

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL (AT) No. 58 of 2017

[Arising out of order dated 31st January, 2017 passed by the National Company Law Tribunal, Principal Bench, New Delhi in C.P. No.104(MB)/2011.

IN THE MATTER OF :

**Den Nasik City Cable Network Pvt. Ltd.
& Others**

... Appellants

Versus

Milind Dayaram Kapse & Others

... Respondents

**Present: For Appellants : Shri Abhinav Vashisht, Senior Advocate with
Shri Rahul Dwarkadas, Ms. Prachi Dhanani,
Shri Sourabh Gupta, Shri Puneet Yadav and
Shri Sumit Bhadana, Advocates**

**For Respondents: Shri Saourabh Kalia and Ms. Swaridhi
Gogia, Advocates**

W I T H

COMPANY APPEAL (AT) No. 130 of 2017

[Arising out of order dated 31st January, 2017 passed by the National Company Law Tribunal, Principal Bench, New Delhi in C.P. No.104(MB)/2011.

IN THE MATTER OF :

Milind Dayaram Kapse & Others

... Appellants

Versus

**Den Nasik City Cable Network Pvt. Ltd.
& Others**

... Respondents

**Present: For Appellants : Shri Saourabh Kalia and Ms. Swaridhi
Gogia, Advocates**

**For Respondents: Shri Abhinav Vashisht, Senior Advocate with
Shri Rahul Dwarkadas, Ms. Prachi Dhanani,
Shri Sourabh Gupta, Shri Puneet Yadav and
Shri Sumit Bhadana, Advocates**

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

These cross appeals have been preferred by the contesting parties against common order dated 31st January, 2017 passed by the National Company Law Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'Tribunal') in C.P. No.104(MB)/2011. They were heard together and are disposed of by this common judgement.

2. The Company Petition was preferred by the Appellants -Milind Dayaram Kapse and others (Respondents in Company Appeal (AT) No. 58 of 2017-hereinafter referred to as 'Petitioners') against M/s. Den Nasik Citi Cable Network Pvt. Ltd. and others (Appellants in Company Appeal (AT) No. 58 of 2017- hereinafter referred to as 'Respondents') under Sections 397 and 398 of the Companies Act, 1956. In the said petition, the petitioners sought reliefs as per the amended petition.

3. The Tribunal by the impugned judgement dated 31st January, 2017, came to a conclusion that there appears financial irregularities in the company which is prejudicial to the interest of the Company and to find the loss on account of irregularities, passed following order :-

“10) Having considered the rival submission and upon careful analysis of the documents filed by the parties in support of their respective allegations and counter allegations, we have come to the conclusions that there appears financial irregularities in the company which is prejudicial to the interest of the company . However, all the loss to the company on account of financial irregularities in the company which is prejudicial to the interest of the company can be ascertained by an appointment of an Independent auditor who may conduct the audit of the company from the financial year 2008-09 and onwards to find out the exact loss caused to the company on account of siphoning, related party transactions and other misdeeds committed by Directors of the Company. As it is expert job we have not entered in details of allegations except few samples to conclude that there is prima facie case of financial mismanagement. Auditor shall enquire into the loss, if any, caused to the company and such loss, to be recovered from the party whoever is found responsible, from his/their personal resources and the amount so recovered will be paid to the Company. Respondent No. 3 to 7, Directors of Respondent No. 1 company are directed to provide inspection of accounts and records of

Respondent No. 1 company to the Auditor and also to the Petitioners who are shareholders of Respondent No. 1 company. The auditor shall give opportunity of hearing to both the parties. Respondent No. 3 to 7 directors of Respondent No. 1 company are directed to assist the auditor and furnish relevant documents as and when asked for. The auditors shall fix their remuneration in consultation with the Respondent No. 1 Company, to be paid by Respondent No. 1 Company. In case of any difficulty in implementation of the directions, liberty is given to file appropriate application before this Tribunal.”

4. The Petitioners have challenged part of the impugned order dated 31st January, 2017, wherein certain acts of oppression, *inter alia*, holding of Extra-Ordinary General Meetings (EOGMs) dated 16th March, 2013 and 15th February, 2016 has been declared legal and not oppressive. According to the Petitioners—Milind Dayaram Kapse and others, the Tribunal failed to notice the fabrication of documents and wrongful cessation of the first Petitioner as a Director of the Company and for that the Tribunal should have granted appropriate relief under Section 242 of the Companies Act, 2013.

5. Learned counsel for the Petitioners submitted that both the EOGMs held on 16th March, 2013 and 15th February, 2016 are only on paper to

maintain the record. They were conducted with pre-determination 'not to invest in digitalisation'. According to Petitioners, Den Nasik Citi Cable Network Pvt. Ltd. (hereinafter referred to as 'Company') never applied for Digital Addressable System License (DAS License) as they had no intention to ever take up digitalisation as they have already decided to incorporate in the 9th Respondent Company and diverted business therein.

6. It was also contended that the Tribunal wrongly held that notice was received by the Petitioners of such EOGMs dated 16th March, 2013 and 15th February, 2016 and failed to notice that the Company called the first meeting of EOGM on 2nd March, 2013, of which receipt of Under Postal Cover (UPC) was only produced.

