NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No. 360 of 2017

[Arising out of Order dated 4th September, 2017 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. No. 208/KB/2017]

IN THE MATTER OF :

1. Raj Singh Chopra, (Original Respondent No. 2)
Residing at A-123, Lake Gardens,
Kolkata – 700045.

2. Narpat Singh Surana, (Original Respondent No. 3)
Residing at 415, 416,
Bentick Chambers, 37A,
Bentinck Street,
Kolkata – 700 069.

3. Krishnendu Roy, (Original Respondent No. 4)
Residing at : 9, Budgebudge
South 24, Parganas,
Kolkata – 700 137.

4. Freyaship Services Private Limited, (Original Respondent No. 1)
Having its registered at :
416, Bentick Chambers, 37A,
Bentinck Street,
Kolkata – 700 069.

... APPELLANTS 1 to 4

- Versus -

1. Jagat Singh Chopra, ... (Original Petitioner No. 1)
Residing at A-123, Lake Gardens,
Kolkata – 700045.

2. Vikram Singh Chopra, ... (Original Petitioner No.2)
Residing at A-123, Lake Gardens,
Kolkata – 700045.

.... RESPNDENTS 1 & 2

Present: For Appellants : Shri Jayant Mehta, Shri Amit Kasera and Shri Sajal Jain, Advocates for the Appellants.

For Respondents: N.P.

J U D G E M E N T

A.I.S. Cheema, J :

This appeal is arising out of final orders dated 4th September, 2017 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata (hereinafter referred to as 'NCLT') in Company Petition No. 208/KB/17.

2. The Company Petition was filed by present Respondents Nos. 1 and 2 invoking Sections 58, 59, 210, 241 and 242 read with other provisions of the Companies Act, 2013 ('New Act' in brief). The Company Petition was partly allowed by the NCLT and the impugned order cancelled the purported allotment of 26000 equity shares which were made in favour of the Original Respondent No. 2 (present Appellant No. 1). By the impugned order, it was also held that the removal of Original Petitioners Nos.1 and 2 (present Respondents) as Directors was bad and their position was restored.

3. Aggrieved by the impugned order, present appeal has been filed. We will refer to the parties in the manner in which they were arrayed before the NCLT.

4. Original Respondent No. 1 – Freyaship Services Private Limited (FSPL) is a private limited company; Original Petitioner No. 1 – Jagat Singh Chopra, Original Petitioner No. 2 - Vikram Singh Chopra; Original Respondent No. 2– Raj Singh Chopra and Original Respondent No. 3- Narpat Singh Surana, incorporated the company. Original Petitioner No. 1 is father of Petitioner No.2 and Respondent No. 2. Original Petitioners Nos. 1 and 2 were holding

50.51% equity stake in the company. The Chopra family had other businesses and companies also. Their business was of dealing in freight forwarding and brokering. The business was running smoothly till the end of December, when disputes arose. The Petitioners and the Original Respondent No. 2 agreed to refer to the disputes for settlement in presence of independent persons. Accordingly, family settlement was entered into in the form of partition of business and residential house. Original Respondents/Appellants claimed that the parties went for arbitration by three persons, namely, Birendra Kumar Surana, Ashok Kumar Manot and Rajesh Kumar Chandak. On 22nd January, 2016, the Arbitrators with the consent of the Original Petitioners and Original Respondent No. 2 passed an award containing directions for division of several family assets and properties and also division of the existing family business including the companies and firms. These parties accepted the award and had to take steps to implement the same. The award was not challenged. As per the award, Original Respondent No. 2 (Appellant No. 1) was, *inter alia,* allotted the present Company to the exclusion of the Original Petitioners.

5. The appeal claims that after the said arbitration, the original Petitioners and Respondent No. 2 took several steps to comply with the arbitration award. The Company having been allotted to the Original Respondent No. 2, the Petitioners were not entitled to file any proceeding relating to the company. In fact, on July 6, 2016, the Arbitrators had, at the instance of the parties, laid down 'Steps of Execution of Arbitration Award' laying down

modalities to be performed by the parties to give full and final effect to the award. These parties consented to the same and even signed the same. According to the Appellants, Original Petitioners failed and neglected to take steps to transfer the shares in the Original Respondent No. 1 Company in favour of Original Respondent No. 2 and purported to continue as Directors of the company. Actually they ceased to be the Directors with effect from 19th October, 2016 in view of Section 167(1)(b) of the New Act and they have not attended any Board meeting after July 22, 2015.

