NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

COMPANY APPEAL (AT) No.345 of 2019

In the matter of:

1.Chalasani Venkateswara Rao
Son of Mr. C. Basavapurnaiah,
Director of United Telecoms Limited
Aged about 58 years,
Residing at Villa 5,
Chaitanya Oakville, Hagadur Road,
Whitefield, Bangalore- 560066 **... Appellant No. 1**

2. Mrs. C. Padmavathi
W/o Chalasani Venkateswara Rao,
Director, United Telecoms Limited,
Aged about 56 years,
Residing at Villa 5,
Chaitanya Oakville, Hagadur Road,
Whitefield, Bangalore- 560066 **... Appellant No. 2**

3. Dr. Chalasani Sandhya Rao
D/o Mr. Chalasani Venkateswara Rao,
Director, United Telecoms Limited,
Aged about 32 years,
Residing at Villa 5,
Chaitanya Oakville, Hagadur Road,
Whitefield, Bangalore- 560066 **... Appellant No. 3**

Vs

1.United Telecoms Ltd.
Having its registered office at
18A/19, doddanekundi Industrial Area,
Mahadevapura Post, Whitefield,
Bangalore 560048. **...Respondent No. 1**

2. Dr. Potluri Raja Mohan Rao,
H/o Dr. Potluri Padmavathi,
Director,

Aged about 68 years,
Residing at 319, Stella Maris
Inner circle, Bangalore- 560066 ... Respondent No. 2

3. Dr. Potluri Padmavathi,
D/o, C. Basavapurnaiah,
Director,
Aged about 64 years,
Residing at 319, Stella Maris
Inner circle, Bangalore- 560066 ... Respondent No. 3

4. Mr. Bharath Krishna Potluri Rao,
S/o Dr. Potluri Raja Mohan Rao,
Director,
Aged about 33 years,
Residing at 319, Stella Maris
Inner circle, Bangalore- 560066 ... Respondent No. 4

5. Ms. Bhavana Potluri Rao
D/o Dr. Potluri Raja Mohan Rao,
Director,
Aged about 35 years,
Residing at 319, Stella Maris
Inner circle, Bangalore- 560066 ... Respondent No. 5

6. Ms. KomaliCherukuri
D/0o Yarlagadda Prasad Rao
Director,
Aged about 57 years,
Residing at 9th, Main Road,
Psubba Rao Compound,
Whitefield, Bangalore- 560066 ... Respondent No. 6

7. Mr. Anil Kumar Vellanki
S/o Subbarao Vellanki,
Aged about 64 years,
Residing at 8-3-318/11/201D,
Flat No. 302, Sri Durga Enclave,

Jayaprakash Nagar,
Yellareddygudda,
Hyderabad, Telengana- 500073 **... Respondent No. 7**

8. Mr. Nagesh Munirathnam Ramineni
CFO,
Working at United Telecoms Limited,
18a/19 Doddanekundi Industrial Area,
Mahadevapura, Bangalore- 560048 **... Respondent No. 8**

9. Mr. Venkateshwarlu Mungala
Son of Gopaiah Munagala,
Director,
Aged about 70 years,
2-1-776
Vidyanagar, Nallakunta,
Hyderabad, Andhra Pradesh **... Respondent No. 9**

10. Andhra Networks Limited
Having its registered office at
6-3-652,3/4
Dhruvavatara Complex
Somajiguda,
Hyderabad, Telangana,
Hyderabad 500082 **... Respondent No. 10**

11. M/s Gujarat Online Limited,
Having its registered office at,
No. 296/2, Sector- 7/A near CH-2
Circle Gandhinagar, GJ 382007 **... Respondent No. 11**

12. M/s United Sustainble Energy India Pvt. Ltd.
Having its registered office at,
18A/19, Doddanekundi Industrial Area,
Mahadevapura Post, Whitefield,
Bangalore- 560048 **... Respondent No. 12**

Present:

For Appellant:- Mr. Abhijeet Sinha and Mr. Naman Jhabakh, Advocates.

For Respondent:- Mr. Ratik Sharma and Mr. Pawan Upadhyaya, Advocates for R-1.
Mr. Ramji Srinivasan, Sr. Advocate, Mr Satyavikram, Mr Rishab Kapoor, Mr. Shikhar Singh, Advocates for R-2 to R-5. Ms Lekha Vishwanath, Advocate.
Mr. Shabaz Hussain, Advocate for R-8.
Mr. KS Ravichandran, PCS for R-10.

