

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION**

Company Appeal (AT) No. 20 and 21 of 2017

(arising out of Order dated 18th January, 2017 passed by NCLT, Allahabad Bench in C.P.No. 75 (ND) of 2016 New Number TP 69/397-398/ALL/16/CLB AND C.P. No. 54 (ND) of 2016)

Sanjeev Agarwal and Anr.

.....Appellants

Vs.

**Shri Omkaleshwar Coloniseers Pvt. Ltd.
And Anr.**

.....Respondents

**Present: For Appellants: Mr. H.L.Tiku, Senior Advocate with
Mr. Subhankar Sengupta, Ms. Shilpi Chaudhary,
Advocates**

**Ms. Anju Jain with Mr. Hitesh Sachar, Advocates for
Syndicate Bank**

**For Respondent No. 2: Mr. Ashish Aggarwal with Ms.
Harleen Kaur, Advocates**

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA,J.

Appellants have challenged common judgement and order dated 18th January 2017 passed by the National Company Law Tribunal, Allahabad

Bench (hereinafter referred to as the 'Tribunal') in Company Petition No. 75(ND) of 2016 and Company Petition No. 54 (ND) of 2016.

2. By the impugned common judgement the Tribunal observed as follows and passed the following order: -

"8.7. Thus, in our considered view, if we examine the allegations and counter allegations individually, they may not strictly imply the acts of oppression or mismanagement, but certainly, if examined cumulatively in the discordant environment created by Petitioner and Respondent, would amount to oppression and mismanagement for compelling the Tribunal ordering liquidation of the company which is the perquisite of sec. 397 and 398 of the Act. If liquidation is ordered, the investment already made in the project will become a profligate outflow and if anybody had booked the flats already, he or they will be at loss. Therefore, instead of ordering liquidation, by virtue of powers vested in the Tribunal under Sec. 402 of the Companies Act, 1956 read with Sec. 242 of the Companies Act, 2013, we have to pass appropriate order for the future progression of the Company."

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9. Result: *Keeping in view the overall circumstances of the case, and the interests of the Company and of the*

prospective purchasers of the flats of the Company's project and those who have already booked the flats and the objective of Sec. 397, 398 and 402 of the Companies Act, 1956 read with Sec. 242 (2) (h) and (k) of the Companies Act, 2013 the following Order is passed:

1) (a) That the Syndicate Bank shall nominate one of its officers as Additional Director of the Company who shall coordinate with the present two Directors namely, Shri Sanjeev Agarwal and Shri Satish Kumar Singh to hold Meeting of the Board within 45 days and take decisions on the following subjects, besides the other issues pending between both the directors;

i) Appointment of additional director from any of the members;

ii) Proper utilization of the funds for the projects;

iii) To take steps for proper and timely implementation of the project;

iv) To review the financial soundness of the company to work out the ways and means to strengthen the company.

(v) to seek independent audit of the accounts of the company;

1. (b) Further the Board shall call for a Meeting of Members either as AGM or EOGM within the statutory time after the Board meeting as the above, for getting approval of the decisions taken in the Board meeting.

2) (a) Dr. Pawan Jaiswal, Practicing ICWA is appointed as observer of the Board Meeting, who shall supervise the service of notices of the Board Meeting (s) and the AGM/EOGM respectively, to have been in strict compliance of procedure and Rules, attend the meetings and report to the Tribunal whether the meetings were conducted in proper manner and the outcome of the same. The observer is empowered to seek necessary instructions or appropriate directions from this Bench as and when necessary for the smooth and effective convening of the meetings of the Board, AGM, or EOGM as the case may be.

