

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

IA No.1060 of 2019

in

Company Appeal (AT) No. 207 of 2017

[Against the order dated 5th May, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in T.P. No. 31/397-398/NCLT/AHM 2016 (New), C.P. No. 3/397-398/CLB/MB/2013(Old)]

IN THE MATTER OF:

1. **Belfin Spa (A Company incorporated
Under the laws of Italy)
Via Piave-66, Busnago,
Italy.**

2. **Mr. Sergio Bellazzi,
Borgazzi 18
Monza (Mb),
Italia.**

3. **Ms. Rita Bellazi
Borgazzi 18
Monza (Mb), Italia**

**... Applicants
(Appellants/Original Petitioners)**

- Versus -

1. **Cima Shyam Springs Private Limited,
Cooperative House, 3rd Floor,
Old Padra Road,
Vadodara,
Gujarat – 390015.**

2. **Mr. Jaimin Girish Patel,
Cooperative House, 3rd Floor,
Old Padra Road,
Vadodara,
Gujarat – 390015.**

3. **Mr. Hemal Patel,
Cooperative House, 3rd Floor,
Old Padra Road,
Vadodara, Gujarat – 390015.**

4. **Shyam Management Services Pvt. Ltd.,
Regd. Office at : Madhukunj,
GundaFalia, Rajmahal Road,
Vadodara,
Gujarat – 390001.**
5. **Shyam Marketing Pvt. Ltd.
Regd. Office at : Cooperative House,
3rd Floor, Co-operative House,
Near Manisha Cross Road,
Old Padra Road, Vadodara,
Gujarat – 390015.**
6. **Shyam Industries Ltd.,
Regd. Office at : 465, GIDC
RamangavdiPor,
Vadodara – 391243,
Gujarat.**
7. **Pinakin Raman Amin
Amin Khadki, MotaGhar,
Varnama,
Vadodara – 391240
Gujarat.**
8. **Agni Fiber Boards Private Limited
990/3/4 GIDC Industrial Estate,
Makarpura, Vadodara - 390010**

**... Respondents
Respondents 1 to 7 – Original Respondents)**

With

**Contempt Case No.10 of 2019
in
Company Appeal (AT) No. 207 of 2017**

[Against the order dated 5th May, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in T.P. No. 31/397-398/NCLT/AHM 2016 (New), C.P. No. 3/397-398/CLB/MB/2013(Old)]

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1. **Belfin Spa (A Company incorporated**

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**... Applicant
(Appellants/Original Petitioners)**

- Versus -

- 1. Mr. Jaimin Girish Patel,
4th Floor, Madhukunj,
Gunda Falia,
Raj Mahal Road,
Vadodara,
Gujarat – 390001**
- 2. Mr. Hemal Patel,
4th Floor, Madhukunj,
Gunda Falia,
Raj Mahal Road,
Vadodara,
Gujarat – 390001**

**Contemnors/Respondents
(Original Respondents 2 and 3)**

**For Applicants: Ms. Armin Wandrewala, Shri Akshay Vani, Shri
Manan Jaiswal, Shri Neel Kamal Mishra,
Advocates**

**For Respondents: Shri Suryanarayanan, Shri Vishwas Shah, Ms.
Garima Bajaj, Ms. Bhavna Shah, Advocates
(Respondent Nos.1 to 3)**

**Shri Amar Dave, Ms. Anne Mathew, Advocates
(Respondent No.8)**

J U D G E M E N T
(8th May, 2019)

A.I.S. Cheema, J. :

1. This IA has been filed by original Petitioners. The original Petitioners had partly succeeded before the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (NCLT – in short) in T.P. No. 31/397-398/NCLT/AHM 2016 (New), C.P. No. 3/397-398/CLB/MB/2013(Old) by Order dated 5th May, 2017. The Appellants got further relief from this Tribunal when they came up in Appeal - Company Appeal (AT) No.207 of 2017 and we passed Judgement dated 25th April, 2018.