JUDGEMENT

Jarat Kumar Jain. J

1. National Company Law Tribunal, Bengaluru Bench, Bengaluru vide Order dated 18.10.2019 allowed an Application, I.A No. 317 of 2019 in CP No. 82/BB/2019, whereby dismissed the Company Petition as it did not meet the threshold criteria under Section 244 of the Companies Act, 2013 (hereinafter referred to as 'the Act'). Hence, the Petitioners (Appellants herein) have filed this Appeal under Section 421 of the Companies Act, 2013.

2. Brief facts of this case are that the Appellant Nos. 2 and 3 are the wife and daughter of Appellant No. 1 respectively. The Appellants are Directors and Shareholders of the Respondent No. 1 Company. The Respondent No. 1 Company was incorporated on 17.03.1994 under the Companies Act, 1956. It's Registered Office was in Tamil Nadu,

subsequently in the year 1986, the Registered Office was shifted to Bengaluru, Karnataka. The Respondent No. 1 Company is primarily owned and controlled by the Appellant no 1's family and Respondent No. 3's family, the legal heirs of late Basava Purnaiah who acquired the same in the year 1992 from the UB Group of companies. According to the Appellants, they hold 26.14%, 8.10% and 8.52% shares respectively total 42.76% of the paid-up share capital in the Respondent No. 1 Company. The Appellants had filed a petition under Section 241 and 242 of the Act, seeking declaration that the actions of Respondent Nos. 2 to 5 are oppressive and prejudicial to the interest of Appellants and therefore, all the Resolutions passed by the Respondent Nos. 2 to 5 from the period of March, 2017 till April, 2019 are void.

3. The Respondent No. 2 herein filed an Application (I.A No. 317 of 2019) before the Tribunal stating that the Appellant No. 1 has filed a Joint Petition for himself and on behalf of the Appellant Nos. 2 and 3. However, no written consent of the Appellant Nos. 2 and 3 has been filed alongwith the Petition. Such consent cannot be filed subsequently. This defect is not curable. The Appellants have misrepresented that they secured 42.76% of shareholding in the Company. The Appellant No. 1 alone cannot maintain the petition as he is not holding 1/10th of the issued share capital of the Company. The Appellants (Petitioners) do not comply with the statutory provisions of Section 244 (1) (a) & (2) of the Act.

Therefore, the Petition is not maintainable and is liable to be dismissed at threshold.

4. The Appellants (Petitioners) resisted the Application on various grounds and stated that the total members of the Company are nine. Hence, Appellants, three members i.e. more than 1/10th of the total number of members as stipulated under Section 244(1) (a) of the Act, can maintain the Petition. Otherwise, also the Appellants prior to demise of Late Basva Puranaiah hold 8.93%, 8.10% and 8.52% respectively i.e. total 25.55% of the paid up capital. Thereafter, in terms of the Will of Late Basva Puranaiah dated 20.07.2015 shareholding pattern changed and now the Appellants shareholding is 26.14%, 8.10% and 8.52% respectively i.e. total 42.76% of the issued share capital in the Respondent No. 1 Company. The Appellant Nos. 2 & 3 have executed a Power of Attorney dated 04.04.2019 in favour of the Appellant No. 1 and have authorized and empowered him to *inter alia* give the consent on behalf of them and sign, verify and present the Petition. Non-filing of the Power of Attorney alongwith the Petition, *ipso facto* would not lead to dismissal of the Petition or to vitiate the entire proceeding before the Tribunal. Section 244(2) does not provide that the consent of the Members supporting the Petition is necessarily filed alongwith the Petition under Section 241 of the Act. The maintainability of the Petition is challenged on technical ground and the issue is mixed question of law and fact. Therefore,

cannot be taken up as a preliminary issue hence, the Application deserves to be dismissed on this ground alone.

