

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI**

COMPANY APPEAL(AT) NO.308 OF 2017

(Arising out of order dated 09.06.2017 passed by the National Company Law Tribunal, Ahmedabad Bench in CP No.13/58-59/NCLT/AHM/2017.

IN THE MATTER OF:

Before NCLT Before NCLAT

1. M. Kondappa, (Shareholder of M/s Symphony Ltd) 1-2-30, Ratna Enclave, Nandamori Nagar, Nizampet Road, Hyderabad-85	Petitioner	Appellant
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Vs

1. Symphony Ltd Symphony House, 3 rd floor, FP-12, TP-50, Off S.G. Highway, Bodakdev, Ahmedabad-380054, Gujarat.	1 st Respondent	1 st Respondent
2. Karvy Computershare Pvt Ltd Karvy Selenium Tower B, Plot No.31-32, Gachibowli, Financial District, Hyderabad-500037	2nd Respondent	2 nd Respondent
3. Sharepro Services (India) Pvt Ltd 13 AB, Samhita Warehousing Complex, 2 nd Floor, Near Sakinaka Telephone Exchange, Andheri – Kurla Road, Sakinaka, Andheri (E), Mumbai-400072.	3 rd Respondent	3 rd Respondent
4. Mr. Mayur Chimanbhai Barvadiya, 404, Vraj Vihar Tower, Opp. Shagun Casa, Nr Prerna Tirth Jain Temple, Satelite, Ahmedabad 380015	4 th Respondent	4 th Respondent
5. Mr. Manan Chandraprakash	5 th Respondent	5 th Respondent

Bhavsar,
 Former Company Secretary,
 Symphony Limited,
 104-A, Parmeshwar Avenue,
 Vishwakarma Society,
 Gordhanwadi Tekra,
 Kankaria, Ahmedabad-380028

6. Mr. Rajgopal B.V. - 6th Respondent
 B-3, Green Park Extension,
 New Delhi-110061.

Present: For Appellant:-Mr Shyam K. Shelat, Advocate.

For Respondents: - Mr. Gaurav Chauhan, Advocate for Respondent No.1.

JUDGEMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

1. This appeal has been preferred by appellant under Section 421 of the Companies Act, 2013 against the impugned order dated 9th June, 2017 passed by the Hon'ble National Company Law Tribunal, Ahmedabad Bench, Ahmedabad.
2. The brief facts of the case are that 1st respondent is a company registered under the Companies Act, 1956, initially, as a private limited and thereafter, converted into a public limited company. The shares of the 1st respondent are listed on recognised Stock Exchanges.
3. The appellant was originally holding 1000 equity shares of Rs.10/- each of the 1st respondent. Later on the shares were sub-divided by dividing one equity share of Rs.10/- each to 5 equity shares of Rs.2/- each by passing Board Resolution dated 29.7.2011 and BSE Notice No.20120215-5 dated 15.2.2012and thereby the shareholding of the petitioner, as per the Register

of Members of the 1st respondent as on 30th June, 2015, was 5000 equity shares (Page No.81).

4. It is stated by the appellant that on and after 15.2.2012 the split shares were sent to the appellant by the 1st respondent through post but the same is returned back "undelivered" since the appellant address had changed from Anantapur to Hyderabad and, therefore, the 3rd respondent could not have transferred the shares to anyone. It is stated that the undelivered share certificate is already lying with 1st respondent, and hence it is not possible to transfer the alleged share certificate to anyone and/or 6th respondent by 3rd respondent (the then Transfer Agent of the 1st respondent).

5. The appellant came to know that his shares have been misplaced and, therefore, he sent a request to the 1st and 2nd Respondent (new Transfer Agent appointed by 1st respondent) for issue of duplicate shares and for updation of the new address vide letter dated 12.05.2016(page 82). 2nd respondent vide letter dated 5.07.2016 (Page 83,) intimated the status of his shares and sought certain information. The appellant sent all the required documents to the 2nd respondent vide letter dated 12.09.2016 (Page 84) and also demanded bonus shares, which were announced in July/August, 2016 by 1st respondent, issued by the 1st respondent and also unclaimed dividend but the same were not provided by the 2nd respondent. .

