

REFUSAL TO TRANSFER SECURITIES & RECTIFICATION OF REGISTER OF MEMBERS – MICROSCOPIC VIEW

BY PRADEEP KUMAR MITTAL
Advocate- Past Central Council Member of,
Institute of Company Secretaries of India
E-Mail: pkmittal171@gmail.com

This article has been drafted with a view to explain and amplify the scope and applicability of Section 58 and Section 59 of Companies Act, 2013 dealing with refusal or neglect to transfer or transmission by company and appeal thereof and rectification of register of members. For the proper appreciation of Section 58 and 59, their text is reproduced hereunder:

Section 58 Refusal to Registration and Appeal thereof

(1) If a private company limited by shares refuses, whether in pursuance of any power of the company under its articles or otherwise, to register the transfer of, or the transmission by operation of law of the right to, any securities or interest of a member in the company, it shall within a period of thirty days from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, **was delivered** to the company, send notice of the refusal to the transferor and the transferee or to the person giving intimation of such transmission, as the case may be, giving **reasons** for such refusal.

(2) Without prejudice to sub-section (1), the securities or other interest of any member in a public company shall be **freely transferable**: Provided that any contract or arrangement between two

or more persons in respect of transfer of securities shall be enforceable as a contract.

(3) The transferee may appeal to the Tribunal against the refusal within a period of thirty days from the date of receipt of the notice or in case no notice has been sent by the company, within a period of sixty days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, was delivered to the company.

(4) If a public company without sufficient cause refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within a period of sixty days of such refusal or where no intimation has been received from the company, within ninety days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.

(5) The Tribunal, while dealing with an appeal made under sub-section (3) or sub-section (4), may, after hearing the parties, either dismiss the appeal, or by order—

(a) direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within a period of ten days of the receipt of the order; **or**

(b) direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved.

(6) If a person contravenes the order of the Tribunal under this section, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years **and** with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

ANALYSIS

- ✚ Section 58 of Companies Act, 2013 casts a duty upon the company to send reply stating reasons for non-registration of transfer or transmission within 30 days of delivery of instrument of transfer or intimation of transmission as the case may be, and provides a consequential relief to the transferee by way of appeal in case of non-receipt of reply.
- ✚ In terms of the provisions of Section 2(68) Companies Act, 2013, a private company is required to restrict the transfer of its shares through its Articles of Association ("AoA"). Hence, any restriction on transfer of shares as agreed under the shareholders agreement and duly incorporated in its AoA shall be valid and binding on such a private company and may be enforced against the shareholders of a private company. However, if a private company refuses to register the transfer of any securities or interest of a member, whether in pursuance of any power of the company under its AoA or otherwise, it is required to intimate the transferor and transferee within the stipulated time period. This follows that in case of a Private Company even the restriction which is contained in AoA which has a "Constructive Notice" the company is obliged to send reply stating reasons for refusal. In **Re, Smith and Fawcett Ltd. (1942) 1 All ER 542 (CA)**
- ✚ **Dr. S. Krishna Sarma vs. Kanthimathy Plantations (P) Ltd. (07.06.2008 - CLB) : MANU/CL/0080/2008** the court observed that even though the articles may give the directors absolute and uncontrolled discretion to refuse to register a transfer, a fiduciary power of this sort must be exercised bona fide in the interest of the company.

✚ Section 58(2) of CA 2013 states that the securities of any member in a public company are freely transferable, while under section 58(4) of CA 2013, it is open to the public company to refuse registration of the transfer of securities for a 'sufficient cause'. To that extent, section 58(4) can be read as a limited restriction on the free transfer permitted under the section 58(2). However, the statute does not provide any guidance on what would constitute 'sufficient cause'. To analyse further the provision of section 58(4) of Companies Act, 2013 corresponds the proviso contained in section 111A(2) of the erstwhile Companies Act, 1956. Section 111A(2) of Companies Act, 1956 deals with the refusal to register a transfer of shares and section 111A(3) thereof deals with the rectification of the register of members once registration has been done.

✚ It is pertinent to note that while section 111A(2) of Companies Act, 1956 used the term 'sufficient cause' as a reason for refusal for registration, Section 111A(3) set out an exhaustive list of three instances where rectification of register could be undertaken, namely (i) where the transfer was in violation of any provision of SEBI Act or regulations; (ii) where the transfer would violate any of the provisions of The Sick Industrial Companies Act, or (iii) where the transfer would violate any other law in force.