5. Learned Tribunal held that in fact the Appellants (Petitioners) are holding 8.93%, 8.10% and 8.52% shares respectively and remaining shares are sub-judice before the Hon'ble High Court of Karnataka as the Will of (Late) Mr. Basava Purnaiah and (Late) Mrs. C. Sarojini are in dispute and the implementation is stayed. The Appellants have based their claim on undeclared title of shares. Therefore, the Petition is not maintainable. The Appellants jointly hold 25.55% shares in the Respondent No. 1 Company but the Appellant No. 1 has not obtained and filed the written consent of the Appellant Nos. 2 and 3 alongwith the Petition. The General Power of Attorney of Appellant Nos. 2 and 3 in favour of Appellant No. 1 dated 04.04.2019 would not fulfil legal requirement and there is no pleading in the Petition with regard to alleged consent by way of GPA in question. The Execution of GPA itself doubtful which might be executed subsequent to file Company Petition. Thus, the Appellants did not meet the threshold criteria under Section 244 of the Act and they have suppressed material facts. In the result allowed the Application, consequently dismissed the Petition. Being aggrieved with this order, the Appellants (Petitioners) have filed this Appeal.

6. Learned Counsel for the Appellants submitted that in the Respondent No. 1 Company there are total 9 Members out of them the Appellants

being 3 Members of the Company i.e. more than 1/10th of the total Members can maintain the Petition as provided under Section 244 (1) (a) of the Act. The Appellants can also maintain the Petition on the basis of shareholding 1/10th of the issued share capital of the Company i.e. 25.55%. So far as, the consent of the Appellant Nos. 2 and 3 i.e. wife and daughter of the Appellant No. 1 respectively, is concerned the Appellant No. 1 has filed the General Power of Attorney (hereinafter referred to as 'GPA') of the Appellant Nos. 2 and 3 executed in favour of the Appellant No. 1. There is no ground to infer that the GPA is antedated or it was executed subsequent to filing of the Petition. The Appellant Nos. 2 and 3 have never challenged that they have not given authority to the Appellant No.1. The Appellant Nos. 2 and 3 have signed the Vakalatnama which is filed alongwith the Petition. The GPA dated 04.04.2019 has not been filed alongwith the Petition, and, only on this ground the execution of the GPA cannot be doubted.

7. Learned Counsel for the Appellants further submitted that the provision under Section 399 of the Companies Act, 1956 is *pari materia* to Section 244 of the Act. Hon'ble Supreme Court in the case of P. Punnaih vs Jeypore Sugar Company Ltd. reported as (1994) 4 SCC 341, while interpreting Section 399 of the Companies Act, 1956 held that the consent can be given by the Power of Attorney Holder of such shareholder and issue of consent must be decided on the basis of the broad consensus approach, in relation to avoidance and subsistence of

the case. It is not necessary that the consent should be given by the member personally. For this purpose, Learned Counsel for the Appellants also placed reliance on the Judgment of Hon'ble Supreme Court in the case of J. P. Srivastava Vs. Gwalior Company Sugar Ltd. (2005) 1 SCC 172 and Bhagwati Developers Pvt. Ltd. Vs. Peerless General Finance & Investment Company & Anr. (2013) 5 SCC 455.

8. Learned Counsel for the Appellants also submitted that Section 244 of the Act, only provides for obtaining written consent of other members but does not speak for filing such consent alongwith the Petition. Hence, non- filing of the Consent alongwith the Petition would not *ipso facto* result in the dismissal of the petition.

9. Learned Counsel for the Appellants further submitted that though Rule 81(2) of National Company Law Tribunal Rules, 2016 (in brief NCLT Rules, 2016) provides that the consent signed by the rest of members shall be annexed with the Petition. However, non-compliance of this Rule would not *ipso facto* result in the dismissal of the petition as Rule 58 of the NCLT Rules, 2016 provides that failure to comply with any requirement of these Rules shall not invalidate any proceedings, unless the Tribunal is of the view that such failure has resulted in miscarriage of justice.

10. Learned Counsel for the Appellants lastly submitted that the defect of non-compliance of Rule 81, NCLT Rules, 2016 was cured subsequently, by filing the GPA and the Appellant Nos. 2 and 3 have verified it's

execution by submitting their Affidavits and another Power of Attorney dated 03.09.2019. Thus, Apellants No. 2 and 3 have rectified and confirmed the acts of Appellant No. 1 under GPA. Hence, the impugned order is not sustainable in law. Therefore, it must be set aside and the matter be remanded back to the Tribunal for deciding the Petition on merit.

11. *Per contra*, learned Counsel for Respondent No. 1 submitted that the Appellant No. 1 has not obtained and filed written consent of Appellant Nos. 2 and 3, and that written consent is not mere a technicality but is a mandate of law. The written consent is to be obtained before filing of the Petition under Section 241 of the Act, as provided under Section 244(2) of the Act.

