitled to any relief from this Hon'ble Board.

5. The respondents/petitioners filed counter to this application. It is submitted that the application has been filed as an afterthought with the intention of misleading this Hon'ble Board and tantamount to playing fraud upon this Hon'ble Board. The applicant No.1 is represented independently and the applicants 2 to 6 are being represented independently. Despite this, the applicants have chosen to file a common application, by enclosing the affidavit



of applicant No.3 without any sort of authorization in his favour. For this purpose alone, the application ought to fail on the count of misrepresentation. The intention of the applicants to unnecessarily delay the proceedings before this Hon'ble Board is writ large on the face of the records and is evident from the fact that the application challenging maintainability of the company petition has been filed at such a belated stage of the proceedings after having filed detailed reply to the averments contained in the company petition. It is submitted that the company petition has been filed in January/February 2013, whereas the application challenging its maintainability has only been filed towards the end of 2014, almost more than 20 months of filing the company petition without any explanation for the delay in filing the application. Further, the application has also been filed after the reply to the company petition has been filed by the applicants 2 to 6, and therefore, the filing of this application at such a belated stage is only an attempt to delay the proceedings before this Hon'ble Court and to continue the oppressive actions against the respondents. The other grounds raised in this application, viz, delay & laches, no cause of action and doctrine of unclean hands, are factually incorrect and not in any event, go to the merits of the company petition and are not grounds for challenging the maintainability of the company petition. The application therefore is liable to be dismissed in toto. It is submitted that the only requirement for approaching this Hon'ble Board under section 397 of the Act is that the petition be filed by a member whose rights have been oppressed by the conduct of the affairs of the company. Section 397 does not provide at any place that the petition ought to be filed against the remaining shareholders/members exclusively. In fact, this Hon'ble Board is even empowered to pass orders/ directions against directors under section 397 of the Act. Therefore, it cannot be said that the scope of section 397 is restricted to disputes between Members vis-à-vis members alone. It is submitted that even disputes between members vis-à-vis directors would be covered within the ambit of section 397



of the Act. The conditions which are required to be satisfied before filing a petition under section 397 of the Companies Act, 1956 can be enumerated as follows:

- (i) An application under the said section 397 can be made only by the members representing not less than 10% of the paid up capital of the company.
- (ii) It must be established that the affairs of the company are being conducted in a manner
 - a. Oppressive to any member/members of the company or
 - b. Prejudicial to public interest.
- (iii) The oppression complained of must affect a person in his capacity as a member of the company.
- (iv) The acts complained of must be continuing acts of oppression. The acts constituting oppression must continue till the date of making the application.
- (v) The applicant must make out a prima facie case that the degree of oppression is so severe that there is just and equitable ground for winding up of the company. But at the same time, it must also be established that the winding up of the company would not unfairly prejudice the applicant.

6. It is submitted that the respondents/petitioners have satisfied all the conditions mentioned above in filing the present company petition, and the same cannot be dismissed on the ground of non-joinder of the majority shareholders. It is submitted that a perusal of the prayer in the company petition would show that save for one shareholder, there is no relief being claimed by the respondents against any of the remaining shareholders. As for the remaining shareholders, they are all neither necessary nor proper party to the



proceedings, and therefore, the company petition cannot be dismissed on this ground. It is to be noted that all averments raised herein in this application have already been raised and adjudicated by this Hon'ble Board while deciding company application No.3/2011 i.e. the application challenging the maintainability of the company petition under the provisions of section 8 of the Arbitration & Conciliation Act, 1996. The application has been filed by the applicants seeking to challenge the maintainability of the company petition under the following grounds:

- a. Non-joinder of remaining shareholders;
- b. No cause of action shown;
- c. Delay and Laches; and
- d. Approaching this Hon'ble Board with unclean hands

7. Unlike in a writ petition, which would not normally be maintainable, unless permitted by a court, company petition are intrinsically maintainable as long as they fulfil the conditions laid down under section 399 of the Companies Act, 1956. Similar to a civil suit under the Code of Civil Procedure, which would ordinarily be maintainable, unless it falls within the narrow and specific scope of Order VII, Rule 11, a company petition also would be ordinarily maintainable if it fulfils all the conditions laid down under the provisions of section 397 and 399 of the Companies Act.

8. In reply to **non-joinder** of necessary parties it is submitted that the remaining shareholders are not necessary parties. The provisions of section 397-399 do not state at any place specifically that company petitions under these provisions have to be filed by one member against another member only. The only prerequisite under these statutory provisions is that the party aggrieved must be a member of the company, which in this case is met since the respondents have been aggrieved in their capacity as a member. Their entire



shareholding in the company has been appropriated and their right to appoint a nominee director onto the Board has been marginalized without their consent after first removing their nominee director from the Board without any authority. The directors of the company, including the applicants 2 – 6, are responsible for the gross mismanagement of the company and oppression of the respondents' rights as shareholders and hence the company petition has been preferred against them. The remaining shareholders have no direct interest in the dispute before this Hon'ble Board, which relates to the proper functioning of the directors of the company and their abuse of this role to the detriment of the respondents.

9. In reply to **delay & laches** it is submitted that there is no delay and laches in filing the company petition before this Bench. It is submitted that the present company petition has been filed against constant acts of mismanagement and oppression committed by the directors, including applicants 2 – 6, from the years 2010 – 2012. It is submitted that even by normal standards of limitation, the actions complained of are well within the limitation period, if any.