✚ Tracing the precedents emerging out of Indian courts with respect to section 111A of Companies Act, 1956, there appears to be a dichotomy in the views taken by various courts while evaluating the meaning of 'sufficient cause' as used in section 111A(2) and 111A(3) of CA 1956. On the one hand, some courts have held that Section 111A(2) must be read homogenously with section 111A(3), so as to limit the scope of the term 'sufficient cause' to the grounds mentioned in sub-section (3), on the other hand, some courts have opined that 'sufficient cause', especially as it relates to

unlisted public companies, would not be limited to the grounds set out in section 111A(3). However, the position has now been settled by the Supreme Court of India in **Mackintosh Burn Limited v. Sarkar and Chowdhury Enterprises Private Limited, MANU/SC/0299/2018**. In this case, the Supreme Court held that the registration of a share transfer may not only be refused on the ground of it resulting in a violation of any law but also for any other sufficient cause. The decision of the Supreme Court in the Mackintosh Case significantly enlarges the scope of the expression ‘sufficient cause’ used in Section 58(4) of CA 2013. Applying this to the present context it can be said that ‘sufficient cause’ would include matters that are not in the best interests of the company.

What constitutes a sufficient cause will depend on the facts of each case. However, the following illustrative list of decided cases is cited below:

- Refusal to register transfer by a deemed public company which is in process of conversion into private company cannot be said to be restricting free transferability of shares of public company and refusal was held to be based on “sufficient cause”. **Synthite Industries Limited Vs. Plant Lipids (P) Ltd. and Ors. MANU/NL/0281/2018**.
- Refusal of transfer based on the ground that transferee is competitor in business was held to be sufficient cause. **Mackintosh Burn v. Sarkar and Chaudhary Enterprises 2018**
- Not only statutory provisions, even mala fide and other allied factors would constitute “sufficient cause” to seek rectification. **Tracstar Investments v. Gordon Woodroffe MANU/CL/0027/1996**

- Refusal by the Banking Company to register transfer under short-term pledge was held to be based upon “sufficient cause”. **Canara Bank v. Ankit Granites Ltd. MANU/CL/0039/1999**
- Where the deemed public company takes no action to revert back to the status of a private company fulfilling all characteristics of a private company, it is to be deemed to have chosen to remain a public company. Therefore, the provisions in the Article providing for pre-emption rights cannot be enforced such as provision in a public company is contrary to the provisions of Companies Act according to which the shares of a public company are freely transferable. **Jer Rutton Kavasmaneck v. Gharda Chemicals Ltd.**
- The Supreme Court in **Bajaj Auto Holdings Ltd. v. Company law Board MANU/SC/0437/1998** has emphasized that directors must exercise their power of refusing transfer of shares in good faith in the interest of company. it is not a ground by itself that transferee entertains the intention of increasing his shareholding.
- In **Joy Holdings Pvt. Ltd. v. Indian Railway Finance Corporation Ltd. MANU/CL/0001/1996** the CLB held that there cannot be a blanket refusal to be applies in all cases without application of mind to the individual case.
- It was held not to be sufficient cause for refusal that the shares under transfer were the part of a trust even if the trust is of perpetual nature. **Jose Pulikken v. Damien Subsidies & Kuries Ltd. MANU/KE/0620/2006**

+ FREELY TRANSFERABLE

The expression '**freely transferable**', has not been defined under Companies Act, 2013. The expression '**freely transferable**' is a mandate against the board of directors to register the transfer of

the specified shares and such expression should be given wider interpretation. Any arrangement / contract providing restriction on transfer of shares should not be construed as violation of the expression '**freely transferable**'. Had that not been the intention of the legislature, the proviso to Section 58(2) would not have been specifically inserted. However, such expression does not in any way restrict the power of the board of directors of a public company to refuse the registration of transfer of such shares on '**sufficient cause**'.

In the matter of **Messer Holdings Limited vs. Shyam Madanmohan Ruia & Others MANU/MH/0998/2010**, the Hon'ble Bombay High Court held that any contract or arrangement between two or more persons with respect to transfer of securities can be enforced like any other contract and does not impede the free transferability of shares at all. In view of the above, any restriction on transfer of shares under the shareholders agreement as executed amongst the shareholders shall be valid and binding as a '**contract**' inter-se the shareholders. If any public company is also being made party to such shareholders agreement, then such contract will also be enforceable against the public company like any other contract and in case of breach of such contract by any party, the aggrieved party may avail such legal remedies as available in case of such '**breach of contract**' including the specific performance of such contract under the Specific Relief Act, 1963.

Section 59 Rectification of Register of Members.

(1) If the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register, is, without sufficient cause, omitted therefrom, or if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be a member, the person aggrieved, or any member of the company, or the company may appeal in such form as may be prescribed, to the Tribunal, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register.

(2) The Tribunal may, after hearing the parties to the appeal under sub-section (1) by order, either dismiss the appeal or direct that the transfer or transmission shall be registered by the company within a period of ten days of the receipt of the order or direct rectification of the records of the depository or the register and in the latter case, direct the company to pay damages, if any, sustained by the party aggrieved.

(3) The provisions of this section shall not restrict the right of a holder of securities, to transfer such securities and any person acquiring such securities shall be entitled to voting rights unless the voting rights have been suspended by an order of the Tribunal.

