

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 242 of 2017

IN THE MATTER OF:

- 1. M/s Span Biotronics Private Limited,
701-702, 7th Floor, Opulence 6th Road,
TPS III, Santacruz (E), Mumbai – 400055,
Maharashtra.**
- 2. M/s Arkay Healthcare Private Limited,
701-702, 7th Floor, Opulence 6th Road,
TPS III, Santacruz (E), Mumbai – 400055,
Maharashtra.**
- 3. M/s Span Divergent Limited, Formerly
known as M/s Span Diagnostics Ltd.,
902-904, 9th Floor, Rajhans Bonista,
Behind Ram Chowk Temple,
Ghod Dod Road, Surat – 395 007,
Gujarat.**

....Appellants

Vs

- 1. Dr. Bhagwati Prasad,
B-2003, Lake Pleasant Lake Homes,
Off. AdiShankaracharya Marg,
Powai, Mumbai – 400 076,
Maharashtra.**

....Respondent

Present:

For Appellants: Shri P. K. Mittal, Shri Hitender Mehta and Shri Hardeep, Advocates

For Respondents: Shri Shakunt Saumitra, Advocate.

JUDGEMENT

BANSI LAL BHAT, J.

This appeal is directed against order dated 22nd May, 2017 passed by Mumbai Bench of the National Company Law Tribunal in CP No. 16/397-398/CLB/MB/MAH/2016, titled Dr. Bhagwati Prasad Vs Span Biotronics Private Limited & Others by virtue whereof the petition filed by Dr. Bhagwati Prasad – Respondent herein alleging oppression and mismanagement has been partly allowed by directing Arkray Health Care Private Limited – Appellant no.2 herein to accept the offer of transfer of 500 shares by Respondent herein as per valuation report dated 1st February, 2014 @ Rs.2064.74 per share. Respondent herein has been granted further relief by awarding Rs.20 lakhs in lieu of his professional qualification utilized during the initial days of establishment of Appellant no.1 Company. Aggrieved of the aforesaid findings and relief granted, the appellants have assailed the impugned order through the medium of instant appeal on the grounds mentioned therein.

2. The case set up by the Respondent herein before the National Company Law Tribunal, Mumbai Bench (hereinafter referred to as 'NCLT') may shortly be adverted to. The Appellant no.1 M/s Span Biotronics Private Limited was incorporated under Companies Act 1956 on 8th November, 2006. Respondent herein was appointed as Vice President (Research & Development) in Appellant No.1 Company on 22nd January, 2007. On 10th August, 2008, 500

equity shares having face value of Rs.100 each were allotted to him. While Respondent herein held 5% shares, remaining 95% shares of Appellant No.1 Company were held by Appellant no.3 – Span Diagnostic Limited. Respondent herein claimed that as Vice President, he played a key role in activities of the company looking after the administration and promoting the research and development business of the company. Appellant no.1 executed royalty agreement with Appellant no.3 under which Appellant no.3 was granted the right to possess, manufacture and sell off the instruments developed by Appellant No.1 Company, for a consideration of a royalty. Respondent herein was given entitlement of 10% of the gross royalty received by Appellant No.1 Company from licensing the technology developed by the present Respondent. This was in recognition of his contribution and formed the subject of a royalty agreement dated 14th May, 2010 executed inter-se Appellant No.1 Company and the present Respondent. According to the present Respondent, the smooth functioning of Appellant no.1 Company was disrupted when on 24th January, 2014, a conference of all the employees of Appellant no.3 Company was held at Surat where Appellant no.3 Company announced that the process of selling of the entire diagnostic business was in progress which included the majority stake in Appellant no.1 Company. On the following day the employees of Appellant No.3 Company were assured in writing that they would be retained in their existing positions and all business commitments would be honoured. Respondent herein alleged that he was not given any notice about the deal between Appellant no.3 and Appellant no.2 Companies. Allegedly Appellant no. 2 and 3 acted through Appellant no.1 Company and

connived to harm the Respondent herein by their actions. The Respondent herein alleged that he was denied participation or involvement. Pursuant to the aforesaid deal, Appellant no. 1 Company was sold through the transfer of its bulk shares by Appellant no.3 along with its related business to Appellant no.2 to the prejudice of Respondent herein.

