

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 18 of 2019

[Arising out of Order dated 5th July, 2018 passed by the National Company Law Tribunal, Mumbai Bench, in Company Petition No. 5/397-398/CLB/MB/2014]

IN THE MATTER OF:

1. Mr. Ganesh Jaiswal

S/o Sitaram Jaiswal,
R/o 291, Santsang Sudha,
Near Labour Court, Civil Lines,
Nagpur, Maharashtra – 440001.

2. Mrs. Vijayalaxmi Jaiswal,

W/o Ganesh Jaiswal,
R/o 291, Santsang Sudha,
Near Labour Court, Civil Lines,
Nagpur, Maharashtra – 440001.

3. Mr. Raju Jaiswal

S/o Pyarelal Jaiswal,
R/o 291, Santsang Sudha,
Near Labour Court, Civil Lines,
Nagpur, Maharashtra – 440001.

4. Mr. Alok Jaiswal

S/o Late Laxminarayan Jaiswal,
R/o 291, Santsang Sudha,
Near Labour Court, Civil Lines,
Nagpur, Maharashtra – 440001.

5. Mr. Santosh Jaiswal

S/o Jaynarayan Jaiswal,
R/o 291, Santsang Sudha,
Near Labour Court, Civil Lines,
Nagpur, Maharashtra – 440001.

...Appellants

Vs

1. Tourist Inn Private Limited.

Having registered office at:
New Cotton Market Road,
Nagpur, Maharashtra,
India - 440002.

Having office address at:
Hotel Tourist Inn,
Opposite Janki Cinema,
Malviya Road, Sitabuldi,
Nagpur, Maharashtra – 440012.

2. Mr. Dinanath Sharma,

S/o Mr. Khilindram Sharma,
R/o Gayathri Bhavan, 14, Vijay Nagar,
Chhaoni, Nagpur, Maharashtra, India.

3. Mr. Pradeepkumar Sharma,

S/o Mr. Dinanath Sharma,
R/o Gayathri Bhavan, 14, Vijay Nagar,
Chhaoni, Nagpur, Maharashtra – 440013.

4. Mr. Narendrakumar Sharma,

S/o Mr. Dinanath Sharma,
R/o Gayathri Bhavan, 14, Vijay Nagar,
Chhaoni, Nagpur, Maharashtra – 440013.

5. Mr. Surendra Sharma,

S/o Mr. Dinanath Sharma,
R/o Gayathri Bhavan, 14, Vijay Nagar,
Chhaoni, Nagpur, Maharashtra – 440013.

6. Mr. Rama Sharma,

S/o Mr. Surendra Sharma,
R/o Gayathri Bhavan, 14, Vijay Nagar,
Chhaoni, Nagpur, Maharashtra – 440013.

7. Mrs. Krishna Sharma,

W/o Mr. Dinanath Sharma,
R/o Gayathri Bhavan, 14, Vijay Nagar,
Chhaoni, Nagpur, Maharashtra – 440013.

8. Mrs. Sarita Sharma,

W/o Mr. Pradeepkumar Sharma,
R/o Gayathri Bhavan, 14, Vijay Nagar,
Chhaoni, Nagpur, Maharashtra – 440013.

9. Mr. Karan Sharma,

S/o Mr. Pradeepkumar Sharma,
R/o Gayathri Bhavan, 14, Vijay Nagar,
Chhaoni, Nagpur, Maharashtra – 440013.

10. Mr. Varun Sharma,

S/o Mr. Pradeepkumar Sharma,
R/o Gayathri Bhavan, 14, Vijay Nagar,
Chhaoni, Nagpur, Maharashtra – 440013.

....Respondents

Present:

For Appellants: Ms Arshiya Ghose, Advocate.

For Respondents: None.

J U D G M E N T

BANSI LAL BHAT, J.

Appellants herein - the minority shareholders of Respondent No. 1 Company alleged acts of oppression and mismanagement against Respondent No. 2 and his family members in taking unilateral decisions to gain majority in shareholding of Respondent No. 1 Company and its Board of Directors. They filed Company Petition No. 5/397-398/CLB/MB/2014 under Section 397 and 398 of the Companies Act, 1956 challenging the acts of oppression and mismanagement of the present Respondents which came to be dismissed in terms of impugned order dated 5th July, 2018 passed by National Company Law Tribunal, Mumbai Bench (hereinafter referred to as

the 'Tribunal') as being barred by limitation despite the Tribunal coming to a finding that the Respondents, while acquiring the shares, had not followed due procedure as contained in Articles 34(b), 34(g) and 35 of the Articles of Association.

