SUPREME COURT OF INDIA

J.P. Srivastava and Sons Private Limited

Vs

Gwalior Sugar Company Limited

Appeal (Civil) 6951 of 2004, (Arising Out of Slp) No. 22044/2001)

((Mrs.) Ruma Pal and Arun Kumar)

26/10/2004

JUDGMENT

MRS. RUMA PAL, J.

Leave granted.

This appeal arises out of proceedings initiated under Sections 397 and 398 of the Companies Act (hereinafter referred to as 'the Act') by a group of minority shareholders complaining of mismanagement and oppression in respect of the respondent No.1 company M/s. Gwalior Sugar Company Ltd. (referred to as 'the Company'). The appellants are the unsuccessful petitioners. The primary question to be resolved in this appeal is whether they held the requisite one-tenth of the issued share capital of the Company under Section 399 (1) of the Act when they filed the petition under Ss. 397 and 398.

The shares of the Company are basically held by two branches of the family of J.P. Srivastava. J.K. Srivastava, who was originally the petitioner No.4, and H.K. Srivastava who was originally the respondent No. 2, were the two sons of J.P. Srivastava. During the pendency of the proceedings before us, both J.K. Srivastava and H.K. Srivastava have died and are now represented by their respective heirs. In the case of J.K. Srivastava, his interest is now represented by his widow Mrs. Raj Mohini Srivastava and his only son Vijay Kumar Srivastava.

As far as H.K. Srivastava is concerned, he is represented by his four children, Vikram, Hemlata, Vir and Radhika. The corporate shareholders in the Company are in turn also held by members of the Srivastava family. Mrs. Nini Srivastava, appellant No.3, the wife of Vijay Srivastava, was the third petitioner in the proceedings as originally filed. She was described as a petitioner "for herself and as trustee for J.K. Srivastava Family Trust" (referred hereafter as the Trust).

The proceedings were initiated before the Company Law Board (CLB) on 1st July 1995. The pleadings were completed and the matter heard from time to time. On 22nd January 1996, CLB issued an order, the relevant extract of which reads thus:

"In view of the close relationship between the parties, we suggested to the counsel for both the sides that they should try to work out an amicable settlement between the parties. The counsel has undertaken to do so. The result of their efforts will be intimated to us on 20th February 1996 at 2.30 p.m." *

Hearings were adjourned on 22.2.96, 4.3.96 and 15.3.96 when the CLB was informed that compromise talks were in progress. Ultimately on 7.5.96, the CLB passed this order:

"It was agreed by the parties that the petitioners will sell their shares to the respondents for a value per share to be determined by a valuer appointed by us and the value will be binding on all the parties.

The parties will approach jointly reputed valuers and suggest an acceptable name for our approval on 30/5/96 at 4.15 p.m." *

On 10.6.1996, with the consent of the parties, the CLB appointed M/s Thakur Vaidyanathan Iyer as company chartered accountants, New Delhi to value the shares of the company.

On 22.11.96, the chartered accountants valued the shares. As the respondents had reservations about the value, the matter was re-heard by the valuer who reconsidered the submissions of the parties. Ultimately, the value of the equity shares was given by the valuer as Rs. 6340 per share.

The valuation for a preference share of Rs. 100/- was fixed at par. The respondents objected to this valuation also. The contention of the respondents was that the other disputes relating to family properties in possession of the petitioners should be settled also. After various hearings the matter was fixed for hearing on 6.11.1998.

On 3.11.1998, the respondent No. 8, Mrs. Radhika Srivastava, moved an application challenging the order dated 10.6.1996. In the application it was alleged that the respondent No. 8 had no knowledge of the compromise and that she had been kept in the dark about the settlement arrived at. She prayed

for recall of the order dated 10.6.1996. It was also said that the calculation of 10% of the petitioner's shareholding in the Company was made only with regard to the equity share capital of the company, whereas Section 399 sub-section(1) requires the petitioner to have 10% of the total issued share capital which would include preference shares and that the shareholding claimed by the petitioners did not amount to 10% of such total. It was contended that the appellants therefore did not hold the requisite 10 per cent of the issued share capital of the respondent No. 1 company and therefore the petition under Section 397 and 398 was not maintainable and should be dismissed.

