NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeal (AT) No.341 of 2017

[Arising out of order dated 31.07.2017 passed by National Company Law Tribunal, New Delhi Principal Bench in C.P. No.27 (ND) of 2013]

IN THE MATTER OF:

Mr. Jagdish Kumar Dhingra
S/o Shri Kishan Chand Dhingra,
E-5 Second Floor, Kailash Colony,
New Delhi – 110048

…Appellant
(Original Petitioner)

Versus

1. A.R. Plaza Pvt. Ltd.
   8/508, Circular Road,
   Chota Bazar, Shahdara,
   New Delhi – 110032

2. Mr. Raj Kumar Mittal
   S/o Late Shri Raghuvir Saran,
   A-31, Anand Vihar,
   New Delhi – 110092

3. Mr. Rajeev Aggarwal,
   7/80 Jawala Nagar,
   Shahdara
   New Delhi – 110032

4. Mr. Ajay Jolly,
   S/o Shri Madan Lal Jolly
   F-1082 Chitranjan Park,
   New Delhi – 110019

…Respondent Nos.1 to 4
(Original Respondent Nos.1 to 4)

Present: **Shri Sajiv Sen, Sr. Advocate with Shri Hemant Phalpher, Shri Sagan Ray and Shri Partha Goswami, Advocates for the Appellant**

Shri P.K. Mittal, Advocate for Respondent Nos.1 to 3

Shri Naresh Kumar Joshi, Advocate for Respondent No.4

J U D G E M E N T

A.I.S. Cheema, J. :

1. The Appellant – Original Petitioner in Company Petition 27 (ND) of 2013 has filed this Appeal against dismissal of his Company Petition filed before National Company Law Tribunal, New Delhi, Principal Bench ('NCLT' in brief). The petition was filed complaining oppression and mismanagement relying on Sections 397 and 398 of the Companies Act, 1956 ('old Act' in brief). The learned NCLT found that the Appellant had failed to establish that he had shareholding in the Respondent No.1 Company and on such basis, dismissed the Company Petition. Hence this appeal.

2. A brief reference needs to be made to the rival cases put up by the parties.

3. The Appellant (Original Petitioner) filed the Company Petition claiming irregularities, illegalities, mismanagement and oppression on the part of Respondents 2 to 4 in the Company – Respondent No.1. The Appellant claimed that Respondent Company was incorporated in 2002.

He was appointed as Director on 18th February, 2008. There was illegal allotment of shares to the extent of 2,40,000 of Rs.10/- each to Respondent No.2 on 15.03.2010 in complete derogation of basic tenets of law, it is claimed. He claimed that he had submitted complaint of theft dated 20th March, 2010 of documents including Memorandum of Understanding to the Goa Police which documents had been stolen from his luggage at the Dabolin Airport. According to him on 30th March, 2010, there was increase in authorized share capital of the Company from Rs.25 lakhs to Rs.100 lakhs and on the same date he was allotted 7,45,000 equity shares of Rs.10/- each against share application money which had already been received by the Company since 2007 – 2008. One Shri Narain Ladu Mandrekar was appointed Additional Director on the same date of 30th March, 2010. The Appellant was appointed as Managing Director on 1st April, 2010. The Appellant claimed that on 04.06.2010, Respondent No.2 allegedly conducted Board Meeting and had submitted From 2 illegally and claimed allotment of 7,50,000 equity shares. The Appellant came to know that the company had been marked as “Management Dispute”. The petition filed by the Appellant claimed that in violation of the provisions of the old Companies Act, he was removed from the post of Director on 26.07.2010 in sham Extra Ordinary General Meeting. The Petitioner claims setting aside of the Resolution said to have been passed by Board of Director on 15.03.2010 allotting shares to Respondent No.2; setting aside Resolution passed in EOGM dated 26.07.2010 removing the Appellant from the post of Director; setting aside Resolution of Board of Directors

dated 04.06.2010 allotting shares to Respondent No.2 and Kanica Metals Pvt. Ltd.; he also sought setting aside Resolutions authorizing Respondent No.2, to execute sale deeds as mentioned in the prayer clause. Further reliefs and investigation were also sought.

