

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Company Appeal (AT) No. 323 OF 2019

(Arising out of order dated 24.07.2019 passed by National Company Law Tribunal, Chennai Bench in CA/281/2019)

IN THE MATTER OF:

A. Renuga

W/o N.V.S Anandhan,
R/o A47, Park View Street, Anna
Nagar, Tennur, Trichy- 17

...Appellant

Vs.

1.Shar Theme Park Pvt. Ltd

A58, Park View Street
AnnaNagar, Tennur, Trichy- 17
Represented by its
Managing Director,
Mr.N.V.S.Anandhan

... Respondent No.1

2.N.V.S.Anandhan

Managing Director of Shar Theme
Park Pvt. Ltd.

Registered Office at:

A58, Park View Street, Anna
Nagar, Tennur, Trichy -17

...Respondent No.2

3.K.Rajendran

Managing Director of Chennai
Integrated Construction Company Pvt. Ltd.
No.41, 4th Sea Ward Road,
Plot No.2-A, Valmigi Nagar,
Tiruvanmiyur, Chennai – 600 041

...Respondent No.3

4.S.Devi

Plot No.2102,
T.V.H.Lumbini, No.127-A,

Bricklin Road, Purasaiwakkam,
Chennai – 600 007

... Respondent No.4

5.A.Raja Prabhu

No.6-7/7, Chinna Nackiappan
Street, Viswanathapuram,
Madurai – 625 014

... Respondent No.5

6.R.Prabhu

No.49, Pattai Street,
Velappadi,
Vellore – 632 601

... Respondent No.6

7. P.G.Thomas

Thomas Villa,
Enathu, Adoor,
Pathanam thitta District,
Kerala – 691 526

... Respondent No.7

8.K.Siva Kumar

Flat No.6, 2nd Floor,
B Block, Riverina flats,
No.16, Amma Mandapam Main
Road, Sri Rangam,
Trichy – 620 006

...Respondent No.8

9.Salai Natarajan

H5D, Kiruba colony,
1st Avenue, Ashok Nagar,
Chennai – 600 083

... Respondent No.9

Present:

For the Petitioner: Mr. S.Santanam Swaminatha, and Ms. Ashima Sachideva, Advocates.

For the Respondent: Mr. Shangarmurli and Mr. R.V.Balakrishnan, Advocates for Respondent No.3.

J U D G M E N T

(29th May, 2020)

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appellant and her husband are the only two shareholders of the Respondent No.1 Company. The Appellate has alleged that the entire assets of the Respondent No.1 Company has been illegally sold for a purpose other than the object of the Company by Respondent No.3 misusing the power of attorney granted unilaterally by Respondent No.2 without notice to Respondent No.1 and relying on a fabricated Board Resolution dated 04.09.2014. The Appellant has sought the relief for setting aside the impugned order dated 24.07.2019 in CP/281/2019 passed by NCLT, Chennai Bench apart from other reliefs.
2. The Appellant has filed the Petition under Section 241-242 of the Companies Act, 2013 seeking action against the acts of “Oppression and Mismanagement” by the only other shareholder and Director of the Respondent No.1 Company i.e Sri N.V.S.Anandhan Respondent No.2, who is the husband of the Appellant and they are living separately.
3. As per the submission made by the Appellant, the NCLT, Chennai Bench has relied on the orders of Madurai Bench of Hon’ble Madras High Court in the W.P and Civil Suit (O.S.258/2018) filed by the Respondent No.2 against Respondent No.3 and other alleged purchasers and has imposed a costs of Rs.5 Lakhs on the Appellant.

