

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT) NO.220 OF 2017

(Arising out of order dated 13.01.2017 passed by the National Company Law Tribunal, (New Delhi Bench), New Delhi in Company Petition No.144(ND) of 2016.

IN THE MATTER OF:

Before NCLT

Before NCLAT

- | | | |
|---|----------------------------|---------------------------|
| 1. Montreaux Resorts (P) Ltd
D-367, 4 th floor,
Defence Colony,
New Delhi-110024. | 1 st Petitioner | 1 st Appellant |
| 2. Mr Vir Jai Khosla,
D-367, 3 rd floor,
Defence Colony,
New Delhi-110024. | 3 rd Petitioner | 2 nd Appellant |
| 3. Mr. Shiv Khosla,
D-367, 3 rd floor,
Defence Colony,
New Delhi-110024. | 4 th Petitioner | 3 rd Appellant |
| 4. Mr Neel Khosla,
D-367, 3 rd floor,
Defence Colony,
New Delhi-110024. | 5 th Petitioner | 4 th Appellant |

Vs

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| 01.M/s Ascot Hotels & resorts Ltd
15th floor,
Mohan Dev Building,
13, Tolstoy Marg,
New Delhi-110001. | 1 st Respondent | 1 st Respondent |
| 02.Mr. Vikram Bakshi,
157, Golf Links,
New Delhi-110003. | 2 nd Respondent | 2 nd Respondent |
| 03.Mr. Wadia Parkash,
C-220, Defence Colony,
New Delhi. | 3 rd Respondent | 3 rd Respondent |

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| 04.Mr. Vinod Surha,
B-43 Raju Park,
(Near Sainik Farms),
New Delhi. | 4 th Respondent | 4 th Respondent |
| 05.Mrs Mahurima Bakshi,
157, Golf Links,
New Delhi-110003. | 5 th Respondent | 5 th Respondent |
| 06.Ms Devika Bakshi(nee Talwar)
15 th floor,
Mohan Dev Building,
13 Tolstoy Marg,
New Delhi. | 6 th Respondent | 6 th Respondent |
| Also at:
B-2 Greater Kailash-I,
New Delhi. | | |
| 07.Ms Kanika Bakshi,
15 th floor,
Mohan Dev Building,
13 Tolstoy Marg,
New Delhi. | 7 th Respondent | 7 th Respondent |
| Also at:
157 Golf Links,
New Delhi. | | |
| 08.Mr P. Nagesh
142 Sahyog Apartments,
Mayur Vihar-I,
New Delhi. | 8 th Respondent | 8 th Respondent |
| 09.Mr Rajeev Puri,
C-109 Pratibha Apartments,
Plot No.1, Sector 23,
Dwarka
New Delhi-110075. | 9 th Respondent | 9 th Respondent |
| 10.Mr. Prem Singh,
R/o Village Chattiyan
Tehsil Kasauli,
Dist. Solan, H.P. | 10 th Respondent | 10 th Respondent |
| 11.Mrs Kaushalya Devi
R/o Vill Chattiyan
Tehsil Kasauli,
Dist. Solan, H.P. | 11 th Respondent | 11 th Respondent |

12.Mr Vini Ahuja, 12th Respondent 12th Respondent
 Bungalow No.1, Neelkanth Teerth,
 Road No.6, Near Diamond Garden,
 Chembur,
 Mumbai 400071

(Respondents No.13 to 41 were deleted vide order dated 17.11.2017)

Present: For Appellant:-Mr Deepak Khosla, Advocate.

For Respondents: - Mr. Raj Shekhar Rao, Mr Rishi Sood, Advocates for Respondent No.1.

Mr. P. Nagesh, Advocate for Respondent No.8.

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 13th January, 2017 passed by the Hon'ble National Company Law Tribunal, New Delhi Bench, New Delhi in C.P. No.144(ND) of 2017. The appellant has sought the relief of setting aside, quashing and setting aside the impugned order dated 13th January, 2017.

