

**BEFORE THE COMPANY LAW BOARD, NEW DELHI BENCH
NEW DELHI**

C.P. No. 11(ND)/111/2011

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

In the matter of:

Companies Act, 1956 Sections 111

And

In the matter of:

Shri Arvind Mohan Johari and Another

..... Petitioners

Versus

M/s Carlton Hotels Pvt. Ltd. & Ors

..... Respondents

Present:

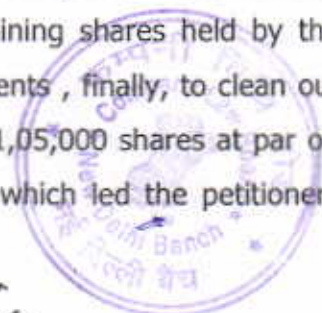
The counsel for the Petitioners: Shri Arvind Mohan Johri, (P-2) argued on behalf of the petitioners.

The counsel for the Respondents: Shri Virender Ganda, Sr. Advocate, Shri Rakesh Kumar, Shri Santosh Kumar Giri, Advocates,

Order

(Pronounced on 13-5-2015)

Basing on the order dated 29.4.2011 passed by this Bench in CP 76/2002, the petitioners filed this CP11/2011 seeking rectification of the register of members of R1 company u/s 111 of Companies Act 1956 (hereafter referred as "the Act") for having Respondents 2&3 omitted the names of the petitioners and their group company M/s Cyberspace Ltd (hereafter called Cyberspace) from the share register without sufficient cause. The petitioners acquired 100 shares each on 3.3.1997, thereafter the petitioner group company Cyberspace acquired 22,670 shares on 28.4.1997, and finally the petitioners and their father Late Gyanendra Nath Johari acquired 25,000 shares (8,500 each to the petitioners and 8,000 shares to their father) on 31.3.2000. Thereafter R2&3, on fraudulently showing 200 shares held by the petitioners transferred to R2 and forfeiting the remaining shares held by the petitioners and their company Cyberspace, these Respondents, finally, to clean out the petitioners from the company, allotted to themselves 1,05,000 shares at par on Rs 6.50/- paid up without any notice to the petitioners, which led the petitioners



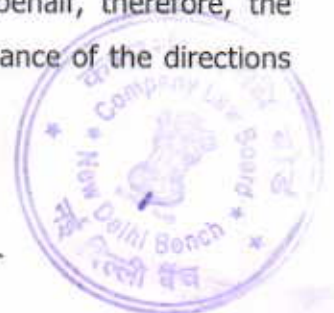
holding more than 50% to nil. Therefore for having these Respondents omitted the petitioners shareholding from the Share Register without sufficient cause and for these Respondents allotted 1, 05,000 shares to themselves without sufficient cause, the petitioners, on the liberty given to the petitioners to file this petition under section 111 of the Act 1956, filed this company petition.

The averments of the petitioners in brief:

2. The petitioners submit that they initially placed their grievance in CP 76/2002 u/s 397, 398 of the Act, on which, when the Respondents filed CA 98/2008 challenging maintainability of that CP, this Bench passed an order dated 24.9.2011, giving liberty to the petitioners to prove that they have shareholding in R1 Company as pleaded in CP 76/2002 by filing company petition u/s 111 of the Act, within a period of 4 weeks of receipt of the order dated 24-9-2011.

3. The Petitioners 1 & 2 are real brothers; third petitioner late Gyanendra Nath Johari in CP 76/2002 is father of them. Since their father passed away on 23-2-2010, they moved this CP seeking prayer for rectification of the register to the shares held by their father as well. These petitioners submit that Cyberspace is one of the group companies owned by the petitioners. Since Cyberspace has gone into liquidation, though they have not shown it as petitioner along with them. However, they have espoused the cause of Cyberspace, because R1 Company has shown as Cyberspace forfeited 22, 670 shares held by the petitioners through Cyberspace. Of course, a counsel, namely Mr Nagesh, appeared on behalf of Cyberspace on the authorisation given by the Official Liquidator.

4. The petitioners submit that the dispute being in relation to the shares of a company called Carlton Hotels Pvt. Ltd., the petitioners made it as R1. For having its directors (R2&3) alleged to have indulged, in causing tampering of the records of the company and the records R1 filed before RoC, Kanpur; in altering the share register without sufficient cause; they made them as R2&3. For R2&3 having allotted shares to the wife of R3, they made her as R4. Since Cyberspace, being in liquidation, it's directors cannot initiate proceedings on it's behalf, therefore, the petitioners made it proforma Respondent/ intervener in pursuance of the directions in the order dated 29-4-2011.

