

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

Company Appeal (AT) No. 17 of 2016

(arising out of Order dated 6th October 2016 passed by NCLT, Kolkata Bench in C.A.No. 331 of 2015 in C.P.No. 41 of 2016).

Anup Kumar Agarwal & Anr.

.... Appellants

Vs.

Crystal Thermotech Ltd. & Others

....Respondents

For Appellant : Mr. Akhilesh Kumar Srivastava with Ms. Manjulika Pal,
Advocates for the Appellants.

Ms. Suhita Mukhopadhyay, PCS

For Respondent : Mr. Ratnanico Banerji, Senior Advocate with Mr. Patita
Paban Bishwal and Mr. Kuldip Mallick, Advocates for
Respondent Nos. 1, 2 and 4

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by the Appellants against Order dated 6th October 2016 passed by the National Company Law Tribunal, Kolkata Bench (hereinafter referred to as 'Tribunal' for short) in C.A.No. 331 of 2015 in C.P. No. 41 of 2016 whereby and whereunder the application preferred by

respondents under Section 399 of the Companies Act 1956 questioning to maintainability of Company Petition under Section 397 and 398 of the Companies Act 1956 was entertained and the Company Petition preferred by Appellants/Petitioners was dismissed as not-maintainable.

2. The relevant facts as detailed and placed on record by the appellants are as follows: -

The 1st respondent Crystal Thermotech Limited & Others (hereinafter referred to as "Company") was incorporated on 31st October 2013 under the Companies Act 1956. At that stage the appellants subscribed 28.57% of shares in the 1st respondent Company and also a Director of the company. The grievance of the appellants is that without any notice to the appellants, without their consent and knowledge, on 11th February 2014, the respondents made additional allotment to outsider i.e. M/s Jupiter Goods Private Limited reducing the joint share value of the appellants below 10%.

3. The further case of the appellants is that similar illegal additional allotment of shares were made in favour of outsiders or others on 1st March 2014, 25th March 2014 and 29th March 2014 without notice to the appellants and without their consent and knowledge. They came to know of illegal allotment of shares, additional shares to outside company and others on 30th April 2014 from the Audited Balance Sheet.

4. Further case of the appellants is that subsequently also certain allotments were made in the year 2015 including allotments in favour of the

appellants. It was so allotted as the respondents orally agreed to redress the grievance of the appellants. There was an oral understanding that some of the shares allotted to M/s Jupiter Goods Private Limited will be transferred to the appellants. In view of such oral understandings the appellants paid a sum of Rs. 25 lacs to M/s Jupiter Groups Private Limited on 7th and 9th May 2014 to enable them to transfer the shares but curiously they returned back the amount to the appellants on 18th May 2015 by RTGS without transferring any shares.

5. Subsequently to redress the grievance, the respondents agreed to allot additional shares and the appellants were asked to deposit Rs. 20 lacs which they deposited in favour of the 1st respondent Company. However, against such amount only 1,33,000 shares were allotted and Rs. 6,70,000/- was returned back again to the appellants by the 1st respondent Company. It is alleged that in between 2014 and 2015, further allotment of shares worth Rs. 5.41 Crores were illegally made to outsiders and others without notice and knowledge of the appellants.

6. On 21st March 2016 by SMS message the respondents convened Board Meeting on 22nd March 2016 which was objected by the 1st Appellant by return SMS text message on the same day. On 1st April 2016, the Board's Meeting was held by sending a Notice by an email dated 22nd March 2016 for appointment of an Additional Director when the 1st appellant was out of India between 28th March 2016 and 3rd April 2016.

7. On 4th April 2016 a Notice of EOGM through shareholders holding only 50,000 shares which is less than even 1% in the purported paid up capital was made, and without the authority step was taken for illegal removal of the 1st appellant as Director of the 1st respondent Company. On 2nd May 2016 pursuant to a purported EOGM, the 1st appellant was removed as Director of the Company.

