NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT) NO.321 OF 2018

(ARISING OUT OF JUDGEMENT AND ORDER DATED 2ND AUGUST, 2018 PASSED BY NATIONAL COMPANY LAW TRIBUNAL, CHENNAI BENCH, CHENNAI IN TCP NO.107/2016)

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
C.J. Mathew Apartment 5B, Trinity crown, Edappally, Kochi-682024	Petitioner	Appellant
Vs		
1. Greendot Hotels & Resorts (I) Pvt Ltd 34/1806D, III Floor, Kurickal Arcade, Edapally P.O. NH-47, Ernakulam, Kerala 682024 Previously at 32/2982B, Sahrudaya Building, Ponnurunni, Vyttila P.O. Ernakulam, Kochi 682019	1st Respondent	1st Respondent
2. Mr. K.J. Paul, Kureekal House, Near Thrikkakara Temple, University Post, Kochi 682 021	2nd Respondent	2nd Respondent
3. Ms Bindu Paul, (W/o K.J. Paul) Kureekkal House, Near Thrikkakara Temple, University Post, Kochi-682 021.	3rd Respondent	3rd Respondent
4. Mr. K.A. Mathai, Kochappilly House,		

Chembumukku,
Kakkanad
Ernakulam,
Kochi 682 030 4th Respondent 4th Respondent

For Appellant:- Mr. Arun Kathpalia, Sr. Advocate, Mr. Bhargav Thali, Mr. Abhishek Iyer, Advocates for the appellant.
For Respondents: - Mr. K.S. Ravichandran, PCS for R3.
Mr. K.R. Sasiprabhu, Mr Biju P Raman, Advocates.
Mr. Sumesh Dhawan, Mr. Aditya Swarup, Mr. Biju P. Raman, Ms Vatsala Kak, Ms Geetika Sharma, Ms Maithili Shubhangi, Advocates.

JUDGEMENT
(2nd September, 2019)

MR. BALVINDER SINGH, MEMBER (TECHNICAL)

The present appeal under Section 421 of the Companies Act, 2013 has been preferred by the Appellant (Original Petitioner) against the judgement dated 2.8.2018 passed by the National Company Law Tribunal, Chennai Bench, Chennai vide which the Tribunal has dismissed the Company Petition No. 107/2016 filed by the appellant was dismissed.

BACKGROUND

2. The brief facts of the case are that the appellant (original petitioner) filed Company Petition under Section 397, 398 and 111(4) of the Companies Act, 1956 seeking reliefs against the acts of oppression and mis-management practised by the Respondents by various acts of fraud and fabrication of documents in an effort to remove the appellant from the Membership and Board of the 1st respondent divesting him of his entire investment.

a) 1st respondent company was incorporated on 30.6.2008 and the appellant and 2nd respondent are subscribers to the MOA of 1st respondent with each having subscribed to 25000 shares having face value of Rs.100 per shares. Appellant and 2nd respondent were the

promoters and the first directors of the 1st respondent and subscribers to the Memorandum of Association of the 1st respondent.

b) Appellant had paid the entire money towards the shares subscribed i.e. a sum of Rs.25,00,000/-. 1st respondent was functioning in the years between June 2008-December 2010 under the control of appellant and 2nd respondent.

c) Certain disputes arose between appellant and 2nd respondent, appellant visited the office of 1st respondent and found that all records of the 1st Respondent had been removed. Appellant vide letter dated 11.1.2011 (Page 152 of appeal) addressed to 2nd respondent informed that the record in respect of properties acquired by 1st respondent have been removed and to bring back the same and keep it with registered office of 1st respondent. Appellant stated that thereafter belated filings were made by 2nd respondent in relation to 1st respondent and by way of said filing, 2nd to 4th respondent removed the appellant as a Director from the Respondent company and also forfeited 25000 shares subscribed and paid by the appellant, despite no notices having been served on the appellant. 2nd Respondent also showed the appointment of 3rd respondent as director and shareholder of 1st respondent from 2008 onwards in order to create a majority and justify the removal of the appellant as a director and also forfeiture of his shares. Appellant stated that the said acts came to his knowledge in the year 2011 only after the said belated filings were made.

