

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.241 of 2017

[Arising out of order dated 24.05.2017 passed by National Company Law Tribunal, Kolkata Bench in C.P. No.119 of 2014]

IN THE MATTER OF:

1. ACME Consultants (P) Limited
Office at 145, Rash Behari Avenue,
4th Floor,
Kolkata – 700 029

2. Mooldhan Advisory Systems (P) Ltd.
Office at 145, Rash Behari Avenue,
4th Floor,
Kolkata – 700 029

3. Namokar Vinimay (P) Ltd.
Office at 145, Rash Behari Avenue,
4th Floor,
Kolkata – 700 029

...Appellant Nos.1 to 3

Versus

1. Wondermax Supply Pvt. Ltd.
Office at 21A, Shakespeare Sarani,
3rd Floor,
Kolkata – 700 017

2. Yash Deep Trexim (P) Ltd.
Pekon Building,
4th Floor, Plot No.Y-13,
Block – EP,
Kolkata – 700 091

3. Beltas Merchants (P) Ltd.
Pekon Building,
4th Floor, Plot No.Y-13,
Block – EP,
Kolkata – 700 091

4. Millenium Securities (P) Ltd.
Office at 7A, Bentinck Street,
2nd Floor, Old Wing,
Kolkata – 700 001
5. Chitravali Dealers (P) Ltd.
7A, Bentinck Street,
2nd Floor, Old Wing,
Kolkata – 700 001
6. Deva Merchants (P) Ltd.
7A, Bentinck Street,
2nd Floor, Old Wing,
Kolkata – 700 001
7. Propkar Marketing (P) Ltd.
7A, Bentinck Street,
2nd Floor, Old Wing,
Kolkata – 700 001
8. Safal Vyapaar (P) Ltd.
7A, Bentinck Street,
2nd Floor, Old Wing,
Kolkata – 700 001
9. Jitendra Kumar Choubey
5, Sreenath Das Lane,
Bowbazar,
Kolkata 700 012
10. Anil Kumar Bhansali
77 G.T. Road, Howrah – 711 106,
West Bengal
11. Jarjious Sheikh
Office at Noorpur, Ramnagar,
South Twenty Four Parganas – 743 368
12. Prabir Mukherjee
Son of Late Janakinath Mukherjee
Resident at 121, Bonfield Lane,
Kolkata – 700 001
13. Joykey Merchandise Private Limited
Office at 6B, Clive Row,
Kolkata – 700 001

14. Swarna Technology Private Limited
Office at 3A, Shakespeare Sarani,
Kolkata – 700 071

15. Jagrati Trade Service (P) Ltd.
Office at 3A, Shakespeare Sarani,
Kolkata – 700 071

...Respondent Nos.1 to 15

Present: Shri Arvind Kumar Gupta, Ms. Purti Marwaha and Ms. Henna George, Advocates for the Appellants

Shri Gopal Jain, Senior Advocate with Shri Gaurav Kejriwal, Shri Ankit Kohli, Shri Arjun Agarwal, Shri Sujit Kesari, Shri Rishabh Srivastava and Shri Karan Khanna, Advocates for Respondent No.1

J U D G E M E N T

A.I.S. Cheema, J. :

1. The appellants – original petitioners had filed Company Petition No.119 of 2014 which came up before National Company Law Tribunal, Kolkata Bench (“NCLT” in short). The petition was filed under Section 397, 388, 402 and 403 of Companies Act, 1956 (old Act) read with Section 241 and 242 of Companies Act, 2013 (new Act). The dispute relates to Respondent No.1 Company. It is stated that it is a private limited company.

2. The case put up by the Petitioners before NCLT was that the authorized paid up share capital of the company was of Rs.1 lakh. The Petitioners held 33% shares while Respondents 2 to 4 held 33% and Respondents 13 to 15 held 33% shares. Respondent No.12 held 100 equity shares equal to 1% equity shares. The earlier Directors Ghanshyam Sarda, Shri Jagdish Sarda and Smt. Santa Sarda resigned from the Board of

Directors on 15.12.2007 and Board of Directors of Respondents 2 to 4 was constituted as per wishes of Ghanshyam Sarda. The Petitioners did not have any representation in the Board. *Inter alia*, it was claimed before the NCLT that the Petitioners came to know that the Respondents were trying to dispose of the property of the Company. They claimed that in Extraordinary General Meeting purported to have been held on 17.07.2009, the authorized share capital of company had been increased from Rs.1 lakh to Rs.5 lakhs reducing the shareholding of Petitioners from 33% to 6.6%. The Petitioners claimed that they had not been given notice of such meeting and the increase of shares was illegal, null and void. Subsequently, on 30.07.2009 in Board Meeting, 40,000 equity shares of the company were issued and allotted to Respondents 5 to 8 without proper Board Meeting. The resolutions passed in the Board Meeting were illegal, null and void. Petitioners claimed that they did not receive any notice of General Body Meetings between 2009 – 2010 till 2012 – 2013. No such details were also provided by Respondent No.1 Company in the balance sheet for year ending 31.03.2009. Petitioners claimed that there was siphoning of funds of the company.