8. Being aggrieved the appellants filed Company Petition under Section 397 and 398 of Companies Act 1956 before the then Company Law Board, Kolkata, in May 2016 alleging Oppression and Mismanagement by the respondents. It was pointed out that the cause of action took place since 11th February 2014 when allotment of shares were made in favour of M/s Jupiter Goods Private Limited of which the appellants came to know only on 30th April 2014 from audited Balance Sheet.

9. The respondents on appearance filed one Company Application under Section 399 of the Companies Act, 1956 questioning the maintainability of the Company Petition on the ground that the share value of the appellants as on the date of filing i.e. May 2016 was less than 10%.

10. According to the respondents the authorised share capital of the company was Rs.15,00,00,000 divided into 1,50,00,000 equity shares of Rs. 10/- each and issued and subscribed share capital of the Company was Rs. 15,00,00,000/- divided into 1,50,00,000 equity shares of Rs. 10/- each. The appellants jointly hold 4,50,000 equity shares in the 1st respondent Company

which is equal to 3% of the total shareholding. Before the Company Law Board, they placed reliance on a copy of the Annual Accounts for the financial year 2014-2015 in support of their claim.

11. The respondents also claimed that the 1st appellant had signed annual accounts for the Financial Year ended on 31st March 2014, as per which Rs. 15,00,00,000 divided into 1,50,00,000 equity shares of Rs. 10/- each and issue and subscribed share capital of the Company was shown at Rs. 9,85,70,000/- divided into 98,57,000 equity shares of Rs. 10/- each, which was not disclosed by the appellants in their Company Petition and suppressed the same.

12. As on 31st March 2014 there were 23 numbers of Members in the 1st respondent Company and the appellants have filed the Company Petition simply for their personal benefit and not for the benefit of the Company or any other member. The main plea taken by respondents was that the share capital of the appellants being less than 10% i.e. 3% the Petition under Section 397 and 398 of the Companies Act 1956 was not maintainable.

13. The stand taken by the respondents was accepted by the Tribunal which observed that the 1st appellant-Anup Kumar Aggarwal was holding only 3,10,000 shares, which is 2.07% of the total shareholding and 2nd appellant-Payal Aggarwal was hold only 1,40,000 shares which is equivalent to 0.93% of the total shareholding i.e. total 3% of the shareholding on the date of filing of the petition. Referring to the provisions of Section 399(1) of the Companies

Act 1956 and the decision of the Supreme Court in 'Bhagwati Developers Private Limited Vs. Peerless General Finance Investment Company Limited', (2013) 5 SCC Page 455, the Tribunal held that the Company Petition under Section 397 and 398 of the Companies Act, 1956 was not maintainable.

14. Similar plea has been taken by the parties before this Appellate Tribunal. According to the counsel for the Appellants, the Company Petition was filed in April 2016 against the first cause of action which had taken place on 11th February 2014 which came to their notice on 30th April 2014. There was no delay on their part as in the meantime the respondents assured them to enhance their shareholding as is apparent from the subsequent allotments made by respondents and the amount of 25 lacs which was deposited by appellants with M/s Jupiter Goods Private Limited.

Learned Counsel for the respondents while contended that there is a delay coupled with acquiescence the appellants having accepted the subsequent shares in May 2015, their claim is barred by principle of estoppel having received the subsequent shares without any objection.

15. Learned Counsel for the respondents also relied on Supreme Court decision in '**Bhagwati Developers Private Limited**' wherein the Supreme Court while dealing with the case under Section 397 of the 1956 Act held that the date of filing is the crucial date to decide whether the appellant had minimum 10% of the share capital to maintain the petition under Section 397.

