

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**I.A. No.189 of 2017****In****Company Appeal (AT) No.36 of 2016 alongwith Company Appeals (AT) No.43 to 47 of 2016****IN THE MATTER OF:****Mrs Sonia Khosla****...Appellant****Vs****Mr Sameer Kudsia & Ors****...Respondents**

Present: **Mr. Deepak Khosla, Advocate for Appellant.**
Mr. Anil Panwar, CGSC, Ms Natasha, Advocate and Mr Ajeet Kumar Srivastava (Prosecutor)
Mr. Rishi Sood, Advocate for Respondent NO.5.
Mr.Anand M. Mishra, Advocate for Respondent Nos 2,3,4,6,7 and 8.

Judgement

1. An I.A. No.189/2017 has been filed by the Respondent No.10, Mr. R.P. Khosla, with the following prayers:

- i) Recall (simpliciter) the order dated 12.4.2017 on grounds of breach of audi alterum partum, lack of jurisdiction, and fraud.
- ii) Consequently, set down the appeal for fair hearing on its merits.

2. Appellant herein (Respondent No.10) has stated that the Appellate Tribunal may exercise of inherent powers to act ex debito justitiae and recall the order dated 12.4.2017 passed in breach of audi alterum partum and without jurisdiction. Appellant has further stated that in the alternative, application may be for review and recall of its order dated 12.4.2017. Appellant herein has stated that the Appellate Tribunal has proceeded on the erroneous premise that the appeal has been filed in respect of 7 orders when the actual fact is that the appeal has been filed in respect of 6 orders passed

on the 6 CAs. Appellant herein has further stated that the Appellate Tribunal has not given a reasonable opportunity to be heard to the appellant and proceeded against it. Appellant herein has stated that the Appellate Tribunal did not allow any parties to lead the arguments on the sole question of law as to whether an application under Section 8 of the Arbitration and Conciliation Act, 1996 can, at all, be filed to block the passage of a petition alleging oppression and mismanagement. It is further stated that the Appellate Tribunal did not allow substantive arguments to enter into any other area other than the maintainability of an application under Section 8 of the Arbitration and Conciliation Act, 1996. It is further stated that no reasoning was given directing the parties to focus arguments only on the question of law relating to Section 8.

3. The appellant has stated that he is seeking recall simpliciter on the ground that they have not been heard while passing the order dated 12.4.2017. The other ground on which they are seeking recall is lack of jurisdiction. The next ground on which they are seeking recall is the fraud played upon the Tribunal, the aspect of the fraud been set out in a petition for criminal contempt and perjury which is pending before the Tribunal for hearing. The other point raised for recall of the order is that the order passed by the Tribunal below were passed by a Bench composed of a single Learned Member, when by law, they could have been passed only by a Division Bench in accordance with Rule 64(2) of the NCLT Rules, 2016 and further stated that the impugned orders were passed coram non judice and, therefore, all subsequent proceedings including the present appeal, stand coram non judice.

4. The appellant herein further stated that if an order is void, then the issue is not merely whether a court has the power to recall it as much as the question that it is duty bound to do so. Therefore, the Tribunal is duty bound to adjudicate CA No.418 of 2009.

5. The appellant herein, therefore, prayed for recall the order dated 12.4.2017 passed by this Appellate Tribunal.

6. Written arguments have been filed on behalf of the Respondent No.2 to 4 and Respondent No.6 to 8. These Respondents have stated that the Company Appeal filed by the appellant through her legal heir Mr. Deepak Khosla is against 6 impugned orders which was disposed of by this Hon'ble Appellate Tribunal vide its order 12.4.2017 and the NCLT was directed to hear the Company Petition CP No.114 of 2007 and this Appellate Tribunal had dismissed the amendment application No.46 and 47 of 2016 filed by the appellant before the NCLT. These Respondents have further stated that Mr. Deepak Khosla acting in malicious manner through his father Mr. R.P. Khosla, Respondent No.11 had sought a review of the order dated 12.4.2007 on the ground that he was not heard by this Appellate Tribunal even though Mr Deepak Khosla always represented Mr. R.P. Khosla both before Hon'ble NCLT and Hon'ble NCLAT.

7. Written arguments have also been filed by Respondent No.5 and the Respondent No.5 has taken the similar stand as stated in para 6 above.

