

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) No. 36 of 2019

[Arising out of order dated 5th December, 2018 passed by National Company Law Tribunal, Bengaluru Bench, Bengaluru in CP No. 459/BB/18]

M/s Chembra Peak Estates Limited,
No. 2, 5th Main, RMS Layout, Post Office Road,
Sanjay Nagar,
Bangalore- 560 094

.. Appellant

Vs.

Registrar of Companies, Karnataka,
E Wing, 2nd Floor, Kendriya Sadana
Koramangala, Bangalore,
Karnataka – 560 034

.. Respondent

Present:

For Appellant: Mr. Shivam Narang, Mr. Saumabho Ghosh, Mr. Raza Abbas, Advocates

For Respondent: Mr. P.S. Singh with Mr. Raj Pal Singh, Mr. M. Yadubhushana Rao Advocates

J U D G M E N T

(11th December, 2019)

KANTHI NARAHARI, MEMBER(T)

The Appellant- M/s Chembra Peak Estates Limited filed the appeal aggrieved by order dated 5th December, 2018 passed by National Company Law Tribunal, Bengaluru Bench, Bengaluru (in short NCLT), whereby NCLT dismissed the petition filed by the Appellant herein.

2. The Appellant filed petition before the NCLT under Section 61(1)(b) of the Companies Act, 2013 read with Rule 71 of NCLT Rules, 2017 for the purpose of consolidation of division of equity share of the Company. The NCLT passed the order and the operative portion of the order at paragraph-6 is reproduced here at:

...

“6. Furthermore, on perusal of the Circular No. SEBI/HO/MRD/DSA/CIR/P/2016/110 dated October 10, 2016 at the Annexure-A, para (vi), the Promoters are liable to acquire shares that are not offered under the exit offer up to a period of one year from the completion of offer. However, it appears the Promoters of the Company have not utilized this provision to acquire all the shares of the public shareholders after completion of one year. Instead, they have appeared before this Tribunal for purchasing shares and providing an exit route to the public shareholders, but under the pretext of consolidation of the share capital. This evinces an intention to avoid compliance with necessary provisions of Companies Act, 2013 and SEBI regulations. We are also concerned about the interests of the minority shareholders that

expressed their concern of reduction in their voting percentage in an arbitrary manner.”

...

3. From the perusal of the impugned order, NCLT relied upon SEBI Circular No. SEBI/HO/MRD/DSA/CIR/P/2016/110 dated October 10, 2016 and one of its clauses viz. that the Promoter are liable to acquire shares that are not offered under the existing offer period of one year from the completion of the offer. The finding of the Tribunal is that the Promoters have not utilised this provision to acquire shares of public after completion of one year. Further, Tribunal expressed its concern about the interest of minority shareholders whereby the minority shareholders expressed their concern of reduction in their voting percentage in an arbitrary manner if the consolidation of shares is allowed. With the aforesaid observation, learned Tribunal dismissed the petition.

4. FACTS:

4.1 Learned Counsel for the Appellant contended that one of the findings given by the learned Tribunal with regard to purchasing of shares by the Promoters is concerned, it is stated that there was no such stipulation by SEBI in its circular dated 10th October, 2016 and submits that the Company had no intention to affect the concern and interest of the minority shareholder. He further submitted that the Appellant Company was always in compliance of the provisions of the Companies Act, 2013 and applicable SEBI

regulations and in pursuance thereof a valid offer was made for acquiring shares.

4.2 Shri P.S. Singh, learned Counsel appearing for the Registrar of Companies (in short ROC) submitted that they have filed affidavit vide Diary No. 10731 dated 15.03.2019 and Additional Affidavit vide Diary No. 13311 dated 23.07.2019. He submitted that in its first report dated 15.03.2019 it is stated that the ROC Karnataka, Bangalore had received objection from Mr. Mahendra Girdharilal, Shri P.P. Zibi Jose, Ms. Kavitha, Ms. G. Jaiyashri, Mr. R.M. Govindan, Mr. S. Gopalkrishna Pai and Shri S. Rajjeevi R Pai against consolidation stating that the scheme of consolidation of shares by changing the face value of the shares from Rs. 10/- to Rs. 60,500/- is against the interest of minority shareholders and violates the principle of public policy.

