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Court : Company Law Board CLB

Decided On : Jan-28-2004

Reported in : (2004)121CompCas671

Judge : K Ganjwal

Appellant : it Cube Inc. and Anil Anand

Respondent : it Cube India Pvt. Ltd. and ors.

Judgement :

1. The petitioner No. 1 is the company incorporated under the laws prevailing in the USA having its office at 1209. Orange Street, Wilmington, Delaware, USA. The petitioner No. 2 is the director of the petitioner No. 1 having his office at Mahalakshmi Chambers, 3rd Floor, 22 Bhulabari Desai Road. Bombay-26.

2. The respondent company, namely IT Cubes India Pvt. Ltd. was incorporated on 5th July, 2000 with limited liability under the provisions of C.A. 1956 having the authorized share capital of Rs. 10,00,000 divided into 1 lakh shares of Rs. 10 each. Out of the same 8900 shares of Rs. 10 each were issued and subscribed on incorporation of the company. The respondents were the original promoters of this company with one share each. However, the majority shares amounting to 8900 shares were held by the petitioner NO. 1 and their shareholding at the time of incorporation was as under:- 3. The petitioners have filed petition under Section 397 of the C.A.1956 against the above mentioned respondents. They have stated that the main business of the company respondent company was to develop

software and other related products for IT Cube INC in USA. The petitioners have further stated that one Mr. Hitain Patel was employed by Respondent No.1 company who represent the petitioner in day to day business of the company. Shri Hiten Patel shifted his office to Bangalore. The petitioner No. 1 found that the performance of respondent No. 4, who is one of the directors of respondent company was not upto the mark and he was asked by to either reduce his take home pay or resign. Instead of resigning, respondent No. 4, on 27.1.2003 directed Mr. Hiten Patel to immediately leave the premises of the respondent company and also to vacate the flat provided to him by the respondent company. The petitioner No. 2 was disturbed by this event and he enquired from respondent No. 4 as to the reason of Patel's termination and why he had not resigned or reduced his salary. R-4 did not give any satisfactorily reply and rather indicated that the petitioner No. 1 and 2 had no control over the Respondent company. This raised some doubts in the petitioner No. 2's mind as to the reason behind Mr. Patel's termination and the boldness of respondent No. 4. Thereafter, the representative of P-1 conducted search in the records of ROC at Bangalore. The P-1 was surprised to learn that the R-1 had filed relevant document to show that the respondent No. 1 had purportedly issued further 28400 shares.

This further issue of 28400 shares was by issuing 7100 shares each to R-2,3,4 and 5. No notice of such further issue of shares was given to the petitioner No. 1 even though Petitioner No. 1 originally holding 8896 shares out of 8900 shares issued at the time of incorporation of Respondent company. This further issue of shares reduced the shareholding of the petitioners from 99.95% to 23.85%. The petitioners have submitted that this further issue shares to Respondents 2,3,4 and 5 on 16.01.2003 are illegal and wrongful and against public interest.

The petitioners have further alleged that the respondent No. 2 to 6 collectively and each one of them individually are under an obligation to the company and shareholders to ensure that the management and affairs of the company are concluded in accordance with the provisions of the C.A. and articles of association of the company. The respondent numbers 2 to 6 have acted in breach of such obligation. The further issuance of shares has been made without any intimation to petitioner No. 1 who has majority shareholding and also without calling a general

meeting of shareholders.

II. Perpetual Induction restraining the respondent No. 2 to 6 from acting and holding themselves to be director of the respondent company.

III. Declare that any further issue of shares of the respondent company after 13.7.2000 is null and void and purported further issue of shares issued on 16.1.2003 as wrongful, illegal and ab-initio void.

