

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 104 of 2018

IN THE MATTER OF:

1. Komoline Aerospace Ltd.

110-124 Om Tower,
Satellite Road,
Ahmedabad, 380015.
CIN:U29219GJ1991PLC070436

**...Appellants
(Original Respondent
Nos.1 to 4)**

2. Mr. Niraj Nagindas Shah

Son of Mr. Nagindasbhai shah
17, Shivalik Floratte,
Opp.: Khodiyar Mandir
Ambali Gam, Bhopal
Ahmedabad-380058
DIN:00071910

3. Mr. ShaunakHasmukhlal Shah

Son of Mr. Hasmukhlal Shah
10, Retreat Residency, Bokadev
Ahmedabad-380059.
DIN:02356160

4. Mr. Bharat Smajibhai Patel

Son of Mr. Smajibhai Patel
7 Shishir Bunglows,
¾, Woodfield Row House
Opp. Rajpath Club, SG Road
Ahmedabad-380054

Vs

Sanjay Bhagwanji Attara

S/o Shri Bhagwanji Attara
91, Sarthi Row Houses
Near Drive in Cinema
Memnagar
Ahmedabad-380052
Din No.00417310

**....Respondent
(Original Petitioner)**

For Appellant(s):

Mr. Anandh Venkataramani, Mr. Rajsekhar Rao and Ms. Anannya Ghosh, Advocates.

For Respondent(s):

Mr. Vivek Sibal, Ms. Anushree Kapadia and Ms. Priyanka Rathi, Advocates.

Oral Judgement

A.I.S. CHEEMA, J. :

05.10.2018: This Appeal arises out of Impugned order dated 07.02.2018 passed by National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (NCLT in short) in I.A. 403 of 2017 and 415 of 2017 in CP 195/241-242-246/NCLT/AHM/2017 wherein learned NCLT doubted the audit done by the Statutory Auditor appointed by the original Respondent No. 1 Company and directed re-audit by the independent Auditor. Respondent- (original Petitioner) had filed I.A. No. 403 of 2017, interalia, praying declaration of appointment of Statutory Auditor M/s Shah & Bhatt, CA to be bad in law and to restrain them from auditing. Vide I.A. No.415 of 2017 Respondent (Petitioner) disputed how when new Auditor M/s. Shah & Bhatt's appointment was approved in EOGM dated 07.12.2017 they could have finalized the Accounts in one day.

2. The Learned Counsel for the Appellants who are original Respondents 1 to 4 in Company Petition, submits that the present Respondents (original Petitioner) filed the Company Petition alleging Oppression and Mismanagement. It appears that the original Petitioner also made allegations regarding accounts. It is stated by the learned counsel for the Appellants that I.A. No. 403 and 415 of 2017 were filed by the original Petitioner and one of the prayer made in I.A. No. 403 of 2017 was to have the accounts re-audit and that the Statutory Auditors M/s. Shah and Bhatt who had been appointed be

restrained from doing audit. The dispute relates to the finalization of the Accounts for the Financial Year 2016-17. The learned counsel submits that the earlier Auditor M/s. Mashar Shah and Associates had earlier resigned on 23.10.2017 (Annexure A3-Page 149) and because of which Board Meeting (Annexure A4-Page 150) was held on 01.11.2017 appointing new Auditor M/s. Shah & Bhatt CAs as Statutory Auditors subject to approval of the general body. He states that EOGM was called on 07.12.2017, to approve the appointment. It is stated that on 07.12.2017 the appointment was approved (Resolution Extract- Page 302- Reply Dairy No. 4664) and the Auditors who had been appointed earlier on 01.11.2017 finalised the accounts which were audited since 01.11.2017 and thus there was nothing unusual and no error in the auditing done. The argument is that the NCLT wrongly proceeded on the basis that if the EOGM had approved the appointment of new Auditor on 07.12.2017, it was not possible that audit of the entire year would get completed in a couple of hours so as to approve the audited accounts on same day.

