

**Tony Electronics Ltd. Vs.** .....

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**Court :** Delhi

**Decided On :** Dec-17-2012

**Judge :** Indermeet Kaur

**Appellant :** Tony Electronics Ltd.

**Respondent :** .....

**Judgement :**

\$~ \* IN THE HIGH COURT OF DELHI AT NEW DELHI % + Date of Judgment:

17. 12.2012 CO.PET. 167/1999 and Co. Appl. 730/2002, 167/2003, 1861/2012 IN THE MATTER OF TONY ELECTRONICS LTD. .... Petitioner Through Mr. Neeraj Yadav, Mr.Rishabh Maheshwari and Mr.Saurabh Seth, Adv. for the applicant with the applicant-Mr.Gopal Krishan. Mr. Kamal Sawhney, Adv. for the Respondent. CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

(Oral) 1 By way of this application the applicant Gopal Kishan seeks a recall of the order dated 20.09.1999; i.e. setting aside of the scheme which had been sanctioned by this Court on 20.09.1999. This application has been filed on 22.07.2002. 2 Submission in the application being to the effect that this merger had been effected malafide behind the back of the applicant; he was a shareholder of M/s Tony Electronics Ltd. (hereinafter referred to as the company) which pursuant to the order dated 20.09.1999 has merged with Super Cassettes Industries Ltd.; no information about the merger of the aforementioned companies had ever been intimated to the applicant who is a shareholder of the transferor

company (M/s Tony Electronics Ltd.) and was holding 52470 equity shares; being a majority stake holder of 52.47%; scheme sanctioned without notice to him and amounting to a fraud played upon the Court is thus liable to be set aside. 3 Facts as emanating from the record show that the parties are closely related; the applicant is the brother of Krishan Kumar (respondent No.

6) and uncle of Bushan Kumar (respondent No. 4). Case as per the petitioner is that an agreement dated 19.02.1998 had been entered into between the parties pursuant to which it was decided that the petitioner would be gifted eight properties along with a payment of Rs.2.5 crores in cash; as a counter guarantee respondent No. 6 had given the original share transfer deed dated 01.03.1998 of 52,470 equity shares (52.47% of the equity) of the company and this was confirmed vide letter dated 02.03.1998 (page 395 of the paper book); it was agreed that if this payment of Rs.2.5 crores is delayed beyond a reasonable time, it would be paid with 2% interest per month or in the alternate the said shares would be transferred in favour of Gopal Kishan. 4 This letter has been heavily relied upon by the petitioner/applicant. His submission is that he was admittedly a shareholder of the company and this has been confirmed by the Managing Director of the company Devender Kumar Dua in this letter dated 02.03.1998. Attention has been drawn to the Annual Return of the company (Annexure-5) in the record of the Registrar of Companies (ROC); this document shows several transactions conducted on 27.02.1999. Transactions No. 4 & 5 are relevant to decide this controversy. Transaction No. 4 shows that Gopal Kishan (the applicant) had transferred 100 equity shares to the transferee Bushan Dua on 27.02.1999; transaction No. 5 shows that 52,470 equity shares had been transferred by Krishan Kumar Dua (respondent No.

6) in favour of Gopal Kishan (the petitioner) on the same date i.e. on 27.02.1999. This document had surfaced before this Court during the course of the proceedings when it was filed by the petitioner. The authenticity of this document was disputed and doubted. On 13.01.2003, Local Commissioner Advocate Arjun Bhandari was appointed by the Court to visit the office of the ROC to inspect the record and to initial the certified copies of the documents issued by the ROC. This report is dated 27.01.2003. It is pointed that this report supports the case of the

petitioner as it clearly states that the annual return filed by the company before the ROC also shows that the petitioner was the holder of 52,470 shares on 27.02.1999. Attention has also been drawn to the subsequent report of the second Local Commissioner Advocate Arjun Bhandari dated 21.03.2003; submission being that this report reiterates that the document i.e. the annual return produced by the petitioner is an authentic document; this is fortified and substantiated by the fact that this document also bears the stamp of ROC dated 28.12.1999 substantiating his submission that this document is a true certified copy of the original document and was a part of the original record of the ROC. Further submission of the petitioner being bordered on the argument that a scheme had been propounded by the nonapplicants/respondents for which purpose the first motion petition under Section 391 read with Section 394 of the Companies Act had been filed before the Company Court on which orders were passed on 26.02.1999 and the meeting of the shareholders/members/creditors of the company had been ordered. Submission being that this meeting was held on 17.04.1999 but no notice of this meeting was sent to the applicant; this is a fraud which has been played upon the Court and the fact that the applicant was a shareholder/member of the company on 17.04.1999 (when meeting was held) has deliberately been suppressed from the Court. The petitioner was admittedly a member/shareholder of the company on that date but admittedly no notice of this meeting had been served upon him. Submission being that he was holder of 52,470 shares as on 27.02.1999 and meeting of the shareholders convened on 17.04.1999 without notice to the petitioner smacks of the malafides of the respondents who deliberately did not want to inform the applicant that the company M/s Tony Electronics Ltd. was to be merged with Super Cassettes Industries Ltd. Further submission being that it was only in the year 2002 when certain properties of the company were to be sold that he learnt that this company was no longer in existence; it had been dissolved by the order dated 20.09.1999 sanctioning the scheme. The present application filed on 22.07.2002 seeks a setting aside of the aforementioned sanction. 5 The respondents have opposed these submissions; their primary contention is that the present application is not maintainable. Submission being that this application has been filed under Rule 9 of the Company (Court) Rules invoking the inherent powers of this Court which are to be exercised by the