3. Citing yet another instance of oppression, Respondent herein alleged that he was not taken into confidence or consulted when Appellant no.3 transferred shares in favour of Appellant no.2 when the shares of Appellant no. 1 Company were valued by a Chartered Accountant at Rs.2064.74 per share. After completion of acquisition, the Appellant no.2 Company began tough oppression of Respondent herein and pressurised him to increase the speed of work. Business Transfer Agreement inter-se Appellant no. 2 and Appellant no. 3 was executed on 5th March, 2015 thereby reducing the Appellant no. 1 Company to the status of a subsidiary of Appellant no. 2. It was further alleged by the Respondent herein that he was harassed and hostile conditions were created compelling him to make an offer of exit as a shareholder from the Appellant no. 1 Company. Meanwhile on 28th May, 2015 termination notice was served upon Respondent herein as Appellant no. 1 communicated its decision to discontinue the business activity w.e.f. 27th June, 2015. This was followed by one more letter relieving the Respondent herein. Respondent herein addressed letters to the company raising his grievance that the entire transaction was carried out without consulting him. On 31st March, 2015, Chairman of Appellant no. 2 Company informed the Respondent herein that it was decided to windup the operations of Appellant

no. 1 Company. Respondent herein objected to the same on the ground that the same was prejudicial to the interest of the company. Respondent herein also shot a letter to the company detailing his vital role in growth of the company. He further emphasized that he was not consulted despite being the minority shareholder of the company. He also claimed compensation for his wrongful termination and royalty besides the value of his 500 shares.

4. Appellants, while denying the allegations of oppression and mismanagement in their reply pleaded that the Respondent herein was one of the employees of the company and very small royalty income constituted the share of Respondent. It was further pleaded that acquisition of Appellant no. 3 Company by Appellant no. 2 Company was under due process of law and the valuation of shares was systematically considered. A second valuation was done in February, 2015 which valued the equity share at Rs.1165 per share. This was done to ascertain the quantum of the stamp duty required to be paid at transfer of shares from Appellant no. 3 Company to Appellant no. 2 Company. It was further pleaded that the Respondent herein was not capable of delivering the expected results. Hence it was decided to terminate his services. It is pleaded that amount of Rs.4,15,183 towards full and final salary, gratuity Rs.5,14,423, Royalty Rs.3785 from April, 2015 to May, 2015 was paid to Respondent herein through cheque to which he raised no objection. It was further pleaded that the termination of Respondent was based upon certain basic irregularities committed on his part and due process of law was followed in terminating his services. Thus there was no continuing oppression as alleged. Appellant no. 3 has filed an affidavit affirming therein

that the Respondent herein was aware about the transfer of shareholding by Appellant no.3 Company in favour of Appellant no.2 Company. It was pleaded that the Respondent herein had no locus standi in the said companies and thus had no legal right to object to such transfer.

5. On consideration of the pleadings of the parties and the documents placed on record, learned NCLT found that the Respondent herein was associated with the Appellant no.1 Company in two capacities, one as a vice president (employee) and two as a shareholder (500 shares). In so far as his removal from the Vice Presidentship was concerned, NCLT found that the Respondent herein was not a Director but an employee (Vice President) who had been removed by the employer. It was found that due legal process had been adopted in removal of the Respondent from the Vice Presidentship and Respondent herein had not raised any technical objection to the legal formalities observed with regard to his removal. In so far as transfer of shareholding by Appellant no.3 Company in favour of Appellant no. 2 is concerned, NCLT was of the view that there was nothing on record to establish that such acquisition was not enforceable in law. It found that in transfer of shareholding in question due process of law had been adopted. Learned NCLT was of the view that it was not in interest of the business of the company to reverse the events, more so as no instances of financial irregularity had been brought to its notice. Referring to letter dated 17th July, 2015 written by Appellant no. 1 Company to Respondent herein when the Respondent herein had expressed his intention to transfer his shareholding in favour of Appellant no.2 Company, NCLT observed that it was beneficial to Respondent as also

Appellants 1 and 2 to accept exit plan of the Respondent. It was further of the view that it would be proper to direct the Appellant no. 2 to accept the offer of transfer of 500 shares by the Respondent. Rejecting valuation report dated 16th February, 2016 on the ground that the same was drawn up only for purpose of payment of stamp duty, the NCLT acted upon valuation report dated 1st February, 2014 determining the valuation of shares at Rs.2064.74 per share for arriving at the consideration amount of 500 shares to be transferred by Respondent herein.