6. The appellant has submitted that the 1st respondent vide their letter dated 5.10.2016 (page 95-96) confirming the status of the appellant as the bonafide registered shareholder and had also intimated that their former Registrar and Transfer Agent i.e. 3rd respondent had indulged into illegal activities of transferring and dealing of the shares of the 1st respondent and

SEBI instituted suo motu proceedings against the 3rd respondent. 1st respondent in the said letter intimated that the shares belonging to me were transferred to some other person on 10.12.2015 and the said shares are in the list of “suspicious transfers” as made during the period of 3rd respondent. The appellant, to establish the suspicious transfer, have submitted a copy of letter dated 21.6.2016 of auditor Ernst and Young who were appointed by SEBI to conduct investigation and also submitted a copy of police complaint made by the 1st respondent against 3rd respondent that it is established that the transaction has been done by 3rd respondent fraudulently without the knowledge/confirmation/consent of the appellant. The appellant submits that he never transferred any of his shares to anybody till the date and the shares are held by him only. The appellant submits that the Respondents instead of cooperating with the appellant, who is a shareholder, created hurdles and troubles in issuance of duplicate share certificate. Being aggrieved the appellant filed a CP before the NCLT. After hearing the parties the Ld. NCLT passed the order dated 9th June, 2017, the relevant portion of which is as under :

“26. In the case on hand, there is a dispute whether the shares of the petitioner were, in fact, transferred by the petitioner in the year 1998 or not. On the basis of a transfer form, the shares were already transferred to Mr. Rajgopal BV. Therefore, the issue involved in this case is a disputed question of facts. Moreover, in this case, investigation by SEBI is also pending relating to certain suspicious share transactions that were undertaken by the third respondent and the transfer of shares of the petitioner is one such

case. Therefore, pending investigation by SEBI also, it is not proper for this Tribunal to decide the issue. Further, the petitioner did not choose to disclose in the petition that he has already approached SEBI for issuance of duplicate shares and the matter is pending there. It amounts to suppression of material fact since the order, if any, passed may be or may not be in consonance with the order, if any, passed by this Tribunal in this proceeding. Therefore, it is a fit case where the petitioner can approach the civil court. Further, the petitioner did not choose to implead the transferee of shares by name, Mr. Rajgopal B.V. as a party to this petition. Any order of rectification of the register passed in this proceedings would have a direct effect on the interest of Mr. Rajgopal B.V. Therefore, Mr. Rajgopal B.V. is not only a proper party but also a necessary party to this proceeding. But, such person has not been impleaded as a party in this petition.

27. In view of the above discussion, the petitioner is not entitled to any relief in this petition. This petition is dismissed. However, the petitioner can approach the civil court for appropriate remedies, if so advised. The interim order passed by this Bench on 23.11.2016, freezing all transactions in respect of shares in Folio No.024442 owned by the petitioner and all consequential benefits arising therefrom till the disposal of the petition, is vacated. No order as to costs.”

7. Being aggrieved by the said order dated 9th June, 2017 of the Tribunal the appellant has filed the present appeal. The appellant has prayed for the

direction to the 1st respondent to restore the name of the appellant-Original petitioner in the member register and issue duplicate share certificates and further direct the 1st respondent to also allot the bonus shares, accrued dividend till date and further if any.

8. The appellant in his appeal has stated that he is the holder of 5000 equity shares of the 1st respondent company and he has not transferred/sold these shares to anyone. The appellant submits that the 1st respondent has himself admitted vide letter dated 5.10.2016 (Page 95) that the 3rd respondent has done some suspicious transaction and the 1st respondent as per direction of SEBI had conducted an independent audit through M/s Ernst and Young. The report of Ernst & Young also states that the shares in question are amongst the suspicious transfers carried out by 3rd Respondent (Page 117-118). 1st respondent also intimated that they have lodged FIR against the 3rd respondent and their concerned persons before the Local Police Station in Ahmedabad being FIR No.90/2016.

