

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.402 of 2017

[Arising out of order dated 4th September, 2017 passed by National Company Law Tribunal, Kolkata Bench in C.P. No.181 of 2013]

IN THE MATTER OF:

1. Pramod Chandra Rath,
Kairapari, P.O. – Kotsahi,
P.S. – Tangi, Dist. – Cuttack,
Odisha – 754022

...Appellant No.1
(Original Petitioner No.1)
2. Dr. Subas Chandra Rath,
Kairapari, P.O. – Kotsahi,
P.S. – Tangi, Dist. – Cuttack,
Odisha – 754022

...Appellant No.2
(Original Petitioner No.3)
3. Shri Pradeepta Chandra Rath,
Kairapari, P.O. – Kotsahi,
P.S. – Tangi, Dist. – Cuttack,
Odisha – 754022

...Appellant No.3
(Original Petitioner No.4)
4. Shri Prasanta Chandra Rath,
Kairapari, P.O. – Kotsahi,
P.S. – Tangi, Dist. – Cuttack,
Odisha – 754022

...Appellant No.4
(Original Petitioner No.5)

Versus

1. Hotel Aristocrat Pvt. Ltd.
Badapadia, P.O./P.S. – Paradip,
Dist. – Jagatsinghpur,
Odisha – 754142

2. Shri Bhagirathi Sahoo,
Badapadia, P.O./P.S. – Paradip,
Dist. – Jagatsinghpur,
Odisha – 754142

3. M/s. N.C. Nayak and Co. Company Secretaries,
HIG 14, 1st Floor, Dharamvihar,
Khandagiri, Bhubanshwar,
Dist. – Khundla, Odisha – 751037

...Respondent Nos.1 to 3
(Original Respondent Nos.1 to 3)

Present: Shri Amar Dave, Shri Anirudh Sanganeria, Ms. Shruti Agarwal,
Shri Jayant Mehta and Shri Rahul Kukreja, Advocates for the
Appellants

Shri Arunav Patnaik, Shri Karun Pahwa and Ms. Kanika Singh,
Advocates for the Respondents

J U D G E M E N T

A.I.S. Cheema, J. :

1. The Appellants were Petitioners 1, 3 to 5 before the National Company Law Tribunal, Kolkata Bench, Kolkata ('NCLT' in short) in CP 181/2013. The Petitioner No.2 - Smt. Padmini Rath, wife of Appellant No.1 was Petitioner No.2. She expired when the matter was pending in National Company Law Tribunal. The petition was filed against the present Respondents under Section 397, 398 and 402 of the Companies Act, 1956 ('old Act' in brief) claiming oppression and mismanagement on the part of Respondents in the Company – Respondent No.1.

2. The learned NCLT after hearing the matter dismissed the Company Petition and hence, the present appeal by the original Petitioners.

3. The Appellants claimed that the Respondent No.1 Company was incorporated in 1980 with the object of running a hotel at Paradeep in Odisha by founder Directors and shareholders - Shri Antarjyami Pattnaik, Shri Shyam Charan Pattnaik and Smt. Reeta Mohanty. The Appellant No.1 took over the business of Respondent No.1 Company subsequently. He was appointed Managing Director on 2nd July, 1997. The Appellants along with deceased Smt. Padmini Rath were holding 647 equity shares comprising 77.29% of the total paid up share capital of the Company. The total paid up share capital was of Rs.8,37,000/- divided into 837 equity shares of Rs.1,000/- each. The Appellant No.1 was based in Cuttack and Respondent No.2 was based in Paradeep. Respondent No.2 (main contesting Respondent – hereafter referred as ‘Respondent’) was invited by the Appellant No.1 (hereafter, also referred as ‘Appellant’) and was allotted 190 equity shares comprising 22.7% of issued, subscribed and paid up share capital. The shares were allotted to Respondent as compensatory remuneration to look after day-to-day affairs of the Company. According to the Appellants, because of the Appellant, the Company flourished. The Appellant had implicit faith in contesting Respondent. Because the Appellant reposed faith and trust in the Respondent, he gave over the reins

of the Company in the hands of the Respondent. At the behest of Respondent, the Appellant from time to time used to put his signatures over blank papers and blank letter pads to ensure smooth running of the business affairs of the Company. This continued for about a decade and with passage of time, the Appellant reposed further faith and confidence in the Respondent.