4. In nutshell, the Respondents put up defence that no shares have been allotted to the Appellant. According to Respondents, the Appellant was not a shareholder in the Company. Respondents relied on affidavit filed by Narain Ladu Mandrekar to counter the allegations made by the Appellant that there was EOGM dated 30th March, 2010 and increase in share capital and allotment of shares. The Respondents accepted that the Appellant had deposited certain monies but claimed that the same were towards unsecured loans and it was shown accordingly in the Financial Statement from 2008 till 2012 and it was not subscription towards share capital. They claimed that there was no agreement to give participation to the Appellant in the Company. The Respondents countered various averments made by the Appellant with regard to transactions relating to properties at Goa. According to the Respondents, equity shares were allotted to Respondent No.2 and the Appellant was aware about it and there was no forgery. On 15.03.2010, Board Meeting took place in the morning and on the same day, Respondent No.2 had left in the afternoon for Goa, and the necessary formalities had been complied with. The allotment was for bona fide purpose of expansion in the real estate. The allotment of March, 2010 could not be challenged after delay of 3 years.

The Respondents claimed that the removal of the Appellant from the post of Director was after complying with the necessary provisions.

5. The record as well as the impugned order show that the learned NCLT gave opportunity to both sides to put up their complete cases and even referred to the rival claims in details but keeping in view provisions of Section 399 of the old Act, framed following issues for consideration:-

> "i) Whether the Petitioner satisfies the requirement of Section 399 of the Companies Act, 1956 in order to maintain the petition under Sections 397 and 398 read with Section 399 of the Companies Act, 1956?
>
> ii) If the answer to the above is affirmative whether under the facts and circumstances of the case the principles of partnership can be applied in order to sustain the petition as contended by the petitioner?
>
> iii) Whether the petition suffers from any delay and laches as contended by the respondents disentitling the petitioner from maintaining the petition?"

6. The learned NCLT considered the concerned provisions and observed in Para – 24:-

> "24. The facts narrated in the earlier paragraphs as culled out from the pleadings of the respective parties as

well as perusal of the pleadings and documents clearly shows that the 1st respondent company was incorporated on 18th January 2002 as a private limited company with two subscribers to the Memorandum and Articles Association of the company, they being the 2nd and 3rd respondents respectively subscribing to 5000 equity shares each. Hence it is evident that the petitioner was not involved as a promoter of the company at the time of its incorporation nor was he subscriber to the charter documents of the 1st respondent company at the time of incorporation of the company and in the circumstances, he could have become a member or shareholder of the 1st respondent company only on the basis of allotment of shares subsequent to the incorporation of the 1st respondent company or by way of purchase of shares or other mode like inheritance, gift etc. <u>However, no letter of allotment of shares nor share certificates issued by the 1st respondent company or share transfer forms or any transfer/transmission document in relation to 4,65,000 equity shares which is claimed to be held by him has been produced along with the petition in order to establish that he is in fact having title to the said shares.</u> The piece of evidence on which the petitioner is relying to establish his claim over the 4,65,000 equity shares is based primarily upon Form No.2, namely the

return of allotment filed with the Registrar of Companies which is seriously disputed by the respondents as not valid and which has been categorized as "Management Dispute" by the Registrar of Companies, NCT & Haryana, New Delhi. In relation to the said Form No.2 and whether it can be made as a basis by the petitioner for claiming the shares of the 1st respondent company the same is dealt with separately elsewhere in this order particularly in light of the absence of any other document being produced, even though alleged to be in existence, to sustain the claim of the petitioner relating to the ownership of 4,65,000 shares in relation to himself and 2,80,000 shares to his associates in all aggregating to 7,45,000 shares. At the cost of repetition, the onus is on the petitioner to first establish his claim of shareholding in the petitioner company to the satisfaction of this Tribunal, before this Tribunal can venture into the merits of the case as alleged by the petitioner in his petition."