4. The respondent in reply to the averments made in the petition have stated that the said equity shares were issued and allotted by the Board of Directors of the respondent company against valid application received from the respondents 2-5 who are in any case promoter directors of the first respondent company. The question of issuing notice of further issue of shares to petitioner NO. 1 does not arise since there is no such requirement either under law or under the articles of association of the first respondent company. The question of disclosure of further issue of shares to first petitioner does not arise since the respondent were under no duty or obligation to make any such disclosure. The respondents have admitted that the shareholding of the first petitioner stood reduced to 23.85% of the total paid up capital of the first respondent company. The respondents have further submitted no motive can be imputed and no illegality can be alleged in that behalf. They have once again reiterated that such further issue of shares did not require any notice to the petitioners.

5. The petitioner in his rejoinder has stated that further issue of shares was to be regulated under the provisions of Article 9 of Articles of Association of the respondent company. The respondents have ignored to call general meeting of the shareholders before issue of any further issue of shares which is in breach of said Article 9 of the Article of Association.

6. From the records and arguments advanced by learned counsels of both the sides it is admitted fact that the respondents 2-5 had only one share each in the company. The majority share of 99.95% were held by the petitioner company. The Article 9 of Article of association of the respondent company rends as under- "Variation of Capital: - Subject to the provisions of the Act and these Articles, the

shares in the capital of the COMPANY for the time being (including any shares forming part of any increased capital of the COMPANY) shall be under the control of the Directors who may issue, allot or otherwise dispose of the same or any of them to such persons, in such proportion and on such terms and conditions and either at premium or at par or (subject to compliance with the provision of the Section 79 and Section 79A of the Act) at a discount and at such times as they may from time to time think fit and proper, with full power subject to the sanction of the COMPANY in General Meeting)" 7. The learned counsel for respondent during arguments submitted that this provision of calling general meeting of shareholder is only applicable in case the company has to comply with the provisions of Section 79 and Section 79A of the C.A 1956 for selling shares at a discount.

However, the learned counsel for the petitioner submitted that further issue of capital shares made by the Board of Directors was subject to sanction of the company in general meeting of shareholders. The learned counsel for respondent has further submit no general body meeting has ever been called so far by the respondent company, even at the time of allotment of shares to the petitioner amounting to 8896 share. The learned counsel for petitioner submitted that there were only four directors who were only shareholders holding one share each of respondent company. As such the question of calling any general body meeting of shareholders would not arise More over, it is not possible at this bilated stage to confirm whether any general body meeting had been called or not at the time of issue of 8896 shares to the petitioners.

8. Having carefully gone through the records of the case and the arguments advanced by learned counsels for both the parties during the hearing, it is found that the plain reading of Article 9 of Articles of Association envisages on the company to hold general meeting of shareholders before allotment of any further shares. The interpretation given by learned counsel for respondent to Article 9 of articles of association does not seems to be correct and they were duty bound to hold general meeting of shareholders before issue of further shares.

Accordingly, the petitioners should have been given notice of issuance of further shares of the respondent company. The second argument of the learned counsel

for respondent that no general meeting has been held and as such the original allotment to the petitioner is also not tenable, is not correct. The respondents cannot be allowed to take advantage of their own wrongs by not calling the general meeting of the shareholders at the time of initial allotment of shares to the petitioners. Moreover, during the period of first allotment of shares to the petitioners there were only four shareholders and they were all directors of the respondent company. Therefore, I am inclined to accept the arguments shareholder meeting was not held at the initial stage because all the directors are only shareholders and they had allotted the shares to the petitioner.

9. In view of the above discussions, the allotment of 7100 shares each to respondent No. 2,3,4 and 5 amounting to 28400 shares issued on 16.1.2003 without giving notice to the petitioner and without holding general meeting of the shareholders of the company, is illegal and void in terms of Article 9 of Articles of Association of the respondent company. Accordingly, the allotment of further issue of shares of 28400 mentioned above is set aside being wrongful, illegal and void abinitio.

The other prayers made in the petitioner are not considered in view of the above decision and the same can be decided in the general meeting of the shareholders of the respondent company. The petition is disposed of with the above direction.

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