Court only if there is no other alternate remedy available to the petitioner which is not so in the instant case. Attention has been drawn to Section 391 (7) of the Companies Act (which admittedly stood repealed in November, 2003); submission being that this remedy was available to the petitioner at the time when he filed this present application which was on 22.07.2002; the right of appeal was available to him on 22.07.2002 and the present application under Rule 9 of the Company (Court) Rules is thus clearly not maintainable; on this count alone the petition is liable to be dismissed. 6 Further submission of the respondent is that a person qualifies as a member/shareholder of the company only if his name is registered in the register of members and even as per the case of the petitioner, his name was never entered into the register of members. Reliance has been placed upon (1986) 1 SCC 26. Life Insurance Corporation of India Vs. Escorts Ltd. and others; submission being that a share is transferable but while a transfer may be effective between a transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term, with all the rights of a shareholder, only when the transfer is registered in the company's register; submission being that in this judgment, the Apex Court has clearly noted that the right of the transferee to get on the register must be exercised with due diligence and the principle of equity which makes the transferor a constructive trustee does not extend to a case where a transferee takes no active interest to get on the register. Submission being qualified by the fact that even as per the case of the petitioner the original share transfer deed for 52,470 shares was lodged with the applicant (Gopal Kishan) on 02.03.1998 (page 395 of the paper book) and this is clear as per this aforementioned communication (which has been relied upon by the petitioner vehemently); if the case of the petitioner is that on 02.03.1998, the original share certificates were with him, why he did not take any steps to get his name entered into the register of company for such a long period thereafter has not been explained or answered; the petitioner is not entitled to any equity in his favour. For the same argument reliance has also been placed upon BalKrishan Gupta Vs. Swadeshi Polytext Ltd. (1985) 2 SCC 167. submission being that the Supreme Court in this later judgment has cited with approval the case of LIC (supra) and had noted that the rights of a member as against the company concerned can be exercised only when his name is entered into the

register of members; no right would arise till such registration takes place. Submission being that in this factual scenario the name of the petitioner not having been entered in the register of members for 52,470 shares (of which the original share transfer deeds were even as per the petitioner lying with him), he does not deserve any relief. Further submission being that the original share transfer deeds have not seen the light of the date till date. Attention has also been drawn to prayer C of the aforementioned application wherein the prayer is specifically to the effect that a direction be given to the company that formalities should be completed by the respondents to get the 52,470 shares transferred in the name of the petitioner; submission being that even as per the prayer the petitioner has asked for the relief of the transfer of these shares in his name thereby admitting the argument of the respondents that on the date of filing of the petition (22.07.2002) the aforementioned 52,470 shares were not in his name. Since the name of the petitioner was not entered in the register of members, he was not entitled to any notice of the aforementioned scheme. It is submitted that the fraud which is alleged by the petitioner is not only to be specifically stated but also to be proved; it cannot be a fraud inter-se between the parties; it must be a fraud upon the Court before an interference is called for. Submission being that even as per the case of the petitioner, the aforementioned 52,470 shares were admittedly not stamped; no stamp duty was affixed upon them; in the absence of requisite supporting documents, the question of the shares having been transferred to the petitioner did not arise. Reliance has been placed upon 1999 (3)ALLMR 68 Sant Chemicals Pvt. Ltd Vs. Sant Chemicals Pvt. Ltd. with Aviat Chemicals Pvt. Ltd. and Jagmohansingh Arora and others; submission being that this judgment on all fours applies to the facts of the instant case. In this case, the Court had returned a finding that where the provision of Section 391(7) of the Companies Act was available to the petitioner, an application under Rule 9 of the Company (Court) Rules seeking an interference under the inherent powers of the Court in a scheme which already stood sanctioned was not maintainable; on merits, the facts are similar and no relief had been granted to the petitioner. It is pointed out that the plaintiff has also filed a suit qua the alleged family settlement dated 21.02.1998 and this family settlement did not speak of disputed shares; on all counts, the case as set up by the petitioner suffers from vices; petition is liable to be dismissed. 7 In rejoinder, it has been

