

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT) NO.379 OF 2017

(Arising out of order dated 17.10.2017 passed by the National Company Law Tribunal, (New Delhi Bench), New Delhi in Company Petition No.348(ND) of 2017.

IN THE MATTER OF:

Before NCLT Before NCLAT

1. Aude Priya Donatelle Wacziarg Ep Engel A-50, Nizammuddin East, New Delhi-110013,	2 nd Respondent	Appellant
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Vs

1. Neemrana Hotels Pvt Ltd A-20B, Lajpat Nagar II, New Delhi.	1 st Respondent	1 st Respondent
2. Mr. Aman Nath, 12-Jaipur Estate (First Floor), Nizamuddin East, New Delhi-110013.	Petitioner	2 nd Respondent
3. Yatish Moncourt, B-58, Sector 57, Gautam Buddh Nagar, Noida-201301	3 rd Respondent	3 rd Respondent

Present: For Appellant:-Mr Jayant K. Mehta, Shri Ashish Dholakia, Ms Nidhi Mohan Parashar and Shri Roshan Chawla, Advocates.

For Respondents: - Mr. Vivek Malik and Shri Dhawal Jain, Advocates for Respondent No.1.
Shri Sudhanshu Batra, Senior Advocate with Shri Krishnendu Datta, Shri Ashish Verma, Ms Sahiba Pantel and Shri Aditya Mishra, Advocates for Respondent No.2.

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 17th October, 2017 passed by the Hon'ble National Company Law Tribunal, New Delhi Bench, New Delhi in C.P. No.348(ND) of 2017 preferred by 2nd Respondent under Section 241 and 242 of the Companies Act, 2013. The appellant has sought the relief of setting aside, quashing and setting aside the impugned order dated 17th October, 2017.

2. The brief facts of the case are that 1st respondent is a private limited company registered under the Companies Act, 1956 was incorporated on 09.07.1993 and having its registered office at New Delhi. Mr. Francis Wacziarg (the father of the appellant) and 2nd respondent were the founders, promoters and equal shareholders of 1st respondent. Both Mr.Francis Wacziarg and 2nd respondent were each holding 50% shareholding of 1st respondent. Mr. Francis Wacziarg passed away on 19.2.2014 and after death his shareholding devolved upon his two legal heirs i.e. appellant and son, Mr. Romain Wacziarg. Mr. Romain Wacziarg relinquished his shareholding in favour of appellant and thereafter the appellant settled a trust namely Wacziarg Family Trust, the beneficiary of which were Mr.Romain Wacziarg and his children. The trust is the holder of 25% shares in 1st respondent. Therefore, the appellant effectively represents 50% shareholding in the 1st Respondent. The appellant was appointed as a Director of 1st Respondent at the AGM dated 30.9.2014 and

thereafter only two directors namely appellant and 2nd respondent are on the Board of 1st respondent.

3. In October, 2017 the appellant came to know from independent sources that the 2nd respondent's office as a director in 1st respondent had become vacant on account of 2nd respondent having become disqualified under Section 164(2)(a) of the Companies Act, 2013.

4. Appellant acting in furtherance of her obligations under Section 174(2) of the Companies Act, 2013, appointed 3rd respondent on 12.10.2017 as an Additional Director to ensure the smooth functioning of the 1st respondent who's board consisted of only one director as the office of 2nd respondent became vacancy by operation of law.