d) Appellant lodged Police complaint against 2nd respondent on 6.5.2011 for investigating the matter. Appellant then approached

Munsif Court, Ernakulam by way of a Civil Suit being OS No.249/2011 against the respondents seeking inter alia an injunction from disposing off assets of the 1st respondent in March, 2011. On 8th April, 2011 (Page 160 to 173 of appeal), the Munsif Court restrained the respondents by a temporary prohibitory injunction from alienating the plaint schedule property till the disposal of the suit.

e) Appellant filed Company petition under Section 397, 398 and 111(4) of the Companies Act,1956 before the erstwhile Company Law Board and the petition was transferred to NCLT and was numbered as TCP/107/2016. The appellant (original petitioner) sought the following reliefs:

i) An order declaring that the conduct of the Extra Ordinary General Meeting of the Company held on 5.2.2011 and the increase of the authorized capital of the Company as per the resolution passed thereat are illegal, null and invalid.

ii) An order declaring that the transfer of 5000 shares of the company from the name of the second respondent in favour of the third respondent on 16.8.2008 is invalid, null and void and directing the 1st respondent to rectify the Register of Members accordingly.

iii) An order declaring that the removal of the petitioner as director of the 1st respondent by virtue of the Board Resolution dated 22.1.2011 is illegal and void.

iv) An order directing the 1st respondent to rectify the Register of members to the effect that the Petitioner is holding 25,000 fully paid up equity shares of the company out of the total authorized capital of

Rs.50,00,000/- before the illegal enhancement of the share capital in violation of the provisions of the Companies Act,1956.

v) An order declaring that the appointment of 3rd respondent as Director of the 1st respondent made on 12.7.2008 is illegal and invalid.

vi) An order declaring that all decisions taken by the Board of the Company reconstituted after removing the petitioner from the office of director and inducting the 3rd and 4th respondent as directors are invalid, null and void as vitiated by fraud.

vii) An order setting aside the allotment of 1,00,000 shares of the 1st respondent company in favour of the 2nd and 3rd respondents purported to have been made on 18.2.2011, and any subsequent transfer of shares by them to any other person, as invalid and bad in law.

viii) An order restraining the respondents from making any further issue of shares without rectifying the illegal share allotment made on 18.2.2011.

ix) An order directing the first respondent company make allotment of shares to the petitioner against the share application money of Rs.88,10,000/- paid by him and lying to his credit in the company's account.

x) An order setting aside the appointment of the 4th respondent purportedly made on 10.1.2011 as illegal and invalid.

xi) An order declaring the shifting of the Registered office of 1st respondent company on 26.6.2010 as illegal, null and void.

xii) An order directing the Registrar of Companies to reject all statements of accounts, returns, forms certificates and reports filed on

behalf of the 1st respondent company after the date of Annexure A5 issued by the petitioner to the second respondent, as falsified, fabricated or manipulated.

xiii) An order appointing an independent practising Chartered Accountant to verify the books of Accounts of the 1st respondent and ascertain the extent of fraud, manipulation and falsification of books of Accounts perpetrated by Respondents 2,3 and 4.

xiv) An order directing the Central Government to carry out an investigation into the affairs of the first respondent company in the light of the submissions made in this petition.

xv) Such other further order as may be deemed fit by this Hon'ble Bench on the facts and in the circumstances of the case.

3. Reply was filed by the Respondents denying all the allegations made by the petitioner. Arguments were held and after hearing the parties the learned NCLT passed the impugned order 2.8.2018 and dismissed the petition filed by the appellant (original petitioner). Relevant portion of the impugned order is as under:

> ***"43. In the light of the provisions of the Articles of Association of the Company and the decision taken by the Board of Directors to forfeit the shares of the Petitioner, it can safely be concluded that the Petitioner is not a member of the 1st respondent company as his shares stand forfeited for non-payment of the subscription money. The Petitioner has miserably failed to support his contention for rectification of the Register of members for the purpose of entering his name in the Register of Members of 1st Respondent Company. Though petitioner claims that he has been chairing all the Board Meetings and was in charge of the finance and fund raising matters, but he did not open any account of the 1st respondent with the Bank and even not maintained any record, particularly with the regard to the payment, if any, of subscription money for 25,000***

shares subscribed. Even, he did not file PAS-3 to intimate the RoC of the allotment of shares being made by the Company. The defence of the Petitioner that the Respondents have fabricated all the record relating to the 1st Respondent Company is hollow and therefore, stands rejected. Thus, the issue raised under Para 34 hereinabove stands decided against the Petitioner, as he is not legally entitled to seek relief under prayer 'D'. Therefore, he cannot invoke the provisions of Sections 397 and 398 of the Companies Act,1956, as he was not a shareholder of 1st respondent company at the time of filing the petition. Accordingly, the Petition stands dismissed. However, these findings will have no bearing on the complaint filed by the Petitioner before the Police. There is no order as to costs."

CASE OF THE APPELLANT

4. Being aggrieved by the said impugned order dated 2nd August, 2018 the appellant has preferred the present appeal praying that the appeal filed by the appellant may be allowed and set aside the order dated 2.8.2018 passed by the NCLT, Single Bench, Chennai in TCP No.107/2016.

5. Appellant stated that the 1st respondent is a private company limited by shares, promoted by the appellant and 2nd respondent and incorporated on 30.6.2008. The authorised capital of 1st respondent at the time incorporation was 50,000 shares of Rs.100/- each entirely issued and subscribed by the appellant and the 2nd respondent in equal shares of 25,000 equity shares. The main object of the company was to carry on the business of hotels, restaurants, café, tavern, motel, rest houses etc. The incidental object includes purchase and development of immovable properties. Appellant stated that as the 1st respondent did not have any bank account, therefore, the appellant paid the amount Rs.25,00,000/- in cash for purchasing 25000 shares of Rs.100/- each and his name was entered in the Register of Members of 1st respondent and necessary entries were passed in

the books of accounts of 1st respondent. Appellant stated that 2nd respondent was not having sufficient funds, therefore, he did not bring in his share of the capital and had, as a matter of fact, borrowed funds from the Appellant. Appellant stated that he being a subscriber (Page 130 of Appeal) to the Memorandum of Association of the 1st respondent company, therefore, the appellant is a subscriber within the meaning of Section 41(1) of the Companies Act, 1956.

6. Appellant stated that 2nd and 3rd respondent have forged the cash book of 1st respondent to make it appear that the money brought in by the appellant had instead been brought in by 2nd respondent. Appellant stated that intimation dated 13.6.2008 and letter dated 30.12.2011 of Ministry of Corporate Affairs enclosing the challan and DD, which show that the said expenses for Rs.108000/- were actually incurred by the Appellant and not 2nd Respondent (Page 451-453, 517 of Vol II of Appeal). Appellant stated that he had paid the amount for stamp paper which were purchased on 30.6.2008 towards purchased of land one from Mr. K. Dharamalal (Page 454-458 of Appeal). Appellant further stated that he paid a sum of Rs.20,00,000/- by way of a cheque dated 20.1.2010 bearing number 04882 (Page 86 of Rejoinder) on behalf of 1st respondent to one Trinity Arcade Pvt Ltd as an advance for purchase of land by 1st respondent.

7. Appellant stated that in terms of Section 36(2) of the Companies Act, 1956, sums due in lieu of 'subscribed' shares are required to be reflected in the balance as 'debt due' to the company. Appellant stated that perusal of the balance sheet of 1st respondent would make it evident that no amount has been reflected as being 'debt due' to 1st respondent against any unpaid

amount on shares subscribed in terms of Section 36(2) of Companies Act, 1956.

8. Appellant stated that 2nd and 3rd respondent have sought to forfeit the shares held by appellant in 1st respondent company on the strength of notices dated 26.6.2010, 21.8.2010 and 25.9.2010 (Page 281-283 of Appeal). Appellant further stated that the shares were forfeited in the Board Meeting dated 22.11.2010 (Page 280 of Appeal). Appellant stated that such notices were never issued and served upon the appellant by respondents. Appellant further stated that the shares subscribed by the appellant are fully paid and no further sums are payable on the same. Appellant also stated that no calls have been issued to him.