pointed out that the present petition is very much maintainable; inherent powers of his Court under Rule 9 can be invoked and to support this submission reliance has been placed upon AIR 200.SC 154.A.V. Papayya Sastry and Others Vs. Government of A.P and Others and I (2000) ACC 48.United India Insurance Co. Ltd. Vs. Rajendra Singh and Others. On merits, the averments made in the petition have been reiterated; submission being that the argument propounded by the respondent that no effort had been made by the petitioner between the interregnum period of 1998 up to 2002 is answered by the fact that all efforts were being made by the parties to implement the family settlements of 19.02.1998 and 21.02.1998. Submission being that the conduct of the respondent speaks volumes of his intent of playing fraud upon the Court as is evident from the fact that although the scheme stood sanctioned on 20.09.1999 whereby M/s Tony Electronics stood dissolved yet Darshan Kumar Dua, (the erstwhile managing director of M/s Tony Electronics) continued to use the letterhead of the company and continued to communicate with various Government bodies even after 20.09.1999 and reference in this regard has been made to the letters dated 20.10.1999 (written by M/s Tony Electronics to the Account Officer, Noida), 06.01.2000 by M/s Tony Electronics to New Okhla Industrial Development Authority, 07.08.2000 again on behalf of M/s Tony Electronics to Okhla Development Industrial Area all seeking processing of the transfer application qua the property No. G-22, Section-11, Noida, UP in favour of Rajni Dua w/o Gopal Kishan. To support this submission on fraud, attention has also been drawn to the resolution passed by M/s Tony Electronics on 20.03.1999 (pages 415 & 418 of Volume II of the paper book); submission being that although on both the aforementioned pages, the resolution is the same yet the contents of the two are different; this is another example of the callous attitude of the company to interchange documents according to their suitability; it being yet another glaring example of the fraud being perpetrated upon the Court; there being no explanation as to why and how the two documents both of which speak of a resolution passed by the company on 20.03.1999 yet the contents are different. Submission being that all efforts were being made by the company to exclude the knowledge of the merger of M/s Tony Electronics with Super Cassette Industries and to keep this information a secret from the present petitioner who was a majority shareholder of

the company. 8 Arguments have been heard. Record has been perused. 9 Under Section 391 of the Companies Act where a compromise or an arrangement is proposed between a company and its creditors/members or any class of them, the court may on an application of the company or of the creditor or of the member of the company order a meeting of the creditors or a class of creditors or the members or a class of the members as the case may be. 10 In the present case a scheme had been propounded by the propounders for which a first motion petition had been filed upon which order had been passed on 26.02.1999. The meeting of the members/creditors of the Company had been called. This meeting was held on 17.04.1999. Notices had been sent by the Chairperson appointed by the Court namely Advocate Mr. Anup Bagai on 23.03.1999. The list of the persons who were members as per the record i.e. the register of the members was relied upon by the Chairperson to send individual notices to the said members/creditors of the Company. Admittedly, no notice had been sent to the present petitioner-Gopal Kishan. All other members/creditors of the Company had been notified except this single objector/applicant. 11 It is not the case of the propounders that this omission was a mistake on the part of the Chairperson to send the notice to the applicant/objector-Gopal Kishan. The case as set up by the propounders is that no notice was required to be given to the petitioner for the reason that his name was not entered into the Register of Members and in the absence of which, there was no mandate upon the Chairperson (acting on behalf of the propounders) to give any notice to him. 12 There is no dispute about the fact that the name of the petitioner Gopal Kishan was never entered into the register of members qua the aforementioned 52470 shares. On the date of the issuance of notices by the Chairperson for the meeting proposed for 17.04.1999; Gopal Kishan was also not a member qua the 100 shares which were earlier held by him as on 27.02.1999; he had transferred these shares in favour of Bhushan Dua. This is evident from transaction No. 4 as reflected in the annual return 1998-99. Vehement submission of the petitioner that 52470 shares stood transferred in his name on the same day vide transaction No. 5 has been disputed by the respondent. 13 On 13.01.2003, counsel for the respondent had filed in Court certified copies of certain documents obtained from the ROC. To determine the authenticity of these documents, Advocate Arjun Bhandari had been appointed to inspect the record of the ROC.

