Efirst Technologies Private Limited vs Hiperworld Cybertech Limited

Court: COMPANY LAW BOARD, (PRINCIPAL BENCH)

Date of Decision: Nov. 30, 2004

Hon'ble Judges: S. Balasubramanian, Chairman

Advocate: A. N. Haksar, Sr Adv, Pradosh Mohanty, Arun Kathpalia, Gaurav Liberham

Final Decision: Application dismissed

Judgement

S Balasubramanian (Chairman)

1. This petition has been filed by first M/s. eFirst Technologies Pvt. Ltd. which stood merged with M/s. Assam Company Ltd., under section

397/398 of the Companies Act, 1956 (the Act) alleging oppression and mismanagement in the affairs of M/s. Hiperworld Cybertech Ltd. (the

company).

2. The facts of this case are that the first petitioner-company was incor- 2 porated in March, 2000, with an authorised capital of Rs. 5 lakhs of

50,000 equity shares of Rs. 10 each with a paid up capital of Rs. 200. The first respondent-company was incorporated in January, 2000, with an

authorised capital of Rs. 50 lakhs divided into 5 lakh equity shares of Rs. 10 each by the second respondent group, viz., Shrivastav group. The

main business of the company relates to application services and providing of e-solutions. Shrivastav group invited the petitioners" group to invest

Rs. 6 crores in the company sometime in May/June, 2000. Accordingly, an MoU was entered into, between the second respondent, the company

and the first petitioner, according to which the first petitioner was to invest Rs. 6 crores for 50 percent, of the share capital of the company.

Thereafter, an Investment-cum-Shareholders" Agreement (ISA) was entered into between the same parties on October 9, 2000, by which the

petitioner was to invest Rs. 5,87,99,370.70 by way of subscription to 58,415 shares of Rs. 10 each at a price of Rs. 1,006.86 per share

constituting 49 per cent, of the issued and paid up capital of the company. Accordingly, the first petitioner invested the said sum which included a

premium of about Rs. 996 per share and was allotted 58,415 shares. Along with a number of other companies, eFirst was merged with Assam

Company Ltd. by an order of the Gauhati High Court dated September 1, 2003. In the present petition, filed by eFirst as the first peti tioner, the

petitioners have alleged various acts of oppression and mismanagement in the affairs of the company.

3. When this petition was mentioned on February 6, 2004, I granted certain 3 interim reliefs ex parte which were later modified by an order dated

February 17, 2004, on an application made by the respondents. The petitioners filed an application C. A. No. 149 of 2004 seeking for substitution

of the name of the petitioner ""eFirst Technology Pvt. Ltd. (now merged with Assam Company Ltd.)"" to that of ""Assam Company Ltd."" on the

ground that the former had been merged with the latter, and the said application was allowed by me by an order dated May 31, 2004. This order

was taken on an appeal before the Delhi High Court. In the said appeal the respondents had alleged that eFirst Technologies Pvt. Ltd., having

been merged with Assam Company Ltd., no longer could claim to be a member of the company to file the petition and the name of Assam

Company Ltd. did not find a place in the register of members of the company and as such it also had no locus standi to file this petition. Therefore,

it was contended in the appeal, that if this Bench had given an opportunity to the respondents to file their replies to C. A. No. 149 of 2004, these

facts could have been brought before this Bench. However, without giving an opportunity to the respondents, this Bench had allowed substitution

of the name of the petitioner. On hearing the appeal, the High Court directed this Bench to first consider the maintainability of the petition.

Accordingly, the respondents filed an application C. A. No. 204 of 2004 challenging the maintainability of the petition more or less on the same

grounds as in the appeal before the Delhi High Court. By this order, I am disposing of that application.

