

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Company Appeal (AT) No. 122 of 2017

[arising out of Order dated 9th January, 2017 by NCLT, New Delhi, in C.P. No. 43(ND)2015]

IN THE MATTER OF :

1. M/s. Rubicon Real Enterprises Pvt. Ltd.
Corporate Office at
66, Indl. Area, Phase-I, Chandigarh,
Through its Director,
Mr. Sanjay Jain,
R/o Panchvati Farms,
Hallomajra, Chandigarh
2. Mr. Sanjay Jain,
R/o # 3022, Sector – 28 D,
Chandigarh.
3. Mrs. Shamita Jain,
R/o # 3022, Sector – 28 D,
Chandigarh. ...Appellants

Versus

1. Premium Acres Infratech Pvt. Ltd.
Having its Registered office,
17/6, Anand Parbat,
Industrial Area Near Gali No. 10,
New Rohtak Road,
New Delhi – 110 005.
2. Shri Parminder Singh Sehgal,
R/o House No. 61-62, Sector 70,
SAS Nagar,
Mohali (Punjab)
3. Mrs. Parminder Kaur Sehgal,
House No. 61-62, Sector 70,
SAS Nagar, Mohali (Punjab) ...Respondents

Present:

For Appellant : Shri Alok Dhir, Shri K.P.S. Kohli and Shri Milan Singh Negi, Advocates

For Respondent : Shri Sachit Kumar Sahijpal, Shri Prateek Gautam, Shri Suraj Narain Shukla, Advocates
Shri Sehgal, Respondent in person

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The appellants, who were petitioners, preferred an application under Section 397, 398, 402 and 403 of the Companies Act, 1956 r/w Section 59 of the Companies Act, 2013 before the National Company Law Tribunal ('Tribunal' for short), New Delhi alleging 'oppression and mismanagement' at the hands of 2nd and 3rd respondents and for direction on respondents to rectify of the register of the shareholders so as to include the name of 1st petitioner (1st appellant herein) as its shareholder, or being a transferee of the shares held by the respondent. The petition having been dismissed by the Tribunal by the impugned judgment dated 9th January, 2017, the present appeal have been preferred.

2. For proper appreciation of the case, it is desirable to refer the 'appellants' as 'petitioners' and the 'respondents' as the 'respondents' as was their position before the Tribunal.

3. The case of the petitioners before the Tribunal is as follows.

2nd Petitioner was engaged in selling properties and in the course of his business came in contact with 2nd Respondent, who at the relevant time was working with a real estate company viz. EMAAR MGF. 2nd Respondent who was contemplating leaving his assignment to pursue his business independently, got together with 2nd petitioner to develop a project at Mohali. A contact was entered into with another Real Estate Company viz. 'M/s. TDI' by the 1st Respondent Company for development of 150 plots on which villas and flats were to be constructed. The said agreement was signed between 'M/s. TDI' and '2nd Petitioner' as Director of the 1st Respondent Company.

4. The 1st Respondent Company was incorporated in the year 2010 with an authorised and fully paid up share capital of Rs. 1,00,000/- being 10,000 shares of face value of Rs.10/- each. The 2nd Respondent and his wife – 3rd Respondent, being the promoters, subscribed to 5000 shares each. They were the only shareholders, as per the Memorandum & Articles of Association of the Company. Being unable to come to the forefront on account of his job commitments, the 2nd Respondent appointed the 2nd Petitioner and his wife 3rd Petitioner as Directors to manage the affairs of the 1st Respondent Company.