5. On 16.10.2017, appellant received copy of Company Petition No. 348(ND)/2017 filed by 2nd respondent before the National Company Law Tribunal, New Delhi alleging oppression and mismanagement by the appellant seeking the following main reliefs:-

a) Issue appropriate orders, directions and reliefs under Sections 241, 242 and other applicable provisions of the Companies Act, 2013 to bring to an end the aforesaid acts of oppression and mismanagement being perpetrated by the Respondents, including the orders, directions and reliefs prayed for herein;

b) Pass an order declaring that the Board Meeting dated 12.10.2017 was illegal, invalid and non-est in the eyes of law and/or any other appropriate order or directions;

- c) Issue appropriate orders and/or directions declaring the appoint of Respondent No.3 as additional director of the Respondent No.1 as null, void and non-est in the eyes of law.
- d) Issue appropriate orders and/or directions declaring the Board Meeting dated 12.10.2017 and all decisions taken and/or resolutions passed at the said Board Meeting to be null, void and non est in the eyes of law.
- e) Permanent injunction restraining Respondents No.2 and/or 3 from acting, representing and/or holding themselves out as directors of the Respondent No.1 company;
- f) Permanent injunction and/or any other appropriate order of direction restraining Respondent No.2 and/Respondent No.3 from interfering in the day to day affairs of the Respondent No.1 company.
- g) Issue appropriate orders/directions restraining the Respondent No.2 from acting as Director of the Respondent No.1 company, inter-alia, under Section 167 of the Companies Act, 2013 for conducting the affairs of company in a manner which is prejudicial to the interest of the company.
- h) Issue appropriate orders and/or directions for reversal of all decisions taken as to the affairs of Respondent No.1 company from 12.10.2017 till the date of passing the order including calling back of any monies siphoned off by Respondent Nos 2 and/or 3 from the account of the Respondent No.1 company.

i) Pass a declaration that the Respondents have conducted the affairs of the company with an intent to defraud its members or other persons, have been guilty of fraud, misfeasance or other misconduct towards the Respondent No.1 company and/or its members and/or liable to be punished in accordance with law;

6. On 17.10.2017 the matter was listed. After hearing the parties the National Company Law Tribunal, New Delhi passed the following order:-

“Learned Sr. Counsels for the Petitioner have prayed for grant of ad-interim relief. Attention of this bench is drawn to the alleged acts of illegality attributed to Respondent No.2, whereby, she is stated to have unilaterally inducted Respondent No.3 as an Additional Director of the Respondent No.1 company, without convening a proper Board Meeting. This was done on the alleged misconception that the Petitioner had been disqualified as a Director in this case.

Notice of this Bench is drawn to a letter dated 12.10.2017, whereby it has categorically been affirmed by the office of the ROC, that the petitioner’s representation was considered and his disqualification has since been recalled.

Referring to the impugned acts in this case, it is argued that the decisions taken by the newly constituted Board is tainted with illegality, being in complete violation of the provisions of law, as the Additional Director was appointed by Respondent No.2 in her individual capacity and her decision was communicated by an email.

Further, it is averred that even in such an event where a sole Director is on the Board, an EGM can be called for passing a Resolution of a one point Agenda i.e. of appointing an Additional Director. In the present case, several resolutions have been passed to the alleged detriment of the company. Ld. Counsel for the Respondent on the other hand has refuted the submissions made on behalf of the Petitioner on the grounds that there is no illegality since as on that date, Respondent No.2 was the only Director of the Respondent Company as the Petitioner was disqualified in terms of provisions of Section 174(2) (should be 164(2)) of the Act r/w Section 167(1)(a) of the Companies Act. She also holds the 25% equity (the other 25% equity is held by her brother's trust) and resolutions were passed for conducting the business of the Respondent Company.

Be that as it may, the fact that the disqualification of the Petitioner was an apparent error, cannot strip him of his rights, nor vest Respondent No.2 with the right of passing resolutions as done in the present case. Her actions appear to have been made in haste. Without questioning her bonafides, prima facie, her actions can neither be justified, nor be said to be in accordance with law. Accordingly, it is directed that Status Quo ante 12.10.2017 be restored. All decisions taken subsequent to 12.10.2017 and thereafter are hereby set aside. The Petitioner being a Director shall be on board for all decisions to be taken henceforth.

Reply be filed by the Respondents within three weeks.

To come up on 16th November, 2017 for final arguments.”