7. According to Petitioners, the Tribunal failed to appreciate the protest letter dated 15th March, 2013 written by the petitioners wherein they lodged their protest for not attending the meeting there being a threat of life to the first Petitioner by Respondents and some of their members. Learned counsel for the Petitioners tried to highlight the activities of the Respondents, the majority shareholders and submitted that they have not invested a single penny for digitalisation and transferred the entire business to 9th Respondent Company.

8. Other alleged acts of 'oppression' were also highlighted, such as investment in Set Top Boxes (STBs), which according to the Petitioners, were not required as they were property of 2nd Respondent Company alone.

It was also submitted that the Respondents abused their power as directors with *malafide* intention in order to oppress the minority shareholders.

9. Learned counsel for the Petitioners submitted that the Tribunal, while partly allowed the Company Petition, disposed of the Company Petition in its totality without granting any relief to bring an end to the matters complained of.

10. On the other hand, according to the Respondents, the Tribunal rightly decided this issue, in so far as allegations regarding oppression of minority shareholders by majority of shareholders are concerned. The Tribunal noticed that despite clear knowledge of the EOGMs, the Petitioner-Milind Dayaram Kapse, *suo moto* chose not to participate and, therefore, bald allegation of the alleged breach of fiduciary duty of directors was not accepted by the Tribunal.

11. It was further contended that the Tribunal rightly held that the majority members (85.78%) having clearly decided not to invest further for digitalisation, and convert to digital mode, the Tribunal cannot interfere with the business decisions nor can compel the majority shareholders to do any business against their wishes.

12. The grievance of the Respondent Company (Appellant in Company Appeal (AT) No. 58 of 2017) is that the Tribunal though held that the Petitioners have failed to establish the allegation regarding fabrication of

documents and that the Appellant - Mr. Milind Dayaram Kapse, did not attend the Board meetings since August, 2008 and having rejected the prayer of the Petitioner-Milind Dayaram Kapse for declaring him as a director, wrongly closed the case.

13. The Respondents have challenged the same very impugned order on the ground that the Tribunal despite observing that a loan of Rs.10 Crores was sanctioned in favour of 10th Respondent which was never advanced, merely on presumption, observed that there appears to be financial irregularities in the Company.

14. It was contended that the Tribunal on the one hand appointed an independent auditor to ascertain financial irregularities, which is the job of an expert, on the contrary, the Tribunal without any reasoning, held that there appears to be financial irregularities.

15. We have heard the learned counsel for the parties and perused the records.

16. From the record, we find that the Tribunal, taking into consideration the evidence on record rightly held that notices of EOGMs in respect of meeting 15th February, 2016 were served on the Petitioners, except 12th Petitioner, and they did not choose to participate in the said meeting.

17. For coming to such conclusion, the Tribunal also noticed the consent order passed by the Hon'ble Bombay High Courts dated 4th February,

2016, wherein the Company was allowed to hold EOGM after giving due notice to all the shareholders. Hon'ble Bombay High Court in the consent order also observed that if any resolution was passed in the EOGM, the Company would not act until further orders from the Company Law Board. As the Petition was pending before the Company Law Board, the Board was requested to hear the case expeditiously. In compliance of the Hon'ble High Court's order, the Company again issued notices, including public notices in Newspapers, to all its shareholders informing them about the EOGM to be held on 16th March, 2013. From the record it is clear that the Petitioners sent a letter to the Company on 15th March, 2013, a day before the EOGM which was scheduled to be held on 16th March, 2013. The said letter shows that the Petitioners had prior knowledge of the meeting dated 16th March, 2013.

18. Taking into consideration the relevant facts including the investment made for digitalisation purpose and installation of digital headend in the premises of Mayur Plaza, exclusive property of 2nd Respondent and other records, the Tribunal rightly came to a conclusion that 'there appears to be financial irregularities in the Company which is prejudicial to its interest'. In the aforesaid background, the Tribunal ordered to appoint an independent auditor to ascertain financial irregularities and to conduct an audit of the Company from the financial year 2008-09 and onwards. In these circumstances, no interference is called for.

19. However, we agree with the submission made on behalf of the Parties that once independent action has been appointed to ascertain the financial irregularities, after report of the auditor, the Tribunal was required to notice as to whether financial irregularities were actually committed or not, and if there is irregularities they are prejudicial to the interest of the Company. In this background, we are of the view that the case is required to be kept pending, for appropriate order, as may be passed by Tribunal, after receipt of the report of the Auditor and notice to the parties.

20. For the reasons aforesaid, the last part of the impugned order, which reads as- "**C.P. No. 104/2011 is partly allowed, accordingly, without any order as to cost**", is set aside. The case is remitted to the Tribunal to proceed further taking into consideration the report of the Auditor for deciding as to whether there are financial irregularities in the Company committed by any of the party which is prejudicial to the interest of the Company and causing loss or not.

21. Both the appeals stand disposed of with the aforesaid observations and directions. However, in the facts and circumstances of the cases, there shall be no order as to costs.

[Balvinder Singh]
Member (Technical)

[Justice S.J. Mukhopadhaya]
Chairperson

NEW DELHI

23rd August, 2017

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