3. In the Company Petition, the Petitioners along with other prayers requested for declaration that the increased authorized capital on 17th July 2009 should be declared as illegal, null and void; declaration that the allotment of 40,000 equity shares on 30.07.2009 to Respondents 5 to 8

was illegal, null and void; declaration that all Board Meetings subsequent to January, 2008 should be held as illegal, null and void.

4. It appears that in the NCLT only Respondent Nos.1 and 11 appeared and filed reply while others remained ex-parte. These Respondents claim that the petitioners did not take any action for 7 years and after much delay the petition had been filed. The Petitioners had waived their right to claim the reliefs as sought. It was alleged that one Amit Sarda, eldest son of Govind Sarda had filed the Company Petition suppressing material facts. It was claimed that Respondent No.1 Company was guarantor for loan obtained by one M/s. Monozyme India Ltd. from Oriental Bank of Commerce and said Amit Sarda was running the said company. The brother of Aditya Sarda was the Managing Director of the said M/s. Monozyme India Ltd. The Respondent No.1 Company had approved and provided its assets as collateral security for the loan obtained by Aditya Sarda for M/s. Monozyme India Ltd. The Respondents claim that there was default in the repayment of the said loan and to save property of that company with ulterior motives, present petition had been filed. The Respondents referred to para 13 and 14 of the petition to state that the resignation of Ghanshyam Sarda, Jagdish Sarda and Smt. Santa Sarda was of 2007 and grievances on that count were also hopelessly delayed.

5. The learned NCLT heard the parties and going through the matter recorded reasons to come to a conclusion that the petition suffered from delay and laches. Taking support of Article 137 of the Limitation Act, 1963

and keeping in view huge inordinate delay and latches, the NCLT dismissed the petition.

6. Being aggrieved of such Judgement and Order, the original Petitioners - Appellants have filed this appeal. The Appellants claim that they came to know that the Respondents were trying to dispose of the only property of the company through brokers and upon making an enquiry, the Appellants came to know about the affairs of the company. Subsequently, they filed the Company Petition relating to various acts of oppression and mismanagement. However, NCLT solely on the ground of delay and latches dismissed the petition without going into the merits of the case. The Appellants claim that the petition was filed at the earliest opportunity after coming to know about illegalities committed by the Respondents. According to them, the Respondents did not provide prior knowledge to the Appellants. Several illegalities committed by the Respondents which were on record were ignored by NCLT. The increase of share capital was not in the knowledge of Appellants. They had not been given any invitation to purchase the shares. Rentals received by the Company by leasing its assets was not provided in the balance sheet. Equity shares issued to Respondents 5 to 8 were without proper Board Meeting. They had not received any notice of Annual General Meetings between 2009 – 2010 till 2012 – 2013.

7. It has been argued by the Appellants that the Appellants constitute 3 out of 10 Members of the Company and thus they could maintain the

petition. The main contention is that the Respondents fraudulently increased the share capital of Respondent No.1 Company on 17.07.2009 and on 30.07.2009 allotted fresh equity to 3rd parties without justification and notice to the Appellants – petitioners, who were shareholders. It is argued that the information was discovered in early 2014 when brokers contacted and the Appellants – Petitioners conducted enquiries on MCA portal. The petition was immediately filed thereafter claiming oppression and mismanagement. The Company was receiving Rs.3 lakhs per month from rentals and did not require any funds to increase the share capital. The Respondents contested the company petition but did not show that notices were issued to the Petitioners. No record was produced that proper procedure had been followed. The NCLT misread para – 13 and 14 of the Company Petition to dismiss the petition on the ground of delay. According to the counsel for Appellants – Petitioners, the concerned paragraphs were only written to demonstrate that the Appellants were not part of the Board of Directors and so they were not aware of the working of the Company. Thus according to the learned counsel, the petition was misread. It has been argued that there are Judgements to show that date of knowledge is material for the purpose of limitation when there are allegations like discovery of fraud, etc. It is argued that limitation is pure question of law and facts. It is also argued that the Appellants not being Directors were not involved in day-to-day affairs and the annual returns had been filed after 4 years and that the same were forged and false and thus the Appellants – Petitioners did not know about the acts of Respondents and

the petition could not have been dismissed on the ground of delay. The Respondents had claimed that the Appellants had changed their address which was vague. The argument is that the Petitioners came to know about illegal increase in authorized share capital and allotment of shares only after they found brokers trying to sell property of the Company and the said brokers contacted the Petitioners. The exact date could not be given since evidently no notice was received. The Petitioners – Appellants claim that they have now filed screen shot to show that the annual return of 2008 -2009 was filed only on 29.07.2011. The learned counsel tried to show the concerned returns had actually been filed late. According to the learned counsel for the Appellants, the appeal should be allowed and the matter should be sent back to the NCLT to decide the same on merits.