The appellants filed a pre-notice reply on 5.11.1998 in which they stated that the petitioner No. 3 (the appellant No. 3 before us) had filed the petition on behalf of herself and as a trustee of the J.K. Srivastava Family Trust (referred to as the Trust) and that the Trust held 1029 preference shares.

It was also alleged that the respondent No. 8 was fully aware of and had participated in, the proceedings, in which there had been 25 hearings over three and a half years. On 6th November, 1998, the matter was listed for orders to be passed by CLB, when, according to the appellants, the CLB directed the appellants to file the consent/authority if any given by the Trust to Mrs. Nini Srivastava to file the petition under Sections 397 and 398. On 9th November, 1998 the appellants brought on record an affidavit dated 9th June, 1995 executed by the trustees to the effect that they had granted consent to the appellant No.3 to file the petition, a resolution of the Trust dated 10th June, 1995 and an affidavit of Mr. V.K. Srivastava dated 12th June, 1995. The appellants also filed a detailed reply in which it was inter alia stated that the Trust held 1029 preference shares in the company, that Mrs. Nini Srivastava had been appointed as a trustee of the Trust on 24th August, 1994, that authority/consent to file the petition under Sections 397, 398 had been given by the trustees on 9.2.1995 and by Mr. V.K. Srivastava a co-trustee by his affidavit dated 12th June, 1995.

The other respondents supported the respondent No. 8's application. In the counter affidavit filed on behalf of the Company, it was said that:

"As per the records of the Company as on date i.e. the shareholders register, 1029 Preference Shares stand registered in the name of Mr. V.K. Srivastava Trustee, J.K. Srivastava (family) Trust and not in the name of Mrs. Nini Srivastava.

The endorsement in the cause title against the name of Mrs. Nini Srivastava who is not all a Trustee is no compliance at all and the petition is liable to be dismissed as being not maintainable on the ground that it has been filed by the petitioners holding less than 1/10th of the issued share capital of the company i.e. 27.68 lakhs".

*

The hearing in the matter was concluded by the CLB and judgment reserved two days after the last affidavit was filed. On 18th January, 1989 the CLB passed an order rejecting the challenge by the respondent No.8 to the consent order dated 10.6.1996. It revised the valuation and considered that a sum of 6000 per equity share would be an appropriate value and Rs.100/- would be the appropriate value for the preference shares.

However, the CLB upheld the contention of the respondent No. 8 that the application under Sections 397 and 398 was not maintainable on the ground that the petitioner did not hold the requisite 10 per cent shares. The CLB proceeded on the basis that the Trust held 1029 shares in the company but that it had not consented to the filing of the petition under Sections 397, 398 by Nini Srivastava. According to the CLB " The only issue for examination is whether the Trust is a party to the proceedings or whether the Trustees have given their consent to file the petition and if so whether the same is legally valid". *

It answered this issue against the petitioners because;

1) No authority of the J.K. Srivastava Family Trust authorizing the 3rd Petitioner to represent the Trust nor any affidavit by her representing the Trust had been annexed to the petition;

(2) since there was no averment to the effect that the petitioner had the consent of the Trustees to file the petition and since the consent documents were not enclosed with the petition, the requirement under Regulation 18 had not been complied with and that non-enclosing the consent document with the petition was fatal to the petition.

(3) If the preference shares held by the Trust is not taken into consideration, then the total number of shares held by the petitioners would work out to about 7% of the subscribed capital and if the shares are included, then the percentage would go to 10.85%.

(4) 515 preference shares of the trust had already vested in the one of the beneficiaries thus reducing the percentage of the petitioners share holding to less than 10% and;

5) relying upon Duli Chand v. M/s. Mahabir Pershad Trilok Chand Charitable Trust, Delhi 1984 AIR(Delhi) 145 that Trustees cannot authorize one of them to initiate proceedings in the name of the trust.

It therefore reached the conclusion that the shares held by the Trust cannot be taken into account for the purposes of the provisions of Section 399. Therefore without passing any directions pursuant to its finding on the effect of the consent order, it dismissed the petition. Several appeals were preferred from this order under Section 10-F of the Act both by the appellants and the respondents.

The learned Single Judge dismissed all the appeals holding that the petition was not maintainable because no consent of the trustees had been pleaded, that there was no compliance with Regulation 18, that the shares of the Trust had vested in the beneficiaries and that the trustees could not delegate their powers or authorize one of them to represent the Trust.

