

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

J.C.M. No. 18 of 2021

NP Waterproof Industries (Private) Ltd. & others
Versus
NP Spinning Mills Limited

Date	Order with signature of Judge
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Date of hearing: 12.09.2022, 20.09.2022 and 21.09.2022

Mr. Arshad Tayebaly and Ms. Heer Memon for petitioners.

M/s. Omer Soomro, Danish Nayyer and Zahid Hussain Sahito for respondents.

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Muhammad Shafi Siddiqui, J.- This petition was articulated under the provisions of the Companies Act, 2017 with special reference to Section 286 and 78, for redressal of treatment, as meted out by the petitioners. Such treatment is claimed to be oppressive and against their (petitioner's) interest and hence being minority shareholders attempted to exhaust the remedy.

2. Counsels have argued this petition on a preliminary issue i.e. whether petitioners could maintain this petition under peculiar facts and circumstances of the case as described below in respect of their shareholding.

3. Petitioner No.1 and petitioner No.5 holds share of the respondent No.1 company i.e. "NP Spinning Mills Limited" to the extent of 0.39% and 8.29% respectively whereas petitioners No.2 to 4 claimed to be shareholder by virtue of being legal heirs of their deceased father Inam ur Rehman who passed away on 11.12.2020. Thus the share of father being director of the company claimed to have devolved in them (petitioners No.2 to 4) out of deceased's shareholding i.e. 2,280,820.

Petitioners Nos.2 to 4 claim to have fetched shares out of inheritance which constitute 15.25% of Company.

4. The maintainability of petition is objected by Mr. Soomro, appearing for respondents No.1 and 2 on the count that the minimum threshold of holding not less than 10% of the issued share capital of the company or a creditor or creditors having interest equivalent to an amount not less than 10% of the paid up capital of the company is not matched by them, hence the proceedings must fail on this count alone.

5. Mr. Omer Soomro, learned counsel appearing for respondents, has relied upon Section 286 read with section 78 of the Companies Act, 2017 in support of his arguments and opined that unless the shares of the deceased stand transferred on an application duly supported by Succession Certificate or by lawful award, as the case may be, in favour of successors to the extent of their interest, their names shall not be entered in the register of members by SECP and law does not recognize them as lawful members and are thus prevented from filing this petition.

6. It is claimed that after sad demise of Inam ur Rehman, the petitioners have not demonstrated to have obtained any Succession Certificate for the shares of deceased, on the contrary respondent No.2 has filed a suit for administration, accounts, mesne profit, declaration and injunction bearing No.585 of 2022, copy of which is provided at the time of argument through a statement. The shares of NP Spinning Mills Ltd., the subject matter of this petition, is at Sr. No.2(o) of the list of moveable assets in that suit, however, Mrs. Summaya Rehman, wife of deceased was only regarded as an ostensible owner in respect of some of the properties disclosed in aforesaid suit. Learned counsel for respondents in this regard has relied upon:-

- (i) Abdul Kareem Khan v. Haroon-ur-Rahseed (2015 CLD 719)
- (ii) Malik Aziz Ul Haq v. Crystal Line Chemical Industries (2016 CLD 970)

- (iii) Hassan Al-Adawi v. Hama International (Pvt.) Ltd. 2009 CLD 1043 and
- (iv) Nadeem Kiani v. American Lycetuff (Pvt.) Ltd. 2021 CLC 07.

7. Mr. Arshad Tayebally, learned counsel appearing for petitioners, has argued that this threshold is only a technicality as petitioner No.5, apart from independent shareholding of 8.29% has also inherited 1.09% out of the share of the deceased together with other shareholders i.e. petitioners No.2 to 4 and cumulatively held 20.28% shares. It is stated that it is immaterial that Succession Certificate in this regard has not been obtained in terms of requirements of Section 78 of the Companies Act, 2017 as after sad demise of Inam ur Rehman the property, whether moveable or immovable, automatically devolves upon all legal heirs to the extent of their entitlement under Muhammadan Law. Hence this is only a futile attempt, as argued, to oust the petitioners from exercising their right under section 286 of the Companies Act, 2017 as rights of these minority shareholders are being oppressed. Reliance is placed by Mr. Arshad Tayebally on a number of judgments/case law i.e.