12. Learned Counsel for Respondent No. 1 submitted that Rule 23(A) of the NCLT Rules, 2016 provides that the Tribunal may permit to file a Joint Petition if more than one person has common interest in the matter and cause of action and relief is the same. Rule 26 of NCLT Rules, 2016 provides that the Petition shall be signed and verified by the party concerned. There is no pleading in the petition as well as in the Affidavit filed by Appellant No. 1 in support of the Petition in regard to the written consent of Appellant Nos. 2 and 3. The Appellant No. 1 has not filed a written consent of Appellant Nos. 2 and 3 along with the petition. Such defect cannot be cured by filing of GPA of appellant No. 2 and 3 which seems to be executed after filing of the petition. Thus, the Tribunal has

rightly allowed the Application and dismissed the petition as the Petition does not meet the threshold criteria under Section 244 of the Act.

13. Learned Senior Counsel for Respondent Nos. 2 to 5 submitted that as per pleading, this is a Joint Petition on behalf of three Appellants, therefore, the Appellant No. 1 alone cannot maintain the Petition.

14. Learned Senior Counsel for Respondent Nos. 2 to 5 submitted that as per the Company's balance sheets for the Financial Years 2016-2017 & 2017-2018 the Appellant Nos. 1, 2 and 3 hold 8.93%, 8.10% and 8.52% shares respectively (total shareholding 25.55%). Thus, the Appellant's contention that their collective shareholding is 42.76% or the individual shareholding (26.14%) of the Appellant No. 1 is contrary to the record, therefore, the Appellant No. 1 individually cannot maintain the petition.

15. Learned Senior Counsel for the Respondent Nos. 2 to 5 further submitted that a Joint Petition can be filed with the written consent of other members and the consent should be filed alongwith the Petition. There is no pleading in the petition that the Appellant No. 1 has obtained the written consent of Appellant Nos. 2 and 3 for filing the petition under Section 241 of the Act. Rule 81 of the NCLT, Rules, 2016 provides that in case of Joint Petition under Section 241 of the Act, written consent shall be annexed to the Petition. In the present case, the Appellant No. 1 produced a GPA of the Appellant Nos. 2 and 3 subsequently but not alongwith the Petition. The statement in the GPA shows that it was created subsequently, and did not exist at the time of presentation of the

petition. It is also submitted that the Appellants produced another GPA which was undated and referred to a completely different proceeding to be initiated in future and which sought to rectify some other Power of Attorney dated 26.03.2019, which is non-existent. Thus, the GPAs filed by the Appellants were invalid and there was no valid consent in favour of the Appellant No. 1 for filing the Joint Petition on behalf of the Appellant Nos. 2 & 3.

16. Learned Senior Counsel for the Respondent Nos. 2 to 5 submitted that obtaining of consent in writing is a condition precedent for filing Joint Petition under Section 241 of the Act and subsequent consent is therefore, not a valid consent. In this regard he placed reliance on the Judgment of Hon'ble High Court of Allahabad in the case of Makhan Lal Jain and Anr. Vs. Amrit Vanaspathi Company reported at AIR 1953 Allahabad 326 and also cited the Judgment of Hon'ble High Court of Madras in the case of M.C Duraiswami Vs. Shakthi Sugars Ltd. (1980) 2 Mad LJ 77 as well as the judgment rendered by the Hon'ble High Court of Delhi in the case of Omini India Pvt. Ltd. Vs. Balveer Singh 1989, 66 Comp. Cas. 903 Delhi. It is further submitted that the Hon'ble Supreme Court's decision in J.P. Srivastava (Supra) relied upon by the Appellants is *per incuriam*, because it erred in its finding that Section 399(3) of the Companies Act, 1956 contains no requirement of obtaining the consent in writing and only speaks of obtaining of the consent. A bare examination of the provisions would clearly reveal the aforesaid error.

17. Learned Senior Counsel further submits that obtaining prior consent in writing for making an Application under Section 241 of the Act is mandatory, a condition precedent and substantive requirement. Such provision is enacted to protect the Companies from abusing the provisions under Section 241 and 242 of the Act. Thus, the Tribunal has rightly held that the Appellant No. 1 individually holds less than 10% of the paid up share capital and the Joint Petition is not maintainable as the written consent of the Appellant Nos. 2 and 3 has not been filed with the Petition and such defect cannot be cured subsequently by filing of General Power of Attorney.