2. When we had disposed Company Appeal (AT) No.207 of 2017 we had, inter alia observed and directed as under:-

“46. To conclude:-

We note NCLT has already set aside 80010 equity shares by conversion in Meeting dated 19.04.2011 and 80010 shares issued on 25.07.2012.

- a) We set aside the allotment of 95,500 equity shares to Respondents 4 and 5 and the decision to issue convertible debentures as taken by Respondents 2 and 3 on 28.02.2011.
- b) We set aside the Resolutions taken in Board Meeting dated 18.05.2011 and E Form 32 dated 18.05.2011 submitted to the ROC and removal of Appellants 2 and 3 as Director in Board Meeting dated 02.07.2011. Appellants 2 and 3 shall be treated to have been Directors.
- c) We set aside Resolution and increase of Authorized Share Capital as done in EOGM dated 18.06.2011.

- d) We set aside the Resolutions taken in Board Meeting dated 02.07.2011 and 3,83,334 equity shares allotted to Respondent No.4 regarding which Respondents 2 and 3 took decision on 02.07.2011 and which were issued on 07.07.2011.
- e) We set aside the Resolution dated 18.09.2011 and the 3,87,066 equity shares allotted to Respondents 4 and 6 on 18.09.2011.

46.1 We hold that decisions taken in the Board Meetings, EOGMs and AGM discussed in this Judgement regarding which there was no Notice or short Notice to the Appellants, are not binding on the Appellants. We restore shareholding as it stood ante 28.02.2011.

47. At the time of submissions regarding the reliefs to be granted, the learned counsel for Respondents took up the issue that the Appellants had at one stage offered winding up, the learned counsel for the Appellants submitted that the Appellants were still open for the parties to buy out each other if status quo ante February, 2011 is restored. Referring to the documents at Page – 266 relating to the meeting between the representative of the Appellants with Respondents 2 and 3, the learned counsel submitted that the offer of Appellants was still open to buy the shares of each other. She submitted that the Appellants were, however, not willing for buy out if the additional shares issued to the other Respondents was to be upheld.

47.1 The Impugned Order shows that the learned NCLT has on setting aside the debentures which were converted into equity shares on 19.04.2011 and set aside the 80010 shares which were allotted to Respondents 4 and 7 on 25th July, 2012, discussed that the situation in the Company was such that the possibility of Belfin Spa and Respondents working together was not possible. NCLT considered the dispute between the parties regarding amounts actually invested and dispute over the assets of the Company and found it expedient to direct accounts of the Company to be audited by Chartered Accountant since the date of incorporation

till the Impugned Order. NCLT further appointed Chartered Accountant to do the needful and laid down fees etc. It has then directed that on receipt of the report of the Chartered Accountant, fair value of the equity shares will be assessed by Independent Valuer and as to the date of valuation what is just and equitable in the facts and circumstances of the case is the date of filing of petition. According to the learned counsel for the Appellants, this date should be from the date of Order. However, we do not find any reason to interfere regarding this aspect as the NCLT has given reasons that ordinarily it has to be date of filing of the petition and also relied on passage from the Judgement of *Scottish Co-operative Wholesale Society's* case. It has then repeated the claim of Respondents that the Petitioners had only made initial investment. In Para – 42 of the Impugned Judgement, NCLT recorded that as the Respondents were now in the management of the Company the first right to purchase the shares of Petitioners should be with the Respondents. Even in the Minutes dated 16th March, 2011 relating to Meeting between parties (Page – 266 of the Appeal), the Minutes referred to the solutions available as:-

- Shyam party buyout Cima shares
- Bankruptcy of Cima Shyam
- Cima party buyout Shyam shares

47.2 Thus even at that time, the parties between themselves were also of the view that first option should be for the Respondents 2 and 3 to buy out the shares of the Cima Group.

48. Reading the Judgement of NCLT with the findings recorded by us, all the shares issued to Respondents 4 to 7 stand set aside. We hold that there appears to be no scope for the groups of Appellants on one side and Respondents 2 and 3 on the other to work together and run the Company.