The annual return of the company dated 11.10.2002 (Annexure V) had been initialled by him. The Court Commissioner had filed his report dated 27.01.2003. The Commissioner had noted the missing pages in the file of the company which had prevented the ROC from giving a certified copy of the documents on that day itself. 14 This report had been disputed by the respondent company; objections were filed. This was by way of affidavit of Mr.Amit Bansal (the director of the company) whose affidavit has been accompanied by the report of the Chartered Accountant disputing this report. Objections to the manner in which the record was being maintained in the ROC were also raised. These objections read as under:-

5. The return was personally prepared by me and the hand writing in the Return is my hand writing. The first page of Annexure V which contains details of shareholders was as per the printed format and was filled up by me in hand. The names of 3 out of 9 shareholders was written in hand by me.

6. Annexure-V comprises in all the three pages, one of which, as stated above was filled up by me in hand. In the other two pages, the names of the balance 6 shareholders, three in each page was type written.

7. I have examined the certified copy of the return for the F.Y.1998-99 filed by the petitioner from the records of the ROC. After examining the said certified copy I say that this certified copy is at variance with the Annul Return which had been prepared by me and filed on my instructions. The second and third page of Annexure-V has been tampered and has been retyped.

8. Likewise Annexure VI has been tampered and re-typed. In Annexure-VI as prepared by me only two transactions, namely at serial number 3 and 4 had been mentioned. This has been increased after inserting a third transaction.

9. I say that in the return as originally filed, the second page of Annexure-V contained the name of only three shareholders, at serial numbers 4 to 6 namely, Bhushan Dua, M/s YOgesh Kumar Gupta & Co. and Darshan Kumar & Mrs. Sunita Rani. In the tampered version the second page contains the name of four shareholders at serial number 3 to 6 (comprising of two serial No.3, including the tampered induction at serial number 3 of Mr.Gopal Krishan).

10. I say that since the applicants while tampering with the documents had to retain the number of shareholders to 9 in details of shareholders two different persons are to be found the same at serial No.3 namely Mr.Krishan Kumar Dua written in my hand writing and Mr.Gopal Krishan, who, once again had to be shown at the same serial number, namely serial No.3.

11. I say that the margins drawn in the second and third page of Annexure-V are different from the original filed by me. 15 On 10.02.2003 in terms of this affidavit of the respondent company and the objections raised to the report of the Local Commissioner, the Local Commissioner Arjun Bhandari had been directed to re-inspect the record of the company both at the office of the ROC as also in the office of the company. This second report of the Local Commissioner is dated 21.03.2003. This report has revealed that the Local Commissioner had examined the record of the company on two occasions. On 18.02.2003, he visited the office of the company at Sector-16A, Film City, Noida along with the respective counsels of the parties. The statutory record of the company which included (i) Register of members, (ii) Register of share transfer, (iii) Minutes book & (iv) Original transfer deed for the financial year 1998-99 were examined by him. The photocopy of the return filed by the company before the ROC was also placed before him. (hereinafter referred to as Annexure A). On inspection of the record it was noted that there were nine shareholders of the company as per the Register of members; name of the petitioner Gopal Kishan did not find mention in this list. This Register maintained in the company records had been initialed as way back as on 24.07.2002 i.e. when the Local Commissioner Advocate Geeta Sharma had been appointed by the Court and she had visited the office of the company on the same day itself. This visit being on the same day when the order of the Court had been passed, the possibility of the record of the company being tampered with is excluded; there could be no manipulation. Annexure-A had also noted nine shareholders. 16 The second commission was executed by the Local Commissioner on 25.02.2003 which was also in terms of the directions of this Court dated 10.02.2003. This second commission was executed in the office of the ROC. The documents of the company maintained in the ROC were contained in two files; record evidenced that the annual return for the financial year 1998-1999 had been filed by the company on 28.12.1999 vide diary No.57693. On

