

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No.276 of 2017

(Arising out of order dated 07.06.2017 passed by the National Company Law Tribunal, Chennai Bench, Chennai in TCP No.113 of 2016).

In the matter of:

1. **Mr. Giju Mathai,
Purapadathil House,
Mulanthuruthy P.O.
Ernakulam, Kerala 0682314** **...Appellant**

Versus

1. **Roger Mathew P,
Plot No.G.203, Panampilly Nagar,
Ernakulam.**
2. **P.T. Mathai Construction Company Private Ltd.
Kv-29, Panampilly Nagar, Ernakulam, Cochin 682036**
3. **Mr. P.T. Mathai,
Purapadahtil House,
Mulanthuruthy P.O.
Ernakulam, Kerala-682314**
4. **Seguro Foundation & Structures Pvt Ltd,
Represented by its MD, Mr. C.V. Rajeev,
XXXI/392, Behind Milma Diary, Edapally P.O.
Ernakulam.** **...Respondents**

Present: For appellant: Mr. Amar Dave, Mr. Bharat Sood, Mr. Paul Kuriakose and Mr. P.S. Sudheer, Advocates.

**Shri Rana Mukherjee, Senior Advocate with Shri Harshad V. Hameed and Ms Sreoshi Chatterjee, Advocates for Respondent No.1
Mr. Dileep Poolakkot, Advocate.**

JUDGMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

1. The present appeal has been preferred under Sections 241/242 of the Companies Act, 2013 read with Section 421 of the Companies Act, 2013 by the appellant against the impugned order dated 07.06.2017 passed by the National Company Law Tribunal, Chennai Bench, Chennai (hereinafter referred to as the 'Tribunal') in TCP No.113 of 2016 (C.P. No.23 of 2016) wherein
 - a) the appellant herein has been removed from the Directorship of the 2nd Respondent Company and the 1st Respondent herein has been appointed as Director-cum-Managing Director of the 2nd respondent
 - b) the appellant herein is liable to pay Rs.16.48 Crores with Bank interest.

2. The brief facts the case are that the 2nd respondent is a company incorporated under the Companies Act, 1956 engaged in the business of civil construction of roads, bridges, buildings etc. The 2nd respondent company was incorporated on 15.12.2003 promoted, managed and operated by the appellant herein, 1st respondent, 3rd respondent and the wife of 3rd respondent. The following was the shareholding of 2nd respondent company.

S.No.	Particulars	Shareholding
1.	Giju P Mathai	46.5%
2.	Roger Mathew	46.5%
3.	P.T. Mathai	3.5%
4.	Martha Mathai	3.5%

3. Appellant and 1st respondent were the directors of 2nd respondent and 3rd respondent was Director cum Managing Director of 2nd respondent.
4. For smooth running of the business, 2nd respondent had availed overdraft facilities from the South Indian Bank and for this purpose the security of Directors' immovable properties were provided to Bank. The overdraft facility availed from the Bank was renewed from time to time. The accounts with the Bank were operated by the different directors of the 2nd respondent yet the same were still accounts of the company and any deposits or withdrawals from the said accounts were duly accounted in the books of account of 2nd respondent.
5. 1st respondent filed a Company Petition being CP No.23/2013 for operation and mismanagement against 2nd respondent. 2nd respondent filed its reply thereby stating that the 1st respondent was competing with the 2nd respondent. Appellant also filed its reply thereby controverted the allegations. 1st respondent filed its rejoinder and deliberately did not reply to the contention of the appellant and 2nd respondent that 1st respondent was carrying on a competing business. In August, 2013 the 1st respondent filed CA No.1/2013 praying for supersession of the Board of Directors of 2nd respondent and appointment of an Administrator/Receiver to conduct and manage the affairs of 2nd respondent and also to protect the assets and properties of the company and any action of the Bank. Appellant, 2nd, 3rd and 4th respondent filed its reply to the CA No.1/2013. CA No.1/2013 was dismissed by the Tribunal. However, the Tribunal observed that there was no deadlock situation in the affairs of the company and 1st

respondent was duty bound to work together. On constitution of the NCLT the CP No.23/2013 was transferred to NCLT, Chennai and renumbered as TCP No.113/2016. The Tribunal, after hearing the parties, was pleased to pass the impugned order dated 7.6.2017. Relevant portion of impugned judgement dated 7.6.2017:

