

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/JAS, PART 14
NASSAU COUNTY

**In the matter of the Petition of DALBARA SINGH,
a shareholder of MOHTHI TRANSPORTATION, INC.,**

Decision and Order

Plaintiff,

**MOTION SUBMITTED:
May 6, 2014
MOTION SEQUENCE:01
INDEX NO.:600768-14**

-against-

**For judicial dissolution of MOHTHI
TRANSPORTATION, INC., pursuant to Article 11
of the New York State Business Corporation Law,**

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Order to Show Cause & Petition	1
Supplemental Affirmation in Support	2

The instant dissolution proceeding was commenced by the filing of a petition with order to show cause dated February 25, 2014. Petitioner, a 50% shareholder of Mohthi Transportation, Inc. ("Mohthi")¹ seeks the following relief:

¹ On March 7, 2013, Mohanarooban Thiyakarajakkurukkal ("Thiyakara") and Petitioner executed a Shareholder's Agreement ("Agreement"). Pursuant to the Agreement, Thiyakara and Petitioner each had a 50% ownership in Mohthi. Petitioner had made contributions of approximately \$100,00 in exchange for his 50% interest in Mohthi. Prior to that date, Thiyakara was the sole shareholder Mohthi.

- (a) dissolving [Mohthi];
- (b) appointing a receiver for the purpose of marshaling and liquidating all assets of [Mohthi], and paying all creditors thereof;
- (c) distributing all net assets of [Mohthi] after payment of creditors, and receivership commissions and expenses, between the shareholders thereof;
- (d) assessing damages and/or surcharges against [Thiyakara], payable from [Thiyakara] share of any net assets of [Mohthi] for breach of fiduciary duty, conversion, diversion or looting of corporate assets, waste of corporate assets, or other illegal, fraudulent, or oppressive conduct; and
- (e) entering a money judgment against [Thiyakara], in favor of Dalbara Singh, for any damages and/or surcharges for which [Thiyakara] share of corporate assets are insufficient to satisfy.

For the reasons that follow, the motion and petition are granted in part and denied in part and to the extent that relief sought in the petition has been denied, it is also dismissed.

The Court's Determination

Branch "a" of the petition and motion seeking judicial dissolution pursuant to Business Corporation Law §1104(a) is granted, there being no opposition to dissolution.

With respect to branch "b" of the petition and motion, the court is authorized to appoint a receiver at any stage of a dissolution proceeding (Business Corporation Law §1113). However, a receiver should not be appointed unless the complaining shareholder makes a clear showing of a serious risk of potential loss of his interest or a violation of the court's directives on the part of the other shareholder (*In re Harrison Realty Corp.*, 295 AD2d 220 [1st Dept 2002]). Here, the Petitioner has failed to make such a showing. In support of his application, the Petitioner stated:

On April 13, 2013, just over one month after Petitioner acquired a one-half interest in the company, Thiyakara's wife Wignakumary, incorporated a competing business, Krishna Trans., Inc. a NY Department of State printout is annexed hereto as Exhibit C.

Krishna Trans, Inc., was used to convert assets, income, and opportunities from Mohthi Transportation, Inc. Among other thing, Thiyakara's wife was actively participating in the operation of Mohthi Transportation at the time she incorporated

the competing business, and this competing business operates using the same mailing address and phone number as Mohthi Transportation. Annexed hereto as Exhibit D are printouts from the US Department of Transportation's "SAFER" system reflecting both Mohthi Transportation and Krishna Trans using the same mailing address and phone number.

On or about May 14, 2013, barely two months after Petitioner acquired an interest in the company, Thiyakara sent a letter attempting to "terminate" Petitioner's relationship with the company, which is annexed hereto as Exhibit E.

On July 9, 2013, Petitioner commenced a plenary action entitled Singh v Thiyakarajakkurukkal, Nassau County Index No. 601281/2013 asserting claims for, *inter alia*, breach of contract, breach of fiduciary duty, and conversion. Petitioner did not seek dissolution in that action.