During the pendency of the appeals, the respondents, according to the appellants, committed further acts of oppression in respect and mismanagement of the company. Consequently, a second petition was filed under Sections 397 and 398 of the Act by the appellants.

A Letters Patent appeal was filed from the decision of the Single Judge before the Division Bench by the appellants. The Division Bench held that the filing of the consent along with application under Section 399(3) of the other share holders was a sine qua non to the initiation of proceedings under Sections 397 and 398 and that on the failure on the part of the appellants to file the alleged consents the application had been rightly dismissed. It was held that it was not necessary to determine the nature of the trust and whether the shares held by the Trust had devolved on any of the beneficiaries before the petitions under Sections 397 and 398 of the Companies Act had been filed.

It was said that:

"If the trust contained some other properties there is likelihood that the shares may not be divided." *

The Division Bench was also of the view that since the second application had been filed, the CLB should consider whether the shares of the trust should be reduced and the implications of Section 153 of the Act.

The CLB was directed to decide the subsequent application on its merits ignoring the observations made by the CLB in its order dated 18.1.1999 as well as of the Single Judge and to decide the case on merits on the basis of the persons whose names were recorded in the register of share holders.

Before us the appellants contended that the Trust and the co-trustees had authorised the third appellant to represent the Trust. It was submitted that there was no dispute in fact that the Trust held 1029 shares in the company. The only dispute was whether the third appellant was authorized to act on behalf of the Trust. It was submitted that Section 399(3) did not deal with the authorization but with the consent of supporting shareholders. It is said that the Trust still continues and has not been brought to an end by reason of devolution of the shares to the beneficiaries. It is said that the co-trustees had in fact consented to/ authorized the appellant No. 3 to initiate and prosecute the petition under Sections 397 and 398 and that in any event the CLB should have given an opportunity to the appellants to implead the other co-trustees.

It was pointed out that the respondent No.8 had never raised any issue that the trustees were necessary parties and that in their absence the petition under Sections 397 and 398 was not maintainable. It was also submitted that the High Court erred in holding that compliance with Regulation 18 of the Company Law Board Regulation was a mandatory requirement.

It was said that Section 399(3) only requires that the consent should be obtained prior to the filing of the petition. If this was proved as a fact, the requirement of filing the consents in writing along with the petition under Regulation 18 should not render the petition itself not maintainable. Reference has been made to Regulations 44, 46 and 48 to show that the CLB retained the power to dispense with the requirements of Regulation 18, in support of the submission that Regulation 18 was merely directory.

Learned counsel appearing on behalf of the respondents submitted that the petition had originally been filed only on the basis of the equity share holding of the four petitioners and did not refer to any redeemable preference shares. In the absence of these pleadings, it was asserted that the petitioners did not have the requisite qualification shares for initiating proceedings under Sections 397, 398.

It was submitted that the subsequent phrase "plus 1029 preference shares" in paragraph 2 of the petition was an interpolation. Secondly, it is submitted that Mrs. Nini Srivastava did not have the consent of the other trustees, and that assuming that she had the consent of the trustees to file the petition, there was no such averment in the petition nor any consent letter filed with the petition in violation of the mandatory requirement of Regulation 18 of the Company Law Board Regulations. Finally, it was said that the only person who could have joined the petition as a petitioner was V.K. Srivastava who was the registered share holder of the 1029 Preference Shares.

It is said that the trust was not and could not have been a member of the company. This, according to the respondents, clearly followed from Sections 41(2) read with Section 153 of the Act. It is said that admittedly, the application had not been filed on behalf of V.K. Srivastava. Even assuming that the Trust was the registered member of the Company, it is contended that there was no averment that the company petition had been filed on behalf of the Trust.

It is submitted that there was in fact no consent and that the so called consents were subsequently obtained. Any Member/or members of a Company may apply under Ss, 397 and 398 of the Act to the CLB complaining of mismanagement or oppression provided such Member or Members have the requisite shareholding as prescribed under Section 399 to do so. The relevant portions of Section 399 read as under:

S. 399. Right to apply under Sections 397 and 398.

(1) The following members of a company shall have the right to apply under section 397 or 398:-

a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less or any member or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;

b).....

2).....

