

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL (AT) NO.168 OF 2017

(ARISING OUT OF ORDER DATED 18.04.2017 PASSED BY NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH, CHENNAI IN TCP NO.185/2016(CP NO.68/2015).

IN THE MATTER OF:

Before NCLT

Before NCLAT

- | | | |
|--|----------------------------------|---------------------------------|
| <p>1. Vijaya Hospitality & Resorts Ltd,
Kochi-682020
Represented by its
Director, Mrs Shalini Vijayan,
37/991, First floor, Emmy Square,
S.A. Road, Kadavanthra,
Residing at Flat No.6A,
Vijaya Glimpses,
Jawahar Nagar,
Kadavanthra, Kochi-682020.</p> | <p>1st Respondent</p> | <p>1st Appellant</p> |
| <p>2. C.K. Vijayan,
S/o Krishnankutty,
Director/Chairman,
Vijaya Hospitality & Resorts Ltd,
37/991, First Floor, Emmy Square,
S.A. Road,
Kadavanthra, Kochi-682020
Represented by his POA,
Mrs Shalini Vijayan,
Residing at Flat No.6A,
Vijaya Glimpses,
Jawahar Nagar,
Kadavanthra, Kochi-682020.</p> | <p>2nd Respondent</p> | <p>2nd Appellant</p> |
| <p>3. Mrs Shalini Vijayan,
Director,
Vijaya Hospitality and Resorts Ltd,
Reg Office at 37/991,
First Floor, Emmy Square, S.A. Road,
Kadavanthra, Kochi 682020
Residing at Flat No.6A,
Vijaya Glimpses,
Jawahar Nagar,
Kadavanthra, Kochi-682020.</p> | <p>3rd Respondent</p> | <p>3rd Appellant</p> |
| <p>4. Saira Thampi Krishna,
W/o Late Thampi Krishna,</p> | | |

Director,
 Vijaya Hospitality and Resorts Ltd,
 Regd Office at 37/991,
 First Floor, Emmy Square, S.A. Road,
 Kadavanthra, Kochi 682020
 Residing at Flat No.7A,
 Vijaya Glimpses,
 Jawahar Nagar,
 Kadavanthra, Kochi-682020. 4th Respondent 4th Appellant

5. Akshay Vijayan,
 Son of Sh C.K. Vijayan,
 Director,
 Vijaya Hospitality and Resorts Ltd,
 Reg Office at 37/991,
 First Floor, Emmy Square, S.A. Road,
 Kadavanthra, Kochi 682020
 Residing at Flat No.6A,
 Vijaya Glimpses,
 Jawahar Nagar,
 Kadavanthra, Kochi-682020. 6th Respondent 5th Appellant

Versus

01.Sibi C.K.
 S/o Sh C.K. Krishnankutty,
 Ex-Director
 Vijaya Hospitality & Resorts Ltd
 Reg Office at 37/991,
 First Floor, Emmy Square, S.A. Road,
 Kadavanthra, Kochi 682020
 Residing at Chanjamattathil House,
 Flat No.7D,
 Vijaya Glimpses,
 Jawahar Nagar,
 Kadavanthra, Kochi-682020. 1st Petitioner 1st Respondent

02.Mr K.C. Baboo,
 s/o Krishnankutty,
 Ex-Director,
 Vijaya Hospitality & Resorts Ltd,
 37/991, First Floor, Emmy Square,
 S.A. Road,
 Kadavanthra, Kochi-682020
 Residing at Chanjamattathil House,
 Piravom,
 Ernakulam District,
 Kerala State 2nd Petitioner 2nd Respondent

