

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.159 of 2017

(Arising out of Order dated 15th March, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in TP No. 106/397-398/NCLT/AHM/2016]

IN THE MATTER OF:

**M/s. Therm Flow Engineers
Private Limited & Ors.**

...Appellants

Vs

Mr. Bhavesh Narumalani & Anr.

...Respondents

Present: For Appellants:- Mr. Ashok Lal Bhai, Mr. Arvind Kumar, Ms. Hena George and Ms. Purti Marwaha Gupta, Advocates.

For Respondents: - Mr. Krishnendu Datta, Ms. Prachi Johri and Ms. Malvika Awasthi, Advocates for Respondent No.1.

With Company Appeal (AT) No.198 of 2017

(Arising out of Order dated 15th March, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in TP No. 106/397-398/NCLT/AHM/2016]

IN THE MATTER OF:

Mr. Bhavesh Narumalani

...Appellant

Vs

**M/s. Therm Flow Engineers
Private Limited & Ors.**

...Respondents

Present: For Appellant: - Mr. Krishnendu Datta, Ms. Prachi Johri and Ms. Malvika Awasthi, Advocates

For Respondents: - Mr. Ashok Lal Bhai, Mr. Arvind Kumar, Ms. Henna George, Ms. Purti Marwaha Gupta, Advocates for Respondent nos. 1 to 11 & 13, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The cross appeals have been preferred by the Petitioners and the Respondents against common order dated 15th March, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench, (“Tribunal” for short). They were heard together and disposed of by this common judgment.

2. The Appellant- Mr. Bhavesh Narumalani (hereinafter referred to as “Petitioner”) preferred an application under Sections 397, 398 and 402 of the Companies Act, 1956 claiming to be entitled to 25% of the issued subscribed and paid up share capital of the M/s. Therm Flow Engineers Pvt. Ltd & Ors. (hereinafter referred to as “Company”) and alleged that by issue and allotment of further shares his percentage of shareholding of 25% has gone down to insignificant percentage of 8.33% by the 2nd and 3rd Respondents. The Tribunal by impugned judgment dated 15th March, 2017 in TP No. 106/397-398/NCLT/AHM/2016 held that the act on the part of the 2nd and 3rd Respondents is only to enrich the persons in the

'Narayanbhai Patel Group' at the cost of other shareholders of the Company amounting to financial mismanagement and passed following orders: -

"153. The aforesaid case of the respondents 2 and 3 in the management and affairs of the first respondent company are harsh, burdensome and detrimental to the interest of the petitioner. Therefore, finding of this Tribunal is that, respondents 2 and 3 committed act of oppression, mis-management in the conduct of the affairs and business of the first respondent company. The acts cases of oppression and mismanagement warrant passing winding up order but such order prove to be detrimental not only to the interest of the petitioner but to the first respondent company. Therefore, this Tribunal is passing the following order:

- (1) Increase in the share capital from Rs. 1.00 lac to Rs. 2.00 lacs of the first respondent company that took place on 21/12/2009 and from Rs. 2.00 lacs to Rs. 3.00 lacs on 28/9/2010 is declared as illegal and set aside.*
- (2) Allotment of 2500 shares to Respondent No.4 on 29/01/2010, allotment of 2500 shares each to Respondent No.5 to Respondent No.10*

on 18/1/2011 and allotment of 2500 shares to Respondent No.11 on 4/7/2013 is declared as illegal and set aside.

(3) Transfer of shares of Respondent no.1 to Respondent no. 2 is set aside.

(4) Shares of respondent No. 12 shall be re-allotted to the shareholders by duly following the procedures laid down under the Companies Act and Articles of Association.

(5) This Tribunal is not inclined to grant other reliefs prayed in the petition.

The petition is disposed of accordingly. There is no order as to costs. The pending application TP 106-A/2016 (CA 35/2016) stands closed.”

3. The contesting Respondents along with the Company has challenged the judgment on merit (Company Appeal (AT) No. 159/2017).

