NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 323 of 2018

[Arising out of Order dated 9th August, 2018 passed by the National Company Law Tribunal, Jaipur Bench in C.P. No. 11/JPR/2018]

IN THE MATTER OF:

Axestrack Software Solutions Pvt. Ltd.
Having its Registered office at:
310 Srigopal Nagar,
80 Feet Road, Gopalpura Bypass,
Jaipur, Rajasthan - 302018.

...Appellant

Vs

1. Harman Singh Arora
S/o Jatinder Singh Arora,
R/o 38 Ground Floor,
Poorvi Marg, Vasant Vihar,
New Delhi – 110057.

2. Mr. Abhit Kalsotra
S/o Ashok Kalsotra,
Flat No. 103, Tower 7, Unitech Escape,
Nirvana Country, Golf Course Road Extension,
Section 50, Gurgaon,
Haryana – 122 002.

3. Mr. Vignesh Sridharan
S/o Jayaram Sridharan
R/o Flat No. 1A-104, Princeton Estate,
Sector 53, Gurgaon,
Haryana – 122 002.

4. Mr. Vineet Singh
S/o K. K. Singh,
R/o Flat No. 310, Gate No. 5,
Sector A, Pocket B & C,
Vasant Kunj, New Delhi – 110 070.

5. Rahul Yadav
R/o 310, Srigopal Nagar,
80 Feet Road, Gopalpura Bypass,
Jaipur, Rajasthan – 302 018.

....Respondents

With

Company Appeal (AT) No. 243 of 2019

[Arising out of Order dated 29th August, 2019 passed by the National Company Law Tribunal, Jaipur Bench in I.A. No. 271/JPR/2019 in C.P. No. 11/JPR/2018]

IN THE MATTER OF:

Axestrack Software Solutions Pvt. Ltd.
Having its Registered office at:
310 Srigopal Nagar,
80 Feet Road, Gopalpura Bypass,
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5. Mr. Rahul Yadav
R/o 310, Srigopal Nagar,
80 Feet Road, Gopalpura Bypass,
Jaipur, Rajasthan – 302 018.

6. Mr. Sahil Yadav
R/o 310, Srigopal Nagar,
80 Feet Road, Gopalpura Bypass,
Jaipur, Rajasthan – 302 018.

7. Ms. Priya Choudhary
R/o 310, Srigopal Nagar,
80 Feet Road, Gopalpura Bypass,
Jaipur, Rajasthan – 302 018.

....Respondents

Present:

For Appellant: Dr. U. K. Chaudhary, Sr. Advocate with Ms. Manisha Chaudhary, Mr. Dhruv Gupta, Mr. Pratham Soni and Mr. Naveen Dahiyal, Advocates.

For Respondents: Mr. Jatin Mongia, Mr. Dhruv Suri, Mr. Animesh Tomar and Mr. Nikhil Nissar, Advocates for R-1 to 4.

J U D G M E N T

BANSI LAL BHAT, J.

Respondents No. 1 to 4 herein filed C.P. No. 11/JPR/2018 under Section 241-242 r/w Section 244 of the Companies Act, 2013 (for short 'the Act') against 'Axestrack Software Solutions Pvt. Ltd' (Appellant herein) and others before the National Company Law Tribunal, Jaipur Bench (for short 'the Tribunal') alleging some acts of oppression and mismanagement qua the affairs of the Appellant Company. A preliminary objection was taken by the Appellant Company as regards maintainability of the Company Petition on the ground that the Respondents (Original Petitioners) did not fulfill the eligibility criteria as fixed under Section 244 of the Act and in these circumstances they had no locus to file the petition. Even before the pleadings were completed, the Tribunal while declining to go into the merits of the case passed impugned order dated 9th August, 2018 ordering *status quo ante* in relation to the Directorship of the Appellant Company as well as its shareholding as it existed prior to 30th July, 2018 further staying the resolutions qua removal of Respondent Nos. 1 and 2 herein from the Directorship of the Appellant Company and the follow up action. Subsequently, during pendency of the Company Petition, I.A. No. 271/JPR/2019 preferred by the Respondents herein for preponing the date of hearing of the Company Petition from 1st October, 2019 to an early date came to be disposed of by the Tribunal on 29th August, 2019 preponing the