[Emphasis supplied]

7. The learned NCLT then dealt with the claim of the Appellant that there was a Memorandum of Understanding and that he was promised equal shareholding as well as management rights. NCLT observed that the Memorandum of Understanding in original or copy had not been produced. This is being found fault with by the Appellant by referring to document at

Page – 1339 of Volume 7 in the Appeal to say that it was before the learned NCLT. The learned NCLT observed in Para – 28 as under:-

> "28. Thus in the absence of any prima facie evidence to sustain the plea of the petitioner in relation to the shareholding in the 1st respondent company and to corroborate the plea of equal participation and shareholding of the petitioner, the only document which is required to be considered in relation to shareholding is the Form 2 as filed with the Registrar of Companies, NCT of Delhi & Haryana by the petitioner himself and which has been categorized by the said authority as under "Management Dispute". The consistent refrain of the petitioner in the entire petition has been that as between himself and the second respondent there was an understanding of equal shareholding. However, even assuming that the enhanced authorized capital and the allotment of equity capital on 30.03.2010, suo moto, by the petitioner to himself and to his nominees are taken into consideration the same is clearly in excess of the understanding as it almost comes to 74.5% of the capital of the 1st respondent company and in clear violation of the same demonstrating that the petitioner has not come before this Tribunal with clean hands which is also a pre-requisite for invoking the equitable jurisdiction of this Tribunal.

> Further it is seen that along with the petitioner, Mr Narayan Ladu Mandrekar, his associate seems to have been also allotted shares to the extent of 1,60,000 equity shares of Rs.10/- each. However, the said Mr Narayan Ladu Mandrekar, claimed by the petitioner initially to be his acquaintance had given an affidavit (Annexure XXVI) dated 28.12.2011 filed by the respondents in their typed set to the effect that the deponent therein never had any interest in the Delhi based company, A. R. Plaza Pvt Ltd. (the first respondent company) either as a director or a shareholder or in any other capacity."

8. Considering this and other reasons as recorded in the Impugned Order, the learned NCLT found that the Appellant failed to show that the petition was maintainable and dismissed the same. It held that the plea that Petitioner was issued shareholding could not be sustained.

9. Judgement of NCLT shows it allowed parties to put up their complete respective cases and referred to the same in Impugned Order but having concluded that shareholding itself was not proved by Appellant and thus did not go into the merits of other issues raised.

10. We have heard learned counsel for the parties. It has been argued by the learned counsel for the Appellant that since 2007 – 2008, Appellant was investing huge amounts in the Respondent No.1 Company, from which

amounts various properties were purchased by the Company. According to the learned counsel, the Appellant was working as Director in the Respondent No.1 Company and in such capacity issued Notice dated 2nd March, 2010 convening Extra Ordinary General Meeting on 30th March, 2010 seeking Resolution to increase share capital. According to the learned counsel, the Respondent No.2 illegally showed convening of Board Meeting on 15th March, 2010 and submitting of Form 2 regarding allotment of additional 2,40,000 equity shares to himself although on the same date he travelled to Goa also. It is claimed that at Goa Airport, Respondents 2 to 4 had committed theft of original title deeds and other documents from the luggage of the Appellant and FIR was filed. The learned counsel submitted that on 30th March, 2010 in view of the Notice dated 2nd March, 2010, EOGM was held and authorized share capital was increased and 4,65,000 equity shares were allotted to the Appellant, 1,20,000 equity shares in favour of Anant Containers Pvt. Ltd. which is Company owned by the Appellant and 1,60,000 equity shares were allotted in favour of Narain Ladu Mandrekar. Form 2 was submitted to ROC in this regard. The learned counsel referred to copy of Form 2 which was submitted. The copy has been filed with Diary No.2247 at Page – 3. The learned counsel submitted that subsequently on 4th June, 2010, Respondent No.2 allegedly conducted Board Meeting and allotted 7,50,000 equity shares to himself and M/s. Kanica Metals Pvt. Ltd., a company owned by him. It has been argued that the Resolution passed to remove the Appellant as Director was also illegal. The learned counsel referred to the document at Page 1339 Volume 7 as

statement which was effected between the Appellant and Respondent No.2 in June, 2010 whereby Respondent No.2 was to return Rs.60 lakhs to the Appellant with interest and to give equity shareholding in the ratio of 53.47 between R2 and the Appellant. According to the counsel, the original of this document is with the Goa Police and the NCLT wrongly observed that this document was not on record. It is further argued that Narain Ladu Mandrekar had given affidavit in favour of the Respondents on 28.12.2011 which he later on retracted by filing another affidavit on 17.08.2017.

11. The learned counsel for the Respondents submitted that the Appellant himself averred in the Company Petition that the amounts deposited by him were reflected as unsecured loans in the annual accounts. The amounts were brought for purchase of immovable property and not as share application money. According to the counsel, till 30th March, 2010 admittedly there were only Respondents 2 and 3 and the Appellant as Directors and without the consent of the Respondent Directors, no Board Meeting or AGM or EGM could be held. The Respondents 2 and 3 were the only shareholder Directors. It is argued that the Appellant illegally showed holding of meeting dated 30th March, 2010 and increase in shareholding and allotment of shares to himself and Narain Ladu Mandrekar. The Appellant who was Director misused his position to submit Form 2 to the ROC but the same has been disputed as there was no Board Meeting. According to the learned counsel, there was no Board Meeting before the alleged Notice dated 2nd March, 2010 was

issued and there was no EOGM dated 30th March, 2010 and there was no allocation of shares. It has been argued that pursuant to alleged and purported Board Meeting held on 30th March, 2010, the Appellant claims that there was allotment of 4,65,000 shares to himself although books of accounts of the Company showed that only Rs.16.50 lakhs were there in the name of the Appellant and Rs.13 lakhs were there in the name of his wife Mrs. Shalini Dhingra. As such the learned counsel submitted that the Appellant, even if it was to be said that there was increase in share capital, could not have shown 4,65,000 shares allotted to himself. According to the counsel, the Appellant could not allot the shares to himself for the value of 46.5 lakhs when such amount had not been contributed. It has been argued that the Appellant without any Board Meeting filed Form 32 with ROC showing appointment of Shri Narain Ladu Mandrekar as Additional Director and his own designation as MD with the effect from 01.04.2010. Even regarding the alleged EOGM, the learned counsel submitted that to call EOGM, there has to be authorization of the Board and on 2nd March, 2010, there were only Respondents 2 and 3 shareholder Directors and there is no material to show that they had joined any such Board Meeting to call EOGM. The Unilateral Act of Appellant issuing Notice dated 2nd March, 2010 (Page – 427 Diary No.2752) cannot be said to be legal. Without the authorized share capital increasing legally, there could not have been any such allotment of shares on 30th March, 2010.

12. The learned counsel for the Respondents referred to Page – 1339 relied on by the Appellant to claim that it was only a page having mere scribbling made by the Appellant and cannot be said to be any agreement as such. The page does not bear any date and no terms and conditions have been written down. Mere scribblings cannot be relied on.

13. We have heard parties on respective claims. But we find that necessity to go to other issues will arise only provided Appellant crosses the first hurdle. Considering the rival claims, we find that the material issue is only whether the Appellant is able to show that he was at any time a shareholder in the Respondent Company. It is admitted fact that he was working as a Director in the Company. The counsel for Appellant referred to Annexure – XXIII (Page – 427) filed with the Reply. This document is a Notice dated 2nd March, 2010 purporting to be Notice calling Extra Ordinary General Meeting on 30th March, 2010 for increase in the authorized share capital from Rs.25 lakhs to Rs.1 crore. The learned counsel for the Appellant was unable to show us any Board Resolution deciding on issue of such Notice by one of the Directors. Keeping in view Section 169 of the old Companies Act, at the time of Arguments we asked but the counsel was unable to show us any provision which permits one of the Directors to unilaterally, without authority issue Notice on his own calling EOGM to increase authorized share capital. We find substance in the arguments of the learned counsel for Respondents that it is impossible that the Respondents 2 and 3, the other Directors would support increase

of authorized share capital and let the Appellant take away major part of the shares on the same date when already before 30th March, 2010, the Appellant had on 20th March, 2010 filed FIR against these Respondents, copy of which is at Page - 431 with the Reply filed by the Respondents in the Appeal. No Board Meeting deciding to call EOGM and no resolution of EOGM is brought on record.

