NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

COMPANY APPELLATE JURISDICTION

Company Appeal (AT) No. 162 of 2017

(arising out of Order dated 07.04.2017 passed by the National Company Law Tribunal, Kolkata Bench, in C.P. No. 370 of 2010)

IN THE MATTER OF:

Adbhut Vincom Private Limited ... Appellants

Vs

M/s. Hotel Birsa Private Limited ... Respondent

Present: For Appellant: - Shri Abhijeet Sinha, Shri Arijit Mazumdar, Shri Akshay Chandan and Shri Krishnu Ray, Advocates

For Respondent: - Shri Prateek Khanna, Advocate.

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by Appellant "Adbhut Vincom Private Limited" against part of the order dated 7th April 2017 passed by the National Company Law Tribunal (Kolkata Bench) (hereinafter referred to as Tribunal), whereby and

whereunder the Company Petition preferred by the Appellant has been allowed but the Ld. Tribunal while allowing the same directed to sell their shares to a 3rd party – 'Libra'.

2. The Company Petition was preferred by the Appellant under Section 397, 398, 399, 111A, 402 and 406 of the Companies Act, 1956 alleging wrongful acts and conduct of 'oppression and mismanagement' by 2nd to 7th Respondents to the petition who are also Respondents herein. The application was heard and by impugned order dated 7th April 2017 the Tribunal held as follows: -

> *" Therefore, omission to give notice of meeting was held to be oppression. Not sending notices to the shareholders/directors and passing resolutions therein is held oppressive to members and constitute mismanagement of companies. Moreover, the Respondents claim to have served the notice to the Petitioners through "Certificates of Posting" and it is their case that the Petitioners despite being in the know of the meetings chose not to attend the same. However, the Petitioners contend that they were never notified about the meetings that were held to pass the aforementioned resolutions and therefore the meetings were convened in violation of the Companies Act, 1956. Section 97 of the Companies Act, 1956 contemplates notice of increase of share capital or of members. Serving of notice to members for general meetings is mandatory under all circumstances. Serving of notice to members for general meetings is mandatory under all circumstances. Even though the Petitioner had apparently been notified of all the meetings and the on goings of the company which are evident only through "Certificates of Posting", the Petitioner failed to attend any of the meetings. Moreover, since the Petitioner, until the share capital was increased, was the holder of 49% shareholding in the company, no special resolutions could have been passed without his participation and vote on the same.*
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> *Therefore, in the light of the contentions, it is concluded that there is a clear case of oppression against the Petitioner. The meetings that were convened by the Board of Directors have not been properly notified to the Petitioner and resolutions therein were passed in absence of the vote of the Petitioner thereby constituting statutory violation. Also notices that were alleged served by the Respondents onto the Petitioner was not proper. The reason for the same being that the alleged notice for the meeting that was*

held on 18th February 2010 was stated to have been sent by the company on the same day from Ranchi which was the date of the board meeting on 18th February 2010, another board meeting according to the Respondents was held at Kolkata on 19th February 2010, notice of which was sent on the same date 19th February 2010 to the shareholders of the company. Therefore, issue nos. 1 and 2 are conclusively decided in affirmative in favour of the Petition."

3. However, while allowing the petition in favour of Appellant, the Tribunal passed the following order: -

"ORDER

The Petition is allowed. It is therefore in the interest of the company and for the existing shareholders of the company that since the Petitioner was agreeable to sell their shares to Libra, the same be effected. Also the shareholding of the Petitioner shall be reinstated to the amount at which it stood prior to the increase in the authorised capital and subsequent increase in issued capital. The resolution as passed in the meeting whereby the increase in authorised share capital, alteration of the Memorandum of Association and Articles of Association, appointment of whole time directors in the meeting and allotment of shares stand cancelled as they were carried out in violation of the Companies Act, 1956. Consequently, the shares of 1,20,000 and 90,000 allotted to R7 and R4 respectively are to be cancelled and the amount paid by them is to be refunded by the R1 company. The Memorandum of Understanding between Libra and the Petitioner will be binding on the parties.