4. Shri Haksar, senior advocate appearing for the respondents submitted :

It is true that eFirst was a shareholder of the company holding 58,415 shares constituting 49 per cent, shares in the company. eFirst got itself

merged with Assam Company Ltd. even before filing of this petition and has been dissolved and as such it is no longer in existence to claim

membership of the company. After moving C. A. No. 149 of 2004 before this Bench, Assam Company sent an antedated letter dated May 25,

2004, seeking for substitution of its name in place of eFirst in the register of members of the company. This letter was considered by the board of

the company and after careful consideration, they rejected the same on various grounds, inter alia, including that to make Assam Company as a

member would be prejudicial to the interest of the company as it was having a competitive business as that of the company. At the time when

eFirst became a shareholder, an Investment-cum-Shareholders'' Agreement (ISA) was entered into between eFirst, the first and second

respondents. One of the terms of the agreement was that eFirst could transfer the shares held by it only with the approval of the board and that no

transfer shall be made to any affiliate/third party that is engaged in a business competing with the business of the company (clause 8.8). The same

provision has also been incorporated in article 30 of the articles of association of the company. Further, in terms of clauses 14.7 and 14.8 of the

ISA, no variation of the agreement shall be binding on any party without consent of all and that the agreement was not capable of assignment by

any party without the consent of the other. However, in the present case, eFirst and Assam Company have jointly engineered the

merger/amalgamation and have attempted to do an act indirectly which could not have been done directly. Since eFirst is no longer in existence

having been dissolved, it cannot be considered to be a member of the company. Since Assam Company''s name is not in the register of members

and since the alleged transfer of shares by eFirst to Assam Company is in violation of the provisions of article 30 of the articles of association of the

company, it cannot claim any right over the shares and as such has no locus standi to file this petition and therefore the petition deserves to be

dismissed.

5. Learned counsel further submitted : Even though the shares held by eFirst were transferred and vested in Assam Company by an order of the

High Court under section 391/394 of the Act, yet, the board of directors, having absolute powers under the articles to refuse registration of

transfer, has done so as the transfer was in violation of the provisions of article 30. The order of the High Court does not in any way bar the right

of the board to reject the transfer. In case of transfer of properties in terms of an order under section 391/394 of the Act, it has all the trappings of

a sale since the court only approves a voluntary arrangement between the transferor and transferee companies. This being the case, all the

provisions relating to sale of the property have to be complied with. Since in the present case, the property involved is the shares held by eFirst,

the provisions of section 108 of the Act and article 30 of the articles of association of the company have to be complied. In Indian Shaving

Products Ltd. v. Delhi Development Authority, 2002 61 DRJ 304, the BIFR approved a scheme of amalgamation in terms of section 17(3) read

with section 18 of the SICA by which the undertaking of the transferor company was ordered to be transferred to the transferee company without

any further act or deed. The transferor company had taken an industrial plot in a long term lease from DDA and in terms of the lease deed, no

transfer of industrial plot could be effected without the approval of DDA and even if it approves, the difference between the premium paid and the

market value has to be paid by the transferee. When the transferee company approached DDA for effecting requisite changes in its record

regarding the industrial plot, DDA demanded substantial sum as unearned increase which was resisted by the transferee company on the ground

that in case of amalgamation, by an order of BIFR, there was no voluntary transfer and as such no unearned income was payable to DDA. The

Delhi High Court has held that the transfer was not involuntary and that DDA not being a party to the scheme, its rights cannot be affected and

BIFR order was not binding on DDA. Similarly, in the present case, the company was not a party before the High Court and the power of the

company in the articles cannot be affected by the order of the High Court. In Gemini Silk Ltd. v. Gemini Overseas Ltd., 2003 114 CompCas 92,

the Calcutta High Court has held that a transaction under section 394 of the Act has all trappings of a sale and an order under section 394 has its

genesis in an agreement between the transferor and transferee companies and the intended transfer is a voluntary act of the contracting parties and

accordingly the court held that the order of the court transferring the property is an instrument by which the transfer is effected and therefore is

liable for stamp duty. Accordingly, the court directed the ROC not to take on record the order sanctioning the scheme until the same has been duly

stamped. This order would show that the provisions of section 108 of the Act have to be complied with even in the case of a transfer of shares by

an order of the High Court under section 391/394. The power of the board of directors to insist on compliance with the provisions of the articles

has been upheld by the Karnataka High Court in S. A. Padmanabha Rao v. Union Theatres Pvt. Ltd.,2002 108 CompCas 108. In that case, the

appellants purchased shares of the respondent company in a court auction held in execution of a decree.

The board ofdirectors refused to register the transfer on the ground that the articles prohibited the transfer of shares to non-shareholders.