9. Appellant stated that certain disputes arose between appellant and 2nd respondent, appellant visited the office of 1st respondent and found that all records of the 1st Respondent had been removed. Appellant vide letter dated 11.1.2011 (Page 152 of appeal) addressed to 2nd respondent informed that the record in respect of properties acquired by 1st respondent have been removed and to bring back the same and keep it with registered office of 1st respondent. Appellant stated that thereafter belated filings were made by 2nd respondent in relation to 1st respondent and by way of said filing, 2nd to 4th respondent removed the appellant as a Director from the Respondent company and also forfeited 25000 shares subscribed and paid by the appellant, despite no notices having been served on the appellant. 2nd Respondent also showed the appointment of 3rd respondent as director and shareholder of 1st respondent from 2008 onwards in order to create a majority and justify the removal of the appellant as a director and also forfeiture of his shares. Appellant stated that

the said acts came to his knowledge in the year 2011 only after the said belated filings were made.

10. Appellant lodged Police complaint against 2nd respondent on 6.5.2011 for investigating the matter. Appellant then approached Munsif Court, Ernakulam by way of a Civil Suit being OS No.249/2011 against the respondents seeking inter alia an injunction from disposing off assets of the 1st respondent in March, 2011. On 8th April, 2011 (Page 160 to 173 of appeal), the Munsif Court restrained the respondents by a temporary prohibitory injunction from alienating the plaint schedule property till the disposal of the suit.

11. Appellant stated that by virtue of constitution of the Bench of Hon'ble NCLT at Kochi w.e.f. 1.8.2018 and the present impugned order being passed by the Bench of NCLT at Chennai on 2.8.2018, NCLT Chennai did not have any jurisdiction to pass the impugned order.

CASE OF RESPONDENT

12. Respondents stated that the appellant has not submitted the proof of payment of subscription of 25000 shares and also not produced the share certificate to establish his claim. Respondent further stated that the NCLT has also held in its impugned order at para 35-36 that the appellant had not produced any share certificate or even a shred of evidence that he had the means or paid any subscription money in lieu of the shares. Respondents stated that the appellant has not now even attempted to assail the said findings of NCLT Chennai in the impugned order or even bothered to produce or substantiate his claim that he made the said payments in cash to the company.

13. Respondent stated that the appellant made a police complaint dated 16.5.2001 but has wilfully suppressed the fact that the Crime Branch of the CID investigated into the complaint, interrogated all the parties and values various documents and by a Final Closure Report dated 7.6.2016 (Reply Annexure R7/Page 65-89) concluded that there was no record to prove that the appellant paid any money in respect of the shares.

14. Respondents stated that Income Tax Department, Kochi vide letter dated 24.2.2014 (Page 90, Annexure R-8 of Reply) intimated the deputy Superintendent of Police Kaloor that the Income Tax Return filed by the appellant during the period i.e. Assessment Years 2006-07 to 2010-11 is Rs.2141860/- (Total 5 years) and a sum of Rs.152547/- has been paid as Income Tax. Respondents stated that the claim of appellant that he has paid Rs.1,13,00,000/- in cash grossly disproportion to his known sources of income.

15. Respondent stated that any person holding shares of a company and who has not made any payments in respect of those shares is not entitled to file and maintain a petition for oppression and mismanagement under the Companies Act, 1956.

16. Respondent stated that the appellant filed Writ Petition No.10544/2014 (P) before the Kerala High Court at Ernakulam which was disposed off by the Hon'ble High Court vide Judgement dated 16th October, 2014 (Page 118-119, Annexure R-11 of Reply) vide which the Hon'ble High Court observed that *"I am well satisfied that the investigating officer has conducted investigation in all ways possible, and I do not find any irregularity or flaw in the investigation conducted by him. In the particular situation, I find no necessity to grant the*

second prayer made by the writ petitioner in WP© No.10544 of 2014, ordering investigation by somebody else."

17. Respondents stated that the appellant made complaint against the Chartered Accounts of 1st respondent to the Disciplinary Committee of the Chartered Accountants regarding falsification of accounts and audit report. The Committee after hearing the parties and perusing the record observed vide its order dated 8.2.2015 (Page 150 of Annexure R-12 of Reply) *"the Committee is of the considered opinion that in the instant case, the Respondent is not guilty of professional misconduct"* and passed order for closure of the case.