7. Being aggrieved by the said order 17.10.2017 the appellant has come in appeal seeking the following relief:-

a) Set aside the impugned order dated 17.10.2017 passed by the Hon'ble National Company Law Tribunal, New Delhi in petition bearing No.(IB)348(ND) of 2017; and/or

b) Pass any other order that this Hon'ble Tribunal may deem appropriate to pass in the interest of justice, equity and good conscience.

8. The appellant have stated that the impugned order does not give any final and conclusive reasons for setting aside the decision of the Board of 1st Respondent after 12.10.2017. The appellant further stated that the impugned order being final in nature is a non-speaking order.

9. The appellant stated that the office of 2nd respondent as a Director in 1st Respondent company, having become vacant, the appellant bona fide appointed 3rd respondent so that the Board of 1st respondent is functional. The appellant further stated that the office of the 2nd respondent as a director in 1st respondent became vacant by operation of law.

10. The appellant further stated that the RTI, on which the 2nd respondent is relying upon, from the Ministry of Corporate Affairs merely states that the disqualification has now been removed and does not specifically state that the disqualification was void ab initio.

11. The appellant next states that the Learned Tribunal should see the malafide action of 2nd respondent who intentionally and deliberately withheld information about his disqualification as a Director from the Appellant.

12. The appellant stated that the Learned Tribunal has erred in holding that disqualification of 2nd respondent cannot strip him of his rights. The appellant further stated that the Learned Tribunal has failed to provide any reasons for arriving at this finding.

13. The appellant stated that the Learned Tribunal by ordering “*Status Quo ante 12.10.2017 be restored, all decision subsequent to 12.10.2017 and thereafter are hereby set aside*” has set aside all decisions taken on 12.10.2017 including but not limited to the appointment of 3rd respondent. The appellant stated that the Learned Tribunal could not have done so without adjudicating the merits and circumstances of each of these decisions.

14. The appellant stated that the appellant acted under Section 174(2) of the Companies Act, 2013 for the purpose increasing the number of directors. It is next stated that under the said provision, the appellant as a continuing director had the option to either increase the number of directors to that fixed for quorum or to summon a general meeting of the company. The appellant stated that the Learned Tribunal failed to appreciate the Section 164(2), 167(1) and 174(2) of the Companies Act, 2013.

15. The appellant stated without setting aside the appointment of 3rd respondent, the Tribunal could not have restored status quo ante as 3rd

respondent was appointed director to fill the vacancy in the Board that came to be created by the disqualification of the 2nd respondent.

16. The appellant stated that the impugned order passed by the Tribunal is prima facie a final order and the same has been passed without the reply of the appellant. The appellant stated that the Learned Tribunal could not have granted the final relief at the time of admission of the aforesaid company petition.

17. Reply has been filed by 2nd respondent. 2nd respondent has stated that being aggrieved by the series of actions of the appellant the 2nd respondent has filed Company Petition before the Hon'ble Tribunal.

18. 2nd respondent stated that the appellant by trying to take advantage of an error which has been committed by Registrar of Companies vide an email dated 12.10.2017 at 08.48 AM appointed 3rd respondent as an Additional Director and after usurping complete control of the company, took a series of decisions like suspending the CEO and terminated the services of two senior consultants, which were detrimental to the interest of the company. 2nd respondent stated that he had never vacated his office as a Director of 1st respondent. 2nd respondent further stated that the impugned order dated 17.10.2017 passed by the Tribunal has been passed by it in exercise of its wide powers under Section 242(4) of the Companies Act, 2013.

19. 2nd respondent stated that on 17.10.2017 a detailed hearing had taken place before the Hon'ble Tribunal and hearing both the parties the learned Tribunal had passed the impugned order which is a well reasoned and

speaking order. Appellant was unable to give explanation as to how the appointment of Additional Director can be made vide an email as against in a Board Meeting.