2) (b) Both the parties shall pay a sum Rs. 25, 000/- (Rs. Twenty five thousand only) each to Dr. Pawan Jaiswal as his honorarium in advance besides reimbursing his traveling and incidental expenses;

3) (a) That the Petitioner in CP 54/16 Shri Sanjay Agarwal shall withdraw /waive his objection made to the Syndicate Bank against the disbursal of further loan amount forthwith positively within 15 days from the date of service of this Order. If he fails to do so, it is deemed that the said letter of

objection is withdrawn / waived and the Bank is at liberty to ignore the same. However, the Syndicate Bank is at liberty to take a decision on disbursal of the further amounts of loan on the basis of the outcome of the Board Meeting as above said and also on the basis of the financial health and repayment capacity of the Company and other parameters as per the Bank rules;

3) (b) The Bank is further expected to examine the feasibility of restructuring the loan facility according to the norms, provided the Board makes an application to that effect.

4) The Company shall report the compliance of the above order to the Registrar of Companies, Kanpur within 15 days from the date of the Board Meeting/ (s), AGM / EOGM as the case may be, as directed above;

5) That the Petitioners in the CP 54/16 and 75/16 shall report to the Registrar of Companies, Kanpur by filing certified copy of this Order within 30 days from the receipt of this Order;

6) All the applications pending as on today are hereby disposed off and merged with this common order;

7) Both the Company Petitions viz., CP 54/2016 and CP 75/2016 are disposed of accordingly and both the parties in both causes shall bear their respective costs.

*Typed by self, corrected by us, delivered in open
Court this Wednesday, the 18th day of January, 2017."*

3. The Company Petition No. 54(ND) of 2016 under section 397 & 398 of the Companies Act, 1956 was filed by respondent - Mr. Satish Kumar Singh. Another Company Petition No. 75(ND) of 2016 under section 397 & 398 was preferred by Appellants-Mr. Sanjeev Kumar Agrawal and Mr. Pranvir Pratap Garg.

4. Appellants were respondents in the petition preferred by respondent Mr. Satish Kumar Singh, whereas respondent - Mr. Satish Kumar Singh & Ors. were respondents in the petition preferred by appellants.

5. The brief facts of the case are as follows: -

There are four shareholders of M/s Shri Omkaleshwar Colonisers Private Limited (hereinafter referred to as Company). In the said Company the Appellant No.1 - Mr. Sanjeev Agrawal has 26.27 percentage of shares and Appellant No.2 - Mr. Satish Kumar Garg has 18.43 percentage of shares i.e. in total 44.70 percentage. The respondents jointly have 55.33 percentage of shares. There are two directors i.e. the 1st and 2nd appellants.

6. The appellants claimed that they brought huge funds amounting to Rs. 40.90,000/- but the 2nd respondent never contributed any amount. Mr. Satish Kumar Singh, respondent/petitioner had only given personal

guarantee in addition to mortgage of the land, for development of a residential project "Palm Heights", against the loan amount of Rs. 7,50,00,000/- as was taken from the Syndicate Bank.

7. In this petition No. 54 of 2016, respondent/petitioner - Mr. Satish Kumar Singh, raised allegations relating to acts of 'Oppression and Mismanagement', as follows: -

- i. After part of the loan was released by Syndicate Bank, the said amount was not utilized for the purpose it was taken and therefore, the Petitioner addressed the Bank on 11.2.2016 to stop further release of loan.*
- ii. The Respondent failed to convene meeting of the Board to avoid 'function' of the Board.*
- iii. Respondent No. 2 happened to be sole signatory of the Bank account, he had siphoned off about 30 lacks of the company funds and evaded to hold meeting to pass a resolution to make the petitioner also joint signatory to operate the bank account.*
- iv. The authorised capital was illegally increased from 11 lacks to 50 lacks without knowledge, information and notice to the Petitioners. For this no Board meeting or the AGM/ EGM of the members was*

convened for the approval of increase of the authorised share capital. The Respondent has signed SH7 Form showing falsely that on 5.3.15 EGM was held.

