

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) No. 242 of 2020

[Arising out of order dated 6th November, 2020 passed by National Company Law Tribunal, New Delhi Bench- VI, in CP No. 86/ND/2020]

IN THE MATTER OF:

1. **Mr. Abhishek Jain,**
137, Jagriti Enclave,
Delhi- 110092

...Appellant

Vs

1. Mis Puerto Life Sciences Private Limited

Shop No. 24, G/F C S C Saini Enclave,
Delhi
East Delhi- 110 092

Respondent No. 1

2. Mr. Pramod Kumar Sharma,

Shop No. 24, G/F C S C Saini Enclave,
Delhi
East Delhi- 110 092

Respondent No. 2

3. Mr. Vardaan Sharma,

Shop No. 24, G/F C S C Saini Enclave,
Delhi
East Delhi- 110 092

Respondent No. 3

4. Mr. Veerinder Pal Singh,

Shop No. 24, G/F C S C Saini Enclave,
Delhi
East Delhi- 110 092

Respondent No. 4

5. Mrs. Anju Jolly,

Shop No. 24, G/F C S C Saini Enclave,
Delhi
East Delhi- 110 092

Respondent No. 5

6. Mrs. Nisha Walia,

Shop No. 24, G/F C S C Saini Enclave,
Delhi
East Delhi- 110 092

Respondent No. 6

Present:

For Appellants: **Mr. Virender Ganda, Sr. Advocate with Mr. Vishal Ganda, Mr. Anand Singh Sengar and Mr. Ayandeb Mitra, Advocates.**

For Respondents: Mr. Saurabh Kalia, Mr. Divendra Singh, Mr. Mohit Chaurasia, Mr. Gaurav Jaggi and Ms. C.S. Priyanka Aggarwal, Advocates for Respondent Nos. 1 to 6.

J U D G M E N T

(26th March, 2021)

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The present appeal has been filed challenging the order passed by learned National Company Law Tribunal, New Delhi- Bench-VI (in short '**NCLT**') whereby the learned NCLT vacated the stay granted by it vide impugned order dated 06.11.2020. Aggrieved by the same, the Appellant preferred the appeal.

2. Shri Virender Ganda, learned Senior Counsel appearing for the Appellant submitted that the Appellant is a Director and shareholder of the Respondent No. 1 Company. The Respondent No. 1 was incorporated on 04.10.2018 and the Appellant was appointed as a Director in July, 2019 and allotted 12 lakhs equity shares of the Respondent No.1 Company which constitutes 30% of the total paid share capital.

3. Learned Senior Counsel for the Appellant further submitted that the Respondent Nos. 2,4,5 & 6 are directors and shareholders of the Company. Father of the Appellant is having vast experience in pharmaceutical industry and the 2nd Respondent approached the father of the Appellant to overcome major hindrances. Before

investment in the Respondent No. 1 Company Appellant and Respondents entered an Memo of Understanding (in short **MOU**). Basing on MOU, Appellant became a shareholder of the Respondent No. 1 Company. In view of financial difficulty faced by the Respondents, they approached the Appellant and requested for short term loan, which they assured to be repaid within 30 days. In view of the request made by the Respondents, father and mother of Appellant granted an unsecured loan of Rs. 6 Crores 90 lakhs to the Respondent No. 1 Company and the same was disbursed in trenches between September to October, 2019.

4. While so, the Respondents secured an approval from the South Indian Bank for a loan of Rs. 25 lakhs and in the sanctioned letter, the total cost of the project was mentioned as 44 Crores 60 lakhs. However, the project cost was escalated. The Respondents issued four cheques to the parents of the Appellant for repayment of the loan. However, all the cheques were returned as 'dishonoured'.

5. The Respondent No. 1 Company in the Board Meeting held on 06.03.2020 passed several resolutions including increase of the project cost from 52 Crores to 59 Crores and to bring in rights issue and thereby increasing the equity share of the Company from Rs. 4 Crores to Rs. 16 Crores. The sole motive of the rights issue is simply to dilute the shareholding of the Appellant in the Company and curtail his rights. Further, the Board passed resolution not to repay the short term unsecured loan of Rs. 6 Crores 90 lakhs. However, the

Respondents forcing the Appellant to invest Rs. 10.70 Crores to secure the sanction of loan from South India Bank.