20. 2nd respondent stated that the appellant herein in addition to instant appeal, as a counter blast, has also filed a Company Petition bearing C.P. No.401(ND)/2017 on the ground that the appellant herein was being disallowed by the 2nd respondent to participate in the affairs of the 1st respondent. The Learned Tribunal has issued notice and granted some interim reliefs to the appellant. 2nd respondent stated that the impugned order has been passed in due consideration of law.

21. 2nd respondent stated that his name had appeared in the list of disqualified directors prepared by ROC on account of an apparent error. 2nd respondent further stated, without prejudice, that the said disqualification if at all was only in respect of company in which it had arisen and did not extend to any other company. 2nd respondent stated that he had never vacated his office in other companies except Ashok Brother Impex Pvt Ltd. 2nd respondent stated that he always remained the director of 1st respondent and there was no occasion for the appellant to have acted in the manner she had acted and appointed an Additional Director in terms of Section 174(2) of the Companies Act.

22. Rejoinder has been filed by the appellant. The appellant stated that in terms of press release dated 12.09.2017 issued by the Ministry of Corporate Affairs, it has been stated that upon suffering disqualification under Section 167 of the Companies Act, 2013, the office of the Director shall fall vacant. The

same also states that the disqualification under Section 164 of the Companies Act, 2013 is by way of operation of law. The appellant stated that once the office of 2nd respondent became vacant, 2nd respondent could not automatically become a director even if the ROC states that the disqualification has now been removed even though the ROC has no power to remove such disqualification. The appellant further stated that the disqualification incurred is not by virtue of the name appearing in the list, but due to the fulfilment of the conditions mentioned in Section 164 of the Companies Act, 2013. The appellant stated that it is not the ROC that disqualifies directors, but the fulfilment of conditions present in the statute that causes the disqualification.

23. The appellant stated that Companies Act, 2013 does not vest the ROC with any power to cause removal of disqualification incurred under Section 164 of the Act. The proper legal course for the removal of disqualification was to challenge the said defaulters list before a Court of Law. The appellant further stated that, as per para 63 of Company Petition, 2nd respondent had filed a Company Petition No.71(ND)/2013 seeking for the removal of the name of the Petitioner from the list of disqualified directors and the Hon'ble NCLT was pleased to issue Notice to the ROC in the said application on 09.10.2017. The appellant stated that 2nd respondent did take some steps but later on 2nd respondent withdrew the said application and sought to rely on the reply received under RTI dated 12.10.2018, which stated that the disqualification had now been removed.

24. The appellant stated that this Appellate Tribunal vide order dated 14.11.2017 had directed that 2nd respondent will not take part in any meeting of the Board of Directors, which relate to policy decision of the 1st Respondent. The appellant stated that 2nd respondent having been restrained from participating in the policy decision of 1st respondent, malafide refused to even share the policies of the company with the appellant. The same is recorded as part of the report of the Local Commissioner appointed at the request of the appellant by order dated 16.11.2017 in CP No.401(ND)/2017.

25. During the course of hearing 2nd respondent was given an opportunity to place certified copy of the application and concerned record/order from the office of ROC which formed the basis for issuance of RTI response dated 12.10.2017. 2nd respondent filed copy of RTI application dated 4.5.2018, RTI response bearing No.RTI/April 2018/PP/143 dated 16.5.2018.

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

27. Learned counsel for the appellant argued that the Board of 1st respondent consists of two directors namely appellant and 2nd respondent. 2nd respondent was disqualified under Section 164(2)(a) of the Companies Act from being a Director from 1.11.2014 to 31.10.2021 by the Ministry of Corporate Affairs in September, 2017. 2nd respondent did not intimate 1st respondent and the appellant about his disqualification and continued to be director of 1st respondent. Learned counsel further argued that this act of 2nd respondent has exposed the company as well as appellant to penalties and legal action, by continuing as director. The Learned counsel for the appellant