The High Court upheld the decision of the board of the company and held that even in case of court auction, the same was subject to limitation and

restrictions in the articles of the company. In Harish Bansal v. Moti Films Pvt. Ltd., 1986 59 CompCas 925, the Delhi High Court, dealing with the

provisions of section 433 of the Act, held that a winding up order is not a judgment in rem and is not binding on strangers. This being the case,

even the order under section 391/394 of the Act is not an order in rem to bind outsiders like the company which in terms of its articles has the

power to refuse registration. Accordingly, the name of Assam Company cannot be substituted to that of eFirst and since, eFirst has ceased to

exist, the petition should be dismissed as not maintainable.

6. Shri Kathpalia, advocate appearing for the petitioners submitted :

This application is mala fide, filed with a view to ensure avoidance of any enquiry into the acts of oppression and mismanagement committed by the

respondents in the affairs of the company. The submission of the respondents that since eFirst has ceased to be in existence and as such cannot be

considered to be a member of the company and that since the name of Assam Company is not entered in the register of members of the company

and as such cannot prosecute the petition, is misconceived. eFirst along with several other companies were merged with Assam Company under a

scheme sanctioned by the Gauhati High Court. By the said scheme, the shares held by eFirst in the company stood vested in Assam Company by

operation of law. The transfer was not contractual. In the petition, rightly the name of Assam Company Ltd. should have been shown as the first

petitioner but inadvertently it was shown as eFirst Technologies Ltd. (now merged with Assam Company Ltd.). Therefore, when an application

was made to correct the error, this Bench had allowed the same but with mala fide intention, the respondents approached the High Court by way

of an appeal against that order. Even the High Court has observed ""In view of this, no fault can be found in the impugned order whereby prayer

contained in C. A. No. 149 of 2004 was allowed by the Company Law Board"". However, since the respondents contended that the purported

amalgamation was not a valid amalgamation in the eyes of law and as the company could not recognise Assam Company as its shareholder, the

High Court directed this Board to consider the maintainability of the petition at the first instance.

7. Learned counsel further submitted : The total investment in the company by the respondents is only of the order of Rs. 6 lakhs while the

petitioners have contributed nearly Rs. 5.98 crores, by paying substantial premium of over Rs. 996 per share and thus hold 49 per cent, shares in

the company. Therefore, it is highly inequitable for the respondents to claim that they would recognise neither eFirst nor Assam Company as a

member. This denial is highly oppressive to the petitioners. The contentions of the respondents that in terms of article 30, the approval of the board

should have been obtained before transfer or that no transfer of shares to a person having competing business can be recognised are false to their

own knowledge. eFirst was a 100 per cent, subsidiary of Assam Company. While the respondent-company is engaged in the business of software

development, the business of Assam Company is of growing, manufacturing and selling tea. It is not having any business relating to software

development. Therefore, the ground that Assam Company is in competing business and as such cannot be admitted as a member cannot be

sustained. Since the transfer of shares was by way of operation of law, the question of obtaining prior permission of the board also does not arise.

In other words, the question of application of article 30 in the present case does not arise. Even otherwise, in case of transfer of shares by an order

sanctioning a scheme under section 391/394 of the Act, the board has no power to refuse registration.

8. Learned counsel further submitted : The company is a public company, the shares of which are freely transferable in terms of section 111A(2) of

the Act. If at all, a public company could refuse registration of transfer, it can be only on sufficient cause. In Estate Investment Co. Pvt. Ltd. v.

Siltap Chemicals Ltd.,1999 96 CompCas 217 and McDowell and Co. Ltd. v. Shaw Wallace and Co. Ltd., 2002 108 CompCas 306, the

Company Law Board has held that in case of a public company, the term ""sufficient cause"" would cover only 3 grounds as specified in section

111A(3), viz., if the transfer is in contravention of the provisions of the SEBI Act, or regulations made thereunder, the provisions of the SICA or

any other law for the time being. In other words, a public company cannot refuse registration on any other ground including non-compliance with

the provisions of the articles. Therefore, in the present case, the company could not have refused to register the name of Assam Company as a

member on the ground that the provisions of article 30 have been violated.

