

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION
Company Appeal (AT) No. 59 of 2017

(arising out of Order dated 16th January 2017 passed by NCLT, Ahmedabad Bench in C.P. NO. 11/397-398/CLB/MB/2014/OLD, TP No. 58/397/398/NCLT/AHM/2016(NEW))

Shri Sanjivbhai Kirtibhai Patel & Ors.Appellants

Vs.

M/s Biocare Remedies Private Limited & Ors.Respondents

And

Company Appeal (AT) No. 110 of 2017

(arising out of Order dated 16th January 2017 passed by NCLT, Ahmedabad Bench in C.P. NO. 11/397-398/CLB/MB/2014/OLD, TP No. 58/397/398/NCLT/AHM/2016(NEW))

M/s Biocare Remedies Private Limited & Ors.Appellants

Vs

Shri Sanjivbhai Kirtibhai Patel & Ors.Respondents

Present: For Appellants: Mr. M.L. Sharma, Advocate.
For Respondent 1 to 3 :Mr.Pratik Thakkar, Advocate.

J U D G E M E N T

HON'BLE MR.BALVINDER SINGH, MEMBER (TECHNICAL)

1. As both the appeals have been preferred against common judgement passed by National Company Law Tribunal,

Ahmedabad Bench (hereinafter referred to as the "Tribunal"). They were heard together and are decided by this common judgement.

2. For the sake of convenience, we have described the appellants of Company Appeal (AT) No.59 of 2017 as appellants and the appellants of Company Appeal (AT) No.110/2017 as the Respondents, they being the respondent in the earlier appeal.
3. This appeal has been preferred by the appellants against order dated 16.01.2017 passed by the Tribunal in TP No. 58/397-398/NCLT/AHM/2016(NEW), whereby and where under the tribunal while held that the respondents committed an act of oppression to petitioner/appellant, granted the following reliefs: -
 - a. The second Respondent is directed to deposit a Demand Draft drawn on a Nationalised Bank in the name of the Petitioners for an amount of Rs.16,95,000/- with 12% interest per annum from the date of filing of this petition, i.e. 28th October, 2013, till the date of Demand Draft, before the Court Officer of this Tribunal on or before 17th March, 2017 under intimation to the Petitioners.
 - b. The Petitioners shall deposit the original Share Certificates of all the Petitioners and their group persons along with the Share Transfer Forms duly signed by the Petitioners and their group persons in favour of the second Respondent with the Court Officer of this Tribunal on or before 17th March, 2017, under intimation to the second Respondent.

- c. The Court Officer shall list the matter before this Tribunal in the last week of March, 2017 for passing appropriate orders for return of the Demand Draft and for return of the original Share Certificates along with the duly signed Share Transfer Forms. The registry shall send notice of date of hearing to both parties.
4. The company petition was filed by Appellants/Petitioners under section 397/398 of companies act 1956 before the erstwhile company law board alleging oppression by reducing the shareholding of the appellants/petitioners and their group from 100% to 49.91% without giving notice to the Appellants and without following the procedures laid down under the Companies Act and Articles of Association.
5. The case of the Appellants/Petitioners of appeal No. 59 of 2017 before the tribunal is as follows:
- 5.1 The first respondent company was incorporated as M/s Mentac Pharmaceuticals Pvt. Ltd. on 12.5.1988 with authorised share capital of Rs.10 lakh divided into 100000 equity shares @ Rs10 each. The name of the company was changed as M/s Biocare Remedies Pvt Ltd. w.e.f. 24.2.1994. Since incorporation of company several changes took effect in the constitution of the board of directors which stood as under as on 31.03.1999 : -

DIRECTORS

Shri Sanjivbhai K. Patel

Shri Pankajbhai C. Patel

Shri Rajendra Kumar N. Arora

- 5.2 As on 22.11.2001 an MOU was signed between Appellants 1, 3 and Rajendra Kumar Arora(seller) and their relatives holding collectively 100% of the paid up capital of the Respondent Company on one side and Respondent no 2 (the buyer) on the other side. As per MOU the seller agreed to transfer the entire shareholding in the name of the buyer at the time full & final payment of Rs. 50 lakh to the sellers any dispute to which shall be resolved by arbitration as per clause 10 of MOU. On the next day of the execution of the MOU i.e. on 23.11.2001 respondent 2,3, and Smt Rupaben Gorania were appointed as additional directors whereas on request of 2nd Respondent and in good faith the Appellants 1, 3 and Shri Rajendra Kumar Arora resigned from board on 01.1.2002.
- 5.3 In consideration of purchasing entire shareholding for Rs 50 lakh the 2nd Respondent out of total consideration admittedly paid 33,05,000 between 11.1.2002 and 25.08.2002 subsequently between 25.03.2002 and 25.11.2002 Respondent no. 2 gave cheques for Rs. 16,95,000 (Rupees Sixteen lac ninety five thousand only) but were dishonoured on presentation for payment against which appellants and others had filed 12 criminal cases under Section 138 of Negotiable Instrument Act. The Respondent number 2 filed Special Civil

Suit No 18 of 2003 in the court of Civil Judge (Sr Division) Gandhinagar alleging to have breached the terms and conditions of the MOU by the Appellants/Petitioners claiming short realisation from debtors of the company and shortfall in the stocks and inventories, the suit was dismissed holding that the plaintiff has failed to prove the suit in his favour and if any dispute arises in respect of breach of conditions mentioned in MOU and there is an arbitration clause in MOU then civil court has no jurisdiction, the respondent filed first appeal no 2782 of 2010 in Hon'ble high court of Gujrat in Ahmedabad and which was allowed to be withdrawn with observation that if an arbitrator is appointed rights and contentions of both side on merit of the case will remain open.

- 5.4 During the course of time from 1.09.200 to 22.11.2012 the respondent no 2 increased authorised share capital without giving any notice to the general meeting and allotted shares to his relatives in following manner without giving notice to the appellants/petitioners: -

| SR. NO. | DATE | TRANSACTION | Effect on % of shareholding Appellants |
|---------|------------|---|--|
| 1. | 01.09.2002 | Allotment of 36400 shares to R-2 | Reducing from 100% to 85.44% |
| 2. | 13.08.2003 | Increased in authorised share capital from 25 lacs to 50 lacs | |

| | | | |
|----|------------|---|---|
| 3. | 30.09.2003 | Allotment of 90000 shares to R-2 and his wife | Reduction of shareholding from 85.44% to 68.12% |
| 4. | 1.10.2008 | Allotment of 79000 Shares | 68.12% to 50.98% |
| 5. | 22.11.2012 | Allotment of 9000 shares | 50.98% to 49.91 % |

6. The learned tribunal below while considering the above facts gave the following finding and granted above mentioned reliefs :-

“57. The finding of this Tribunal is that increasing the authorized share capital and allotment of shares to R-2 and to his group persons without giving any notice to petitioners and without the consent of the Petitioners more so after second Respondent raised disputes in payment of balance amount to Petitioners group in the pretext of alleged breach of clauses 2(g) and (i) are acts of oppression and detrimental to the rights of the Petitioners and their group. But considering the fact the second Respondent purchased the entire shareholding of the Petitioner group in the first Respondent-company and the second Respondent and his group persons are in the management of the first Respondent-company for the last 16 years and considering the fact that the allotment of shares took place from 2002 to 2012, there is no justification to set aside those allotment of shares.”

7. Aggrieved by the impugned order passed by the learned tribunal below the appellants filed the present appeal and prays for the following reliefs:

- a) Set aside the impugned order dated 16.01.2017 passed by the Hon'ble NCLT, Ahmedabad Bench in C.P. NO. 11/397-398/CLB/MB/2014/OLD, TP No. 58/397/398/NCLT/AHM/2016(NEW)

- b) Declare the allotment of 36400 equity shares of Rs. 10 each allotted on 01.9.2002 as illegal and void and to direct Registrar of Companies, Ahmedabad to deregister and put the form No. 2 dated 5.09.2002 off the records of the Respondent No. 1 Company.
- c) Declare the increase in authorised capital of the company from 25 to 52 lakh made on 13.08.2003 as illegal and void and direct ROC Gujrat, Ahmedabad to deregister and put the form No 5 dated 1.09.2003 off the records of the Respondent No. 1 Company;
- d) Declare the allotment of 90000 equity shares of Rs. 10 each allotted on 30.9.2003 as illegal and void and direct roc Ahmedabad to deregister and put the form no. dated 6.09.2003 off the record of the respondent no. 1 company
- e) Declare the allotment of 790000 equity shares of 10 each allotted on 1.10.2008 as illegal and direct roc Ahmedabad to deregister and put the form no 2 dated 1.10.2008 off the records of the respondent no 1 company
- f) Declare the allotment of 9000 equity shares of 10 each allotted on 22.11.2012 as illegal and void and direct the roc Ahmedabad to deregister and put the form no 2 dated 22.11.2012n off the record of the respondent company

- g) Direct the respondent 1 company to rectify its register of members by removing the names of allottees of illegal allotment made during the period from 1.9.2002 to 22.11.2012
- h) Pass such order and further orders as this Hon'ble appellate tribunal may deem fit and proper in the facts and circumstances of the case

Alike relief were sought for by the appellant before the tribunal below.