2. The brief facts of the case are that the appellant company M/s Montreux Resort was incorporated on 13.4.2005 by Mrs Sonia Khosla and Mr. Vini Ahuja. One of the objects of the appellant company was to develop a Holiday Resort at Kasauli on land belonging to Mr. R.P. Khosla father-in-law of Ms Sonia Khosla. In terms of business arrangement, it was proposed that 2nd respondent would infuse investment for developing the project and would be a majority shareholder. Agreements dated 31st March, 2006 was signed between the parties. Respondent No.2 to 4 were inducted as Directors. It is alleged that Respondent No.2 further allotted shares to his wife and

daughters i.e. Respondents No.5-8, in an attempt to fraudulently usurp majority control of the appellant company under the garb of increasing its capital. It is further alleged that the 2nd Respondent, during his tenure as the Director of the 1st Appellant got sale deeds of various pieces of land parcels executed in favour of 1st respondent or his nominees instead of getting it executed directly in favour of 1st appellant. It is also alleged that 2nd respondent being a majority stake holder in the 1st respondent has set up competing business with that 1st appellant, breaching the fiduciary relationship and the trust reposed in him by the appellants. Therefore, appellants had filed Company Petition No.144(ND) 2016 before the National Company Law Tribunal (hereinafter referred to as the Tribunal) under Sections 241-246 of the Companies Act, 2013 read with Sections 397, 398 read with Section 402 and 403 and 235 of the Companies Act, 1956 accusing 1st respondent of oppression and mismanagement. After hearing the parties, the Tribunal passed the following order:-

“12. I am unable to appreciate the arguments advanced by the petitioner. Firstly, in the absence of any resolution passed by the Petitioner No.1 company, the maintainability of the proceeding is vitiated by lack of authorisation to file the same. The company is a separate entity and cannot be represented through individual petitioners. Mr Khosla has relied upon a catena of judgements. Needless to say all these are proceedings pertaining to Suits and not to Company Petitions. Moreover, in a derivative claim the shareholders invoke their rights for wrongs done by their own

company for which the company is necessarily a defendant. The substance of allegations made by Petitioners 2 to 6 in a derivative capacity, for and on behalf of Petitioner No.1 can be adjudicated in civil proceedings only. The reliefs claimed are by way of Declaration or Injunction on principles of Non Compete between two business entities. The allegations of the petitioners are of breach of fiduciary relationship. The respondents controvert it and breach of an agreement. Such a dispute can be adjudicated only in civil proceedings.

13. Similarly, in respect of the locus of the other petitioners as shareholders, other than averments, there is no document to substantiate the Resolution approving the transmission of the shares of late Mrs Sonia Khosla, or the transfer of shares by Vini Ahuja in favour of the Petitioner. While the respondents rely on Courts directions and orders and admissions made in various pleadings filed in Courts negating such a step, the petitioner seeks to completely disregard them on grounds of being void orders or being factually incorrect.

14. Though the objections raised by the respondents on all three grounds find favour with this bench, their one point alone is sufficient to dismiss the present petition on grounds of maintainability. The petitioners not being the shareholders of 1st respondent company, cannot invoke the provisions of Sections 241-242 of the Companies Act, 2013. The provisions of the Act

***make it abundantly clear as to who can initiate such proceedings
Section 241 of the Companies Act 2013 is reproduced as below:***

“(1) The following members of a company shall have the right to apply under Section 241, namely:-

(a) In the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

Provided that the Tribunal may on an application made to it in this behalf, waive all or any of the requirements specified in clause(a) or clause (b) so as to enable the members to apply under section 241.

(b) Where any members of a company are entitled to make an application under sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.”

15.The petitioners have candidly admitted that neither petitioner No.1 nor the other petitioners are shareholders of Respondent No.1 company. I, therefore, find the present petitioner not maintainable.

