NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT) NO.123 OF 2018

(ARISING OUT OF IMPUGNED ORDER DATED 01.01.2018 PASSED BY THE NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HYDERABAD IN C.P. NO.78/2012 (T.P. NO.67/HBD/2016)

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
1. Triumphant Institute of Management Education Pvt Ltd 2nd floor, Siddamsetty Complex, 95B, Parklane, Secunderabad 500003.	1st Petitioner	1st appellant
2. Triton Education & Learning Pvt Ltd, 2nd Floor, Siddamsetty Complex, 95B, Parklane, Secunderabad 500003.	2nd Petitioner	2nd Appellant
Versus		
1. Inspire Educational Services Pvt Ltd, 2nd floor, Siddamsetty Complex, 95B, Parklane, Secunderabad 500003.	1st Respondent	1st Respondent
2. A.R.K.S. Srinivas, H.No.1-8-75, R.K. Colony, Temple Alwal, Secunderabad 500010.	2nd Respondent	2nd Respondent
3. P. Rahul Reddy, 1-7-1237, Street No.3, Advocates Colony, Hanamakonda Andhra Pradesh	3rd Respondent	3rd Respondent
4. The Vistamind Education Pvt Ltd, 2nd floor, G.K. Shivaswami Complex, No.861, 80 ft. Peripheral Road, 8th block,		

Koramangala
Bangalore 560095 4th Respondent 4th Respondent

For Appellant:- Mr. Jayant Mehta, Mr Rohan Swarup and Mr Diggaj Pathak, Mr. Kunal Vats, Mr. Shubhankar, Advocates.
Respondents: - Mr. Ritin Rai, Mr Saransh Jain, Mr. Madhavam Sharma, Respondent No.1 to 4.

JUDGEMENT

Mr. BALVINDER SINGH, MEMBER (TECHNICAL)

1. The appellants, original petitioners, have filed this appeal under Section 421 of the Companies Act, 2013 being aggrieved by the impugned order dated 01.01.2018 passed in CP No.78/2012 (TP No.67/HDB/2016) filed in National Company Law Tribunal, Hyderabad Bench, Hyderabad (NCLT in short) whereby the Company Petition has been dismissed vide impugned order.

2. 1st appellant, original petitioner, under the brand name of "TIME" has a country wide reputation of being the premier Institute for coaching for management entrance examinations and other competitive examinations. The appellant had used the franchising model to expand its business in various cities. The franchisees use all this intellectual property to run the courses under the guidance and supervision of the 1st appellant. In return the franchisees pay to the 1st appellant a "fee royalty" which is a fixed percentage of the fee collected from the students, and "Material royalty", which is sum paid per set of study material indented by the franchisees. This amount per set varies from course to course and from time to time.

3. 2nd and 3rd respondent showed their interest in being franchisees of 1st appellant for Kolkata city. Therefore, it was mutually decided among 1st appellant and 2nd and 3rd respondent to form ***"Inspire"*** as a joint venture

company in which 1st appellant will hold approximately 40% shares, 2nd respondent would hold 60% shares approximately and Mr. Manek N. Daruvala, a director of 1st appellant had subscribed to 100 shares. The date of incorporation of the Inspire Educational Services Pvt Ltd is 25.3.2003.

4. This company took over the business of a partnership firm, in consideration for which 2nd and 3rd respondent was allotted certain shares.

5. Shares were further allotted in 2005 and the shareholding pattern was changed to approximately 33.33% each for 1st appellant, 2nd respondent and 3rd respondent.

6. In 2009, 100 shares held by Mr. Manek N. Daruvala were transferred to 2nd appellant. The shareholding pattern as on 25.7.2009 was as under:-

	No of shares held	%age of shares held
TIME PVT LTD	59900	33.28
Triton Education & Learning Pvt Ltd	100	0.05
ARKS Srinivas	60000	33.33
P Rahul Reddy	60000	33.33

7. The Board of Directors of Inspire consists of three directors namely the 2nd and 3rd Respondent and Shri P. Viswanath, who is a nominee director of 1st appellant. 2nd and 3rd respondents being in majority, therefore, have complete control over the decisions taken by the Board.

8. 1st appellant and 2nd and 3rd respondent entered into a Shareholders Agreement dated 14.8.2002 (Page 114 to 120) thereby agreeing that 2nd and 3rd respondent would not, while the agreement in force, enter into a competing business.