- i) Saghir Ahmed Soofi v. Saga Sports (Pvt.) Ltd. (2005 CLD 1875)
- ii) Ghulam Ali v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1)
- iii) Mst. Suban v. Allah Ditta (2007 SCMR 635)
- iv) World Wide Agencies Pvt. Ltd. v. Mrs. Margarat T. Desor (1990 AIR 737)
- v) Rajkumar Devraj and Rajkumari v. Jai Mahal Hotels (2006 134 CompCas 405 CLB)

8. I have heard learned counsel for parties and perused material available on record.

9. Previously the Ordinance 1984 recognized the threshold of 20% for maintaining the petition under section 290 (pari materia to Section 286

of 2017 Act), as it was at the relevant time. This threshold is diluted in the present enactment of 2017 to the extent of 10%. The primary question which requires consideration is whether the present set of petitioners are enjoying the requisite percentage of shareholding in the subject company i.e. NP Spinning Mills Ltd. in the light of provisions of Section 78 of the Companies Act, 2017 and/or whether it is immaterial for a cause initiated for oppressive conduct of majority shareholders.

Sections 78 and 286 of Companies Act, 2017 are as under:-

“78. Transfer to successor-in-interest.- The shares or other securities of a deceased member shall be transferred on application duly supported by Succession Certificate or by lawful award, as the case may be, in favour of the successors to the extent of their interests and their names shall be entered in the register of members.

....

286. Application to Court.- (1) If any member or members holding not less than ten percent of the issued share capital of a Company, or a creditor or creditors having interest equivalent in amount to not less than ten percent of the paid up capital of the Company, complains, or complain, or the Commission or registrar is of the opinion, that the affairs of the Company are being conducted, or are likely to be conducted, in an unlawful or fraudulent manner, or in a manner not provided for in its memorandum, or in a manner oppressive to the members or any of the members or the creditors or any of the creditors or are being conducted in a manner that is unfairly prejudicial to the public interest, such member or members or, the creditor or creditors, as the case may be, the Commission or registrar may make an application to the Court by petition for an order under this section.

(2) If, on any such petition, the Court is of opinion-

(a) that the Company's affairs are being conducted, or are likely to be conducted, as aforesaid; and

(b) that to wind-up the Company will unfairly prejudice the members or creditors;

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the Company's affairs in future, or for the purchase of the shares of any members of the Company by other members of the Company or by the Company and, in the case of purchase by the Company, for, the reduction accordingly of the Company's capital, or otherwise.

(3) Where an order under this section makes any alteration in, or addition to, a Company's memorandum or articles, then, notwithstanding anything in any other provision of

this Act, the Company shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; and the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the Company and the provisions of this Act shall apply to the memorandum or articles as so modified accordingly.

(4) A copy of any order under this section altering or adding to, or giving leave to alter or add to, a Company's memorandum or articles shall, within fourteen days after the making thereof, be delivered by the Company to the registrar for registration; and if the Company makes default in complying with this sub-section, the Company and every officer of the Company who is in default shall be liable to a penalty of level 1 on the standard scale.

(5) The provisions of this section shall not prejudice the right of any person to any other remedy or action.”

10. There is no such allegation of petitioners in their arguments in the instant case that majority shareholders have acted in a manner that has affected or reduced their minimum threshold of shareholding as existing prior to the sad demise of father/husband Inam ur Rehman. Petitioners have not been able to demonstrate that any efforts were made to acquire shares after sad demise of their father and husband respectively. It is obligatory upon all successors inheriting shares to have obtained Succession Certificate in terms of Section 78 *ibid*. SECP may not be able to go into such details as who the legal heirs are and how much have they inherited and it is for this reason, it was left to the Courts for passing such declaration as to their entitlement.

11. In addition to above it is also to be seen that Section 78 is an active pulse for maintaining shareholding of company, as regulated by SECP, since it (Company) is incorporated through SECP, therefore, they have devised special criteria for transfer of shares. It may not have a direct application of the principle of inheritance generally as it is governed by special law called SECP's Act and the company and its shares are creatures of *ibid* Act and thus shall be governed under the Act.

12. Learned counsel Mr. Arshad Tayebaly while arguing the case for petitioners has relied upon a number of judgments from this jurisdiction as well as from Indian jurisdiction which are being dealt with one by one.

13. Case of Saghir Ahmed Soofi¹ at the very outset was not dealing with any kind of oppressive affairs. It is in relation to Section 302 and 152 of the Companies Ordinance, 1984. It is in relation to a contributory who dies either before or after he has been placed on the list of contributories; his legal representatives were liable, in a due course of administration, to contribute to the assets of the company in discharge of his liability and shall be contributors accordingly whereas Section 152 of the ibid law deals with the rectification of the register; it does not deal with the shares of a company left by deceased which devolved amongst the legal heirs for which a special provision of Section 78 is provided under the enactment of 2017 for its transfer either through Succession Certificate or lawful award.