9. Learned counsel further submitted : The reliance of counsel for the respondents on Gemini Silk Ltd."s case [2003] 114 Comp Cas 92 (Cal) that

a transfer under a scheme sanctioned by the High Court has all trappings of sale is not correct. This judgment has been set aside by the Division

Bench of the same High Court by an order dated January 22, 2004, wherein the Division Bench has held that when a scheme is sanctioned by a

High Court in terms of section 391/394, any transfer of property in accordance with scheme is by way of operation of law and not merely by

voluntary act of the parties. Similarly, in Sadanand S. Varde v. State of Maharashtra,2000 3 CompLJ 430, the Division Bench of the Bombay

High Court has held that when an amalgamation takes place, the transfer of assets takes place by the force of the company court order/or by

operation of law and that it ceases to be a contractual or consensual transfer (para. 96). Similarly, in Telesound India Ltd., In re [1983] 53 Comp

Cas 926, the Delhi High Court has held that the provision of vesting on amalgamation is analogous to vesting in insolvency. The vesting in

amalgamation is by operation of law, as is clear in the scheme of section 394 and such vesting in the transferor company on amalgamation is neither

an act of the transferor company nor an assignment by it but as a result of a statutory instrument.

10. Summing up his arguments, learned counsel contended that the transfer of shares held by eFirst to Assam Company Ltd., being by operation

of law cannot be rejected by the respondents nor they can refuse registration on the ground of non-compliance with the provisions of articles as the

shares of a public company are freely transferable. Since the shares have been vested in Assam Company, it has the right to get its name entered in

the register of members and as such can maintain this petition in its name and therefore this application should be dismissed.

11. I have considered the matter carefully. Two issues that have to be decided in this application are whether the company being a public

company, the board of directors of the company could refuse registration of the name of Assam Company on the ground of violation of the

provisions of articles and even otherwise whether they have the powers to refuse registration of the shares vested in Assam Company by an order

of the High Court sanctioning a scheme under section 391/394 of the Act.

12. Recently, I dealt with a petition under section 111A of the Act challenging the decision of the board of an unlisted public company to refuse

registration of the shares vested in the petitioner-company by an order of the High Court sanctioning a scheme of amalgamation. (Vijaya Finance

Corporation Ltd. v. Peerless General Finance and Investment Co. Ltd. C. P. No. 316/ERB/2002). In that case, the board of Peerless refused

registration of transfer on the ground that there was no compliance with the provisions of section 108 which requires execution of instruments of

transfer and also on the ground that the application for registration was time barred, having been made nearly five years after the High Court order.

In that case also the issues as to whether a company could refuse registration of transfer of shares vested by an order of the High Court and

whether the board of a public company, the shares of which are freely transferable, could refuse registration on any ground other than those

specified in section H1A(3) arose for consideration. I am quoting the decision in that case on these issues verbatim.

Shri Mitra contended that while section 111 specifically recognise ''the power to refuse'' there is no such power specifically recognised in section

111A, and therefore, no public company has the power to refuse registration of transfer as its shares are freely transferable. Even though this

contention appears to be sound, yet, a reading of the proviso to sub-section (2) would, indicate that this proviso recognizes the implied power of

the board to refuse the registration on sufficient cause and therefore as long as there is sufficient cause to refuse registration, the company has the

power to do so. Another contention of Shri Mitra that in view of the shares of a public company being freely transferrable, the registration cannot

be refused and only after registration, rectification can be sought in terms of section 111A(3) of the Act. It is to be noted that section 111A was

introduced when the Depositories Act was enacted and in terms of the Depositories Act, shares are to be de-materialised and are to be kept in

fungible form and transfers take place electronically and instantaneously without the interference of the company. That is the reason, why section

111A(3) has provided for rectification after registration. However, when the shares are held in physical form, every transfer has to be approved by

the board for registration and therefore, the proviso to sub-section (2) has provided for refusal on sufficient cause. It would be illogical to hold that

when, even at the time of considering the registration of transfer, the board of the company has sufficient cause to refuse, that registration should be

effected and thereafter application is to be made to the CLB for rectification. The next contention is that the term ''sufficient cause'' in the proviso to

sub-section (2) should cover only those grounds under which rectification can be sought under sub-section (3). It is true that in a number of cases,

like Shaw Wallace case [2002] 108 Comp Cas 306 (CLB); [2002] 1 Comp LJ 160 and Siltap case [1999] 96 Comp Cas 217 (CLB) referred

to by Shri Mitra, this Board had held so and all those cases were in relation to shares of listed public companies. So far this Board has not dealt

with shares of any unlisted public company under section 111A. Certain grounds that are available to seek rectification under sub-section (3) are

not available to an unlisted company. For instance, since an unlisted company is not subject to SEBI jurisdiction, it cannot complain that in