18. After hearing Learned Counsel for the parties, we have gone through the record and considered their rival submissions.

19. Firstly, we have considered the scope of enquiry under Section 244 (1)(a) of the Act. At an initial stage, the maintainability of the company petition on certain preliminary objection is analogous to the power of Civil Court to decide the Application for rejection of plaint under Order 7 Rule 11 of Code of Civil Procedure, 1908. The Hon'ble Supreme Court in the Case of Bhau Ram Vs Janak Singh (2012) 8 SCC 701 has laid down the law that in order to decide an application for rejection of plaint under Order 7 rule 11 CPC, the Court is precluded from considering the defense of the defendants and their evidence. The Court has to look into the pleadings in the plaint and the documents annexed with the plaint. The stand of the defendants in the written statement or in the application is

wholly immaterial for deciding the application under Order 7 Rule 11 of the CPC.

20. Hon'ble Supreme Court in the case of J.P. Srivastava (supra) held that the objection of maintainability of the petition on the ground that without obtaining the consent of members, a Joint Petition has been filed for mismanagement or oppression, then such issue can be decided on the basis of the averments contained in the petition alone, accepting the pleas therein as correct.

21. The law is well settled that an objection as to maintainability of the Company Petition is only to be allowed at an initial stage if there is absolutely no doubt that the petition is not maintainable. It is general principle that a petition is to be thrown out at an initial stage if it is unarguable on the demurrer. The issue of qualification is a mixed question of fact and law and the correct position is required to be ascertained on hearing the parties on merits as well.

Whether the Joint Petition by three members (Appellants) is maintainable?

22. Admittedly the total number of members of the Respondent No. 1 company are nine. Hence, even Appellant No. 1 being a member i.e. more than one-tenth of the total number of members can maintain the petition under Section 241 of the Act. However, there is no such averment in the petition. Therefore, in the absence of pleading, the petition is not maintainable on this ground.

Whether written consent is required to be filed alongwith the Petition?

23. Sub-section 2 of Section 244 of the Act only speaks of obtaining written consent. It does not speak of such consent to be annexed with the Petition. The Rule 81 of NCLT Rules, 2016 provides that the letter of consent signed by the members shall be annexed with the petition. Earlier, there was provision in Section 399 of the Companies act, 1956 and Regulation 18 of the Company Law Board Regulation, 1991. Sub-section 2 of Section 244 of the Act and Section 399 of the Companies Act, 1956 are *pari materia* and Rule 81 of NCLT Rules, 2016 and Regulation 18 of the Company Law Board Regulation, 1991 in sum and substance are the same.

24. Hon'ble Supreme Court in the case of J.P. Srivastava (Supra) while dealing with the case under Section 399 of the Companies Act, 1956 and Regulation 18 of the Company Law Board Regulation, 1991 held as under:-

> "38. 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 AIR 1953 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."

39.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 referred 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 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 presented on behalf of members, the letter of consent given by them". Other documents required to be filed include "documentary and or other evidence in support of the statements 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.

oral sworn statement in Court, can be given to prove that such consent was given."

40. 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 ofcourse 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."

25. With the aforesaid proposition, it is clear that the requirements contained in Regulation 18 of Company Law Board Regulation, 1991 can hardly be said to be mandatory in the sense that non-compliance would *ipso facto* result in the dismissal of the petition. Thus, we can say that sub-section 2 of Section 244 of the Act only speaks of obtaining of written consent of members. Though Rule 81 of NCLT rules, 2016 provides that the letter of consent signed by the members shall be annexed to the petition, however, non-compliance would not *ipso facto* result in the dismissal of the petition. We can say that such defect can be cured subsequently by filing of the written consent of members.

26. It is not out of context to refer that Rule, 58 of the National Company Law Tribunal, Rules, 2016 provides that failure to comply with any requirements of these Rules shall not invalidate any proceedings, merely by reason of such failure, unless the Tribunal is of the view that such failure has resulted in miscarriage of justice. Thus, the written consent obtained under Section 244(2) of the Act is not annexed with the Petition as per the Rule 81 of NCLT Rules, 2016. Such non-compliance of this rule shall not invalidate the proceedings.

