

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) No. 297 of 2017**

**IN THE MATTER OF:**

- 1. Shanta Prasad Chakravarty**  
S/o Late Taraprasad Chakravarty  
R/o T.R. Phookan Road,  
Chiring Chapari,  
Dibrugarh-786 001
  
- 2. Madhusandhya Barkaki,**  
D/o Late Taraprasad Chakravarty,  
W/o Sanjay Barkakati  
R/o T.R. Phookan Road,  
Chiring Chapari,  
Dibrugarh-786 001
  
- 3. Madhukrishna Baruah,**  
D/o Late Taraprasad Chakravarty,  
R/o T.R. Phookan Road,  
Chiring Chapari,  
Dibrugarh-786 001
  
- 4. Nizara Devi**  
W/o Lata Taraprasad Chakravarty  
R/o T.R. Phookan Road,  
Chiring Chapari,  
Dibrugarh-786 001

**.. Appellants**

**Versus**

- 1. M/s. Bochapathar Tea Estate Private Ltd.,**  
Registered Office at  
P.N. Road, Dibrugarh, Assam  
PC 786 001
  
- 2. Sanjeeb Kumar Chakravarty,**  
S/o Late Bishnu Prasad Chakravarty

P.N. Road, Dibrugarh, Assam  
PC 786 001

**3. Chittaranjan Chakravarty**

S/o Late Uma Prasad chakravarty  
P.N. Road, Dibrugarh, Assam  
PC 786 001

**4. Tridib Kumar Chakravarty**

S/o Late Bishnu Prasad Chakravarty  
P.N. Road, Dibrugarh, Assam  
PC 786 001

**5. P.K. Goenka**

S/o Late Bajranglal Goenka  
R/o Central Chowkidinghee,  
Dibrugarh- 786 001,  
Assam

**6. Jyoti Prasad Kanoi**

R/o Central Chowkidinghee,  
Dibrugarh- 786 001,  
Assam

**.. Respondents**

**Present:**

**For Appellant: Shri A.K. Ganguly, Senior Advocate assisted by Shri Subhro Sanyal, Shri Ashok Sharma, Shri Vikram Hegde, Advocates**

**For Respondent Nos. 1 to 4: Shri Ashok Sharma, Chartered Account.**

**For Respondent Nos. 5 to 6: Shri Ashutosh Gupta, Shri Rishi Sood and Shri Suraj Shukla, Advocates.**

**ORDER**

**06.11.2017**

1. Heard learned Counsel for the parties. This is a matter where the Appellants/Original Petitioners filed Company Petition No. 1/2016 u/Sections 241, 242, 243 & 244 of the Companies Act, 2013 (“**Act**” in brief) claiming oppression and mismanagement before the National Company Law Tribunal (in short “**NCLT**”), Guwahati Bench, Guwahati. In the array of parties, inter alia, the Statutory Auditors- Respondent Nos. 5 & 6 were added. The said Respondents filed I.A. No. 07/2017 to delete them from the array of parties claiming themselves to be only Statutory Auditors and that they have already resigned and they are not necessary parties in the petition. The learned Tribunal has, after hearing the parties, deleted the original Respondent Nos. 5 & 6 from the array of parties. Hence this Appeal by Original Petitioners.

2. The learned Senior Counsel for the Appellants is submitting that in the Company Petition, the Appellants had made various allegations against the Statutory Auditors alleging acts of omission and commission in collusion with the Board of Directors. It is submitted that the Board of Directors were not making payments towards the PF contribution of the Workers nor the same were being paid but this information was suppressed by the Company while submitting Annual Financial Statement for the Financial year 2014-15 and the Statutory Auditors- Respondent Nos. 5 & 6 colluded with the Board of Directors. It is submitted that the Auditors were thus necessary parties as the Appellants had made specific allegations against them and even if it is to be held that for a matter of oppression and mismanagement, the Statutory Auditors are not necessary parties, but, according the learned Senior Counsel,

they are proper parties who should be before the Tribunal when it is dealing with the matter.

3. Learned Counsel for the Respondent Nos. 5 & 6 in rebuttal submits that there was an error on the part of the Statutory Auditors, while preparing Annual Financial Report of the F.Y. 2014-15 which error was accepted and their bonfides can be seen from the Audited Tax Audit Report which was submitted soon after the Annual Financial Report. The learned Counsel for the Respondent Nos. 5 & 6 has submitted that these Respondents have already resigned from the assignment of being Statutory Auditors of the Company. The learned Counsel pointed out prayer 'xv', which was made in the Company petition seeking removal of M/s. Kanoi Associates, Chartered Accountants to which the Respondent Nos. 5 & 6 belong. It is stated that as these Respondents have already resigned, the question of removal does not arise. It is stated that prayer 'xvi' of the Company Petition sought direction to Institute of Chartered Accounts of India to investigate into their conduct. It is stated that even prayer 'xvi' has become redundant because the Appellants have filed complaint with the Institute of Chartered Accounts of India. Thus, it is stated that both the prayers have become redundant and Learned NCLT considered these aspects and passed orders which may not be disturbed.