acquisition of shares, the transferee had violated the provisions of the SEBI Act or regulations made thereunder. Practically, every one of the cases

dealt with by this Board so far under section 111A(3) related to violation of the provisions of the SEBI regulations. In this connection, it is relevant

to refer to the observation of the Andhra Pradesh High Court in Karamsad Investments Ltd. v. Nile Ltd., 2002 108 CompCas 58 wherein the

court has observed ''The expression ""sufficient cause"" occurring in the proviso to sub-section (2) of section 111A takes within its sweep not only

those contingencies contemplated under sub-section (3) but there can also be circumstances and reasons other than those contemplated under

subsection (3) which might require the company to refuse to register the transfer of shares and such a refusal would be, refusal for ""sufficient case"".

Thus, there can be various reasons though it is not possible to enumerate all of them and it is to be decided on the facts of each case which could

constitute ""sufficient cause"" for a company to refuse the registration of transfer of shares". Similarly, in Finolex Industries Ltd. v. Anil Ramchand

Chhabria,2000 37 CLA 278, 292 the Bombay High Court has held: "Remedy provided in section 111A(3) is in addition to the remedy provided

in section 111(4). It is therefore held that the remedies of appeal and rectification are available to all kinds of shares held in a public company

under the proviso to section 111A(2) and section 111A(3) read with sub-section (7) of section 111(A) which would make applicable the

provisions of section 111(1), (2) and (4) by virtue of section 111(5)". It further held that (page 293) : ""restriction contained in sub-section (14) of

section 111 would not apply to transfer and ownership of the shares of the public company held in the form of share certificates". In both these

cases, the shares involved were those of listed companies and the courts have held as above. In view of the fact that section 111A was inserted in

the Act pursuant to the enactment of the Depositories Act, 1996, which is applicable to listed companies, I am of the view that in case of unlisted

public companies, all the provisions as are applicable to a private company should also be applicable. If so, then the term ""sufficient cause"" in

proviso to sub-section (2) of section 111A should receive the same construction as in section 111(4).

13. Since in the present case, the company is an unlisted public company, the above decision is squarely applicable that the term ""sufficient cause

appearing in the proviso to section 111A(2) does not cover only the grounds at section 111A(3) but on other grounds also.

14. The next issue is whether a company could refuse registration of transfer of shares vested in the transferee company by an order of the High

Court.

In the Peerless case, I had decided as follows :

The contention of the petitioners is that when the shares had been transferred to and vested in projects by an order of the High Court, Peerless

has no powers to refuse registration of transfer and it cannot insist on compliance with the requirements of section 108. In other words, according

to the petitioners, the shares have been vested in projects by operation of law and an order under section 391/394 being an order in rem, is

binding on all. .Whether the order of the High Court sanctioning a scheme is binding on third parties is an issue under examination by me in another

case, wherein some decisions have been cited, which I feel would be relevant to refer in this order. In most of the cases cited by counsel in the

present case and in the other case, the scope of an order under section 391/394 was examined with reference to the provisions of either Stamp

Act or Rent Control Act in which the issue, whether, the transfer of properties by an order under section 391/394 is by operation of law or by a

contractual/consensual arrangement, has also been discussed. In General Radio and Appliances Co. Ltd. v. M. A. Khader, 1986 60 CompCas

1013, the Supreme Court has held that transfer properties in terms of an order under section 391/394 is not an involuntary transfer by operation of

law, but a transfer of the interest of the tenant company on the basis of their application made before the High Court. However, in the matter of

Gemini Silk Ltd. [2003] 114 Comp Cas 92, the Division Bench of the Calcutta High Court has held : "The consistent view of this court has been

that the transfer of assets and liabilities of the transferor company to the transferee company was by operation of law in view of the provisions of

sub-section (2) of section 394 of the aforesaid Act, and apart from complying with the provisions of subsection (2) of section 394, nothing further

was required to be done in order to complete the transfer of liabilities and assets of the transferor company to the transferee company". In this

case, the issue was whether an order under section 394 was a conveyance or instrument in terms of section 2(10) of the Indian Stamp Act. The