16. It would not be out of place to observe that the allegations made in the present petition are almost the same as in CP No.114/2007, which is still pending adjudication on account of initiation of multiple proceedings. The petitioners seek to array herein several other parties who may be just remotely connected with Respondent No.2 and which he did not include in the earlier proceedings. The arraying of such parties in a proceedings under 241/242 of the Companies Act, 2013, is a total manifestation of misjoinder of parties and an absolute abuse of the process of law.

17. In the light of the above observations, this Company Petition is dismissed as not maintainable.”

3. Being aggrieved by the said order dated 13.1.2017 of the Tribunal the appellants have preferred this appeal. The appellants have sought the following reliefs:

i) Declare and hold by virtue of Article 141 of the Constitution of India that the impugned order dated 13.1.2017 passed by the Tribunal in Company Petition No.144 of 2016 titled Montreaux Resorts (P) Ltd & Ors Vs Ascot Hotels & Resorts Ltd & Ors to be a nullity in law, void ab initio as if non est, having been passed coram non iudice, as well as on fraud practised by the respondents, and in breach of audi alteram partem.

In the alternative:

ii) Declare and hold the impugned order dated 13.1.2017 passed by the Tribunal in Company Petition No.144 of 2016 titled Montreaux Resorts (P) Ltd & Ors Vs Ascot Hotels & Resorts Ltd & Ors to be a nullity in law, void ab initio as if non est, being in violation of a cardinal principle of natural justice when judged by the standards laid down by the Hon'ble Supreme Court in the case of Needle Industries (India) Ltd Vs Needle Industries Newey (India) Holdings (Ltd) AIR 1981 SC 1298-para 49.

In the alternative to all of the above:

iii) Strike down, quash and set aside the impugned order dated 13.1.2017 passed by the Tribunal in Company Petition No.144 of 2016 titled Montreaux Resorts (P) Ltd Vs Ascot Hotels and Resorts Ltd & Ors.

iv) Direct that the proceedings of the Hon'ble National Company Law Tribunal while adjudicating Company Petition No.144 of 2016 titled Montreaux Resorts (P) Ltd & Ors Vs Ascot Hotels & Resorts Ltd & ors shall be video recorded thereafter and at the cost of Appellant, and the recordings shall be preserved exclusively with the Hon'ble NCLT, with copies to be provided directly by it only to the review or appellate courts, as the case may be.

v) The cost of the appeal may be awarded to the Appellants(s).

vi) Pass ex parte orders and/or directions as prayed for above.

vii) Any further order or direction which this Hon'ble Appellate Tribunal may deem fit and proper in the circumstances of the case be issued in favour of the appellant;

4. Appellants have argued that the Tribunal has dismissed the company petition in relation to three preliminary objections raised by the respondents that the appellants have no locus standi to file the petition under section 241/242 of the Companies Act, 2013; second objection is that no resolution have been passed by the appellant company authorising appellant to sign, verify or institute the present proceedings. Third objection raised to the maintainability thereby questioning the locus of the appellants as shareholders of 1st appellant itself.

5. Learned counsel for the appellants argued that the respondents, even prior to issuance of notice, had challenged these factual assertions, raising 3 contentions. Learned counsel further argued that all these objections were raised by the respondent in the nature of preliminary objections, which at the highest can result in a rejection of the Company Petition and not its dismissal on merits. Learned counsel for the appellants further argued that on this ground alone the Appellate Tribunal may remand the parties back to the Tribunal to proceed with the Company Petition after removal of the defects, if any.

6. Learned counsel for the appellants argued that they are the shareholders of the oppressed/mismanaged company. Learned counsel further argued that the Tribunal should not have dismissed the petition without going into the merits of whether or not such contention raised by respondents that the appellants are not shareholders of the oppressed/mismanaged company, merely at the preliminary stage even prior to issuance of notice of the Company. Learned counsel for the appellant

therefore stressed that the order of the Tribunal warrants being set aside by this Appellate Tribunal as it had no jurisdiction to wade into an arena involving adjudication of factual assertions made by both the parties at the preliminary stage, prior to issuance of notice of the Company Petition.