14. The other document relied on by the Appellant is Form 2, copy of which has been filed with Diary No.2247 at Page – 3. Admittedly, this Form was submitted to the ROC by the Appellant himself. This document is being relied on by the Appellant without showing any Resolution of the EOGM permitting increase in the authorized share capital. The Appellant claims that EOGM took place on 30th March, 2010 and Form 2 claims that on the same date, the allotment of shares was made. Form 2 is accompanied by details of shares allotted on 30th March, 2010. Even this has been signed by the Appellant as Director. Admittedly, the ROC did not accept such Form 2 in the face of the fact that disputes had been raised. When, till 30th March, 2010 along with the Appellant the only 2 other Directors were the Respondents and the Respondents deny any such meetings and the Appellant fails to show any attendance sheet or Board Resolution or Resolutions passed in EOGM, merely brandishing From 2 signed by himself is not enough for the Appellant. This is poor attempt of a non-member Director to give himself shares that did not exist as the EOGM also could not be proved. The learned NCLT has rightly discussed

the material on record and concluded that the Appellant failed to show that he had shareholding in the Company.

15. The counsel for the Appellant argued that to maintain the petition, it was sufficient for the Appellant to show that From 2 had been submitted and the Appellant could not have been non-suited only on the basis that Form 2 was disputed. We find that the learned NCLT did not dismiss the petition at primary stage but complete hearing was given to the parties after taking on record rival pleadings and hearing and only when the learned NCLT found that basic shareholding itself is not established, it did not go into the merits of other contentions. We do not find any fault with this approach of the learned NCLT.

16. It has been then argued by the learned counsel for the Appellant that Company Petition 62/ND/2014 was filed by the Respondent No.2 and later on withdrawn. The learned counsel for the Appellant submitted that the said petition was filed on 6th January, 2012. It was argued that in para – H of the petition (Page - 1657 Volume VIII of the Appeal), the Respondent No.2 had pleaded that the present Appellant had by fraudulent misrepresentation increased authorized/subscribed capital by Rs.75 lakhs and the Petitioner (i.e. Present Respondent No.2) had by way of extra abundant measure applied to the Registrar for allotment of shares to avoid slip out of the Company to rival hands. The learned counsel referring to these pleadings submitted that the said Company Petition was filed on 6th January, 2012 but brought up for registration only in 2014. Meanwhile,

the present Company Petition 27/2013 had been filed by the Appellant on 28th January, 2013. According to the counsel, subsequently on 12th June, 2014, the Respondent No.2 withdrew his Company Petition 62/2014. According to the learned counsel, in view of such withdrawal, Respondent No.2 must be treated to have given up his rival claims against the Appellant.

17. We find that there is no substance in this argument of the learned counsel for the Appellant. We have seen the Order of withdrawal pointed out by the Appellant, copy of which is at Page – 1 of Diary No.2247. The Order shows that when CP 62/2014 was taken up, the learned Member of the Company Law board noted that the Petitioner had filed for withdrawal stating that the Company Petition could not be listed due to technical reasons and so he wanted to withdraw the same. The Member (Judicial) of the Company Law Board recorded that since the Company Petition had not been moved before the Bench, the same was being dismissed as 'withdrawn', "giving liberty to the petitioner as permissible under the law". When this withdrawal took place, the Company Petition 27(ND) of 2013 was already pending. If the petition was withdrawn with liberty to the present Respondent No.2, it was the option of the Respondent No.2 to pursue his remedy even by defending the petition which had been filed by the Appellant. Thus, we do not find that the Appellant can take any advantage by such a withdrawal. Merely by such withdrawal, the Appellant does not become a shareholder and cannot be heard saying that there was

legal increase in the authorized share capital of the Respondent No.1 Company as claimed by him.

18. For this view which we are taking, we need not go into various other disputes and arguments raised by Appellant.

19. For such reasons, we do not find that there is any substance in the appeal. We do not find that there is any error in the Impugned Judgement and Order passed by the learned NCLT.

20. The Appeal is dismissed with costs quantified at Rs.2 lakhs to be deposited by Appellant in the accounts of Respondent No.1 Company.

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

[Balvinder Singh]
Member (Technical)

New Delhi

12th July, 2018

/rs/nn