(4) Where the transfer of securities is in contravention of any of the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992) or this Act or any other law for the time being in force, the Tribunal may, on an application made by the depository, company,

depository participant, the holder of the securities or the Securities and Exchange Board, direct any company or a depository to set right the contravention and rectify its register or records concerned.

(5) If any default is made in complying with the order of the Tribunal under this section, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

MEANING OF AGGRIEVED PERSON

In **Vinod K. Patel vs. Industrial Finance Corporation of India Ltd. (2001)** it was held that the word ‘aggrieved’ refers to a person having substantial grievance who has been denied some personal or property rights. Merely because the transferor and transferee chooses not to prefer appeal before the Tribunal would not be ground to permit an intermediary to prefer appeal on account of his alleged pecuniary loss as he cannot be called an aggrieved person.

LIMITATION PERIOD

Section 59 (1) of Companies Act, 2013 Act is silent with respect to the Limitation Period for filling petition under Section 59(1). As per **Section 433** of Companies Act, 2013 ‘The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be’. Thus, it can be safely said that the provisions of Limitation Act also applies to Companies Act, 2013.

Whereas, Article 137 (Part II) of the Schedule to the Limitation Act, 1963 provides the limitation period of three years dealing with the "Any other application for which no period of limitation is provided elsewhere in this Division". Further, in **Kerala State Electricity Board v. T.P. Kumhaliumma** MANU/SC/0323/1976 Hon'ble Supreme Court of India, held that Article 137 of the Limitation Act, 1963 will apply to any petition for rectification of the share register, which prescribes a period of three years of the transfer of shares. Further in **A. Devarajan Vs. N.S. Nemura Consultancy India Pvt. Ltd. and A. Panneerselvam** MANU/CL/0060/2004 the Hon'ble Company Law Board observed that in the light of the Kerala State Electricity Board Judgment (Supra) of the Hon'ble Apex Court, the period of limitation as mentioned under Article 137 of the Limitation Act, 1963 shall apply to the proceedings before the Company Law Board initiated u/s 111 (4).

In **Bhupendra Patel and Ors. Vs. Hotel Satyaketu Pvt. Ltd. and Ors.** MANU/NL/0182/2017 NCLAT(National Company Law Appellate Tribunal), New Delhi admitted the petition under Section 59 of Companies Act, 2013 stating that the petition is within the limitation period of 3 years from date of transfer.

In the light of the above, it can be safely concluded that period of limitation for applying for the rectification for register of members by the company under the provisions of Section 59 (1) of the Companies Act, 2013 is three years.

It is worth to note that the order which the Tribunal can pass on an appeal being preferred under Section 58 and 59 is same, so moot question is that what was the intention of the Legislature to incorporate two separate Sections ?

The main difference between Section 58 and 59 is that under Section 58 petitioner can only be transferee however in Section 59 petitioner can be the company, person aggrieved or the member. Further the time limit for approaching Tribunal under is 30 days and time limit for approaching Tribunal under Section 59 is 3 years. Moreover, appeal under Section 58 can be preferred when reply of company is not received within 30 days, however, unnecessary delay by the company for registration of shares is also covered under Section 59. However, the period of limitation for approaching the Tribunal, may get extended in case it is discovered that “fraud” has been played against the aggrieved person. The period of limitation shall apply from the date of knowledge of “fraud”.

Further, in case of dematerialized shares, the transfer happens instantaneously hence, the company does not get any occasion to refuse a transfer at all. If a company wants to contest a transfer, it needs to use the appellate procedure of Section 59 of Companies Act, 2013 to seek rectification of register of members.

COMARARISION CHART B/W SECTION 58 & 59(1)

BASIS	SECTION 58	SECTION 59(1)
Who can be the petitioner	Transferee.	Member, Company, or Aggrieved person.

Time of petition	Prior to entry in Register of Members (pre-registration)	After entry in Register of Members (post-registration)
Period of Limitation	Governed by section 58 of Companies Act, 2013	Governed by Article 137 of Limitation Act, 1963
Penal consequences	The person who does not comply with the order of tribunal is liable of imprisonment from 1 year to 3 years and with fine from 1 lakh to 5 lakhs.	Company shall be liable to fine from 1 lakh to 5 lakhs and every officer in default shall be liable to fine from 1 lakh to 3 lakhs or with imprisonment from 1 year to 5 years or with both.
Transfer right pending entry in Register of Members	The holder of the securities (transferee) is not entitled to transfer such securities pending entry of his name in Register of Members.	The holder of the shares is entitled to transfer such shares pending the enforcement of NCLT order unless restricted by NCLT.
Eligible grounds of refusal/rectification	Private company: any ground mentioned in Articles. Public Company: sufficient ground	Sufficient cause for both private and public company
Coverage	Issues relating to transfer of securities is covered.	Only issues relating to transfer of shares is covered.