hearing to 20th September, 2019. However, while advancing the date of hearing, the Tribunal passed further directions declaring the Board Meeting dated 12th August, 2019 as invalid, restoring the position of Company to its previous position and restraining the Appellant Company from taking any policy decisions including termination of employees. Aggrieved of the slew of directions passed by the Tribunal in succession in terms of the impugned orders dated 9th August, 2018 and 29th August, 2019 while hearing of the Company Petition was underway, the Appellant has assailed the same through Company Appeal No. 323 of 2018 and 243 of 2019, separately. Since, both orders arise out of the same matter and have been passed before final disposal of the Company Petition which is still sub-judice, both appeals were heard together and same are being disposed of by a common judgment.

2. Learned counsel for the Appellant submitted that the Tribunal, though ignored to consider the merits of the case, but granted status quo ante in relation to the Directorship and shareholding of the Appellant Company as it existed prior to 30th July, 2018, which is in the nature of final relief. It is submitted that nothing is left for adjudicating in the petition which has been decided even without completing the pleadings. He further submits that allotment of shares were made to Respondent No. 1 and 2 as per the Co-founders Agreement dated 17th January, 2015 in contravention of provisions of Companies Act and on account of such illegal allotments shareholding of Respondents is presently 50.32% of the paid up share capital. It is so because allotment of shares and transfer of shares were

made to other Respondents as per the terms of Agreement but Respondents 3 and 4 were allotted 4% and 2.5%, respectively of the authorized share capital though as per Agreement the allotment should have been from the paid up share capital. It is submitted that at the relevant time Respondents No. 1 and 2 were Directors of the Appellant Company. Respondents 1 and 2 proposed to convene an EoGM on 4th August, 2018 for removal of Ms. Priya Choudhary and Respondent No. 5. This was sought to be done on the strength of shareholding. The Appellant Company convened Board Meeting dated 30th July, 2018 and passed resolutions to rectify the irregularities and also filed the same with the ROC. It is submitted that correction of such mistake does not constitute an act of oppression. It is further submitted that the Company Petition was not maintainable under Section 244 of the Companies Act.

3. Per contra it is submitted on behalf of the Respondents that the question of grant of interim directions is decided only on the basis of undisputed facts and the material which can legitimately be taken into account at the interlocutory stage and the Tribunal is not required to express opinion on the merits of the matter. It is further submitted that in appropriate cases, the Tribunal may grant interim relief which may tantamount to grant of final relief but a strong prima facie case besides other considerations would have to be established. In such case, the Tribunal may restore the status quo of the last non-contested status preceding the controversy. Lastly it is contended that the Tribunal has

considered Board Meeting notice dated 27th July, 2018, letter dated 30th May, 2018 and EGM notice dated 19th July, 2018 for coming to a prima facie conclusion. It is further submitted that the impugned order is not in the nature of final relief as it restricts both the parties.

4. Heard learned counsel for the parties and perused the record. Before proceeding to examine the legality and correctness of the impugned orders, it would be appropriate to glance through the legal framework incorporating provisions with regard to prevention of oppression and mismanagement warranting passing of appropriate directions by the Tribunal.