14. The case on which reliance was made in the aforesaid judgment is of Muhammad Fikree² wherein unregistered member/legal heirs of deceased member were not given their lawful registration and the Court directed the Company to transfer shares of such member to the unregistered petitioner. It was not oppressive conduct in the affairs of Company.

15. Next cited judgment of the petitioners' counsel is Ghulam Ali³. It is purely a case of inheritance under Muhammadan Law and neither special law of Companies Ordinance, 1984 nor that of 2017 Act is discussed therein hence would be an irrelevant proposition for the purposes of present controversy.

¹ Saghir Ahmed Soofi v. Saga Sports (Pvt.) Ltd. (2005 CLD 1875)

² Muhammad Fikree v. Fikree Development Corporation (PLD 1988 Karachi 446)

³ Ghulam Ali v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1)

16. Similar is the case of Mst. Suban⁴ where only Islamic law of inheritance was discussed without any application of Company law, which sets a special procedure for transfer of shares of a deceased member.

17. In case of World Wide Agencies Pvt. Ltd.⁵ which is a case of oppressive conduct of some of the majority shareholders, the petitioner's case was considered on the count that the complainants therein were wife and children of late S.K. Desor (shareholder) and said LRs obtained Letters of Administration under section 290 of the Indian Succession Act read with Section 273 of the Act and also permission of the Reserve Bank of India and were only then, on the strength of such Succession Certificate/Letters of Administration, treated as member for the purpose of maintaining petition under section 397 and 398 of the Indian Companies Act, which is pari materia to Section 286 of Act 2017 hence ratio, as relied upon in the judgment, is missing in the instant case.

18. As regards the case of Rajkumar Devraj⁶, effectiveness of this judgment is evident in paragraph 12, which is as under:-

“12. Therefore, to decide whether, the petitioners have fulfilled the requirements of Section 399, I have to only examine the averments in the petition. According to the petitioners, their father held 99% shares in the Company and they are the legal heirs along with Rajmata. All the three of them together have sought for grant of a Succession Certificate and the 2nd respondent and other brothers being the near relations of the deceased have filed no objection to the grant of Succession Certificate in favour of the petitioners and Rajmata and that the shares held by the deceased of 5050 equity shares are also part of that application. ...”

19. In the case of Abid Hussain⁷ a Division Bench of Uttaranchal High Court from Indian jurisdiction conceived as under:-

⁴ Mst. Suban v. Allah Ditta (2007 SCMR 635)

⁵ World Wide Agencies Pvt., Ltd. v. Mrs. Margarat T. Desor (1990 AIR 737)

⁶ Rajkumar Devraj and Rajkumari v. Jai Mahal Hotels (2006 134 CompCas 405)

“For the purposes of invoking Section 397 read with Section 398 and to overcome the embargo of Section 399(a), the appellant has come up with the case that when some of the directors ceased to be the directors of the company, their shares were transferred. It is an admitted case that the said transfer was not registered as required under Sections 108 to 112 of the Companies Act. Provisions of Section 108 to 112, deal with the manner in which the shares would be transferred and registered. If the provision from Section 108 to 112 is not followed, the transfer cannot be treated as to be valid transfer of share in accordance with law.”

20. Somehow the situation was dealt with in the case of Aruna Oswal⁸, wherein the Supreme Court of India has held as under:-

“20. Admittedly, respondent No.1 is not holding the shares to the extent of eligibility threshold of 10% as stipulated under section 244 in order to maintain an application under sections 241 and 242. He has purchased the holding of 0.03% in M/s. Oswal Agro Mills Ltd. in June 2017 after filing civil suit and remaining 9.97% is in dispute, he is claiming on the strength of his being a legal representative. In M/s. Oswal Greentech Ltd., the shareholding of the deceased was 11.11%, out of which one-fourth share is claimed by respondent No.1. Admittedly, in a civil suit for partition, he is also claiming a right in the shares held by the deceased to the extent of one-fourth. The question as to the right of respondent no.1 is required to be adjudicated finally in the civil suit, including what is the effect of nomination in favour of his mother Mrs. Aruna Oswal, whether absolute right, title, and interest vested in the nominee or not, is to be finally determined in the said suit. The decision in a civil suit would be binding between the parties on the question of right, title, or interest. It is the domain of a civil court to determine the right, title, and interest in an estate in a suit for partition.

.....