Despite good faith efforts, Thiyakara and Petitioner have been unable to reach an amicable resolution, the assets of the company are losing value with time, and Petitioner is not receiving any share of the profits the business is generating.

(Petition at ¶¶ 8-12).

The foregoing allegations do not establish that the appointment of a receiver is necessary to preserve the assets of the corporation, operate the business, or protect the interests of the parties (*Matter of Steinberg*, 249 AD2d 551 [2d Dept 1998]; Business Corporation Law § 1113; *Matter of Hessert v Brooklyn Home Dialysis Training Ctr.*, 231 AD2d 719 [2d Dept 1996]). Accordingly, Petitioner's application for the appointment of a receiver of Mohthi is denied.

With respect to branches "d" and "e" of the petition and motion, the Petitioner requests that the court "assess any applicable damages, penalties or surcharges against Thiyakara" and enter a money judgment against Thiyakara for any damages or surcharges that cannot be satisfied by the assets of Mohthi. Petitioner seeks this additional relief on the grounds that: "Thiyakara, a shareholder and officer of the company, in control of the corporation, is guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders" and/or the "property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by Thiyakara" (Petition at ¶¶ 3a and 3b).

It is the petitioner who chooses the statutory authority under which dissolution is sought (Business Corporation Law §1105). Here, the petition for dissolution specifically sets forth the

statutory section under which it seeks dissolution, namely, Business Corporation Law §1104(a).² Having sought dissolution pursuant to that section of the Business Corporation Law, Petitioner cannot seek additional remedies available under dissolution pursuant to Business Corporation Law §1104-a, notwithstanding allegations in the petition that Thiyakara's wife incorporated a competing business which is being used to convert assets, income and opportunities from Mohthi.³ In any event, branches "d" and "e" of the petition and motion seek relief against Thiyakara, who was not named as a party respondent in the petition, and are, therefore, denied.

Branch "c" of the petition and motion is granted inasmuch as a referee will be appointed by the court to close the business of the corporation, marshal its assets, and determine and discharge its liabilities (*see* Business Corporation Law §1108).

Conclusion

Based on the foregoing, it is hereby

Ordered that the branch of the petition and motion for dissolution of Mohthi Transportation, Inc. is granted and Mohthi Transportation, Inc. shall be dissolved pursuant to and in accordance with Article 11 of the Business Corporation Law; and it is further

Ordered that pursuant to Business Corporation Law § 1108, the matter is hereby referred

² According to the petition, "[p]ursuant to Business Corporation Law §1104(a), Petitioner seeks dissolution of Mohthi Transportation, Inc. on the following grounds"

³ Pursuant to BCL 1104-a, a judicial dissolution under special circumstances:

The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . may present a petition of dissolution on one or more of the following grounds:

(1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;

(2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation.

* * *

(d) The court may order stock valuations be adjusted and may provide for a surcharge upon the directors or those in control of the corporation upon a finding of wilful or reckless dissipation or transfer of assets or corporate property without just or adequate compensation therefor.

to Referee Thomas Dana to report and to supervise the winding down, marshaling of assets, and determination and discharge of liabilities, of Mohthi Transportation, Inc. (Business Corporation Law §1008); and it is further

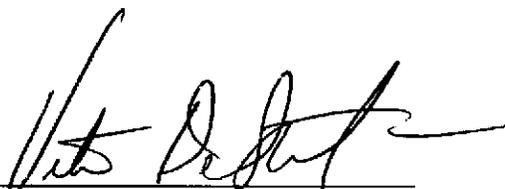
Ordered that the parties are directed to contact Referee Dana within seven days of the date hereof, to facilitate scheduling; and it further

Ordered that the liquidation shall be concluded within 45 days of the date hereof and that the referee shall report to the undersigned within 15 days thereafter, unless the appearing parties consent to a determination by the referee; and it is further

Ordered that the petition and motion are, in all other respects, denied, and the petition, to the extent that it has been denied, is also dismissed.

This constitutes the decision and order of the court.

Dated: June 25, 2014



Hon. Vito M. DeStefano, J.S.C.

ENTERED

JUL 14 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE