

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Review Application No.2 of 2018 in
Company Appeal (AT) No. 12 of 2018

IN THE MATTER OF:

Dr. M.A.S Subramanian & Ors.

Appellants

Vs

Mr. T.S. Sivakumar & Ors.

Respondents

IN THE MATTER OF:

Indian Overseas Bank

Review Applicant

Vs

Mr. T.S. Sivakumar & Ors.

Respondents

MEMO OF PARTIES

Indian Overseas Bank

Orleanpet Branch, Pondicherry
Regional Office(0821)
ECR 100 Feet Road, Jansi Nagar Corner,
Pondicherry-605004

.....Review Applicant

IN THE MATTER OF: (Arrayed as in Appeal:-)

1. Dr. M.A.S. Subramanian

S/o Late Mr. M.A. Shanmugam
"Selvanayagam Illam"
No.83, 2nd Cross
Vasan Nagar, Lawspet
Puducherry – 605 008

**...Appellant No.1
(Original Respondent No.2)**

2. Mrs. Santhi Subramanian

W/o Dr. M.A.S. Subramanian
"Selvanayagam Illam"
No.83, 2nd Cross
Vasan Nagar, Lawspet
Puducherry – 605 008

**...Appellant No.2
(Original Respondent No.3)**

3.[Mr. S. Suresh (deceased)

S/o Dr. M.A.S. Subramanian
(died on 01.04.2016)] – Deceased

**...Appellant No.3
(Original Respondent No.4)**

4. Mr. S. Sundar

S/o Dr. M.A.S. Subramanian
 “Selvanayagam Illam”
 No.83, 2nd Cross
 Vasan Nagar, Lawspet
 Puducherry – 605 008

**...Appellant No.4
 (Original Respondent No.5)**

5. Mrs. SuganthiPrabhakar

W/o Mr. Prabhakar
 No.27, First Cross Street
 Natesan Nagar,
 Puducherry – 605 005

**...Appellant No.5
 (Original Respondent No.6)**

Versus**1. Mr. T.S. Sivakumar**

S/o Late Mr. T. Sivaraman,
 Flat No.5, Subramaniya Appt
 Old No.135/1, Santhome High Road,
 Mylapore, Chennai – 600 004

**...Respondent No.1
 (Original Petitioner No.1)**

2. Mr. T. Thiagarajan

S/o Late Thillai Govindan
 No.7, 2nd Cross Street
 Anna Nagar
 Puducherry – 605 005

**...Respondent No.2
 (Original Petitioner No.2)**

3. Mrs. Rani Mangammal

W/o Mr. G. Elangovan
 “Chez Nous”, 4165,
 13a Main Hal, 2nd Stage
 Indira Nagar
 Bengaluru – 560 008

**...Respondent No.3
 (Original Petitioner No.3)**

4. Mr. T. Senthil Kumar

S/o. Mr. T. Thiagarajan
 No.7, 2nd Cross Street
 Anna Nagar
 Puducherry – 605 005

**...Respondent No.4
 (Original Petitioner No.4)**

5. Mrs. T. Valli

W/o Mr. Murugan
 No.7, 2nd Cross Street
 Anna Nagar
 Puducherry – 605 005

**...Respondent No.5
 (Original Petitioner No.5)**

6. M/s. Vee Pee Estate and Hotels Pvt. Ltd.

No.16, ECR-Cuddalore Main Road
Kirumampakkam,
Puducherry – 607 402

**....Respondent No.6
(Original Respondent No.7)**

7. M/s. Hotel Mass Private Limited

Nos.152 and 154,
Maraimalai Adigal Salai Orleanpet
Puducherry – 605 001

**...Respondent No.7
(Original Respondent No.1)**

For Appellant(s): Mr. Anand A. Pavgi, Advocate

For Respondent(s): None.

Oral Judgement**A.I.S. CHEEMA, J. :**

24.09.2018: Heard counsel for Indian Overseas Bank Review Applicant.

This Company Appeal 12 of 2018 was disposed off by us on 12th July, 2018 after hearing the parties. In the matter M/s Vee Pee Estate and Hotels Pvt. Ltd. Respondent No.6 (original Respondent No.7) was served with public notice but still remained absent. The Company proceedings related to Oppression and Mismanagement. The Respondents 1 to 5 in Appeal (Original Petitioners) had come up with a case of Oppression and Mismanagement.

2. The case of the Petitioners as recorded by us was as under:-

“3. The Company Petition (Annexure A-33 Page –442 of the Appeal) shows the case of Petitioners in brief as under:-

a) The Company Petition refers to the different shares held by the original Petitioners and refers to the Respondent No.1-M/s. Hotel Mass Private Limited (hereinafter referred as the Company) stating that the same was incorporated in 1982. The object of the Company was to carry on business of restaurants and refreshment rooms.

Original Respondent No.2 Dr. M.A.S. Subramanian (Appellant No.1) is son of Late Shri M.A. Shanmugam. The Company Petition gives details regarding other Respondents 3 to 6 which shows that they are relatives of the Respondent No.2. According to the Company Petition, the Company was incorporated in 1982 by Late Shri M.A. Shanmugam, his wife(Late) Mrs. S. Senganiammal and the second Petitioner (Thiagarajan). The petition states as to how subsequently the shares were allotted to other Petitioners and Respondents. As per the petition, vide Form No.2 dated 14.03.1983, 30,000 equity shares were allotted to the family members out of which 17820 were allotted as payable in cash and remaining 12180 equity shares of Rs.100/- each were allotted for a consideration otherwise than in cash to Late M.A. Shanmugam in lieu of selling his property being plot of land measuring 52 Kuzhies and 14 Veesams situated at Pudukalayam Villagem, as described in the petition. The land had unfinished building constructed over it. The shares were allotted to Late M.A. Shanmugam before execution of sale deed. However, the Company was put in possession of the land and it completed the construction for setting up the hotel. The Company was in the nature of quasi partnership under the guise of private limited company. Directions had fiduciary duty towards members. Late Shri M.A. Shanmugam died on 06.06.1984 before he could execute the sale deed. Subsequently, Respondent No.2, son of M.A. Shanmugam being eldest educated member of the family who took control of all the affairs of the Company, took over the entire 16,000 equity shares which had stood in the name of Late M.A. Shanmugam, taking consent of other legal heirs. The 12180 equity shares which had been allotted to Late M.A. Shanmugam for consideration payable otherwise than in cash after he had promised to register the land in the name of the Company reflected in the balance sheet of

the Company and the Company was in possession of this land and was the real owner.

(b) The Petitioners claimed that wife of Shanmugam expired and her shares were also allotted in the name of Respondents 3 to 6. Petition claims that the Petitioners learnt that Respondent No.2 in connivance with Respondents 3 to 6 held various meetings between 1998 to 2003 to increase authorized issued paid up capital without giving Notice to other members of the Company and that the Petitioners were kept in the dark as no Notices were received by them. The further issued shares were distributed by the Respondents between themselves without offering the same to other members in violation of Section 81 of the Companies Act. The petition gives particulars regarding the shareholding on 31.03.2011. According to the Petitioners, Clause 3 and 15 of the Articles of Association prohibited transfer of shares to persons other than members. Clause 16 gives rights to members of pre-emption, if any member wants to sell the shares. The petition makes further averments regarding acts of Respondent No.2 and other Respondents to claim that the requests of Petitioners for information were being denied in spite of letters. Petitioners claimed that their enquiries in September, 2014 disclosed that the Respondents 2 to 6 had sold off the land standing in their name while the actual ownership was vesting with the Company, along with other lands of Respondent No.7 by sale deed dated 31.10.2011 which was registered as document No.1844 of 2013 in the office of District Registrar, Puducherry. Petitioner claimed that the Respondent No.2 with his family members had clandestinely sold their shares in the Company along with the assets of the Company. These facts were never informed to the Petitioners by the Respondents 2 to 7. The selling of shares by Respondent No.2 and his family along with assets of the Company was surreptitiously

done with mala-fide intentions. The Petitioners had not received any Notice regarding such sale. The same deserves to be set aside. Respondent No.2 as MD sold the buildings, movables and fixtures of the Company for Rs.3,93,80,706/- to Respondent No.7, which was much less than the book value of the building disclosed in balance sheet of Financial Year 2010–2011. The substratum of the Company had been completely lost.

c) Thus, the petition claimed various reliefs as mentioned in the Company Petition seeking accounts, audit and directions to Respondent Nos.2 to 6 to deposit Rs.58.50 crores received from Respondent No.7 and also investigation into the affairs of the Company as well as setting aside of 3,15,860 equity shares sold by Respondents 2 to 6 to Respondent No.7. ”

3. Against Impugned Order Dated 03.10.2017 of NCLT Chennai directing appointment of Auditor and Company Secretary, Appellants (Original Respondents 2 to 6) filed Appeal. After hearing the parties we had passed Judgement and the operative order reads as under:-

“Order

We maintain direction 1 issued by the learned NCLT in the Impugned Order that an Independent Auditor should be appointed to carry out audit as proposed by the learned NCLT. The fees of the Auditor to be appointed by NCLT shall be borne by the original Respondent No.1 Company. The other directions 2 to 6 of the Impugned Order are quashed and set aside.

We quash and set aside the shares transferred by original Respondents 2 to 6 in favour of three persons -1) Kumaravel Varatha Rajan, 2) Jayanthi Kumaravel and 3) Manikandan

Kumaravel. We restore the shareholding of the Company as on 29.09.2011.

We declare that the sale deed dated 31.10.2011 executed by original Respondents 2 to 6 in favour of original Respondent No.7 as not binding on the Respondent No.1 Company.