- v. The name of the Company was changed from Onkareshwar Colonisers Pvt Ltd to Omkaleshwar Colonisers Pvt Ltd on 9.12.2015 with adopting any resolution by the Board or in the EGM of the members of the Company. This is contrary to Sec. '13 91) which requires that a Special Resolution is necessary for change of the name of the company.*
- vi. For executing the project, the Respondent no. 2 did not obtain the approval of the Petition for finalization of civil contract, suppliers of construction material, suppliers of electrical, sanitary, cement and steel or for appointment of engineers etc and of sub-contractors, which amounts to oppression.*
- vii. The Respondent No. 2 has committed financial mismanagement by buying various materials at a much higher price, accepting 'kickbacks' and collected the money from the suppliers. He has also indulged in taking the bills for higher qualities of steel, cement and other material but received lesser*

quality and took differential amount in cash from the vendors.

- viii. During FY 2015-16, the Respondent No. 2 has raised funds from individuals including Mr. Ganga Sagar Singh, in a sum of Rs. 55, 99, 714, without authorization and approval from the Petitioner and no approval from the Board was given. Further, the Respondent no. 2 did not provide proper accounts relating to utilization of those funds.*
- ix. The Respondent No. 2 paid Rs. 5, 72, 715 to Vinod Kumar Singh one of the shareholders (Respondent No. 4 in CP75/ 16) without any reason or purpose, merely because, Mr. Singh happened to be close associate of Respondent No. 2.*
- x. Having collected huge amount towards booking of flats in Palm Heights, the Respondent No.2 has not account for that amount to the Company. He has refused to furnish account of those bookings.”*

8. It was also alleged that the acts of 2nd appellant was oppressive and amounting to mismanagement of affairs of the Company. It was also alleged that the appellants tried to induce one Mr. Vinod Kumar Singh as Director.

9. On the other hand, the 1st appellant Mr. Sanjeev Agrawal pleaded that he had not indulge in any acts of oppression or mismanagement against one or the other party.

10. On hearing the learned counsel for the parties the Tribunal framed the following questions: -

“Question No. 1: Whether increasing of authorised share capital from 11 lakhs to 50 lakhs is duly resolved in the Board meeting dated 5.2.2015?”

The Tribunal held: -

“5.2. Though, the petitioner was unable to show that he was not in Varanasi on 5.2.15, the burden is on the Respondent to prove that the Petitioner was present in the Board Meeting and signed in the minutes. The copy of original minutes of the meeting of the Board dated 5.2.15 is the best evidence in that respect which is not filed and no explanation is offered for non filing of that important document by the Respondent. Therefore, we hold that the Respondent is unable to substantiate his contention that the Board meeting was attended by Petitioner. Because there are only two directors, viz., the Petitioner No. 1 and Respondent No.2, there cannot be a Board Meeting in the absence of one of the Directors. Therefore, there is every reason to accept that the Petitioner was not informed about the Meeting of Board dated 5.2.15 and he was absent. Consequently, the minutes of the meeting shown in

Annexure 19 (page 334) of Reply paper Book is not a valid resolution of the Board to be acted upon.

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However, after increasing of the authorised capital, the additional equity shares are not allotted to anybody at the choice of the Respondent No. 2. Mere increasing the capital of the company without any attempt to dilute the share holding of the Petitioner or any other else of his group so as to reduce them to minority, does not lead to an inference that it is an act of oppression for the purpose of sec. 397 of the Act of 1956. To fortify our view, we have on hand the authority of Supreme Court where has considered in Dale 86 Carrington Investment (P) Ltd. and another vs. P.K. Prathapan and others. The Supreme Court having referred to certain earlier precedents held that:

"Further it was held that if a member who holds the majority of shares in a company is reduced to the position of minority shareholder in the company by an act of the company or by its Board of Directors malafide, the said act must ordinarily be considered to be an act of oppression to the said member. The member who holds the majority of shares in the company is entitled by virtue of his majority to control, manage and run the affairs of the company. This is a benefit or advantage which the member

enjoys and is entitled to enjoy in accordance with the provisions of company law in the matter of administration of the affairs of the company by electing his own men to the Board of Directors of the company"

The ratio evolved in Dale (supra) was followed with approval by Apex Court in Shri V S. Krishnan & Ors vs. M/s Westfort Hi-tech Hospital Ltd. & Ors.