- 03.Somen C.K.,
s/o C.K. Krishnankutty,
Chanjamattathil House,
Piravom P.O.,
Pin-6886664, Muvatrtupuzha Taluk,
Ernakulam Distt.
Residing at Chanjamattathil House,
Chottanikkara P.O., Pin 682312,
Kerala. 3rd Petitioner 3rd Respondent
- 04.Saliya Somen
W/o Somen c.K.,
Chanjamattathil House
Piravom P.O.,
Pin-6886664, Muvatrtupuzha Taluk,
Ernakulam Distt.
Residing at Chanjamattathil House,
Chottanikkara P.O., Pin 682312,
Kerala. 4th Petitioner 4th Respondent
- 05.Eva Sibi,
W/o C.K. Sibi,
Chanjamattathil House,
Flat No.7D, Vijaya Glimpse,
Jawahar Nagar,
Kadavanthra
Kochi 682020, Kerala. 5th Petitioner 5th Respondent
- 06.M.J. Suraj Prakash,
S/o M.K. Jayaprakash,
Residing at Prakash Bhavan,
Kanimangalam P.O.,
Pin 680027, Thrissur Taluk,
Thrissur District,
Kerala. 6th Petitioner 6th Respondent
- 07.P.K. Ramanujam
S/o Late Kittu,
IX/661A, Perinkulangara House,
Kannamkulangara P.O.
Chiyaram Village,
Thrissur Taluk,
Trissur District
Kerala. 7th Petitioner 7th Respondent
- 08.V. Venugopalan,
S/o :ate Ravimmo Maor.
Sreerangam House,

- Puthur P.O.
Pin 678001
Palakkad II Village,
Palakkad District,
Kerala.
- 8th Petitioner 8th Respondent
- 09.Radhika Venugopalan,
W/o Venugopalan,
Sreerangam House,
Puthur P.O.
Pin 678001
Palakkad II village,
Palakkad District
Kerala.
- 9th Petitioner 9th Respondent
- 10.Karthikeyan Menon,
S/o Damodara Menon,
XI/74, Kuttamkulam,
Irinjalakuda P.O.
Pin 680121
Mukundapuram Taluk,
Thrissur Distt,
Kerala.
- 10th Petitioner 10th Respondent
- 11.Varghese Chacko,
S/o M.V. Varghese,
Chithira,
Vizhatt House,
(Manjamattathil)
Piravom P.O.,
Pin 686664
Ernakulam Distt.
Kerala.
- 11th Petitioner 11th Respondent
- 12.V.P. Jose,
S/o V.C. Porinju,
Vadakut Vihar,
Puthenpally P.O.
Pin 680101
Thrissur Distt.
Kerala.
- 12th Petitioner 12th Respondent
- 13.Subhash Vasudevan,
S/o Vasudevan,
Residing at Flat No.5D,
Dukes,
Skyline Imperial Garden,
Kaloor,
Ernakulam,

Kochi 682018.

7th Respondent 13th Respondent

14.The Federal Bank Ltd,
Ernakulam,
Vytila Branch,
Thammanam Road,
Vytila Junction,
Kochi-682019,
Ernakulam District
Kerala.

8th Respondent 14th Respondent

JUDGEMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

The appellants have filed this appeal, under Section 421 of the Companies Act, 2013, being aggrieved by the impugned order dated 18.4.2017 passed in TCP No.185/2016 (CP nO.68/2015) filed in National Company Law Tribunal, Division Bench, Chennai (NCLT in short) whereby the Company Petition has been decided vide impugned order dated 18th April, 2017.

2. This appeal was earlier heard by this Appellate Tribunal and the same was dismissed vide order dated 24.5.2017. Being aggrieved by the order dated 24.5.2017 of the Appellate Tribunal the appellant filed Civil Appeal No.9100/2017 before the Hon'ble Supreme Court of India. The Civil Appeal was heard by the Hon'ble Supreme Court of India and vide order 21.7.2017 remanded the matter and permitted the parties to argue the matter on merits.

3. On receiving the orders dated 21.7.2017 of the Hon'ble Supreme Court of India, the matter was listed, parties were given opportunity to argue and submit their written synopsis and lastly the matter was reserved for judgement.