18. Respondents stated that the appellant and 2nd respondent have been engaged in disputes pertaining to other companies and in each of the proceedings the appellant claims to have made investment in cash. Respondent stated that the appellant have stated in different various proceedings that the appellant have made payment in cash aggregating to Rs.5.26 crores (Page 17 of the Reply). Respondents craves leave to refer to the said affidavit when produced. Respondent stated that the appellant is harassing the respondent by filing false complaint and claiming that he has paid the amount in cash but giving no proof for the same.

19. Respondent stated that the appellant has not produced a single document evidencing that the appellant attended any Board Meeting or AGM of 1st respondent. Respondent further stated that the appellant only attended the Board Meeting on 12.7.2008 (Page 176-178 of appeal) in which Mrs Bindu Paul, 3rd respondent, was a special invitee and was appointed as an Additional Director. Respondent stated that in the said Meeting it is recorded that the

appellant informed that he is making arrangements for the payment of subscription amount of Rs.25 lakhs.

20. Respondent stated that the appellant was one of the subscribers of the 1st respondent is not denied.

21. Respondent stated that in the Board Meeting dated 16th August, 2008 (Page 275 of Appeal) it was resolved to transfer 5000 shares of 2nd Respondent to 3rd Respondent and the said transfer was in accordance with the provisions of Articles 29 and 33 of the Articles of Association of 1st Respondent (Page No.138-139 of Appeal). Respondent stated that since the appellant had not made any payments in respect of his shares, therefore, the appellant has no voting rights as per Section 87 of the Companies Act, 1956.

22. Respondent stated that appellant had in fact subscribed to 25000 equity shares of Rs.100/- each, aggregating to Rs.25,00,000/- of 1st respondent, is not denied. 1st respondent issued Notices dated 26.6.2010, 21.8.2010 and 25.9.2010 (Pages 267-274 of Appeal) on the strength of Board Resolution but the appellant failed to respond to these notices. Respondent stated that, therefore, the shares of the appellant were forfeited after due notice to appellant and as decided at the Meeting of the Board of Directors held on 22.11.2010 (Page 280 of Appeal). Respondent stated that the appellant was duly informed vide letter dated 1.12.2010 (Page 284 of appeal) for forfeiture of shares. Respondent stated that there was sufficient cause in the removal of appellant from the register of members of the Company in terms of Section 111A of Companies Act, 1956.

23. Respondent stated that notification dated 27.7.2018 (Reply of R1/Pages 44-45) is a notification merely constituting the Kochi Bench of NCLT and is

not a substantive document taking away the jurisdiction of the Chennai Bench of NCLT to pass the impugned order. Respondent stated that pursuant to the constitution of Bench, a subsequent circular is to be issued by NCLT regarding the function of the Bench and the transfer of cases to such Bench. This procedure was followed in the case of constitution of the Jaipur Bench of NCLT. Respondent further stated that as a general practice, when transferring cases from one court to the other, if the previous court is still functioning, cases that are reserved for orders/judgement are not transferred.

24. Respondents lastly prayed that the impugned order dated 2.8.2018 may be upheld and the appeal may be dismissed.

25. Rejoinder has been filed by the appellant. Appellant has reiterated the submissions made in the appeal.

OUR CONSIDERATION

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

27. Learned counsel for the appellant argued that 1st respondent company was incorporated on 30.6.2008 and the appellant and 2nd respondent are subscribers to the MOA of 1st respondent with each having subscribed to 25000 shares having face value of Rs.100 per shares. Appellant and 2nd respondent were the promoters and the first directors of the 1st respondent and subscribers to the Memorandum of Association of the 1st respondent. Appellant further argued that he had paid the entire money towards the shares subscribed i.e. a sum of Rs.25,00,000/-. Appellant argued that as the 1st respondent did not have any bank account, therefore, the appellant paid the amount Rs.25,00,000/- in cash for purchasing 25000 shares of Rs.100/- each and his name was entered in the Register of Members of 1st respondent

and necessary entries were passed in the books of accounts of 1st respondent. Appellant argued that 2nd respondent was not having sufficient funds, therefore, he did not bring in his share of the capital and had, as a matter of fact, borrowed funds from the Appellant. Appellant argued that he being a subscriber to the Memorandum of Association of the 1st respondent company, therefore, the appellant is a subscriber within the meaning of Section 41(1) of the Companies Act, 1956.