5. R1 Company owns a hotel called Carlton Hotel in a building spread in 6.48 lacs Sq Ft. This hotel is located in 8.89 acres of freehold commercial land situated in the heart of Lucknow City. In mid 1990s, when R1 was in heavy losses for it was being occupied by nearly 70 tenants on nominal rent for decades, R2 & R3, to come out of this tangle, approached P1 & P2 with an offer envisaging substantial investment for settlement of the long term tenants of the hotel because vacating tenants from the premises was necessary for the growth of hotel business. On negotiations, both the parties agreed that the petitioners group would solely hold more than 50% equity and constitute 50% in the Board of the company. On this agreement, P1 & P2 were invited to join the Board taking qualifying shares as stated under Article 76 of AoA of the company to become directors of the company. Accordingly, P1 & P2 acquired 10 shares of R. 100/- each for directorship in a board meeting held on 3.3.1997. In pursuance thereof, P2 was made additional director of R1 Company in the same meeting held on 3-3-1997, accordingly the company filed Form-32. In furtherance of their understanding, the petitioners, in April 1997, purchased 22,267 shares of Rs. 100/- each (Rs. 65 per share paid up) at a premium of Rs 900/- per share from R2 in the name of Cyberspace (in liquidation), for a price of Rs. 2,27,00,000/-, duly reflected in the Board Resolution dated 28.4.1997. In the same resolution, Board appointed P1 as Additional Director of R1 Company. When R1 Company held AGM on 30-9-1997, the company appointed both the petitioners as regular directors, ever since they continued as directors up to the year 2000. The petitioners submit that the certified copies of Directors Reports for the year 1998 and 1999 and copies of certified copies of Note on Accounts for the years 1999 and 2000 reflect that the petitioner had been continuing as directors of the company.

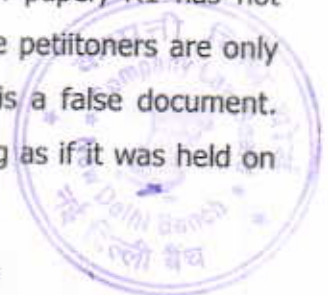
6. The petitioners submit that the Respondents agreed that they would make the petitioners majority in the company, provided the tenants stand vacated. Having the petitioners caused the tenants vacated hotel premises by making payments to them, R1 allotted 25,000 shares to the petitioners and their father on 31.3.2000 at the rate of Rs. 80/- per share (Rs 10 at face value, Rs 70/- at premium). In these 25,000 shares, P1 & P2 were allotted 8,500 shares each, whereas their father was allotted 8,000 shares. As to consideration, having the petitioners already made huge payments to the tenants for vacation of them from the premises, 25,000 shares were allotted to them at the rate of Rs 80/ per share. Out of total consideration, the



petitioners paid part consideration of Rs. 10,00,000/- at the rate of Rs. 40/- per share (Rs. 5/- towards face value and Rs. 35/- towards share premium) to the company in March 2000, which was reflected in the audited annual accounts of R1 for the year ended on 31.3.2000. The petitioners paid remaining 10 lacs to the company in August 2000 and these shares by this second payment have become fully paid. The tenants being vacated from the premises of the hotel by the petitioners, the company, for the first time, made profits in the years 1998, 1999 and 2000. When R1 Company was facing liquidity crunch in between 1997 and 2000, Cyberspace had paid Rs. 30, 00,000/- to R1 Company as advance for sponsorship vide three Account Payee cheques bearing serial No. 127007, 127008 to 127010 for Rs. 10 lacs each, which R1 reflected in Notes on Accounts annexed to its audited Annual Accounts for the year ending 31.3.1997.

7. The petitioners submit R2&3 perhaps seeing the company making profits after the petitioners came in, R2&3 with the help of CA, V K Gupta, to get rid of the petitioners from the company, started doing mischief in the company – deleted the names of the petitioners, their father and Cyberspace as shareholders of the company. To achieve their oblique motive, R2&3, without any notice to the petitioners, deleted P1 & 2 holding 200 shares from the register of members without any transfer deeds from the petitioners. The reason given by R3 for removal of their names from register is that the petitioners sold these 200 qualification shares in the year 1999-2000 to R2; another reason they gave is that these 200 shares were transferred back to respondents on the failure of the petitioners to meet their obligations – both are inconsistent to each other.