9. The appellant submits the respondents have illegally transferred his shares to a third party as there is no signatures of the appellant on the Form No.SH 4(Securities Transfer Form) (Page No.226 of Reply). The appellant further submits that no proof of delivery of shares certificate has been given. The appellant submits that when the shares have been transferred without the signature of the appellant and without shares certificate then it is said to be bad transfer. The appellant further averred that when the 1st respondent has admitted irregularities with respect to the 3rd respondent regarding share related operations including the appellant and also filed a police complaint against 3rd respondent and SEBI vide order dated 22.3.2016 restrained 3rd

respondent and entities linked with it from buying, selling or dealing with the security market either directly or indirectly till further directions because dividends and shares belonging to rightful shareholders/investors were transferred to the persons related to the management of 3rd respondent on the basis of transfer deed which is without appellant signatures without original share certificate makes this a clear case to quash and set aside the impugned order and to restore the appellants name in the member register of 1st respondent.

10. The appellant submits that when the 1st respondent itself states unequivocally that there are apparent, illegal, suspicious transfers by the 3rd respondent and the 1st respondent sees such suspicious, without signature and that too without original share certificate and anomalies makes it clear that the 3rd respondent is hand in glove with the respondent Nos1 company and therefore, also, the Tribunal ought to have exercised the jurisdiction vested in it by directing the 1st respondent to issue duplicate share certificates and the impugned order is required to be quashed and set aside.

11. The appellant has stated that in the case of M/s Manah Tradelink Pvt Ltd (Page 26) wherein transfer of shares is set aside and the company is directed to rectify the member register with the appellant's name alongwith the number of shares after bonus etc and has also directed the respondent to pay the accrued dividend to the applicant. The appellant has stated that the Tribunal vide the impugned order dated 9th June, 2017 has directed that the appropriate remedy lies with the civil court which itself is bad in law. The appellant submitted that the Tribunal has neither referred to nor considered the judgements cited by the appellant, therefore, the impugned order suffers

from non-consideration of binding judgement and, therefore, the impugned order is required to be quashed and set aside.

12. Reply has been filed by 1st respondent. 1st respondent submitted that they deny all the averments, allegations and submissions made in the appeal save and except those which are admitted here. 1st respondent submitted that they are relying upon facts and contentions of the reply filed before National Company Law Tribunal, Ahmedabad. 1st respondent has also relied upon the order dated 17.8.2017 passed by this Appellate Tribunal in Company Appeal (AT) No.228 of 2017 –***Hasmukh Bachubhai Baraiya Vs Symphony Ltd & Others.***

13. We have heard the learned counsel for the parties and perused the entire record.

14. Learned counsel for the appellant submitted that he is a shareholder of 1st respondent and holds 5000 equity shares as 30.6.2015. The appellant argued that he has never transferred/sold these shares to anyone. The appellant argued when the shares were split, 1st respondent sent these shares to his address. Since he has changed his address from Anantapur to Hyderabad so these shares were not received by him and were returned back “undelivered” to the company. The appellant argued that the undelivered share certificate is already lying with 1st respondent, and hence it is not possible to transfer the alleged share certificate to anyone and/or 6th respondent by 3rd respondent.

15. The appellant argued that his shares have been misplaced and, therefore, he sent a request to the 2nd Respondent for issuance of duplicate shares and for updation of the new address vide letter dated 12.9.2016 (Page

84). The appellant also intimated vide letter dated 28.9.2016 (Page 94) 1st and 2nd respondent for sending bonus shares at his new address which were announced by 1st respondent in July/August, 2016. 2nd respondent vide letter dated 5.10.2016 intimated the status of his shares and sought certain information. The appellant further argued that all the required documents were sent to the 2nd respondent and he also demanded bonus shares issued by the 1st respondent but the same were not provided by the 2nd respondent.

