

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****COMPANY APPEAL (AT) NO.144 OF 2020**

<u>In the matter of:</u>	<u>Before NCLT</u>	<u>Before NCLAT</u>
1. Omega Icehill Pvt Ltd Through its Director Tushar Kant Jindal, 39, first Floor, Raghu Shree Market, Ajmeri Gate, Delhi.	1 st Respondent	1 st Appellant
2. Herman Johan Oonk, Director, Omega Icehill Pvt Ltd Bastinglaan 20, Ebschede 7548, Netherlands	2 nd Respondent	2 nd Appellant
3. Harm Jan Oonk, Director Omega Icehill Pvt Ltd Bastinglaan 20, Ebschede 7548, Netherlands	3 rd Respondent	3 rd Appellant
4. Tushar Kant Jindal, Director, Omega Icehill Pvt Ltd 39, First Floor, Raghu Shree Market, Ajmeri Gate, Delhi-110006	4 th Respondent	4 th Appellant
Vs		
Anil Agarwal, Director, Omega Icehill Pvt Ltd. Flat No.F-1201, Prateek Stylome, Sector 45, Noida Uttar Pradesh 201301	Petitioner	Respondent

Mr. Anil Airi, Sr. Advocate with Mr. Shafiq Ahmed, Mr. Nishant Menon, Ms Kavita Sarin, Ms Sarika Raichur, Mr. Krishnandu Datta and Mr. Abhishek Jindal, Advocates for Appellant.

Mr. Rohit Sharma, Advocate for Respondent.

JUDGEMENT
(10th November, 2020)

Mr. Balvinder Singh, Member (Technical)

1. The present appeal has been filed by the Appellants under Section 421 of the Companies Act, 2013 praying therein to quash the order dated 22.7.2020 passed by the National Company Law Tribunal, New Delhi Bench, New Delhi (in short the 'Tribunal') vide which the Tribunal has allowed the application filed by the Respondent (original petitioner) under Section 244 of the Act seeking waiver of the requirements for filing Company Petition under Section 241 read with Section 244 of the Act.

2. The brief facts of case are that the 1st appellant is company incorporated on 11.11.2009 under the Companies Act, 1956 and the 1st respondent (original petitioner) is holding 5000 shares i.e. 0.04% of the total issued share capital of the 1st appellant company. The company was formed as a joint venture company between a Netherlands based company called Omega Engineering Holding BV and an Indian partnership firm called Friends Refrigeration and Associates (FRA). 1st respondent filed Company Petition before the NCLT New Delhi under Section 241 read with Section 242 of the Companies Act, 2013 against the acts of oppression and mismanagement committed by 2nd to 4th appellant to oust the 1st respondent (original

petitioner) from the position of Managing Director of the 1st appellant company. The original petitioner was removed from the position of Managing Director by the Board of Director through the meetings held on 6.5.2019 and 14.5.2019. The original petitioner filed an IA under Section 244 of the Companies Act, 2013 being IA No.Nil/241/242/ND/2019 seeking waiver of the requirements for filing the Company Petition under Section 241 and 242 of the Companies Act, 2013.

3. In the IA the original petitioner/1st respondent submitted that he is the managing the affairs of the 1st appellant company as Managing Director and he is holding 5000 shares i.e. 0.04% of the total issued share capital of the appellant company. The original petitioner also stated that he is the First Director and promoter of the appellant company and it is trite law that removal of the First Director form the management of the company is an act of oppression. The original petitioner stated that there is a violation of the provisions of the AoA particularly Articles 52 which provides that the controlling shareholders shall have the right to appoint MD of the company and the powers of removal are vested with the controlling shareholders and not with the directors as in this case the Board of Directors vide Resolution dated 14.5.2019 has remove the 1st respondent. The original petitioner also stated that the appellants also violated the terms of agreement which states that each group will have two members. The original petitioner stated that on 14.5.2019 the appellants removed him from the position of Managing Director without sending any charge sheet on the summary of allegations on the basis of which the removal was done by the appellants. The original petitioner

stated that he is the minority shareholder and the interest of the minority shareholder may be protected. The original petitioner also stated that the original petitioner together with his family members holds about 2.93% shares(Page 375 of Appeal). The original petitioner also stated that the spouse of the original petitioner also holds 25% of a company Kurinji Metals Pvt Ltd which company in turn holds 30.42% of the shares of 1st appellant company in the manner the spouse of the original petitioner holds further 7.60% of the issued share capital in 1st appellant company. The original petitioner stated that in this way the original petitioner holds 10.53% shares of the 1st appellant company and prayed that the waiver may be allowed.

