

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 54 of 2018

IN THE MATTER OF:

**1. S.P. Gupta
K-115, Hauz Khas,
New Delhi 110017**

...Appellants

**2. Vipul Gupta
K-115, Hauz Khas,
New Delhi 110017**

**3. Kaveen Gupta
K-115, Hauz Khas,
New Delhi 110017**

Vs

**1. International Commenter Ltd.
302, Akash Deep Building,
26A, Barakhamba Road
New Delhi 110001**

**2. B.C. Gupta
M-138, Greater Kailash, Part II,
New Delhi 110048**

**3. Rajni Gupta
M-138, Greater Kailash, Part II,
New Delhi 110048**

**4. Gudiya Gupta
M-138, Greater Kailash, Part II,
New Delhi 110048**

**5. Robin Gupta
M-138, Greater Kailash, Part II,
New Delhi 110048**

**6. Manisha Gupta
M-138, Greater Kailash, Part II,
New Delhi 110048**

**...Contesting
Respondents**

**7. Registrar of Companies
Delhi & Haryana
IFCI Tower,
61, Nehru Place, New Delhi**

**8. Sheel Gupta
K-115, Hauz Khas,
New Delhi 110017**

**9. S.P. Gupta for Janki Devi
K-115, Hauz Khas,
New Delhi 110017**

**10. S.P. Gupta for Hari Ram Gupta
K-115, Hauz Khas,
New Delhi 110017**

**11. Babita Gupta
K-115, Hauz Khas,
New Delhi 110017**

**12. Monisha Gupta
K-115, Hauz Khas,
New Delhi 110017**

**13. Isha Metals Pvt. Ltd.
B-219, Vivek Vihar,
Delhi.**

**14. Ujjwal Exports Pvt. Ltd.
D-219, Vivek Vihar, Phase I,
New Delhi 110095**

**...Proforma
Respondents**

Present:

For Appellants: Mr. Virender Ganda, Sr. Advocate with Mr. Yogesh Jagia, Mr. Nitesh Jain and Mr. Pradeep Dhingra, Advocates.

For Respondents: Mr. Rajnish Sinha, Mr. Nikhil Jain and Mr. Yogender, Advocates.

Oral Judgment

06.04.2018: Heard counsel for the appellant and learned counsel for contesting respondents. Perused Impugned order.

2. It appears that the Company Petition is pending between the parties since 2010. Counsel for appellant submits that there were various applications filed in the petition but CA 142/14 was picked up out of turn and decided. It appears that the parties are connected with different companies and disputes have arisen between them relating to the different companies and litigations are pending. In the present matter it appears that the NCLT was moved by Respondents vide CA 11/18 because of Condonation of Delay Scheme, 2018 and to take benefit of the Scheme the question of getting the accounts audited and placing the same before AGM was taken up. In Para 1 NCLT recorded how it was in interest of Justice to take up the application of 2014 and to decide it. The NCLT has recorded in Para 2 of the impugned order as under:

“2. The urgency in this case is that the Directors of Respondent no. 1 Company, have been disqualified on grounds of non-filing of the Annual Returns and Balance Sheets of the Respondent Company under Section 164(2) of the Companies Act, 2013 by Registrar of Companies vide their notice dated 15.09.2017 issued on the website of MCA disqualifying the applicants namely, Mr. Robin Gupta, Ms. Rajni Gupta and Ms. Manisha Gupta. A scheme has now been floated by the MCA to rectify the default of non-filing of documents under the name “Condonation of Delay Scheme 2018” introduced vide “General Circular no. 16/2017 bearing F. NO. 02/04/2017-CL-V”. This Scheme has been introduced

by the MCA providing opportunity to the defaulting companies to clear their defaults in filing the documents within the specified period and seek the benefit of setting aside the suspension of Directors. Further for the filing of the Financial Statements and the Annual Returns, the DIN of the disqualified Directors have been reactivated temporarily till 31st March, 2018.”