10. In reply to **no cause of action** in the present company petition, it is submitted that the assertions made by the applicants that there is no cause of action shown in the company petition falls within the realm of the merits of the case and the validity of the same may be determined only after the completion of pleadings. The reasons cited in the application, in support of the applicants' claim that there is no cause of action, are all pertaining to the merits of the case and this cannot be a ground for seeking to challenge the maintainability of the company petition. The application states that the respondents have allegedly "failed in establishing any of the ingredients of oppression under section 397", without going on to provide any particulars in support.



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11. In reply to Doctrine of **unclean hands** the same has no application to this case. Even going by the application on a demurer, the contentions set out thereunder relate to the merits of the case and cannot be used as grounds for challenging the maintainability of the company petition. The application has raised triable issues which can only be adjudicated after the completion of pleadings. In any event, the contentions put forth by the applicants are devoid of any substance and are again simply bald allegations without any particulars, and therefore there is no case made out to answer by the respondents. In view of the reasons, it is submitted that the application is devoid of merits and requested the Bench to dismiss the same.

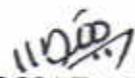
12. Heard the learned counsel appeared for the respective parties perused the pleadings, documents filed in support and against to this application. The only point for consideration is whether the Company Petition deserves to be dismissed for the reasons as stated in the application. The contention of the applicants is that the petition filed by the respondents herein is not maintainable for non-joinder of necessary parties, delay and laches, no cause of action and approached this Bench with unclean hands. With regard to non-joinder of parties the applicants contended that the petitioners have not impleaded the majority shareholders to the petition and arrayed only the directors of the company. From the perusal of cause title to the petition it is seen that the Company is the 1st respondent, the 2nd, 3rd, 4th, 5th, 6th & 7th respondents are directors of the R1 Company and the 8th respondent is a statutory auditor of the company. The main grievance of the petitioners to the CP is that the respondents 2 to 7 therein have illegally misappropriated an amount of Rs.4,39,78,925/-. Further it is an allegation that the respondents 2 to 7 started interfering in the work of promoter directors who were given the charge of day to day affairs of the company. Further it is alleged that the respondents 1 to 7 have indulged in illegal activities which amounts to mismanagement under




section 398 of the Companies Act, 1956. It is also alleged that the respondents 2 to 7 have manipulated the records of the R1 Company apart from several misdeeds. In pursuance to the allegations made in the company petition, the petitioners have sought directions from this Bench to declare the allotment of 77,100 voting equity shares, 765 non-equity shares, 192290 Class A Convertible Preference Shares and 54397 Class B Convertible Preference Shares made on 04.06.2010 to India Accelerated Growth Real Estate Ltd, Mauritius as illegal, null and void. Further the petitioners sought direction that their removal under section 284 is null and void and prayed this Bench to reinstate them as directors. Further there are specific directions seeking permanent injunction restraining the respondents 2 to 7 in para 6 & 7 of the main reliefs. From the entire petition and the reliefs sought therein it is evident that the petitioners are not seeking any directions or made any specific allegations against the majority shareholders. The averments and allegations made in the petition directly against the company and the directors/applicants. Moreover the majority shareholders have not made any grievance that the petitioners have made allegations against the majority shareholders in the petition and without they being a party and without affording any opportunity to them the petition cannot be adjudicated. Therefore it is for the petitioners to array the necessary and proper parties to the petition against whom they wish to make allegations in the petition. Even as per the provisions of the Companies Act, 1956 there is no mandatory requirement that the majority shareholders necessarily to be made as parties to the company petition under section 397 or 398. To contend that the majority shareholders are to be made as parties to the petition if it is a private limited and a closely held company it can be considered to array them as parties to the CP provided there are specific allegations made against those majority shareholders. In case of public and listed companies where there are large numbers of shareholders, it is highly impossible to add all the shareholders/majority shareholders to the petition. Therefore the petition



cannot be rejected on this ground. Further it is contended that there is no cause of action, delay and laches and approached this Bench with unclean hands. From the perusal of the petition this Bench is of the opinion that the petitioners have filed the present petition in the capacity as members of the company alleging certain acts of oppression and mismanagement purported to be committed by the respondents in the affairs of the company. Therefore the applicants cannot contend that the petitioners have no cause of action. Further with respect to delay and laches is concerned, the present company petition was filed in the month of February 2013 and the petitioners are alleging certain acts pertaining to the year 2010, 2011, 2012. There is no abnormal delay in filing of the present company petition. Therefore the applicants have no ground to seek dismissal of the present petition on the ground of delay and laches. Further with regard to the doctrine unclean hands it is to be noted that unless and until the petition is enquired after completion of all the pleadings, it cannot be known that whether the petitioners have approached this Bench with clean hands or unclean hands. To decide this issue at this point of time will be a purely premature. In view of the aforesaid reasons, the application is devoid of merits and liable to be dismissed. Accordingly, the CA No.4/2014 in CP No.11/2013 is dismissed. No orders as to costs.


KANTHI NARAHARI
JUDICIAL MEMBER

DATED THIS THE 3RD DAY OF JULY, 2015

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Certified to be True Cop.,


Bench Officer
Company Law Board
Chennai Bench
dated the 03/07/15