

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

IA 616 of 2018

in

Company Appeal (AT) No.187 of 2017

[Arising out of Order dated 15.02.2018 passed by National Company Law Appellate Tribunal in Company Appeal (AT) No.187 of 2017 and Company Appeal (AT) No.215 of 2017]

IN THE MATTER OF:

1. Dr. Nitin Modi
62, FH, Sch.54, Vijay Nagar
Indore ...Applicant No.1
2. Dr. Hariprasad Yadav
101, Raunak Vihar, 3/1 Ravindra Nagar
Palasia, Indore ... Applicant No.2
3. Dr. Sandeep Julka
138, Royal Bunglow City,
Sukhliya, Indore ... Applicant No.3
4. Dr. Ravi Nagar
B-40, Chandra Nagar, M.R.9.
Indore ... Applicant No.4

Versus

1. Dr. Rakesh Shivhare
D-37, Apollo D.B. City,
Nipania Road, Indore ...Respondent No.1
2. Dr. Sandip Saxena
460, Goyal Nagar,
Indore (M.P.) ...Respondent No.2
3. Shri Suresh Choukse
13/5, Paredeshipura,
Indore ...Respondent No.3
4. Sobhagya Hospital & Research Centre Pvt. Ltd.
Dispensary Part 2, Scheme No.74-C,
Sector -B, Vijay Nagar, Indore – 452010
Madhya Pradesh ...Respondent No.4

5. Mr. Anil Jain
402, Sukhsagar Apartment, Block No.2,
Race Course Road, Indore ...Respondent No.5
6. Dr. Subodh Jain
149, Royal Bungalow City,
Sukhliya, Indore ...Respondent No.6
7. Dr. Pravar Passi
G-2, Utkarsh, 139, Indrapuri,
Indore ...Respondent No.7
8. Bank of India
Mid Corporate Branch, Airen Heights,
14-PU-3, Scheme No.54, Vijay Nagar,
Agra Bombay Road, Indore ...Respondent No.8
9. Registrar of Companies, Madhya Pradesh
Sanjay Complex, A-Wing, 3rd Floor,
Jayendra Ganj, Lashkar,
Gwalior – 474009 (M.P.) ...Respondent No.9
10. Dr. Sobhagyamal Jain (Originally Petitioner No.1,
transposed vide CLB Order dated 07.11.2014)
48-B, Vijay Nagar Scheme No.54,
Opposite Mangal City,
Indore ...Respondent No.10
(Original Petitioner No.1 – Transposed as Respondent)

With

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Company Appeal (AT) No.215 of 2017

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**Present: Shri Vivek K. Tankha, Sr. Advocate with Shri Sumeer Sodhi,
Shri Ashish Tiwari and Shri Prashant Sivarajan, Advocates for
the Applicant**

ORAL JUDGEMENT

17.05.2018

1. Heard the learned Senior Counsel for the Applicants. The Applicants are original Respondents 4 to 7 in Company Petition who were party to consent terms recorded in Annexure 'B' considered in the petition. (In CA 187 of 2017 they were arrayed accordingly and as Respondents 7 to 10 in CA 215 of 2017 - in Appeals) We have passed a detailed Judgement in these appeals on 15th February, 2018 and disposed the Appeals finally. The learned Senior Counsel is submitting that in terms of the Annexure 'B' terms, these original Respondents 4 to 7 had transferred their shares and relinquished the directorship also and on receiving consideration had walked out and thus, NCLT could not have directed them to return back the money on the alleged failure of the consent terms Annexure 'A' and 'B' as according to the counsel, both the Annexures were independent and stood alone and in the matter of these Respondents, there was no term for return of money. The learned counsel

is submitting that this Tribunal should exercise inherent powers to allow the present applications and rehear the appeals as according to him these Respondents had raised cross-objections in the appeals and had sought setting aside of the observations made against these Respondents by NCLT.

2. In these applications, the contentions raised are (for example - see IA 615 of 2018 Para 17 to 22):-

“17. That this Hon’ble Appellate Tribunal failed to appreciate that there were two completely separate consent terms recorded as “Annexure A’ and “Annexure “B”. It is submitted that the consent terms recorded as Annexure A were entered between the Appellants No.1 to 3 on one end, and the Respondent Nos. 2 to 3 on the other end, whereas the consent terms recorded as Annexure B was executed between present applicants (Respondent No.4 to 7) and the Respondent Nos. 2 to 3.