7. Learned counsel for the appellants further argued that it was not the case of the appellants that they are the members/shareholders of the 1st respondent. Learned counsel for the appellants argued that the 1st respondent had been arrayed as a contesting respondent in context of its being the vehicle used by the other respondents to commit acts of oppression and/or mismanagement. Learned counsel for the appellants argued the Tribunal was entitled to accept this as an objection and it ought to have directed that 1st respondent stands removed from the array of parties, leaving it to the appellants to challenge this order, if so advised. Learned counsel for the appellants further argued that this was not a ground to dismiss the petition.

8. Learned counsel for the appellants argued that the fair and just opportunity ought to have been given to the appellants by the Tribunal to file a copy of the Board Resolution or the Tribunal ought to have directed that the appellant company stands removed from the array of the parties. Learned counsel for the appellants further argued that it was not a ground to dismiss the petition at the initial stage.

9. Learned counsel for the respondent argued that the appellants had no locus to file the company petition under Section 241/242 of the Companies Act, 2013 before the Tribunal below as they are not the shareholders of the

1st respondent. Therefore, they are not entitled to file the present appeal before this Appellate Tribunal. Secondly they are also not the shareholders of the appellant company.

10. Learned counsel for the respondents further argued that no resolution has been passed by the appellant company (original petitioner) to file the present appeal and the earlier company petition authorising appellant/petitioner to sign, verify or institute the present appeal/company petition. In the absence of any resolution, filing of the present appeal against the 1st Respondent and earlier petition is not maintainable.

11. Learned counsel for the Respondents raised the objection to the maintainability is questioning the locus of the appellants as shareholders of 1st appellant itself. The respondents repudiate that 2nd appellant is either a director or a shareholder of the appellant company. Learned counsel for the respondent argued that the agreement dated 31.3.2006 recording the transfer of major equity in favour of 2nd respondent, as also on the admissions made by the deceased wife of the Mr. Deepak Khosla (original 2nd petitioner) in various proceedings before different courts. Learned counsel for the respondents argued that 2nd respondent is holding 51% equity in the appellant company. Learned counsel for the respondent argued that this fact was disputed, therefore, the Hon'ble High Court of Delhi vide its order 29th February, 2008 restrained Mr. Deepak Khosla (original 2nd petitioner) from acting as the Managing Director or from holding any Board or Shareholders Meeting. Learned counsel for the Respondent further argued that even in the C.P. No.114/2007, which is still pending before the NCLT, directions were

given to maintain a status quo in respect of land as on 22.8.2007. Learned counsel further argued that in the light of the orders, the appellants claim to be shareholders on the basis of the transmission of shares of Late Mrs Sonia Khosla could neither be approved by the Board of Directors nor given consent to, restraining Mr. Deepak Khosla (original 2nd petitioner) from holding any Board Meeting. Learned counsel for the respondent also denied the submissions of the appellants (original 2nd petitioner) that he had purchased the shares of 12th respondent and pointed out that there is no document on record to substantiate either the said transfer or the transmission of shares in favour of any of the petitioners.

12. Learned counsel for the Respondent further argued that an attempt is being made to mislead the Appellate Tribunal with an attempt to improve upon the pleadings which are subject matter of Company Petition No.114 of 2007 which is still pending.

13. We have heard the learned counsel appearing on behalf of both the parties and perused the record.

14. Learned counsel for the appellants argued that they have not made any claim that they are the shareholders of the 1st respondent and it is not their claim. This is also the position pinpointed by the counsel for the respondent. Learned counsel for the appellants argued that they are not required to be shareholders of 1st respondent, as it is not 1st respondent whose affairs were alleged to have been mismanaged or conducted oppressively. Learned counsel further argued that the appellants agitating oppression and mismanagement of affairs of 'x' company must be shareholder of that 'x'

company, not of company 'y'. Learned counsel further argued at the highest, 1st respondent could have been stripped from the array of respondents instead of dismissing the petition. We have given a thoughtful consideration on this issue and it would have to be examined whether 1st respondent is a necessary party or not and if so the appellants (original petitioners) would have been directed to make suitable amendments. In the light of it we do not find that the dismissal of company petition at the preliminary stage on this would be justified and at best 1st Respondent could only be deleted from the arrays of the parties which also we have to reach a conclusion after some examination.