4. It was also submitted that the two causes of action overlap to a considerable extent cannot deprive the Appellant of her right to move the NCLT where certain acts of shareholders have resulted, even if 'unwittingly' in causing prejudice to the Company & Members.
5. The Respondent No.1 Company was owning approx. 16.64 acres of land and the object of the Company was to carry on the business of running Amusement Parks/Water Theme Parks etc. In 2011 Respondent No.2 as the Managing Director of the Respondent No.1 Company, had executed "Agreement for Development and Sale" (ADS) dated 07.12.2011 with developers represented by Respondent No.3 and it was a registered document. The Company has received Rs.6.25 crores.
6. Around February 2015, the Respondent No.3 approached the Appellant and requested her to sign the blank letter head of the Company mentioning that it is in respect of land approval/plan sanctioned at the time she did not suspect anything amiss and signed those papers. She started doubting from the year 2017 and, thereafter, taking all necessary actions. It is also being mentioned that the value of the property is more than Rs.55 Crores as per Para 7.20 of the Application. It is also submitted that Respondent No.3 had even unilaterally and illegal cancelled the registered gift deeds executed in favour of the Government transferring approximately 4.80 crore in the layout prepared. It was submitted that the District Collector Trichy, and the

Inspector General (Registration) has also issued letters in this regard calling into question such unilateral cancellation of the gift.

7. The Appellant has submitted that the Board Resolution dated 04.09.2014, power of attorney executed and illegal sale deed executed by the Respondent No.3 all suffer from fundamental flaw is that *ultra vires* the Memorandum of Association of the Company as it is against the object of the Company. Apart from this Appellant was not given opportunity to file Rejoinder.
8. It was also submitted that selling substantially the whole of the undertaking requires shareholder approval in accordance of the Company Act, 2013 and alone on this ground, the Application needs to be allowed.
9. The Respondent has submitted that he has purchased a land approx. 16.33 acres and these lands were the agricultural land and they have paid the amount of Rs.6.25 crore to the Company for entering into a joint development agreement with the Company (Respondent No.1). The 3rd Respondent has also submitted that unless and until the said land are classified into mixed residential zone it is impossible and impracticable to get house site, layout approval. Accordingly, the 3rd Respondent obtained Govt. order vide G.O dated 27th May, 2013 from the Principal Secretary, Ministry of Urban and Ruler Development. The Respondent has also submitted that the Board Resolution dated 04.09.2014 has empowered the 1st Respondent to execute the Power of Attorney dated 30.10.2014. the

Appellant has not chosen to send her rejoinder through her Advocate and the Appellant has not denied her participation in the Board Meeting held on 04.09.2014. Now she is raising the issue of Sham Board Resolution and Agenda of the Meeting completely different. The Respondent No.3 has also submitted that they have total remitted a Rs.8.25 crore to the Respondent No.1 Company through bank and Respondent No.3 is empowered to sale the land as per the Power of the Attorney. The Writ Petition filed by the 1st Respondent Company in the Madurai Bench of Hon'ble Madras High Court has already dismissed on 27.09.2017 by holding that all the sale deeds executed by the Respondent No.3 as Power Agent of the 1st Respondent Company are legally valid and binding on the 1st Respondent including the Directors- the Appellant and the 2nd Respondent.

10.It has also been pointed out by the Respondent that the 2nd Respondent the Managing Director of the 1st Respondent Company has filed a false and frivolous suit in O.S No.258/2018 in the Court of Additional District Judge, Thruthirapalli to set aside the sale deed executed by the 3rd Respondent as illegal, null and void and the same is pending for adjudication. The relief sought before the NCLT and Additional District Judge are in *Pari Materia* similar and hence has requested for dismissal of the case.

11.We have gone through the pleadings of both the parties. We have also observed that Appellant is free to exercise her remedy under the Companies

Act, 2013 when the Company law provides for “Oppression and Mismanagement” and hence imposition of costs needs review. It is also evident that the Appellant came to know about the Board Resolution dated 04.09.2014 for the first time when Respondent No.3 has submitted its reply affidavit dated 08.03.2019 and at that juncture the Appellant wish to file a rejoinder affidavit but the NCLT refuse to allow her to do so and subsequently reserved the judgment. Since the Companies Act, 2013 provides for restrictions on powers of the Board to sell or dispose of the whole or substantially the whole of undertaking of the Company; Hence, the approval of shareholders through Extra-Ordinary General Meeting was required for selling the land being substantially the entire Assets of the Company. Extract of Section 180 of the Companies Act, 2013 is given hereunder:

180. Restriction on powers of Board.— (1) The Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:—

(a) to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

Explanation.—For the purposes of this clause,—

- (i) *—undertaking¹ shall mean an undertaking in which the investment of the company exceeds twenty per cent. of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates twenty per*

cent. of the total income of the company during the previous financial year;

(ii) the expression —substantially the whole of the undertaking *in any financial year shall mean twenty per cent. or more of the value of the undertaking as per the audited balance sheet of the preceding financial year;*

(b) to invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation;

(c) to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves, apart from temporary loans obtained from the company's bankers in the ordinary course of business:

Provided that the acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause.

Explanation.—For the purposes of this clause, the expression —temporary loans *means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature;*

(d) to remit, or give time for the repayment of, any debt due from a director.

(2) Every special resolution passed by the company in general meeting in relation to the exercise of the powers referred to in clause (c) of sub-section (1) shall specify the total amount up to which monies may be borrowed by the Board of Directors.

(3) Nothing contained in clause (a) of sub-section (1) shall affect—

(a) the title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, in good faith; or

(b) the sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.

(4) Any special resolution passed by the company consenting to the transaction as is referred to in clause (a) of sub-section (1) may stipulate such conditions as may be specified in such resolution, including conditions regarding the use, disposal or investment of the sale proceeds which may result from the transactions:

Provided that this sub-section shall not be deemed to authorise the company to effect any reduction in its capital except in accordance with the provisions contained in this Act.

(5) No debt incurred by the company in excess of the limit imposed by clause (c) of sub-section (1) shall be valid or effectual, unless the lender proves that he advanced the loan in good faith and without knowledge that the limit imposed by that clause had been exceeded.

Section 241 and 242 of the Companies Act, 2013 are given hereunder:

PREVENTION OF OPPRESSION AND MISMANAGEMENT

241. Application to Tribunal for relief in cases of oppression, etc.— (1) Any member of a company who complains that—

(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or

manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

242. Powers of Tribunal.— *(1) If, on any application made under section 241, the Tribunal is of the opinion—*

(a) 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 interests of the company; and
(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

(2) Without prejudice to the generality of the powers under sub-section (1), an order under that subsection may provide for—

- (a) the regulation of conduct of affairs of the company in future;*
- (b) the purchase of shares or interests of any members of the company by other members thereof or by the company;*
- (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;*
- (d) restrictions on the transfer or allotment of the shares of the company;*
- (e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;*
- (f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e): Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;***
- (g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;*
- (h) removal of the managing director, manager or any of the directors of the company;*

(i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;

(j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h);

(k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;

(l) imposition of costs as may be deemed fit by the Tribunal;

(m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

(3) A certified copy of the order of the Tribunal under sub-section (1) shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.

(4) The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.

(5) Where an order of the Tribunal under sub-section (1) makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the

extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

(6) Subject to the provisions of sub-section (1), the alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.

(7) A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.

(8) If a company contravenes the provisions of sub-section (5), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

12. From the above provisions of Companies Act, 2013, it is very much evident that Members are free to file a petition/application if he or she is adversely affected or the interest of the Company is prejudicially affected, he or she is authorized to file petition/application under the Companies Act, 2013.

The NCLT/NCLAT is the specialised agency to look into the impact on the members/company. Hence, there is a need to provide proper opportunity to the aggrieved members to present the genuiness or otherwise of the documents in relation to the provisions of Section 241 of the Companies Act, 2013. We are not passing any comment on the merit of the case. However, we are remanding back the matter for appropriate consideration by the NCLT, Chennai Bench. NCLT, Chennai Bench will after giving the proper opportunities to parties to pass fresh order without influenced by the earlier orders. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member(Technical)

RK

New Delhi