4. The Petitioner Mr. Bhavesh Narumalani has preferred the appeal against the said order on limited ground that the consequential declaration has not been passed by the Tribunal.

5. The brief facts of the case are as follows: -

5.1 The Petitioner alleged that, at the time of incorporation of the Company, he held 25% of the issued and subscribed and paid up equity

share capital of the Company (M/s. Therm Flow Engineers Pvt. Ltd. & Ors.) but the shareholding of the Petitioner has been illegally reduced from 25% to 8.33% by the 2nd and 3rd Respondents which is an act of oppression on the part of the Respondents.

5.2 Further, according to Petitioner, he was one of the four members of the Company but subsequently while issuing and allotting shares to others, the number of members have been increased to ten members and he was not allotted any share.

5.3 It was alleged that the share certificates in respect of his shareholding have not been issued by the Company but the annual return of 2nd Respondent as on 30th September, 2009 and the annual return of the 1st Respondent as on 30th September, 2014 filed before the Registrar of Companies, Ahmedabad, reflects the shareholding of the Petitioner.

5.4 The petitioner claims that he and his father Mr. Dev Narumalani are only referred in the Company as “the Narumalani Group”. The Company which presently owns about 27% equity shares of the 13th Respondent (another Company) controls the affairs of 13th Respondent (the other Company) whereas 2nd Respondent to 11th Respondent are mainly the shareholders of the 1st Respondent Company.

5.5 The main allegation of the Petitioner is that he was not informed of the change in the shareholding which the Petitioner came to know from

the search of records of the Registrar of Companies. No notice of the Board of Directors Meeting was issued during the years 2010, 2011 and 2013 nor served on the Petitioner.

5.6 According to the Petitioner, the notice of the Extra Ordinary General Meeting held on 28th September, 2010 was not forwarded and the shares were allotted to 5th to 10th Respondents at a discount of 99.83% and thereby, the valuation of the Petitioner's shares was brought down.

5.7 It was further alleged that the Petitioner was not served with the minutes of the meetings of the Board of Directors dated 1st November, 2014 and 22nd June, 2015 and therefore, there was no occasion to raise objection or no occasion to file for leave of absence.

6. The Respondents in their reply disputed the allegations and also raised question of maintainability of the Petition under Sections 397 and 398 of the Companies Act, 1956 on the ground that the Petitioner is not eligible. It was submitted that the Petitioner is not having 1/10th of the share capital of the 1st Respondent Company and is not entitled to file the petition under Sections 397 and 398 of the Companies Act, 1956.

7. According to Respondents, the shares of the 1st Respondent Company to 4th, 5th to 10th Respondents were allotted pursuant to the Board's Resolutions dated 29th January, 2010 and 18th January, 2011 respectively and at all times it was within the knowledge of the Petitioner.

It was also submitted that the Petitioner being a subscriber to the Memorandum of Association of the Company at the time of incorporation of the Company on 29th August, 2002, share certificates for 2500 equity shares were issued and allotted to the Petitioner.

8. According to Respondents, the Petitioner cannot allege that the share certificates were not issued to him till 2014, after lapse of thirteen years from the date of subscription of the Memorandum of Association. However, such submissions cannot be accepted in view of the fact that the Petitioner does not have any grievance with regard to issuance of the original share certificates and has made grievance with regard to fresh certificates issued between 2010 and 2013.

9. Next, it was contended on behalf of the Respondents that notice of the Board of Directors meeting in which fresh issuance of shares had taken place in the years 2010, 2011 and 2013 were sent to the Petitioner and that Annual Returns for the respective years have also been filed with the Registrar of Companies. The Petitioner was duly served with notices of the concerned Extra Ordinary General Meeting dated 21st December, 2009, by which, the authorised share capital was increased from Rs. 1 lac to Rs. 2 lacs and 2500 shares to 4th Respondent in the year 2010.

10. The Respondents disputed the allegations that in the year 2010 shares were issued at a discount of 99.85% to the 4th Respondent. They also disputed the allegation that wrong method was used to ascertain the

valuation of the shares and denied the allegation that the Petitioner came to know of the same in the year 2014.