The appeal claims that the Company Petition was filed making false and baseless claims. According to the Appellants, Original Petitioners had relinquished whatever right they had in the Company and could not claim any reliefs. The appeal refers to various disputes between the parties with reference to the acts of the parties after the arbitration award was passed. With reference to setting aside of the issue and allotment of 26000 equity shares made in favour of Appellant No. 1 (Original Respondent No. 2). The appeal claims that the NCLT failed to appreciate the binding arbitral award on the Original Petitioners and that they had no right and interest in the affairs of the present Company. For such reasons, the appeal has been filed to set aside the impugned judgment and order.

6. In this matter, notice was issued to the Respondents. It is stated that notice has been served on the respondents. The Respondent No.1 of the appeal (Original Petitioner No. 1) sent a few letters to the Registry in this Tribunal seeking time. This matter was adjourned on couple of dates but the

Respondents did not cause representation on their behalf nor have appeared. We have kept in view Section 422 of the New Act also which requires time-bound disposal of such appeal(s). We have thus proceeded to hear the learned counsel for the Appellants.

7. Learned counsel for the Appellants referred to the copy of the Company Petition as was filed before the learned NCLT where in the Synopsis, Original Petitioners pleaded as under :

> *"(2) The Respondent Company was carrying on it's business smoothly till December, 2015. Thereafter family disputes arose. The Petitioners and the Respondent No. 2 agreed to refer the disputes for the settlement by way of arbitration. On 22nd January, 2016 the arbitrators with the consent of the petitioners and respondent no. 2 passed an award containing directions for the division of several family business, assets and properties and companies. However, the Respondent No. 2 is not taking any steps to implement the said arbitration award."*

8. Reference was then made by the learned counsel to the Paragraphs 6 and 7 of the Company Petition, which read as under :

> *"6. In such circumstances, the Petitioners and Respondent No. 2 agreed to refer the entirety of the disputes for settlement by way of arbitration. As such,*

all three of us, approached the arbitrators and sittings were held in presence of both the Petitioners and the Respondent no.2. On or about January 22, 2016, the Arbitrators, with the consent of the Petitioners and Respondent no. 2, passed an award containing directions for the division of several family business, assets and properties and also division of the existing family business including the companies and firms amongst the three parties to the arbitration.

7. By and under the said award, the Petitioners were allotted the companies viz., M/s. M.L Chopra Shipping Pvt. Ltd., M/s. KVR Shipping & Logistics Pvt. Ltd. and M/s. Maverick Trading Pvt. Ltd. The Respondent No.2, on the other hand, was allotted M/s. Freyaship Services Pvt. Ltd. ("FSPL") and M/s. Freya Shipping Agencies Pvt. Ltd. ("FSAPL")."

9. Learned counsel submitted that the FSPL referred by the Original Petitioners is the present Company regarding which disputes have been raised. The learned counsel pointed out Annexure – A1 of the appeal which is said to be the Arbitration Award dated 22nd January, 2016. The document is in *Devnagri*. Translation of the same is said to be at Page 106 of the Paper-Book. Referring to Paragraph 3 of the award and reading the same with Paragraph 9, it is argued that the present Company had come to the share of

the Appellant No. 1 (Original Respondent No. 2). Learned counsel submitted that when this is so, the Petition making allegations of 'Oppression and Mismanagement' could not have been maintained for acts which are admittedly of a period after the Arbitration Award. Learned counsel submitted that the learned NCLT did not consider as to what would be the effect of the award on the matter. It is stated that the NCLT should have asked both the parties to go for execution. The counsel submitted that in the face of the award, even if the acts of Appellants with regard to the Company were to be questioned, the Original Petitioners cannot claim legal injury. The counsel further referred to the additional Paper-Book filed where at Annexure-A12-Copy of the Execution Petition No. 2 of 2017 has been filed. It is submitted that the Original Petitioners have filed the said Petition before the High Court of Calcutta for execution of the same award. The Paper-Book shows that even the Appellant No. 1(Original Respondent No. 2) had filed application under Section 17 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act' in brief) before the Arbitrators seeking interim measures till the award is enforced.

