



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

COMPANY PETITION NO. 857 OF 2004

In the matter of Companies
Act, 1956;

AND

In the matter of Section 433 (f) of
the Companies Act, I of 1956

AND

In the matter of winding up of
CAPITAL CONTROLS INDIA PRIVATE
LIMITED,Company

Severn Trent Water Purification IncPetitioner

R.A. Kapadia i/b. Jyoti Sehgal and Shravan Shah for
the petitioner.

J.J. Bhatt for respondent no.1.

D.D. Madon for respondent no.2.

CORAM: S.U. KAMDAR, J.

DATE : 21ST APRIL, 2005.

JUDGMENT :

1. The present petition is filed by the petitioner
for winding up of the respondent company on the
ground of just and equitable under section 434 (e)

of the Companies Act-I of 1956. Some of the material facts of the present case are briefly enumerated as under:

2. A company known as Capital Controls (Delaware) Company, Inc a company incorporated and registered under the relevant law of USA and the respondent herein which is a company incorporated under the Indian Companies Act decided to carry on business jointly in India. In pursuance thereof they executed what is known as shareholders agreement dated 16.11.1995. Under the terms of the said agreement both parties agreed that to float a company in India in the name and style of 'Capital Controls India P.Ltd' In clause-4 of the shareholders agreement it was inter-alia provided that the company shall initially have a share capital constituted of 150,000 equity shares of Rs.10/- each and the said shares will be subscribed by the said company namely Capital Controls (Delaware)P.Ltd of 75,000 equity shares of Rs.10/- each and Chloro Controls Pvt.Ltd being the respondent company herein another 75000 equity

shares of Rs.10 each. Thus under clause-4 of the shareholders agreement dated 16.11.1995 the holdings of both the petitioner as well as the respondent in the said company is 50% each. Under clause-7 of the said agreement the said company Capital Controls (Delaware) Ltd hereinafter referred to as "capital Control") was appointed as a distributor in India of the products manufactured by Capital Controls an American company. Under clause-8(i) it was provided that the total board of directors of the company will be six including the managing director plus not more than two directors will be appointed by financial institution if so required. Pursuant to the shareholders agreement a company has been incorporated on 14.11.1995 which is known as 'Capital Controls India P.ltd'. It seems that there were differences and disputes by and between this group of shareholders who are holding equal shares and in fact it is the case of the petitioner that the respondent company which is being held by one Mr. Madhusudan B. Kocha along with his sons assumed full control of the company and is preventing the petitioner herein from running the said business.

In view of the fact that most of the disputes have not been possible to resolve between the parties in so much so that in 47th Board Meeting of the company which was held on 27.6.2003 there was a difference of opinion between the parties and even the draft minutes of the said meeting could not be finalised. This state of affairs has been continued in the said company even today. There are also arbitration disputes between the parties as well as various other proceedings are pending in different courts.

3. On 21.7.2004 the joint venture agreement was terminated and consequently the suit has been filed in this court which is pending. It is an admitted position before me that both the group of shareholders are holding 50% shares each in the said company. It is also an admitted position that unless both the joint venture partners concur to the decision it is not possible to arrive at any of the decisions for the smooth functioning of the said company.

4. In the mean time sometime in or about on

31.3.2003 the said company Capital Controls (Delaware) Company Inc. merged with the petitioner company and the said company is now known as Severn Trent Water Purification Inc, which is a transferee company in which the original Capital Controls being the transferor company has merged and ceased to be in existence. In view of the diverse disputes between the parties, the said transferee company namely Severn Trent Water Purification Inc, has filed the present petition on the ground of just and equitable for winding up of the said company.

4. The learned counsel appearing for the company as well as the respondent shareholders has inter-alia contended that the present petition is not maintainable. It has been contended that the petition can be filed for winding up only by those class of persons who are specifically under sub-section (1) of section 439. The case of the petitioner would fall under sub-clause (c) of sub-section (1) of section 439 which inter-alia provides for a petition to be filed by any

contributory or contributories. It has been contended that under sub-clause (4) of section 439 it has been provided that the contributory shall not be entitled to present the petition for winding of the company unless the shares in respect of which he is a contributory or some of them, either were originally allotted to him or have been held by him, and registered in his name for at least six months during the eighteen months immediately before the commencing of the winding up. It has been thus contended that the petitioner herein is not the registered shareholder of the company because the name of the petitioner does not appear on the register of members of the company. However it is admitted that the name of the erstwhile company which has since amalgamated namely 'Capital Controls' was and is appearing on the register of members of the respondent company. It is thus contended that the petitioner to maintain the present petition must first apply to the company for transfer of the shares in their favour under the provisions of section 111 and bring the name of new amalgamated company on the record of the register of members