28. Learned counsel appearing on behalf of Respondents argued that it is not denied that the appellant is subscriber to the MOA of 1st respondent. Learned counsel also argued that the appellant alongwith 2nd respondent were promoters/directors of the company. Learned counsel for the respondents argued that the appellant has argued that he had made payment of Rs.1,13,00,000/- towards the subscription of 25000 shares in 1st respondent and towards share application money (Page 338 of Appeal and also para 6.25 at Page 333 of appeal). Learned counsel for the Respondent further argued that the appellant has not produced any share certificate or his bank statement or the acknowledgement receipt issued by 1st respondent or its authorised representative having received the amount in cash towards share application money from the appellant. Learned counsel for the Respondent further argued that NCLT, Chennai in its impugned order at para 35-36 has held that the appellant did neither prove to whom the money was given on behalf of the company nor produce any receipt to that effect. The appellant even did not bother to place on record the share certificates, which appellant claims to have been issued to him by the 1st respondent. Respondents further argued that the impugned order further held that there is no shred of evidence

to substantiate his claim that the appellant has paid the subscription money. Learned counsel for the Respondents further argued that the letter dated 24.2.2014 issued by the Income Tax Department, of which the appellant was an ex-employee, to Dy. Supdt of Police, Kaloor (Page 90 of Counter affidavit of Respondent) clearly establishes that the total income of the appellant for five years from 2006-07 to 2010-11 is approximately Rs.21 lakhs. Respondent argued that the appellant has not made any payment to 1st respondent towards share application as argued above.

29. We have heard the parties on this issue. The appeal is whether the appellant has paid the amount and is not a defaulter. It will be appropriate to know the legal provisions in this regard. Section 399 of the Companies Act, 1956 is as under:

> ***"****399. Right to apply under sections 397 and 398-(1) The following members of a company shall have the right to apply under Section 397 or 398:-*
>
> > ***(a)*** *in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less or any member or members holding not less than one-tenth of the issued share capital of the company,* ***provided that the applicant or applicants have paid all calls and other sums due on their shares.***
> >
> > ***(Emphasis given)***
>
> ***(b) Xxx"***

Similarly, Section 244 of the Companies Act, 2013 provides as under:-

"*244. Right to apply under Section 241-(1) The following members of a company shall have the right to apply under Section 241, namely:-*

(a) *In the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whoever is less, or any member or members holding not less than one-tenth of the issued share capital of the company,* ***subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;***

(Emphasis given)

(b) Xxx"

In case the person is a defaulter in payment of subscription to capital or any sum due against him, he will be denied the benefit of this Section.

It is also not disputed that the appellant and 2nd respondent are promoter and director of 1st respondent. We note that the appellant is a retired Officer of Income Tax Department, he is very well aware of the law of the land in financial matters. The stand taken by the appellant is that 1st respondent was not having any bank account, therefore, he paid the amount in cash to 1st respondent towards shares application money to the tune of Rs.25,00,000/-. The stand has no legs to stand on. Nothing stops opening of Account in the name Company with "Proposed" added in bracket. Nothing stops showing a trail from Account to Account. The appellant has not produced any evidence before the NCLT or before this Appellate Tribunal to substantiate his claim that the appellant paid the said amount in cash. Tax