3. The Learned Counsel submits that the NCLT took note of the Resolution of the Board of Directors as on 01.11.2017 and EOGM which was held on 07.12.2017 and while dealing with the reasons in Impugned Order wrongly interpreted Section 139(8) of the Companies Act, 2013 (Act in brief). It is stated that NCLT wrongly assumed that the appointment was of 07.12.2017 and on such basis went on to direct re-audit of the accounts. According to the counsel without setting aside the earlier audit done and without doubting the

correctness of audit done, such direction for re-audit could not have been passed. The argument is that before directing the re-audit, there has to be material to show that the audit already done was not correct and on mere surmises re-audit could not be directed.

4. Against this the learned counsel for the Respondents (original petitioner) submitted that if the Impugned Order is seen, only re-audit has been directed and that the same will not prejudice anybody. If the audit done by the Statutory Auditor M/s. Shah and Bhatt is not found to be irregular in the re-audit there would be no prejudice. According to him it is correct that the earlier audit had not been set aside but if it has been done properly, why should the appellants have any apprehension and why they should object to re-audit? The learned counsel for Respondents further submitted that if the resolution passed in the EOGM dated 07.12.2017 is seen in which the appointment of the Auditor was made, the resolution shows that the appointment itself was of that date. The learned counsel points out to the notice (Page 29-Dairy No. 4664) which was issued for this meeting dated 07.12.2017 as well as Explanatory Statement (Page 30) and the proposed resolution which were sent to the shareholders. It is stated that at all places the Respondents conveyed that on 07.12.2017 new Auditors M/s. Shah & Bhatt were to be appointed. It is stated that the pleading of the Respondents (present Appellants) was also that the appointment was done of the new Auditors on 07.12.2017. Thus according to the Counsel if the appointment was made on 07.12.2017 it is surprising as to how within couple of hours the Auditors completed the audit and even the

report was approved by the general body. The learned counsel pointed out Annexure P-5 from the reply which is the EOGM Resolution's abstract. (It appears there is typing error with regard to time in this document. There is no dispute at Bar between the opposite Counsel, that the time was 11:30 AM which has been wrongly printed as 11:30 PM). The learned counsel for the Respondents referred to Annexure P-7 at Page 304 to say that after the appointment at 11:30 AM as per Annexure P5, the Auditors completed their job and the financial statements were approved by the general body at 5:30 PM on the same day. The learned counsel referred to SA 210 of the Accounting Standards which gives details as to how Auditor is to be engaged and that there are other further accounting standard procedures which are available and such appointments of Auditors and audit of the accounts takes time and the audit could not have been done in a couple of hours and the learned NCLT rightly has doubted the accounts and directed re-audit. It is stated that the records had been seized by police and how Audit could have been done.

5. If the impugned order is perused, it took note of the Resolutions of Board of Directors dated 01.11.2017 and the EOGM dated 07.12.2017. Para 20 reproduced Board Resolution of 01.11.2017 and in Para 21 Resolution of 07.12.2017 was reproduced as under:-

“21. Resolution pertaining to the new Auditor in the EOGM held on 07.12.2017 is as follows:

“RESOLVED THAT pursuant to the provisions of section 139 (8) and other applicable provisions, if any of the Companies Act, 2013 as amended from time to time or any other law for the time being in force (including any statutory modification or amendment thereto or re-enactment thereof for the time being in force), M/s. Shah & Bhatt, Chartered Accountants, Ahmedabad (Firm Registration No. 140823W) be and hereby appointed as Statutory Auditors of the company to fill up the casual vacancy caused by the resignation of M/s. Mashar Shah & Associates, Chartered Accountants, Ahmedabad at a remuneration and out of pocket expenses, as may be decided by the Board of Directors of the Company, in consultation with them”.

6. Impugned Order in Para 22 to 25 reads as under:-

“22. A reading of both the resolutions would go to show that the Board of Directors only recommend name M/s. Shah & Bhatt were appointed as Statutory Auditors of the company for the financial year 2016-17 and whereas they were appointed as Statutory Auditors in the AGM held on 07.12.2017.