IA No.419/2017

8. An IA No.419/2017 has been filed by the applicant/Respondent No.11 in pursuance to order dated 24.7.2017 of this Appellate Tribunal to place on record the summoning order dated 22.6.2017 issued by the Learned Company Appeal (AT) No.36 & 43 to 47 of 2016

Additional Chief Metropolitan Magistrate, Saket Courts, New Delhi in Criminal Complaint CC No.2028 of 2017. The applicant has placed a copy of the CC No.2028 of 2017 and the position of the accused summoned and their position in the Company Petition and in the present proceedings. Applicant has submitted that the complaint was preferred for false evidence given in judicial proceedings taking place before a Tribunal. It is stated that the complaint is in respect of the falsehoods set out in pleadings supported by affidavits duly sworn under oath by the various accused before the Ld. Arbitration Tribunal on 17.4.2008 in their application under Section 17 of the Arbitration and Conciliation Act, 1996. The applicant has also placed alleged forged documents in support of the relief prayed. Applicant herein has stated that mere pendency of proceedings relating to adjudication of commercial disputes between parties cannot act as a restraint on either party preferring criminal prosecution against the other.

9. Applicant has further stated that as regards the issue of alleged transfer of shareholding, the accused No.1, Vikram Bakshi, has kept changing his stand before as many as 15 different judicial authorities including before this Tribunal. Applicant has further stated that the relevance of the summoning order to the present proceedings is that it puts the review petition in an even stronger light. Applicant has cited the judgement of ***D.P. Chadha Vs Triyugi Narain Mishra (AIR 2001 SC 457: (2001) 2 SCC 221, Lord Denning (1967, 1 QB 443), R Vs O'Connell Roundel Vs Worsley 1969 1 AC 191, H.S. Bedi Vs National Highway Authority of India, RFNo.784 of 2010, Seema Thakur Vs Union of India, 223 (2015) DLT 132*** relating to the conduct of advocates. Applicant has also quoted Standards of Professional Conduct and Company Appeal (AT) No.36 & 43 to 47 of 2016

Etiquette to be observed by Advocates. At last the applicant has prayed for the following reliefs:

- i) Advance the date in the present matter from 11.8.2017 to 1.8.2017, for the reasons set out in para 26-27 above, so as to facilitate the present matter being heard alongwith Company Appeal (AT) No. 220 of 2017 and Restoration Petition No.2 of 2017.
- ii) Take on record the summoning order dated 22.6.2017 issued by Addl. Chief Metropolitan Magistrate, Saket Courts, New Delhi in CC No.2028 of 2017, and the complaint on which it has been issued.
- iii) Take on record the repeat incidents of egregious, criminally-prosecutable conduct in the matter over the last 10 years.
- iv) To pre-empt(iii) from being repeated further, allow recording (or at least 100% transcription) of the proceedings in the present review petition, so as to pre-attempt “making false claims in Court”, as well as to capture incontrovertible evidence of the same (if made)
- v) Issue an ex-parte order(s) and/direction(s) in terms of prayers above; and
- vi) Pass such other order(s) or direction(s) as may be deemed just and proper in the facts and circumstances of the case.

IA No.539 of 2017

10. An IA No.539 of 2017 has been filed by the applicant acting as LR of the appellant/petitioner as well as in his own capacity as Respondent No.11

Company Appeal (AT) No.36 & 43 to 47 of 2016

under Rule 11 of the NCLAT Rules, 2016 and all other enabling provisions of law, praying for grant of relief(s) relating to sole remaining grievance in CP No.114 of 2007 which is assignment of rights to all lands within 500 metres of the respondent No.1 company's project to it, so that there is no competing business which is statutorily forbidden. The appellant stated that the company petition was filed in 2007 under Section 397-398 of the Companies Act, 1956 read with Sections 402 and 403 and 235. It is stated that the Section 402 read with Section 403 of the Act are very relevant for the present application i.e. the power to set aside or modify any agreement between certain parties on just and equitable grounds. It is next stated that the proceedings before this Tribunal are for review and recall of the order dated 12.4.2017 and consequently for allowing CA No.47 of 2016 in CP No.114 of 2007.

11. It is stated that the it is the case of the respondents that the pleadings are erroneous, as the pleadings contradict the documents and records also of the respondents. Therefore, the respondents can have no possible opposition to the amendment in pleadings being allowed by this Tribunal. It is stated that the importance of allowing the amended pleadings can be gauged also from the fact that the amendments in the pleadings prayed for cannot possibly be objected by the Respondent No.2, given that the erroneous pleadings drafted by since discharged counsel in 2007 contradict even the documents and records before all judicial forums. It is next that the Respondent No.2 has filed pleadings before different judicial forums in which he has constantly changed his stand as regards to alleged shareholding transfers, thereby clearly proving that he himself is not in agreement that the