4. Arguments were made by the parties and after hearing the arguments the Tribunal passed the order dated 22nd July, 2020, the relevant part of the order is as under:

“In the fact and circumstances of the case, we are of the view that it is a fit case where the requirements laid down under Section 244(1)(a) of the Act, 2013 need to be waived off and allow the applicant/petitioner to file company petitioner under Section 241 read with Section 242 of the Act, 2013 as the company petition cannot be dismissed at the threshold because it requires a detailed enquiry into the matter complained of. Thus, the issue framed stands decided in favour of the applicant and against the respondents.”

Being aggrieved the order dated 22nd July, 2020 the appellants have filed the present appeal under Section 421 of the Companies Act, 2013

praying therein that the order 22nd July, 2020 passed in CA No.Nil in CP No.102/ND/2019 may be set aside and stay the proceed of the CP pending before the NCLT New Delhi.

5. The appellants stated that the 1st appellant is a company incorporated under the Companies Act, 1956 on 11.11.2009. The authorized share capital of the company is Rs. 135,000,000/- while paid up capital is Rs.122,633,970/-. The respondent and 2nd to 4th appellant are directors of the appellant company. The appellants stated that the appellants and Respondent and other entities made investment and acquired share of the appellant company. The investment made and loans provided by the shareholders are as follows:

Name	Investment	Collateral
Mr. Herman Johan Oonk and Mr Harm Jan Oonk(Omega Group	6.5 Cr	5 Cr (SBLC)
Mr Tuskar Kant Jindal and Mr. M.OL. Jindal family	Rs.1.75 Cr + Rs.1.77 Cr	Rs. 6 Cr (Collateral + Personal guarant)
Mrs Poonam and Mr. Anil Agrawal and family	56 L	No
Mr Anup Agarwal and Mrs Shashi Agarwal	Rs.1.67 Cr	No

(through HUF and Mangalam Power Systems)		
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The appellant stated that the share holding pattern of 1st appellant in May, 2019, when the Company Petition was filed is as under:

Particulars	Amount (in Rs)	Percentage
Indian shareholder		
Kurinji Metals Pvt Ltd.	3,73,02,970.00	30.42%
Mangalam Power Systems Pvt Ltd	50,13,970.00	4%
Mr. Anil Agrawal	50,000.00	0.04%
Ms Mansi Agrawal	8,50,000.00	
Ms Nandini Agrawal	6,00,000.00	
Mrs Poonam Agrawal	21,00,000.00	
Sub Total	36,00,000.00	2.93%
Mr Mohit Jindal	17,50,000.00	
Mr Saurabh Jindal	17,00,000.00	
Ms Sarita Jindal	3,00,000.00	
Smt Payal Jindal	2,00,000.00	
Shri Madan Lal Jindal	20,00,000.00	

Sub Total	59,50,000.00	4.85%
Mr Abhishek Jindal	18,00,000.00	
Mrs Nidhi Jindal	24,50,000.00	
Mrs Shivail Jindal	8,00,000.00	
Mr Tushar Kant Jindal	6,86,030.00	
Sub Total	57,36,030.00	4.67%
Foreign shareholder		
Omega Laser Products BV Netherlands	4,14,02,880.00	
M/s Omega Participants BV	21,00,000.00	
M/s Omega Laser Systems BV	41,28,210.00	
Omega Thermo Products BV	1,74,00,000.00	
Sub Total	6,50,31,090.00	53%
Grand Total	12,26,33,970.00	

The appellants stated that it was agreed that Omega group will have two directors and one of them will be the Chairman and while the other two directors will be 4th appellant and 1st respondent and it was also agreed that 1st respondent would be the Managing Director of the company (Page 19 of the appeal). The appellants further stated that the Articles of Association was not amended to reflect this arrangement and no formal letter was issued to

1st respondent appointing him the Managing Director. The appellants stated that the respondent was acting against the interest of 1st appellant for quite some time which was adversely affecting the performance of the company, therefore, the Omega Group, majority shareholders decided to outline the job responsibilities and powers of the Managing Director for 1st appellant in consultation with the remaining shareholders. The appellants stated that Notice dated 6.5.2019 for the Board Meeting on 14.5.2019 was issued (Page 262) in which one of the agenda items was to withdraw all powers, privileges and rights of the Managing Director, Mr. Anil Agrawal and to terminate the appointment of Mr. Anil Agarwal as the Managing Director of the company with immediate effect. The appellants stated that the Board Meeting was held on 14.5.2019 and the matter was discussed and the resolution was passed (Page 268 of the appeal) to remove the Managing Director, Mr. Anil Agarwal.