5. As per the petitioners, there was an understanding that shareholding of the 1st respondent Company would be held by two corporate bodies, viz. 'M/s. Rubicon Real Enterprises Pvt. Ltd.' of which 2nd & 3rd Petitioners are shareholders and 'M/s. BHEE Enterprises Pvt. Ltd.', company promoted by 2nd & 3rd Respondents. The 2nd Respondent is stated to be a Chartered

Accountant and handled all documents while 2nd Petitioner looked after the business promotion of 1st Respondent such as the project for development of the 150 plots assigned under the agreement with 'M/s. TDI'. As per averments made in the petition, in furtherance of the agreement the 2nd Respondent transferred 5,000 shares in favour of company, while shares held by 3rd Respondent were transferred to 'M/s. BHEE Enterprises Pvt. Ltd.' To corroborate this submission the petitioners relied on the photocopies of the Share Certificate No. 0001, Folio No. 001, distinctive Nos. 1-5000. In respect of 5,000 shares held by the 2nd Respondent being transferred to the 1st Petitioner 'M/s. Rubicon real Enterprises Pvt. Ltd.' petitioners alleged that their signature was taken on blank documents and papers which remained in custody of the 2nd Respondent. The petitioners further alleged that the respondents in collusion with the chartered accountant, fraudulently filled Form 20B and uploaded it on the portal of the RoC along with the Annual Returns for the year ending 31st March, 2010. The petitioners' case is that while E-Form 20B correctly reflects the shares of the 1st Respondent company held by body corporates, the annual return which was forged and is without signatures, wrongly reflects that the shares are held by 2nd and 3rd Respondents alone. The petitioners further alleged that the fraud and fabrication has been done with the complicity and connivance of their Chartered Accountant viz. 'M/s. B. Aggarwal & Company' to whom 2nd Petitioner had entrusted his digital signatures for filing requisite documents with the Income Tax Authority and the Registrar of Companies. It is also alleged that in furtherance of this fraud, the 2nd and 3rd Respondents

fabricated the records of 1st Respondent Company wherein the amount withdrawn by the 2nd Petitioner was reduced from his investment and was not intentionally reflected in the books of accounts. It is further stated that with the intention grabbing the company, 2nd and 3rd Respondents made criminal conspiracy and forged the resignation letter of the 3rd Petitioner and uploaded the relevant form on the website of Ministry of Corporate Affairs by misusing his digital signatures. After the alleged resignation of 3rd Petitioner, the 3rd Respondent was illegally induced as an Additional Director and subsequently, shareholders' meeting was falsely recorded to have been held on 9th June, 2014, in which the 2nd Petitioner was removed as its Director. It is alleged that no notice of AGM was served on the petitioners.

6. Apart from the 'oppression and mismanagement' of the affairs of the company the petitioners made allegations of the siphoning of companies funds to the tune of several crores. According to the petitioners, 2nd and 3rd respondents were consistently marginalising and victimising the petitioners. Not only that they are denying the petitioners 50% shareholding and have removed them as the Directors of the 1st Respondent Company. The grievance of the petitioners are that the 2nd petitioner was illegally removed as the Director of the 1st respondent company, and the resignation to 3rd Petitioner is forged.

7. The respondents on appearance refuted the claim. The stand of the respondents are as follows.

The 2nd Respondent worked as the Chief Executive Officer of 'M/s. EMAAR Ltd.' at the time of incorporation of the 1st Respondent company. The 2nd Petitioner, a property dealer having expertise in sale of flats, being aware that the 2nd Respondent was planning to incorporate his own company in the vicinity of Chandigarh, convinced the respondents about his capabilities of looking after the development and sale of flats. He undertook overall supervision and control till the 2nd Respondent was released from service of 'EMAAR MGF Land Ltd.' 1st Respondent Company agreed to pay 7% commission to the 2nd Petitioner on the basic sale price of each unit sold. As per the respondents, it was made amply clear that the 2nd and 3rd Respondents would be the only shareholders, while 2nd and 3rd Petitioners would act as agents. The 1st Respondent Company was incorporated on 5th January, 2010, and the 2nd and 3rd Respondents were its sole subscribers. The 2nd and 3rd Petitioners were however made its Director(s) to act on the instructions of the 2nd and 3rd Respondents.