05.04.2002 inspection of the record of the ROC had been obtained and the certified copy of the record had been taken; one Manmohan Singh resident of W-108, Greater Kailash-II (which is also the residence of the petitioner) had obtained these certified copies on 11.10.2002; record further evidenced that this annual return which had been filed by the company on 28.12.1999 was registered in the office of the ROC only on 10.10.2002 and during this intervening period from 28.12.1999 to 10.10.2002 where the said document was lying in the office of the ROC could not be ascertained by the Local Commissioner. The manner of maintaining the record in the office of the ROC was suspect. Relevant would it be to also note that certified copy of this annual return had been obtained by a resident of W-108, Greater Kailash-II from the ROC on 11.10.2002 and this document had surfaced in the Court for the first time on 13.01.2003; when it was filed by the petitioner; why it was not filed along with the petition or earlier has not been satisfactorily explained by the petitioner; case of the respondent all along being that this document has been tampered in the office of the ROC. Glaring discrepancies having been noted by the Local Commissioner in the annual return lying in the record of the ROC (Annexure V) as compared to the annual return filed by the company (Annexure A); for example the folio number allotted to Krishan Kumar was different; fathers name of baby Khushali was wrongly stated; so also the fathers name of baby Tulsi. Cumulative opinion of the Local Commissioner being that in this scenario, he could not positively conclude whether there has been tampering of the additional sheets of the annual return lying in the ROC which had further reflected that the printed pages and additional pages filed thereto along with the annual return have not been signed at the bottom. 17 The documents annexed along with this report have also been perused. Annexure B is the Register of members maintained by the company from its inception i.e. on 03.06.1982 which evidenced that Gopal Kishan had been registered as a member on 03.06.1982; he ceased to be a member on 27.03.1999; his 100 shares which he was holding were sold on 27.02.1999 to Bhushan Dua; there is no other transaction of 27.02.1999. The submission of the petitioner that 52,470 shares were transferred in his name on 27.02.1999 is not borne out from the record. This is also being clearly stated by the Local Commissioner. At the cost of repetition, this bound Register of members maintained in the company had been signed by

the Advocate Geeta Sharma as early as on 24.07.2002; this was in fact the first day when the petition was filed; there is no possibility of manipulation of the record of the company. Annexure C is the Register of share transfer forms which also reflects four transactions between 1998 to 1999. Vide T-4 dated 27.02.1999 100 shares had been sold by Gopal Kishan to Bhushan Kumar. Annexure D is the share transfer form which show that on 27.02.1999 Gopal Kishan had lodged the share transfer forms for transferring his 100 shares in favour of Bhushan Kumar; this share transfer form had been witnessed by R.K. Ahuja; it was duly stamped with Rs.50/-. Annexure E is the Minutes book of the company; board meeting of the company had ratified all the aforementioned transactions; two of 25.02.1999 and two of 27.02.1999 which includes T-45. 18 This record of the Company thus evidences that on 16.03.1999 when notices were issued by the Chairperson to the members of the Company, there were only 9 members; name of Gopal Kishan did not appear. Rightly no notice was sent to him. 19 Who is a member of the company is answered by Section 41 of the Companies Act. Section 41 reads as follows:

41. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members. (2) Every other person who (agrees in writing) to become a member of a company and whose name is entered in its register of members, shall be a member of the company. (3) Every person holding equity share capital of company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company. 20 To become a member and to get all the corresponding rights and privileges of a member, the name of such a member must be entered into the Register of Members. 21 Section 108 of the Companies lays down the procedure for the transfer of shares. It inter alia reads as follows:108. A company shall not register a transfer of shares in , or debentures of, the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transferee, has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence, along with the letter of allotment of the shares or debentures. 22 It is

a mandate upon the Company; it thus became incumbent upon the Company not to register the transfer of shares of the company unless the instrument of transfer was duly stamped; this is the first requirement. It must also be completed in all respects. The Articles of Association of the Company have also been perused. Under Article 19 transfer of shares could be effected only if instrument of transfer is duly stamped and accompanied by the certificate of the shares proposed to be transferred or such other evidence as the director may require to prove title of the transferor or his title to transfer the shares. 23 In the present case the share transfer forms (relied upon by the petitioner) shows that they were unstamped. They are also admittedly only a photocopy of the original forms. The originals have not been filed. Pleadings of the petitioner are relevant. In para 14 of this application it has been pleaded that the petitioner had submitted these share transfer forms with the Company so that the formality of registration could be completed; the petitioner was given a letter dated 02.03.1998 informing him that he would continue to hold shares as a security; a photocopy of this share transfer deed was retained by Darshan Kumar, (Managing Director of the Company). This letter has been heavily relied upon by the petitioner. It is addressed by Darshan Kumar, to the petitioner. Para 2 of this letter clearly states that Darshan Kumar had given the original transfer deed (dated 01.03.1998 of 52470 equity shares) to Gopal Krishan as a counter guarantee for the payment of Rs. 2.5 crores and a photocopy had been kept by him (Darshan Kumar). This letter is clear on the averment that the original share transfer forms were with the petitioner-Gopal Kishan; Gopal Kishan has only filed a photocopy of this document. There is no explanation as to where the original document is. It has not surfaced. Submission of the petitioner that this document had been lodged with the Company is negated by this letter dated 02.03.1998 which in fact states that the original share transfer form had been given to the petitioner. 24 The rejoinder filed by the petitioner is also relevant. Even while rejoicing to the reply of the Company, the averments contained in the letter dated 02.03.1998 have been reiterated. Even at this stage, the contents of the letter dated 02.03.1998 have not been objected to by the petitioner. It was never the case of the petitioner that the letter dated 02.03.1998 had made an incorrect statement of facts. In fact it clearly and categorically avers that the original transfer forms are with the petitioner-Gopal