6. In so far as claim for a sum of Rs.5 Lakhs towards royalty due on the Appellant no.1 Company and claim for 'severance pay' of Rs.26,75,000/- set up by the Respondent herein is concerned, NCLT deemed appropriate to allow a sum of Rs.20 Lakhs to be disbursed by Appellant no. 2 in favour of Respondent herein in lieu of his professional qualification utilized during the initial days of establishment of Company. This lump sum amount appears to have been awarded in favour of Respondent herein to set at rest the dispute after prolonged litigation.

7. At one stage we were informed that the parties intended to settle the dispute on the terms that the Appellant will pay lump sum of Rs.10 lakh in favour of the Respondent. While no affidavit has been filed on behalf of the Appellant in this regard, Respondent herein has filed affidavit indicating his willingness to a reduction in compensation amount from Rs.20 lakhs to Rs.10 lakhs in order to give a quietus to the matter. This claim, according to the

Respondent shall be in addition to benefit from sale of 500 shares at the rate of Rs.2064.74 per share. The proposed settlement, however, did not take off.

8. The impugned order has been assailed on the ground that the Appellant no.1 has made payment of 'severance pay' in accordance with the terms and conditions of the letter of appointment. It is contended that the Respondent had resigned as Vice President and after his resignation he was paid salary, allowances and gratuity thereby severing the relationship of employer and employee. Since the Respondent had accepted the dues paid to him and appropriated without any protest and demur, therefore direction to pay a sum of Rs.20 lakhs was totally illegal and without jurisdiction. It is contended that as per letter of appointment nothing further was required to be paid by Appellant no.1 Company to Respondent. It is further contended that the Respondent has not even alleged any instance of mismanagement. It is further contended that the direction for purchase of shares of Respondent at Rs.2064.74 per equity share is unwarranted as even the Appellant no.2 has purchased the shares held by Appellant no.3 at a rate of Rs.1165 per equity share. It is contended that the NCLT has arbitrarily decided to adopt valuation report giving rate of Rs.2064.74 per equity share though the same was quite old and the working of the company has drastically reduced. It is further contended that inspite of holding that the Appellants were not guilty of oppression and mismanagement, exercise of powers beyond the scope of Section 403 of the Companies Act was illegal.

9. Heard learned counsel for both the parties and scanned through the material on record. Findings recorded by the NCLT have been assailed as being erroneous. Following issues are raised in the appeal:

I:- Whether the Respondent was not entitled to sum of Rs.20 Lakhs in lieu of his past services rendered as Vice President when he had been paid salary, allowances and gratuity pursuant to his resignation in terms of letter of his appointment.

II:- Whether the Appellant no.2 was under no obligation to purchase the shares held by Respondent at a price of Rs.2064.74 per share when the shares were earlier purchased by Appellant no. 2 at a price of Rs.1165 per share.

Issue No. I

10. It is the admitted position in the case that the Appellant no.1 Company comprised of two shareholders. While Appellant no. 3 - M/s Span Diagnostics Ltd held 95% shares, Respondent was the minority shareholder holding 5% share. It was in deference to the professional qualification of the Respondent that he was invited to join the Appellant no. 1 Company with his designation approved as 'Vice President (Research and Development)' in terms of his letter of appointment. Respondent was to devote full time to perform the duties as envisaged in Annexure to the letter of appointment. His salary was also decided mutually. According to Respondent, he contributed in a big way in shaping up the company and it was on account of his hard toil and strenuous efforts that the Appellant no.1 Company gained a stature. However, tables

were turned on him when an agreement was reached between Appellant no.3 and Appellant no.1 Company regarding transfer of management in the hands of Appellant no. 2 Company. According to Respondent, Appellant no. 1 Company granted exclusive right of use of instruments and research activity to Appellant no. 3, thereby side-lining the Respondent, who alleged that he was kept in dark about these developments and not informed. Appellants have effectively repelled this contention of Respondent by pointing out that the Respondent was in attendance when the board meeting was held on 6th August, 2014, wherein proposed transfer of 10,000 equity shares of Rs.100 each from Appellant no. 3 to Appellant no. 2 was approved. This comes to fore from Annexure XIII, Vol. II of the paper book at page 295-296. The new management was not satisfied with the performance of Respondent, as it emerges from the correspondence placed on record. These developments ultimately paved the way for exit of Respondent.