3) Where any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

The question is, did the appellants who were the original petitioners have the requisite number of shares when the petition was filed. The question itself raises two further issues viz. who were the petitioners and did they in fact hold the necessary shares?

Mrs. Nini Srivastava claimed to represent the Trust which held 1029 shares so making up the necessary shareholding under Section 399. It will be noted from the arguments particularized earlier that there has been a shift in the arguments raised by the respondents. Before the CLB, the Single Judge and the Division Bench the respondents arguments and basis of the decision of the three fora was that the Trust held the 1029 Preference Shares and that the Trust had not consented to or authorized the filing of the petition under Sections 397, 398 of the Act. Before us however, the main focus of the argument has been that the Trust was not owner of the 1029 shares but that the owner was Mr. V.K. Srivastava, who is now appellant No. 4(b) before us, and that the petition had not been filed on his behalf by the appellant No. 3. Although in the affidavit in reply filed by the Respondent No.8 there is a plea that shares could not be held in the name of the Trust under Section 153 of the Act, from the reasoning of the CLB and the two decisions of the High Court which we have noted earlier, it is apparent that the issue was not pressed.

The three courts below have concurrently found that the Trust which held the preference shares was not properly represented by Nini Srivastava. This was the only case which the appellant had to meet. Now the respondents contend that in fact it was Vijay Kr. Srivastava who held the 1029 shares and not the Trust and Nini Srivastava did not represent him. Although a passing reference was made to the fact in the counter affidavit filed by the Company as noted above, that was done in the context of denying that Nini Srivastava was a trustee.

In our judgment it would not be proper to permit the respondents to raise an issue not argued by them either before the CLB or the High Court and to make out a new case at this stage. To allow a party to take grounds not urged earlier would not only result in taking the other party by surprise but it would deprive such party of any adjudication on the issue by the different courts - a right to which each party is otherwise entitled. It would also place such party at a great disadvantage as no opportunity would have been granted to it to meet the new plea. In the case of Rajahmundry Electric Supply Corporation v. A. Nageshwara Rao & Ors. the contention on behalf of the Company, while opposing a petition under Ss. 397, 398, was that there was no proof that the applicant had obtained the consent of the requisite number of shareholders opposing the petition. It was said that out of the 80 persons who had consented to the institution of the application, 13 were not shareholders at all

and that two members had signed twice. This Court said:

"This point is not dealt with in the judgment of the trial court, and the argument before us is that as the objection went to the root of the matter and struck at the very maintainability of the application, evidence should have been taken on the matter and a finding recorded thereon". *

The submission was rejected because the objection though raised in the written statement had not been pressed at the trial and had not been argued before the Trial Judge. We will therefore decide only those issues which were pressed and decided upon by the three courts.

The issue then is was it represented before the CLB by Nini Srivastava? The answer to this would depend on whether the trustees of the trust could authorize one of them to initiate proceedings for and on behalf of the Trust. A Full Bench of the Gujarat High Court in Atmaram Ranchhodbhai v. Gulamhusein Gulam Mohiyaddin 1973 AIR(Gujarat) 113 said:-

�Whether the trust is a private trust governed by the Indian Trusts Act or is a public charitable or religious trust, a trustee cannot delegate any of his duties, functions and powers to a co-trustee or to any other person unless the instrument of trust so provides or the delegation is necessary or the beneficiaries competent to contract consent to the delegation or the delegation is in the regular course of business.

These are the only four exceptional cases in which delegation is permissible and save in these exceptional cases, the trustees cannot, even by a unanimous resolution, authorize one of themselves to act as managing trustee for executing the duties, functions and powers relating to the trust and every one of them must join in the execution of such duties, functions and powers ". * (p.115)

The issue in that case was whether one co- trustee could determine a tenancy. The Court said he could not, but held:

"But when we say that the tenancy must be determined by all co-trustees, we must make it clear that what we mean is that the decision to terminate the tenancy must be taken by all the co-trustees. The formal act of giving notice to quit pursuant to the decision taken by all the co-trustees may be performed by one co-trustee on behalf of the rest. The notice to quit given in such a case would be a notice given with the sanction and approval of all the co-trustees and would be clearly a notice given by all co-trustees." * (p.116)

The view has been followed by the different High Courts [See for example Duli Chand v. M/s. Mahabir Pershad Trilok Chand Charitable Trust, Delhi AIR 1984 Delhi] and held to be too narrow in Jain Swetambara Murthi Pujaka Samastha v. Waman Dattatreya Pukale 1979 AIR(Karnataka) 111.