6. The Company called an Extra Ordinary General Meeting (in short **EOGM**) on 15.06.2020 to increase the authorised share capital from 4 Crores to 16 Crores. Further, the Company issued the offer letter dated 27.06.2020 for subscribing the rights issue and it is stated that the rights issue offer was made in proportion to the shareholding of the shareholders of the Company. If the Appellant failed to subscribe to the rights issue, the Appellant's shareholding will be reduced.

7. Learned Senior Counsel for the Appellant submitted that they have filed a petition before the NCLT under Section 241, 242 and 213 of the Companies Act, 2013 and sought various reliefs. The Appellant also sought interim reliefs praying the Hon'ble Tribunal to stay the process of effecting increase in the paid up share capital of the Company by way of rights issue as has been initiated by the Respondents vide Board Resolution dated 09.05.2020 carrying forward vide offer letter dated 27.06.2020. The Appellant also sought various other Interim Reliefs.

8. The Respondents filed Reply Affidavit to the Appeal and submitted that the Appellant has made bald, vague and non-existent allegations against the Respondents and the Appellant with a malafide intention and to settle the personal score against the Respondents, filed the Company Petition before the Hon'ble NCLT. He submitted that

South India Bank sanctioned Term Loan and the bank insisted the Directors to provide Bank Guarantee or else the collateral security. However, the Appellant was not inclined to provide Bank Guarantee nor collateral security, causing hindrances by writing letters to the Bank thereby the Bank stopped further disbursal of loan. Therefore, the Respondents had no option except to increase authorised share capital. The Respondents have provided personal Guarantee and collateral security as insisted by South India Bank for obtaining term loan. The Bank also insisted for unsecured loan which was provided by the Directors of the Company and could not be repaid. In view of non-disbursal of loan from Bank, the Company faced financial crunch and having no option, decided to increase the authorised share capital and issue shares to the existing shareholders in proportion of their shareholding. However, the Appellant refused to subscribe to the offer made by the Company. The Respondents decided to provide an exit opportunity to the Appellant by purchasing the entire shareholding of the Appellant and repayment of unsecured loan to the parents of the Appellant. However, the Appellant refused to exit from the company, thereby the settlement of exit option could not fructify.

9. Learned Counsel for the Respondents submitted that the Appellant has failed to establish oppression and mismanagement in the affairs of the Company and thereby the Appellant could not maintain the Company Petition even before the learned NCLT. The Appeal is devoid of merits and the same may be dismissed.

10. Heard learned Counsel for the respective parties. Perused the pleadings, documents and citations relied upon by them.

11. Learned NCLT is of the view that-

...

“23. Therefore, it is no longer res-integra that the right issue for genuine purpose and for the benefit of the Company is not illegal until proved otherwise. The petition/ minority shareholders have to prove the malafide of the majority in order to get relief against the Rights issue. In the case in hand petitioner himself attended the meeting, submitted his objections against the Rights issue. The petitioner has a chance to purchase/invest more in the company. There is no single instance of oppression or mismanagement by way of further issue of Rights by the directors of the company.

24. In that view of the matter there is no prima facie ground to stay the further issue of rights. Hence the stay on the further issue of Rights has now been vacated subject to the final outcome of the present petition.

..

12. From the perusal of the impugned order, the learned NCLT observed that there is no prima facie ground to stay further issue of

rights. Hence vacating the stay, subject to the final outcome of the present petition.

13. It is an admitted fact that the Appellant is a shareholder and Director of the Respondent No. 1 Company holding 12 lakhs equity shares constituting 30% of the paid up share capital of the Company.

14. Learned Senior Counsel for the Appellant apart from the rights issue, raised various grounds in the appeal. However, we are concerned with the order passed by the learned NCLT which is impugned in this appeal whereby the learned NCLT vacated the stay thereby the Company is free to proceed with the rights issue. The apprehension of the Appellant that if the Appellant would not subscribe to the rights issue, then his shareholdings would get diluted.

15. Learned Senior Counsel for the Appellant vehemently contended that upon rights issue, money has credited to the Company's account and the shareholder's/the Respondents have withdrawn the same. Therefore, the learned Senior Counsel for the Appellant vehemently opposed the rights issue. The Appellant filed Interlocutory Application being I.A. No. 237 of 2021 before this Tribunal in the Appeal praying this Bench to stay the EOGM of the Respondent No. 1 Company and to take on record the pleadings from this Application and stay on the operation of the impugned order passed by learned NCLT and set aside the allotment of shares to the Respondent pursuant to the rights issue.