9. 1st respondent entered into a franchise agreement for the area of Kolkata with the 1st appellant in 2003 for a period of 3 years which was renewed thereafter from time to time. Last renewal was on 19.4.2011 w.e.f. 1.4.2011 till 31st March, 2014 (Page 103 & 110). The agreement has a clause which states that 1st respondent shall not engage in a competing business during the pendency of the agreement but it can only do with the prior permission of 1st appellant.

10. 1st respondent carried on coaching for CAT, other MBA entrance exams, coaching for MAT, coaching for bank PO and bank clerical examination. 1st respondent's performance in some of the course, namely CRT and Bank PO courses was poor and enough work was not done to tap the potential of these courses in Kolkata market, therefore, the 1st appellant exercising its rights under Franchise Agreement decided to terminate these courses and it was discussed in the meeting of the Board of Directors of 1st respondent on 20.4.2012. It was decided by the 1st respondent to withdraw from the franchise of 1st appellant and proposed resolution which was passed. 1st appellant vide email dated 30.4.2012 stated that the issue was not discussed in the manner in which it was set out in the email dated 25.4.2012 (Page 122) 1st appellant vide email dated 13.5.2012 (Page 125) stated the issues that needed to be sorted out. 1st appellant also stated that it relieved 1st respondent of some of the obligations it had undertaken under the Franchise Agreement.

11. Being aggrieved of the actions of the 2nd and 3rd respondent, 1st appellant filed company petition before the NCLT, Chennai under Section 397, 398, 402, 406 read with Part XI and other applicable provisions of the Companies Act, 1956 praying for the following reliefs:

> a. Direct the second and third Respondent to give up all interests on the Fourth Respondent, in all capacities, including as directors or shareholders either directly or through their associates or affiliates.
>
> b. Restrain the Second and Third Respondents from diverting any further business of Inspire to the Fourth Respondent.

c. Direct the Second and third Respondent to make good the loss of Rs. 10 Crores suffered by the First Respondent due to the diversion of the First Respondents' business to the Fourth respondent.

d. Restrain the Fourth Respondent from employing any of the employees of the First Respondent at the instance of the Second or Third Respondents.

e. Direct the Second and Third Respondent to refrain from any or omission that may cause detriment to the Petitioners or First Respondent Company; and

f. Appropriate orders be made under and in accordance with Sections 402 and Schedule XI to the Companies Act, 1956.

12. Reply was filed by the Respondents refuting all the allegations levelled against them by the 1st appellant. After hearing both the parties Hon'ble NCLT passed the impugned order dated 1.1.2018. Relevant part of the impugned order is as under:

"37. We have perused the pleadings of the parties, materials placed before the Bench and based on the arguments, the CP No.78/2012 (TP No.67/HDB/2016) is dismissed with the following observations:

a) With regard to the first prayer i.e., to direct, the 2nd and 3rd respondents to give up all interest in the 4th respondent in all capacities, including as Director or shareholders either directly or through their associates or affiliates are without any basis, justifiable grounds, established with cogent reason. Therefore, the Bench rejects the above prayer of the petitioners.

b) With regard to the second prayer of the Petitioners i.e. restricting the 2nd and 3rd Respondents from diverting further business of Inspire to the 4th Respondent, the Bench is of the view that in the present competitive world choices are plenty

and to choose the interest of his or her choice based on various parameters, criteria as perceived good for them. Therefore, the above said prayer is also without any merits and therefore rejected.

c) The Petitioners prayer to direct the 2nd and 3rd Respondents to make good the loss of Rs.10 crores suffered by the first Respondent business to the 4th Respondent, is without any proof, supporting documents for a huge amount of Rs.10 crores etc. In the absence of the same the Bench is not inclined to grant the prayer as sought by the petitioners.

d) With regard to the 4th prayer of the petitioners is also without any merit since choosing an employer is of choice of the employees. After liberalisation of the economy, many opportunities are available for any of the job seeker/aspirants and because of establishment of number of companies in private sectors, changing of the company in the same sector, industry, peer group is very much available and changing of employer is also frequent, especially in private sector. Therefore, freedom of choosing an employer cannot be curbed by this Tribunal.

e) The Respondents have also submitted that in their advertisement they advertised only as Centre Director and not as Director/Board of Directors of the R1 company. It is also necessary to add that designation in small companies, certain sectors like IT, Hospitality and Service sector etc the Position of Director is even below position of General Manager and not to be treated as Director of the Board. Therefore, the Respondents submission that they have advertised as only Centre Directors of the franchise of the 1st Respondent Company may not be of much prejudicial to the petitioners companies.

f) In view of the above discussions/observation other prayers of the petitioners are also rejected."