4.3 Learned Counsel for the ROC further submitted that the above objections of the shareholders were taken up with the Company and the Appellant-Company has submitted its reply stating that the Company has followed due process of law under the Companies Act, 2013 and out of the above seven shareholders objecting to the scheme, three of them have already sold their respective equity shares on 18th June, 2018 left with 4 shareholders'.

5. Heard learned Counsel for respective parties. Perused pleadings, documents filed in their support. The Appellant

Company was incorporated as a Public Limited Company by shares. The authorized share capital of the Company is Rs. 75 lakhs divided into 6,05,500 equity shares of face value of Rs. 10/- each and 14,500 Redeemable Cumulative Preference shares of value of Rs. 100/- each. It is seen that the equity shares of the company were initially listed on various stock exchanges. The Security Exchange Board of India vide its circular No. SEBI/HD/MRD/DSA/CIRP/P/2016/110 dated 10.10.2016 stipulated the procedure and process for exit of Exclusively Listed Companies from the Dissemination Board. Based on the same, the Promoters of the Company provided an exit opportunity to all the public shareholders by offering to buy the equity shares of the company. The Exit Offer was valid upto 18.03.2017. The National Stock Exchange, listing Department, vide its circular dated 18.10.2017 (Page-88 of the Paper Book) had been removed the Appellant Company from the Dissemination Board, shown at serial no. 17 of the Circular. At page 90 of the Paper Book, the reason for removing from Dissemination Board shown as Exit option. The Exit option was initially valid up to 18.03.2017 for purchase of shares at the same price. However, the option was extended one more year i.e. upto 18.03.2018 to provide exit to the public shareholders who hold small number of equity shares and who did not or could not participate in exit offer.

6. The Appellant company in its Board Meeting held on 19.03.2018 passed a resolution for consideration of consolidation of equity shares of the Company (page -92 of the Paper Book) in which the Board discussed the SEBI Circular and the procedure and process for exit opportunity to the public shareholders to buy equity shares of the company. It is made clear that shares of the company are unlisted that it does not have liquidity, the Board considered and passed the resolution. The Bench posed a question to the learned Counsel for the Appellant that what steps are being taken to protect the interest of small/fractional shareholders if they are not willing to exit from the company. The learned Counsel for Appellant has drawn our attention to the Board Resolution of the Appellant Company at page-93 of the Paper Book whereby it was resolved that a Trust is required to be created and Trustee will be appointed as per the resolution of Board Meeting dated 19.03.2019 for the purpose of aggregating the fractional entitlements resulting from the consolidation into whole equity shares and will hold the same until its disposal at a fair price equal to Rs. 76/- being more than 15% above the Exit Price arrived at during the Exit Offer provided to the Public Shareholders by the Company and for proportional distribution of the proceeds among the shareholders who would otherwise entitled to fractional entitlement. Further it was resolved that fair value of the shares will represent an attractive exit payment to the shareholders who would otherwise receive fractional entitlement pursuant to the consolidation. The Trustee

will give effect to the disposal of the fractional shares and distribute the proceeds thereof.

7. From the perusal of the minutes of the Board Meeting dated 19.03.2019 (Page 91 of Paper Book) it is also seen that the Company proposed to alter Memorandum of Association (in short '**MOA**') and Articles of Association (in short '**AOA**') of the Company with regard to the authorised share capital by deleting existing Clause-5 and by substituting new clause -5 as mentioned in paragraph-5 of page-96 of Paper Book. We had a doubt whether the Article of Association permit the Company to consolidate and divide the shares. We perused the Article of Association of the Company (Page 51 of Paper Book) of the Company and Article 41(a) refers to the consolidation and divide of all or any of its share capital into shares of larger amount than its existing shares. After decision taken in the Board Meeting dated 19.03.2018, the Company held its Extra Ordinary General Meeting (in short '**EGM**') on 14.04.2018.