2. The short question for consideration in the instant appeal is whether the petition before the Tribunal was barred by limitation.

3. Before dwelling upon the issue raised in this appeal that there being a continuous cause of action, petition under 397-398 of the Act would not be hit by limitation, it would be appropriate to have a brief glimpse of the factual aspect having bearing on the disposal of instant appeal. Appellants alongwith Late Laxminarayan Jaiswal and Late Subhash Jaiswal collectively held 4969 equity shares constituting 20.72% of the total shareholding of Respondent No. 1 Company which had been incorporated on 25th May, 1980 with Registrar of Companies, Mumbai, Maharashtra with authorized Share Capital of Rs.24 Lakhs divided into 24,000 equity shares of Rs.100 each. Main object of the Company was to purchase, acquire, operate and manage or deal in hotel and lodging house of every kind with allied and ancillary facilities. Respondent No. 2 and his family Members initially acquired 3340 equity shares held by Shri Chhanabhai Shah, Promoter of the Company in the year 2000. Respondent No. 3 was appointed as Director of the Company on 20th January, 1996 where Respondent No. 4 was appointed as Director on 23rd October, 2000. Respondent No. 5 was holding 1850 equity shares and further acquired 750 equity shares from Shri Chhanabhai Shah on 16th

September, 2000. Respondent No. 6 was appointed as Director of Company on 23rd October, 2000. Respondent No. 6 acquired 500 equity shares from Shri Chhanabhai Shah on 16th September, 2000. Respondent No. 7 acquired 1250 equity shares from Shri Narayan Deosarkar in the year 2009 though it was alleged that the transferee had expired in the year 1996. Respondent No. 8 acquired 545 equity shares from Smt. Parvati Deosarkar in the year 2009 and she was appointed as Director of the Company on 16th November, 2009. Respondent No. 9 acquired 500 equity shares from Mr. Prakash Deosarkar. Respondent No. 10 acquired 300 equity shares from Mr. Nikhil Deosarkar in the year 2009. All transfers of shareholding were questioned in the petition heard by the Tribunal. In consequence of acquisition of these shares through transfer of shareholding impugned in the petition Respondent 1 to 10 belonging to Sharma Family collectively came to hold 19,031 equity shares constituting 79.28% holding of the total share capital of the Company making them the majority shareholders of the Company. According to Appellants, Respondent No. 2 wrongly and illegally accepted the resignation of Shri Chhanabhai Shah with a view to gain full control over the Company. No notice was given to Appellant No. 1 of any Board Meeting in regard to appointment of Respondents 3, 4 and 6 as Directors of the Company. It was further alleged that Shri Chhanabhai Shah held 3,340 equity shares till 16th September, 2000 and on the same day five members of Sharma Family acquired shares without complying with the procedure laid down for transfer of shares. All this was allegedly done in a clandestine manner to gain majority in the Board of Directors of the

Company and also to have absolute control over the Company. It was contended that apart from the provisions of law governing Private Companies the 'Articles of Association' imposed restrictions on the right to transfer of shares. Reliance was placed on Article 34(b), 34(g), 35 besides Article 15 of the 'Articles of Association'. It was further alleged that the Respondents had availed loan facility against mortgage of property of the Company after removal of Appellant No. 1 from the Directorship of the Company on 23rd February, 2006. The Appellants sought declaration in regard to all meetings of the Board of Directors and General Meeting of the Company held after 1996 and all business conducted thereafter as illegal, void and non-est besides declaring the transfer of shareholding in favour of members of Sharma Family as illegal and non-est. Respondents, in their reply, before the Tribunal pleaded that all legal formalities had been completed in effecting transfer of shareholding and appointment of Directors as also in regard to removal of Appellant No. 1 from the Directorship of the Company. Objections were raised to the maintainability of the petition with further plea that the same was barred by limitation.

4. Mr. Shakul R. Ghatole, Advocate initially appeared on behalf of the Respondents as a sequel to service of notice upon them and sought time to file reply affidavit along with vakalatnama. However, subsequently the Respondents failed to turn-up and contest the appeal though the matter was adjourned from time to time. Finally, Respondents were set ex-parte and only Appellants addressed arguments.

