

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

COMPANY APPEAL (AT) NO.297 OF 2019

(Arising out of impugned order dated 04.10.2019 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in I.A. No.1229/KB/2019 in C.P. No.119/KB/20017)

In the matter of:

Amit Kumar Gupta,
For self and as Karta of
Amit Kumar Gupta (HUF)
DA-47, Sector -I, Salt Lake City,
Kolkata 700064

Also at

LGW Complex, Narayanpur,
P.O. Rajarhat-Gopalpur,
24 Parganas (North),
Kolkata 700 136

Appellant

Vs

1. LGW Ltd,
LGW Complex,
Narayanpur, P.O. Rajarhat-Gopalpur,
24-Parganas (North),
Kolkata 700136
2. Sanjay Kumar Gupta
LGW Complex,
Narayanpur, P.O. Rajarhat-Gopalpur,
24-Parganas (North),
Kolkata 700136
3. Anurag Gupta,
LGW Complex,
Narayanpur, P.O. Rajarhat-Gopalpur,
24-Parganas (North),
Kolkata 700136
4. Lucia Gupta,
LGW Complex,

Narayanpur, P.O. Rajarhat-Gopalpur,
24-Parganas (North),
Kolkata 700136

5. Jinesh Shah,
LGW Complex,
Narayanpur, P.O. Rajarhat-Gopalpur,
24-Parganas (North),
Kolkata 700136

Respondent

Mr. Abhrajit Mitra, Sr. Advocate, Mr. D.N. Sharma, Mr. Anjan Kumar Roy, Mr. Aseem Chaturvedi, Ms Radhika Khanna, Ms Vansha S. Suneja, advocates for appellant.

Mr. Joy Saha, Sr Advocate, Mr. Avishek Guha, Mr. Soumya Dutta, Advocates for R1 to R4

Mr. Jinesh Shah, Respondent No.5 in person.

JUDGEMENT
(22nd JANUARY, 2020)

JUSTICE JARAT KUMAR JAIN, MEMBER(JUDICIAL)

NCLT Kolkata Bench, Kolkata vide order dated 04.10.2019 decided application of Respondents herein I.A. No.1229/KB/2019 in C.P.No.119/KB/2017 against the order Amit Kumar Gupta, who is petitioner before NCLT, has filed this appeal.

2. Appellant, Amit Kumar Gupta, has filed petition before the NCLT, Kolkata Bench, Kolkata on the ground of oppression and mismanagement inter alia under Section 241 and 242 of the Companies Act, 2013 in relation to the affairs of the LGW Limited (Respondent No.1 company). Respondent No.1 company was incorporated on 31.8.1984 in the name of Laxmi Glass Works P. Ltd. However, subsequently name changed as LGW Limited. It is a close family company. The appellant being member of the family is the promoter, director of company. He and his HUF owns 17.58% of equity shareholding whereas his brother Sanjay Kumar Gupta and his branch owns

82.42% of equity shareholding. However, Sanjay Kumar Gupta permitted appellant Amit Kumar Gupta to act as a Director of the said company. Somewhere in February, 2017 differences arose between the appellant Amit Kumar Gupta and Sanjay Kumar Gupta and his branch and the interest of the business of the said company jeopardised. Appellant had received a special notice dated 6.2.2017 issued by Respondents No.2 under Section, 11, 115 and 169 of the Companies Act, 2013 for convening EOGM proposed to be held on 15.3.2017 for removal of appellant from the Board of Directors of the company. Then the appellant had filed a petition on the ground of oppression and mismanagement. Appellant claimed that the notice issued by Respondents is illegal and null and void as due procedure has not been complied with. Considering the urgency of the matter NCLT has passed ex parte interim order on 14th March, 2017. The operative portion of the order reads as under:-

“We are of the view that EOGM should not be stayed. In the interest of justice we do not want to stay the proceeding of EOGM but we make it clear that if any EOGM takes place then its resolution shall not be given effect without taking permission from the Tribunal. It is further directed that if the EOGM takes place, then resolution of that meeting should be submitted to the Tribunal within 3 days of the meeting. Petitioner is directed to serve the order of the court to the Respondents through Speed Post and e-mail and file affidavit regarding service of notice within 7 days. Respondents may file their reply within 7 days and thereafter, rejoinder, if any, be filed within 7 days.

List the matter for hearing on 29.03.2017”

3. In the light of this order the EOGM was scheduled to be held on 16th March, 2017. In the said Meeting the resolution was passed with 82.42% majority shareholders thereby removing the appellant from the post of directorship but in view of the said interim order dated 14th March, 2017 the resolution was not uploaded with the Registrar of Companies and no effect thereto was given. The aforesaid interim order has been extended from time to time.

4. Respondents stated that the aforesaid ex parte interim order has completely paralysed the functioning of the company as appellant creating obstacles and hurdle at every juncture and bypassing every decision taken by the majority of the Board of Directors. In such a situation the Respondents have filed an application No.1229/KB/2019 and prayed that if a Special Officer is appointed as Chairman for holding EOGM of members in accordance with the provisions of the Companies Act, 2013 and Rules and Regulations framed thereto, the whole issue relating to oppression and mismanagement in the matter will be put to an end.

5. In reply the appellant vehemently opposes the application on the ground of maintainability as well as other reliefs sought in the application. It is also stated that the interim order dated 14th March, 2017 directing the EOGM of the company was never challenged in any of the appeal. It is also submitted that the appellant is a promoter/director and one of the original subscribers to the Articles and Memorandum of Association of the company and he is also shareholder of the family company. The Respondents are trying to take inconsistent and self- explanatory stand, hence the application be dismissed.