15. The other issue on which the company petition was dismissed raised in this appeal that No Board Resolution authorising representation of appellant company was presented. On this issue learned counsel for the appellants argued that No Board Resolution is required to be shown by shareholders of a Company claiming to act in the name of that company, on the principle of derivative rights to act for and/or on behalf of, and/or in the name of the company. Learned counsel further argued that at the highest appellants (original petitioners) could have been directed that the company shall not be allowed to be represented until such time a Board Resolution was presented or it could have been directed to stand stripped from the array of appellants. We are, therefore, of the opinion that the appellants (original petitioners) should have been given time to produce the authority to represent the company or it could have been directed to stand stripped from the arrays of the appellants. Further 2nd to 4th appellants have also an independent right to move the application for oppression and mismanagement against their

interest even if they are representing the company. Therefore, the dismissal of the petition that they do not have a Board Resolution etc would be a partial truth only which should not amount to denial of right of a shareholder to move an application for oppression and mismanagement.

16. The other issue raised by the Respondents was that the appellants are not shareholders of the appellant company. On the other hand, the appellants have stated that they are the shareholders of the appellant company on affidavit, therefore, the Tribunal would have directed the appellants to present the proof of their shareholding during the course of hearing and then should have come to the conclusion whether the appellants are shareholders of the appellant company or not.

17. This Appellate Tribunal vide its judgement dated 24th January, 2017 in the matter of **Anup Kumar Agarwal & Anr Vs Crystal Thermotech Ltd & Others** has held as under:

“A shareholder/member or group of shareholder/members without and notice or information cannot visualize or presume that his/their share(s) will be brought down to their disadvantage, which amounts to oppression and mismanagement. On such anticipation or presumption no petition under Section 397 or 398 of the Companies Act, 1956 can be filed. Such aggrieved shareholder(s)/member(s) can file the petitioner under Section 397 and 398 of the Companies Act, 1956 only after cause of action has taken place. If that be so, the day on which a petitioner under Section 397 and 398 is filed by

a shareholder/member, whose shareholding has been brought down below the requirement of having an aggregate of 10% out of the total shareholding, will be deprived to avail remedy under Section 387 and Section 398, without their fault. He will be remediless. In **'Bhagwati Developers Pvt Ltd'** and **'Rajahmundry Electric Supply Ltd'** aforesaid issue was not raised nor decided. For the reasons aforesaid, we are of the view that the law laid down by Supreme Court in **'Bhagwati Developers Pvt Ltd'** and **'Rajahmundry Electric Supply Corporation Ltd'** are not applicable in the case where an applicant alleges 'oppression and mismanagement' in bringing down his shareholding below the requirement of 1/10th of the total shareholding of the company, thereby deprived him of his right to sue.

28. For the reasons recorded above, we hold that in the cases where an applicant alleges that his shareholding has been brought down by way of oppression and mismanagement below 1/10th of the total shareholding without notice and knowledge then it is the duty of the Tribunal to determine whether the applicant had 1/10th of the shareholding prior to the date of alleged oppression and mismanagement. Such petition cannot be dismissed on the ground that the applicants shareholding is below 1/10th of the total shareholding of the Company on the actual date of presentation of the Company Petition."

18. In view of the above observations, we set aside the impugned order dated 13.1.2017 passed in Company Petition No.144/2016 and direct the Tribunal to rehear the company petition in view of our above observations. Parties are directed to appear before the Tribunal on 26 .11.2018.

(Justice S.J. Mukhopadhaya)
Chairperson

(Mr.Balvinder Singh)
Member (Technical)

New Delhi

Dated:02-11-2018

Bm