Kishan. No objection had in fact even been raised by the petitioner to the contents of this letter. 25 That apart as rightly pointed out by the learned counsel for the respondent, this photocopied document is even otherwise not stamped. The mandate and requirements of Section 108 of the Companies Act have not been met. The Company could not register the unstamped shares in favour of the petitioner. The fact that this document is unstamped has been admitted by the petitioner. In his rejoinder (para

25) he states that this share transfer form was unstamped but the obligation of stamping this document as per the understanding of the parties was upon the company. 26 The Supreme Court in (1977) 2 SCC 42, titled as Mannalal Khetan and Ors. vs. Kedar nath Khetan and Ors. in the context of provisions of Section 108 of the Companies Act had noted that the words appearing shall not register are mandatory in character. The relevant extract of the aforementioned judgment reads herein as under: The words shall not register are mandatory in character. The mandatory character is strengthened by the negative form of the language. The prohibition against transfer without complying with the provisions of the Act is emphasized by the negative language. Negative language is worded to emphasise the insistence of compliance with the provisions of the Act. (See State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga K. Pentiah v. Muddala Veeramallappa of 1975 and Additional District Magistrate, Jabalpur v. Shiakant Shukla) Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative. In Raza Buland Sugar Co. Ltd. v. Municipal Board Rampur, this Court referred to various tests for finding out when a provision is mandatory or directory. The purpose of which the provision has been made, its nature, the intention of the legislature in making the provision, the general inconvenience or injustice which may result to the person from reading the provision one way or the other, the relation of the particular provision to other provisions dealing with the same subject and the language of the provision are all to be considered. Prohibition and negative words can rarely be directory. It has been aptly stated that there is one way to obey the command and that is completely to refrain from doing forbidden act. Therefore, negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. 27 Thus a transaction by a Company which is in non-compliance of

provisions of Section 108 of the Companies Act prohibited by law; such a transaction would necessarily be void. Section 108 of the Companies Act further stipulates that the share transfer forms must be accompanied by the certificate of the shares which are the subject matter of transfer. No such certificate has been filed. It is also not the case of the petitioner that there was any such certificate. 28 This transfer relied upon by the petitioner being neither stamped and nor completed did not fulfill the requirement of Section 108. Even if the share transfer forms had been lodged with the Company, the company could not have registered these shares as being prohibitive and impermissible by law. A perusal of this share transfer form in fact shows the lacuna in the form. Besides being unstamped; the distinctive numbers are missing; corresponding certificates have also not been mentioned. This document when compared with the share transfer form in the records of the Company shows the differences between the two forms. The lacuna as noted supra is clear and self-evident. The Board of Directors had also not approved this transaction. 29 Section 111 (2) pre-supposes that if the company refuses to register the shares of an applicant, he may within two months file an appeal against this order to the Company Law Board. This share transfer form is dated 01.03.1998; it has a life of two months; it would even otherwise have become a useless document by 01.05.1998. That apart the submission of the learned counsel for respondent that the stage reaching Section 111 did not arise. Section 108 was the first hurdle which has to be crossed by the objector which he has failed to do so; this is a forceful submission. 30 Heavy reliance of the learned counsel for the petitioner on the provisions of Section 164 of the Companies Act is also mis-directed. Section 164 reads herein as under;164. The Register of members, the register of debenture holders, and the annual return shall be prima facie evidence of any matters directed or authorized to be inserted therein by this Act. 31 There is no dispute to the proposition that annual returns are a prima facie evidence of any matters directed or authorized to be inserted therein by this Act. Section 164 has however to be read along with Section 610(3) of the Companies Act which reads as follows. 610 (3) A copy of, or extract from, any document kept and registered at any of offices for the registration of companies under this Act, certified to be a true copy under the hand of the Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings, be admissible in