23. *In this context it is necessary to refer to section 139 (8) which deals with appointment of Auditor in case of casual vacancy. It says that casual vacancy shall be filled up by the Board of Directors within 30 days and such appointment shall be approved by the company's AGM convened within three months of the recommendation of the Board. Therefore, Section 139(8) only gives power to Board of Directors to recommend the name of New Auditors in case of casual vacancy on the ground of resignation of Auditors. In view of the said proviso appointment of new Auditor, recommended by the Board of Directors shall be approved by the company at an AGM. Therefore, in the case on hand, the appointment of new Auditor even as per the Resolution of the Board of Directors and the resolution in the AGM placed on record along with rejoinder goes to show that name of the New Auditor was recommended by the Board of Directors and it was approved in the AGM. Therefore, the procedure contemplated under section 139(8) has been followed by the company in appointing the new Auditor M/s. Shah & Bhatt. Therefore, there is no illegality in appointing M/s. Shah & Bhatt as new Auditors of the first respondent company.*

24. *Next aspect is that when the appointment of New Auditor is approved in the EOGM on 07.12.2017, how it is possible he has audited the accounts of the company for the entire year on*

07.12.2017 and they were approved by the Board of Directors and it was decided to place the said accounts before the Board on AGM dated 30.12.2017.

25. Contention of the learned senior counsel appearing for the respondents that the new Auditor continued with the audit work form 01.11.2017 do not merit acceptance in absence of material on record to show that the New Auditor was appointed as Tax Auditor. No material is placed on record to show that New Auditor M/s. Shah & Bhatt acted as Auditor of the company from 01.11.2017 and audited the accounts.”

(Emphasis Supplied)

7. The Learned Counsel for the Appellant referred specifically to underlined portion of Para 23 reproduced above to say that the NCLT here misinterpreted Section 139(8) proceeding on the basis that the Board of Directors is only to recommend the name of Auditor and that appointment as such is not to be done by the Board of Directors. It is stated that the Board Resolution was based on Section 139(8) and made appointment of Statutory Auditor and further appointed the same Auditor as Tax Auditor and the position of law will not change only because while putting up the matter to EOGM, under misconception word “appointment” was used instead of “approval”.

Sub-section 8(i) of Section 139 reads as under:-

“(8) Any casual vacancy in the office of an Auditor shall-

(i) in the case of a company other than a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor-General of India, be filled by the Board of Directors within thirty days, but if such casual vacancy is as a result of the resignation of an auditor, such appointment shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board and he shall hold the office till the conclusion of the next annual general meeting;”

8. Section 139 relates to appointment of Auditors. This sub-section (8) deals with casual vacancy arisen in the office of an Auditor. In the present matter, undisputedly earlier Auditor resigned on 23.10.2017 and there was vacancy which had arisen. Reading of this sub-section makes it clear that when any casual vacancy in the office of an Auditor is there it has to “be filled by the Board of Directors within 30 days”. The time frame shows how much importance law gives to presence of such Auditor. The sub-section further says that in case such vacancy is as a result of the resignation of the Auditor “such appointment” was also to be “approved” by the Company at a general meeting convened within 3 months on the recommendation of the Board. It is clear from the words of this sub-section that when such casual vacancy due to resignation arises the Board of Directors have to “fill” the vacancy and “such appointment” was required to be “approved” by the general body convened

within 3 months of the recommendation. The continuation or otherwise thereafter would depend on the approval at the general meeting. The learned counsel for the Appellant referred to the meeting of the Board of Directors dated 01.11.2017. In the Resolution relating to appointment of the new Auditor, it was mentioned at page 151:-

“FURTHER RESOLVED THAT pursuant to the provisions of sub section (8) of Section 139 of Companies Act, 2013 and all the applicable rules made thereunder (and subject to any enactment, re-enactment or amendment thereof) and further subject to the approval of Members in General Meeting of the Company, M/s. Shah & Bhatt., Chartered Accountants having FRN 140823W, having consented to act as Statutory Auditors in the casual vacancy so caused, be appointed as the Statutory Auditor to hold office as such till the conclusion of next Annual General Meeting of members of the Company at remuneration to be decided by the members of the Company.