48.1 We further direct:-

It is just and expedient, as directed by the learned NCLT, to direct that the accounts of first Respondent Company be audited by a Chartered

Accountant from the date of incorporation of the Company till the date of Order passed by NCLT taking into consideration the cancellation of all shares allotted to Respondents 4 to 7 and fix the shareholding of Petitioners and Respondents 2 and 3 which shall be one of the basis for determining the fair value of shares for Respondent No.1 Company.

48.2 As directed by NCLT, M/s. ACHR & Associates (now SARC & Associates) at 308, Shail Complex, Opp. Madhusudan House, Off.C.G. Road, Navrangpura, Ahmedabad is appointed as “Auditors” to audit the accounts of first Respondent Company from the date of incorporation of the Company till the date of Order of NCLT. As we have set aside the allotment of shares, the auditor while auditing shall also check if the money for all allotments illegally done was actually received by the company and its utilisation. The Chartered Accountant shall file his Audit Report before NLCT on 2nd July, 2018 serving copies of the same on the Appellants and Respondents 1 to 3. The fee of the Chartered Accountant is initially fixed at Rs.50,000/- payable by 1st Respondent Company but later on to be shared by the parties in proportion to their shareholding. The Chartered Accountant is at liberty to claim further amount in the same proportion from the parties after his work is completed and before filing of the Report. The 1st Respondent Company shall bear all the necessary expenses of the Chartered Accountant for the purpose of carrying out the works of auditing the accounts of the 1st Respondent Company.

48.3 After the Report of the Chartered Accountant is finalized, the fair value of equity shares of the 1st Respondent Company shall be assessed by an Independent Valuer. As directed by the NCLT, the date of valuation is the date of filing of the Company Petition in NCLT.

48.4 M/s. A.R. Gaudana & Associates, at 502-D, Shaily Complex, B/h. Old Gujarat High Court, Opp: Loha Bhavan, Navrangpura, Ahmedabad – 380009 is appointed as “Independent Valuer” to value the shares of the 1st Respondent Company as on the date of filing of petition. His fee is fixed at Rs.50,000/- initially payable by 1st Respondent Company but later

to be shared by the parties in proportion to their shareholding. The 1st Respondent Company shall bear all the necessary expenses of the Independent Valuer for the purpose of assessing the fair value of the shares of the 1st Respondent Company. The Independent Valuer shall file his Report before the NCLT on 2nd August, 2018.

49. The Respondents 2 and 3 will have the first right to purchase the shares of the Appellants – original Petitioners in 1st Respondent Company, but not below the fair value fixed by Valuer, and in case Respondents 2 and 3 fail to purchase the shares of the Petitioners – Appellants at the value fixed by the NCLT, the Respondents 2 and 3 must sell their shares at the fair value determined by the Independent Valuer to the Petitioners – Appellants. After filing of the Report by the Independent Valuer, the Appellants and Respondents 2 and 3 would be at liberty to file application before the NCLT within two weeks from the date of service of the Valuer Report on them, to determine the mode and manner in which the transfer of shares shall take place.

50. NCLT may, if necessary, extend the above date fixed for Audit Report and date fixed for Report of Independent Valuer, if necessary. NCLT will ensure carrying out of these Orders and if Auditor/Valuer have any difficulties, or for any other reasons it becomes necessary, may pass such further and other Orders deemed fit in the interest of justice to both sides.

51. The appeal is allowed in terms of above directions and orders with costs quantified at Rs.1 lakh to be paid by Respondent No.2 – Mr. Jaimin Girish Patel and Rs.1 lakh by Respondent No.3 - Mr. Hemal Patel from their personal accounts, to the Appellants.”

The Respondents had then challenged the Judgement of this Tribunal before the Hon'ble Supreme Court and Civil Appeal

No.9201/2018 which had come up before the Hon'ble Supreme Court and Hon'ble Supreme Court on 7th September, 2018 passed following Order:-

“O R D E R

1. Delay condoned.
2. Heard the learned counsel for the appellants and perused the relevant material.
3. We find no merit in this appeal. Admission is refused and the civil appeal is, accordingly, dismissed.”

Thus, the matter has gone back to NCLT for further steps.

3. Now this IA has been filed by the Original Petitioners which disclosed as to the steps the Appellants – original Petitioners started taking before the learned NCLT after the matter was disposed by this Appellate Tribunal (and upheld by Hon'ble Supreme Court) and paragraphs – 12 and 13 of the IA read as follows:-

- “12. On 8th February, 2019, the I.A. 290 of 2018 was once more listed before the Hon'ble National Company Law Tribunal, Ahmedabad Bench, Ahmedabad for directions. The matter was adjourned in the Hon'ble National Company Law Tribunal, Ahmedabad Bench, Ahmedabad due to paucity of time. After the matter was adjourned, one Mr. Ritesh Gandhi of SARC & Associates, the Chartered Accountants appointed, (formerly M/s. ACHR & Associates), handed over to the Advocate for the Applicants/Appellants, the Special Audit Report dated 6th February, 2019, containing the financial statements of the Respondent No.1 Company, for the year ending 31st March, 2009 and 31st March, 2011. The Constituted Attorney of the Applicants/Appellants

proceeded to the site of the said land/factory of the Respondent No.1 Company at Vadodara and was shocked to find, on the land, the board of the Respondent No.8 hereto. On making inquiries, it appeared that the land and factory belonging to Respondent No.1 Company has been sold off by Respondent Nos.2 and 3, behind the back of the Applicants/Appellants, and without their consent, to Respondent No.8.

13. On or around 13th February, 2019, on taking a search in the office of the Sub-Registrar of Assurances at Karjan, the Applicants'/Appellants' Advocates came to learn that the Respondent No.2, claiming to be the 'authorized signatory' of Respondent No.1 Company, had, by a Deed of Sale dated 10th March, 2015, purported to sell off the Property described in Annexure B hereto, to the Respondent No.8 for a stated consideration of Rs. 6,50,00,000/- (Rupees Six Crores Fifty Lakhs Only). Hereto annexed and marked as **Annexure D** is a copy of Deed of Sale dated 10th March, 2015. This amount is reflected in the Auditor's Report dated 22nd February, 2019, for the year ended 31st March, 2015. This Auditor's Report was received by the Advocates for the Applicants/Appellants only on 28th February, 2019."

4. The IA further claims that the Appellants also came to learn that the alleged purchaser had mortgaged the property to Kotak Mahindra Bank vide a Principal Deed of Mortgage dated 18th April, 2016 to avail a facility of Rs.11,50,00,000/-. The Application has other further details and it is pleaded as under:-

"18. The Respondents Nos. 2 and 3 have deliberately, wilfully, and with mala fide intent, during the hearing of the Petition and the Appeal suppressed that the entire land, factory, and machinery belonging to the Respondent No. 1

Company was sold off by them, behind the back of these Applicants/Appellants, and without their knowledge or consent. This was suppressed not only from these Applicants/Appellants, but also from this Hon'ble Tribunal, as also from the Hon'ble National Company Law Tribunal, Ahmedabad Bench, Ahmedabad. The Respondent Nos. 2 and 3 were duly bound to disclose to this Hon'ble Tribunal, to the Hon'ble National Company Law Tribunal, Ahmedabad Bench, Ahmedabad, and to the Applicants/Appellants, that they had thus sold off the property, indeed, the very sub-stratum, of the Respondent No. 1 Company.”

5. The IA makes various prayers which includes seeking directions to Respondents 2 and 3 to bring back Rs.17,09,00,000/- with interest, seeking disclosures of the assets of Respondents 2 and 3 including their family members; seeking penal action against Respondents 2 and 3 for fraud, etc.

6. When this IA was moved before us on 29.03.2019, we have passed following Order:-

“ORDER

29.03.2019- Heard counsel for the applicants. Perused application filed in disposed matter and record. In this matter partly relief was granted by the NCLT and further relief was granted by this Tribunal and the respondents after this Tribunal passed the judgement went in Appeal and before in Hon'ble Supreme Court in Civil Appeal No.9201/2018 and the Hon'ble Supreme Court had dismissed the appeal finding no merit in the appeal on 7th September, 2018.

2. Counsel for the applicants now points out that after the company petition was filed in 2013 before the Company Law Board and was pending in CLB/NCLT, in 2015 the Respondent No.2 illegally

sold off immovable property of the company and the fact was kept hidden and not disclosed throughout the course of litigation and the contesting Respondents went on litigating in NCLT and then in this Appellate Tribunal and then even went to Supreme Court claiming they are running the company efficiently although the substratum i.e. the immovable property of the company had already been sold off.

3. Perused the application and the documents. Keeping all questions open, Issue notice to respondents.

4. We are convinced that to protect interest of the company interim orders are required to be passed. By way of interim relief we direct that the respondents shall maintain status quo with regard to shareholding and immovable and movable properties of the Respondent No.1 company till decision of this application. The immovable property has been described by the applicant at Annexure B of the application. Respondent No.8, Agni Fiber Boards Pvt. Ltd. is restrained from, in any manner, transferring and/or encumbering and/or creating third party rights in respect of the property in dispute as described in Annexure B and/or from parting with the possession thereof, till the next date.

5. Requisites alongwith process fee may be filed immediately and applicants will ensure service on respondent of this application expeditiously.

6. List the I.A. for hearing on **8th April, 2019.**”

7. The Appellants – original Petitioners have also filed Contempt Case No.10/2019 against original Respondents 1 and 2, inter alia, praying as under:-

“a) that the Respondents be punished with imprisonment for a period of 6 (six) months or such other period as this Hon’ble Tribunal may deem fit and proper, and/or with fine in such amount as this Hon’ble Tribunal may deem fit

and proper, for having committed gross contempt of this Hon'ble Tribunal, by misleading the Hon'ble Tribunal, disposing of the sub-stratum of the Company illegally and unlawfully, during the pendency of the Company Petition/Appeal, and then exacerbating the contempt by deliberate, wilful and mala fide suppression of the same, during the pendency of the hearing of the Petition and the Appeal therefrom, from this Hon'ble Tribunal, as also the Hon'ble National Company Law Tribunal, Ahmedabad Bench, Ahmedabad, and for misleading this Hon'ble Tribunal, as also the Hon'ble National Company Law Tribunal, Ahmedabad Bench, Ahmedabad.

- b) that pending the hearing and final disposal of this Petition, the Respondents be ordered and directed by an Order and direction of this Hon'ble Tribunal to restore status quo ante, in respect of the property of the Company;"

8. The IA had come up before us on 8th April, 2019 when we had recorded that we wanted to hear both the sides relating to admitting this Application and as such, we were not receiving any pleadings from the parties at the moment. On that date, it was informed that Contempt Application was also filed. On that date, we had listed the IA for preliminary hearing on 30th April, 2019. Bench was not available on 30th April, 2019 and the IA as well as Contempt Case came up before us on 1st May, 2019 when we passed the following Order:-

“ORDER

01.05.2019 - Heard. In order to consider whether we should entertain the IA and the Contempt Case or the matter should be before NCLT, we reserve the orders.

2. List the matter on 8th May, 2019 for orders.

3. Interim orders dated 29.3.2019 in I.A. No.1060/2019 in Company Appeal (AT) No.207/2017 to continue to operate till further orders are passed.”

9. We have asked the learned Counsel for the Appellants – original Petitioners as to why this IA and the Contempt Case as has been filed, should not have been or could not have been filed before NCLT. The learned Counsel tried to submit that as this Tribunal had decided the Appeal, so the Appellants have moved this Tribunal. But then, there has been further Appeal to Hon’ble Supreme Court also. Again, keeping in view our Order dated 29th March, 2019, when the matter has gone back to the learned NCLT, which has the task to ensure enforcing the Orders passed by it and further passed by us with a further direction of this Tribunal that the NCLT “for any other reasons it becomes necessary, may pass such further and other Orders deemed fit in the interest of justice to both sides”, we find that the NCLT can squarely and fully deal with developments pendente lite to ensure that no party takes the Tribunals for a ride. The Appellant No.1 is foreign based Company and Appellant Nos.2 and 3 are also not residing as such in India. The developments pending litigation as are shown by the Appellants – original Petitioners, are matter of serious concern. The IA and Contempt Case filed claim that Respondents 2 and 3 sold off the substratum of the Company to Respondent No.8 in 2015 when matter was being litigated before NCLT and original Respondents went on litigating as if nothing had happened and after losing till Supreme Court at the time of follow up actions, Respondent No.8 has stepped forward putting its Board

on property of the Company. NCLT can appropriately deal with the case of developments pending litigation and Contempt also.

10. The Company Petition was filed in 2013 and the alleged sale deed is stated to be of 2015 and NCLT passed Impugned Order dated 5th May, 2017 which was challenged in Appeal before us. The Respondents, mainly original Respondent Nos.2 and 3 appear to have continued to litigate without disclosing the fact that substratum had already been sold in 2015. In fact, in the Reply filed by Respondents 1 to 7 in Appeal in this Tribunal vide Diary No.1178, the Respondents rather pleaded:-

“34. That the Respondents, since the very beginning, had made due efforts to keep the business of the Respondent No.1 Company going in one way or the other. It is submitted that it is the Respondents who have invested their hard earned money, labour in the Respondent No.1 Company since the date of incorporation till date and have kept the company going at the cost of their personal guarantees and assets.”

11. The Respondents in fact even went further and filed Appeal before the Hon'ble Supreme Court but now the picture as revealed by the IA and Contempt Case is quite different and it appears to us appropriate that the matter should be taken up by the NCLT for ensuring that the Orders passed by the NCLT earlier and further Orders passed by this Tribunal as maintained by Hon'ble Supreme Court are taken to logical end so as to do justice hearing both sides. We proceed to dispose the IA and the Contempt Case giving liberty to the Appellants to move the NCLT by filing similar IA

and Contempt Case for NCLT to consider and decide the same on merits. The Appellants/original Petitioners may make any suitable changes while filing similar applications. In the meanwhile, under Rule 11 of the National Company Law Tribunal Rules, 2016, we will extend the protection of interim orders we passed on 29th March, 2019, in the interest of the Company.

12. We pass the following Order:-

ORDER

A) The IA and the Contempt Case are disposed of giving liberty to the Appellants – original Petitioners to move similar IA and Contempt Case before the NCLT, Ahmedabad. When such IA and Contempt Case is filed, the NCLT will consider and decide the same on its merits hearing both sides. The observations made by us in this Order are preliminary and will not weigh with NCLT while deciding the IA and the Contempt Case as may be filed.

B) The Interim Order passed by us as appearing in para – 4 of our Order dated 29th March, 2019 shall continue to operate till **10th June, 2019** by which time, we expect the Appellants to file similar IA and Contempt Case before NCLT, Ahmedabad. NCLT,

Ahmedabad would be at liberty to modify or continue with the Interim Orders we have passed during pendency of the IA and Contempt Case as may be filed.

C) NCLT would be at liberty to deal, as per law, with IA and Contempt Case as may be filed and pass any further and suitable orders as may be deemed fit in the matter already before it, in interest of justice so as to protect the interest of the Company.

D) Parties to appear before NCLT, Ahmedabad on 10th June, 2019.

No orders as to costs.

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

[Balvinder Singh]
Member (Technical)

/rs/nn