

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION**

Company Appeal (AT) No. 26 of 2016

(arising out of Order dated 6th October, 2016 passed by NCLT, Principal Bench, New Delhi in C.A. No. 272 in C.P. No. 108/ND/2016).

M/s Esquire Electronics Inc. & Anr. Appellants

Vs.

**Netherlands India Communications
Enterprises Ltd. & Others. Respondents**

For Appellants: Mr. Uttam Dutt, Advocate

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by Appellant(s) Esquire Electronics Inc. (Appellant No. 1) & Anr., Esquire Electronics (India) (Appellant No. 2) against Order and judgement dated 6th October 2016 passed by National Company Law Tribunal, Principal Bench, New Delhi (hereinafter referred to as the 'Tribunal') in Company Petition No. 108/ND/2016 whereby and whereunder the Tribunal dismissed the Company Petition filed under Section 241 and 242 of

the Companies Act 2013, and imposed cost of Rs. 25,000/- on the appellant(s) with following observation: -

“22. It is needless to say that any observation made in the instant order shall not be construed as an expression of opinion on the merit of controversy raised in CP 67/2006 or any application filed therein. As the petitioners have filed the instant petition against Respondent No. 1 and against its directors Respondent Nos. 2 to 5 and Respondent No. 6 company, we find that the petition is hopelessly time barred and an attempt has been made to rake up issues in respect of, and seeking reliefs pertaining to, the years 2000 to 2012. Even otherwise, the petitioners lack locus standi to file the instant petition as they have neither been director, shareholder or members of the Respondent No. 1 company at any stage whatsoever.

23. Accordingly, this petition fails and the same is dismissed with Rs. 25,000/- as cost.”

2. According to the appellant(s), the 1st appellant is a Company incorporated as per laws of United States of America. 2nd appellant is the President of another company. The 1st appellant company primarily holds 429740 equity shares of 1st respondent company, Netherlands India Communications Enterprises Ltd. comprising of 14.37% of its paid up capital. Originally, in the year 2001, till 2003

the 1st appellant held 729750 equity shares comprising of 23.5% of its paid up capital of the 1st respondent company. It is alleged that with the illegal dilution by the 2nd and 3rd respondents since the year 2005, the shareholding of the 1st appellant has reduced to 14.37% and thereafter in the year 2012 further reduced to 9.55%.

3. Further, case of the appellant (s) is that the sole proprietor of 1st appellant, Shri S.S.Lamba, is holding 84680 equity shares of the company, aggregating to 2.83 of its paid up capital. Initially in the year 2001, and till 2003, the 2nd appellant held 684680 comprising of 22.05% of the equity capital of the 1st respondent company. The 2nd appellant also alleged that its shareholding was illegally diluted by 2nd and 3rd respondents since the year 2005 to 2.83%, and then in the year 2012 to 1.88%. Despite the illegal dilution, the current collective shareholding of the appellant (s) is 11.43% of the equity capital of the company.

4. According to appellant(s), 1st respondent company was incorporated in the year 1995 and 2nd & 3rd respondents were its initial promoters. The 1st respondent is in the business of telecom services but it has not been doing any business since 2004-2005 and as per the data available with the Registrar of Companies, it has not done any statutory filings since 2012 and even prior thereto the filings

are incomplete. As per the records, the last Annual General Meeting ('AGM' for short) was held by the 1st respondent company in the year 2012, which itself was illegal. It is also alleged that the 4th respondent has been illegally appointed as a Director by the 2nd and 3rd respondent (s) though he is not the shareholder of the company.

5. Further case of the appellant(s) is that 5th respondent holds only 4500 shares in the 1st respondent company and he has been illegally appointed as Director. In fact both the respondents are the proxy agents of 2nd and 3rd respondents in order to get their majority on the Board.

6. It is also pleaded that the 6th respondent company holds 9,40,000/- equity shares which is 20.89% of the equity capital. 6th respondent earlier held 30.28% till 2005 but went up to 31.43% and then reduced to 20.89% as per the annual return for the year 2012. The 1st respondent also holds 32.47% paid up capital of 5th respondent company.

7. It is alleged that there are number of shareholders of 1st respondent company who have been illegally allotted shares by 2nd and 3rd respondents.

8. Similar plea was taken before the Tribunal but without going into the merit of the case, the Tribunal dismissed the Company Petition on the ground that the petition is hopelessly time barred and an attempt has been made to rake up issues and reliefs pertaining to the years 2000 to 2012. The Tribunal further observed that otherwise also the appellant(s) lack *locus standi* to file the Company Petition as they have neither been director, shareholder or members of the 1st respondent company at any stage whatsoever.

9. Notice (s) were issued on respondent (s) by speed post but all notices returned by the postal department with specific note that the 2nd and 5th respondent (s) refused to accept notice and the 1st respondent left without address. In that view of refusal the notices were treated to be served and the appeal was heard.

10. This court mainly heard the question of limitation and maintainability as the Tribunal observed that the petition is barred by Limitation and appellant(s) are neither directors, nor shareholders of the 1st respondent company.