Bombay High Court has also taken a similar view in Sadanand S. Varde v. State of Maharashtra,2000 3 CompLJ 430 that "There is

overwhelming authority of precedents suggesting that when an amalgamation takes place, the transfer of assets take place by the force of the

company court"s order and/or by operation of law ; it ceases to be a contractual or a consensual transfer". However, in Hindustan Lever v. State

of Maharashtra, 2004 AIR(SC) 326 the Supreme Court has held "The scheme of amalgamation has its genesis in an agreement between the

prescribed majority of shareholders and creditors of the transferor company with the prescribed majority of shareholders and creditors of the

transferee company. The intended transfer is a voluntary act of the contracting parties. The transfer has all the trappings of a sale. The transfer is

effected by an order of the court (para. 9)". In Singer India Ltd. v. Chander Mohan Chaddha, 2004 122 CompCas 468, the Supreme Court has

referred to the decision in General Radio case [1986] 60 Comp Cas 1013 wherein it was held that the order of amalgamation was made by the

High Court on the basis of the petition filed by the transferor company in the company petition and therefore it cannot be said that this is an

involuntary transfer effected by the order of the court. These decisions would indicate that there are diverse views expressed in the context of

issues before the courts either in relation to the Stamp Act or Rent Control Act. But one matter that is clear from all these decisions is that the

courts have held that the High Court order is binding on all the shareholders and creditors of the transferor and transferee companies including

those who had expressed dissent to the scheme. In none of these judgments it has been held that the scheme is binding on third parties. As a matter

of fact, a reading of the judgments of the Supreme Court in General Radio [1986] 60 Comp Cas 1013 and Singer India [2004] 122 CompCas

468 cases would indicate the same. In both the cases, the transferor companies were lessees of certain premises. When these companies were

merged with transferee companies, by orders of the High Courts, the leased premises were also transferred to the transferee companies. In terms

of the provisions of the relevant Rent Control Acts, the owner of the leased premises was entitled to recovery of possession if the same was sub-

let or assigned or possession was otherwise parted with or without the permission of the owner. A contention was raised that when the leased

premises were transferred by an order of the High Court in terms of section 391/394, the provisions of the Rent Control Act were not applicable.

The Supreme Court negatived the contention in both the cases. These decisions would indicate that the rights and obligations of third parties are

not affected by the order of the High Court in terms of section 391/394. This being the case, in the instant case, Peerless has the right to refuse

registration on sufficient cause notwithstanding the transfer being by a scheme sanctioned by the High Court.

15. The above decision would indicate that a company can refuse registration of transfer of shares vested in the transferee company by an order of

the High Court under section 391/394 of the Act on sufficient cause. Therefore, in the present case, I have to only consider whether, the board of

directors of the company has refused the registration on sufficient cause. The settled law is that the board of directors of a company does not have

any inherent power to refuse registration of transfer and such a power has to be specifically conferred on the board by the articles. It is also a

settled law that even if the articles provide for unrestricted or absolute powers, the same should be exercised bona fide and in the interest of the

company and not on a wrong principle or with an oblique motive or for a collateral purpose. The respondents have relied on ISA and article 30 of

the articles to contend that the approval of the board of directors for the transfer has not been taken and that Assam Company is engaged in

competing business. Article 30(a) which is relevant reads as follows : ""The investor shall have unrestricted right to transfer at any time any or all its

shares along with all rights pertaining thereto, to any of its affiliates or to third parties, subject to the approval of the board. The board shall not

unreasonably and without just cause withhold its consent/approval to such a transfer to third parties. Provided that no such transfer shall be made

to any affiliate/third party that is engaged in a business competing with the business of the company"". In the articles ""the investor"" means eFirst, its

affiliates and its nominees. Therefore, eFirst had the unrestricted right to transfer the shares held by it in the company. Whether the approval of the

board is necessary for transfer to its affiliate is not clear from the articles. Even though the article says that transfer to affiliates or third parties would

be subject to board approval, the next sentence in the article would indicate that discretion to refuse relates only to a transfer to a third party. This

sentence would indicate that the board has no discretion to reject a transfer to an affiliate. This appears to be logical considering the fact that the

first sentence of the article talks of unrestricted right of eFirst to transfer the shares. Therefore, it appears to me that the words ""subject to the

approval of the board"" occurring in the first sentence have to be read to apply only in a case of transfer to a third party and not to an affiliate. Even

otherwise, since in terms of the second sentence of the article, the board has discretion to refuse transfer only to a third party, the failure of eFirst

to get the approval of the board, which, in the absence of power to refuse, cannot refuse a transfer to an affiliate, cannot be a ground to reject the

transfer to Assam Company, which is an affiliate of eFirst. The respondents have alleged that the fact that eFirst was a subsidiary of Assam

