

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 100 of 2018

[Arising out of Order dated 9th February, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in CP No.106/397-398/CLB/MB/MAH/2013]

IN THE MATTER OF:

1. Mr. Soumitra Banerjee,
S/o Bansari Banerjee,
R/o K-401 Maheshwari Nagar,
MIDC, Marol, Andheri (East),
Mumbai – 400 093.

2. Mrs. Shampa Banerjee,
W/o Soumitra Banerjee,
R/o K-401 Maheshwari Nagar,
MIDC Marol, Andheri (East),
Mumbai – 400 093. Appellant

Vs

1. Mr. Asher Ebrahim Melamed,
S/o Mr. Ebrahim Melamed
R/o 101, Zafranieh Asef,
Street Tehran, Iran
(Through his Power of Attorney Holder
Mr. Jay Prakash Daga),
Address for service in India:
A-101, Trishul Heights, Akta Nagar Opp.,
Mahavir Nagar, Kandiwali (W),
Mumbai – 400 067.

2. Touranto Company (India) Private Limited
(Through its Director)
Registered Office: 705, Acme Plaza
Andheri Kurla Road,
Andheri East, Mumbai – 400 059. Respondents

Present:

**For Appellants: Mr. Arjun Krishnan, Mr. Ankur Singh and
Mr. Sumit Srivastava, Advocates.**

**For Respondents: Mr. Deepak Kapoor and Ms. Neha Gola,
Advocates for Respondent No.1.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Mr. Asher E. Melamed (Petitioner) moved an application under Section 397-398 r/w Sections 402 and 403 of the Companies Act, 1956, before the erstwhile Company Law Board, Mumbai Bench on 30th September, 2013. The case remained pending and later on transferred and heard by National Company Law Tribunal, Mumbai Bench (hereinafter referred to as the 'Tribunal').

2. By impugned order dated 9th February, 2018, the Tribunal held that the dispute between the parties had reached to a stage of deadlock of the business activity of the Company. Attempts of settlement had exhausted and the Directors had not reached settlement. They had also not expressed any intention or desire to work together to run the Company. The Company had already closed its business activity. The Office premises of the Company had already been rented out. As a consequence, the only source of income of the Company was 'rental income'. The Tribunal further held that evidence on record had indicated that Petitioner - Mr. Asher E. Melamed (Respondent No.1 herein) once expressed his desire to exit from the Company subject to recovery of his investment in the Company. The record had established that he had made investment towards equity as well as towards the capital. The immovable property of the Company was purchased from the funds contributed by the Petitioner. The Tribunal further observed that the Company- Touranto Company (India) Private Limited is a Private Limited Company, having only three shareholders and all of them, at one pint of time,

were the Directors. Therefore, it is just and equitable that the Company should be allowed to liquidate its assets to be distributed among the Members of the Company, which would otherwise would not unfairly prejudice the rights of the Members. Circumstances were so compelling in this case that closure of the Company was justifiable. In this background, the Tribunal held as under: -

- a) *That this Company has no future to run the business for which it was incorporated. The two parties under litigation in this Petition have almost equal shareholding i.e. 51% with the Petitioner and 49% holding with the Respondents. There is no possibility to resolve the differences. Reconciliation attempts have failed. Parties have not agreed to work together. A vertical split is the only remedy left to direct the parties to be separated from each other by ordering for 'winding up' of the Company.*
- b) *In this critical situation when 'winding up' is the only answer to put an end to the controversy the disposal of the Immovable Property of the Company is a must. To implement the process of 'winding up' it is hereby directed to dispose of the immovable Property and the consideration be divided among the shareholders/directors as per their percentage of shareholding.*
- c) *The steps to be taken for sale of the Immovable Property should transparent by first obtaining a Valuation Report of the Independent Valuer to be informed to both the sides and on their approval the Property in question is to be sold at the best fair market value. Both the parties shall cooperate*

with each other in the documentation of transfer of the said Property.