18. That this Hon’ble Appellate Tribunal failed to appreciate that the liability arising out from both the consent terms i.e. “Annexure “A” and “Annexure B”, were completely different and the parties had different obligations to perform within the purview of their respective consent terms.

19. This Hon’ble Appellate Tribunal failed to consider that insofar as the consent terms between the present

Applicants and the Respondent Nos. 2 to 3 are concerned, there was no default on part of the present applicants in complying with the terms and conditions of their consent terms and it is the Respondent Nos.2 to 3 who had acted in violation of Clause 5 of the Consent Terms as per which the Respondent Nos.2 to 3 had to pay the share transfer consideration from their own source of fund and not by creating any liability upon the Company by way of mortgaging the assets of the company.

20. This Hon'ble Appellate Tribunal has erred in over-imposing the terms and conditions of the Consent Term entered between Appellants No.1 to 3 and Respondent Nos. 2 to 3 upon the present Applicants and has failed to appreciate that Clause 19 of Consent Term recorded as "Annexure A", which provided for appointment of independent Committee of Management for governing the affairs of Respondent Company, was, in any manner whatsoever, not a part of the consent terms of the present applicants which were recorded as "Annexure B" and therefore, it was not apposite for this Hon'ble Appellate Tribunal to impose the arrangement of appointment of Independent Committee of Management on the present applicants when the same was not within the purview of the consent terms recorded

between the present applicants and Respondent Nos.2 to 3.

21. This Hon'ble Tribunal failed to consider that there was no Clause or arrangement in the Consent Terms of the present applicants and Respondent Nos.2 to 3, recorded as "Annexure B", as per which the present applicant was required to deposit back the amount received from Respondent Nos.2 to 3, that too without having committed any default whatsoever on their part, relating to the compliance of terms and conditions of the Consent Terms. Correct appreciation of the consent Terms entered into between the Respondent Nos.2 to 3 and the Applicants would go onto show that the Applicants are in fact entitled to forfeit the consideration paid by the Respondent Nos. 2 to 3 in case of default by the said Respondent.

22. That this Hon'ble Appellate Tribunal failed to consider that as of today, the liabilities of the Respondent Company i.e., Saubhagya Hospital & Research Center Pvt. Ltd. has gone up substantially from what it existed when the present applicants resigned from the Management of the company, due to gross mismanagement and arbitrary decision making of the Respondent Nos. 2 to 3 and such other persons handling the management of the Respondent Company, and hence any direction to the applicants to

either enter into fresh settlement again with other parties or to pay back the entire amount of share consideration even after complying with the terms and conditions of the Consent Term or directing them to re-participate/rejoin the management of the Respondent Company, would lead to an inevitable situation where the present Applicants, without any fault whatsoever, would have to share the existing burden of liabilities created due to the unilateral, and ill-conceived actions of Respondent Nos.2 to 3, and would therefore cause a irreparable harm and would unnecessarily prejudice the financial interest of the present applicants.”

3. Then there are paragraphs arguing liabilities as on to-day and Balance of Convenience.

4. The learned counsel for the Applicants is arguing on above lines to claim that the Annexure ‘A’ and ‘B’ which were subject matter of the dispute should have been dealt with separately and these Respondents could not have been given directions as was done by NCLT.

5. We have looked into the averments which have been made in these applications. The averments in the Applications are more in the nature of grounds of Appeal than invoking inherent powers to do justice. Our Judgement needs to be read as a whole. Without speaking much, we refer to Para – 14 of our Judgement relating to averments made by original Respondents 4 to 7. We

also reproduce Paragraphs – 8 and 20 to 23 of our Judgement which read as under:-

“8. In the impugned order, NCLT *inter alia* disposed of CA 141/2015 where Respondents 4 to 7 claimed that Respondents 2 and 3 violated consent terms and amounts paid by them should be forfeited. Purchasing Respondents filed CA 115/2015 seeking interpretation of the consent terms and sought relief as per the consent terms. *Inter alia*, Petitioners filed CA 108/2015 to acquire consequential rights. When these matters came up before us, both the sides have argued at length and tried to convince us that the opposite party is responsible for violation of the consent terms. Original Respondents 2 and 3 are trying to show that they have taken appropriate steps as per the consent terms and the relief should have been granted to them as per the consent terms. They are questioning the final orders passed by NCLT calling upon the parties to enter into fresh settlement or face appointment of Committee of Management.”