13. Being aggrieved by the said impugned order the appellants have preferred this appeal.

14. 1st appellant stated that the even before termination of the Franchise Agreement, 2nd and 3rd respondent incorporated 4th respondent company alongwith three others, with its registered office at Bangalore and operating from Bangalore, Chennai, Kolkata, Mysore, Lucknow and Kanpur. The objects of the Fourth Respondent are similar to that of 1st respondent. Further the Memorandum and Articles of Association of 4th respondent evidencing the fact that the 2nd and 3rd respondent are Directors and shareholders of the 4th respondent.

15. 1st appellant further stated that they received communication from their franchisees in Bangalore, Chennai and Mysore intimating that they would like to discontinue the Franchise Agreement. 1st appellant stated that on investigation it revealed that 4th respondent had been incorporated with major stake holders in the franchisees of the 1st appellant in these cities. 1st appellant stated that it made blatantly clear that the 2nd and 3rd respondent had only used the cancellation of the Bank PO and CRT courses as an excuse to terminate the Franchise Agreement.

16. 1st appellant stated that the 4th respondent also issued advertisement that were specifically targeting 1st appellant and made furious attempts to woo students to continue with them instead of with the new Franchisees of the 1st appellant. 1st appellant submitted that in the advertisement issued by 4th respondent, 2nd and 3rd respondents refer to themselves as "Ex-Director, TIME, Mumbai and "Ex-Director, TIME –Kolkata". This is highly misleading since they were never directors of the 1st appellant and were only centre directors of the franchisees of the 1st Respondent.

17. Ist appellant stated that 1st respondent has been blatantly mismanaged by 2nd and 3rd respondent. A number of employees has been shifted to 4th respondent and they have got the employees to sign resignation letters and have been immediately employed by the 4th respondent. The other mismanagement of 2nd and 3rd respondent is that they never disclosed to the

Board of Directors that they had other business ventures. 1st appellant stated that the 2nd and 3rd respondent have violated the non-compete clause in the Articles of Association to further their personal interests. 1st appellant further stated that the 2nd and 3rd respondent are using the same premises from where 1st respondent was imparting coaching to the students at Kolkata and the same is being done in the name of 4th respondent.

18. The appellant has filed the present appeal seeking the following reliefs:

a) Set aside the impugned order dated 1.3.2018**.**

b) Direct the 2nd and 3rd respondent to give up all interests in the 4th respondent, in all capacities, including as directors or shareholders either directly or through their associates of or affiliates.

c) Restrain the 2nd and 3rd respondent from diverting any further business of Inspire to the 4th Respondent.

d) Direct the 2nd and 3rd respondent to make good the loss of Rs.10 crores suffered by the 1st respondent due to the diversion of the First Respondent's business to the 4th Respondent.

e) Restrain the 4th respondent from employing any of the employees of the 1st Respondent at the instance of the 2nd and 3rd respondent.

f) Director the 2nd and 3rd respondent to refrain from any act or omission that may cause detriment to the petitioners or First Respondent Company.

g) Such other further order (s), Direction(s) as may be deemed fit and proper under the facts and circumstances of the present case; and

h) Award cost(s) and damages as this Hon'ble Tribunal may deem fit and proper.

19. Appellant has stated that while passing the impugned order no reasoning for conclusions arrived have been given and the NCLT has failed to consider the contentions of the appellant in fact or in law.

20. Appellant has stated that 2nd and 3rd respondent being directors of 1st respondent have acted in violation of Article 43 of the Articles of Association by incorporated 4th respondent having the identical objectives and business as 1st respondent while continuing to be shareholders of 1st respondent.

21. Appellant stated that the 4th respondent was incorporated on 12.3.2012 whereas the franchisee agreement was only terminated by the 2nd and 3rd respondent on 25.4.2012.

22. Appellant stated that the 2nd and 3rd respondent have attempted to ride on the goodwill and reputation of the Appellants by representing themselves as "Ex-Director –TIME and 2nd and 3rd respondent issued various advertisement for promotion of 4th respondent.

23. Appellant stated that it is the understanding of 2nd and 3rd respondent that to remain a shareholder of 1st respondent and at the same time running a competing business would qualify as a conflict of interest.

24. Appellant stated that it was a premeditated act that were taken to specifically target the business of 1st respondent. Appellant stated that 2nd and 3rd respondent did not want to share the profits of the business with the other shareholders, and joined hands with other franchisees of the 1st appellant to divert the business of the company. Appellant stated that the 2nd and 3rd respondent are liable to compensate the 1st respondent for the loss/diversion of business due to their breach of duties.