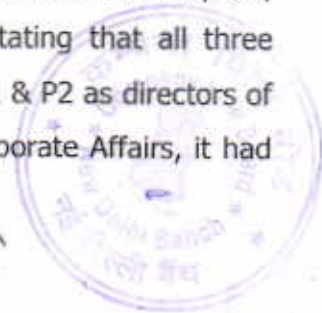
8. The petitioners submit that the Respondents have come up with a story that P2 and R2 & R3 entered into an MOU dated 27.3.2000 stating that the petitioners and their father acquired 25000 shares at the rate of Rs 1,000/- per share coupled with right of forfeiture. As to this MoU, the petitioners stated that it is a false document forged by R2 & R3 to create non-existent demand against the petitioners. The petitioners submit that this purported MoU is on a plain paper, R1 has not signed as a party to the same, the purported signatures of the petitioners are only on one page. He submits that CBI has found that this MoU is a false document. Apart from this, the respondents filed minutes of Board meeting as if it was held on



31.3.2000 prescribing the entire sum be paid latest by 27.3.2000 even if no calls are made. Contrary to above, it is said that call money shall be paid in 25 equal monthly instalments within 15 days from the date of receipt of call notice by the shareholders of these 25,000 shares. Therefore, it is clear that the receipt of call notice was a pre-condition for call become due. Whereas, Clause (iv) of MoU dated 27.3.2000 says that calls on these shares be made as and when need arose, in the same MoU, clause (vi) says that in any case, the entire call money should be paid within two years from the date of allotment. That various statements in the document itself are not in sync with each other, in fact, conflicting one clause against another within the document.

9. The petitioners submit that R2 & R3 annexed the minutes of Board meeting on which 25,000 shares held by the petitioner were allegedly forfeited. In CP 76/2002, the respondents claim that the shares were forfeited in a Board meeting held on 12.6.2001, whereas in a Revision u/s 482 CrPC before Hon'ble High Court of Allahabad, the same respondents stated that the very same shares were forfeited in a Board meeting held on 30.3.2001. Notwithstanding this inconsistency, these 25,000 shares were shown as continuing in the name of petitioners on 29.9.2001 as per Annual Return for the year 2001 filed by R1 with Registrar of Companies. Since Annual Return for the year 2001 is showing 25,000 shares in the name of the petitioners as on 29.9.2001, the actual date of forfeiture, if really happened, could be on some date only after 29.9.2001. When CBI seized original minute's books of the Board meeting of R1 Company, it appears that no Board meeting was held on 29.9.2001 in which these 25,000 shares have been shown as forfeited.

10. When the petitioners inspected the statutory file of R1 Company in the office of RoC, Kanpur, they were shocked to know that Annual Returns dated 30.9.1997; 20.9.1998 and 30.9.1999 have been tampered to show that P1 & P2 were not appointed as regular directors after 30.9.1997. On knowing the same, P1 complained to Ministry of Corporate Affairs for investigation on tempering of Annual Returns dated 30.9.1997, 30.9.1998 and 30.9.1999. In pursuance of the request, Deputy Director (Investigation) submitted a detailed report stating that all three Annual Returns have been tampered to remove the names of P1 & P2 as directors of R1 Company. On the investigation made by the Ministry of Corporate Affairs, it had



lodged an FIR with CBI to investigate the said matter, on which CBI on 12-1-2006 registered FIR against Mr V K Gupta and others under sections 120-B, 420, 467, 468, 471 & 477 IPC. When P1 inspected the statutory records of R1, it was revealed that a Board meeting of R1 has been falsely claimed to have been taken place on 2.12.2000 at which R2 & R3 have allegedly been allotted 1,05,000 shares of Rs. 10/- each to themselves and to Mrs. Kamini Singh, mother of R3, at par on paid up at the rate of Rs. 6.50/- per share. The petitioners submit that the said allotment is bad because no notice of the Board meeting dated 2.12.2000 was sent to P1 & P2 who were continuing as directors of the company, no offer for issue of further shares was made to P1, P2 or P3 or Cyberspace, who were the registered shareholders of R1 company and not only that, this allotment of 1,05,000 shares was made beyond the authorised capital of R1 company. Besides this, for having the Respondents admitted that R2&3 alone present in the Board Meeting held on 12-1-2000, it is ex facie bad in the eye of law because the quorum for any Board Meeting shall have not less than three directors under article 99 of the Articles of Association. The authorised share capital of R1 was in fact Rs. 10/- lacs as on 2.12.2000 and this allotment resulted to increase of subscribed capital above authorised share capital that was only Rs. 10/- lacs as on the date of allotment. Therefore, this allotment on many fronts is bad in the eye of law. That apart, these respondents did not pay cash for acquiring these 1, 05,000 shares. This was only a book entry made to acquire majority stake in the company to the detriment of the petitioners. The respondents made this allotment to their group at par whereas 25,000 shares allotted to the petitioners at the rate of Rs. 80/- per share just 8 months back after adjusting the amount paid by them to the tenants.

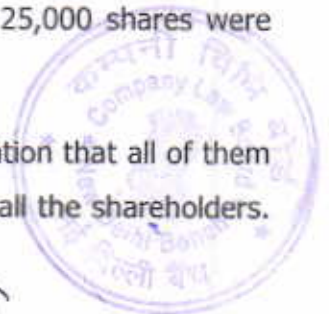
11. The petitioners further submit that this allotment of 1, 05,000 shares was shown in the records only three months after **29.8.2001**, therefore, the petitioners submit, allotment of 1,05,000 is ex facie bad in law and the company entered the name of persons against this allotment in the register without any sufficient cause, hence it warrants rectification of register of members of R1 company, by this allotment, the shareholding of respondents has gone up to 76.1% whereas the shareholding of the petitioners and their group company has gone down from 50.4% to 23.9%.