4. The learned Senior Counsel for the Appellants pointed out prayer 'xix' of the Company Petition to say that exemplary cost has been sought to be imposed on the Statutory Auditors for the acts of oppression and mismanagement. The learned Counsel has then relied on Sub -Section 2 of

Section 245 of the Companies Act to support himself that such relief can be sought against the Auditors.

5. Having heard Counsel for both the sides, we find from record that Company Petition filed before the NCLT, Guwahati Bench, Guwahati is under Sections 241, 242, 243 and 244 of the Companies Act. The acts of oppression and mismanagement under these Sections could be averred against the Company, Board of Directors, Shareholders or its members. The Statutory Auditors are admittedly none of these. Before NCLT petition was not under Section 245 of the Companies Act 2013, which is a new provision. Section 245 of the Act reads as under:

*“ 245. Class action – (1) Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (2) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, namely:-*

- (a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;*
- (b) to restrain the company from committing breach of any provision of the company’s memorandum or articles;*
- (c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;*
- (d) to restrain the company and its directors from acting on such resolution;*

- (e) *to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;*
- (f) *to restrain the company from taking action contrary to any resolution passed by the members;*
- (g) *to claim damages or compensation or demand any other suitable action from or against –*
  - (i) *the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;*
  - (ii) *the auditor including audit firm of the company or any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or*
  - (iii) *any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;*
- (h) *to seek any other remedy as the Tribunal may deem fit.*

(2) *Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.*

(3) (i) *The requisite number of members provided in sub-section (1) shall be as under:*

- (a) *in the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members*

*holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;*

*(b) in the case of company not having a share capital, not less than one fifth of the total number of its members.*

*(ii) The requisite number of depositors provided in sub-section (1) shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.*

*(4) In considering an application under sub-section (1), the Tribunal shall take into account, in particular –*

*(a) whether the member or depositor is acting in good faith in making the application for seeking an order;*

*(b) any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in clauses (a) to (f) of sub-section (1);*

*(c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;*

*(d) any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;*

*(e) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be –*

*(i) authorised by the company before it occurs; or*

*(ii) ratified by the company after it occurs;*

- (f) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.*
- (5) If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely: -*
- (a) public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;*
  - (b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;*
  - (c) two class action applications for the same cause of action shall not be allowed;*
  - (d) the cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.*
- (6) Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.*
- (7) Any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.*

- (8) *Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.*
- (9) *Nothing contained in this section shall apply to a banking company.*
- (10) *Subject to the compliance of this section, an application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in sub-section (1).”*

Perusal of the Section shows that it provides for complete procedure as to when and how it can be invoked. It is necessary to comply the requirements laid down before it is admitted. Procedure after admission is also laid down. Again, the Section is enforced w.e.f. 1<sup>st</sup> June 2016 and Annual Financial Report questioned in the petition is of 2014-15. Apart from this, the Appellants in the petition filed in November 2016 did not invoke Section 245 of the above Act which has a procedure of its own. In absence of invoking procedure under Section 245, the Appellants cannot import action possible under Section 245, in a proceeding under Sections 241, 242 of the Act. If Appellants want to rely on Section 245, they will have to do needful under Section concerned and satisfy the requisites.

6. Considering the submissions and going through the material which was before the Learned NCLT and the claims made we are unable to find error with the impugned order which has recorded proper reasons. Even otherwise, when the complaint against the Auditors is being looked into by the Institute

of Chartered Accounts of India and it is stated that investigation is still going on, it will not be appropriate that same subject should be agitated before two different Forums as there may be conflict of decisions. In the Company Petition, the learned NCLT will be looking into the acts of oppression and mismanagement by other Respondents within the framework of Sections 241 and 242 of the Companies Act, 2013 and as such we are unable to accept the submissions made by the learned Counsel for the Appellants that statutory Auditors are necessary parties to the petition under these provisions.

6. We do not find that the impugned order deserves to be interfered with. The Company appeal is dismissed. No order as to costs.

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

[Balvinder Singh]  
Member (Technical)

akc/nn