10. It has been argued by the learned counsel for the Appellants that in the order of the NCLT, it is not a finding of 'mismanagement' and if 'oppression' has to be held under Section 242, it would require series of acts. It is stated that only because Respondents (Original Petitioners) have extended unsecured loans in the Company to recover that the Company Petition under Section 242 could not be maintained. It has been argued that the Appellants

have done whatever they had to do under the award. Learned counsel referred to the impugned order to say that NCLT could see from the record that enhancing the capital base of the Company was in the interest of the Company but still went on to cancel the allotment of 26000 equity shares wrongly referring to Section 62(3) of the New Act. It is stated that the NCLT forgot that when Respondent No. 2 had extended loan to the Company, Section 81 of the Companies Act, 1956 ('Old Act' in brief) was applicable and so if the conversion was done by the Appellants, new Act Section 62(3) could not have been applied.

11. Even with regard to other finding of the NCLT holding that the removal of the Original Petitioners was bad in law has been questioned claiming that if the arbitral award is seen and the intention of the parties is seen, the finding on this count was not necessary. Learned counsel submitted that after the award was passed while the Original Respondent No. 2 resigned from the Directorship of the Company which was not allotted to him but this was not followed by the Original Petitioners. According to him, the present impugned order is in the nature of final order but the fact of the matter was that they can continue only till the award is implemented. Once the award is executed, the Original Petitioners have no right to continue as Directors.

12. In the impugned order, the learned NCLT took up two chief reliefs sought by the Original Petitioners. The points taken up were :-

"The petitioners have prayed for grant of multiple reliefs in the prayer portion of the company petition out of which chief reliefs are as follows :

(1) Cancellation of purported allotment of 26,000 equity shares on September 15th, 2016 in favour of the respondents on the premises that notices of EOGM and Board Meeting have not been served.

(2) Restoration of Petitioner No. 1 and 2 as director of the respondent No. 1 company who were illegally removed."

13. With regard to the first point, NCLT referred to the rival claims and then took up for consideration Section 62(3) of the New Act referring to Section 62(3) of the New Act along with Rule 13 of Share Capital and Debenture Rules, 2014 and the question considered by the NCLT was whether the Company can convert a loan into equity shares if at the time of raising the money, the company had not passed special resolution. It answered the question on this count observing that if the company had passed said special resolution at the time of raising of money then the Company can convert such loan into paid up capital of the company. Learned NCLT referred to the reply of the present appellants to observe that there was nothing to show that such resolution had been passed at the time of raising of loan and the requirement to file Form – MGT-14 for submission of special resolution with ROC had been followed, prior to the raising of the loan. NCLT thus invoked Section 62(3) of

the New Act. It was found that the purported allotment of 26,000 equity shares in favour of the Original Respondent No. 2 was required to be cancelled.

14. The learned counsel for the Appellants has questioned this invoking Section 62(3) of the New Act. Section 62 of the New Act deals with 'Further issue of share capital'. There is provision how Company having a share capital, can increase its subscribed capital by issue of further shares. Such shares are to be offered to persons, in the manner stated in sub-Section (1) of Section 62. Sub-Section (2) deals with notice and sub-Section (3) which has been relied by the NCLT reads as under :

> *"62. Further issue of share capital.—(1) Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered—*
>
> *xxx xxx xxx*
>
> *(3) Nothing in this section shall apply to the increase of the subscribed capital of a company caused by the exercise of an option as a term attached to the debentures issued or loan raised by the company to convert such debentures or loans into shares in the company :*
>
> *Provided that the terms of issue of such debentures or loan containing such an option have*

been approved before the issue of such debentures or the raising of loan by a special resolution passed by the company in general meeting."

15. The arguments of the learned counsel for the Appellants is that this Section could not have been applied and if at all Section 81 of the Old Act would be relevant, as according to him, when the loans were raised, at that time the New Act was not in force. We find that there is no substance in this argument. When the New Act is in force and conversion of loan has to be done, the conversion would be permissible only as per the new provisions. In view of sub-Section (3) of Section 62 when the question of issue of further share capital is taken up, conversion of loan into share capital would be permissible provided there was special resolution passed by the company in General Meeting which granted option as a term attached to the loan raised by the Company permitting conversion of such loan into shares of the company.