8. The resolution passed therein (vide page 101 of the Paper Book) wherefrom EGM resolved to alter Memorandum of Association(MOA) and Articles of Association (AOA) by substituting the clause as per the decision taken in the Board Meeting and in EGM respectively.

9. The Practicing Company Secretary of the Company submitted his report dated 18.04.2018 to the Whole Time Director and

Chairman of the EGM duly enclosing the minutes at pages 101 to 104 of the Paper Book wherefrom it is evident that 95.12% votes cast in favour of the resolution for consolidation and 3.10% votes cast against the said resolution. Therefore, the resolution was approved with majority.

10. The Board also resolved to appoint Trustee at Clause-7 of its minutes of the Board Meeting dated 19.03.2018 (page -98 of the Paper Book) wherefrom it is apparent that the Fractional Entitlements resulting from the consolidation shall be aggregated into whole equity shares and the number of whole shares so arising shall be held by a Trustee who shall dispose off the said whole equity shares and proceeds of sale of such whole equity shares shall be distributed proportionately among the shareholders who would otherwise be entitled to Fractional Entitlements.

11. When the matter was listed on 13.11.2019 before us, learned Counsel for the Appellant stated that Mr. Mr. Mahendra Girdharilal, who was Objector before the NCLT and whose objection was taken into consideration by the NCLT in passing the impugned order (at paragraph-3 of the impugned order) has already transferred his shares to the Promotor of the Company in which the learned Counsel filed an affidavit vide diary No. 14424 dated 09.09.2019. Further this Bench directed learned Counsel for the Appellant to file affidavit with regard to other objections raised by some of the shareholders apart from Mr. Mr. Mahendra Girdharilal. In

compliance thereof, learned Counsel filed an Affidavit vide diary No. 16144 dated 19.11.2019. Before proceeding with the contents of the Affidavit, it is to be noted that NCLT at paragraph 4(b) (page-29 of the Paper Book) referred to the objections received by the RoC, Karnataka referred to the shareholder's who were against the consolidating of shares.

...

“4(b) The office has received objections from Mr. Mahendra Girdharilal, Shri P.P. Zibi Jose, Ms. Kavitha, Ms. G. Jaiyashri, Mr. R.M. Govindan, Mr. S. Gopalkrishna Pai and Shri S. Rajjevi R Pai against consolidation stating that the scheme of consolidation of shares by changing the face value of the shares from Rs. 10/- to Rs. 60,500/- is against the minatory shareholders and violates the principle of public policy. The said objections were taken up with the Company and vide letter dated 25.07.2018, the Petitioner Company has submitted its reply stating that the Company has followed the due process of law under the Companies Act, 2013 and that out of the aforementioned 7 shareholders objecting to the scheme, 3 of them have already sold their respective equity shares on 18.06.2018”

...

12. Page-3 at paragraph -3 of the Affidavit, vide Diary No. 16144 dated 19.11.2019, filed by the learned Counsel for the Appellant, the names of seven shareholders, who objected to consolidation of shares and some of them have sold their shares, is given and the same is extracted herein below:

...

“3. That it is stated that during the pendency of this Appel the majority of the objecting shareholders have sold their shares in full to the promoters of the Appellant Company. That the shareholding of the shareholders in the Appellant Company as on date is mentioned herein below:

Serial No.	Name of the Shareholder	No. of Shares held as on EGM	No. of Shares held as on 14.11.2019	Comments
1.	Mr. Mahendra Girdharilal	9515	NIL	Sold on 09.07.2019
2.	Shri PP Zibi Jose,	6820	NIL	Sold on 08.02.2019
3.	Ms. Kavitha,	922	NIL	Sold on 03.07.2018 & 11.08.2018

4.	<i>Ms. G Jaiyashri</i>	90	<i>NIL</i>	<i>Sold on 03.07.2018 & 11.08.2018</i>
5.	<i>Mr. R M Govindan</i>	100	<i>NIL</i>	<i>Sold on 03.07.2018 & 11.08.2018</i>
6.	<i>Mr. Gopal Krishna Pai</i>	172	172	<i>Continues to be shareholder</i>
7.	<i>Smt. S. Rajeevi Ramananda Pai</i>	335	335	<i>Continues to be shareholder</i>

“

[Emphasis supplied]

...