11. Admittedly, Respondent was an employee of Appellant no.1 Company besides being a minority shareholder, his shareholding being mere 5%. He was not Director of the company. On transfer of shares from Appellant no. 3 Company to Appellant no. 2, services of Respondent were decided to be terminated by the new management. The terms and conditions of his employment were governed by the appointment letter dated 22nd January, 2007 forming Annexure VIII to the paper book at page 272, clause 6 whereof reads as under:

“6. *Termination of Service/Resignation:*

6.1 *Subject to sub-Clause 2.5, your services can be terminated, without any notice or compensation and without assigning any reason for loss of confidence, or for any act including dishonesty, misappropriate of company's money or property, fraud or any act subversive of discipline which in the opinion of the management is seriously detrimental/ prejudicial to the interest/philosophy of the company and warrants your termination forthwith*

6.2 *If you absent your self without leave or remain absent beyond the period of leave originally granted or subsequently extended, you shall be considered as having voluntarily terminated your employment without giving any notice unless:*

- i) return to work within 8 (eight) days of the commencement of such absence and*
- ii) give an explanation to the satisfaction of the management regarding such absence.*

6.3 *Should you desires to resign, you will be required to give one month's notice in writing or amount*

equivalent to one month's salary (i.e. Basic salary plus all allowances) in lieu thereof. In case the company desires to relieve you from the services, the company shall also give one month's notice in writing or amount equivalent to one month's salary (i.e. Basic salary plus all allowances) in lieu thereof. The condition of one month's notice as aforesaid may be waived or may be reduced by the management at the sole discretion of the management.”

12. A bare perusal of the provisions contained in the aforesaid clause makes it abundantly clear that the employment of Respondent was terminable on one months' notice from either side which could be waived or reduced by the management at its sole discretion. The appointment letter further lays bare that the Respondent was required to serve the company for a minimum period of three years from the date of joining the company and his services could not be terminated in the ordinary course during such period except on grounds of misconduct or breach of contract. The employment was contractual in nature, terminable at the instance of either party by giving one months' notice. Admittedly, Respondent served the Appellant no.1 Company for slightly over eight years. His services were not terminated within three years of his appointment. Therefore, he was not entitled to claim any

‘Severance Pay’ for such termination. However, in terms of agreement dated 14th May, 2010 inter-se the Respondent and Appellant no. 1 Company, the Respondent was entitled to royalty. Appellants have apart from demonstrating that the Respondent was aware about the transfer of shareholding by Appellant no. 3 in favour of Appellant no. 2, pointed out that the revenue had declined in year 2015 and that the company suffered a loss which was the compelling reason behind closing down the operations of the Company. We find considerable force in the argument of the learned counsel for Appellants that the Respondent had ceased to be a driving force behind the progress of Company which had started declining gradually. Thus, the Respondent was not entitled to any compensation for his past services apart from the benefits paid to him. It is pointed out on behalf of the Appellants that an amount of Rs.4,15,183/- was paid towards full and final settlement of salary to Respondent. Besides, an amount of Rs.5,14,423/- was paid as gratuity and Rs.3,785/- was paid towards royalty. This is duly evidenced by the documents forming Annexure XVI pages 304 to 309 of paper book Vol. II. The Respondent appears to have not only accepted such benefits without demur but has also not raised any legal question on the issue. We accordingly find ourselves in agreement with the finding returned by the learned NCLT that due legal process was observed in removal of Respondent from service of Appellant no. 1 Company. We further find that the Respondent has been paid all benefits admissible in terms of his contract of employment and royalty agreement dated 14th May, 2010.