11. According to Respondents, notice of concerned Extra Ordinary General Meeting dated 28th September, 2010 and the notice of the Board of Directors meeting of the 1st Respondent Company were duly issued to the Petitioner and only thereafter, it was decided to allot shares in favour of 5th to 10th Respondents.

12. Learned counsel appearing on behalf of the Respondents (Appellants in Company Appeal (AT) No. 159 of 2017) submitted that the 13th Respondent (the other Company), M/s. Patel Air Temp Ltd. and the father of the Petitioner was a Whole Time Director in 13th Respondent Company and has always been aware about the operations of both the entities. The 13th Respondent Company was incorporated prior to 1st Respondent Company and its value has always been substantial. On the contribution of the Petitioner in the affairs of the 1st Respondent Company was the initial subscription money of Rs. 25,000/- for 2,500 shares, which were allotted to him as a gesture of good faith in view of his father being the Whole Time Director of the 1st Respondent Company.

13. It was further submitted that the Petitioner is a signatory to bank accounts of the 1st Respondent Company and has also signed the relevant bank form pursuant to the resolution dated 1st October, 2009. Learned counsel for the Respondents also contended that the share capital of the

1st Respondent Company was duly increased on 21st December, 2009 and 28th September, 2010 and the allotment of shares that took place on 29th January, 2010, 18th January, 2011 and 4th July, 2013 were in the knowledge of the Petitioner at the relevant point of time.

14. Learned counsel for the Respondents submitted that no case of 'oppression and mismanagement' has been made as alleged by the Petitioner as he had been seeking leave of absence from Board Meetings held on different dates. Reference was made to a letter dated 7th July, 2015 written by the Petitioner seeking leave of absence from the meeting which was to be held on 11th July, 2015. It was further contended that shares of the 12th Respondent were offered for purchase to the Petitioner vide letter dated 23rd June, 2015, however, Petitioner did not reply to such offer. It was submitted that the Petitioner intentionally and deliberately did not challenge the aforesaid increase in share capital or allotment of shares.

15. The main grievance of the Petitioner is that though the Tribunal has accepted 'oppression' by Respondents but no consequential relief has been granted apart from the relief as noticed in the preceding paragraphs. Learned counsel for the Petitioner submitted that once the 'oppression' is held, the Tribunal ought to have granted consequential relief by cancelling shares which were illegally issued to 5th to 10th Respondents.

16. So far as the maintainability of the Petition is concerned, we hold that the Tribunal rightly rejected the objection of the Respondents. Once the share of the member is reduced below 1/10th of the total share capital of the Company without information and knowledge to the member, the application under Sections 397 & 398 of the Companies Act, 1956 (now Section 241 of the Companies Act, 2013) cannot be opposed on the ground that the member has less than 1/10th of the share capital.

17. In **Anup Kumar Aggarwal Vs. Crystal Thermotech Ltd. & Ors.** — [Company Appeal(AT) No. 17 of 2016], this Appellate Tribunal considered the crucial date when an applicant is required to satisfy the requirements under Section 399 of the Companies Act, 2013 so as to make the requirement of having an aggregate of 1/ 10th of share out of the total shareholding of the company, if the appellant alleges oppression in bringing down his shareholding. In the said case, this Appellate Tribunal noticed the Hon'ble Supreme Court's decision in "**Bhagwati Developers Private Limited**" and "**Rajahundry Electric Supply Corporation Ltd.,**" wherein the Apex Court held that **the requirement of 1/ 10th of holding of the total share is to be examined in the light of whether such a number is maintained on the actual date of presentation of the company petition in the court** (emphasis added). This Court while discussing the decision of Hon'ble Supreme Court in "**Bhagwati Developers Private Limited**" and "**Rajahundry Electric Supply Corporation Ltd.**" held that the said principle, which was made

applicable in the case of winding up, will not be applicable where applicant alleges oppression and mismanagement in bringing down the shareholding below 1/ 10th of the total share of the company. This Appellate Tribunal further observed that if the principles laid down by Supreme Court in "**Bhagwati Developers Private Limited**" and "**Rajahundry Electric Supply Corporation Ltd.**," which related to cases of winding up, is made applicable in the case of alleged 'oppression and mismanagement' in bringing down the minimum requirement of shareholding, then the applicant (s) will be remediless. This Appellate Tribunal thereby held that the crucial date for determination of requirements under Section 399 will be the date the alleged date of oppression and mismanagement in bringing down the shareholding below 1/ 10th of the total shareholding of the company took place.