6. The appellant stated that the NCLT allowed the waiver application which is liable to be set aside on the facts that the 1st respondent was not eligible to waiver in view of the requirements laid down by the Hon'ble Appellate Tribunal in paragraph 151 of the **Cyrus Mistry Judgement** as there are no exceptional circumstances warranting for grant of waiver. The appellant stated that only the powers and privileges of the respondent were withdrawn in view of the brazen misconduct of the Respondent and he is still the Director of the appellant company and his shareholding has not been disturbed. The appellant stated that the NCLT did not deal with or expressed opinion on the threshold of minimum 10% shareholding entitling the Respondent to maintain the company petition.

7. Reply on behalf of the Respondent has been filed. The Respondent stated that the appellant is raising the grounds which relate to the merits of the case and the same is impermissible in law. The Respondent stated that the appellants have also placed on record certain documents which were not part of the record before the NCLT and the appellants cannot rely upon these documents. The Respondent stated that he is already member of the appellant company and holds 5000 shares of the which represents 0.04% of the total issued share capital of the company. The Respondent stated that at the time of incorporation of the appellant company the Respondent and Appellant No.4 held 5000 shares i.e. 25% equity shares each and the other 10000 shares were held by the Omega Group. The Respondent stated that subsequently investments were made in appellant company by the Omega Group and FRA in equal proportion leading to FRA become 49.74% shareholder of appellant No.1. In FRA, the Respondent brought in 25% of the investment in his wife's name and also introduced an investor Mangalam Power Systems Pvt to contribute another 25%. The Respondent further stated that his wife holds 25% shares of Kurinji Metals who holds shares in the appellant company. The Respondents stated that he holds 0.04% shares, his family members holds 2.89% shares and Respondent's wife holds 25% of Kurinji Metals who is shareholder of appellant No.1 company. The Respondent stated that in this way the Respondent holds a significant stake in appellant company. The respondent stated that it is the admission of the appellants that the respondent was managing the day to day affairs of the appellant company and was Managing Director of the appellant company. The respondent stated that the appellant company generated positive results for the first time in 2015-16

and became a profit making company due to his hard work and the Omega Group and Appellant No.4, uncle in law of Respondent, attempted to divest the Respondent of his control over the affairs of the company through extraneous means. These mala fide intentions have culminated in the unlawful removal of the Respondent from the position of the Managing Director in direct contravention of the Joint Venture Agreement and the Articles of Association. The respondent stated that the appellants have taken advantage of his small share in the shareholding of appellant No.1. The respondent stated that these are the exception case of gross oppression and mismanagement on account of which the waiver application has been rightly allowed by the NCLT. The Respondent stated that there is no other minority shareholders with whom the Respondent could join together to maintain a petition under Section 241, in view of the winning over of Appellant No.4 by Appellant No.2 and 3.

8. Rejoinder has been filed by the appellant reiterating the submissions made in the appeal except with respect to the Respondent's objection to pleading of new facts and placing new documents of record particularly annexure A-6 to A-8, the appellants stated that the same have been brought on record on account of the reason that the impugned order contains the findings on merits without the appellants having even filed their reply to the Company Petition.

9. Learned counsel for the appellants argued

- i) that the Respondent never place any document or resolution on record whereby he was ever appointed as Managing Director of the company.
- ii) That the Respondent only relied on a Joint Venture Agreement dated 20.1.2020(Page 110 of Appeal) which was never incorporated in the Article of Association of Appellant No.1.
- iii) That the four requirements laid down in para 151 of the Cyrus Mistry Judgement (Page 435 of the Appeal), the Respondent failed to satisfy two substantial requirements i.e. whether the Company Petition pertains to oppression and mismanagement and whether there are exceptional circumstances warranting for grant of waiver.
- iv) That the Respondents failed to satisfy as to how removal of a managing director makes out a case of oppression and mismanagement or exceptional circumstances to seek waiver.
- v) That the NCLT did not deal with or expressed opinion on the threshold of minimum 10% shareholding entitling the respondent to maintain company petition.
- vi) That the NCLT wrongly passed directions for treating the company petition under Order 1 Rule 8 of the CPC as a representative petition.
- vii) That the NCLT has erred in making observation on the merits of the Company Petition, while the appellants had not even filed their reply to the Company Petition.

- viii) That the agenda of the Meeting was circulated on 6.5.2019 and the Respondent deliberately chose not to attend the said Meeting.
- ix) That as per Section 196(2) of the Companies Act, 1956, no company shall appoint or reappoint any person as the Managing Director, whole time director or manager for a term exceeding five years at the time. The respondent deliberately chose to ignore the automatic vacation of office by virtue of Section 196(2) and Section 6 of the Act.
- x) That the Hon'ble Supreme Court in the case of VB Rangaraj Vs VB Gopalakrishnan and others has held that the SHA restrictions contrary to the provisions of the AoA would not be binding on either the shareholder or the company.