16. Before dealing with the contents as made in the Application and the Bank Statement filed along with this Application, we intend to give factual matrix of the case.

17. The Respondents along with their Reply Affidavit filed Memorandum of Understanding (in short **MOU**) on 22.07.2019 entered between the Respondent No. 1 and the Appellant. Since the MOU is not legible, we are not able go through the same. However, there is no denial of the Appellant with regard to the MOU and the clauses therein. It is an admitted fact that South India Bank sanctioned term loan of Rs. 25 Crores for setting up a manufacturing unit for production of pharmaceutical products and at an estimated cost was shown as Rs. 44.60 Crores. At page-65 of the sanction letter, the guarantors are Respondent Nos 2,3,5 & 6. However, the Appellant, who is a Director and shareholder, is not shown as Guarantor. At page 69 of the letter of Bank it is clearly mentioned at Clause 3(c) that the unsecured loans and advances received from close friends, relatives will be retained in the business during the subsistence of the credit facilities.

18. Learned Counsel for the Respondents submitted that in view of the above, they could not repay the unsecured loan to the Appellant.

19. In the Board Meeting held on 06.03.2020, the Board discussed and deliberated upon financial obligation to be fulfilled by the Appellant. It is also discussed that the Appellant did not become party to obtain Bank credit facilities and also not provided his personal

guarantee in respect of the current sanctioned bank facilities. However, the Board without taking any decision on this aspect decided to take the matter in the next Board Meeting.

20. From the records it is apparent that the Appellant has not provided any guarantee for the credit facilities to avail from the South India Bank.

21. In the Board Meeting held on 09.05.2020 wherein the father of the Appellant was present, the Board took various decisions including the financial status of the project of the Respondent No. 1 Company and fund requirements. It was also discussed that the Company is losing approximately 60 lakhs to 70 lakhs every month due to shortage of working capital fund. It is seen from the minutes of the meeting that the Appellant denied to infuse any further fund into the Company. The Company also took decision to further collecting fund to the tune of Rs. 12 Crores by way of subscription from the shareholders. In view of the requirement, the Company resolved to increase authorised share capital of the Company from existing 4 crores divided into 40 lakhs equity shares of Rs. 10/- each to 16 Crores divided by 1 Crore 60 lakhs equity shares of Rs. 10 each by creating additional 1 Crore 20 lakhs equity shares of Rs. 10/- each ranking Pari Passu in all respect with the existing equity shareholder of the Company. However, the Appellant dissented the said resolution vide note dated 13.05.2020. However, the Board passed the resolution offering 1 Cr. 20 lakhs equity

shares to the existing shareholders in proportion of their existing shareholding as on the date.

22. The Respondents have issued an Offer Letter by way of mail dated 27.06.2020 annexed at page 332 of Vol. 2 of the Appeal Paper Book. The said e-mail reads as under:

“You are hereby informed that the Board of Director of Puerto Life Sciences Limited (Company) in their meeting held on 09.05.2020 granted approval for right issue aggregating to Rs. 1 Cr. 20 lakhs equity shares of Rs. 10/- each at par of the existing shareholders of the Company.

Based on the above decision of the Board, this Offer is made to issue 36,00,000 equity shares to you, under the right issue being as an existing equity shareholder of the Company on June 15, 2020(Record date) on proportionate basis and conditions as laid down, interalia in the letter of offer. Application form and the terms and conditions of the said right issue are enclosed in the letter of offer for your kind perusal.”

23. At page 333 of Vol. 2, the letter of offer clearly mentions that the Appellant was offered 36 lakhs equity shares of Rs. 10/- each which comes to Rs. 3 Crores 60 lakhs. At clause 7 of the offer letter it is stated

that the Appellant may apply for the equity share offered to him wholly or in part by filing application form and submitting the same along with the Application money to the Company between 27.06.2020 to 14.07.2020.

24. Learned Senior Counsel for the Appellant filed an Interlocutory Application being I.A. NO. 237 of 2021. At pages 6 & 7 given in a tabular form regarding utilisation of rights issue and unsecured loan as per Tally Data. Learned Senior Counsel for the Appellant submitted that the amount raised through rights issue were in fact did not utilised for the project of the Respondent No. 1 Company however the same were used to clear the loan advances provided by the Respondents to the Respondent No. 1 Company.