.....

“14. Respondents 4 to 7 claimed that before the Annexure ‘A’ and ‘B’ were accepted by the Company Law Board, the purchasing Respondents 2 and 3 had submitted affidavits dated 05.12.2014 and affirmed before the Company Law Board

that they shall buy the shares from their own funds. This was pre-condition for purchase of shares. According to these Respondents, they were the largest group of shareholders which was holding 30% share capital whereas Respondent No.2 Anil Jain held 12.86% and Respondent No.3 Dr. Sobhagyamal Jain held 9.64% shares. According to these Respondents, had such affidavit and condition of use of personal funds for purchase of the shares not been there, these Respondents 4 to 7 would have certainly acquired proportionate shares to remain in control and management of Respondent No.1 Company. According to them, Respondents 2 and 3 have betrayed them and committed breach of term 5 as the payments were not made from the funds of Respondents 2 and 3 but were made by borrowing funds from Religare Finvest Limited by mortgaging the assets of the Respondent No.1 Company. The money of the Company was siphoned by diverting the same to four private limited companies incorporated just 2 - 4 days before transfer of funds of Respondent No.1 Company in which close relatives are Directors and shareholders of Respondent Nos.2 and 3, with the object of paying purchase consideration to these Respondents. On this basis, these Respondents claimed that term 14 of Annexure 'B' was required to be enforced regarding

forfeiture of the payments made to them. It is claimed that NCLT could not have directed them to return the money.”

.....

“20. Respondents 4 to 7 claimed forfeiture of the amounts paid to them on the basis that there was violation of consent term 5. The learned NCLT considered term 4 of Annexure ‘B’ which required payments in particular schedule and found that Respondents 2 and 3 had paid the entire sale consideration of the shares before the expiry of 9 months’ period specified and thus concluded that term 4 of the consent terms was not breached. NCLT discussed term 14 of the consent terms Annexure ‘B’ and observed that no notice was issued by Bench Officer in terms of para 14, if there was default. This was apart from the fact that it observed that in the present matter, there was no default in payment of sale consideration towards purchase of shares from Respondents 4 to 7 as it was done in period agreed and so there was no scope to invoke forfeiture clause. Going through the reasoning recorded by NCLT, we find that term 14 dealing with forfeiture basically related to “purchase” and Respondents 2 and 3 did make the payments within the period of 9 months fixed. Violation of term 5, which relates to not creating 3rd party rights etc. was rightly not invoked by NCLT for forfeiture in

term 14 of Annexure 'B'. NCLT rightly discarded claims of Respondents 4 to 7 that the amounts they have already paid should be forfeited and they should be allowed to hold on to the shares they have. Against impugned order against claim of Respondents 4 to 7, they have not filed appeal.

21. NCLT has then found the Petitioners in default of term 6 of Annexure 'A' which required execution of transfer deeds in favour of respondents and depositing the same with the Bench Officer for safe custody. NCLT has rightly discarded the averments made for petitioners that Respondents 2 and 3 did not suggest the manner in which transfer deeds were to be deposited by observing that petitioners could have deposited the same without filling the name of transferee. Considering that such difficulty did not arise with similar term 6 of Annexure 'B', the approach of NCLT on this count cannot be faulted with.

22. The NCLT further found the petitioners in default with regard to paras 14 and 15 of Annexure 'A' which required them to unconditionally withdraw the legal cases and endeavour to pursue the complainants and facilitate process of closure of legal cases which had been made in Annexure 3 of the documents.