10. Learned counsel for the Respondent argued

- i) That the Respondent is undisputedly a member of the appellant No.2 and he individually own 5000 shares of appellant No.1 and his wife and daughters together own 3,55,000 shares of the appellant No.1 and they have filed affidavits supporting the Respondent's claim. Thus the Respondent own 2.94% shareholding of appellant No.1.
- ii) That the respondent represents the interest of a significant number of members in the company. That appellants have now taken over the affairs of the company by winning over 4th appellant (uncle in law or Respondent), thereby reducing the Respondent into an insignificant minority.

- iii) That Article 52 of the AoA stipulate that the right of appointment of the Managing Director shall be with the controlling shareholders and therefore by necessary implication, the Respondent could only have been removed by the controlling shareholders and not by the Board as has been done in the present case.
- iv) That from the nature of shareholding that there are no other minority shareholders, with whom the Respondent could join together to maintain a petition under Section 241 in view of the winning over of 4th appellant by 2nd and 3rd appellant.
- v) That the mode and manner of removal of respondent from the post of managing director by giving a 1-minute notice was in gross violation of the mandatory provisions of the Companies act, 2013.
- vi) That the Respondents represents the interest of a substantial number of shareholders in 1st appellant as his wife owns 25% shares of Kurinji Metals Pvt Ltd, the company which holds 30.42% shareholding in 1st appellant.
- vii) That the issues pertaining to Section 196(1) and (2) relates to merits of the case and, therefore, they cannot be looked into at the stage of grant of waiver.

11. We have heard the parties and perused the record.

12. As the Company Petition was filed by the original petitioner (Respondent herein) for oppression and mismanagement and the same is still

pending, therefore, we will not pass any order on the same. We will only limit the issue to the extent that the waiver allowed by the Tribunal is valid or not.

13. It is undisputed that the Respondent was managing the affairs of the appellant No.1 as managing director as per Joint Venture Agreement dated 20.1.2020 and the same was not incorporated in the AoA of appellant No.1. The notice circulated on 6.5.2019 and resolution passed on 14.5.2019 also establishes that one of the Agenda items was to withdraw the rights, powers, privileges of Respondent as Managing Director. Therefore, it cannot be ignored that Respondent was Managing Director of the appellant No.1.

14. Learned counsel for the appellant argued that the Respondent is a minority shareholder of the appellant No.1 and does not meet the threshold of minimum 10% shareholding entitling him to maintain the company petition and the consent affidavits of the family members of the Respondent were not filed at the time of filing the petition but only at the rejoinder stage. On the other hand the Respondent argued that he fulfil the criteria as laid down in the **Cyrus case**.

15. We have heard the parties and perused the record. It is not disputed that the Respondent is member of appellant No.1 and holding 0.04% shareholding. It is also not disputed that the consent affidavit of his family were filed with the Rejoinder before the Tribunal below (Page 403 of Appeal Paper Book). Thus the Respondent's wife and his daughters has given affidavits to the Respondent in order to protect their rights and interest in the company in which they own shares. It is on this basis the affidavits given by the wife of Respondent and his daughters who holds shares in the company

is a valid consent within the meaning of Section 244(2) of the Act. The Respondent alongwith his family members hold 2.93% shareholding. His family has given the consent affidavits which were filed before the Tribunal. There are 19 shareholders as per shareholding pattern of Appellant No.1 as filed by the Appellant (Page 18 of the appeal). In the present case that the Respondent alongwith his family members are 4 in numbers but their shareholding is less than 10%.

16. That the Respondent has been corresponding with the appellants for the last ten years as Managing Director of 1st appellant and is well known in the knowledge of the appellants. It cannot be said that merely some technical compliances have not been done under the law will be used for detrimental to the interest of the said Managing Director to derive him the benefit provided by the law.

17. The arguments of the Respondent that his wife is shareholder of M/s Kurinji Metals Pvt Ltd which holds 30.42% shares in the appellant No.1 and she holds approximately 7% of the shareholding of appellant No.1 through M/s Kurniji Metals Pvt Ltd cannot be considered as the Resolution from M/s Kurniji Metals Pvt Ltd is required to give company's consent. The contention that she is a proportionate shareholder and her shareholding should be counted for making out the criterial is not accepted.

18. Thus in this way this will be in the hands of the major shareholders namely Omega Group, who hold majority shares holding and only have right and their prerogative to file such application. In these circumstances, we are

of the view that this is one of the exceptional and compelling circumstances, which merit the application for waiver.

19. With the above observations and discussions the appeal is dismissed.

No costs.

(Jarat Kumar Jain)
Member (Judicial)

(Balvinder Singh)
Member (Technical)

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