Further resolved that M/s. Shah & Bhatt., Chartered Accountants having FRN 140823W, be and are hereby appointed as Auditors to conduct the tax audit pursuant to section 44 AB of the Income tax Act, 1961 and submit their report thereon.”

Thus as per this Resolution of the Board of Directors the new Auditor was appointed as Statutory Auditor and same person was further appointed as Auditor to conduct the tax audit. Then if the reply which was filed by the Appellants to I.A. No. 415 of 2017 is perused (reply at page 245 and 246) it was pleaded by these Respondents in Para 4:-

“(4). The new Auditor upon getting the No objection from the earlier Auditor and earlier Auditor upon tendering the resignation in writing to the Company, the new Auditor was appointed on 1st November 2017 in the duly convened board meeting of the members of the board of directors of the Company and appointment is subject to the approval by the members in the General Meeting. The said new Auditor appointed as tax Auditor and has started statutory function expeditiously considering the stipulated time limit to get the accounts audited and successfully completed the audit on the date of approval of the members of the company in the Extra Ordinary General Meeting as held on 07.12.2017. The members in the Extra Ordinary General Meeting approved the appointment of new Auditor and hence the loud allegation made that on the day such Auditor was appointed has audited and not followed the principles of accounting and gave his report and such hue and cry as made is unfounded and misleading. As on 23.10.2017 the earlier Auditor tendered resignation and hence the board of directors were put into

untold hardship and on 01.11.2017 new Auditor was appointed as tax Auditor and statutory Auditor subject approval of the members in General Meeting. In anticipation of getting approval of the members in General Meeting pursuant to the majority holding of the other respondent and hence effectively the said new Auditor got sufficient time of more than 30 days to conduct the audit and hence undertaken the statutory function forthwith and on the date of approval in the EOGM, the report was also prepared and all the principles of accounting has been followed. The conduct of targeting the statutory Auditor is only with a view to put the Company's working into standstill. The perverse and sadistic approach of the Petitioner is highly condemnable.”

(Emphasis Supplied)

Thus the Appellants had pleaded that the new Auditor had been appointed as Tax Auditor and Statutory Auditor on 01.11.2017 subject to approval of the members of the general meeting. It appears from the Impugned Order that NCLT treated the new Auditor appointed only as Tax Auditor and thus further fell into error.

9. The grievance raised by Counsel for Respondent is that original Financial Data had been seized by police so how audit was done. Para 6 of Impugned Order itself shows Respondent himself had pleaded that audit was carried out on the basis of regenerated data, documents and records. In this computer age

there could be multiple ways. We will not on this basis jump to doubts. Appellants may give details at the time of disposal of Company Petition.

10. We find substance in the submission of Appellants that when the audit had taken place, without finding at least prima facie from the record that there was error in the audit or that it had not been properly done, directing re-audit was not correct. We are not impressed by the arguments of the learned counsel of the Respondents that only because the notice and agenda for that EOGM dated 07.12.2017 used the word “appointment” and not “approval”, the appointment should be treated as on 07.12.2017. The law requires and the Board Meeting dated 01.11.2017 in which the appointment was done shows that the appointment was done on 01.11.2017 which was subject to the approval of the general body.

11. Learned counsel for the Respondents is raising various grievances regarding the accounts. We find that the grievances being raised may be raised at the time of final hearing of the Company Petition. Learned counsel for the Appellant is submitting that because of the present Impugned Order the Respondent is raising contentions and disputes even with regard to the subsequent Audit of 2017-18 claiming that unless 2016-17 gets settled, the accounts of 2017-18 cannot be looked into. A litigation may remain pending for years and dispute relating to Accounts of a particular year may be raised. It does not mean that for years to come finalization of Accounts should be kept suspended or in doubts.

12. For the above reasons, the Appeal is allowed. The Impugned Order directing re-audit of the accounts is quashed and set aside. The Respondent would be at liberty to question the audit done of 2016-17 at the time of final hearing of the Company petition. The accounts of subsequent Financial Years may be settled but would be subject to the decision of the Company Petition. Disposed off accordingly. No Costs.

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

(Balvinder Singh)
Member (Technical)

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