25. Learned Senior Counsel further contended that the tabular depiction at page-6 of the Application demonstrated that the loan of all the stakeholders of the Respondent No. 1 Company, except the Appellant, has been reduced. At page-7 tabular depiction has been given with regard to unsecured loans as Tally data.

26. Learned Senior Counsel for the Appellant submitted that the tabular depictions make it abundantly clear as to how the funds raised qua the rights issue were being utilised by the Respondent No. 1 Company and the fact that the said rights issue was never given for the benefit or interest of the Respondent No. 1 Company but were in fact a method of fund rotation. Further in the Application at page -89

a Bank Statement of ICICI Bank of the Respondent No. 1 Company from 01.06.2020 to 30.06.2020 has been filed. Further at page -90, the Bank Statement of ICICI Bank of the Respondent No. 1 Company from 01.07.2020 to 31.07.2020 is given. Learned Senior Counsel for the Appellant submitted that from the statement of the Bank, the amounts have been credited into the account of Respondent No. 1 Company. However, the same was received by the same Director/shareholder from the Company, thereby he submitted that the amounts have come and gone. Learned Senior Counsel for the Appellant submitted that the Respondents failed to demonstrate the benefits of rights issue in favour of the Respondent No. 1 Company rather it is a clear intention of reducing the Appellants' shareholding to below 10%. In support of his contention, the Learned Senior Counsel relied upon judgment of the Hon'ble Supreme Court.

27. Per Contra, learned Counsel for the Respondent submitted that the rights issue was made in the interest of the Company. He submitted that the Appellant has not raised a single plea that there is any infirmity legally in the rights issue. He submitted that the increase of authorised capital and allotment of shares is in the interest of the Company for the reason that South India Bank did not disburse the full term loan to the Respondent No. 1 Company for the reason that the Appellant created hindrances. The Appellant refused to contribute in the Company. Further, the Appellant started writing e-mail to lender bank portraying that there is management dispute. However, the

Respondent Company clarified many times to the Bank that the except Appellant's non-cooperation there is no management dispute on the part of Respondents. As stated supra, the Bank stopped further disbursement w.e.f. 21.03.2020 till date causing serious liquidity crisis in the project and required personal guarantee of the Appellant.

FINDINGS:

28. It is a fact that the Appellant has not filed any document regarding Tally Data and the statement etc. before the learned NCLT. In view of non-providing the documents before the learned NCLT, the learned NCLT had no opportunity to look into the documents and deal with the aspects. It appears that the Appellant for the first time filed these documents along with I.A. No. 237 of 2021 before the Tribunal. Since the Appellant alleging that the amounts have been credited into the Respondent No. 1 Company and later on withdrawn by the Respondents. Sitting in the Appellate Jurisdiction, we cannot decide the merits since the matter is *sub judice* and seized of by the learned NCLT. We are also of the view that the petition was filed under Sections 241 & 242 of the Companies Act, 2013 alleging certain acts of oppression and mismanagement into the affairs of the Company.

29. Though prima facie we are not inclined to deal with any of the issues on merits. Further, following the Principle of Natural Justice, we would afford an opportunity a liberty to the Appellant to address the issues before the learned NCLT with regard to the bank statement

of the Respondent No. 1 Company for the reasons that the Appellant disputed the payments made by the other Directors. The Appellant may file these documents by way of Additional Documents before the learned NCLT after serving a copy of the same upon the Respondent well in advance. The Respondents may file their rebuttal/Reply, if any to the pleadings or additional pleadings.

CONCLUSION:

30. In view of the aforesaid reasons, we remand the matter back to the learned NCLT who will decide the Company Petition on merits along with Additional Documents as may be filed by the Appellants. If the Appellant failed to file these documents before the learned NCLT, learned NCLT may proceed with the records available with it.

31. We direct the Respondents that the shares offered to the Appellant by way of rights issue may not be renounced and may not be allotted if already not renounced and not allotted to other shareholders as on today. The said direction will be in operation till the disposal of the Company Petition.

32. Interest of the Company is utmost. This Tribunal, vide order dated 20.01.2021 deferred the AGM scheduled to be held on 23.01.2021. In view of the statutory requirement to be complied with, we vacate the order passed on 20.01.2021. The Company is at liberty to convene and conduct AGM in accordance with law. We request the

learned NCLT to dispose of the Company Petition and Application, if any, as expeditiously as possible.

33. With the above directions, the Appeal is disposed. No Orders as to cost.

[Justice Jarat Kumar Jain]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

Ahc