8. Whereas the Respondent to the Company Appeal (AT) No 59 of 2017 and appellant in company appeal (AT) no 110 of 2017 has come before the Appellate Tribunal seeking inter-alia following reliefs: -

- a. That this Hon'ble Appellate Tribunal may be pleased to quash and set aside the impugned order dated 16.1.2017 passed by the Hon'ble National Company Law Tribunal, Ahmedabad Bench in CO No 11/397-398/CLB/MB/2014/OLD, TP No. 58/397/398/ NCLT/AHM/2016(NEW), in the interest of justice.
- b. That this Hon'ble Appellate Tribunal may be pleased to pass such other orders as this Hon'ble Appellate Tribunal may deem fit and proper in the facts and circumstances of this case.

9. The learned advocate for the appellants submitted while presenting their case that the Tribunal below returned the finding that allotment of shares without offering them to the Petitioners and without the knowledge of the petitioners' group and thereby reducing the petitioners to minority from 100% shareholding to 49.91% shareholding clearly amounts to an act of oppression. The advocate of appellants further submitted that the NCLT also gave a finding that there is no material on record to substantiate the plea of the second respondent that they have invested more than Rs.2 crores to augment the business of the company therefore, direction by the impugned order to the petitioners to transfer their shares to the respondents on payment of just 12% interest on the unpaid amount from 28.10.2013 only whereas as per the MOU full amount of Rs.50 lakhs was to be paid by 25.12.2002 and personal guarantee given by the petitioners to the Bank for working capital was to be replaced before transfer of share is itself oppressive, unjust and harsh to the petitioners. Further, the advocate for the appellants submitted that the directions are in violation of Article 300A of the Constitution and Section 402 of the Companies Act, 1956 which requires consent of the parties even for modifying agreement between the company and third parties whereas the MOU is between third parties only and the company is not party to it. The directions are also against the principles of reasonableness and fairness in the facts of the case in view of the galloping value of real estate during the last 16 years and the

delay involved caused due to litigation thrust by the second respondent with mala fide intention which caused loss of opportunity cost and litigation cost to the petitioners.

10. The advocate for the appellants further contented that though the articles of a company generally vest the shares in the Board of Directors for allotment. But the allotment of shares, as held in various cases by the Hon'ble Apex Court, cannot be made to reduce the shareholding of other shareholders or for the benefit of the directors on the Board of Directors but in the interest of the company. They are in a fiduciary position. Further, allotment of shares can be made within the authorized capital only. If the increase in authorized capital itself is invalid for want of compliance with the statutory provisions of taking approval of general meeting with proper notice to all existing shareholders under Section 94 of the Act, any allotment made of such increased share capital would be invalid besides being oppressive to other shareholders.

11. The Respondent's counsel while presenting case before this Appellate Tribunal argues that allotment and increase in Share Capital has been done as per provisions of law and in confirmation with Clause of AOA which provides for increase in capital and allotment of shares by Board of Directors. The counsel further argued that Section 81(3) of Companies Act, 1956 specifies that Sec.81 is not applicable to private company. Thus, findings at para 55 of the order pass by the Tribunal for not offering such

shares to original appellants/petitioners amounts to oppression is perverse, arbitrary and bad in law. Moreover, Oppression must be burdensome, harsh and wrongful; none of such condition exist in present case, the interest of the appellants is limited to extract money, after MoU they only tried to demand more money than the agreed as per MoU for transfer of their shares despite of accepting 2/3rd of the agreed amount as for the remaining 1/3rd of the agreed amount the parties are before arbitral tribunal since the stock as per MoU was expired and they failed to discharge recovery from debtors and breached the condition 2(g) & 2(i) of the MOU. Thus, such allotment and increase of share capital did not hamper their limited interest in the company. It is vehemently argued by the counsel respondent that the subject issue and allotment of shares happened in normal course of business at a time span of 10 years and the appellants never filed any complaint for not receiving of AGM notices from 2002 till 2013, thus, neither shows the ulterior motive of the Board of Directors nor it forms an act of oppression.