4. The brief facts of the case are that 1st appellant was incorporated on 3.11.1999 with the main object of carrying on business of travel and tourism, hotels and resorts and it was converted into a public limited company on 4.8.2000. 2nd appellant, 1st respondent, 2nd respondent and Late Mr. Thampi Krishna, all four brothers, were the first directors of 1st appellant. As per Article 15(b) of the Articles of Association that all the first directors shall be permanent directors, not liable to retired by rotation. 2nd appellant was appointed the Chairman and Late Mr. Thampi Krishna was appointed the Managing Director of 1st appellant. The primary business of 1st appellant is running a resort by the name of Elephant Court in Thekkady, Kerala. During the year 2005-06, 1st appellant borrowed money from financial institution for its project. During the period 2000 to 2010 several group companies were formed. Business of the group concerns grew considerably, with the result two brothers busy with business ventures in UAE and 1st respondent in the steel business of the family and this left the door open for 2nd appellant to deliberately carry out all kinds of mismanagement in the respondent company.

5. Mr. Thampi Krishna passed away on 23.11.2011 and immediately thereafter 2nd appellant appointed himself as the Managing Director of the Company. 2nd appellant then backdated appointed 3rd appellant, his wife, and 13th respondent as director to a date prior to the demise of Mr. Thampi Krishna. 2nd appellant forged the signatures of 1st and 2nd respondent and filed the forged resignation letters before the ROC to illegally remove the Respondents from management of the company. 2nd appellant then appointed 5th Respondent and 4th appellant as Directors. 2nd appellant later on

appointed original 5th respondent in the company petition as director of 1st appellant. Due mismanagement of the company under 2nd appellant the 1st appellant's account with the Bank was declared as NPA and proceedings under SARFEASI Act were initiated. There are other mismanagement done in 1st appellant. This compelled 1st to 5th respondent to file Company Petition No. 68/2015 before the Company Law Board and coming into existence NCLT and petition was transferred and was renumbered as TCP No.185/2016.

6. Reply to the company petition was filed and after hearing the parties the Tribunal passed the order dated 18.4.2017. Relevant portion of the same is as under:-

2. The allegations of the petitions are about the oppression and mismanagement, transmission of shares of shares including and illegal transfer of shares. The details of the allegations with regard to transfer of shares of the 2nd petitioner to the 2nd respondent is provided under Para XVIII at Page 17 of the company petition. The same is not mentioned in the annual returns filed by the 1st respondent company. The table mentioned under the said para indicates the shares purportedly held by the 2nd respondent by fraudulent means as nothing reflects from the annual returns as to how the shares of Respondent-2 have been increased and the shares of Petitioner-2 have been decreased. It is a closely held public limited company. Nothing is reflected from the annual returns for the year 2011-12 filed by the 1st respondent company signed by 2nd

Respondent (available at Page 199 to 210) Besides this, the other allegations are with regard to illegal appointment of Shalini Vijayan (R3) and Subhash Vasudevan (R7) as Directors on 2.8.2011 which has not been regularised as per Section 257 of the Companies Act, 1956. Hence they ceased to be the Directors on 30.9.2011. Even R7 in his counter filed on 16.11.2015 disputed his appointment as Director.

3. It has been alleged by the petitioners that Saira Thampi (R4) has also been appointed illegally as Director on 27.3.2012 for which no Board resolution was passed. There are allegations of forged resignation letters of C.K. Sibi (P1) and Baboo C.K. (P2) who have illegally been removed from the Board on 7.6.2012. It is further alleged in the company petitions that there is illegal transmission of 3,452,825 shares on 29.3.2012, of late Thampi Krishna to his widow, viz. Saira Thampi (R4) by ignoring the other legal heirs.

5. The petitioner also alleges illegal appointment of Mannoor Raghavan Ajaykumar (R6) as Managing Director and illegal change in designation of Mr.C.K. Vijayan (R2) from Managing Director to Chairman on 19.2.2014. The other allegation is with regard to the illegal appointment of Akshaay Vijayan (R6) as Director on 28.6.2014, as shown in the documents placed at Page 179 (Annexure 15) of the petition.