16. As regards the other issue regarding removal of the Petitioners as Directors, the observations of the learned NCLT are as under :-

"On perusal of the record the respondent not submitted a single document so as to show that statutory notice are issued to the petitioners of the Board meeting which were held before removing them from the office and / or not able to produce the notice of removal with effect from 19.10.2016. The burden of proof lies upon

the respondent to show that the notice was served upon the petitioner. Section 167(1)(b) of the Companies Act, 2013 mandates that :

"….. He absents himself from all the meetings of the Board of Directors held during the period 12 months with or without seeking the leave of absence of the Board….."

Thus, for the vacation of the Office of the Director under Section 167(1)(b), notices of the meeting which the Director is alleged to have not attended, is a must, vacation on the ground that the Director has failed to attend three consecutive meetings is invalid, if the meetings were not validly held, since, meetings held without notice are not valid."

17. At the time of arguments, we had referred to these observations of the NCLT but the learned counsel preferred to submit that when the award was already there and the present Company had come to the share of Appellant No. 1 (Original Respondent No. 2), the Original Petitioners were even otherwise required to resign as Directors and they could not have maintained the Company Petition.

18. At the time of arguments, when the learned counsel for the Appellants referred and relied on the arbitration award passed, we had posed a question to the learned counsel that once an arbitration award like present, has been

passed and the Company has been decided to be given to the share of Appellant No. 1 (Respondent No. 2), does it mean that the Petitioners next moment cease to be Directors ? The learned counsel fairly did not claim that the Petitioners would immediately cease to be Directors. We have carefully gone through the Arbitration Award which is without any reasons and quite cryptic and very much using telegraphic language. In most of the places, initials have been used and abbreviation for Companies, Individuals and Business and even HUF (Hindu Undivided Family) without explaining. The fact however, remains that such agreement has been entered into between the Original Petitioners and Original Respondent No. 2. But then the Company apparently had Respondent No. 3, Narpat Singh Surana also as Director. There is yet another Director Original Respondent No. 4 - Krishnendu Roy. The Arbitration agreement was between the Original Petitioners and Original Respondent No. 2. Even if the award between the Original Petitioners and Respondent No. 2 had been passed, there would be necessity to do further necessary compliances under the Companies Act for giving effect to the award. Only because a consent award is passed between these parties deciding to allot Company 'A' to one party and Company 'B' to another Party, it does not mean that the legal requirements to be followed under the Companies Act for transfer of shares etc. is given a go-bye. It is necessary for parties to either mutually comply/get complied with all the requirements under the Act for transfer of shares and due resignation from the Directorship etc. or it would be necessary to have recourse to the execution procedure. It cannot be that moment a document is executed, the

party goes and takes over the Companies and starts doing whatever he likes without following any procedure for transfer of shares, administration etc. Till the Petitioners resigned as Directors or were removed under established procedure under the Companies Act, or in execution, it will not be permissible not to send any notices to them and declare that they have not attended meetings and they discontinued to be Directors under Section 167 of the New Act. The Appellants themselves in the NCLT relied on Section 167 to claim that the Original Petitioners were not Directors. As such, they were bound to show that duly notified and called meetings were not attended to so as to attract Section 167 of the New Act.

19. It is clearly on record that the Original Petitioners have filed an Execution Petition before the High Court of Calcutta to give effect to the award. Even the Appellant No. 1 has filed application under Section 17 of the Arbitration Act as has been referred above. It would be more appropriate for the parties to cooperate with each other and comply with the Arbitration Award as has been passed between the signatory parties and do the necessary legal compliances as per the Arbitration Award for implementation/execution of the same. If it is done mutually, execution would not be necessary, otherwise the aggrieved parties would naturally have the option of the execution of the award. Till that time, it is necessary for the parties not to commit such acts as would attract violation of the provisions of the Companies Act, 2013. For such reasons, we are unable to interfere with the impugned order.

20. We decline to interfere with the impugned order. The appeal is disposed of accordingly. We, however, make it clear that the Appellant No. 1 and Respondents are free to either mutually comply with the Arbitral Award or take steps permissible, under provisions of the Companies Act, 2013 or resort to Execution under the Arbitration and Conciliation Act, 1996.

No order as to costs.

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

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

23rd January, 2018

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