- d) On completion of the disposal by sale of the assets of the Company, the Directors shall complete the legal formalities of winding up with Registrar of Companies, Mumbai.*

3. The Petition was disposed of accordingly by impugned order dated 9th February, 2018.

4. The Appellants were the two shareholders in the Respondent No.2 (M/s. Touranto Company (India) Private limited) before the Tribunal. The learned Counsel for the Appellants submit that the Tribunal has no jurisdiction to order for winding-up as the Petition was under Section 241-242 of the Companies Act, 2013. It was further submitted that the cause of action being in the year 2000-2008, the Company Petition preferred by the Respondent was fit to be dismissed on the ground for delay and laches. The learned Counsel for the Appellants further submits that the Respondent-Mr. Asher E. Melamed failed to make out a case of 'oppression' against him and, therefore, no relief could have been granted.

5. On merit, it was submitted by the learned Counsel for the Appellants that from the very beginning, it was the Appellants who were managing the affairs of the company and bearing all the expenses of the business. The Respondent No.1 is an Iranian national who did not participate in the day to day affairs of the company. From 1999 to 2011, the Appellants expended Rs.2.24 Crores on the expenses of running the company. The only contribution made by the Respondent No.1 was a contribution of

approximately 41 lakhs (USD 95000) for setting up of an office in Mumbai. The Appellants too made a matching contribution of approximately 38 lakhs for setting up the office.

6. It was submitted that the business of the company was export of chemicals and pharmaceuticals. The business arrangement between the parties were that the Appellant No.1 would use his experience in India to identify manufacturers in India and obtain export orders for buyers in Iran as per L/C terms. The Respondent No.1 would in turn liase with the Iranian buyers in Iran. The Appellants were entitled to charge upto 2% commission, whereas the Respondent's share was restricted to 5% commission.

7. It was further submitted that from 2000 to 2008, the business was doing well and the Company showed profits and Respondent No. 1 was also getting his share of commission from the export transactions (either by himself or through his agent), which was remitted to his foreign bank accounts and was never deposited to the Respondent Company's bank account. It later came to the knowledge of Appellant No.1 that all these years the Respondent No.1 was cheating the company of its share of revenues by over invoicing and charging commission beyond the 5% as agreed between the parties. In addition, the Respondent No.1 and his associates were communicating directly with the Indian suppliers thereby by-passing the Appellants and the company entirely.

8. It was submitted that the *modus operandi* of the Respondent No.1 was that while the Appellants/Company was charging commission at a lower FOB Rate (eg. USD 8), the actual transaction was done by the Iranian buyer at a

higher rate (eg. USD 9.2), and the difference and commission was going to the Respondent directly to his European Bank accounts. An illustration of this is explained as under: -

Invoice No.	Customer Name	Invoice Rate shown to Company (FOB)	Actual Invoice Rate Taken by Respondent (FOB)	Difference: Unjust Enrichment of Respondent (per kg)
3127	Kharazmi Pharma	USD 8.00/kg	USD 9.20/kg	USD 1.20/ KG
3131	Tehran Darou	USD 8.00/kg	USD 9.20/kg	USD 1.20/ KG
3133	Amin Pharma	USD 8.00/kg	USD 9.20/kg	USD 1.20/ KG
3135	Chemie Darou	USD 8.00/kg	USD 9.20/kg	USD 1.20/ KG

9. It was submitted that over and above this malpractice, the Respondent was also charging excessive commission to the tune of 8 – 40%, as opposed to the agreed 5%, which fact was discovered subsequently as is clear from the email dated 5th August, 2009 sent by Unichem Laboratories which shows the commission paid to one Samuel Gregorian, associate of Respondent No.1. The above facts regarding the siphoning off of funds and cheating of the company and the Appellants by Respondent No.1, were not immediately apparent, and came to light only gradually. The Respondent No. 1 and his associates deliberately suppressed information and told the Indian exporters not to disclose the true picture of the transactions and commissions being paid to the Respondent No.1, which was evident from the email dated 15th May, 2008 sent by Mr. Gregorian, associate of Respondent No. 1 directing the exporter to ensure that statement be sent only to his email. Similarly, on 3rd June, 2008, the supplier was requested not to send any copies anymore to the company. Unfortunately, the Ld. NCLT has brushed aside this

submission, without appreciating the true nature of the fraud perpetrated by Respondent No. 1.

10. It was submitted that the entire dispute between the parties began after the Appellants sent an email dated 24th November, 2008 to Respondent No.1 requesting him to apply for and provide DIN (Director's Identification Number), since the same was required for filing of taxes on behalf of the Company. Instead of complying with the DIN requirements, the Respondent stated that he was not an active member of the company in daily activities and decisions and he would like to find a buyer to buy his shares. In other words, the Respondent was keen to exit the company and had no interest in its affairs. There was no complaint of "oppression and mismanagement" at the relevant time.