further argued that in para 63 (Page 85 of the Paper Book) of the Company Petition, 2nd respondent has admitted that he had filed company petition No. 71(ND)/2013 before the NCLT, New Delhi praying for removal of his name from the list of disqualified directors in the matter of **Ashok Brothers Impex Pvt Ltd.** Learned counsel for the appellant argued that he has not removed 2nd respondent as director of 1st respondent but he was disqualified in terms of provisions of Section 174(2) of the Act read with Section 167(1)(a) of the Companies Act, 2013. Learned counsel for the appellant further argued that as the office of 2nd respondent as director having become vacant, therefore, the appellant bona fide appointed 3rd respondent so that the Board of 1st respondent is functional. Learned counsel further averred that the RTI from the Ministry of Corporate Affairs merely states that the disqualification has now been removed and does not state that the disqualification was void ab initio. Learned counsel for the appellant further argued that the appellant acted under Section 174(2) of the Companies Act for the purpose increasing the number of directors as the appellant had the option to either increase the number of directors to that fixed for the quorum or to summon a general meeting of the company.

28. On the other side, learned counsel representing 2nd respondent argued that the appellant by trying to take advantage of an error which has been committed by ROC, vide an email appointed 3rd respondent as director and that the 2nd respondent had never vacated his office as a Director of 1st respondent. Learned counsel for the respondent argued that the appellant convened a purported Board Meeting on 12.10.2017, for which no notice of

the said Board Meeting was given to 2nd Respondent, and the decisions taken therein are illegal and against the interest of the company. Learned counsel for the 2nd respondent argued that the name of the 2nd respondent appeared in the list of disqualified directors prepared by ROC on account of an apparent error. Learned counsel for the 2nd respondent further argued, without prejudice, that the said disqualification if at all was only in respect of company in which it had arisen and did not extend to any other company and the 2nd respondent has never vacated his office in other companies, except Ashok Brother Impex Pvt Ltd. Learned counsel for the respondent further argued that the appointment of 3rd respondent as director was not in accordance with law. Learned counsel for the 2nd respondent further argued that by RTI response, the ROC intimated that the matter was considered and the name of the 2nd respondent, which was wrongly put in the list of disqualified directors by the ROC, from the disqualified directors was removed. Learned counsel further stated that they have filed the certified copies of these documents as additional affidavit.

29. A perusal of the impugned order which we have reproduced in para 6 (Supra) makes it clear that at initial stage of the petition itself and even before the appellant-respondent could file reply the impugned order declared that it was a fact that the disqualification of the petitioner was an apparent error. Now in the company petition filed by the respondent/original petitioner it can be seen that the respondent was pleading by referring to developments with regard to the other company M/s Ashok Brother Impex Pvt Ltd as to how there were orders of Company Law Board because of which account statements

could not be filed of that company and that the name of respondent/original petitioner came to be entered in the list due to a technical error. The respondent-original petitioner referred to the same as technical error due to orders of Company Law Board. There is no dispute in arguments before us, that regarding the fact that the appellant acted on list as has been filed as Annexure A-2, Page 27 of the Appeal. The pleadings of the respondent-petitioner that it was due to technical error or what, is yet to be tested in the petition.

30. Respondent No.2-original petitioner before us has filed additional affidavit (Diary No.5059) to say that on 22nd September, 2017 he had moved the Registrar of Companies with reference to the removal of his name and the name of other directors of M/s Ashok Brothers Impex Pvt Ltd. He referred to copy of order dated 9.5.2013 of CLB in CP No.71/2013 (Page 471 of Appeal) and copy of order dated 28.5.2013 (Page 472) of the Appeal which have been filed with Company Petition to argue that there was stay on holding of meetings because of which the statutory compliances could not be done. It is argued that this was brought to the Notice of ROC to claim that his name is wrongly entered in the list. With the additional affidavit Respondent No.2-original petitioner has filed a copy of the documents from the record of Registrar of Companies to show that ROC dealt with the matter of not only Respondent No.2 but also of other companies for removing the disqualification where "Management Dispute" or stay order was there or matter was under consideration of NCLT. At the stage at which the present litigation is standing, we are not entering into the dispute whether ROC could "remove

disqualification”. The dispute raised in the present matter is that the entering the name of the respondent No.2/petitioner in the list of disqualified director was a technical error. Original Petitioner is showing document that ROC did act upon his representation. ROC could do so or not will be matter in issue. That would be matter for consideration in the petition. At this stage we are not entering into the arguments of automatic activation of disqualification provisions as looking to the fact referred to by the parties before us, it would have to be decided whether in fact and in law the disqualification had been incurred.