laws prohibit such huge payments in cash. There is force in the arguments of the Respondent that the appellant should have produced the share certificate, bank statement showing that he has withdrawn the said amount from Bank or should have produced the acknowledgement receipt issued by the 1st respondent in token of having received the share application money from the appellant. Further the letter issued by the Income Tax Department to Dy. Supdt of Police clearly shows that the appellant has an income of Rs.21 lakhs approx. for the five financial years. We also failed to understand that the appellant being an ex-employee of Income Tax Department is paying such a huge amount in cash and that too to a company which even did not have the Bank account and also taking no receipt for the same from the 1st respondent. Further the arguments of the appellant that he has paid Rs.1,13,10,000/- in cash towards subscription of 25000 shares and towards share application money is concerned, we have perused the Balance Sheet duly certified by the Chartered Accountant as at 31st March, 2010 (Page 487 to 490 of the Appeal). We have noted that on Page 487 of the Balance, it is shown Rs.8810000/- as share application money pending allotment and at Page 490 it is clearly mentioned that Rs.75,00,000/- has been received from Mr K.J. Paul, Director and an amount of Rs.13,10,000/- has been received from Mrs Bindu Paul, Director both aggregating to Rs.88,10,000/-. We further observe that 1st respondent is a company. In all cases it has to act through natural persons. Admittedly there are two subscribers to the capital and who are first directors of 1st respondent. It is their duty to see that 1st respondent is operational. Once the person is asserting that he has made payment in cash to 1st respondent, he has also to show how this payment to 1st respondent could be

recorded unless it is asserted that he has made this payment to 2nd Respondent or to any other authorised person who has failed to keep the record or he has retained this money on behalf of 1st respondent with himself. He has not asserted nor has produced any record nor he has made payment to 2nd respondent on behalf of 1st respondent especially when there is no bank account in the name of 1st respondent. Interestingly even if we presume that there could be any authorised person to receive the cash on behalf of 1st respondent, that person is also required to be authorised by the appellant or 2nd respondent or by both. As such no record has been placed by appellant to substantiate his claim.

30. Learned counsel appearing on behalf of the Appellant argued that the NCLT has failed to appreciate that the appellant had brought in money towards the 25000 shares subscribed by him in the MOA. Learned counsel for the appellant has drawn out attention to his Bank Account maintained with Catholia Syrian Bank at Page No.517 of the Appeal and argued that he had incurred expenses of Rs.108247/- for issuance a draft in the name of Pay & Accounts Officer MCA and also showed copy of the Challan dated 23.6.2008 (Page 451- 453) and argued that the said amount was incurred by the appellant and not by the 2nd respondent.

31. Learned counsel appearing on behalf of the Respondent argued that the appellant has only shown the payment of Rs.2,35,500/- and not Rs.1,13,00,000/-. Learned counsel further argued since he has not paid the payment towards the share application money therefore, he cannot claim the said shares.

32. We have heard the parties on this issue and perused the record. We are satisfied that the appellant has made some payment towards preparation of Demand Draft from his Bank Account but this does not prove that the appellant has made payment towards share application etc. There has to be some evidence to show that the amount being spent is a part payment for subscription of the share capital. No such evidence has been brought before this Appellate Tribunal to reach a conclusion that the amount so spent is necessarily payment against subscription to the share capital.

33. Learned counsel for the appellant argued that the Respondents have fraudulent and illegally forfeited the shares held by the appellant in 1st Respondent. Learned counsel further argued that no such notices were ever issued or served upon the appellant. Learned counsel for the appellant further argued that no proof has been adduced to show that the appellant was served with notices even for the Board of Directors Meeting.

34. Learned counsel for the Respondent argued that 1st respondent issued notice to the appellant to make payment with respect to his shares vide notice dated 26.6.2010, 21.8.2010 and 25.9.2010. Learned counsel further argued that the appellant did not respond to the said notices and it was approved in the Board Meeting dated 22.11.2010 (Page 280 of appeal) to forfeit the shares due to appellant's failure to pay the total amount of shares agreed to be subscribed by him as subscriber to the memorandum. An intimation to this effect was sent to the appellant vide letter dated 1.12.2010 (Page 284 of the appeal).

35. We have heard the parties and perused the record. We noted that due notices were sent to the appellant and the appellant did not respond. We

further noted that at last the notice for forfeiture of shares was sent to the appellant vide letter dated 1.12.2010. Even if we hold that the forfeiture of shares is bad in law for not following due process, invocation of application under Section 397 of Act is possible only, if Petitioner is able to prove that he has made all payments and is not a shareholder in default of payments of dues. Once we are convinced that there is no adequate proof that the person has paid its money against the shares allotted and is in default, it is immaterial whether the shares have been rightly or wrongly forfeited or he cannot take benefit under Section 397 of the Act.