27. Now, we have considered the judgments cited by Learned Senior Counsel for the Respondent Nos. 2 to 5. He submitted that, in order to file a joint petition under Section 241 of the Act, it is mandatory to obtain the written consent of another member and such consent must be filed alongwith the Petition. For this purpose, he placed reliance on the Judgments of Hon'ble High Court of Allahabad in the case of Makhan Lal Jain (Supra) Hon'ble High Court of Madras in the case of Duraiswami (Supra) and Hon'ble High Court of Delhi in the case of Omni India Ltd. (Supra). The Hon'ble High Court of Delhi had held as under: -

> "8. The word "consent", according to Webster's Third New International Dictionary, inter alia, means compliance or approval of what is done or proposed by another, acquiescence, permission, capable, deliberate and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action. According to Mozley and Whiteley's Law Dictionary, Tenth Edition, "consent" presupposes physical power, mental power and a free and serious use of them. Examined in the light of these meanings and keeping in view the purpose for enacting section 399, we have no doubt, that the expression "consent in writing" used in section 399(3) means conscious approval of the action proposed to be taken by the persons to whom the consent has been given. We are also of the view that the writing itself should indicate that the persons who have signed the consent letters have applied their minds to the question before them and on application of minds have given consent for a certain action. Under section 402 of the Act, the court, on an application under sections 397-398 and without prejudice to the generalities of the powers of the court, can grant several types of reliefs. In this background, lit is necessary that the writing must indicate that the members giving consent had applied their minds to the allegations to the made and the reliefs sought to be

prayed for in the proposed action and have given their consent for seeking those reliefs. This is apparent from the expression "consent in writing". Had the intention been that the writing should not indicate the application of mind, then there was no necessity for using the term "consent in writing" and mere word "consent" could have been used. To hold that the requisite members can give their consent in writing without applying their minds or without considering the nature of the allegations and the reliefs sought would frustrate the entire purpose of section 399 which prohibits the filing of an application under section 397 or 398 of the Act, inter alia, by not less than 100 members.

9. The view taken by us finds support from the decisions of the Allahabad High Court, Madras High Court and Madhya Pradesh High Court. In Makhan Lal Jain v. Amrit Banaspati Co. Ltd. , a learned single judge held (at page 102 of 23 Comp Cas) :

"The expression 'consent in writing' obviously implies that the writing itself lf should indicate that the persons who have affixed their signatures have applied their minds to the question before them and have given their consent to certain action being taken."

10. In M. C. Duraiswami v. Sakthi Sugars Ltd. [1980] 50 Comp Case 154, a Division Bench of the Madras High Court examined the expression "consent in writing" in the background of the requirements of sections 397 and 398. On such examination, it was held (at page 158) :

"From the very nature of the case, 'consent in writing' contemplated in section 399(3) of the Act is a consent to the filing of a particular petition with a particular allegation for a particular relief under section 397 or section 398 or under both. There cannot be a blanket consent like a certain member or members consenting to some other member filing a petition under section 397 or section 398 or under both."

28. With the above, it is clear that Hon'ble High Court of Delhi in the case of Omni India Ltd. (Supra) relied on the Judgment of Hon'ble High Court of Allahabad in the case of Makhan Lal Jain (Supra) and Hon'ble High Court of Madras in the case of M.C. Duraiswami (Supra).

29. The above referred citations are not helpful to the Respondents because the case of Makhan Lal Jain (Supra) has been distinguished by the Hon'ble Supreme Court in the case of P. Punnaiah (Supra) it is held that "Nowhere does the Makhan Lal's decision say that consent must be given by the member personally and it cannot be given through his agent." Hon'ble Supreme Court in the case of J.P. Srivastava (Supra) held that regulation 18 of the company law board regulation 1991 provides that where the petition is presented on behalf of members, the letter of consent given by them is required to be annexed to such petition. This requirement 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. The Petition cannot be dismissed on technical grounds as the written consent of the other members has not been obtained and filed alongwith the Petition.

Whether consent should be given by a member personally or power of attorney holder of such member can give consent?