5. Section 241 of the Act dealing with grant of relief in cases of oppression and mismanagement provides that as regards oppression any member of a company, eligible in terms of Section 244 of the Act, may apply before the Tribunal for an order under Chapter XIV dealing with prevention of oppression and mismanagement. Such member's complaint must be in regard to the affairs of the Company that have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company. As regards mismanagement, the member has to demonstrate that any material change has taken place in the management or control of the company and because of such change it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members. Section 241(2) of the Act enables the Central Government also to apply to the Tribunal for an order under

Chapter XIV of the Act, if in its opinion the affairs of the Company are being conducted in a manner prejudicial to public interest. Section 242 of the Act dealing with the powers of the Tribunal empowers it to pass such order as it thinks fit if, based on application filed under Section 241 it is of opinion that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member(s) or prejudicial to public interest or in any manner prejudicial to the interests of the company and on just and equitable ground winding up order would be justified but such winding up would unfairly prejudice such member(s). Sub-section (2) of Section 242 deals with the nature of substantive relief that can be granted though same is only illustrative and not exhaustive. Section 242(4) of the Act provides for interim relief which the Tribunal may grant for regulating the conduct of the company's affairs. Such interim relief can be granted by virtue of an order passed on the application of any party to the proceeding and such order can be subjected to terms and conditions which appear to the Tribunal to be just and equitable. On a plain reading of these provisions, it is abundantly clear that pending consideration of application by a member or member(s) of a Company alleging oppression or mismanagement, the Tribunal is vested with wide discretion to make any interim order on the application of any party to the proceedings, which it thinks fit for regulating the conduct of company's affairs. Such interim order can be subjected to terms and conditions which appear to the Tribunal to be just and equitable. The nature of interim order would depend upon the nature of complaint alleging oppression or mismanagement and the relief claimed therein. A member

alleging that the affairs of the company have been or are being conducted in a manner prejudicial or oppressive to him or any other member or prejudicial to the interests of the company must come up with specific allegations of oppression and mismanagement and demonstrate that the affairs of the company have been or are being run in a manner which jeopardizes his interests or interests of other members or the interests of the company. Passing of interim order necessarily correlates to regulating the conduct of company's affairs. It is therefore imperative that the member complaining of oppression or mismanagement makes out a prima facie case warranting grant of relief in the nature of an interim order. The making of an interim order by the Tribunal across the ambit of Section 242 (4) postulates a situation where the affairs of the company have not been or are not being conducted in accordance with the provisions of law and the Articles of Association. For carving out a prima facie case, the member alleging oppression and mismanagement has to demonstrate that he has raised fair questions in the Company Petition which requires probe. Fairness of questions depends on the nature of allegations which, if proved, would entitle the member complaining of oppression and mismanagement to final relief in terms of provisions of Section 242. It is in the backdrop of this legal proposition that the issues raised in these appeals are required to be examined.

6. It was alleged before the Tribunal that the shareholdings of Respondents 1 and 2 herein as well as their representation in the Board of

Directors have been completely effaced by manipulating documents by the Appellant. It was further alleged that the cancellation of shares as also the removal of Respondents 1 and 2 from Board of Directors was sought to be done behind the back of Respondents 1 and 2 all related to year 2015 vide Board Meeting dated 30th July, 2018. Respondents 1 and 2 claimed to be holding 50.38% of the paid up share capital of the Appellant Company and alleged that Extraordinary General Meeting (EoGM) of the Company for removal of some of the Respondents from the Board of Directors was scheduled on 4th August, 2018 but in the meanwhile the removal of Directors as well as cancellation of shares was sought to be done in a dubious manner. Admittedly, proceedings in the Company Petition were at the very threshold stage and the Appellant herein was yet to file its reply when the impugned order, inter-alia, directing status quo ante in relation to the Directorship as also shareholding of the Appellant Company as it existed prior to 30th July, 2018 came to be passed by the Tribunal. This happened despite the fact that the Appellant raised objections regarding maintainability of the Company Petition by contending that the Respondents 1 and 2 did not fulfill the eligibility criteria in terms of Section 244 of the Act. The Tribunal, though declined to go in to the merits of the case without the pleadings being completed, somehow appears to have ventured into the 'self-proclaimed forbidden zone' which is manifestly reflected from the following excerpt from the impugned order:

"This Tribunal, however, at this stage is not inclined to go into merits of the case without the pleadings being completed. However, it is evident that both the parties are at each other and has tried to remove the other from the Management of the Company, as evident from the notice which has been circulated by the petitioners for calling convening and holding of an EoGM for removal of the respondents Nos. 2 and 3 who are admittedly the initial promoters of the company.