8. The learned counsel for the Appellant – Petitioner submitted that in the Company Petition, the Petitioners referred to various facts to show narrations of the incidents but their main grievance was only with regard to the increase of share capital in 2009 and the NCLT wrongly referred to the facts narrated of various incidents to calculate limitation. It is stated that the forms submitted to Registrar of Companies were delayed and in the absence of any notice, knowledge could not be attributed to the Petitioners. Reference has been made to the affidavit of the Appellants filed on 06.12.2017 and its compilation - page 35 filed with it to show that the screen shot was evidence of form 2 regarding increase of share capital being filed with ROC only on 19.10.2011. Thus it is stated that the

Company Petition filed on 14.08.2014 could not be said to be time barred. It is argued that even the return of 2009 was filed on 29.07.2011 which can be seen from the screen shot filed at page 37 with the affidavit dated 02.12.2017.

9. Against this, the learned counsel for the contesting Respondents submitted that the Appellants were aware about the developments in the Company in 2009 and did not raise dispute for many years and thus the petition suffered from delays and laches and was rightly dismissed by the NCLT.

10. Learned counsel for the Respondent submitted that the company petition which was filed had vague averments regarding limitation. The Petitioners did not specify as to when they came to know about the EGM dated 17.07.2009 and Board Meeting dated 30.07.2009. It is argued that the company petition mainly seeks reliefs regarding these incidents and there are no clear pleadings regarding knowledge which is exclusively within the domain of the Petitioners. The learned counsel further submitted that the certified copies of annual returns and Form 20B as well as Form 5, which have been filed, show that these were filed in 2009 or 2010 and e-mails sent by ROC showed that the Petitioners were aware of the developments. The Appellants – Petitioners had themselves raised company disputes and thus they had knowledge and the NCLT has rightly dismissed the petition as time barred. The prayers of the petition related to declarations with reference to increase of capital in 2009 and allotment

of equity shares in 2009. The other prayer to declare declaration of Board Meetings after 2008 is based on these earlier declarations sought and thus the petition was clearly time barred and suffered from delay and latches.

11. Looking to the averments made by both sides, when we have perused the Company Petition which was filed with NCLT, it has been pleaded in para 15 and 16 as under:

“15. The petitioners however have recently came to know that respondents are trying to dispose off the only property of the Company through various brokers, who are making frequent visits to the property. The petitioners are apprehending that there will be immediate disposal of the property by the respondents. It is apprehended that Respondents are now seeking to sell, alienate, dispose of the assets and properties of the Company.

16. The petitioners previously upon enquiry with regard to the affairs of the company were shocked to find out the state of affairs of the company which had been all hidden from the petitioners.”

(Emphasis supplied)

12. It is clear from these pleadings that the company petition has been triggered because the Petitioners came to “recently” know from some brokers that the Respondents were trying to sell, alienate, dispose of the properties of the company.

13. Para 16 clearly says that the petitioners “previously” upon enquiry were shocked to find the state of affairs. Thus the knowledge about affairs of the Company was “previous” which could be any time even in the remote of past tense. The paragraphs subsequent to para – 16 then refer to the Extraordinary General Meeting of 17.07.2009 and allotment of 40,000 equity shares. The word “previously” in para – 16 has not been explained. The petitioners themselves pleaded (in para 34 of the petition) that the company was being run on the basis of partnership principles and between the shareholders of the company. If this is so, they would/should ordinarily know what all is going on. Still the Petitioners want it to be accepted in 2017, that actions taken in 2009 and all the Board Meetings subsequent to that, need to be wiped out. Regarding limitation, it has been mentioned in the petition in para 5 as under:

“5. Limitation

The Petitioners declare that there is no prescribed period of limitation for institution of the instant proceedings. Further and/or in any event, the Petitioners declare that the petition is within the prescribed period of limitation.”

14. Thus considering the pleadings as well as limitation paragraph relating to limitation, it can be stated that the petition is quite vague. When the Petitioners came to know specifically in their knowledge and they did not contemplate the same, using the word “recently” does not help.