30. Hon'ble Supreme Court in the case of Bhagwati Developers (P) Ltd. (Supra) followed the earlier judgments in the case of J.P. Srivastava (Supra) and P. Punnaiah (Supra) and held as under:-

> "16. Section 399 of the 1956, Act neither expressly nor by implication requires that the consent to be accorded therein, should be given by a member personally, as the same can also be given by the power-of-attorney holder of such a shareholder. Furthermore, the issue of consent must be decided on the basis of a broad consensus approach, in relation to the avoidance and subsistence of the case. The same must (sic not) be decided on the basis of the form of such consent, rather on the substance of the same. There is hence, no need of written consent, or even of the consent being annexed with the company petition. [vide P. Punnaiah V. Jeypore Sugar Co. Ltd. and J.P. Srivastava and Sons (P) Ltd. V. Gwalior Sugar Co. Ltd.]
>
> 17.In view of the above, the case at hand is required to be considered in the light of the aforesaid settled propositions of law, which provide that where the company petition is filed with the consent of the other shareholders, the same must be treated in a representative capacity, and therefore, the making of an application for withdrawal by the original petitioner in the company petition would not render the petition under Sections 397 or 398 of the 1956 Act, non-existent, or non-maintainable. The other persons i.e. the constructive parties who provide consent to file the petition, are in fact entitled to be transposed as petitioners in the said case. Additionally, in case the petitioner does not wish to proceed with his petition, it is not always incumbent upon the court to dismiss the petition. The court may, if it so desires, deal with the petition on merit without dismissing the same. Further, there is no requirement in law for the shareholder himself, to give consent in writing. Such consent may even be given by the power-of-attorney holder of the shareholder. If the shareholder who had initially given consent to file the company petition to help meet the requirement of 1/10th shareholding, transfers the shares held by him, or ceases to be a shareholder, the same would not affect the maintainability and continuity of the petition."

31. With the aforesaid proposition, the Hon'ble Supreme Court has settled law that is not required that consent should be given by a member

personally. Such consent can be given by the Power of Attorney Holder of such member and the consent must be decided on the basis of a broad consensus approach, in relation to the avoidance and subsistence of the case. The same must not be decided on the basis of the form of such consent, rather on the substance of the same.

Whether General Power of Attorney of Appellant No. 2 & 3 in favour of Appellant No. 1 is doubtful?

32. Learned Tribunal doubted the execution of the GPA on the ground that it was not filed alongwith the petition and there is no pleading in the petition or the Affidavit sworn in support of petition. In the GPA, the Appellant No. 2 and 3 did not state the reasons for executing the GPA, while all the Appellants are residing together. Learned Senior Counsel has also raised these doubts before us in the arguments.

33. As we have discussed above that non-filing of written consent *ipso facto* would not result in dismissal of the petition. The GPA executed and notarized on 04.04.2019 and the petition under Section 241 and 242 of the Act filed on 30.04.2019. There is no finding rendered by the Tribunal that the GPA is back dated or a forged document and the Appellant Nos. 2 and 3 are not denying the execution of this document.

34. Learned Tribunal in the impugned Order without discussing any evidence stated that execution of the GPA was itself doubtful which might have been executed subsequent to filing of the main Company Petition. In the case of J.P. Srivastava (Supra), there was an allegation that the stamp paper

on which the Affidavits have been affirmed were purchased subsequently, however, the Hon'ble Supreme Court declined to accept this plea and held as under:-

> "37. 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."

35. Learned Tribunal also doubted the execution of GPA on the ground that reasons for execution of GPA were not assigned. We are of the view that there is no requirement that the executant should assign the reasons for executing the GPA. The wife and daughter of Appellant No. 1 have executed the GPA in favour of Appellant No. 1 and they have not challenged its execution. Hence, there is no ground to doubt the execution of the document or infer that it was executed subsequent to filing of the main Company Petition.

36. Therefore, we are of the view that the GPA cannot be rejected as being a forged one because it was not filed along with the main Company Petition or there was no reference in the petition or reasons for execution have not been assigned.

37. As we have already discussed above it is not required that a member should himself give the consent for filing the petition under Section 241 and 242 of the Act. The Power of Attorney Holder of the member can give such consent.

38. With the aforesaid, we are of the view that the Appellant No. 1 being holder of the GPA is competent to give consent and file the petition on behalf of the Appellant Nos. 2 and 3. The non-filing of the GPA alongwith the petition would not *ipso facto* result in the dismissal of the petition.