8. Learned Counsel for the Respondents submitted that the petitioners, not being members of the 1st Respondent Company, do not satisfy the requirement of Section 399 of the Companies Act, 1956 and, therefore, the petition under Section 397 and 398 is not maintainable. On the contrary, the 2nd and 3rd Petitioners are taking advantage of their position as Directors, and in fact they have siphoned off the money of the 1st Respondent Company for their personal benefits and have purchased properties in their personal names. For such alleged criminal acts a number of criminal cases are pending

against them and as a counter blast the present petition has been filed by petitioners to detract the mind from the criminal cases pending in different courts.

9. The respondents have brought to the notice of the Tribunal that the annual returns of the 1st Respondent Company for the financial years 2010-11 and 2011-12 do not show any change in shareholding pattern. These financial returns which have been filed by the petitioners under their signatures, reflect the 2nd and 3rd Respondents as the Directors, but have deliberately been kept out so as to mislead the Tribunal. Further, as per statutory requirement for effecting a valid transfer, the transfer deed has not been executed by the respondents in favour of the 1st Petitioner, neither has there been any signed request made by the 2nd Respondent to the Board of Directors to showing his intention of divest his shares. There is no record to show that there is an offer given to the other shareholder, as mandated under the Articles of Association. The Register of members does not record the petitioners as its shareholder, neither has any money been paid by the 1st Petitioner which is alleged to be a shell company. The submission of contributing Rs.85 Lakhs is repudiated and stated to be the booking amount received by the 1st Petitioner from investors and customers. Reliance has been made on the income tax returns of the 1st petitioner company which has reflected its annual income as Rs.2 Lakhs only.

10. The Tribunal after hearing the learned counsel for the parties and on verification of record rightly held that the question of mismanagement of

company can be questioned by the minority shareholders provided the petition is filed by persons holding at least 10% equity. From the record we find that the Registrar of Companies do not reflect the name of 1st Petitioner as shareholder. In view of the fact that the 1st Petition is not shown as the shareholder of the 1st Respondent Company, we hold that the application under Section 397 and 398 of the Companies Act, 1956 is not maintainable at the instance of the petitioners.

11. According to the learned counsel for the petitioners in collusion with the Chartered Accountant, the respondents have manipulated the records of the 1st respondent company. The Annual Returns for the year ending 31st March, 2010 filed by the respondents is different from the one uploaded on the site of Registrar of Companies in the year 2013. However, from the records of the Ministry of Corporate Affairs, we find that the record does not suggest that 1st Petitioner is a shareholder. The petitioners relied upon the Annual Returns and Form 20B filed by 1st Respondent Company for the financial year ending 2010, but the record available with the Ministry of Corporate Affairs do not support it. The respondent's repudiation is based on non-execution of the transfer deed but we find that no written request was made by him to divest his shareholding in favour of 1st Petitioner and no financial transaction took between 1st Petitioner and the 2nd Respondent. This Appellate Tribunal directed the petitioners to produce the original share certificate along with Annual Returns but nothing has been brought on record. Learned counsel appearing on behalf of the petitioners submitted that the respondents with

mala fide intent are withholding the share certificates and the annual return. However, it has not been made clearly as to how respondents are holding shares if the shares have been transferred in the name of the 1st petitioner, as claimed.

12. Learned counsel for the petitioners referred to Income-tax Returns of the 1st Respondent company for the year 2012-13 filed on 24th March 2014 to suggest that the 1st petitioner is 50% shareholder of the 1st Respondent Company, but mere mentioning the name of the 1st petitioner in the Income-tax Return cannot be relied upon to pass order under Section 397 and 398 or Section 59 of the Companies Act, 1956. As the petitioners have failed to show that they are holding any share of the 1st Respondent Company, we hold that the petition under Section 397 and 398 is not maintainable at their instance.

13. We find no merit in this appeal, it is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Balvinder Singh]
Member (Technical)

New Delhi
22nd December, 2017

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