11. The appellant(s) have specifically pleaded that the respondents failed to perform statutory filing before the Registrar of Companies and no AGM held since the year 2012. As clause (xvi) and (xvii) of paragraph 7 at page 36 the appellants made following statement: -

“(xvi) It is further submitted that no Balance Sheet(s) of the Company Respondent No. 1 Company have been audited and circulated since 2003 i.e. for the year 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012, 2013, 2014 and 2015 and surprisingly, the latest Balance Sheet has not even been circulated. It humbly submitted that all the Balance Sheets for 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012, 2013, 2014 and 2015 ought to have been prepared and audited. Furthermore, the Respondent No. 1 Company ought to have prepared Directors Report and circulated the same.

(xvii) The Company has not convened its AGM since 2012. Even prior thereto, as per the records available with the ROC, no AGM was conducted for the year 2002 till 2010.”

The aforesaid statement stands uncontroverted in view of refusal of notice by contesting respondents.

12. We agree with the finding of Tribunal that Section 433 of the Companies Act, 2013 (hereinafter referred to as Act of 2013) makes

it clear that the provisions of Limitation Act ,1963 (36 of 1963) apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be. The Tribunal also rightly held that the petitions under Section 397 and 398 are enforceable like decree and for all purpose a suit within the meaning of Code of Civil Procedure. We also agree with the finding of the Tribunal that the suit for which there is no prescribed period is provided as per Article 113 of Limitation Act 1963, period of limitation is three years. For the reason aforesaid we agree with the finding of the Tribunal that appellant(s) cannot rake up any issue which is barred by limitation i.e., of a period which is three years prior to the date of filing of the Petition.

13. However, in this case we find that the appellant(s) alleged inaction on the part of the respondents even after the year 2013. They have made specific allegation that no Balance Sheet of the 1st respondent company audited and circulated for the year 2013, 2014, 2015 and thereafter. The appellant(s) have also pleaded that the company has not convened its AGM since 2012 that means no A.G.M of the company has been convened during the year 2013, 2014 or 2015 i.e. within three years of filing of the Company Petition.

14. In view of such pleading made by the appellant(s) relating to continuing cause of action during the period 2013, 2014 and 2015,

we are of the view and hold that though the Company Petition was barred by limitation in so far inaction, if any, took place prior to 2013 i.e. three years prior to the filing of the Company Petition but inaction or any alleged oppression and mismanagement, if any made during the years 2013, 2014 and 2015 i.e. within three years of filing of the Company Petition was maintainable and is not barred by limitation.

15. In view of observation as made above, while accept that the appeal in so far it relates to allegation made for the period 2003 to 2012, hold that the Company Petition in so far it relates to alleged oppression and mismanagement during the period between 2013, 2014 and 2015 was not barred by Limitation and Tribunal was required to confine the petition for the said period.

16. In so far finding of the Tribunal that the appellants (petitioners) are neither director nor shareholder or member of the 1st respondent company at any stage whatsoever is concerned, we find that the said finding is not based on record. The Tribunal has not discussed the question as to whether the appellant(s) had any shareholding in the 1st respondent company nor referred to any evidence.

17. Form 20 B, in which annual return has been filed by company with the Registrar of Companies for the financial year beginning on 31st March 2012 has been enclosed as Annexure-B to this appeal.

From the said Form 20 B (refer Section 159 of the Companies Act 1956), provides details of shareholders as on 30th September 2012 (Annexure-A to the Form). Therein, against the name of 1st appellant, “ Esquire Electronic Inc.” it has been shown as a foreign company having 429740 equity shares with the 1st respondent company which come to about 9.54% as on the date of filing. In so far as 2nd appellant “ Esquire Electronics (India)” a firm, it is shown that the 2nd appellant have 84680 equity shares of 1st respondent company, which comes to about 1.88% at the time of filing.

18. From the aforesaid evidence which has not been disputed by the Respondents, we find that the appellant(s) have, *prima-facie*, made out a case that they are the shareholders of the 1st Respondent company, jointly hold 1/10th of the total share holding and thereby they have locus to file the petition alleging oppression and mismanagement. The finding of Tribunal that appellant(s) lack *locus standi* to file Company Petition as they are not the director (s) or shareholder or member of the 1st respondent company is not based on record.

19. For the reasons and finding as recorded above, we set aside the part of impugned judgement dated 6th October 2016 passed in Company Petition No. 108/ND/2016 in so far as it relates to

maintainability of the petition for the period 2013, 2014 and 2015 onwards and remit the case to National Company Law Tribunal, Principal Bench, New Delhi to take decision on merit, limiting the prayer with regard to alleged 'oppression and mismanagement', if any, made between the year 2013 onwards.

20. The appeal is allowed in part, in so far as it relates to the period 2013 onwards but dismissed in so far it relates to year (s) prior to 2012. However, in the facts and circumstances there shall be no order as to cost.

Sd/-

(Mr. Balvinder Singh)
Member (Technical)

Sd/-

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
15th February, 2017

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