6. xxx

7. The counsel for petitioners has drawn our attention to the Articles of Association wherein under Para 15(b) at Page 26 of the typeset it has been mentioned that the first directors of the company are C.K. Vijayan, C.K. Thampi Krishna, C.K. Sibi (P1) and C.K. Babu (P2). C.K. Thampi Krishna expired while Petitioners 1 and 2 were removed from the Directorship. Neither notice was given nor Board's resolution was passed. However, R1 to R4 and R6 have not properly controverted the allegations levelled in the company petition and in the absence of reasonable explanation, the illegal actions are not sustainable as there is non-compliance with the provisions of the Companies Act. The detailed allegations in the CP and the documents filed in support thereof established that the answering respondents have been running the company without following the provisions of law and taken decisions to have control over the 1st respondent company and sidelined the petitioners. As they have not been allowed to participate in the Board Meetings and no notice has been served on the petitioners for holding the AGM. Therefore, as Directors and shareholders, their rights were being violated continuously, which constitutes oppression. The element of mismanagement is also established against the respondents because due to diversion of funds there is huge liability of 1st respondent company, for which R8 has already taken

steps to recover the entire outstanding. However, this Bench vide order dated 12.01.2017 has passed directions permitting the petitioners to infuse funds in order to satisfy the claim of R8, i.e. Federal Bank. The said order shall form part of this order.

8. Therefore, in order to provide substantial justice to the petitioners and to end the matter complained of, we are inclined to grant further reliefs as follows:-

(a) We remove R3, R4, R5 and R6 from the post of Directors by declaring their appointments as illegal and appoint Petitioners 1 and 2 as Directors of R1 company and P1 shall discharge the functions of the Chairman and Managing Director of the 1st respondent company; We remove R2 from the post of the Chairman of the company. However, he shall perform the functions of the Director of 1st respondent company;

(b) We also set aside the transmission of shares of late Thampi Krishna to Mrs Saira Thambi (R4) and direct the company to enter the names of all the legal heirs of the deceased Thampi Krishna equally including Mrs Saira Thampi .

(c) We also cancel the illegal transfer of shares from Baboo K.C. (Petitioner-2) to C.K. Vijayan (Respondent-2) as being totally forged and fabricated and direct the 1st respondent company to rectify the register by restoring the name of

Petitioner-2 and his shareholding pattern as was existing on 30.09.2010.

Besides the above, the Petitioner-1/Petitioner-2 are directed to file the copy of INC 28 which shall be registered by the Registrar of Companies concerned within 30 days from the date of passing this order. Accordingly, the Company Petition TCP 185 of 2016 (CP 68/2015) is disposed of. The file shall be consigned to record after due completion.

7. Being aggrieved by the said impugned order dated 18.4.2017 the appellants have preferred the present appeal on the following grounds:

- i) Illegal transfer of shares of 2nd respondent to 2nd appellant.
- ii) Illegal appointment of number of directors.
- iii) Illegal removal of 1st and 2nd respondent from the directorship
- iv) Illegal transfer of shares of Thampi Krishna to his wife Smt Saira Thampi.
- v) Company petition is filed beyond the period of limitation
- vi) Appointment of 2nd appellant to the post of Chairman is legal.
- vii) 1st respondent cannot be made Chairman & Managing Director of 1st appellant.
- viii) No oppression and mismanagement has taken place.

8. We have heard the learned counsel for the parties and perused the record.

9. The 1st issue raised by the learned counsel for the appellant is that in the year 2011-12 2nd respondent was holding 5.16% of shares and 1st respondent was holding 3.6% shares and the remaining 10 persons of their

group were holding around 7% shares collective. It is further stated that the 2nd appellant was holding 36.9% shares and Thampi Krishna was holding 31.7% of the total shares. Around 14% shares of the remaining were held by the group of 2nd appellant. It is, therefore, admitted that the group led by 2nd respondent and 1st respondent were holding around 15.6% whereas the group of 2nd appellant was holding 84.4%. These facts clearly demonstrates that even if miniscule shares have been transferred in the name of 2nd appellant, the shareholding pattern remains the same and the group of 2nd and 1st respondent remains in minority. It is further stated that it is not their case at all that because of illegal transfers they have become a minority group. It is reiterated that these shares were transferred as per the arrangement arrived at between 2nd appellant and 2nd respondent. There is no illegality as alleged. Learned counsel for appellant further stated that transfer of shares took place in the year 2011 and the company petition has been filed in September, 2015, much beyond the period of limitation.