On the other hand, it is also prima facie evident from the facts that the respondents on its part has not only removed the petitioner from directorship without due and proper notice but has also sought to cancel the shares on the ground that the initial allotment itself is illegal and that the appointment of petitioners 1 and 2 amongst other are not proper and to this effect forms has also been filed concerned with Registrar of Companies, being form 12 dated 30.07.2018 relating back to 28.09.2015."

7. It is abundantly clear that the Tribunal, while declining to go into the merits of the case on account of pleadings being incomplete, made certain observations on the aspect of oppression and mismanagement on the basis of inferences which in the opinion of the Tribunal were available from facts which itself were disputed. It is queer that the Tribunal, while declining to

enter the merits of the case, observed that each party tried to remove the other from the management of the Company. In making this observation the Tribunal appears to have been influenced by the notice circulated by the Respondents herein for holding of an EoGM for removal of Mrs. Priya Choudhary and Mr. Sahil Yadav, who admittedly were the first Promoter Directors and shareholders of the Appellant Company as also Appellant's action in removing the Respondents from Directorship besides cancelling the shares on the alleged ground of same having initially been allotted illegally and the consequential acts. Admittedly, the pleadings were incomplete and the parties were yet to lay the relevant material and evidence before the Tribunal in support of the stands they would respectively take in their pleadings. In these circumstances, the Tribunal could not reach a finding in regard to the issues raised in the Company Petition. In so far as making out of a prima facie case for purposes of grant of interim relief in terms of provisions of Section 242(4) is concerned, the observations made by the Tribunal that the Respondents had been removed from the Board and their shareholding had been cancelled without due notice not in consonance with law are not based on application of mind. The Tribunal observed that legality of these actions could be gone into at the time of final hearing but that would not suffice to hold that a prima facie case for grant of interim relief did exist. The least, the Tribunal was required to disclose in the impugned order, was the material which was taken into consideration for arriving at a conclusion that the allegations raised by the Respondents in the Company Petition stood prima facie substantiated. It has been noticed

elsewhere in this judgment that the Tribunal did take notice of the fact that both the parties had tried to remove each other from the management of the Company and while the Respondents had circulated notice for holding of a EoGM for removal of Mr. Priya Choudhary and Mr. Sahil Yadav from Directorship of the Company, the later on their part had removed Respondent No. 1 from Directorship without due notice and also sought to cancel the shares on the ground of initial allotment being illegal. Prima facie it was not a case of unilateral action on the part of one or the other party which could be said to be prejudicial to the interest of its adversary. It appears to be a duel and not a one sided aggression. Notwithstanding the fact that the Tribunal has not indicated any undisputed facts springing out of admitted or non-controversial documents to draw conclusions as regards existence of a prima facie case in favour of Respondents, the Tribunal proceeded to pass direction in the nature of status quo ante restoring the position in regard to Directorship and Shareholding of Appellant Company as it existed prior to 30th July, 2018. This has purportedly been done "in the interest of the company as well as its shareholders". Consequent orders are as a follow up with further directions in terms of impugned order dated 29th August, 2019 in I. A. No. 271 which was only for preponing the date of hearing of Company Petition but was disposed of with a declaration regarding invalidity of Board Meeting dated 12th August, 2019. The question for consideration is that despite observations of the Tribunal that parties were trying to dislodge each other by taking unilateral action allegedly not warranted under law which would be the subject of probe depending on

fairness of the issue raised for consideration, whether the Tribunal was justified in passing the impugned orders of the nature that could be passed only after conclusion of inquiry within the ambit of Section 242 (1) of the Act and whether the Tribunal has pre-empted the final decision of the Company Petition by passing interim directions without applying its mind to the existence of a prima facie case.