18. The Respondents though have taken plea that notice convening meetings of the Board of Directors dated 1st September, 2014, 15th November, 2014 and 25th March, 2015 were issued to the Petitioner and the Petitioner has orally informed the Respondents on each occasion that he being busy on account of personal reasons requested for leave of absence, but there is nothing on the record to suggest that the notice of the meetings dated 1st September, 2014, 15th November, 2014 and 25th March, 2015 were served on the Petitioner.

19. The stand of the Respondents is that the Petitioner orally informed the Respondents on each occasion being busy on account of personal

reasons and requested for leave of absence which was granted to him is also not based on record. There is nothing on the record to suggest that even the minutes of the meetings of the Board of Directors dated 1st November, 2014 and 22nd June, 2015 were served on the Petitioner.

20. The Tribunal noticed the stand taken by the Petitioner that the minutes of the Board meetings held on 29th January, 2010, 18th January, 2011 and 4th July, 2013, in which additional allotments were made to 4th to 11th Respondents are not at all legitimate and have been fabricated only with the intention to mislead the Tribunal. However, no such opinion having been expressed by the Tribunal on such stand taken by the Petitioner, we are not deliberating on such issue. In the present case, as it is clear that the further shares were allotted to the 4th to 11th Respondents, without notice to the Petitioner, the Respondents cannot raise objection of the maintainability of the Petitioner.

21. Admittedly, on 21st December, 2009 share capital of the 1st Respondent Company was increased from Rs. 1 lac to Rs. 2 lacs and relevant form was filed with Registrar of Companies on 1st January, 2010. Admittedly, on 29th January, 2010, 2500 shares were allotted to 4th Respondent and it was shown in the annual return of the 1st Respondent Company filed with Registrar of Companies on 18th October, 2010. Because of this, rise in the share capital and allotment of 2500 equity shares of the face value of Rs.10/- each to 4th Respondent, percentage of the Petitioner in the paid up share capital of the 1st Respondent Company

reduced from 25% to 20%. According to the petitioner, the value of each equity share of the 1st Respondent Company as on 25th September, 2010 was Rs. 6719.69/-, but it was allotted at a base value of Rs. 10/- each to the Respondents.

22. Further, on 28th September, 2010, share capital of the 1st Respondent Company was increased from Rs. 2 lacs to Rs. 3 lacs. Relevant forms were filed with Registrar of Companies on 18th October, 2010. On 11th October, 2011, 5th Respondent to 10th Respondent were allotted 2500 shares each of face value of Rs. 10/- and thereby the share value of the Petitioner is reduced to 9.09%. According to the Petitioner, value of the share as on 24th November, 2011 was Rs. 5908.62. On 4th July, 2013, in the meeting of Board of Directors, 2500 equity shares of the value of Rs. 10/- each were allotted to 11th respondent. Value of the share as on 4th July, 2013 was Rs. 3230.64/-. This allotment of shares of 11th Respondent reduced percentage of share capital of the Petitioner to 8.33%.

23. Provisions of the Companies Act, 1956 and Articles of Association of the Company require that a notice in writing shall be given to the Directors for the Board Meetings as well as to all the members for Annual General Meetings. In the present case, we also find that the 2nd and 3rd Respondents have thoroughly violated the provisions of the Companies Act, 1956 as also the Articles of Association of the Company. No notice has been given to the Petitioner and any of the member, nor such notice

has been brought on record. There is no evidence to suggest that notices were served on the Petitioner and other members. It is the case of the Petitioner that he had total faith on 2nd and 3rd Respondent and therefore, he did not bother about the manner in which the affairs of the 1st Respondent Company have been conducted till June, 2015.