10. Learned counsel for the respondents drawn our attention to Page 54 of the Appeal which is showing the shareholding pattern of 2nd appellant and 2nd respondent as on 30.9.2011 and 29.9.2012 which is as under:

Name of Shareholder	As per AR of 2012	As per AR of 2011
	As on 29.9.2012	As on 30.09.2011
C.K. Vijayan (R-2) now 2 nd appellant	4280486	4014600

Baboo K.C. (P-2) now 2 nd respondent	445664	561550
Hari Thekkethill	-	125000
Sudha Hari	-	25000

Learned counsel for the respondent submitted that the shareholding pattern of 2nd respondent has been decreased by 115886 shares from 30.9.2011 to 29.9.2012 whereas the shareholding pattern of 2nd appellant has increased from by 265886 shares from 30.9.2011 to 29.9.2012. Learned counsel for the respondents explained that the break up of 265886 shares is that the 2nd appellant got transferred 150000 shares of Hari Thekkethill and Sudha Hari and the remaining 115886 shares has been added. Learned counsel for respondents further stated that the shareholding of 2nd respondent has been decreased by 115886 shares from 30.9.2011 and the shareholding of 2nd appellant has been increased by 115886 shares from 30.9.2011.

11. We have heard the learned counsel for both the parties. We are not satisfied with the version of learned counsel for the appellant that these shares were transferred as per arranged arrived at between 2nd appellant and 2nd respondent. No proof for such arrangement has been produced before this Tribunal. Further 2nd appellant has not produced the transfer forms by which these shares were transferred and further the appellants have stated in their reply before the NCLT that the shares were purchased as contemplated under law. Further there is no averment or documentary evidence to show that any consideration was paid by 2nd appellant for the

shares in question. Therefore, we see no illegality in the impugned order passed by the NCLT on this issue.

12. The other issue raised by the appellant is that the shares of Mr. Thampi Krishna were legally transferred to Ms Saira Thampi. Learned counsel for the appellant submitted that at the time of death, Mr. Thampi Krishna was holding 31.7% shares. Learned counsel for appellant further submitted that at the time of death, his wife was survived by two minor daughters, therefore, the entire shares were transferred in her name. Learned counsel further stated that the mother of Thampi Krishna was alive at the time when his shares were transmitted in favour of 4th appellant but ultimately her shares also dwelled back to 4th appellant as per the local law. Therefore, there was no illegality in transfer of shares and no prejudice has been caused to 1st to 12th respondents and neither their share holding pattern was changed.

13. Learned counsel for the respondents submitted that Mr. Thampi Krishna was director of 1st appellant and husband of 4th appellant died intestate and pursuant to Hindu Succession Act, his shares should have been transmitted to all Class I heirs and not only to 4th appellant. Learned counsel for the respondents submitted that as per the Annual Return of 2011-12, the shares of Mr. Thampi Krishna were directly transferred to 4th Appellant without submitting any heir certificate. Further the appellants have also failed to produce any Board Resolution or documents effecting this transfer. Learned counsel for the respondent submitted that they are not making any claim but they want that proper procedure be followed for transmission of shares of Late Mr. Thampi Krishna.

14. We have heard the learned counsel for the both the parties. We also observe that the shares have been directly transmitted in the name of 4th appellant without adopting proper procedure. We are in agreement with the directions given by NCLT on this issue to enter the names of all the legal heirs of the deceased Thampi Krishna equally including 4th appellant.

15. The other issue raised by the appellants is that the NCLT has wrongly appointed 1st and 2nd respondent as director and also wrongly removed 3rd to 5th appellant and 5th original respondent from the directorship of the company. The appellants submitted that 3rd appellant was appointed as a director on 2.8.2011 in the presence of 1st respondent. The appellant submitted that 4th appellant was legally appointed as a Director on 27.3.2012 which was in public domain and known to public at large. The appellant further submitted that 5th original respondent was a very highly qualified person and known figure in the hospitality industry. 5th original respondent was appointed as a director but later on he resigned during the pendency of the company petition and he is not party to the present appeal. The appellants further submitted that 5th appellant was legally appointed as a Director as per the Memorandum of Association.