4. The Appellants claimed that the Appellant (Appellant No.1) received telephone call from one Shri Ramesh Chandra Pratap, F.C.A. Partner of M/s. Pratap & Co. who were Auditors of the Company seeking confirmation of changes in shareholding of the Company for the year ending 2012. The Appellant denied this and the Respondent No.2 assured the Appellant No.1 that the irregularities would be corrected at the earliest. Respondent No.2 intimated the Appellant No.1 that the audit of the accounts had not been completed because of such irregularities and urgent steps are being taken. However, audited Balance Sheets for the year ending 2012 had not been filed. According to the Appellants, the Appellant No.1 then started making enquiries and sometime in March, 2013 came to know that due to the faith reposed in Respondent No.2, the Respondent No.2 had diluted the shareholding of Appellant No.1 in the Company by forging signatures of the Appellant No.1 and siphoning of funds. In March, 2013, Appellants came to know that Respondent No.2 had filed Form 20B with Registrar of Companies showing massive change in shareholding. Form No.5 had been filed by Respondent No.2 as well as Form No.32 had

been filed recording resignation of Appellant No.1 from the post of Managing Director and appointing Respondent No.2 in the same capacity. According to the Appellants, Respondent No.2 forged and/or caused signature of Appellant No.1 to be forged in purported Resolution passed in Board Meeting dated 6th March, 2012. Respondents proceeded to raise the authorized share capital of the Company from Rs.12 lakhs to Rs.62 lakhs in EOGM called within 6 days of Notice dated 6th March, 2012, on 12th March, 2012. On 27.03.2012, Respondent No.2 filed Form 5 with Registrar of Companies with altered Memorandum of Association. From the increased share capital, Respondent No.2 allotted 1862 shares to the Appellant No.1 and 2422 shares to himself. According to the Appellant there was no need to increase the authorised share capital. There was no need for the Appellant No.1 to resign as Managing Director. It is claimed that Notices of alleged Board Meetings were not given to Appellant No.1 and Notice of EOGM was also not given to the members and Respondent No.2 along with Respondent No.3 who is associated with Respondent No.2 acted in oppressive manner and have mismanaged the Company.

5. It is case of the Appellants that the learned NCLT did not properly appreciated the facts of the matter and wrongly dismissed the Company Petition.

6. We have perused the Appeal and its annexures including counter affidavit filed by the Respondents 1 and 2. We have heard counsel for both sides.

7. The learned counsel for the Appellants referred to the defence of the Respondent No.2 that there was oral agreement way back in 1997 that it was the Petitioner No.1 who had approached Respondent No.2 to help change over the management of the Company with oral agreement that 51% of the shareholding will be given to Respondent No.2. According to the learned counsel, there was no such oral agreement and the same could not be relied on to claim changes in 2012. It is argued that although the share capital was increased from Rs.12 lakhs to Rs.62 lakhs, there was nothing to show that the Company received consideration towards such share subscription. The Explanatory Statement (Annexure A/8 – Page 174) claims that diversification of the activities was the reason for increasing the capital of the Company. However, there was no material to show that the money came in and was used for diversification of the activities of the Company. The reasons given in Explanatory Statement were not supported by any documents. There was no valid and just requirement for issue of additional capital. It has been argued that the Respondent No.2 got the share capital increased to allot additional shares to himself and to become majority shareholder. The argument is that the Board Resolution dated 06.03.2012 did not show that the Appellants were present. The EOGM dated 12.03.2012 was contrary to Article 36 of the Articles of Association which requires minimum 7 days of Notice to call General Meeting. There was no proof that the Notice of EOGM dated 12.03.2012 was served on the

Appellants. The Appellants did not attend the EOGM. The Resolution adopted in EOGM dated 12.03.2012 was stated to have been confirmed in AGM dated 29.09.2012. However, there was no proof that Notice of that AGM dated 29.09.2012 was given to the Appellants. The Appellants claim that the resignation dated 26.10.2012 alleged to have been given by Appellant No.1 was forged and fabricated.