24. It is an admitted fact that the Company who is holding 27% share capital i.e. 13,65,512 shares of the 13th Respondent (another Company) which is listed in Bombay Stock Exchange. It is also not disputed that “Narayanbhai Patel Group”, during the financial year 2014-15, advanced an amount of Rs. 07,01,30,000/- to the 1st Respondent Company as short term borrowings. The said amount was used by the 1st Respondent Company to purchase shares of 13th Respondent from 2nd and 3rd Respondents from Bombay Stock Exchange. The 1st Respondent Company made provisions of Rs. 40,60,111/- by way of interest to “Narayanbhai Patel Group” (2nd Respondent to 11th Respondent) for payment of interest on short term borrowings. There was no urgent and acceptable need placed on record by the 2nd and 3rd Respondents for increase in the share capital of 1st Respondent Company and allotment of shares to 2nd Respondent to 11th Respondent. There is no material on record to show that offer was made to the Petitioner and 12th Respondent about the allotment of shares made to the relative of the 2nd and 3rd Respondents.

25. The decision for allotment of shares were taken in Extra Ordinary General Meeting but not during Annual General Meeting without intimation to the Petitioner. All the additional shares on account of the rise in the share capital were allotted at a price of Rs.10/- per share. The Petitioner has placed on record that the value of the shares of the 1st Respondent Company on the basis of the market price of, shares of 13th Respondent at annexures 5 & 6 at pages 54 and 55 of the rejoinder.

26. The face value of the shares allotted to the 4th Respondent to 11th Respondent in the years 2010, 2011 and 2013 have been noticed by the Tribunal and shown in the table below:-

Dates of allotment	Allotted to (Respondent)	Allotment Price (Rs.)	Intrinsic fair	Discount given
29.01.2010	R 4	10	5946.02	99.84%
18.01.2011	R 5 to R 10	10	5414.04	99.82%
04.07.2013	R 11	10	3230.64	99.70%

27. In the present case, we find that the Petitioner addressed e-mail to the representative of 1st Respondent Company and requested to provide audited balance sheet for the financial year ended 31st March, 2015 but there was no response to the said e-mail from the 1st Respondent Company. On 16th June, 2015, the Petitioner received a notice of the meeting of the Board of Directors of the 1st Respondent Company to be held on 22nd June, 2015. In the said notice, agenda was to appoint Additional Director on the Board of the 1st Respondent Company. In the

Board Meeting held on 22nd June, 2015, the Petitioner was given minutes of the meeting of the Board of Directors of the 1st Respondent Company held on 1st September, 2014, statement of Profit and Loss Account, Balance Sheet and Cash Flow Statements for the year ended 31st March, 2015 without notes. Apart from the said documents, there is no material placed on records by the Respondents to suggest that before 22nd June, 2015, the Petitioner had knowledge about the increase in share capital.

28. In the aforesaid background, the Tribunal has declared the increase in the share capital from Rs.1 lac to Rs. 2 lacs of the 1st Respondent Company that took place on 21st December, 2009 and from Rs. 2 lacs to Rs. 3 lacs on 28th September, 2010 as illegal and set aside the allotment of 2500 shares to 4th Respondent on 29th January, 2010 and to the 5th Respondent to 11th Respondent on 18th January, 2011 and allotment of 2500 shares to 11th Respondent on 4th July, 2013 has been also declared illegal and set aside. Apart from that, the transfer of shares of 1st Respondent to 2nd Respondent having set aside in addition to order for the allotment of shareholders of the shares of the 12th Respondent by duly following the procedures laid down under the Companies Act and Articles of Association, no interference is called for. We are of the view that apart from the just and proper order passed by the Tribunal, it has also passed consequential reliefs of setting aside illegal allotment and therefore, no further relief can be granted to the Petitioner.

29. We find no merit in these appeals. Both the appeals are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Balvinder Singh)
Member(Technical)

NEW DELHI

22nd December, 2017

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