contents of the Company Petition are correct. It is stated that in the amended pleadings there are only 10 prayers and some of these 10 prayers are also either redundant or are intended not to be pressed. It is stated that the only relief remains to be granted is **“Direct Respondent No.5 to transfer all its rights to the land admeasuring 21 bighas and 10 biswas belonging to Shri Prem Singh and his wife Smt. Kaushalya Dev, Respondent Nos.12 and 13 to the Respondent Company.”** It is stated that the basis of this sole grievance is that both parties had a clear understanding that for a period of 5 years following the date of their 2005 understanding to work together, neither party would acquire any land that fell within 500 metres of the perimeter of the proposed project of the Respondent No.1 company. It is stated that this understanding only reflects statutory and/or equitable principles that underline the ratio of non-compete/competing business, which even in the absence of any written agreement between the parties, is a ground which, if breached, gives rise to action for oppression and/or mismanagement under Section 397-398 of the Companies Act, 1956 as it constitutes inter alia a breach of the fiduciary duties of Directors and/or Members of the company. It is stated that based on this understanding and acceptance of well settled statutory and equitable principles the Respondent No.2 was able to induce Respondent No.11 and the LR of the appellant/applicant to assign and transfer all his rights in the lands under acquisition by Mr. Deepak Khosla in his personal name to the name of Respondent No.1 company. It is stated that after having induced the appellant’s group, Respondent No.2 went and surreptitiously executed the agreement for acquisition of the 21 bighas and 10 biswas of land (approx. 4 acres) that was practically adjoining/abutting

the 110 bighas of land not in the name of Respondent No.1 company but in the name of Respondent No.5 company. It shows that the conduct of the Respondent No.2 was fraudulent and was based on dishonesty ab initio. Respondent No.2 never had any intention of performing any of his own obligations under the MOU executed on 21.12.2005 and/or the Agreement executed on 31.3.2006. It is stated that had he disclosed on 31.3.2006 that he had already violated the MOU dated 21.12.2005 on 12.1.2006, the appellant would never have executed the Agreement on 31.3.2006. The execution of the agreement to sell dated 12.1.2006 was a clear breach of the fiduciary duties of the then Directors of Respondent No.1 company, intended to wrongly injure the Respondent No.1 company and to wrongly benefit Respondent No.2 and, his company, Respondent No.5.

12. It is further stated that the Respondent No.2, hardly after a month after 31.3.2006, surreptitiously orchestrated the execution of sale deeds of 2 keys parcels of land in the name of one Rajeev Puri, Respondent No.9, transferring to his name lands under acquisition by Respondent No.1 Company from Kyalli Ram and Dharam Dutt. It is further stated that due to FIRs being registered against him in respect of this fraudulent act, he has sworn before the Hon'ble Delhi High Court that the registration of these sale deeds in the name of Respondent No.9 was for the sole benefit of Respondent No.1 Company.

13. The appellant has sought relief that the acquisition or registration of lands that fall within 500 metres of the periphery of the perimeter of the project of the Respondent No.1 company by Respondent No.2 to Respondent No.9 in the name of any individual/entity other than the Respondent No.1 company since December, 2005 till date; adjudicate CA No.47 of 2016 and CA

No.46 of 2016 filed before Ld. NCLT for amendment of pleadings and allow the same; assign the rights in the lands covered by the Agreement to sell dated 12.1.2006 from Respondent No.5 company to the name of Respondent No.1 company; assign the rights in the lands covered by the Sale Deeds executed on 1.5.2006 from Respondent No.9 to the name of Respondent No.1 company; direct the recording of the proceedings of Hon'ble NCLT be allowed so as to pre-attempt "making false claims in Court" as well as to capture incontrovertible evidence of the same.

14. Reply/written submissions has been filed on behalf of Respondent No.2 to 4 and Respondent No.6 to 8. It is stated that the appellant with malafide intention and only to create prejudice has mentioned the criminal cases against the Respondent No.2. The Respondent has mentioned various orders which has been passed against the appellant by the various courts. It is stated that Respondent No.1 is a shell company and it is only after execution of MOU dated 21.12.2005 and agreement dated 31.3.2016, Respondent No.2 entered into the company and shares of Respondent No.1 were transferred from appellant and thereafter Respondent No.2 has exclusively infused the entire funds. It is stated on the basis of these funds, Respondent No.1 was able to contract with various land owners for purchase of land. It is stated that the appellant and his family or the original subscribers of the Articles of Association of Respondent No.1 had invested a minuscule amount of only Rs.44.5 lakhs which has already been repaid by Respondent No.2. The appellant has made no investment whatsoever in Respondent No.1 other than a meagre amount of Rs.3,650 as the shareholding amount invested by Mrs Sonia Khosla. Respondent No.2 infused funds to the tune of Rs.7 crores

approximately and once the said amount was infused by Respondent No.2, appellant illegally attempted to grab the control of company which was resisted by Respondent No.2.