16. The appellant argued that that 1st respondent intimated that their former Registrar and Transfer Agent i.e. 3rd respondent had indulged into illegal activities of transferring and dealing of the shares of the 1st respondent and SEBI instituted suo motu proceedings against the 3rd respondent. 1st respondent also intimated that the shares belonging to the appellant were transferred to some other person and the said shares are in the list of “suspicious transfers” as made during the period of 3rd respondent. The appellant further argued that the independent auditor Ernst and Young, appointed by 1st respondent on the instructions of SEBI to conduct investigation also confirmed that 3rd respondent has done suspicious transactions fraudulently without the knowledge/confirmation/consent of the appellant. The appellant argued that the Respondents instead of cooperating with the appellant, who is a shareholder, created hurdles and troubles in issuance of duplicate share certificate. Therefore, the appellant has come before the Appellate Tribunal for seeking directions as prayed for.

17. Learned counsel appearing on behalf of 1st respondent submitted that the present appeal deals with disputed questions of facts and issues which are sub-judice and matter of investigation. Therefore, the relief prayed cannot

be granted under a summary procedure, more particularly under Section 58 and 59 of the Companies Act. Learned counsel for the 1st respondent argued that it denies that it had received “Undelivered” share certificate of the appellant at its company address or that it was/is in the custody of the 1st respondent. The learned counsel submitted that the appellant has not disclosed that the appellant has made an online complaint to SCORES (the online complaint redressal port of SEBI). Learned counsel further argued and admitted that the 3rd respondent had indulged into certain fraudulent and illegal transactions and the shares being subject matter of this appeal are a part of such fraudulent transaction per se. Learned counsel further argued that investigation into such issues is pending both before SEBI and police authorities and any orders passed by this Hon'ble Appellate Tribunal may be premature.

18. After hearing both the parties, we have come to the conclusion that the appellant is shareholder of the 1st respondent and holds 5000 equity shares as on 30.6.2015. On the issue that he has not transferred/sold these shares he has drawn our attention to Form No.SH-4, Securities Transfer Form at Page No.226 of the Reply filed by the 1st respondent. On careful scrutiny of the SH-4 form, which is the prescribed form for submitting to the company or its transfer agent for transfer of shares in the name of transferee, we find that the column where the signatures of the transferor is required, the said column is ‘blank’. This is the vital column and the said column is blank. Further there is no signature of witness on the said SH-4 form. The column for Name and Address of the witness who confirms that the transferor has signed before him in SH-4 is also blank. It goes on to prove that the transferor has not

signed the SH-4, Securities Transfer Form, which is mandatory for transferring the shares.

19. Further during the course of arguments, the appellant drew our attention to Annexure-C, Page No.117 of appeal paper book which is letter dated 21.6.2016 of Ernst & Young, auditor appointed by the 1st respondent, addressed to 1st respondent on the Report of audit dealing of 3rd respondent. On Page 119 of the Appeal Paper Book, the auditor has given his findings and stated that the transfer is suspicious due to the following reasons:

“-xxxx The old share transfer form based on which the transfer was executed was not available. We were verbally informed by Bharti Parikh that the old transfer form was available at the time of executing transfer. She said that, Indira had personally collected all original documents related to transfers done during the last four months in relation to Symphony for her review. Some documents were returned and in this case the old transfer form was not returned.

-The original share certificate was collected by Hemal R Panchamia on behalf of Rajgopal BV from Sharepro office on 21 Dec 2015. We were verbally informed by Bharti Parikh that she had received call from Indira stating that a person would come to collect the share certificate. Hemal had also collected his own share certificate (Folio No.024443 as mentioned in point v above).

-Further the address of buyer (Rajgopal BV) is of New Delhi as per securities transfer form available whereas the Hemal R Panchamia belongs to Jetpur (District Rajkot).

-We understand that share certificate can either be dispatched to registered address or can be collected by share holder himself and no share certificate can be given to unidentified person.”