This Court in M/s. Shanti Vijay & Co. v. Princess Fatima Fouzia & ors. held that:-

"The act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both. But such sanction or approval must be strictly proved." *

It was also held that a trustee could act on behalf of others, if there is a clause in the Trust Deed authorizing the execution of the Trust to be carried out by "one or more or by majority of the trustees".

Therefore although as a rule, trustees must execute their duties of their office jointly, this general principle is subject to the following exceptions when one trustee may act for all (1) where the Trust Deed allows the trusts to be executed by one or more or by majority of trustees (2) where there is express sanction or approval of the act by the co-trustees; (3) where the delegation of power is necessary; (4) where the beneficiaries competent to contract consent to the delegation; (5) where the delegation to a co-trustee is in the regular course of the business; (6) where the co-trustee merely gives effect to a decision taken by the trustees jointly.

The present case comes within at least three of the exceptions listed. The Trust in question was created on 25.12.1978 by J.K. Srivastava, one of the original petitioners in favour of his two minor grandsons, Kunal and Yatin. The trustees named in the Trust Deed were the settlor's wife, Raj Mohini (now the appellant No.4 (a)) and their son Vijay (now the appellant 4(b)) who was also the father of the beneficiaries. The Trust Deed contains the following clauses:

" Clause 7: The Trustees shall hold the Trust Fund or any property representing the same in trust for the Settler's said grandsons so, however, that when Master Kunal Krishna Srivastava attains the age of 18 years, he will be given his fifty percent share of the then Trust Property or Fund and thereafter the same will rest absolutely in him, and so, however, that thereafter the Trustees shall hold the remaining Trust Property or Fund for the benefit of Master Yatin Krishna Srivastava till he attains the age of 18 years when the Trust will automatically ease and the properties shall vest absolutely in the said grandson, Master Yatin Krishna Srivastava.

Clause 12:The Trustees may instead of acting personally employ and pay any agent whether a solicitor, banker, stock broker or any other person to transact any business or to any act required to be transacted or done in the execution of the trusts hereof including the receipt and payments of money and shall be entitled to be allowed and paid all charges and expenses so incurred and shall not be responsible for the default of any agent employed in good faith.

Clause 16: The Trustees shall have full power to file and defend suit, appeals, applications etc. to declare, sign and verify all plaints, written statement, memo of appeals, cross objections, applications, affidavits etc. and to appeal at any place or places in the Union of India before any Court, office or authority to present and lodge any documents for registration and to admit disputes,

differences and demands to arbitration and to adjust, approve and settle all accounts relating to the Trust Fund and to execute all releases and discharges and to do all other things relating thereto.

Clause 19: All the decisions that will be required to be taken in carrying out the Trusts herein contained shall be taken by majority of the Trustees. If the Trustees are equally divided the Chairman shall have an extra or casting vote. The Trustees present shall form a quorum for any meeting of the Trustees" *

These clauses clearly allow not only one co-trustee but any person to carry out the trusts and to act for the trust provided ofcourse such person is expressly authorized [See: Killick Nixon Ltd. v. Bank of India (supra); Punnaiah v. Jeypore Sugar Co. Ltd.(supra)].

The Resolution dated 3rd June, 1955 of the Trustees records inter alia:

"The constituents of the J.K. Srivastava group had decided to file a petition with the Company Law Board in Delhi, under Section 397 & 398 of the Company's Act, in the matter. Mrs. Nini Srivastava reported that she was also to be a Petitioner and the petition had been prepared.

The petition, application and Annexures were placed on the table, duly examined read and understood and duly approved particularly to its contentions, submissions and prayers.

It was then duly resolved that Mrs. R.M. Srivastava and Mr. Vijay K. Srivastava Trustees give consent on behalf of the Trust to the filing of the Petition/presentation of the Petition by Mrs. Nini Srivastava and that she be also authorized to take all Legal action as advised in the manner". *

A joint affidavit affirmed on 9th June, 1995 by Raj Mohini and Vijay says:

We have read and understood the Petition Under Section 397 & 398 of the Companies Act, ancillary application annexures and confirm our consent to Mrs. Nini Srivastava, a Trustee of the Trust and a Petitioner with others, in the Petition, to her filing/presenting the same. We also hereby give consent and authority to Mrs. Nini Srivastava a Trustee of the Trust to take such and all legal actions as advised". *

Finally, an affidavit was affirmed by Vijay Krishna Srivastava on 12th June, 1955 to the following effect:

"I, Vijay Krishna Srivastava, Trustee of the J.K. Srivastava Family trust, holding 1029 fully paid up, Cumulative Preference Shares of Rupees 100 each of Gwalior Sugar Company Lt., as Trustee, have hereby given consent to the filing presenting of the Petition before the Company Law Board, New

Delhi, under Sections 397 & 398 of the Company Act, by Mrs. Nini Srivastava a Trustee of J.K. Srivastava Family Trust, in the matters of J.K. Srivastava & others J.K. Srivasatava constituents) against Gwalior Sugar Co. Ltd. and the H.K. Srivastava & Others (H.K. Srivastava constituents).

The Petition relates inter alia to the transfer of 3229 Equity Shares of Gwalior Sugar Co. Ltd. and other acts of oppression and mismanagement by the H.K. Srivastava Constituents in management of Gwalior Sugar Company Ltd.

I have read and understood the Petition under Sections 397 & 398 of the Companies Act, ancilliary application/ annexures and confirm consent to Mrs. Nini Srivastava, a trustee of the J.K. Srivastava Family Trust, and a Petitioner with others, in the Petition to her filing/presenting the same." *

The conclusion is inescapable that the Trustees had expressly authorized Nini Srivastava to file the petition. Additionally, the affidavit of Vijay Srivastava, who is alleged to be the registered owner of the 1029 preference shares, clearly shows that he had expressly consented and authorized Nini Srivastava in his capacity as such trustee to file the proceedings. If the respondents had fairly and squarely raised the issue as to the petition not being consented to by Vijay Srivastava as the registered shareholder of the 1029 shares, it would have been open to the appellants to have relied on this affidavit and if necessary amended the petition.

The power to allow such amendments has been expressly granted to the CLB under Regulation 46. As was stated several decades ago by the Privy Council in Charan Das V. Amir Khan AIR 1921 50:-

"Where the plaintiffs, through some clumsy blundering, attempted to assert rights that they undoubtedly possessed under the statute in a form which the statute did not permit, they should be at liberty to express their intention in a plainer and less ambiguous manner, and to amend the plaint so as to express the rights which it has been really their intention all along to establish, although the amendment of plaint is sought to be made at a time when the suit itself if instituted then would be time-barred". * (P.50).

However, for the reasons indicated by us earlier we do not propose to entertain this plea of the respondents at this stage.

It is true that criminal proceedings have been instituted by the respondents on the allegation that the stamp paper on which the affidavits have been affirmed were purchased subsequently. But we are not prepared to reject the documents as forged ones not only because the executants have hotly contested the allegations but also because there is no finding to that effect by any of the three courts below or by the criminal court. Indeed as matters now stand the criminal proceedings have been stayed by the High Court. Furthermore, Vijay Srivastava and Raj Mohini's continuous support is also apparent from the fact that both of them are parties to the appeal before us albeit in the capacity of heirs of Late J.K. Srivastava.

The Courts below however refused to entertain the petition because the documents referred to earlier had not been filed along with the petition in accordance with their interpretation of S.399 and Reg. 18. Section 399 of the Act has replaced Section 153-C (3) of the Indian Companies Act, 1913 with some major differences. Section 153-C (3) of the 1913 Act itself provided that the consent of the shareholders supporting the petition should be obtained in writing. Sub Section (3) of Section 399 of the 1956 Act, however, contains no such requirement. It only speaks of "obtaining" of the consent.

It does not speak of consent in writing nor does it require any such writing to be annexed with the petition. Many of the decisions cited by both the parties have turned on the wording of Section 153-C (3) of the 1913 Act such as Makhan Lal Jain vs. The Amrit Banaspati Co. Ltd 1953 AIR(Allahabad) 326 when in the context of Sub section 3 of Section 153-C (a) it was held:

"The law requires that the consent should be in writing, i.e., in the form of a document. Therefore, the document itself should prove that the consent has been given. No evidence, either by way of affidavit or of oral sworn statement in Court, can be given to prove that such consent was given". *

The reasoning in this decision would no longer be apposite having regard to the change in the language in Section 399 (3) and the shifting of the requirement from the Act to Regulation 18 of the Company Law Board Regulations 1991 (hereinafter refer to as the 'Regulations'). Regulation 18 also does not itself contain the requirement for filing the consent letters. The requirement has been prescribed in Annexure III, which is referred to in Regulation 18. Serial No. 27 of Annexure III contains a list of several documents required to be annexed to petitions relating to the exercise of powers in connection with prevention of oppression or mismanagement under Sections 397, 398, 399(4), 400, 401, 402, 403, 404 and 405.

The documents required to be annexed to such petition include "where the petition is prescribed on behalf of members, the letter of consent given by them". Other documents required to be filed include "documents or other evidence in support of the statement made in the petition, as are reasonably open to the petitioner(s)", as also "three spare copies of the petition".

These requirements can hardly be said to be mandatory in the sense that non-compliance with any of them would ipso facto result in the dismissal of the petition. Apart from this, Regulation 18 itself is subject to the powers of CLB under Regulations 44 and 48. These read as follows:

"44. Saving of inherent power of the Bench:- Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the Bench to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Bench.

48. Power to dispense with the requirement of the regulations.- Every Bench shall have power for reasons to be recorded in writing, to dispense with the requirements of any of these regulations,

subject to such terms and conditions as may be specified. Given these powers in the CLB, we cannot hold that non- compliance with one of requirements in Srl. No.27 in App. III of Reg. 18 goes to the very root of the jurisdiction of the CLB to entertain and dispose of a petition under Sections 397, 398. All that regulation 18 requires by way of filing of documents, is proof that the consent of the supporting shareholders had in fact been obtained prior to the filing of the petition in terms of Section 399(3). It cannot be gainsaid that it is open to the persons opposing the application under Sections 397and 398 to question the correctness of an assertion as to consent made by the petitioner.

It is equally open to the petitioner to provide evidence in support of the plea taken in the petition. If of course the objection to the maintainability is taken by way of demurrer, the CLB can decide the issue on the basis of the averments contained in the petition alone, accepting the pleas therein as correct. But where the CLB takes into consideration facts outside the petition as it has done in this case, it cannot foreclose the petitioner from supporting its case in the petition on the basis of evidence not annexed thereto. Since the CLB calculated the total shareholding of the company including preference shares based on the allegations contained in the respondent No.8's application, it was for the CLB to determine the issue of actual prior consent on evidence.

This view finds support from Reg. 24 which says: 24. Power of the Bench to call for further information/evidence:- The Bench may, before passing orders on the petition, require the parties or any one or more of them, to produce such further documentary or other evidence as the Bench may consider necessary.-

(a) For the purpose of satisfying itself as to the truth of the allegations made in the petition; or

(b) For ascertaining any information which, in the opinion of the Bench, is necessary for the purpose of enabling it to pass orders on the petition.

In P.Punnaiah V. Jeypore Sugar Co Ltd. AIR 1994 SC 2258, the member of the company was the daughter, Rajeshwari. She was sought to be represented as a petitioner in an application under Ss. 397 and 398 by her father acting as her agent. The respondents objected saying that this was no consent at all.

With a view to counter-act the objection taken by the respondents, the appellants filed an affidavit of Smt. Rajeshwari wherein she affirmed that she had authorized her father to act on her behalf as her G.P.A in that behalf and to take all such steps as he deemed proper to protect her interest.

This Court rejected the objection raised by the respondents. Hansaria, J. rested his concurrence with the view on the affidavit filed by Rajeshwari subsequent to the filing of the petition. He said:

As Smt. Rajeshwari made her position clear in the affidavit filed in the High Court, I do think she had authorized her father to act on her behalf in the matter at hand, and the application under

Section 397/398 of the Companies Act, 1956, as filed in the Court, ought to be taken as one to which she had consented". *

The finding of the CLB and the High Court to the effect that the petition of the appellant deserved to be rejected only because the letters of consent had not been annexed to the petition was therefore incorrect. What the CLB and the High Court should have done was to have satisfied themselves that the consent had in fact been given prior to the filing of the petition.