8. The learned counsel for the Appellant, at the time of arguments submitted that the Appellants accept that the resignation bears signature of the Appellant No.1 but the contents are denied as according to the Appellants, the Appellant No.1 had in good faith signed blank papers for business purposes which have been misused by the Respondent No.2. At the time of arguments, counsel for both sides accepted that there was no dispute relating to the Annual Returns till AGM of 30.09.2011 but there were disputes relating to EOGM dated 12.03.2012. Learned counsel for the Appellants claimed that the Respondent No.2 had shown the allotment of shares to Appellant No.1 only to give colour of legality to the increased share capital.

9. The learned counsel for Respondent Nos.1 and 2 submitted that on record there is copy of Board Meeting Resolution dated 6th March, 2012 (Annexure A-7 Page – 173) which authorizes Respondent No.2, to issue Notice for EOGM in order to increase the authorized share capital. At that time, the Appellant No.1 was the Managing Director of the Company. It is claimed that the Form No.2 is relating to allocation of shares after increase

of the share capital. The list of allottees bears the signatures of the Appellant No.1 as well as Respondent No.2. The counsel referred to the document at Page – 210 of the Appeal for the list. It has been further argued by the learned counsel for the Respondents 1 and 2 that the Balance Sheets of the Company for the Financial Year 2011 – 2012 were also signed by the Appellant No.1 as Managing Director and R.C. Pratap for Pratap & Co. Auditors had also signed the Balance Sheet which showed the change in share capital between the figures at the end of previous reporting period and the current reporting period. It is argued that the balance sheets of the earlier years from 2005 – 2006 till 2010 – 2011 had shown application money pending and after the EOGM on allocation of the shares, this position had changed in the balance sheet as on 31st March, 2012. According to the learned counsel for Respondents 1 and 2 till 26.10.2012, the Appellant No.1 was the Managing Director and only on that date after his resignation, the Respondent No.2 became the Managing Director and thus the Appellants cannot claim oppression and mismanagement by Respondents till that date when Appellant No.1 himself was M.D. It has been argued by the learned counsel for Respondents 1 and 2 that although the Appellants claim that the signatures of the Appellant No.1 had been forged and fabricated in documents relied on by the Respondents, still in spite of various opportunities given by the learned NCLT, the Appellants had not taken steps to get the alleged forged signatures and fabricated documents examined by Hand Writing Expert. According to the learned counsel for

Respondents 1 and 2, Rule 43(3) of the National Company Law Tribunal Rules, 2016 was available to the Appellants and the Appellants did not take the benefit and by merely saying that the documents are forged or fabricated would not help. It has been argued that the Appellants cannot back out of their own documents which are part of record to claim that the Respondents have committed oppression and mismanagement.

10. The first dispute relates to EOGM dated 12.03.2012 when it is stated that there was increase in authorized share capital from Rs.12 lakhs to Rs.62 lakhs. Annexure A-5 of the Appeal is Form 20B of the Company along with Annual Returns up to 30th September, 2011 (Page – 157 to 171) showing the share capital and shareholding of the parties. Till this point of time, there was no dispute. The Annual Returns bear signatures of the Appellant No.1 and Respondent No.2. A sample can be seen as at Page – 171. The signature of the Appellant No.1 on the resignation (Annexure A-14 Page 227) is also available in record. The signature is of Appellant No.1 is not disputed. What is disputed is contents in the resignation as the Appellants claim that the Appellant No.1 had signed blank papers. The original of the said resignation was seen by us at the time of arguments and returned to the Respondent No.2. Annexure A/14 is thus bearing an undisputed signature of Appellant No.1 though the contents are disputed. Then there is Annexure A-6 (Page 172 of the Appeal Paper Book) which is extract of the Board Resolution dated 6th March, 2012, which shows Resolution relating to increase in authorized share capital subject to