The above observations of auditor also confirms that transfer is suspicious as the old share transfer form on the basis of which the transfer has been done is not on record and the share certificate were handed over to unidentified person and not to the transferee. This also proves that the transfer of shares is bad.

20. Learned counsel for the 1st respondent raised the issue that Mr.Rajgopal B.V. has not been made party to the appeal therefore the appeal may be dismissed. On this issue, as per the order of the Appellate Tribunal, Mr. Rajgopal B.V. was made a party and notice was issued to him but the report received says that there is “No such Person.”

21. During the arguments, learned counsel appearing on behalf of the 1st respondent argued that similar issue is decided by this Appellate Tribunal vide order dated 17.8.2017 in Company Appeal (AT) No.228 of 2017 filed by Mr. Hasmukh Baraiya against Symphony Limited. We have gone through the said case and judgement. The facts of the case in hand are different from the case cited by the 1st Respondent. In the cited case the party had approached the Civil Court whereas the case in hand the party has not approached the Civil Court. In the case cited by the 1st Respondent, the signature of the transferor on the transfer deed tallied with the specimen signature of the petitioner and in the present case there is no signature of the transferor on the SH-4, Transfer Deed. Further the earlier transfer deed has not been produced before this Appellate Tribunal. Therefore, the aforesaid decision is not applicable in the present case.

22. Learned counsel for the 1st Respondent argued that the issue of duplicate share certificate falls within purview of Section 46 of the Act read with Rule 6 of the Companies (Share Capital and Debentures Rules, 2004. The learned counsel for 1st respondent has drawn our attention to Rule 6(2)(a) which reads as under:

“the duplicate share certificate shall not be issued in lieu of those that are lost or destroyed, without the prior consent of the Board”

and without payment of such fees as the Board thinks fit not exceeding rupees fifty per certificate and on such reasonable terms, such as furnishing supporting evidence and indemnity and the payment of out of pocket expenses incurred by the Company in investigation the evidence produced.”

On careful reading of this Section, we noted that this Section is meant for issuance of duplicate shares in respect of “lost” or “destroyed” certificates. But in the present case this is not so.

23. We observe that the appellant is a shareholder which means he is the owner of the 1st respondent to some extent. Instead of helping its shareholder, 1st respondent is creating trouble for him and also harassing him. We do not appreciate and expect this type of attitude from 1st respondent.

24. After hearing both the parties at length, we have come to the conclusion that the appellant makes out a case that he has not transferred/sold the shares to anyone, therefore, he has right on his shares and also the bonus shares issued and the dividend declared during the past years. He needs to execute indemnity bond in favour of 1st Respondent, in case later on any other claimant comes forward and proves his title. It is admittedly on record that the 3rd respondent was appointed as Registrar & Transfer Agent of 1st Respondent on 1.3.2010 and his services were terminated on 11.6.2016 by 1st respondent. It is admitted by the 1st respondent that 3rd respondent has done the suspicious transaction and these suspicious transaction has taken place during the period the services of 3rd respondent were being utilised. Therefore, the 1st respondent, who had appointed 3rd respondent as its Registrar and Transfer Agent, is liable for the suspicious transaction which

have been committed by 3rd respondent. 1st respondent should protect the shareholder and should take action against the 3rd respondent and its officials for their wrong doings due to which the 1st respondent has been put to loss. 1st respondent cannot escape the responsibility saying that the other person has done misconduct so the shareholder may suffer.

26. In view of the aforesaid discussions the appeal is allowed. Impugned order dated 9.6.2017 passed by the National Company Law Tribunal, Ahmedabad in CP No.13/58,59/NCLT/AHM/2016 is set aside. 1st respondent is directed to restore the name of the appellant in the member register subject to appellant giving indemnity bond and issue duplicate share certificates and further directed to also allot the bonus shares, with accrued dividend till date. No order as to costs.

(Justice A.I.S.Cheema)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

Dated:24-7-2018

New Delhi

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