16. Learned counsel for the respondent drew our attention to Article of Association of the company at Page 59 of counter affidavit in which it is mentioned that the present directors are (i) C. K. Vijayan, (ii) MR. C.K. Thampi (iii) Mr. C.K. Sibi and Mr. C.K. Babu and all the first directors shall be permanent directors, not liable to retire by rotation. Learned counsel for the respondents submitted that all the four brothers who were permanent director were alive when 3rd appellant was appointed as director on 2.8.2011

illegally. Learned counsel for the respondent submitted that no Board Meeting had taken place on that date i.e. 2.8.2011 as on that date all the four brothers were alive. However, to cover up their illegality and as an afterthought the Forms were filed with the ROC in December, 2011. The Respondent further submitted that the appointment of 4th appellant is completely illegal as no Board Meeting was held on 27.3.2012 and no notice of any such meeting was given to 1st and 2nd Respondent.

17. We have heard the learned counsel for both the parties. We have observed that no notice or Board Minutes were filed/produced by the appellants before the Learned NCLT. We have also observed the affidavit filed by 3rd appellant and also the Form No.32 filed with the Registrar of Companies. 3rd appellant at page No.7 of her affidavit stated **“True Copy of Form 32 dated 02.08.2011 is being filed herewith and marked as Annexure A/4”**. We have also perused the Form No.32 filed by the 3rd appellant. In the said form No.32 there is no date of filing the Form No.32 with the ROC. Therefore, we are satisfied that the said Form No.32 was filed with the ROC in December, 2011 as argued by the Respondent. Further no notice of conducting Board Meeting on 27.3.2012 in which 4th appellant was appointed director was produced. As regards appointment of 5th appellant as director is concerned, we are satisfied that 5th appellant was inducted as director being the son of 2nd appellant. Further, as regards removal of 5th original respondent as director is concerned the said original respondent has not filed any appeal and we presume that he has accepted the impugned order.

18. Learned counsel for the appellant stated that the Clause 15 of Memorandum of Association clearly states that the 2nd appellant will remain the Chairman of the company as 2nd appellant hold more than 36.9% of the total shares of the company and if the shareholding of the other 43 members is taken into consideration then he holds and represents 84.4% of the entire share of the company. Therefore, the 2nd appellant has been legally elected as Chairman of the company and is entitled to remain so.

19. Learned counsel for the respondent stated that 2nd appellant was illegally appointed as Chairman & Managing Director of Company on 25.11.2011. No Board Meeting could have taken place as the bereaved family was performing the last rites of Mr. Thampi Krishna on this date. Learned counsel for the Respondent further stated that pursuant to Schedule XIII of Companies Act, 1956 the appointment and remuneration payable to the Managing Director shall be subject to the approval of the shareholders in the General Meeting. No notice was served to the Respondent or any other shareholders. Further the appellants have not placed the Notice or the Minutes of such a Meeting thereby confirming that no General Meeting took place. Learned counsel further stated that Form 32 filed by the Company does not have any Board Resolution, but merely the consent of 2nd appellant to act as the Managing Director. Further the Board Resolution filed with Form 23 was signed by 2nd appellant himself, thereby violating the provisions of Section 300 of Act,1956 which prohibits an interested director from participating or voting in a meeting in which he is interested.

20. We have heard the parties on this issue. We observe that No notice was issued to Respondent and shareholders for General Meeting for approval of

2nd appellant as Chairman. Further no minutes have been placed of such a meeting. Therefore, there is no illegality on this issue in the impugned order.

21. In view of the foregoing discussions and observations the appeal is set aside. Interim order passed, if any, is vacated. The impugned order dated 18.4.2017 is upheld. No orders as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson`

(Mr. Balvinder Singh)
Member (Technical)

New Delhi

Dated: 14-12-2018.