36. Learned counsel for the appellant argued that the appointment of 3rd respondent as a director is not valid and is based on forged documents, and as such, the forfeiture of the appellant's shares are invalid for lack of quorum. No notice of the Meeting appointing 3rd respondent as director was ever issued to the appellant.

37. Learned counsel for the Respondent argued that 3rd Respondent was appointed as director in the Board Meeting held on 12th July, 2008 in which the appellant was also present. Learned counsel for the Respondent further argued that this is the only meeting that has been attended by the appellant. Appellant has not attended any other Meeting. Learned counsel for the Respondent further argued that the presence of the appellant in the Meeting itself shows that the appellant has received the notice for the meeting in which 3rd Respondent was appointed as director.

38. We have heard the parties and perused the record. We have noted that the Meeting was held on 12th July, 2008 in which 3rd Respondent was appointed as director and the appellant was present in the said meeting.

39. Learned counsel for the appellant argued that the Respondents removed all documents including sale deeds in respect of properties acquired by the two companies namely Greendot Hotels and Resorts India Pvt Ltd and M/s August Builders and Contracts India Pv Ltd and due to this illegal acts on the part of Respondent the statutory compliance under the Companies Act were not complied with. Appellant further argued that vide letter dated 11.1.2011 (Page 152 of appeal) the appellant directed the Respondents to bring back the record. Appellant further argued that on receipt of his notice the Respondents filed various false and fabricated back dated returns, reports and forms with the ROC and the same are shown at Page 175 of the Paper Book.

40. Learned counsel for the Respondent argued that it is wrong to say that the Respondents have filed any false or fabricated returns, reports or forms before the ROC. Learned counsel further denied that the accounts of the Company are falsified. Learned counsel further argued that the Disciplinary Committee of the Institute of Chartered Accountants of India has enquired in the very same allegations and by an order dated 8.2.2015 categorically recorded that the Respondents are not guilty of any fraudulent activities. Learned counsel for the Respondents argued that during the period the appellant was looking after the finance and fund raising affairs of the company. Learned counsel further argued that the appellant himself did not ensure that the returns were duly and timely filed for the period when he was at the helm of the affairs and has chosen to wilfully be silent on the said aspect.

41. We have heard the parties on this issue. We noted that the notice was served on the Respondent regarding non compliance of filing of statutory returns under the Companies Act, 2013. We noted that the returns have been filed as reflected at Page 175 of the Appeal. We further note that during the said period the appellant was equally responsible for not filing the return. However, it will be an exercise to justify the abandonment of his duties by the appellant. However, when the notice was received by the respondent, they immediately filed the returns and the appellant has not been able to prove whether these are false and fabricated returns.

CONCLUSION

42. On hearing the parties and perusing the record, we have come to conclusion that the appellant, being an ex-Civil Officer, who is very well aware of law of the land, has argued that he has paid a huge amount in cash to become shareholder of that such company which has no Bank Account but is not able to prove the same before the NCLT and before this Appellate Tribunal that such amount has been paid in cash. Further no share certificate is with him. He has not produced his Bank Statement to establish that he had such a huge cash on a particular date. He has not shown his Asset and Liabilities Statement which he used to file when he was in Government employment. Looking into his past background it can be safely stated that he should be well aware of the law of the land and knew well compliances to be made. The appellant and 2nd respondent have been the promotors of the company. Hence the directors of the company after incorporation it is their duty that all legal compliances with respect to the company are made by them and one cannot say that while one side does not

know anything about the operation of the company but the other side is only responsible to make legal compliances.

43. In view of the aforegoing observations and directions the following order is passed:-

a) The appeal is liable to be dismissed. It is accordingly dismissed.

b) Interim order passed, if any, by this Appellate Tribunal is vacated.

c) Appellant will pay cost of Rs.1 lakh each to 1st to 3rd Respondent within one month from the date of this order.

(Justice A.I.S.Cheema)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

New Delhi

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