15. 2nd to 4th Respondent has stated that the prayer seeking amendment of the main Company Petition, that the prayers sought in CA No.539 of 2017 i.e. assignment of rights of land, were already sought by Late Mrs Sonia Khosla (appellant herein) in the year 2007. It is stated that mere glance at the reliefs sought by the appellant would indicate that the said arguments advance by the appellant is incorrect and no such relief was sought with respect to the land in the name of Respondent No.9. It is stated the prayer for assignment of rights of land were already sought by appellant in main company petition filed in the year 2007 then there is no requirement of seeking amendment in the main company petition. The said company petition is pending disposal before the NCLT. It is stated that by way of seeking amendment of the company petition the appellant is trying to change the colour and nature of the original petition filed in the year 2007.

16. It is stated that neither the appellant nor her legal heir has any right to represent Respondent No.1. The appellant in malicious manner and unfairly trying to wrest control of Respondent No.1 which they lost upon transfer of over 51% shares in favour of Respondent No.1. It is stated that the agreement dated 31.3.2006 executed between the parties not only the entire shareholding of Respondent No.1 but even the control over the company was to vest in the Respondent No.2. It is stated that the appellant has filed a petition u.s 397 and 398 of the Companies Act, 1956 as a minority shareholder and Respondent No.1 and its majority shareholders wherein Respondent No.1 is

represented by its majority shareholder and its nominees. It is next stated that the Board of Directors of Respondent No.1 had never authorised the appellant to represent it before any forum.

17. It is stated that the present appeal was disposed of by the Appellate Tribunal vide its order dated 12.4.2017 and the review of the same is sought by Respondent No.11, therefore, without deciding the said review, this appellate Tribunal is functus officio and is acting without jurisdiction to entertain any other application filed by the parties before deciding the review application. It is argued that while adjudicating an appeal preferred before Appellate Tribunal, this Hon'ble Tribunal has the jurisdiction to confirm, modify or set aside the order challenged in appeal in the manner it deems fit. However, its jurisdiction would not extend to passing orders on matters not even before it in a particular.

18. Reply has been filed by the Respondent No.5 company. It is stated that the Respondent No.5 company is in existence since 1994 and is well established hospitality company operating high end hospitality properties across North India as compared to Respondent No.1. It is stated that Respondent No.1 came into existence in 2005 and is still a shell company. Respondent No.1 holds no assets in its name apart from some agreement to sell in its name and that also from the funds introduced entirely be Respondent No.2 or his associate companies. It is stated that the Respondent No.5 by its funds had purchased 21 bighas and 10 biswas of land from the original land owners after due deliberation on its own for a hospitality project without any involvement of LR of appellant and Respondent No.1. The appellants are neither the shareholders nor directors or officer of Respondent

No.5. Respondent No.5 has duly applied and received in principal approval by the State Government of Himachal Pradesh for use of property for a hotel project which is different from the Real Estate project of Respondent No.1. It is stated that it is wrongly argued by the appellant that Respondent No.5 was indebted to Respondent No1 and Respondent No.5 instead of repaying to Respondent No.1 had purchased the land for running a competing business as to Respondent No.1. It is stated that this was not pleaded in the Company Petition filed by the appellant at all and a new fact has been introduced which in any case is denied and disputed by Respondent No.5. It is stated that Respondent No.1 is heavily indebted to Respondent No.5. It is next stated that the purpose and scope of land purchased by Respondent No.1 is resort and real estate whereas of land purchased by Respondent No.5 is hospitality which is totally independent of each other. It is stated that Clause 17 and 18 of the agreement dated 31.3.2006 between the parties state clearly and in unambiguous terms that the appellant family was to get only 5% sale of the Real Estate project. The appellant family were not to get any part from the resort part of the project to be developed on the Respondent No.1 purchased land.

19. It is wrongly argued by the appellant that the land in the name of Respondent No.5 is crucially required for Respondent No.1 as it would form the entrance of the entire project. It is reiterated that both the lands are independent of each other having separate ingress an exits. It is next stated that even at the time Respondent No.5 had purchased its 21 bighas and 10 biswas of land there were 3 to 4 houses of 3rd parties in existence. It is next stated that even as per Agreement dated 31.3.2006 executed between the

parties, it unambiguously states that if any additional land is acquired by either of the parties within the vicinity of 500 meters the appellant family is entitled to 5% of the gross sales proceeds of the real estate development only.