29. We are of the opinion that the proceedings before the NCLT filed under sections 241 and 242 of the Act should not be entertained because of the pending civil dispute and considering the minuscule extent of holding of 0.03%, that too, acquired after filing a civil suit in company securities, of respondent no. 1. In the facts and circumstances of the instant case, in order to maintain the proceedings, the respondent should have waited for the decision of the right, title and interest, in the civil suit concerning shares in question. The entitlement of respondent No.1 is under a cloud of pending civil dispute. We deem it appropriate to direct the dropping of the

⁷ Abid Hussain v. Shri Jaspal (Company Appeal No.1/2013) of Uttaranchal HighCourt.

⁸ Aruna Oswal v. Pankaj Oswam (Civil Appeals 9340, 9399 & 9401 of 2019) of Supreme Court of India.

proceedings filed before the NCLT regarding oppression and mismanagement under sections 241 and 242 of the Act with the liberty to file afresh, on all the questions, in case of necessity, if the suit is decreed in favour of respondent No.1 and shareholding of respondent No.1 increases to the extent of 10% required under section 244. We reiterate that we have left all the questions to be decided in the pending civil suit. Impugned orders passed by the NCLT as well as NCLAT are set aside, and the appeals are allowed to the aforesaid extent. We request that the civil suit be decided as expeditiously as possible, subject to cooperation by respondent No.1. Parties to bear their costs as incurred.”

21. In a case where accusation is with regard to bringing down the shareholding below the requirement of 1/10th of the shareholding of the company and such action claimed to have been taken only in order to deprive the complainant of his right to sue, it was such an issue, which is peculiar one beyond comprehension of Section 286 of Companies Act, 2017 and could however be different from general propositions and hence in consideration of such accusation a petition for oppression could be entertained⁹. However, the situation here is totally different; the petitioners nowhere allege that it is an action of the respondent which has brought down the shareholding of the petitioners. The petitioners themselves failed to avail jurisdiction of Court under Succession Act for availing rights in the shares of deceased.

22. It is a unanimous view of the Courts that in order to maintain petition for the accusation that concerns with the oppressive attitude of majority shareholders, the minimum threshold has to be complied with¹⁰.

23. Though this is not in dispute but the arguments put forward by learned counsel for petitioners is that by virtue of being a Muslim, shares automatically devolve upon the legal heirs of deceased shareholder. This

⁹ Anup Kumar Agarwal v. Crystal Thermotech Ltd. (Company Appeal No.17/2016) AND Yamini Bipinchandra Shah v. Trimbak Estate Pvt. Ltd. (Company Appeal No.250/2018) of Indian Tribunal

¹⁰ (i) Hassan Al-Adawi v. Hama International (Pvt.) Ltd. (2009 CLD 1043), ii) Malik Aziz Ul Haq v. Crystal Line Chemical Industries (2016 CLD 970) and (iii) Abdul Kareem Khan v. Haroon-ur-Rahseed (2015 CLD 719)

perhaps may be a case under Muhammadan Law where rights are being acquired in respect of movable and immovable assets under general law, but in case where an entity is created by a special law, it is to be dealt with within that frame of special law. No provision of this special Act would take away any of their right under the general law but it laid down a procedure of its own because the entity is the creation of company law. The successor who intends to take advantage of any of its shareholding left by deceased has to go through a process prescribed by company law and that is Section 78 of the Companies Act, 2017 which provides that the shares or other securities of the deceased member shall be transferred on application duly supported by Succession Certificate or by lawful Award, as the case may be in favour of successors to the extent of their interest and their names shall be entered in the Register of Companies. The officials of SECP may not be aware of the devolvement of the share amongst the legal heirs and also as to who were the legal heirs to whom shares were devolved and as such law sets a mechanism for the transfer of the shares, which is dependent on a Succession Certificate or lawful award by a Court of law.

24. Majority shareholders' rights and their decision taken in this regard could not be ordinarily objected unless a significant number of shareholders, which is prescribed as 10% of the issued share capital of the company, is achieved. If such minority shareholders are allowed to object and interfere in the decisions of the majority shareholders, the business of the company would not function; it should always be to the wisdom of majority shareholders and insofar as decision of the company is concerned, unless the prerequisite of Section 78 and 286 of the Act 2017 are met, the interference in the business affairs may not be appropriate.

25. Petitioners have not even cared to file a succession petition in respect of shares being claimed after the sad demise of Inam ur Rehman whereas a suit for administration is pending which was filed by respondent Khalid Inam wherein he claims administration of moveable and immovable assets left by deceased Inam ur Rehman.

26. In view of above facts and circumstances of the case, I find that the requisite compliance has not been made in terms of Section 78 of the Companies Act, 2017 and hence the lis for oppressive conduct by majority shareholders under section 286 of the ibid Act cannot be maintained. Consequently the petition is dismissed along with pending applications as being not maintainable.

Dated:

J U D G E