16. Having heard the parties we are not inclined to dismiss the appeal on the ground of delay or acquiescence nor on the ground of estoppel as none of those grounds were taken by the respondents before the Tribunal. The Tribunal has also not dismissed the Company Petition on such ground(s). The only ground for which Tribunal has dismissed the Petition is non-maintainability of the petition as the shareholding of the appellants was less than 1/10th of the shareholding of the Company as on the date of presentation of the petition.

17. The decision of *Supreme Court in "Joint Action Committee of Air Line Pilots' Association of India (ALPAT) Vs. Director General of Civil Aviation (2011) 5 SCC Page 435 and "Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (International Company Limited)" (2011) 10 SCC 420* on the question of estoppel is also not applicable in the present case.

18. The appellants have explained the delay of two years in filing the Company Petition. It is pleaded that they came to know on 30th April 2014 that their shareholding has been brought down to less than 10% from the Audited Balance Sheet which has not been denied by the respondents. The respondents have also not denied that the appellants deposited 25 lacs with the Jupiter Goods Private Limited for transfer of further shares which was returned without the consent of the appellants.

19. In the present case we are also not going to decide the question whether there was any oppression and mismanagement on the part of the respondents

in bringing down the share of the appellants below 1/10th of the total shareholding of the company as no such issue has been decided by the Tribunal.

20. While we observe that there was no delay on the part of the appellants in preferring the appeal we only observe that the petition was also not barred by limitation.

21. Section 433 of the Companies Act 2013 reads as follows: -

“433. The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be”.

A perusal of the aforesaid provisions makes it clear that the Limitation Act 1963 would apply to the proceedings or appeal before the Tribunal or the Appellate Tribunal. In the Limitation Act 1963 in most of the cases, the period of limitation is three years except suit for possession of hereditary offices etc. where the period of limitation is 12 years and in Article 111 and 112, where the period prescribed is 30 years. The Article 113 of the Limitation Act 1963 deals with subject of the suits for which there is no prescribed period of limitation. As per the said provisions any suit for which no period of limitation is provided, the period of limitation will be 3 years from the date when the right to sue accrue.

22. In the present case, the right to sue accrued to the appellants on 11th February 2014 and the petition was filed in April 2016. Therefore, the said petition was well within the period of limitation.

23. In this appeal the main grievance of the appellants is that the respondents have brought down their shareholding below 1/10th of the total shareholding of the company by oppression and mismanagement.

24. The question arises for consideration in the present case is where a shareholder/member of a Company alleges Oppression and Mismanagement by Directors in bringing down his shareholding below 1/10th of shareholding, whether such petition under Section 397 and 398 of the Companies Act 1956 can be dismissed as not maintainable on the ground that shareholding of the petitioner is below 1/10th of the shareholding on the date of filing of the petition.

25. The question relating to maintainability of Company Petition under Section 397 and 398 alleging 'Oppression and Mismanagement' was considered by Supreme Court in "**Bhagwati Developers Private Limited Vs. Peerless General Finance Investment Company**", (2013) 5 SCC Page 455.

In the said case, the Supreme Court held as follows: -

"12. The right to apply for the winding up of a company is available provided that the applicant satisfies the requisite requirements under Sections 397, 398 and 399 of the 1956 Act with respect to holding 10% shares in the total shareholding of the

company. It is not necessary that the petitioner(s) must hold the same individually. Such a winding-up petition can even be filed after obtaining the consent of other shareholders, so as to meet the requirement of having an aggregate of 10% out of the total shareholding.

13. The said application is maintainable under Section 397 where the affairs of the company are being conducted in a manner that is prejudicial to public interest, or in a manner that is oppressive with respect to any member or members of the company. (Vide *M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja.*)

14. In *Rajahmundry Electric Supply Corpn. Ltd. v. State of Andhra*, this Court, while dealing with a case under Section 397 of the 1956 Act and Section 153 C of the Companies Act, 1913, which were analogous to the provisions of Section 397 of the 1956 Act held that the issue of whether the petitioner had obtained consent of the members of the company in order to meet the requirements of holding 1/10th of the total shares is to be examined in light of whether such a number was in fact attained and maintained on the actual date of presentation of the company petition in court and in the event that a member later withdraws consent, the same would not affect either the right of the petitioner-applicant to

proceed with the application, or the jurisdiction of the court to dispose of it on merits.”