6. NCLT after considering the submissions allowed the application. The operative order is as under:-

“i) That the Board of Directors of the Company are directed to convene a fresh EOGM of the company on the basis of the notices and documents annexed as Annexure ‘G’ under the Chairmanship of Mr. S.M. Gupta, who is appointed as the Special Officer by this Tribunal and is permitted to take all the necessary which required to hold this EOGM in accordance with the provisions of the Companies Act, 2013 and place before this Tribunal a report about the manner in conducting the EOGM alongwith copies of minutes and the Resolutions if any passed/adopted by the Board of Directors.

ii) If any agenda is included in the notice for passing a resolution of the removal of any directors, it should be done in the presence of the Special Officer in pursuance of section 159 of the Act.

iii) The fees of the Chairman is fixed at Rs.2,00,000/- (Rupees Two lac only) payable to him upon submission of his report before court preferably within one week from the date of conclusion of the EOGM. The Chairman shall also be entitled to have all the out of pocket expenses reimbursed.

iv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.”

7. Being aggrieved with this order the appellant has filed this appeal.

8. Learned counsel for the appellant submits that the earlier order dated 14th March, 2017 and the impugned order are contradictory and inconsistent and no reasons have been given by the NCLT to differ from its earlier order. It is further submitted that the impugned order has the effect of rendering the appellants’ petition infructuous. The impugned order has also the effect of destroying the rights of a minority shareholder and a director of the company which is a family company over which no particular branch of any member of the family can have or claim exclusive control and right. While passing the impugned order the NCLT has not considered that the company is family company in guise of a partnership and provisions under Section 169 of the Companies Act, 2013 cannot be applied.

9. Learned counsel for the Respondents supports the impugned order and submitted that the company petition is pending since 2017 and taking advantage of interim ex parte order passed in petition, the appellant representing himself as a director of the company has taken various steps which are detrimental and prejudicial to the interest not only to Respondent No.1 company but also to the members. In the notice of earlier Agenda of EOGM the reasons for removal of the directorship of appellant was not shown. Therefore, removing these defects new notice has been duly served on the members of the company. NCLT has a vast jurisdiction to pass such an order in the interest of the shareholders of the company. There is no contradiction in the earlier order and the impugned order. By the impugned order Mr. S.M. Gupta is appointed as Special Officer in whose Chairmanship the EOGM will be convened and the appellant has not raised any objection for appointment of Mr. S.M. Gupta before NCLT or even before this Tribunal. It is further submitted that the impugned order is a consent order, therefore, in view of Section 421(2) of the Companies Act, 2013 appeal is not maintainable.

10. Having heard learned counsel for the parties we have perused the earlier order dated 14.3.2017 as well as the impugned order dated 4.10.2019 and also gone through the record.

11. Firstly we have considered the background of earlier order passed on 14.3.2017. The appellant/petitioner filed the Company Petition No.119/2017 before NCLT on 8.3.2017. This petition was filed as appellant/ was served with a notice dated 6.2.2017 for EOGM scheduled on 15.3.2017 at 2 PM for specific business to remove the appellant/petitioner as a director of the Respondent Company. On behalf of the appellant/petitioner it has been pointed out that the notice dated 6.2.2017 is a defective as in the notice no explanatory statement is given. It was argued that if interim order is not passed appellant has to suffer irreparable loss as he will be removed from the directorship illegally and the petition become infructuous. In this background NCLT has passed ex parte order on 14th March, 2017.

12. After passing of this order more than two years has been lapsed but the company petition cannot be decided. It is pointed out on behalf of the

Respondents that taking advantage of the interim order passed on 14.3.2017 the appellant representing himself as a director of the company has taken various steps which are detrimental and prejudicial to the interest of the Respondent NO.1 company as well as shareholder members. The Respondents are not being allowed to enter into a new project due to appellant/petitioner activities. In this background the Respondent have moved the application IA No.1229/KB/2019 and after considering the submissions NCLT has passed the impugned order.

13. We have considered the submissions in the light of the powers of Tribunal under Section 242(4) of the Companies Act,2013 which empowers the Tribunal that on the application of any party to the proceedings, make an 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.

14. The grievance is that impugned order is in contradiction of the earlier order dated 14.3.2017. Earlier order dated 14.3.2017 was passed as the notice for removal of appellant was not in conformity with the Section 169 read with Section 115 of the Companies Act 2013 as in the notice no explanatory statement was given. Now the Respondents are ready to serve fresh notice in conformity with the Companies Act, 2013. Section 242(4) of the Companies Act, 2013 empowers the NCLT to pass any interim order which it thinks fit for regulating the conduct of the company's affairs. Hence the NCLT considering the change circumstances in the matter has modified its own ex parte order dated 14.3.2017, nothing wrong in it. It is not argued that the impugned order is detrimental and prejudicial to the interest of the Respondent Company. While passing the impugned order the NCLT found that

"14. From the aforesaid discussions, the parties have given their respective versions of the story and levelled allegations and counter allegations but, one thing common in their argument is that neither of the parties has any objection if an EOGM is allowed to be held by the Board of Directors under the Chairmanship of Special Officer to be appointed by

this Tribunal. What is challenged on the side of the respondent/petitioner in the CP is that no resolution is to be passed removing the director/petitioner. That objection is devoid of any merit in view of the power of the Company under Section 169 of the Act.”

15. With the above finding of NCLT it is apparent that both the parties agreed to hold EOGM by the Board of Directors under the Chairmanship of Special Officer to be appointed by the Tribunal. Hence the impugned order is well reasoned order.

16. We are unable to convince that the provisions of Section 169 of the Companies Act, 2013 are not applicable to the Respondent No.1 company.

17. We find no illegality or irregularity in the impugned order. NCLT has passed the impugned order in changed circumstances and, therefore, no interference is called for by this Tribunal. Hence the appeal is dismissed. However, no order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

New Delhi

Bm,