5. The sole question for consideration is whether the petition before the Tribunal alleging various acts of oppression and mismanagement against Respondents has been dismissed as being barred by limitation rightly or not as the Respondents have neither appeared before this Appellate Tribunal in compliance to notices served upon them to contest the grounds urged for reversal of the impugned order nor appear to have produced any document before the Tribunal in support of their plea that whenever they acquired shares from other parties, the procedure as laid down in the Articles of Association for the purchase of shares was properly followed. While it cannot be disputed that the restrictions imposed upon Private Companies in regard to transfer of shares enjoins upon the Shareholder desirous of selling away his share to follow the procedure laid down in the Articles of Association of the Company, the issue of limitation affecting the very jurisdiction of the Tribunal has to be addressed irrespective of the fact that the same has been set up as a defense or not.

6. It is well settled that a plea of limitation is a mixed question of law and fact. Reference in this regard may profitably be made to the judgment of Hon'ble Apex Court rendered on 11th July, 2006 in Civil Appeal No. 4766 of 2001 titled '**Ramesh B Desai & Ors. Vs. Bipin Vadilal Mehta & Ors.**' reported in (2006) 5 SCC 638 (para 19). It is not in dispute that in regard to matters falling within the purview of Section 397-398 of the Companies Act, 1956, the Limitation Act does not specifically provide for a period of limitation. In terms of Article 137, which is applicable to matters for which

no period of limitation is specifically provided, the period of limitation is three years from the date when the right to apply accrues. **Unless there is a continuing cause of action, the right to apply will have to be construed as having accrued when the first violation of right occurs or is discovered. Successive violation of right will not give rise to a fresh cause of action.** In the instant case, the alleged acts of oppression attributed to Respondents pertain to period ranging from year 1996 to 2009. The last act indisputably relates to year 2009. However, it is for the first time in the year 2014 that the Appellants filed the Company Petition alleging oppression and mismanagement qua the acts of omission and commission pertaining to the period commencing from year 1996 and lasting till 2009. Computed from the date of first alleged violation occurring in year 1996, the Company Petition is patently barred by limitation. Even if such acts of omission and commission are considered to be a chain of events forming a series, admittedly the Company Petition was filed much beyond the prescribed limitation period of three years from the alleged last act of oppression stated to have occurred in year 2009. Viewed in this context there is hardly any scope for departure from the finding recorded by the Tribunal that the Company Petition was barred by limitation.

7. Learned counsel appearing on behalf of the Appellants made desperate attempt at convincing this Appellate Tribunal that the acts of oppression and mismanagement continued beyond 2009 in as much as the last illegal transfer of share occurred in 2011 when Respondent No. 1

repurchased one share each from Mr. W. P. Joshi and Mrs. Radhika Joshi and the property of Respondent No. 1 was put on sale in the year 2013. This argument is designed to stretch the cause of action qua alleged oppression and mismanagement by an attempt at demonstrating that there was a continuing cause of action. However, this argument is flawed in both technique as well as substance. Admittedly, the Appellants are minority shareholders who have been deprived of their right to participate in the affairs of the Company. The Tribunal has observed that there is certainly a merit in the case in favour of Appellants as the Respondents have not produced any document to prove their plea that whenever they acquired shares from other parties, procedure envisaged in the Articles of Association for purchase of shares was properly followed. However, this deprivation of Appellants of participation in the affairs of the Company did not begin in 2014 when the Company Petition came to be filed. The breach of Articles resulting in such deprivation and prejudice to Appellants beginning 1996 caused the fatal blow to Appellants in 2009 as per their own showing and the acts complained of thereafter, noticed in the argument aforesaid, are merely the long term effects of acts of malfeasance spanning years 1996 to 2009. We say so as the case setup by the Appellants before the Tribunal clearly indicates that Appellant No. 1 had received a special notice on 23rd February, 2006 for his removal from Directorship of the Company to which he responded. Finally he was removed from Directorship of the Company and same was notified to ROC by filing Form No. 32. This instance, though not the solitary one, in itself knocks the bottom of the contention raised on

behalf of Appellants that they were not aware of the alleged acts of oppression at the hands of Respondents. It would be absurd to entertain the plea that after removal of Appellant No. 1 from Directorship of the Company, the Appellants should be waiting for its long term effects to file a Company Petition alleging oppression and mismanagement. Even if cause of action is assumed to be continuing till 2009, though we don't hold so, the Company Petition filed by the Appellants is hit by limitation.

8. For the foregoing reasons, we are of the considered opinion that the impugned order not shown to be erroneous, muchless perverse, does not warrant interference. We find no legal infirmity in the impugned order. The appeal is accordingly dismissed. There shall be no orders as to costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

NEW DELHI

21st August, 2019

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