11. It was submitted that in 29th November, 2008, the Appellants wrote to the Respondent, stating that it was not fair to say that he had not earned anything from his association, whereas hefty commissions were being paid to him. Thereafter from 2008 till 2011 the Respondent did not raise any issue or grievance regarding management of the company by the Appellants. Instead, the Respondent all of a sudden stopped placing orders through the Company by the Iranian buyers from the year 2010-11, thereby depriving the company of its business. Without any other means of livelihood, the Appellants were forced to lease out the office premises on rent from 15th February, 2012 to keep the Company running and maintain the property.

12. It was submitted that on 5th May, 2011, the Respondent wrote to the Appellants seeking a share of profits of the company. The Appellants responded vide emails and reminders dated 13th May, 2011, 24th May, 2011 and 6th June, 2011 and 14th June, 2011 wherein the Appellants demanded to be compensated for their efforts in generating business for the Respondent. The full calculation of the amounts owed to the Appellants from the Respondent No.1 i.e. USD 2.32 million and total of USD 5.42 million to the Company. Thereafter on 3rd December, 2011, Appellant No.1 filed a criminal complaint before the Metropolitan Magistrate, Andheri alleging that Respondent No.1 had siphoned off funds and cheated the company as well as the Appellants. Till 2013 there was again no response or reaction from Respondent No.1. There was no whisper of any alleged 'oppression' or 'mismanagement'. Suddenly, in 2013, the Respondent No. 1 purported to appoint a Chartered Accountant, Shri JP Daga, as his power of attorney holder with a view to sell off the only capital asset of the company (office premises). The company petition, CP No. 106/397-398/CLB/MB/Mah/2013 was filed purely as a counter blast to the aforementioned criminal complaint. In spite of the impugned winding up order passed by NCLT, Mumbai, the Respondent No.1 did not cease his efforts to sell off the assets of the company, and had preferred an application under section 98 of the Companies Act (being CP/1743/98/MB/2018). It is very important to note that the Respondent No.1 and his associate, still, as on date, are doing business directly with the Indian suppliers introduced by the Appellants/ Company which is in contravention to the Agreement between the parties.

13. It has not been disputed that Respondent No.1- Mr. Asher E. Melamed had 51% shareholding and the Appellants had 49% of shareholding in the Respondent No.2 Company. The Respondent No.1- Mr. Asher E. Melamed was appointed as Director with effect from 14th March, 2000. He was removed from the Directorship in the year 2009 by deleting from the Ministry of Corporate Affairs records. Thereafter, the entire control of business of the Company was vested with the Appellants. Therefore, it is clear that there is no delay in preferring the Petition filed by the Respondent.

14. The Respondent No.1- Mr. Asher E. Melamed (Petitioner) transferred 1 lakh US Dollar through Deutsche Bank for the purchase of property of the Company to procure one premises to be utilized for business purposes. Further, when it was not so utilized, the same was given on rent. The profit and loss account for the accounting period of 31st March, 2009 to 31st March, 2012 shows that the business was running in a manner, which was prejudicial to the interest of the Company. The Tribunal noticed the Accounts Book results and the Financial position of the Company and observed that for the rest of the Accounting period, apart from the year 2009 to 2012, no Statutory Books of Accounts were maintained. It was also brought to the notice that no Register was maintained for recording the Meetings of the Members of the Board.

15. Relying upon the surrounding circumstances, the Tribunal came to definite conclusion that the 1st Respondent cannot be blamed for losses and for maintenance of the records etc., which the Appellant failed to do while holding the post of Director and was required to maintain the records.

16. The dispute had reached at a stage of deadlock of business activity. The Company was non-functional, it had already given its premises on rent and it was the only income of the Company. Therefore, we find that the Tribunal came to a definite conclusion of ‘oppression and mismanagement’ of the Company and ‘oppression’ of the Member, i.e., the 1st Respondent-Mr. Asher E. Melamed. In the aforesaid circumstances, if the Tribunal has ordered for winding-up of the Company, no interference is called for.

17. The Appeal is dismissed. No order as to costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

12th March, 2020

Ash