evidence as of equal validity with the original document. 32 The company cannot take shelter under this provision Section 610 (3) only states that a copy of, or extract from ,any document kept and registered at the offices for the registration of companies under this act certified to be a true copy under the hand of the Registrar shall in all legal proceedings be admissible in evidence as of equal validity with the original document. However where the document which is on record of the ROC is itself disputed, the certified copy of such a disputed document can have no evidentiary value. This legal position had also been rightly noted by the bench of the Company Law board in 2005 (126) Com. Cases 675 titled as Kobin Pte Limited vs. Kobian India Private Limited. 33 The whole foundation of the case of the objector is based upon the annual return. This is clearly a suspect document. 34 The guidelines laid down by the Supreme Court in the LIC have not been met. Laches on the part of the petitioner in not getting his name entered into the Register of Member is unexplainable; it has no justification. If the claim of the petitioner is correct and he had become holder of 52470 on 27.02.1998 the non-action on the part of the petitioner to get his name registered into the Register of Members has neither been explained nor answered. Section 150 enjoins that a Register of Members has to be maintained by every company under Section 163 of the Companies Act. This Register is open for inspection. No steps had ever been taken by the petitioner to get his name entered into the Register of Members after this so called transaction of 27.02.1999. 35 The Apex Court in Life Insurance of Corporation (Supra) has noted inter alia as follows:84. On an overall view of the several statutory provisions and judicial precedents to which we have referred we find that a shareholder has an undoubted interest in a Company, an interest which is represented by his share-holding. Share is movable property, with all the attributes of such property. The rights of a shareholders are (i) to elect directors and thus to participate in the management through them; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the Company in the shape of dividends; (iv) to apply to the Court for relief in the case of oppression; (v) to apply to the Court for relief in the case of mismanagement; (vi) to apply to the Court for winding up of the Company; (vii) to share in the surplus on winding up. A share is transferable but while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly

complete and the transferee becomes a shareholder in the true and full sense of the term, with all the rights of a shareholder, only when the transfer is registered in the company's register. A transfer effective between the transferor and the transferee is not effective as against the company and persons without notice of the transfer until the transfer is registered in the company's register. Indeed until the transfer is registered in the books of the company the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares. However, on the transfer of shares, the transferee becomes the owner of the beneficial interest though the legal title continues with the transferor. The relationship of trustee and 'cestui que trust' is established and the transferor is bound to comply with all the reasonable directions that the transferee may give. He also becomes a trustee of the dividends as also of the right to vote. The right of the transferee 'to get on the register' must be exercised with due diligence and the principle of equity which makes the transferor a constructive trustee does not extend to a case where a transferee takes no active interest 'to get on the register'. Where the transfer is regulated by a statute, as in the case of a transfer to a non-resident which is regulated by the Foreign Exchange Regulation Act, the permission, if any, prescribed by the statute must be obtained. In the absence of the permission, the transfer will not clothe the transferee with the right to 'get on the register' unless and until the requisite permission is obtained. A transferee who has the right to get on the register, where no permission is required or where permission has been obtained, may ask the company to register the transfer and the company who is so asked to register the transfer of shares may not refuse to register the transfer except for a bona fide reason, neither arbitrarily nor for any collateral purpose. The paramount consideration is the interest of the company and the general interest of the shareholder. 36 The rights as a member could be exercised by Gopal Kishan/petitioner qua the Company only if his name had been entered into the Register of Members. In the absence of this registration, no right would accrue to him. Admittedly, after 27.02.1999, no steps have been taken whatsoever by the petitioner to get his name transposed as a member/shareholder. It does not now lie in his mouth to say that he being a member/shareholder of the Company he was entitled to a notice of the meeting which was held for a sanction of a scheme

propounded by the non-applicants/respondents. He not being a member of the Company on the date 23.03.1999 when the notices were issued for a meeting which was held on 17.04.1999, he was rightfully not entitled to be notified of the said meeting. 37 This scheme stood sanctioned on 20.09.1999. Present application seeking setting aside of the Scheme has been filed on 22.07.2002 which is again much beyond the period stipulated under Section 391(7) of the Companies Act which was a remedy available to the applicant/objector when he had filed this application on 22.07.2002. 38 In Sant Chemicals (Supra), a Bench of the Bombay High Court had examined the scope of Section 391 (7); it had quoted with approval the observations of Cotton., J.J., Nicholl Vs. The Fberhardt Company wherein it was noted that the only way to set aside an order sanctioning a scheme is to file an appeal. . The observations of the Calcutta High Court relied upon as held in Bank of Mymensing Gauripur Ltd. 1948 (53) C.W.N. 143 had been noted as follows:It appears clear to me, however, that once a scheme is sanctioned and the order granting the sanction has been perfected the Court sanctioning the scheme has no jurisdiction under the Companies Act to alter or amend the scheme except by way of a fresh scheme. It is significant that there is no provision in the Companies Act, similar to section 31 of the Presidency Towns Insolvency Act. Further, the fact that the transferor bank has been dissolved and struck off the register creates procedural difficulties as to making a defunct company a party to any proceeding and as to service of any notice or process on it. The doctrine of the Court's inherent power, like that of public policy, should be sparingly used, for otherwise there is a great risk of all rules of procedure evolved out of the experience and practical wisdom of the past being set at naught by the varying idiosyncrasies and notions of justice of individual Judges."

