

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No. 42 of 2018

IN THE MATTER OF:

M. Sudarsan Swamy

...Appellant

Versus

Moana Hong Kong Ltd. & Ors.

...Respondents

Present:

For Appellant : **Mr. Sumesh Dhawan and Ms. Vatsala Kak, Advocates**

For Respondents: **Mr. Jarnail Singh, Advocate**

O R D E R

03.04.2018 The appellant, who is a shareholder, being aggrieved with the observation as made by the National Company Law Tribunal, Division Bench, Chennai (hereinafter referred to as the 'Tribunal'), at para 39 of the order dated 19th December, 2017 has challenge the same, which reads as follows:

“39. Besides the above, the financials of the 1st Respondent Company have not been maintained, which suggests that the same have been siphoned off, as the Petitioner alone has invested a sum more than one Million USD\$. The Managing Director, who is Respondent No. 5, is responsible along with other Respondents (except Respondent Nos. 2 and 6) for the acts of oppression and mismanagement of the 1st Respondent Company.

However, at present there is no business and no assets of the 1st Respondent Company. The 1st Respondent is completely a shell Company, which has been admitted by the Counsels for the Petitioner and Respondents during the arguments. Therefore, the acts complained of are oppressive in nature and amounts to mis-management of the affairs of the 1st Respondent Company. To support our view, we may refer to the case of **S. Vardarajan Vs. Udhym Leasings and Investment Ltd.**, (2005) 125 Com. Cases 853, in this case, it was held that the Directors are in a fiduciary position vis-à-vis the company, they must exercise their powers with utmost good faith for the benefit as well as interest of the company. But, in the case in hand, the powers have not been exercised with good faith and are not in the interest of the 1st Respondent Company. Further, in **Manmohan Singh Koli vs. Venture India Properties Private Limited**, 2005 123 Comp. Case 198 CLB, it was held without sending notice to the Director was invalid and the resolutions passed therein are also not valid. Therefore, the resolutions passed by the Respondent No. 5 without sending due notice to the Directors are held invalid. This view is also supported by the ruling

*given in **Ansar Khan and Kalimulla Shariff vs. Fincecore Cables Private Limited, Fazlulla Shariff, Kanees Fathima and State Bank of India** reported in MANU/CL/0097/2006, wherein the Addl. P.B. CLB, Chennai, has held that when the mandatory requirement of giving notice is not met, the resolution passed in the meeting of the Board becomes invalid.”*

2. Learned counsel appearing on behalf of the appellant submits that the observations made by the Tribunal that the company is a shell company is based on presumption and is not based on the record. Nothing on the record to suggest that any of the parties instructed their respective lawyers to admit that the company is a shell company. The observations in regard to siphoning the funds of the company, is also not based on the record.

3. Learned counsel appearing on behalf of the respondent submits that the finding of the Tribunal is based on the record but he could not lay hand on one or other evidence based on which the Tribunal came to the conclusion that the funds of the company has been syphoned by any particular member or group of members of the company or that the company is a shell company.

4. Learned counsel for the respondent referred to paragraph 38 of the impugned order wherein the Tribunal noticed the report submitted by one Mr. C.S. Govindarajan, Bench Officer of the erstwhile Company Law Board, who verified and made an inventories and submitted the report. From the said paragraph we find that the Bench Officer of Company Law Board, Chennai

mentioned that the statutory records were not in order as mandated under Sections 143, 193, 300 and 301 of the Companies Act, 1956 and the Rules made thereunder but no finding has been given about siphoning off the funds of the company by one or other individual or that the company is shell company.

5. From the record, we find that the company petition was filed under Section 235, 237, 397, 398, 402, 403 and 405 of the Companies Act, 1956 (corresponding to some of the provisions of Section 241 and 242 of the Companies Act, 2013) and no prayer was made before the Tribunal to exercise its power conferred under Section 273 read with Section 271(e) of the Companies Act, 2013 for winding up the company which has been exercised in this case.

6. As per Section 434(1)(a) of the Companies Act, 2013 on transfer of a petition from erstwhile Company Law Board, the Tribunal is required to dispose of the case in accordance with present Act i.e. Companies Act, 2013, which reads as follows:

“434. (1) On such date as may be notified by the Central Government in this behalf,—

(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10E of the Companies Act, 1956, immediately before such date shall stand transferred to the Tribunal and the Tribunal

shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;”

7. In view of the aforesaid provision, the Tribunal was required to dispose of the case in terms of Section 241 read with Section 242 of the Companies Act, 2013 which is the corresponding provision of Section 397, 398, 402 of the Companies Act, 1956. As per Section 242 if Tribunal is of the opinion that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interest of the company and that to wind up the company would unfairly prejudice such member or members, otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company would be wound up, the Tribunal would have pass the order under Section 242. In a case where winding up order is required to be passed, the Tribunal is not empowered to pass order under Section 241 read with Section 242 of the Companies Act, 2013. Further, in absence of any prayer made by a party to pass an order under Section 273 read with Section 271(e) of the Companies Act, 2013, the Tribunal cannot *suo-moto* pass order under the aforesaid provisions.

8. However, taking into consideration the fact that the appellant has raised grievance only in respect of paragraph 39 of the impugned order dated 19th December, 2017, instead of interfering with the order of winding up, we set aside the observation made in paragraph 39 of the order as quoted above. The appeal stands disposed of with the aforesaid observation. No cost

Let a copy of this order be communicated to the Hon'ble Member (J) of the National Company Law Tribunal, Division Bench, Chennai who passed the impugned order.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

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