before the petition can be maintained for winding up under section 434 read with section 439 of the Companies Act. In support of the aforesaid contention the learned counsel for the petitioner has relied upon the judgment of the apex court in the case of **M/s. General Radio and Appliances Co.Ltd and Ors vs. M.A. Khader reported in 1986 2 SCC 656** and it has been contended that even if the erstwhile company is amalgamated in the petitioner company still the petitioner being not a member is not entitled to maintain the present petition. It has been further contended by relying upon the aforesaid judgment that the amalgamation is contrary to the terms and conditions of the shareholders agreement between the parties and thus invalid and illegal and therefore the petitioner company cannot be made shareholder on the register of members of the respondent company. The learned counsel has relied upon the para-8 and 10 of the aforesaid judgment and has contended that transfer of shares of the erstwhile company in the petitioner company being contrary to shareholder agreement the same be validated even by amalgamation.

5. Thereafter the learned counsel has relied upon the division bench judgment of this court in the case of **Vassant Holiday Homes P.Ltd vs. Madan V. Prabhu** reported in 2003 V.116 CC 172 has contended that the person must be a shareholder of the company for six months in prior to 18 months for maintaining the said petition. The learned counsel for the respondent shareholders has also relied upon the judgment in the case of **Shantilal Khushaldas and Bros P.Ltd vs.Smt. Chandanbala Sughir Shah and Anr.** reported in (1993) Vol.77 CC 253. By relying upon the aforesaid judgment it has been contended that the present petition preferred by the petitioner is not maintainable.

6. The petitioner is not the registered shareholder of the respondent company. It has been further contended that in view of the provisions of s.439(4)(b) unless the person is holding the shares as a registered member for atleast 6 months in last 18 months is not entitled to maintain the present

petition. On the other hand the learned counsel for the petitioner has contended that the present petition is maintainable. He has contended that by virtue of the amalgamation the erstwhile company namely Capital Controls Inc. has ceased to exist. It is been further contended that under the terms and conditions of the said amalgamation all rights, liabilities and assets of the respondent company stood vested in the present petitioner. It is also contended that the rights in respect of the shares originally held by the said company stood transferred and vested in the petitioner herein and therefore the petitioners are the contributories and or shareholders of the said company and therefore the present petition is maintainable. Alternatively it has been submitted by the learned counsel for the petitioner that s.439 of the Act inter-alia provides that any share in respect of which a person is a contributory and/or the said shares devolved on him through the death of a formal holder then such a person is a contributory as contemplated under section 439(1)(B) and thus a petition can be filed by such a person even if his name is not on the

register of members of the company. It has been contended that the original shareholder namely Capital Controls cease to exist by virtue of amalgamation and it is a natural death of the said company and thus the shares are devolved on the petitioner by operation of law. I have considered the rival submissions of the parties. The provision of section 439(4)(b) reads as under:

"439. Provisions as to applications for winding up.

(4) A contributory shall not be entitled to present a petition for winding up a company unless-

(a).....

(b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least ix months during the eighteen months immediately before the commencement of the winding up, or have devolved on him through the death of a former holder."

7. On considering the said section as quoted above there is no manner of doubt that a contributory is a

shareholder of the company. Infact in cases of amalgamation the shareholding of erstwhile company stood automatically transferred and vested from the transferor company to the transferee company and thus the transferee company becomes the successive holder of the said shares by operation of law. The judgments which are cited by the learned counsel for the respondents in support of his contention that the present petition is not maintainable has no application to the facts of the present case. The judgment of the apex court in the case of M/s. General Radio and Appliances Co.Ltd and Ors. (supra) has no relevance because that was the case where the question was whether on amalgamation the tenancy right stand transferred in the transferee company inspite of prohibition contained against sub-letting under a rent law. In the said judgment it has been held that the tenancy right cannot be vested in the transferee company by virtue of prohibition contained in section 10(ii)(a) of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960. By relying the said provisions of law which prohibits the transfer of tenancy the

court has come to the conclusion that what is not permissible in law directly cannot be achieved through the medium of amalgamation. It is undoubtedly true that the observation of the apex court also suggest that the transfer of tenancy was contrary to the terms and conditions of the tenancy agreement between the parties and therefore also invalid. In my opinion the aforesaid judgment has no application in the present case. The shares in the company are fully transferable. There is no prohibition in law which prohibits the transfer of a share by one person to another. The contention that the shareholder agreement contains a prohibition on the part of the erstwhile company to transfer the shares to the petitioner is the question which cannot be determined at the admission stage assuming that such prohibition is legal and or valid. Prima facie I am of the opinion that there is no breach of any such shareholders agreement because what is prevented is a transfer of shares and not merger of two companies. In cases of the tenancy of the premises the rights of the landlord are affected and there is clear prohibition in law. In my opinion no