39. Learned Tribunal relied on the Judgment of Hon'ble High Court of Madras in K. Krishnan Vs. Shree Construction and Services Pvt. Ltd. reported as (1994) 80 Comp. Cas. 558, wherein it was held that the question of authority to institute a suit on behalf of the Company is not mere technicality, but will have a far reaching effect. In this regard, we would like to refer the Judgment of Hon'ble Supreme Court in the case of J.P. Srivastava (Supra) in which it was held as under:

> "48. 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 common sense 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 AIR 1956 SC 140] In our judgment, Section 399(3) and Regulation 18 have been substantially complied with in this case."
>
> (Emphasis added.)

40. Now, in the light of settled position of law, we have considered the facts of the case in hand. Admittedly, the Respondent No. 1 is a family Company, in which there are total 9 Members. The Appellant No. 1 is the husband of Appellant No. 2 and father of Appellant No. 3. It is pertinent to note that all the Appellants have signed the Vakalatnama accompanied with the petition. The Appellant No. 1 having GPA has signed the petition on behalf of the Appellant Nos. 2 and 3 and also has sworn the Affidavit on behalf of the them. Thereafter, the Appellant Nos. 2 and 3 on 04.09.2019 has sworn the Affidavits confirming that they have authorized Appellant No. 1 vide the GPA dated 4.4.2019 in order to protect their rights and interest in all the companies in which they own shares. Apart from this, they have also executed another Power of Attorney dated 03.09.2019 in favour of the Appellant No. 1. It is on the basis of these documents, the consent given by Appellant No.1 for and on behalf of his wife and daughter as their GPA holder, is a valid consent within the meaning of section 244 (2) of the Act. Therefore,

the preliminary objection to the maintainability of the petition vide u/s 241 and 242 is unsustainable in law.

41. Now, it is evident from the Balance Sheet of the Respondent No. 1 Company for the Financial Years 2016- 2017 and 2017-2018 that the Appellants are holding shares 8.93%, 8.10% and 8.52% total 25.55%. Thus, the Appellants hold one-tenth of the total paid up share capital. Therefore, they fulfil the requirement for maintaining the Petition as stipulated under Section 244 (1) of the Act.

42. It is pertinent to note that the principal can always rectify the act by the agent by producing in authenticate Power of Attorney as held by Hon'ble Supreme Court in the case of Jugraj Singh & Anr. Vs. Jaswant Singh & ors. (1970) 2 SCC 386.

43. With the aforesaid, we are of the view that the Joint Petition of the Appellants is fulfilled the requirement under Section 244(1) of the Act. Thus, the Petition is maintainable and impugned order passed by the Learned Tribunal is not sustainable in law. Therefore, the Appeal is allowed and impugned order is set aside. The matter is remanded back to the Tribunal for disposal of the Petition as per law.

44. The Appellant has also filed the Application I.A. No. 1580 of 2020 before us seeking the following reliefs:

> "A. restrain the Respondents from giving effect to the resolutions passed the purported AGM of the Respondent No. 1 Company held on 06.05.2020.
>
> B. Restrain the Respondents from including the names of the Appellants as Directors retiring by rotation in the notice convening any future Annual General Meetings of the Company;
>
> C. Declare the purported AGM held on 06.05.2020 as illegal and void and to restrain the Respondents No. 2 – 8 from holding office of a director and appoint independent director or directors until the appeal is adjudicated upon;
>
> D. Direct the Company to produce copies of all the bank statements where it holds an account i.e. current and savings, for the financial year 2017-2018, 2018-2019, 2019-2020 and till 30th June 2020.
>
> E. restrain Respondents No. 2-8 from operating any of the bank accounts of the Company and appoint a Receiver or an Independent Chairperson to manage the affairs of the Company until disposal of this petition;
>
> F. Pass any other order that this Hon'ble Tribunal may deem just and proper in the facts and circumstance of the case"

45. We are of the view that it is not appropriate to decide this Application at this stage by this Appellate Tribunal. Therefore, this Application is disposed of with the direction that the Appellants if so advise pursue the aforesaid relief before the Tribunal.

46. Parties are directed to appear before the National Company Law Tribunal Bengaluru on 11th November, 2020 for further proceedings.

Registry is directed to send a copy of this judgment to concerned Tribunal forthwith

Appeal is allowed accordingly, however, no order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Balvinder Singh)
Member (Technical)

(V.P. Singh)
Member (Technical)

New Delhi
04th November, 2020.
SC