8. The answer to this question is a big emphatic "No". Interim directions can be passed for regulating the affairs of company but it has to be borne in mind that the provision engrafted in Section 242(4) of the Act can only be invoked during the pendency of the Company Petition alleging oppression or mismanagement and the action must be warranted keeping in view the interests of the Company. Section 242(4) is couched in a language which leaves little room for doubt that the oppression or mismanagement alleged in the Company Petition should have the impact of adversely affecting the interests of the Company i.e. the Tribunal must be satisfied that apart from the merits of the allegations of oppression and mismanagement which may have occurred in the past, the present state of affairs of the Company warrants slapping of interim directions to regulate the conduct of the affairs of the Company. The provision not only takes care of the present but also the interregnum period i.e. till the disposal of the Company Petition. The proposition of law that there must be a prima facie case entitling the party seeking interim relief besides other considerations cannot be disputed. It is also indisputable that in appropriate cases, which can be stated to be rarest

of the rare cases, the Tribunal may even grant interim relief having the attributes of a final order but the Applicant in such cases will have to establish a strong prima facie case in addition to other legal considerations like an imminent legal injury of irreparable nature and balance of convenience lying in favour of the Applicant. In the instant case, the Tribunal, though made a passing reference to Board Meeting of the Appellant Company scheduled for 30th July, 2018 culminating in circulating of notice by the Respondent No. 1 seeking convening of EoGM for removal of Mrs. Priya Choudhary and Mr. Sahil Yadav from the Board of Directors and while holding that it was not inclined to go into the merits of the case without the pleadings being completed, proceeded to pass directions in the nature of status quo ante being maintained as it existed prior to 30th July, 2018. The matter does not rest here. Shockingly, the Tribunal made some observations regarding the validity of notices qua holding of Board Meeting and EoGM without knowing the respective stands of the parties which could be ascertained only after the pleadings were completed. In the given circumstances, observations of Tribunal though short of finding in regard to existence of a Prima facie case, much less a strong prima facie case, are unwarranted. It is not in controversy that the Appellant had questioned the eligibility of Respondents in maintaining the Company Petition, which required to be dealt with in the first instance after the pleadings were completed. The Tribunal gave a short shrift to the matter by ignoring such objections and hastily proceeded to pass the impugned order dated 9th August, 2018 which ex-facie suffers from non-application of mind. It does

not at all speak of the affairs of Company being conducted in a manner which would need some directions to regulate such conduct. It goes without saying that unless there is a finding in regard to existence of a prima facie case that the affairs of the Company are being conducted in a manner prejudicial to public interest or any member or members or the interest of the Company or oppressive to the Applicant, at least for the present, the Tribunal would not be acting within its province to slap interim directions in the nature of impugned order. While there can be no dispute with the proposition that the Tribunal is vested with very wide discretionary powers to pass interim directions for regulating the conduct of affairs of the Company, exercise of such power cannot be arbitrary or capricious. We are shocked to find that the impugned order dated 29th August, 2019 passed in an I.A. moved for preponement of the hearing in the Company Petition exceeded all limits of jurisdiction by passing further interim directions which were beyond the scope of aforestated I.A. Therefore, it cannot be said that the Respondents had been able to demonstrate that they had raised a fair question which required probe. In absence of pleadings being complete, when the version of adversary is yet to come before the Tribunal, it cannot be said that the issue raised constituted a fair question. Viewed in this perspective, the impugned orders cannot be supported.

9. The inescapable conclusion deducible from the foregoing discussion is that the impugned orders being seriously flawed and suffering from legal infirmities have to be set aside. The appeals are allowed and the impugned

orders dated 9th August, 2018 and 29th August, 2019 are set aside. However, there shall be no orders as to costs.

10. Before parting with this judgment we deem it appropriate to bring on record the development in regard to proceedings in the Company Petition pending adjudicating before the Tribunal. We are told that the Company Petition is at the stage of final hearing. We hope and trust that the Tribunal shall make all endeavours for expeditious disposal of the Company Petition and decide the same finally within three months.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

NEW DELHI

1st October, 2019

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