such analogy can be extended to the facts of the present case. The judgment of the division bench of this court cited in the case of Vasant Holding Homes (supra) only specifies the requirement which are expressly set out under section 439 (4)(b) if the original holder namely Capital Controls was valid contributory by virtue of the provisions of s.439(4)(b) then on amalgamation prima facie in my opinion the petitioner company is also equally entitled to exercise the very same rights which the transferor company was entitled to in respect of the said shares. Otherwise also prima-facie in my opinion s.439(4)(b) does not restrict the petitioner from filing the present petition because it falls in the last category i.e. 'or have devolved on him through the death of a formal holder'. These words under s.439(4)(b) prima-facie in my opinion takes into account the situation as in the present case whether the company has ceased to exist by virtue of amalgamation of the said company with the petitioner company. The said original company has ceased to exist and thus there is a natural death in the eyes of law and in view thereof by virtue of the

aforesaid words contained under section 439(4)(b) prima-facie in my opinion the present petition is maintainable and the same can be entertained.

8. I am required to give the aforesaid detailed finding in respect of the maintainability issue because I was invited by the respondents to do so by contending that the admission of the petition ought not to be done without giving detailed reasons about the maintainability of the present petition. According to the learned counsel for the respondent it is necessary that the maintainability issue ought to be decided at the threshold and not at the final hearing of the petition.

9. Now turning to the case on merits there is a complete deadlock in functioning of the business of the company because there are only two shareholders and both the shareholders are holding 50% equity capital. Thus unless both the shareholders concur in conducting the business of the company the business cannot be proceeded with and or carried on.

The apex court has in the case of **Hind Overseas Private Limited vs. Raghunath Prasad Jhunjhunwala and Anr** reported in AIR 1976 SC 259 has in turn held that where the company is closely held company or private limited company then it is in nature of glorified partnership and in such cases for winding up of the company on the ground of just and equitable the court must apply the principles of partnership. However the learned counsel has contended that the present petition is malafide because the present situation has been brought in by the petitioner themselves. They are carrying on competing business and therefore they want this company to be wound up. This issue I cannot determine at the admission stage and it would have to be looked into at the final hearing of the petition. However prima-facie I am of the opinion tat there is a complete deadlock in the functioning of the company. Furthermore it is important to notice that if the company is allowed to function today then in that event the business of the company would be run by the one group of shareholder by contending that petitioners are not the shareholder of the company. Thus the respondent

alongwith his two sons would run the company as if it is their sole proprietary concern and that also by holding only 50% of the shares not even a majority of the shares in the said company. It is not permissible that by adopting such a method the company can be allowed to function and run. In any event the aforesaid issue also will be considered at the final hearing of the petition. Today I am at the prima-facie stage of the admission of the petition. I am satisfied that prima-facie case has been made out that the present company petition requires consideration.

10. However the learned counsel for the respondent company has contended that even if I am of the prima-facie opinion that the present petition should be admitted still the admission of the petition should not be advertised. It has been contended by the learned counsel by relying upon the judgment of the apex court in the case of **National Conduits (P) Ltd reported in 1967 Vol.37 CC 786** in which the court has held that the court has three options

open.

(i) to issue notice to the company to show cause why the petition should not be admitted.

(ii) Secondly, Admit the petition and fix the date of hearing and issue notice to the company before giving advertisement of the petition

(iii) Thirdly admit the petition and fix the date of hearing of the petition and see that the petition be served on the persons specified in that order.

11. In my opinion the aforesaid three eventualities which the apex court has considered is at a stage where the company is not heard. In any event Mr. Kapadia learned counsel for the petitioner has

rightly pointed out the following sentence from the said judgment.

" A petition for winding up cannot be placed for hearing before the court, unless the petition is advertised; that is clear from the terms of rule 24(2)."

12. I have heard the petition at the admission stage and after giving an opportunity both to the company as well as the other group of shareholders having 50% shares in the company. Having heard the petition in my opinion it is not required to further postpone the advertisement and once again hear the parties before the advertisement can be issued. From the aforesaid judgment it is clear that the petition cannot be finally heard unless the advertisement is issued under the Company court rules. In view thereof I am not inclined to accept the contention of the respondent company that even

if I admit the petition I should not advertise the same. In the aforesaid circumstance I pass the following order :

(i) Petition to be admitted and returnable on. 19.8.2005. Respondent waives service.

(ii) Petition to be advertised in Free Press Journal, Janmabhoomi, and Maharashtra Government Gazette. The petitioner to deposit a sum of Rs.2,000/- in the office of the Prothonotary and Senior Master, High court, Bombay for utilisation thereof to issue the advertisement if the petitioner fails to issue the advertisement.

13. At this stage the learned counsel for the respondent as well as the shareholders seek stay of the issuance of the advertisement. I grant stay of the advertisement for a period of three weeks from today.