12. The petitioners further submit that the company has shown as Cyberspace forfeited 22670 shares held by it in a meeting allegedly held on 30.10.2002 i.e. five days after filing CP 76/2002. The Respondents forfeited the shares for non-payment of a paltry amount of Rs. 78,245/- as against the price of Rs. 2.27 Crores paid by Cyberspace. Thereby, when R1 itself owes Rs. 30/- lacs to Cyberspace towards refund of "advance for sponsorship" given to it in the year 1997, duly reflected in Notes on Accounts of 1997, the Respondents could have appropriated whatever balance remained payable by Cyberspace from the advance of Cyberspace pending with R1. They say it is understood that no call can exceed 1/4th of the nominal value of shares. For having R1 Company claimed to have called to Rs. 3.50 per share i.e. 35% of the nominal value of shares in a single call, said call is ex facie invalid, therefore, the petitioners seek rectification of the records by restoring the shareholding to Cyberspace.

13. The petitioners submit that no notice for holding Board meeting on 30.11.2002 was given to P1 & P2 who were then continuing as directors of R1 Company. The petitioners submit that CBI had seized the Minutes Book of the Board meetings, wherein call on 1,52,330 shares at the rate of Rs. 3.50/- per shares was shown as made in the Board meeting dated 18.10.2001, but whereas the audited Balance Sheet dated 31.3.2002 does not show any call on any of 1,52,330 shares. In the alleged Board meetings dated 10.4.2002, 4.9.2002 and 12.10.2002, it is stated that many reminders were issued to shareholders for payment of calls, however, the Annual Return for the year 2002 does not show any calls due on any of 1,52,330 shares. During the search of R2 & R3 office, CBI had seized the original file of the call notices containing copies of call notices issued by R1 Company. This call record does not contain any call notices issued to the petitioner or to Cyberspace in respect of shares held by them. Though CP 76/2002 was filed about nine years before filing this CP, till date, the respondents have not filed any copy of call notice allegedly sent to the petitioners in respect of calls on 25,000 shares held by them. Since the petitioners paid Rs. 10/- lacs at the time of allotment and thereafter, another Rs. 10/- lacs paid in August 2000 towards balance consideration, 25,000 shares were fully paid up, and therefore, their shares cannot be forfeited.

14. CBI, on seeing these call notices, has come to an observation that all of them are stereotyped letters printed by respondents at the behest of all the shareholders.



CBI had seized Members Register, registry receipts in respect of call notices purportedly sent to Cyberspace as well as to P1 & 2 and their father. These registry receipts bear the postal stamp of Chinhat Post Office in rural Lucknow and of Ramsagar Mishra PO in Lucknow.

15. The petitioners submit having their father Gyanaendra Nath Johari passed away on 23.2.2010, the petitioners being sole legal heirs of their father, since they are already parties to this petition; they need not be specially shown as representing their father because they only succeed to the estate of their father.

16. The petitioners further submit that these answering respondents entered into a compromise on 7.3.2004 for restoration of the petitioners as directors with $3\frac{3}{4}$ shareholding, but unfortunately this compromise could not get through as the interim bail granted to the petitioners had in the meantime expired.

17. The petitioners, on these grounds, pray the reliefs on the grievances placed above.

Reply by the Respondents

18. Respondents in their reply stated that R1 allotted 25,000 shares to the petitioners and their father at the rate of Rs.1000/- per share (Rs. 10/- (Rupees ten towards face value and Rs.990/- towards share premium) aggregating to Rs.2, 50, 00,000/- (Rupees two Crores Fifty Lacs). To prove this contention, the respondents placed Balance Sheets as on dated 31st March, 2000 and 31st March, 2001, Copy of the Memorandum Of Understanding dated 27th March, 2000, Form - 2 (Return of allotment).

19. The respondents submit that R1 Company allotted these 25000 shares to the petitioners at the rate of Rs.1000/- in pursuance of Memorandum of Understanding dated 27th March 2000 entered between the petitioners and the respondents. Whereas the petitioners did not show any document or any evidence showing these 25,000 equity shares were allotted in their favour at a price of Rs.80/- per share. They further submit that MoU dated 27.03.2000, discloses the amount paid on application is Rs.1, 25,000/- towards face value and Rs.8, 75,000/- towards share premium. For having, the petitioners paid only Rs.10, 00,000/- they were due to pay Rs.1, 25,000/- towards face value and Rs.2, 38, 75,000/- towards share premium payable in equal instalments in two years.