26. **'Bhagwati Developers Private Limited'** was a case relating to winding up. The Supreme Court was considering the requirement of application(s) to apply for winding up of a company and the crucial date when the applicants were required to satisfy the requirements under Section 399 of the Companies Act 1956. In the said case the Supreme Court while held that it is not necessary that the applicant(s) must hold the same individually, but such a winding-up petition can be filed after obtaining the consent of other shareholders, so as to made the requirement of having an aggregate of 10% out of the total shareholding.

27. A shareholder/member or group of shareholder/members without and notice or information cannot visualize or presume that his/their share(s) will be brought down to their disadvantage, which amounts to oppression and mismanagement. On such anticipation or presumption no petition under Sec 397 or 398 of the Companies Act, 1956 can be filed. Such aggrieved shareholder(s)/member(s) can file the petition under Section 397 & 398 of the Companies Act 1956 only after cause of action has taken place. If that be so, the day on which a petition under Section 397 and 398 is filed by a shareholder/member, whose shareholding has been brought down below the requirement of having an aggregate of 10% out of the total shareholding, will be deprived to avail remedy under Section 397 and Section 398, without their fault. He will be remediless. In **'Bhagwati Developers Pvt. Ltd.'** and **'Rajahundry Electric Supply Ltd.'** aforesaid issue was not raised nor

decided. For the reasons aforesaid, we are of the view that the law laid down by Supreme Court in '**Bhagwati Developers Pvt. Limited**' and '**Rajahundry Electric Supply Corporation Limited**' are not applicable in the case where an applicant alleges 'oppression and mismanagement' in bringing down his shareholding below the requirement of 1/10th of the total shareholding of the company, thereby deprived him of his right to sue.

28. For the reasons recorded above, we hold that in the cases where an applicant alleges that his shareholding has been brought down by way of oppression and mismanagement below 1/10th of the total shareholding without notice and knowledge then it is the duty of the Tribunal to determine whether the applicant had 1/10th of the shareholding prior to the date of alleged oppression and mismanagement. Such petition cannot be dismissed on the ground that the applicants shareholding is below 1/10th of the total shareholding of the Company on the actual date of presentation of the Company Petition.

29. It is a different question whether the shareholding was actually brought down by oppression and mismanagement which is to be decided by the Tribunal on the basis of evidence on record.

30. In the present case, the Tribunal failed to apply the aforesaid principle and erred in holding that the Company Petition preferred by the appellants under Section 397 and 398 of the Companies Act 1956 was not maintainable on the date of presentation of the Company Petition.

31. The question of oppression and mismanagement and maintainability in the present case is a mixed question of facts and law. As the petition was filed on the ground that the shareholding of the applicant(s) has been brought down below 1/10th of the total shareholding of a Company by oppression and mismanagement, Tribunal was required to decide the question of maintainability at the time of final hearing of the Petition. Both the merit and question of maintainability were required to be decided together. On hearing the parties, in case the Tribunal forms opinion that there was no oppression and mismanagement on the date of cause of action as alleged by the applicant then in such case it was open to the Tribunal to dismiss the petition as not maintainable in view of Section 399 of the Companies Act 1956.

33. For the reasons aforesaid, we set aside the impugned order and judgement dated 6th October 2016 passed by the National Company Law Tribunal, Kolkata Bench in C.A.No. 331 of 2015 in C.P. No. 41 of 2016 and remit the case to the Tribunal for determination of question of maintainability and merit, following the principle discussed above, after hearing the parties.

34. The appeal is allowed. However, there shall be no order as to cost.

Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
24th JANUARY, 2017

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