15. Apart from this, the learned counsel for the Respondents has painstakingly pointed out that there are documents to show that the Respondents had long before submitted the necessary forms to ROC and Petitioners who claim that the company was being run on the principles of partnership had every opportunity to check the records and thus should be attributed with knowledge. The learned counsel for the Respondents submitted that the Respondents had themselves raised company disputes and they actually had the knowledge.

16. Learned counsel for the Respondents has pointed out from counter affidavit filed by Respondent No.1 on 12.12.2017 that the 3 Appellants were using e-mail address “vcil @ giasc.101.vsnl.net.in” as their official e-mail address in the annual returns. The learned counsel argued and para - 4 of the affidavit filed for Respondent No.1 along with Annexure A1 at pages 6 to 14 claims that the e-mail ID of these Appellants is as just mentioned. According to the learned counsel, the Appellants appear to have communicated management dispute to Registrar of Companies by such e-mail and consequently, the communication dated August 4, 2009 was forwarded to the Appellants on this e-mail which can be seen from Annexure A2 filed with affidavit dated 12.12.2017. Learned counsel argued that Annexure A2 shows that the Respondent Company had submitted Form 5 dated 23.07.2009 with regard to increase of authorized share capital and ROC had informed Appellants about the same on 04.08.2009. The learned counsel stated that this document shows that in 2009 itself,

functioning regarding increase in authorized share capital was communicated to the Appellants.

17. The learned counsel for the Respondents submitted that Annexure A3 which has been filed with the counter affidavit for Respondent No.1 at pages 16 to 40 is certified copy of the annual return and it shows at page – 40 which is the last page of the certified copy, that Form 20B i.e. Annual Return dated 29.09.2009 of the Respondent Company was “passed on 13.08.2010”. The argument is that in this certified copy, the computerized Form 20B at page – 17, although it refers to authorized capital of the company as Rs.1 lakh, the Respondents submitted hand-filled annual return along with it to show that the share capital is increased to Rs.5 lakhs. The argument is that this was required because the Respondents had raised company dispute and computerized form to that effect could not be filed and so along with computerized form, hand written form was annexed. The counsel referred to Challan at page – 41 with the counter affidavit which is dated 13.08.2010 to say that it was submitted on 18.08.2010. The learned counsel submitted that with the annual return which was submitted with Form 20B, the list of attachments (page 21 of the Annexure with counter affidavit) shows the hand written annual return (as at page – 23) and copy of the letter dated 4th August, 2009 as at page – 14 (which was sent to the Appellants) and Form 5 (page 35 with the counter affidavit) were being attached.

18. The learned counsel then referred to Annexure A4 at pages 44 to 60 with the counter affidavit to submit that in 2009 – 2010 also pre filled Form 20B was filed along with manually filled annual return and was uploaded on 04.12.2010. The counsel then further pointed out that at Annexure A5 with the counter affidavit, certified copies of Form 23AC are submitted which was passed on 17.08.2010.

19. Against this, the learned counsel for the Appellants – original Petitioners argued that screenshot taken from the website of the Ministry of Corporate Affairs shows that Form 20B for year ending 2009 – 2010 had been filed only on 29.07.2011 and thus the company petition filed on 14.08.2014 was in limitation. The counsel referred to page – 37 - 38 with the affidavit dated 2nd December, 2017 of Amit Sarda filed for the Appellants on 06.12.2017. With reference to this, the learned counsel for the Respondents has submitted and rightly so, that in the face of certified copies filed by the Respondents, reliance on screenshot cannot be made. According to him, the MCA Portal has a disclaimer and thus against certified copies reliance on the screenshot cannot be placed.

20. Looking to the documents pointed out by the learned counsel for the Respondents, it is apparent that the Petitioners who appear to have raised company dispute were informed of the developments by e-mail (Annexure A2 with counter affidavit of Respondent No.1) regarding the developments. The learned counsel for Respondents rightly submitted that this shows knowledge to the Appellants – Petitioners. Even otherwise, it is argued that

if the Appellants were vigilant they would have exercised option to have access to records of the ROC and cannot be heard after so many years to set aside actions taken long back to which they acquiesced.

21. Looking to the prayers made in the company petition and the impugned Judgement passed by the NCLT for reasons mentioned above, we agree with the NCLT that the petition was suffering from delays and latches and the Appellants – Petitioners failed to make out a case for the NCLT to interfere.

22. We do not find any reason to upset the impugned Judgement and Order passed by the NCLT.

23. For such reasons we do not find any substance in the various arguments being raised on behalf of the Appellants. We accept the submissions made by the learned counsel for the Respondents which are based on records.

24. For the above reasons, the appeal is dismissed. There shall be no order as to costs.

[Justice Bansilal Bhat]
Member (Judicial)

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

New Delhi
20th February, 2018

/rs/nn