39. It is clear that on the date of the filing of the present petition which was on 22.07.2002, the remedy of appeal was open to the applicant; this provision having been deleted only in November, 2003. The inherent powers of the Court are to be used sparingly and with circumspection only to prevent miscarriage of justice and where an independent remedy is available to an applicant on the date when he had filed the petition, inherent powers of the Court could not have been resorted to; such a power being available to a party only where there is no other remedy available. 40 Even on merits as noted and discussed supra the objections of the

applicant are surfaced largely on his not being notified of the meeting for the sanction of the scheme. The body of the petition otherwise does not disclose any other reason for his objection to a scheme which already stood sanctioned and approved by a majority of more than 75% of shareholder and creditors which is a requirement in terms of Section 391(2) of the Companies Act. In *Laxmi Commercial Bank Ltd., Re*, (1948) 18 Com. Cases, a Bench of the High Court had noted that it is the duty of the court to go through the matter carefully and find out whether all the provisions of law and directions of the court as the conduct of the meetings have been complied with; whether the scheme is in the interest of the company as well as in that of its creditors and should be given effect to. In fact the court had noted that the court itself has to justify in going into the reasons which led the creditors in their meeting to give up a part of their debts. It had inter alia noted as follows: The court has to satisfy itself that: (i) the meeting was duly held and conducted; (ii) that the compromise was a real compromise (iii) that it was accepted by a competent majority; (iv) that the majority was acting in good faith and for common advantage of the whole class; (v) that what they did was reasonable, prudent and proper; (vi) that the court should also satisfy itself as to: (a) Whether the provisions of the statute have been complied with; (b) Whether the scheme is reasonable and practical or whether there is any reasonable objection to it; (c) Whether the creditors acted honestly and in good faith and has sufficient information (d) Whether the court ought in the public interest to override the decision of the creditors and shareholders. 41 Present Scheme has envisaged and taken into account the interest of all the secured creditors, unsecured creditors and the shareholders; the interest of all the aforementioned persons has been protected. In fact this is not even the averment made in the present petition. While sanctioning the Scheme, the court has to watch the interest of all the aforementioned parties. It is not the whims and fancies of one individual which has to be kept in mind while sanctioning the scheme or even at the stage of hearing objections after the scheme has been sanctioned. This is the governing factor. The powers under Section 392 of the Companies Act is the power to supervise the carrying out of the revival scheme and also in the course of implementation of the scheme, if the court is of the view that the scheme cannot be carried forward in the manner in which it was envisaged or it is not being implemented in terms of the sanction it

has wide powers to give such directions in regard to any matter relating to the scheme or make such modifications in the said compromise or arrangement as it may consider it necessary for the proper working of the said compromise/arrangement. 42 This is however not the position in the instant case. The body of the petition does not in any manner raise any objection to the implementation or working of the scheme; the objections are bordered only on the submission of the applicant/objector that notice of the scheme had not been given to him although he was a holder of majority shares and which amounted to a fraud. The allegations of fraud made by the petitioner are unsubstantiated. It is true that there may not always be direct proof of fraud which will have to be gathered from the various circumstances which have been brought to the notice of the Court by the objecting party. Each circumstance by itself may also not be sufficient to prove a fraud and the cumulative circumstances have to be taken as a whole to draw a conclusion as to whether fraud has been made out or not. Powers of this Court under Sections 391 and 392 of the Companies Act are also wide enough to take this objection into account and where it has been prima facie established that the court has sanctioned a scheme or is proposing a scheme which is bordered upon a fraud, such a sanction may not be granted and if same has already been granted, in the best interest of the parties it is liable to be set aside. 43 Facts of this case as noted and detailed supra do not make out any such allegation of fraud. Record shows that the name of the petitioner was never entered into the register of members as a holder of 52470 shares; his own case is that the share transfer forms were available with him in 1998; he however took no steps to get himself on to the register of members; fault was entirely of the petitioner; he thus not being a member on the register of members of the Company; when the notices were issued by the Chairperson 23.03.1999 for the proposed meeting of the merger of Tony Electronics with Super Cassette Industries. Further qua the 100 shares, the same had already been sold to Bhushan Dua on 27.02.1999. As such no rights had accrued in his favour qua the company which would have entitled him to a notice of the meeting in his capacity as a member. 44 Objections raised by the petitioner are wholly without any merit. They are accordingly dismissed. The pending applications have also become infructuous. They are disposed of accordingly. 45 Costs are quantified at

Rs.25,000/-. INDERMEET KAUR, J DECEMBER 17 2012 A

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