25. Common reply has been filed on behalf of the Respondent No.1 to 4. It is stated that the 1st respondent company has not been conducting any operational activities from past 5 years. It was running with Nil profit and only incurs operational expenditure for payment of auditor's fees, lawyers' fees and statutory compliances. In fact, the status of the 1st respondent is dormant company. It is stated that in the interest of not only Respondents but also the appellants that 1st respondent is wound up.

26. Respondents stated that the 1st appellant had unilaterally cancelled the conduct of GATE courses which was otherwise made available to all other

franchisees of 1st appellant (Page 88). Respondents further submitted that 1st appellant being a shareholder in 1st respondent started its own venture (direct outlet) in Kolkata. 1st appellant targeted the market and business of 1st Respondent in Kolkata and introduced its direct outlets in the city which operated in direct competition with 1st respondent.

27. Respondent stated that the 1st appellant was unwilling to continue its franchise with 1st respondent in Kolkata and therefore, as a prelude to its then upcoming start up venture, it devised a plan to discontinue Campus Recruitment Training and Bank Probationary Officer Courses with 1st respondent. It is stated that the decision to withdraw the CRT and BPO courses by 1st appellant was clearly an arm twisting tactic to compel the respondents to accede to their unreasonable terms (Page 89).

28. It is stated that the appellant have miserably failed to establish or make out a case of oppression on the basis of the documents/evidence adduced.

29. It is stated, without prejudice, that the instant dispute, at most, emanates from a Franchise Agreement and some other agreements entered into between the 1st respondent and appellant company and the same stands outside the ambit of Sections 241 and 242 of Companies Act, 2013.

30. Respondents stated that the 1st appellant has submitted that the 2nd and 3rd respondents have set up a competing business and made a concerted effort to divert business of 1st respondent. The appellant have failed to produce any evidence in support of the said allegation/suggestion that the 4th respondent was functioning during the subsistence of the business of 1st respondent.

31. Respondents have stated that the appellant have failed to provide any documents to establish the fact that the respondents have advertised themselves as “Ex-Directors” during the subsistence of the Franchise Agreement. Respondents reiterated that they were occupying the position of Directors of the centers, which were Franchisees of 1st appellant.

32. Respondent stated that the appellants have failed to establish as to how the respondents have made the employees of 1st respondent to sign resignation letters and thereafter appointed them in 4th respondent as alleged. It is submitted that the employees who had resigned from 1st respondent, one individual had joined 1st appellant and others had joined 4th respondent. Respondent had not exerted any influence on the employees and that employees had joined the 4th respondent pursuant to their own will and volition.

33. It is stated that 1st respondent had given up franchisee operations, which was accepted by 1st appellant, therefore, there was no need for the employees to continue and their resignation was in fact beneficial for 1st respondent as it reduced the costs of 1st respondent.

34. It is stated that actually the appellants, being the minority shareholders in 1st respondent, were controlling the affairs of 1st respondent. This is because the business of 1st respondent was to serve the 1st appellant as its franchisee. It is stated that 1st appellant is paid fee royalty, course royalty and the dividend for its shareholding. As such 1st respondent operates for the ultimate benefit of 1st appellant.

35. It is stated that the 1st respondent was unfairly treated and sabotaged by 1st appellant, under the Franchisee Agreement to the extent that 1st respondent's operations were near to being shut down, by requiring the 1st respondent to stop CRT and BPO courses without any reasons.

36. Respondent has submitted that 2nd and 3rd respondent have not contravened any provision of Article of Association, alternatively there has been no violation of the non-compete clauses.

37. 2nd and 3rd respondent submitted that the 1st respondent was not striped of its premises. 3rd respondent intimated vide email dated 29.5.2012 to 1st appellant's nominee director about the surrendering of the office premises and class room location to bring down costs, since 1st respondent

admittedly did not have any business upon the termination of the Franchise Agreement.

38. Respondents have stated that the impugned order is supported by cogent reasoning. At last the respondents prayed that the impugned orders deserve to be upheld.

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

40. Perusal of the record shows that in the appeal they have by and large repeated all their contentions which were raised in the company petition. Further apart from setting aside the impugned order all the reliefs are again the repetition.

41. Learned counsel for the appellant has argued that the impugned order passed by the NCLT is without any reasoning or analysis. On the other hand, learned counsel for the respondents have argued that the NCLT has rightly rejected the petition on justified grounds and the impugned order is supported by cogent reasoning.