Examining the case on hand, we find no pleading made by the Petitioner in CP 54/2016 to the effect that increasing of the authorised share capital was with a malafide view of reducing the petitioner to minority. Therefore, that circumstance, in our considered view, does not amount to oppression."

Question NO.2: Whether Change of name of the Company is without following the procedure?

In this regard the Tribunal observed: -

"6.4. Whether the change of name is legally done or not is a different question from the question, if such change is not legal, whether it will amount to oppression or mismanagement. In our considered view, mere change of the name of the company does not ipso facto amount to oppression or mismanagement as such unless it is established by the Company Petitioner that thereby, the interest of the members or the Company has been prejudicially affected. Such prejudice is observably absent. The Petitioner did

not explicate acceptably as to what is the loss or prejudice sustained by the petitioners or the Company. On the other hand, his own affidavit given to the Bank shows that in the best interests of the Company in order to get loan sanctioned to the company to complete the project, he has declared that there is no 'conspiracy' in the difference in the name of the company appearing in the sale deed and the certificate of incorporation. At the instance of the petitioner, therefore, there is no evidence of prejudice caused to the members or to the company by the change of the name. Whether the change will be approved by the Government or not is not an issue before us. We therefore hold that change of the company's name does not amount to oppression or mismanagement."

Question No. 3: Whether the Respondent No. 2 has resorted to financial mismanagement prejudicial to the company?

The question was discussed and held as under: -

"7.2. The Petition seldom show any further material averments to substantiate such a wild allegation. On the other hand, the Respondent in his pleading stated that complete bills/vouchers relating to the expenditure at the site were given to the Syndicate Bank, Varanasi who has issued a letter on 31.3.2016 about proper utilization of the loan amount. Though that letter is not found in the paper books, it is seen that Mr. Sanjay Mishra,

Engineer on 22.3.2016 has certified that the value of the construction was Rs. 3, 32, 00, 000/. Further some of the conditions of the loan agreement with the Bank were (i) the Company shall produce certificate from structure engineer (ii) payments should be into the Escrow/Collection account only; (iii)Release of term loan is subject to satisfactory physical and financial progress of the project duly certified by empanelled valuer and chartered accountant on quarterly basis and (iv) the company shall submit the periodic progress of work, advances received, margin brought in and percentage of completion in relation to the sanctioned plan, (see: Annexure 20 of Petitioners' paper book).

7.5. The 3rd instance cited by the Petitioner in his effort to brand the Respondent as to have mismanaged the affairs of the Company, is that Respondent raised funds from Ganga Sagar Singh (Rs. 55, 99, 714) and paid a sum of Rs. 5, 72, 715 to Mr. Vinod Kumar Singh and this was without authorization from the Board and without notice and consent of the petitioner.

7.6. The Respondent states that in order to meet the conditions of loan sanctioned by the Syndicate Bank, funds had to be infused for grounding the project and as the Petitioner was not willing to provide funds, the Respondent had to raise the funds from his brother-in law Mr. Ganga Sagar Singh without any interest for one year. In the rejoinder the Petitioner raised the ground that raising

this loan from Ganga Sagar is barred under sec. 73 of the Companies Act, 2013 read with Companies (Acceptance of Deposits) Rules 2014 and the said transaction will not fall under exempted borrowings. Further it is alleged in para 18 of the rejoinder that Respondent No. 2 and Ganga Sagar Singh failed to attach any evidence such as Bank accounts and personal Income Tax returns to show the loan given to the Company and therefore, "the contention of the Respondent No. 2 about deposit of money by them is denied-Respondent No. 12 put to strict proof of averments made herein".