There is nothing either in the orders of CLB or the High Court which could even remotely be construed as a rejection of the affidavits, resolution, etc. filed by Nini Srivastava to show that prior consent had in fact been obtained. We may also note the unrebutted specific averment by the petitioners to the effect that V.K. Srivastava was personally present throughout the litigation.

Having decided that Nini Srivastava could have been and was authorized to act on behalf of the Trust, the next question is, did Nini Srivastava file the petition on behalf of the Trust? The CLB has noted that the cause title to the petition showed that she had filed the petition for herself and as Trustee of the Trust. According to the respondents, this was again an interpolation. But the CLB has given no such finding nor has the High Court. Besides the petitioners had said 'the petitioners are holding some preference shares also'.

It is admitted that Nini Srivastava holds 50 preference shares in her personal name. However, the use of the plural is significant. It is not the case of the respondents that any other individual petitioner holds preference shares except for the Trust. Then again in paragraph 2, even if one were to ignore the phrase 'plus 1029 preferential shares', it has been specifically averred that 'the petitioners form the group headed by J.K. Srivastava'.

There is no dispute that the "group of J.K. Srivastava" holds the requisite percentage of shares for maintaining proceedings under Ss. 397, 398 and that the Trust falls within that group. Again in paragraph 6.2 of the petition there is a categoric reference to the 1029 redeemable preference shares held by the Trust as being held by the petitioners . This was also how the respondents understood the petition. In an application filed by them on 19th March, 1988 under Reg.44 they said: "That shareholding of the respondent company is divided mainly between two groups namely, H.K. Srivastava Group in the Management holding about 30% Equity Shares and 1029 Redeemable Cumulative Preference Shares and the J.K. Srivastava group holding about 12% Equity Shares and 1029 Redeemable Cumulative Preference Shares.

That it is apprehended that J.K. Srivastava group i.e. the Petitioners holding about 12% Equity Shares and 1029 Redeemable Cumulative Preference Shares may obstruct the Resolution for enhancement of Authorised Shares Capital."

It appears to us that the intention of the petitioners undoubtedly was to represent the J.K. Group which admittedly has the qualifying number of shares, although the expression of such intention was

not as clear as it should have been.

All the fora below have not proceeded on the basis that the pleading in the petition did not reflect the intention. They have rested their findings on the law as perceived by them that the Trust could not have been represented by one co-trustee. The perception as we have held was erroneous. The other ground on which the fora dismissed the petition was that the beneficial interest in 551 shares of the 1029 held by the Trust had already vested in the beneficiaries prior to the filing of the petition complaining of mismanagement and oppression. This is again an incorrect legal proposition.

An equitable or beneficial interest in shares does not make the owner of the interest a member of the company. [See M/s Howrah Trading Co. V. Commissioner of Income Tax ; Killick Nixon Ltd. v. Bank of India 1985 (57) CC 832] Therefore, even assuming that in terms of the Trust Deed the shares had devolved on the beneficiary of the Trust, this would not mean that the owner of the shares as registered with the company would not be competent to file the petition under Sections 397 and 398.

The object of prescribing a qualifying percentage of shares in petitioners and their supporters to file petitions under Sections 397 and 398 is clearly to ensure that frivolous litigation is not indulged in by persons who have no real stake in the company. However it is of interest that the English Companies Act contains no such limitation. What is required in these matters is a broad commonsense approach. **If the Court is satisfied that the petitioners represent a body of shareholders holding the requisite percentage, it can assume that the involvement of the company in litigation is not lightly done and that it should pass orders to bring to an end the matters complained of and not reject it on a technical requirement. Substance must take precedence over form. Of course, there are some rules which are vital and go to the root of the matter which cannot be broken. #**

There are others where non- compliance may be condoned or dispensed with. In the latter case, the rule is merely directory provided there is substantial compliance with the rules read as a whole and no prejudice is caused. [See: Pratap Singh v. Shri Krishna Gupta In our judgment, Section 399(3) and Regulation 18 have been substantially complied with in this case.

The decision of the Division Bench of the High Court is, therefore, set aside. **The matter must be remanded to the Single Judge since he had also dismissed the appeals preferred by the respondents from the decision of the CLB consequent upon the dismissal of the appellants' appeal under Section 10F of the Act. #** The appeal is, therefore, allowed and the matter remanded back to the Single Judge for disposal of all the appeals which stand revived by reason of this order.

The costs will follow the cause.