approval by the General Meeting and authorizing Respondent No.2 to issue Notice for calling EOGM. According to the Respondents, this document is signed by the Appellant No.1. The Notice of EOGM (Annexure A-7 – Page 173) (It may be noted that the Index has errors compared with the actual documents in the Appeal Paper Book as in the Index, the Notice is shown as at Annexure A-8) was signed by Respondent No.2 along with Explanatory Statement as can be seen at Page – 174. The extract of Resolution taken in EOGM is at Page – 175 marked as A-9. Counsel for the Respondents referred to Annexure A-12 Form 20B and stated that if the signature below the Annual Return which is at Page – 206 of Appeal is seen, it is clear that the Appellant No.1 was aware and party to the increase in share capital and distribution of the shares on increase. Although the counsel for Appellants disputed the signature of Appellant No.1 below this document (which is at Page – 226 of the Appeal), the learned counsel for the Respondents submitted that if the admitted signature of the resignation is compared, there is no space for doubt that this document was signed by the Appellant No.1. The counsel for Respondents pointed out the Balance Sheets of the Financial Years 2005 – 2006 till 2009 – 2010 (from pages 37 at 40 to 74 filed with counter affidavit of Respondents [Diary No.2830]) to submit that those balance sheets showed share application money pending and once the share capital was increased, depending on the share application money received from the Applicant No.1 and the Respondent No.2, the shares were issued. In the Balance Sheet issued thereafter on 31st March, 2012 ([Annexure R-1] with counter affidavit of

Respondents - Diary No. 2830) the column against share application money was then shown as NIL.

11. Looking to the admitted signatures of the Appellant No.1, when these documents pointed out by the counsel for Respondents 1 and 2 are seen, it does appear that they bear signatures of the Appellant No.1. Annexure -R1 (Diary No.2830) not only bears signature of Appellant No.1 in the Balance Sheet ending 31st March, 2012, (i.e. just after the EOGM dated 12.03.2012) but it also bears signature of the Chartered Accountant R.C. Pradeep. This is the same Chartered Accountant on whom Appellant appears to have reposed faith if the appeal is perused as the Appellants claim that this Chartered Accountant had cross checked with the Appellants regarding increase in share capital and facts came to light. (See synopsis Page – 3.) Till this point of time, the Appellant No.1 was the Managing Director and Annexure – R1 referred above has been signed by him in that capacity.

12. As regards the resignation letter dated 26.10.2012, there is extract of Board Meeting Resolution at Annexure - A15 (Page – 228 of Appeal) accepting the resignation of the Appellant No.1. As per this document, the original Petitioner No.2 - Smt. Padmini Rath proposed the name of Respondent No.2 and resignation of Appellant No.1 was accepted and Respondent No.2 was appointed MD. This extract (Annexure A-15) appears to have been signed by Appellant No.1. It is the case of Respondents that

till 26.10.2012, Appellant No.1 was managing affairs of the Company, as Managing Director.

13. Sub-Rule (3) of Rule 43 of the National Company Law Tribunal Rules, 2016 reads as under:

“(3) Where any party preferring or contesting a petition of oppression and mismanagement raises the issue of forgery or fabrication of any statutory records, then it shall be at liberty to move an appropriate application for forensic examination and the Bench hearing the matter may, for reasons to be recorded, either allow the application and send the disputed records for opinion of Central Forensic Science Laboratory at the cost of the party alleging fabrication of records, or dismiss such application.”