31. If the disqualification of original petitioner whether it was in fact and in law is yet to be decided, so is the question whether the appellant could or could not have legally appointed Respondent No.3 as Additional Director by sending off an email. The case put up by the appellant is that in view of Section 174 when she was the only director left she could appoint another Additional Director. Section 174(2) of the Companies Act, 2013 reads as under:

(2) The continuing directors may act notwithstanding any vacancy in the Board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing directors or director may act for the purpose of increasing the number of directors to that fixed for the quorum, or of summoning a general meeting of the company and for no other purpose.”

If the above sub-section is perused when the quorum fell below the minimum required, in the meeting the decision which was required to be taken was limited to increasing the number of directors to that fixed for the quorum or to take decision regarding the summoning a General Meeting of the Company. Here, prima facie by an email Respondent No.3 was appointed. Whether this can be said to be in compliance of the provisions of the Act, is yet to be finally decided. Apart from this when it is apparent that the appellant with Trust of her brother holds 50% shareholding and the other 50% was being held by the original petitioner, whether appellant acted fairly the moment she came to know about the name of the original petitioner to be in the list of disqualified directors is mater of consideration. When the company had only two directors, and shareholding was equally divided between the two groups, prima facie, fairness required consultation with the original petitioner to ask if he would nominate a person of his choice. This does not appear to have been done. We are concerned with the interest of the Company because in the CP No.401(ND)/2017 which has been filed by the appellant after the present petition, NCLT has passed the order dated 15.11.2017 (Annexure A filed with counter affidavit, Diary No.2704) and where it is recorded that it was not in dispute that the business of the company under the Respondent No.2 i.e. the present original petitioner had prospered over the years.

32. Sub-Section (4) of Section 242 of the Companies Act, 2013 reads as under:-

(4) The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.

Keeping in view this provision, prime consideration for NCLT should have been and which is now our consideration because of this appeal is that the interim order needs to concentrate on regulating the conduct of the company's affairs on such terms and conditions as are just and equitable. At the time of notice in the present appeal vide orders dated 14.11.2017 we had directed that the 2nd respondent-original petitioner may continue as director for day-to-day affairs of the company but will not take part in any of the Meeting of the Board of Directors which relates to policy decision of the company. Now when we are disposing this appeal, we find the operative order of the impugned order was not correct as it was in the nature of final orders which could not have been passed at the interim stage. We intend to give directions so as to balance the equities between the parties.

33. For the above reasons we pass the following order:-

The impugned order is quashed and in its place it is directed that the 2nd respondent-original petitioner will continue as director alongwith the appellant. The appointment of Respondent No.3 as Additional Director/Director is stayed. The decisions taken by original Respondent No.2 and 3 subsequent to 12.10.2017 are also stayed till the decision of the company petition. We request NCLT to appoint, during the pendency of the company petition, an independent Director to the company on remuneration

similar to other directors who will ensure compliances by the Company with provisions of the Companies Act and Rules. The Independent Director would have casting vote in the meetings, (keeping interest of the company in view) in case of any disagreement between the original petitioner and original respondent No.2 of the company petition.

34. The observations made by us in this judgement relating to the dispute are on prima facie for the purpose of deciding this appeal and shall not weigh with the NCLT at the time of deciding the Company Petition. There shall be no orders as to costs.

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

(Mr.Balvinder Singh)
Member (Technical)

New Delhi

Dated: 10 -8-2018

Bm