“11. The petitioner has stated that the shareholders of the company have devised a mutual arrangement by which the petitioner, R2 and R3 will perform the work of construction as per the object of R1 company falling within the scope of each individual Director and the money was to be transferred from the Master Account to the Sub-account from where each individual Director will administer their respective sub-accounts, for purpose of the Project falling within their scope. In other words, each Director function as an individual cost and profit centre. It is on record that while the petitioner and R2 have completed their projects successfully, R3 was not in a position to complete the projects allotted to him. Not only this, some of the work contracts were cancelled; because the projects being handled by R3 could not progress as per the time line specified. R3 has also overdrawn from his sub-account to the tune of Rs.16.48 crores as on 31.03.2012, defaulted in completing several projects which has caused losses to the company. The plea of the petitioner is that he performed well and completed the projects allotted to him and brought profit to 1st respondent company whereas huge losses have been incurred by 1st respondent company on account of the projects undertaken by R3. Therefore, the petitioner could not be made liable for the losses suffered by 1st respondent company due to failure of R3 to commission the projects handled by him, within the stipulated time. R2 has also not taken corrective measures in order to overcome the losses suffered by 1st Respondent company. The petitioner has legitimate expectations that he will be benefitted in relation to the business of the company, as he has completed his projects well in time. Therefore, in the facts and circumstances of the case, petitioner cannot be made liable for the losses incurred by 1st respondent on account of mismanagement and overdrawn money to the tune of crores of rupees. Thus, R3 is responsible for the losses suffered by 1st respondent company. The collateral security given by the petitioner to the bank cannot be charged for such losses caused to 1st respondent company. The acts of omission and

commission of R2 and R3 have caused losses to 1st respondent company which are against the legitimate expectations of the petitioner. The same may not be oppressive in nature, but constitutes mismanagement of 1st respondent company. In the light of the discussions, issue No.1 part proved against R2 and R3. Since we have concluded that issue No.11 is partly proved against R2 and R3, the petitioner is not liable for the losses that have been suffered by R1 company, due to the acts of omission and commission of R3, and R2 failed to initiate corrective measures. Therefore, it is held that R3 alone shall be liable to pay 1st Respondent company a sum of Rs.16.48 crores with bank interest being the money overdrawn by him through current A/c No.2233 operated by R3 as sub-account.

12.For the reasons stated above, R3 is hereby removed from the directorship of the company and the petitioner is appointed as Director-cum-Managing Director of the company who shall perform his duties diligently to run the day to day affairs of the company smoothly along with R2 who is directed to render all assistance and support to the newly appointed Director-cum-Managing Director. Further, 1st respondent company shall not allow third party to use the goodwill of the company for the benefit of third party. The petitioner is also forbidden to compete with 1st respondent company in any manner, so that the company could grow in future. Accordingly, the petition is disposed of. There is no order as to costs.”

6. In the year 2011 the 1st respondent floated a new company namely M/s Roger Mathew & Co and started bidding against the interest of 2nd respondent company. The appellant has stated that the Tribunal
- a) Could not have adjudicated upon the personal liabilities of the Directors towards the Bank.
 - b) The appellant further submitted that there is no finding on the oppression and mismanagement of the affairs of the company by the appellant and the 3rd respondent, therefore the Tribunal was not justified in passing the impugned order.

- c) Learned counsel further submitted that the Tribunal has erred in appointing the 1st respondent as the Managing Director of the company while he was admittedly carrying on competing business.
 - d) The appellant further averred that the Tribunal has failed to point out any reason or instances where the affairs of the company have been mismanaged. The Tribunal has granted a relief which was not claimed in the Petition by the Petitioner.
7. 1st respondent filed its reply thereby stating that the appeal is wholly misconceived, untenable, is wholly devoid of any merit and liable to be dismissed in limine with costs. It further submitted that 1st respondent is the eldest son and the appellant is youngest son of 3rd respondent and 1st respondent is qualified Civil Engineer. It stated that actually it was a closely held family company. It was an arrangement that the money from the Master Account of the 2nd respondent was transferred to the subaccount of the company, operated only by the respective director with signing power, was executed only with the discretion power of the Bank Manager without the consent of the other directors, or backing of any Board Resolution. Once the money was credited to the individually operated sub account that particular director was solely responsible to bring back that money to the company. The respondent further stated that the appellant herein has undertaken more than ten projects while 1st respondent has executed only four projects alone and sharing one project with the appellant herein in 1:1 ratio. The respondent further stated that appellant herein siphoned out money through his personally operated company account and