The NCLT shall immediately appoint an Administrator to take over the land and structure of the Respondent No.1 Company and to manage the affairs of the Company. The NCLT is requested, under Section 242(2)(k) of the Companies Act, 2013, to appoint such number of persons as Directors of the Respondent No.1 Company as it finds appropriate to manage the affairs of the Company under supervision of the Administrator and to ensure holding of free and fair EOGM for the shareholders to decide future course of action for the Company.

It would be open for learned NCLT to later consider, if necessary, if Orders of winding up need to be passed.

The appeal is disposed accordingly.

There shall be no Orders as to costs. ”

4. Now the Indian Overseas Bank has come forward with this Application claiming it to be Review Application, that in 2011 it had extended term loan to M/s Vee Pee Estate and Hotels Pvt. Ltd. as Vee Pee Estate wanted to purchase the property of Hotel Mass Pvt. Ltd. It is stated that taking loan, the property of Hotel Mass Pvt. Ltd. was mortgaged with the Bank in 2011 and perfected in 2013. It is stated that the Company Petition came to be filed in 2014 and thus was a subsequent litigation between shareholders. It is stated that Bank had exercised due diligence while extending the loan. Reference is made to Minutes of Board of Directors of Vee Pee Estate dated 06.03.2013 to approach Bank for

creating Equitable Mortgage relating to property purchased of Hotel Mass Pvt. Ltd. The Resolution is signed by V. Kumaravel, K. Jayanthi and K. Manikandan Directors (referred supra). It is argued that the property having been mortgaged with the Bank, the Bank was a necessary party. It is stated that because of the Judgement and Order passed by this Tribunal declaring the sale deed dated 31.10.2011 as not binding the Company Hotel Mass Pvt. Ltd., the Applicant is affected as in the sale deed not merely property of the said Company was involved but there are other properties also involved. Thus the Applicant claims that it has a case for review.

5. The learned counsel is relying on Sub-section 2 of Section 420 of the Companies Act 2013 (Act in brief). The Section reads as under:

“(2) The Tribunal may, at any time within two years from the date of the order with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to it its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.”

6. The counsel is further relying on Rule 11 relating to inherent powers of the National Company Law Appellate Tribunal Rules, 2016. Rule 11 reads as under:-

“11. Inherent powers.- Noting in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for

meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.”

7. It is stated by the learned counsel that as the Bank had mortgage in its favour it was necessary party and thus its rights are required to be adjudicated while dealing with the issues which are raised between the parties.

8. We have gone through our Judgement and read sub-section 2 as reproduced above. Synopsis of the Application para (i) itself records that both side parties had not brought facts relating to the Bank before NCLT or here in Appeal. Facts relating to alleged mortgage were not on record and it cannot be said that we have made any mistake apparent from the record. Secondly, Sub-section 2 of Section 420 can be invoked by the “parties”. The present Applicant was not a party before us. Thirdly, the inherent powers cannot be so invoked so as to confer on ourselves powers of Review which have not been conferred by the Legislature. The Applicant was neither the shareholder nor the Director in the concerned Company Hotel Mass Pvt. Ltd. The Applicant is relying on the meeting of Board of Directors dated 6th March, 2013 (Annexure A-7) held by V. Kumaravel, K. Jayanthi and K. Manikandan. In the orders which we have passed we have quashed the shares relating to the Original Respondent No.1 Company which were transferred to these persons. In a Company Petition relating to Oppression and Mismanagement between the shareholders, our findings naturally were confined to the parties shareholders. Our Order did not set aside the sale deed. It declared that the sale deed would not bind the Respondent No.1 Company in the matter. We cannot on such Application by a

third party now “Review” the Judgement which we have passed. If the Applicant has a mortgage in its favour, it would have options open under the law to pursue remedies regarding which we need not comment.

9. Power of Review is not an inherent power. Reference can be made to the Judgement of Hon’ble Supreme Court in the matter of *Assistant Commissioner, Income Tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Limited* reported in (2008) 14 SCC 171. In that matter Hon’ble Supreme Court was considering a provision similarly worded as sub-section 2 of Section 420. Hon’ble Supreme Court in Para 30 of the Judgement observed as under:-

“30. In our judgment, therefore, a patent, Manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising certiorari jurisdiction. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long-drawn-out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no court would permit it to remain on record. If the view accepted by the court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record.”

Keeping the above also in view, we do not find that the present Application which has been filed styling the same as Review Application can be entertained

as the Application does not show any manifest and self-evident error in the Judgement which we have passed and we cannot travel beyond record to see whether the Judgement is correct or not. Such aspects beyond record cannot be gone into and considered on the strength of sub-section 2 of Section 420 of the Act.

10. We do not find any reason to entertain the Application. The same is rejected.

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

(Balvinder Singh)
Member (Technical)

sh/nn