23. NCLT found that Respondents 4 to 7 had in compliance of para 6 of Annexure 'B' deposited share certificates with duly executed transfer deeds with the Bench Officer and had also resigned as per term 1 of the consent terms. Although it was the finding that Respondents 4 to 7 cannot claim forfeiture clause but NCLT found that as Respondents 2 and 3 violated term 5 of the terms and thus Respondents 2 and 3 are not entitled for transfer of the shares deposited by Respondents 4 to 7. Considering the rival cases, we do not find that these findings can be found fault with.”

6. In para – 24 of our Judgement, we had referred to para - 48 of the Judgement of NCLT to which we had drawn attention of the rival parties and asked them to address us with regard to observations of NCLT in that paragraph. We have reproduced the observations of NCLT in our Judgement. In the said paragraph NCLT has discussed how the failure in parts, in the Annexures A and B led to contingency not visualized in framing the two sets of Consent Terms. We then observed in para – 25 of our Judgement as under:-

“25. The learned counsel for both sides however, went on with their arguments relating to one party finding fault with the other and *vice versa* but did not satisfy us that Annexures 'A' and 'B' read together and defaults of parties, creates strange situations making execution of the terms unworkable and unpractical. Even if we accept that enforcing term 19 of

Annexure 'A' would require certain compliances as is being argued, question is what is the way out? N.C.L.T. rightly appears to have searched way out in interest of Company and all stakeholders to have a fresh settlement or it would appoint Independent Committee of Management. The directions are in interest of justice and cannot be faulted with. Under Section 424 of Companies Act 2013 NCLT can regulate procedure before it and while dealing with the matter, it could exercise inherent powers to do justice between the parties, the Company and public interest linked with the Company to give the directions it has given.”

7. The learned Senior Counsel referred to Page – 134 of IA 615 of 2018 in CA 215 of 2017 to submit that these original Respondents 4 to 7 of the petition have filed cross-objections in the Company Appeal 215 of 2017. He referred to the prayers made at Page – 151 to state that these Respondents had prayed for setting aside of the observations made by the NCLT directing them to deposit the entire consideration. In what has been filed as true copy at Page – 134, the title reads as under:

“CROSS OBJECTIONS & COUNTER UNDER RULE 54 OF THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL RULES, 2016 TO THE APPEAL FILED BY DR. SUBODH JAIN UNDER SECTION 421 OF THE COMPANIES ACT, 2013”

8. However, when we refer to what was filed by these original Respondents 4 to 7 in Company Appeal 215 of 2017 vide Diary No.2668 the title of this document has been given as **“REPLY & COUNTER UNDER RULE 54 OF THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL RULES, 2016”**

9. Thus, what was filed was “Reply and Counter” and the document was not tendered as any “cross-objections”. Appeal under Section 421 of the Companies Act, 2013 is required to be filed within 45 days and the Appellate Tribunal can condone delay within further period not exceeding 45 days. In the present matter, the Impugned Order of the NCLT was dated 22nd March, 2017 and what was filed by these Respondents 4 to 7 in CA 215 of 2017 as reply and counter was filed on 17th October, 2017.

10. In October, 2017 these Applicants could not have filed appeal. They cannot be permitted by now trying to claim that their Reply and Counter filed on 17.10.2017 was “cross-objection”. Such claim would have to be treated as time barred. Apart from this, we have dealt with all the issues which were raised before us and decided them and find no reason to reopen the matter. We find no substance in the averments and grounds raised in these applications to entertain them.

11. Under Rule 11 of the National Company Law Appellate Tribunal Rules, this Tribunal can exercise inherent powers to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal. The present applications have been filed under this Rule and in effect are seeking review and modification of

the Judgement, which we have already passed. Looking to the submissions made and the contents of these applications and keeping in view the Judgement we passed, we do not find that ends of justice require us to interfere in the matter again. We do not find that there is any error apparent on the face of record or that there is any material to rectify or that there is any mistake apparent from the record calling for amendment in the Judgement which we have already passed.

12. These Applicants who never filed appeal against the Impugned Order passed by NCLT have, in the name of invoking inherent jurisdiction filed these applications, apparently untenable, but may be, more to lay foundation to appeal when earlier it had none.

13. For these reasons, we reject the applications.

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

[Balvinder Singh]
Member (Technical)

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