mismanaged the projects even after getting crores of money as mobilization from the government for contracts, apart from the overdraft taken from the Bank. In fact each project was being handled by the respective director for all purposes. It is stated that the appellant sought to secure the release of personal properties charged with the Bank without the consent and knowledge of the 1st respondent when there was huge outstanding from the appellant's projects centre having 3rd sub-account to the Master Account and consequent arrears to the bankers in discharging the overdraft liability. 1st respondent objected to release of properties without his knowledge by addressing letter dated 5.8.2010. It is stated that the projects undertaken by appellant, there was gross mismanagement, siphoning off funds leading to projects not being completed and remaining at work in progress stage. The time limits expired to complete the project. The projects were cancelled which created liability on the sub accounts of appellant, as he had overdrawn his sub account to the tune of Rs.16.48 crores as on 31.3.2012 and defaulted in completing projects undertaken by him. 1st respondent levelled allegations against appellant that he started dealing with the properties mortgaged with the Bank and effected sales therefor, with the intention of complicating security enforcement by the Bank against collateral of appellant with the Bank. It is further alleged that appellant was not looking at completion of the projects, accounting for monies realised from the projects, to the company and consequently to the bank and settling the overdrafts but was siphoned out the funds and also defaulting in completing the projects. It is stated that the 1st

respondent addressed several letters in June 2, 2012 to the bankers and also R3 and appellant placing on record the objection of the 1st respondent to the conduct of the respondents. 1st respondent further alleged that R3 and appellant allowed the track record and reputation of R2 company to be used by third party and have sought to divert projects which were to be awarded to the company to 4th respondent and thereby allowing the 4th respondent (third party) to become a competitor to the 2nd respondent. 1st respondent further alleged that the appellant is liable and responsible for making good the sum of Rs.16.45 crores plus interest overdrawn in his sub account to the company and consequently to the bank. 1st respondent further submitted that the appellant cannot seek to enforce the liability arising on account of short fall in his sub account and the 2nd respondent or on the 3rd respondent because the 1st and 2nd respondent cannot be mulcted with liability arising due to mismanagement and siphoning off funds resorted to by appellant from his sub account. 1st respondent therefore submitted that the present appeal is wholly devoid of any merit and deserves to be dismissed with costs.

8. Rejoinder has been filed by the appellant. The appellant in his rejoinder has stated that 1st respondent has entered into an agreement with Kerala State Construction Corpn Ltd and annexed a copy of the articles of agreement which shows that 1st respondent while continuing as a Director of the 2nd respondent was undercutting and competing with the 2nd respondent and the 1st respondent has suppressed this fact. The appellant further states that non-disclosure/suppression of

material facts has been deprecated by the Hon'ble Supreme Court and it has been held that a party who wilfully suppresses facts is not entitled to relief, interim or final **(Ref. S.P. Chengalvaraya Naidu Vs. Jagannath (Dead) by LR's and Ors (1994) 1 SCC 1)**. The appellant further submitted that there is clear conflict of interest between the role of 1st respondent as Director cum Managing Director and 2nd Respondent and his role as the promoter of '*Roger Mathew & Co*'. The appellant further submitted that the Tribunal inspite of being aware of the fact that the 1st respondent was carrying on a competing business proceeded to appoint him as the director cum Managing Director of 2nd respondent. The 1st respondent should not have been appointed as the Director cum Managing Director as he is doing competing business. It is further submitted that 1st respondent cannot look after the affairs of the 2nd respondent properly while looking after the affairs of his own company which is in a competing business. It further averred that the sole objective of 1st respondent is to oversee the winding up/liquidation of 2nd respondent so that he may appropriate its goodwill and carry on business under the name and style of '*Roger Mathew & Co.*'