13. Learned NCLT has allowed a sum of Rs.20 Lakhs in favour of Respondent in lieu of his professional qualifications utilized during the initial days of establishment of company. There is no justification in allowing this sum of money, as the Respondent has been duly compensated and paid all benefits in terms of his contract of employment. The utilization of professional qualification of Respondent during initial days of establishment of the Company would not entitle the Respondent to any additional benefits beyond the scope of contract of employment and the financial benefits like remuneration/ salary agreed upon by the parties. Respondent has allowed his professional qualification to be exploited strictly in adherence to the terms of contract of employment for which he cannot be held entitled to some further amount in addition to the amount paid towards full and final settlement of his claim on account of service benefits admissible in terms of contract of service. May be, the Respondent, by engaging in research devised products initially providing company to gain foothold in the market but that was expected of him as an employee of the status of Vice President who also held 5% shareholding. The contribution made by him for emergence of the company during its early days cannot be termed something for which he could expect a windfall. Finding recorded by learned NCLT to award Rs.20 lakhs in favour of Respondent as a fair and reasonable amount in lieu of his professional qualification utilized during the initial days of establishment of Appellant no. 1 Company is unsustainable and cannot be supported. The claim set up by the Respondent for 'Severance Pay' of Rs.26,75,000 in lieu of

past services and as compensation for alleged unjustified termination is unsustainable and the same is to be rejected.

14. We find ourselves in complete agreement with the learned NCLT in holding that nothing has been brought on record to establish that the transfer of shareholding by Appellant no. 3 in favour of Appellant no. 2 was not enforceable in law. No financial irregularity has been brought to our notice and there is no proof of oppression or mismanagement. There is nothing on record to arrive at a finding that the transfer of shareholding by Appellant no. 3 Company in favour of Appellant no. 2 Company was legally unenforceable. Contention raised on this count is accordingly repelled.

Issue No. II

15. Learned counsel for the Appellants further contended that the learned NCLT seriously erred in rejecting the valuation per share of Rs.1165 on the basis of second valuation report and relying upon the first valuation report. It is contended that the Appellant no. 2 purchased shares held by Appellant no. 3 at the rate of Rs.1165 per equity share. In the face of such purchase direction that Appellant no. 2 accept the offer of transfer of 500 shares by the Respondent at the rate Rs.2064.74 was unwarranted.

16. Per contra it is submitted by learned counsel for Respondent that the Valuation report dated 16th February 2015 was drawn up solely for the purpose of payment of stamp duty and the same did not reflect the fair value of shares of Appellant no. 1. We have given our anxious consideration to the submissions made at the Bar. From perusal of record it comes to fore that

the Respondent intended to sever relations with Appellant no. 2 Company. This is reflected from the letter dated 17th July, 2015 addressed by Appellant no. 1 to the Respondent. It is gathered that the Respondent intended to transfer his shareholding in favour of Appellant no. 2. This Exit Plan of the Respondent has been considered as beneficial to both the parties by learned NCLT and we take no exception to such finding. There is no legal infirmity in the impugned order in so far as direction to Appellant no. 2 to accept the offer of transfer of 500 shares by the Respondent is concerned. As regards valuation, it has rightly been noticed by the learned NCLT that the valuation report dated 16th February 2015 has been drawn up merely for purpose of payment of stamp duty and not with the intention to determine the transfer price of shares. Be it seen that in terms of first valuation report dated 1st February, 2014 fair and reasonable price for transfer of shares was determined at Rs.2064.74. Same was adopted by the concerned parties. In the face of same, the subsequent valuation report dated 16th February, 2015 has rightly been held as farce and undervalued to evade proper stamp duty. We accordingly find no infirmity in the finding recorded by learned NCLT that valuation report dated 1st February, 2014 at the rate of Rs.2064.74 was to be taken into account for arriving at consideration amount of 500 shares to be transferred by the Respondent. This finding is accordingly upheld.

17. In view of the foregoing discussion this appeal is partly allowed. The impugned order is set aside to the extent of directing the Appellants to disburse Rs.20 lakhs in favour of Respondent in lieu of his professional qualifications utilized during the initial days of establishment of Company.

The impugned order is maintained in so far as direction to Appellant no. 2 to accept the offer of transfer of 500 shares by the Respondent at the rate of Rs.2064.71 per share is concerned. Respondent is also held entitled to simple interest on the cost of such shares at the rate of 9% per annum from the date of impugned order. The appeal is disposed of in the aforesaid terms. There shall be no orders as to costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

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

NEW DELHI

7th February, 2018

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