14. Last para of the impugned order reads as follows:

“That apart, vide order passed in the instant case on January 04th, 2017, February 06th, 2017 and March 03rd, 2017 the petitioner was given three consecutive opportunities to file an application to testify the genuineness of the signature of petition no.1 so that the documents pertaining to admitted signature and disputed one be sent to the Central Forensic Science Laboratory but the petitioner didn't file any application in this regard despite

the plea taken in his pleading. Thus, it shows the lackluster approach of the petitioner and why petitioner is reluctant to testify the genuineness of the signature of petitioner No.1, the reason best known to him. The extract of the aforesaid orders is usefully quoted as under:

04-01-2017 – “the petitioner submitted that he desires to file the evidence on affidavit and also submitted that he is apprehending that the respondent has forged some documents, hence, they wanted to send those documents to Central Forensic Science Laboratory for expert opinion with regard to the genuinity of the documents and to that effect they intend to file one application and accordingly prayer allowed.”

06-02-2017 – “the petitioner was allowed sufficient time to file his evidence, on his prayer on the last date and he also prayed to file one application for sending alleged forged documents to the Central Forensic Science Laboratory for expert opinion with regard to the genuineness of those documents but even after lapse of one month he has failed to file his evidence as well as to file the application for sending the documents to the Central Forensic Science Laboratory.

03-03-2017 – “sufficient time is allowed to file evidence on affidavit. Not only this matter is pending from 2013 and no endeavour has been taken to dispose of the case. Under such situation prayer for further time cannot be allowed. In view of the above facts, the case cannot be adjourned every day as sufficient time had already been granted to petitioner despite pleadings were completed long back, however, for the end of justice as a last chance the case is adjourned with a cost of Rs.25,000 upon the petitioner.”

Thus, the petitioner has failed to substantiate the allegations of oppression and mismanagement under section 397 and 398 of the Companies Act, 1956 against the Respondent No.2. With this observation the Company Petition No.181/2013 stands dismissed and interim order passed, if any, stands vacated as well as applications pending, if any, also stands dismissed without any cost.”

15. It is apparent that the Appellants were given sufficient opportunities by the learned NCLT to substantiate their claims if they were claiming that the Respondents had fabricated or forged documents but the Appellants did not take advantage. We are keeping in view Section 73 of the Indian Evidence Act, 1872 and having seen the admitted signature of the Appellant No.1 on the resignation, copy of which is available on record and comparing the same with other documents which are being disputed

by the Appellants, we find that the oral submissions and claims of the Appellants trying to deny the documents, which appear to have come into existence in ordinary course of events, cannot be accepted. There is material to show that the Appellant No.1, who was taking great care of the interest of the Appellants, was MD of the Company till 26.10.2012 and was party to the increase in authorized share capital as well as documents show that list of allottees also was bearing his signature. He appears to have subsequently resigned from the post of MD and continued as Director. The Appellants cannot be heard denying their own documents. Merely denying documents bearing signatures of Appellant No.1 is not enough. Burden of proving an averment is on the party making the averment. Appellants have failed to prove documents adverse to their claims to be false or forged. Appellants through Appellant No.1 were in control of the affairs till 06.03.2012 cannot simply disown documents bearing signatures of Appellant No.1 by merely saying that they trusted Respondent No.2 and had signed blank papers and that the same have been misused. Fraud and forgery when alleged require details and circumstances to be proved to spell out possibilities and actual fraud and forgery. Calling for forensic evidence is supportive evidence in this regard and even that was not resorted to. The Appellants thus failed to prove oppression and mismanagement on the part of Respondents.

16. We do not find any error in the impugned Judgement and Order passed by the learned NCLT dismissing the Company Petition of the Appellants. We do not interfere with the impugned Judgement.

17. The Appeal is dismissed.

There shall be no Orders as to costs.

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

[Balvinder Singh]
Member (Technical)

New Delhi

09th July, 2018

/rs/nn