The Petitioner is hereby directed to execute the necessary share transfer forms in favour of Libra Retailer Private Limited as per the Memorandum of Understanding. Libra is therefore directed to pay the balance amount due as per the Memorandum of Understanding after deducting the amount already paid to the Petitioner by Libra pursuant to the Memorandum of Understanding. Parties are directed to adhere to all other terms as agreed to in the Memorandum of Understanding strictly."

4. Ld. Counsel for the Appellant submitted that initially the Appellant intended to sell its share to a 3rd party 'Libra' by Memorandum of Understanding dated 29.9.2009. After filing of the petition under Section 397 and 398 by the Appellant, the said 3rd party tried to intervene in the application which was rejected by the Tribunal. Later on part payment was made

which was adjusted against the outstanding loan which 'Libra' had agreed to repay. But later on it decided by the Appellant not to sell such shares to the 3rd party and to retain the same.

5. After filing of the Company Petition the said 3rd party 'Libra' filed an application for impleading it as Party Respondent, which was rejected by Tribunal by order dated 24th August 2016.

6. The grievance of the Appellant is that though 'Libra' was not a party to the Company Petition and petition for 'oppression and mismanagement' has been decided in favour of the Appellant and against Respondents No. 2 to 7 but by last part of the impugned order dated 7th April, 2017, the Ld. Tribunal directed the Appellant company to sell its shares to the 3rd party 'Libra'. It was submitted that the Tribunal has no jurisdiction to pass such order under Section 402 of the Companies Act, 1956 or under Section 242 of the Companies Act, 2013 once 'oppression and mismanagement' alleged by Appellant company is accepted against Respondent No. 2 to 7 and no direction can be given to the complainant Appellant to sell its shares to the 3rd party, who is not a shareholder of the 1st Respondent company.

7. Ld. Counsel for the Respondents while alleged that several illegal acts have been undertaken by the 2nd and 3rd Respondents in collusion with the Appellant, also alleged wrongful act on the part of the Appellant and other by holding Annual General Meeting of the company on 30th December 2016. However, such alleged act on the part of one or other party cannot be taken into consideration in this case, as the Respondent No.2 and 3 have not raised such question and not challenged the impugned order.

8. Similar question came for consideration before the Hon'ble Supreme Court in "*Dale & Carrington Invt. (P) Limited & Anr v. P.K. Prathapan & Ors*" (2005) 1 SCC 212. In the said case the Hon'ble Supreme Court cited its earlier decision in "*Tea Brokers (P) Ltd. v. Hemendra Prosad Barooah*" (1998) 5 Comp LJ 463 and the observation made therein which is as follows: -

> "*25. On the question of relief, the Court observed:*
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> *A majority shareholder should not ordinarily be directed to sell his shares to the minority group of shareholders, if per chance through fortuitous circumstances or otherwise, the minority group of shareholders comes into power and management of the company. The majority shareholders by virtue of their majority will usually be in a position to redress all wrongs done and to undo the mischief done by the minority group of shareholders, as it will always be possible for the majority group of shareholders to regain control of the company so long as they remain in majority in the company by virtue of the majority. Except in unusual circumstances, the majority group of shareholders, in my opinion should never be ordered or directed to sell their shares to the minority group of shareholders. An order directing*

the majority group of shareholders to sell his shares to the minority group of shareholders will not redress the wrong done to the majority group of shareholders and will not give him sufficient compensation or relief against the act of oppression complained of by him, and, on the other hand, may add to his suffering and grievance and cause him greater hardship. Such an order will not further the ends of justice and indeed the cause of justice may be defeated."

9. Having heard Ld. Counsel for the parties while we hold that the Tribunal has no jurisdiction to direct sale of shares to an outsider particularly while there are other shareholders, who may agree to purchase the same, a wrong doer also cannot get any relief.

10. For the reason aforesaid, we set aside the last para of the order dated 7th April 2017 and as quoted at paragraph 3 above and affirm the rest part of the finding, whereby 'oppression and mismanagement' as alleged by the Appellant has been upheld.

11. The appeal is allowed to the extent above. However, in the circumstances of the case, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

11th August, 2017

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