3. It appears that in the Petition parties have raised disputes before NCLT regarding the question of removal of auditor of the company. The learned counsel for the appellant is submitting that in the Company Petition one of the disputes related to the removal of the auditor and other dispute was regarding appointment of auditor made by the respondents. It is argued by counsel for appellant that the question of the Constitution of Board and shareholding were also in dispute and in such situation the learned NCLT could not have, in between appointed what is stated to be independent auditor. The learned counsel for appellants submits that the NCLT should have decided the Company Petition itself expeditiously. The learned counsel for contesting respondents submits that the question of shareholding is not in dispute in the Company Petition. I am not entering into these fields.

4. The learned NCLT has discussed rival allegations of the parties regarding auditors and considered the prayers in the application. The ld. NCLT observed in Para 10 and 11 as follows:

“10. Keeping in view the facts and circumstances of the case, as also the fact that there is no reason to create any impediment in the Respondents’ availing the scheme floated by the Ministry of Corporate Affairs for filing of the Returns for the defaulting years, which consequently shall result in restoration of their DINs, this Bench is of the opinion that it would be apposite and expedient to direct the financial statements to be audited by an Independent Auditor for the purpose of laying it before the shareholders and filing them with ROC.

11. In view of the facts and circumstances of the case, this Bench appoints M/s. K.G. Somani and Company, Delight Cinema Building, Gate no. 2, 3rd Floor, Asaf Ali Road, New Delhi(Mobile No. 9899904779, 9871098777), as the Statutory Auditors to audit the accounts for the relevant years. The Auditor shall conduct the audit in a time bound manner to ensure that respondents are able to take advantage of scheme floated.”

5. Thus, the NCLT in interest of company, to take advantage of the scheme proceeded to appoint independent auditor and directed that the audit should be completed in a time bound manner as the deadline under the scheme was

31st March, 2018, till when DIN had been re-activated. This is basically an order on interim stage.

6. Against the impugned order the present appeal has been filed and the learned counsel have made statements as above.

7. The learned counsel for the appellant is further submitting that the concerned scheme has been extended till 30th April, 2018 and protection has been given to the Directors till then.

8. The learned counsel for the appellant has tendered across the bar copy of the order in the Company Petition dated 26th March, 2018 (for the purpose of identification the document is marked as 'X'). It shows that after the present impugned order dated 19th January, 2018 was passed, the auditors appointed have submitted audit report and schedule of AGM had been given. The appellants appear to have taken up the issue relating to the auditor's report in the NCLT in view of which order dated 26th March, 2018 has now been passed by the Principle Bench of the NCLT. The last page of the order of Id. NCLT dated 26th March, 2018 reads as under:

“ It is in the aforesaid facts and circumstances the submission has been made that in the absence of aforesaid significant record no audited account could have been prepared.

Mr. Nidesh Gupta and Mr. Arun Kathpalia, learned Senior Counsels have sought to controvert the aforesaid factual position by submitting that in the member register only the

shareholding could be shown but as a matter of fact it is investment and therefore, it cannot be regarded as the shareholding of respective parties. However, it could not be successfully disputed that the Kolkatta Bench has passed an order which has attained finality and C.P. No. 38(ND)/ 2016 for rectification of the member register is pending consideration before this Tribunal.

In view of the above we are prima-facie of the view that the auditors have mixed up the entries and have prepared the audited report by taking into consideration pre transfer data. Accordingly, the adoption of the accounts at the AGM slated as per the schedule given in the aforesaid Para is stayed till the next date of hearing.

It is clarified that the stay order would not result in activation of the DIN pertaining to the Directors of the Respondent Company as well as of the respondent no.1 company. Resolutions, if any, passed in any of the other items shall be subject to the final outcome of the present application.

List for arguments on 03.05.2018.”

9. Counsel for both sides say that there is typing error in last Para of the order regarding activation. I need not enter into that part. Fact remains that in view of these subsequent developments in the litigation, when the auditors

appointed have taken steps in terms of the impugned order dated 19th January, 2018 and the steps taken by them have further been questioned before the Principle Bench of NCLT, Delhi and the learned NCLT is seized with the further developments which have taken place in this prolonged litigation, I do not think it would be appropriate for me to interfere in the impugned order and deal with the question whether or not at all the independent auditor should or should not have been appointed. I do not find it just to interfere in the discretion exercised by NCLT.

10. For the above reasons no interference is called for. The petition is disposed accordingly.

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

sh/nn