9. Heard the parties and perused the entire record.

10. On careful reading of the impugned order it is observed that the appellant herein (R3 in the TCP) has been removed from the directorship of the company and 1st respondent has been appointed as the Director-cum-Managing Director and 3rd Respondent in the appeal (2nd respondent in the TCP) who is Managing Director of the company has been directed to render all assistance and support to the newly

appointed Director-cum-Managing Director, 1st Respondent. It shows that there are now two Managing Directors of the company, one appointed by the Tribunal below and the other one already performing the duties of the Managing Director. In this connection we observe that no such relief was sought in the company petition and in appointing 1st Respondent as Director-cum-Managing Director. Since the Tribunal has given no finding of oppression and mismanagement in respect of the 3rd respondent who is already performing the duties of Managing Director while appointing the Director cum Managing Director it has defacto removed 3rd respondent from Managing Directorship. 1st respondent is already director of the company and now being appointed as Director cum Managing Director, it is amounting to removing 3rd respondent from Managing Director.

11. It has been argued that the 1st respondent who is promotor of M/s Roger Mathew & Co and has also been appointed as Managing Director of 2nd Respondent by the Tribunal is tendering for contracts and competing with the 2nd respondent which was in direct competition with the business of the 2nd respondent. However, the Tribunal has in para 12 of the impugned judgement has given his findings that “**The petitioner is also forbidden to compete with 1st respondent company in any manner**”.

12. In the light of these findings we are not comfortable that the 1st respondent can be expected to look after the affairs of the 2nd respondent while also looking after the affairs of his own company which is in a competing business. We cannot think about any

mechanism by which it can be ensured that 1st respondent who has now been appointed as Managing Director that he will not take care of his own company in the competing business unless he closes his business. Therefore, we are unable to uphold the Tribunal's order in appointing as Managing Director (he was already director and continues to be). While appointing 1st respondent as Director cum Managing Director, no discussions has been made in respect of the Managing Director already performing the duties. Therefore, the Tribunal should not have appointed 1st respondent (petitioner in the company petition) as Director cum Managing Director of the 2nd respondent.

13. The other point considered in this appeal is that the Tribunal has held that the acts of omission and commission of appellant and the 3rd respondent have caused losses to 2nd respondent and the 1st respondent is not liable for the losses that has been suffered by the respondent company. It has been argued that all the tenders are submitted in the name of the Managing Director which fortifies the fact all the works undertaken by the Directors were the projects of the 2nd Respondent and the Directors were only entrusted with the responsibility of execution; amounts withdrawn are for execution of projects and the profits of such work is transferred to the accounts of 2nd respondent. Therefore, the Tribunal has wrongly come to a conclusion that each Director functions as an individual cost and profit centre. As these matters are within the domain of the Management of the company and not normally considered to be subject matter of

oppression and mismanagement by the Tribunal. The Tribunal has further held that the appellant alone is liable to pay 2nd respondent a sum of Rs.16.48 crores with bank interest being the money overdrawn by him through current account No.2233 operated by him as sub-account. In this connection it is contended that the main account maintained with the Bank is of the company and the company is liable to pay to the Bank if the amount is overdrawn. Further no evidence has been led that the appellant has siphoned off the money. The appellant has argued that the amount withdrawn from the bank account maintained by company were for meeting the site expenses for such projects which were then ongoing. The appellant has further argued that the company had earned more than Rupees 19 crores since 1.4.2011 till 31.3.2014. The profit so earned was put in the company account. If any loss has been occurred due to non-completion of these projects will be borne by the company and not an individual. The company should have made a thorough investigation that the loss has been occurred due to inactiveness/negligence of the appellant. The company should have also convened a Board Meeting to analysis the difficulty in non-completion of projects. The sub account accounts are consolidated in the name of company. One person cannot be held responsible for the same. The company is liable to the Bank. The Board of Directors of the company should have investigated and have settled the matter internally. Therefore, the interference in the matter on this issue by the Tribunal is unwarranted.

14. In the light of the above discussions, the appeal is allowed. The impugned order is quashed and set aside. The company petition is dismissed. No order as to costs.

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

(Balvinder Singh)
Member (Technical)

Dated: 13 -2-2018
New Delhi

Bm