20. It is next stated that the Hon'ble Apex Court has time and again held that the parties are not allowed to resile from the admission made by them in the petition under the garb of amendment. It is stated that the appellant under the garb of seeking amendment is allegedly trying to resile/wriggle out of admission made by his wife in the CP No.114 of 2007. It is further stated that the Hon'ble Apex Court has nowhere directed the adjudication of the amended company petition or granted appellant to seek the amendment of the main Company Petition filed by his wife in the year 2007.

21. It is next argued that the power of setting aside or modifying any agreement between certain parties on just and equitable ground cannot be granted on standalone basis but it can only be granted after a case of oppression or mismanagement, if any, made out by the petitioner in a case. The appellant have so far not made out any case of oppression or mismanagement against the Respondent No.1 company and its directors and majority shareholders. Thus granting the relief as prayed by appellant through her legal heir would lead to violation of natural justice and travesty of justice.

22. We have heard the learned counsel for the parties and perused the record. During the course of arguments learned counsel for the appellants submitted that majority of relief has already been availed/received through operation of law or orders passed by other courts in favour of the appellant

except some of the reliefs as claimed in the company application. The following reliefs has been claimed in the IA No.539 of 2017:-

“i) Condone the present application exceeding 5 pages.

ii) Take on record that in the event of amended pleadings being allowed by this Hon’ble Tribunal, the sole remaining issue intended to be pressed by the applicant/appellant (Mrs Sonia Khosla acting through LRs) in CP No.114 of 2007 is the acquisition or registration of lands that fall within 500 meters of the periphery of the perimeter of the project of the Respondent 1 company by Respondent No.2 to Respondent No.9 in the name of any individual/entity other than the Respondent No.1 company since December 2005 till date.

iii) Adjudicate CA No.47/2016 and CA No.46 of 2016 filed before Ld. NCLT for amendment of pleadings and allow the same, in exercise of the powers of this appellate Court.

*iv) Consequent to prayer (ii) read with prayer (iii), pass orders under Section 402 and 403 of the Companies Act, 1956 and in exercise of the powers of this appellate court, assign the rights in the lands covered by the Agreement to Sell dated 12.01.2006 (**Annexure 6** (page 161 hereto) from Respondent No.5 Company to the name of Respondent No.1 company.*

*v) Consequent to prayer (ii) read with prayer (iii), pass orders under Section 402 and 403 of the Companies Act, 1956, and in exercise of the powers of this appellate Court, assign the rights in the lands covered by the Sale Deeds executed on 01.05.2006 (**Annexure 8** (page 191 hereto) from Respondent No.9 (Rajeev Puri) to the name of Respondent No.1 company.*

vi) To pre-empt abuse from being repeated further, direct that recording (or at least 100% transcription) of the proceedings of Hon’ble NCLT be allowed, so as to pre-attempt “making false claims in Court”, as well as to capture incontrovertible evidence of the same (if made).

vii) issue an ex parte order(s) and/or direction(s) in terms of prayers above: and

vii) Pass such other order(s) or direction(s) as may be deemed just and proper.”

23. We have noted that these issues have not been decided by the NCLT and the Company Petition No.114/2007 is still pending and the appellants

have filed CAs for amendment of pleadings. The petition is not proceeded further but the issues rising in relation to this have been agitated in the various forums. It is also noted that no worthwhile progress in the matter has been made on account of related issues filed by one party or the other party and agitated before the various forums. **As the appellant is intending to press the acquisition or registration of lands that fall within 500 meters of the periphery of the perimeter of the project of 1st respondent by 2nd to 9th respondent in the name of any individual/entity other than the 1st respondent since December, 2005 till date**, therefore, in the interest of justice, we hereby direct the Tribunal to hear the Company Petition on priority basis and decide the same under Section 422 of the Companies Act, 2013 expeditiously. NCLT is directed to give one opportunity to both the parties to file any document/information related with this matter before the NCLT, which they feel is necessary for adjudication of the company petition. NCLT is directed to consider the record, CA No.47/2016 and CA No.46/2016 including further documents/information given by the parties and decide the Company Petition expeditiously under Section 422 of Companies Act, 2013. Interim order passed, if any, is vacated. Parties are directed to appear before the Tribunal on 26.11.2018

(Justice S.J. Mukhopadhaya)
Chairperson

(Mr. Balvinder Singh)
Member (Technical)

New Delhi
Dated:02-11-2018

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