42. We have gone through the impugned order and find that the impugned order contain the submissions/contention of the parties. Once it has been accepted by the appellant and the respondent that when this franchise agreement is terminated it will be unreasonable restriction on the part that one party will be restrained not to do anything which is similar to the appellant company, especially when no consideration has flown from appellant company and the respondent nor even there has been any agreement to either purchase or sell shares in the 1st respondent by both group of shareholders. We have also noted non-competing Clause at Para 43 Page 98, that the appellant has reserves its rights to directly or indirectly engage, invest or participate in or provide assistance to any person or entity which competes with the company in India or abroad. After the termination of the franchisees agreement, 1st respondent company being reduced to

virtually defunct company, restrictions on 2nd and 3rd respondent would not be justifiable.

43. The other issue argued by the learned counsel for the appellant that the respondents have violated Articles of Association of 1st respondent by running a competing business and diverting business from 1st respondent to 4th respondent

44. Learned counsel for the 2nd and 3rd respondents argued that as Article 43 Articles of Association and Article 2.4 of the Shareholders Agreement restrains only 2nd and 3rd respondent from carrying on a competitive business, no liability can be imposed on 1st respondent as they were not a part of this agreement. We have gone through Memorandum of Association and Shareholders Agreement at Page 131 and find that 1st respondent is not signatory to the agreement. Further an agreement in restraint of trade and commerce like present matter is bad in so far as it is unilateral in nature against only one part to the said agreements, which is in the present case. The restriction imposed on 2nd and 3rd respondent is one sided and lose its force as soon as 1st respondent has stopped doing the same business. Therefore, any alleged breach of an unreasonable restriction cannot be a ground of oppression and mismanagement. We find no force in the arguments of appellant, therefore, it is rejected.

45. Learned counsel for the appellant argued that 2nd and 3rd respondent have attempted to ride on the goodwill and reputation of the appellants by representing themselves as "Ex-Director- T.I.M.E." and they have promoted 4th respondent and sought to divert business away from 1st respondent.

46. Learned counsel for the Respondents argued that subsequent to the termination of Franchisee Agreement, 2nd and 3rd respondent referred to themselves not as "Ex-Directors" of 1st appellant but "Ex-Directors" of Centers managed by them under the Franchisee Agreement with 1st appellant.

47. We have perused the advertisement issued in the newspaper at Page 143 of the appeal paper book. We find that name of the centre such as

Kolkata, Chennai, Lucknow & Kanpur, and Mumbai is also mentioned with Ex-Director. It is a fact to be noted that 2nd and 3rd respondent have been working as Directors of Franchise Unit of TIME at Kolkata. After the franchise agreement is terminated the status of persons as Ex-Director of the Unit cannot be denied as it is a factual position as existed in the past. At the time of these advertisements it has been noted already termination of the franchise agreement has taken place and it has also been accepted w.e.f. 25.4.2012 (Page No.125) by the appellant company. After this position has been accepted, the right of the persons to use the word "Ex-Director" cannot be denied as it would represent their experience as well. Therefore, we do not see that there is enough ground to object to use of the word "Ex-Director". We see no irregularity in this matter. In any case, it can not be matter for consideration for consideration of question of oppression.

48. The other issue argued by the learned counsel for the appellant is that 2nd and 3rd respondents be directed to make good the loss of Rs.10 crores suffered by 1st respondent to 4th respondent.

49. Learned counsel for the 2nd and 3rd respondents that franchisee agreement was terminated because the 1st appellant was opening their outlet independently in Kolkata and no such loss has been suffered by the 1st respondent. Appellant has also not produced any supported documents to substantiate his allegations.

50. In the absence of any supporting documents for a huge amount of Rs.10 crores, the demand of the appellant is illogical. It could only be a wild guess for a loss. Having noted that few of the courses were withdrawn by the appellant and also having a right directly or indirectly engage, invest or participate in or provide assistance to any person or entity which competes with the company in India or abroad which does not restrict that the appellant to organise his own business especially as it has been contended that the TIME is a great name in the market. There would hardly be any hindrance in its organising its operation even when this franchisees agreement has been terminated. A well established name had come through being successful in

the competition. It would not be desirable that others are denied the same opportunity. After the agreement has been terminated there is no basis for this demand.

51. In view of the aforegoing discussions and observations we find no merit in the appeal. Accordingly, it is rejected. No order as to costs.

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

(Mr. Balvinder Singh)
Member (Technical)

Dated:14-2-2019
New Delhi

Bm