13. From the perusal of the list, 5 out of 7 shareholders have sold their shares on respective dates as stated supra two shareholders i.e. Mr. Gopal Krishna Pai holding 172 shares at Sl. No. 6 and Smt. Rajeevi Ramachandra Pai holding 352 shares at Sl. No. 7, continue to be shareholders of the Company. It is submitted that Mr. Laxmi Kant Mohta, the whole time Director of the Appellant- Company, who deposed this Affidavit at Para 4 of the Affidavit states that, he acquired shares of above 5 shareholders in his individual capacity

and copies of de-materialization delivery instruction was also filed. It is stated that the Appellant-Company had complied with all the provisions of the Companies Act, 2013 and not acted in any manner prejudicial to the interest of the shareholders of the Company. The ROC in their Additional Report vide diary No. 13311 dated 27.03.2019 have stated that the Appellant-Company filed an Affidavit providing information with regard to number of shareholder's pre-consolidation and post-consolidation under Section 61(1)(b) of the Companies Act, 2013 along with clarification as to why the option of 'Buy Back' under Section 68 of the Companies Act, 2013 could not be exercised. The Affidavit of ROC, on the basis of Appellant-Company's stand, states that the Appellant-Company is making losses for the last two Financial Years and it did not have requisite cash flow to initiate 'Buy Back' of the shares under Section 68 of the Companies Act, 2013. Therefore, the Board of Directors of the Company after considering the options available, based on the financial position of the Company, have proposed for consolidation of share capital under Section 61 of the Companies Act, 2013. At paragraph-3 of this Additional Report of ROC it states that the appeal may be considered on merits of the case.

14. The objections taken by seven shareholders with the ROC regarding consolidation of shares is reduced and five out of seven shareholders have also sold their shares as evident from the records,

to the Director of the Appellant-Company and remaining two shareholders holding 172 and 335 shares respectively continue to be shareholders of the Company. So far as remaining two shareholders and their apprehensions are concerned, the Appellant-Company provided a clause to appoint a Trustee to take care of such shareholders in case share capital of the Company is consolidated. Further the Appellant- Company had complied with all the provisions of the Companies Act, 2013.

15. CONCLUSION:

We are satisfied with the submission made by the learned Counsel for the Appellant, the records submitted and the documents filed in its support. We are of the view that the apprehension as expressed by minority shareholders with regard to consolidation of shares is concerned, the Company has well taken care of their concern. The Company having complied with the statutory requirement, as contemplated in the Act, we are of the view that the appeal deserves to be allowed.

16. The reason taken for dismissal of Company Petition by the NCLT does not have any substance. As on the date of EGM, it is evident that the votes cast in favour of the resolution for consolidation of shares is more than 95%. It is noteworthy to mention that during pendency of the Appeal, most of the shareholders, who objected for consolidation of shares, have sold their shares to the Director of the Appellant-Company. Considering

and taking into consideration the transfer of shares, more than 95% of shareholding, appears to be in favour of consolidation of shares. From the records, only two shareholders holding 172 and 335 shares respectively remained as shareholders of the Company and unequivocally their percentage is very minimal and their rights are well protected.

17. Therefore, considering the above, the facts and law, we hereby allow the appeal in terms of Section 61(1)(b) of the Companies Act, 2013, by allowing the Appellant-Company for consolidations of its share capital. The Impugned order dated 05.12.2018 passed by NCLT is quashed and set aside. No costs.

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

(Kanthi Narahari)
Member(Technical)

(V P Singh)
Member(Technical)

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