12. Having heard the learned counsel for the parties at length this Tribunal concludes and make following observations:
 - a. The MOU was signed between parties as on 22.11.2001 and appellants resigned from board on 1.1.2002 in furtherance of terms and condition of MOU, as per the MOU the seller agreed to transfer the entire shareholding in the name of the buyers on full and final payment. 25 cheques aggregating Rs 3305000

were given between 11.1.2002 and 25.08.2002 and duly honoured whereas the cheques aggregating Rs. 1695000 issued between 25.03.2002 and 25.11.2002 were dishonoured. The first allotment of 36400 shares of Rs 10 each in the Respondent No. 1 company was made by the respondent group after assuming board management as on 1.9.2002 whereas the suit for cheque dishonour has been filed on 13.1.2003. The allotment of 36400 shares by the respondent group after assuming office to the board as further allotment can be said to be in the course of business, with due authority, to infuse the necessary capital to run the business hence the allegation of oppression cannot be substantiated on this transaction of the Respondent. Further, the respondents increased the authorized share capital on 13.8.2003 from 25 lakh to 50 lakh and allotted as many as 179000 shares in aggregate without notice to the appellant who remain shareholders of the company. While continuing with the litigation of dishonor of cheques filed under section 138 of Negotiable Instrument Act, on the part of appellant pending under prosecution, and civil suit which ultimately transferred to arbitration filed on the part of the respondent in respect of alleged breach of clauses 2(g) and 2(i) of the MOU whereby the second respondent made claim of Rs 1321670, is left to be decided by the appropriate forum i.e. arbitrator whereas the company petition was filed as on 28.10.2013. This Appellate Tribunal while appreciating the

relief sought for and the facts and circumstances in has to take regard of the interest of the company.

- b. it is undisputed that the jurisdiction of the Court to grant appropriate relief under Section 397 of the Companies Act indisputably is of wide amplitude. It is also beyond any controversy that the court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation, a further relief or reliefs, as the court may seem fit and proper, is warranted (Bennet Coleman & Co. v. Union of India [(1977) 47 Comp Case 92 (Bom)] and Syed Mahomed Ali v. R. Sundaramoorthy [AIR 1958 Mad 587: (1958) 2 MLJ 259 : (1958) 28 Comp Case 554]). The purpose and object of sections 397 and 398 is to put an end to acts of “oppression and mismanagement” promptly and speedily rather than allow the parties to be involved in a costly and protracted litigation.
- c. Looking to the circumstances of the present case while holding that the oppression has been proved against the minority it is not in the interest of the company to declare the increase authorised share capital as illegal and cancel all the allotment made after increasing the authorized share capital, as the company has taken benefit with the infused money. Further, If the reliefs prayed from (a) to (g) is granted and all the allotments made are cancelled the Appellant group will become 100% owner, to consequence of which appellant group will

have to bring all the money already put in the company as share capital through respondent group at the same time will have to return back Rs. 33,05,000 paid between 11.1.2002 and 25.08.2002 the amount received in part consideration in furtherance of MOU between parties. Keeping the fact in mind that the appellant group was always pursuing for realisation of the payment not paid as per the MOU in consideration of selling the entire shareholding in the company, the direction to the appellants to purchase all the shares of the respondent won't be appropriate as neither the appellants approached to the tribunal with such prayer nor shown any such interest or made such offer to the respondent group during the litigation.

- d. Section 402 of Companies Act, 1956 gives wide range of powers to the Tribunal without prejudice the generality of the powers of the Tribunal under Section 397/398 pass an order in the interest of the company vis-a-vis the shareholders. Thus while granting relief under the aforementioned provision of Companies Act keeping the interest of the company in the uppermost mind in the given facts and circumstances to grant such relief so as to do substantial justice between the parties we agree to the reasoning given by the court below and not inclined to set aside the entire judgement but we are not satisfied with the order awarding interest @12% per annum on the unpaid amount from the date of filing of company petition thus modify it to the extent that:-

- i. The second respondent is directed to deposit a Demand Draft drawn on a nationalised bank in the name of the appellants/petitioners for an amount of Rs 1695000/- with 15% rate of interest compounded annually from date 25.11.2002 till the date of Demand Draft, before court officer of the Learned Tribunal below. The Tribunal will reschedule the date of listing for passing of appropriate order for return of demand draft and for return of share certificate along with the duly signed share transfer forms, and give a suitable timeline and manner to the parties to implement the order of this Appellate Tribunal.
- ii. The appellants shall deposit the original share certificates of all the appellants and their group persons along with the share transfer forms duly signed by the appellants/petitioners and their group persons in favour of the second respondent with the tribunal below as per the direction as may be issued by the tribunal below on date of listing of the matter, under intimation to the second responded.

Both the appeals are disposed-off accordingly, however, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Mr. Balvinder Singh)
Member (Technical)

NEW DELHI

23rd May, 2017