7.7. Firstly, we have noticed inconsistency in the pleas of the petitioner. When in the Petitioner he is alleging that the Respondents have unauthorizedly borrowed from Ganga Sagar Singh, in the Rejoinder, he states that Respondent and Ganga Sagar ought to have filed their bank statement and I.T. returns to prove the factum of lending the money to the Respondents. These two averments are mutually inconsistent. Secondly, on an admitted fact, there need not be any evidence from either of the parties. The only question is whether raising a loan or deposit is illegal and if so, whether it amounts to mismanagement effecting prejudicially the interests of the company."

11. The Tribunal as a whole discussing the aforesaid facts taking into consideration the materials on record came to a definite conclusion that no

financial mismanagement with malafide intention of siphoning off company's funds was made. However, the Tribunal held that the allegations and counter allegations though may not strictly imply the acts of 'Oppression or Mismanagement', but if examined cumulatively in discordant environment created by the parties, would amount to "oppression and mismanagement" for compelling the Tribunal to order liquidation but that was not in the interest of the company and therefore passed the order, as noticed and quoted above.

12. Learned counsel on behalf of the appellants submitted that there were no acts of 'Oppression or Mismanagement' on the part of the appellants. Whatever the acts of 'oppression and mismanagement' was on the part of respondent - Mr. Satish Kumar Singh. It was contended that the EOGM of the Company was not called for increasing the authorized capital and without any decision of Board of Governors' and without any notice to the appellants EOGM, if any held. However, having noticed such submissions the Tribunal held that the action of the Company in no manner diluted the shareholding of any of the group.

13. Learned counsel appearing on behalf of the respondents submitted that a sum of Rs. 11.50 lacs was taken for increasing the authorized capital of the Company. As per sanctioned letter of Syndicate Bank, Corporate Branch, Varanasi, 65.30 percentage of total capital was shown as margin-term loan. Mr. Satish Kumar Singh, Mr. Sanjeev Agrawal and Pravin Kumar Garg all three were guarantors; the Bank was to provide approximately 34.70

percentage of the amount and rest 65.30 percentage amount was to be borne by the company. In spite of request made to the appellant to provide or induce money in the company they had not provided the amount. Therefore, loan was taken from one Mr. Ganga Kumar Singh to construct boundary wall of the company, which was given to the Company without any interest, and the amount was paid to one Mr. Kedar Nath, the contractor.

14. Having heard the parties and on perusal of record, we find that the Tribunal has dealt with the issue and rightly came to a conclusion that mere increasing of the authorized capital of the company without any attempt to dilute the shareholding of any one or other group does not constitute an act of oppression for the purpose of Section 397 of the Act 1956.

15. While dealing the question no.2, regarding financial mismanagement, the question whether it was prejudicial to the company or not, the Tribunal rightly held that the loan was raised not with any malafide intention, but to safeguard the interest of the Company to meet the requirements of terms and conditions stipulated by the Syndicate Bank and no loss or otherwise prejudice caused to any person or the Company in that transaction.

16. The Tribunal reinforced its view by the fact that a joint letter was written by appellants and the respondent to Syndicate Bank on 30th March 2015 stating that cost overrun and debt short fall/advance sale proceed short fall had been made by the promoters (company/directors), from its own sources.

We, thus find that the amount borrowed on interest free basis from Ganga Kumar Singh was a bonafide transaction.

17.. We also find that the appellants had written a letter dated 16th February 2016 to bank to freeze the account of the company which shows the nature of the appellants who tried to stall the ongoing progress of the company by freezing account. This is one of the ground on which one can deny any specific relief to the appellants. However, as the Tribunal has not given any finding against the appellants qua the letter dated 16th February 2016, we do not express any specific opinion in this regard.

18. We find no merit in these appeals, they are accordingly dismissed. Interim Orders passed earlier, including the order dated 18th January 2017 are vacated. The Syndicate Bank, Corporate Branch, Varanasi will proceed in accordance with the decision rendered by the Tribunal. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
31st March, 2017

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