Company was not to the knowledge of the respondents and had been suppressed by the petitioners at the time of subscribing to the shares. This

allegation appears to be an after thought. It is on record that the paid up capital of eFirst was Rs. 200 and it was to invest over Rs.6 crores in the

company. It is inconceivable that the respondents did not enquire or were not aware of the identity of the real persons controlling eFirst when they

entered into the MoU and thereafter ISA and who had lent this huge amount to eFirst. This amount is found to have been lent by Assam Company

to eFirst for investment in the company. Therefore, to state that the respondents were not aware that eFirst was subsidiary of Assam Company has

to be rejected. Thus, I hold that the transfer of shares by the subsidiary to its holding company, being an affiliate, does not require the prior

approval of the board as it has not been vested by the articles the power to refuse registration of such a transfer to an affiliate.

16. The second ground for refusal is that Assam Company is in a business competing with that of the company and since the article prohibits such

a transfer, the impugned transfer is invalid. It is true that there is prohibition in the articles for a transfer even to an affiliate if it is engaged in a

competing business. To establish that Assam Company is in a competing business, the respondents have relied on the objects clause in the

memorandum of Assam Company. A reading of the objects clause shows that the main objects of the said company relate to activities connected

with plantation of various kinds including tea, coffee, etc. In addition, the memorandum contains 51 ancillaries objects and 43 other objects. It is

the other objects at clause 43 which resembles a business akin to that of the company. Article 30 of the company deals with an affiliate ""That is

engaged in a business competing with the business of the company"". To determine whether a company is engaged in a competing business, one

does not look at the objects in the memorandum but the business carried on by the company. I find from the annual report of Assam Company

Ltd. for the year ended March 31,2003, that all the income and expenditure of the company related to its business in tea indicating very clearly

Assam Company is not engaged in any business which is in competition with that of the company. The respondents have not produced any material

to show that Assam Company is engaged in a competing business. Therefore, on the ground that Assam Company is doing competing business

and as such shaies cannot be transferred to it, cannot be accepted. The respondents have alleged that in the guise of amalgamation, the petitioners

have mala fidely done something which could not be done directly. I find that more than 10 companies were merged with Assam Company along

with eFirst and therefore, this allegation is baseless. Thus, I find that the transfer of shares to Assam Company by eFirst is not against the

provisions of article 30 and the rejection of the application made by Assam Company for entering its name in the register of members of the

company was on wrong principle and was not on sufficient cause. The refusal to register the name of a person who is entitled for such a registration

itself is a grave act of oppression.

17. It appears to me, as rightly pointed out by learned counsel for the pet tioners, that this application C. A. No. 204 of 2004 itself is misconceived

and is an afterthought. It is on record that when this petition was filed, this Bench passed an ex parte order on February 6, 2004. Thereafter, the

respondents filed C. A. No. 36 of 2004 seeking for certain modification to the interim order. When this application was heard on February 17,

2004, the respondents were directed to file their replies to the petition by March 31, 2004. Application C. A. No. 144 of 2004 dated March 30,

2004, was filed by the respondents seeking for enlargement of time to file their replies to the petition. Along with this application, another

application C. A. No. 45 of 2004 was also filed seeking for direction to the petitioners to provide copies of certain documents to enable the

respondents to file their replies.

In neither of these applications, there was any contention that the petition was not maintainable on the grounds taken in the instant application.

Obviously, these objections were thought of after Assam Company filed C. A. No. 114 of 2004 seeking for substitution of its name in place of

eFirst as the first petitioner, which prayer was also allowed.

18. For reasons aforesaid, I dismiss this application and hold that the petition is maintainable in the name of Assam Company Ltd. as the first

petitioner notwithstanding the fact that its name is not in the register of members as the request by Assam Company Ltd. for entry of its name in the

register of members of the company has been rejected on unjustifiable grounds and without sufficient cause by the board of directors of the

company.

19. The respondents will file their replies to the petition by December 30, 2004, and rejoinder to be filed by January 31, 2005. The petition will be

heard on March 1, 2005, at 10.30 a.m.