NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 331 of 2018

[Arising out of Order dated 3rd July, 2018 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad in CP No. 188/241/HDB/2017]

IN THE MATTER OF:

Nelakuditi Hari Krishna,
S/o Late Nageshwara Rao,
R/o D. No. 6-61, Rythupeta,
Nandigama Village and Mandal,
Krishna District.

...Appellant

Vs

1. Sri Vijaya Gayathri Cold Storage Pvt. Ltd.,
R/o D. No. 6-62, Rythupeta,
Nandigama Village and Mandal,
Krishna District, Pin-521185, Andhra Pradesh.
Rep. By its Director Nelakuditi Tirupataiah.

2. Nelakuditi Tirupataiah S/o Kasaiah,
R/o D. No. 6-62, Rythupeta,
Nandigama Village and Mandal,
Krishna District, Andhra Pradesh.

3. Nelakuditi Kasi Visivisweswara Rao,
S/o Nelakuditi Tirupataiah,
R/o D. No. 6-62, Rythupeta,
Nandigama Village and Mandal,
Krishna District, Andhra Pradesh.

4. Nelakuditi Subhadra,
W/o Nelakuditi Tirupataiah,
R/o D. No. 6-62, Rythupeta,
Nandigama Village and Mandal,
Krishna District, Andhra Pradesh.

5. Nelakuditi Rajyalakshmi,
W/o Kasi Visivisweswara Rao,
R/o D. No. 6-62, Rythupeta,
Nandigama Village and Mandal,
Krishna District, Andhra Pradesh.

....Respondents

Present:

For Appellant: Mr. Mithun Shashank and Mr. M. V. Mukunda, Advocates.

For Respondents: Mr. P. Nagesh and Mr. Dhruv Gupta, Advocates

J U D G M E N T

BANSI LAL BHAT, J.

Appellant – 'Nelakuditi Hari Krishna' - a shareholder of 'Sri Vijaya Gayathri Cold Storage Pvt. Ltd.' (Respondent No.1) filed petition under Section 241-242 of the Companies Act, 2013 (hereinafter referred to as the 'Act') before National Company Law Tribunal, Hyderabad Bench, Hyderabad (hereinafter referred to as the 'Tribunal') alleging fraud at the hands of Respondents 2 to 5 in reducing the share capital of Appellant to deprive him from claiming Directorship in Respondent No. 1 Company, seeking proportionate shareholdings, directorship and proportionate profits in the Respondent No. 1 Company and directing the Registrar of Companies to conduct enquiry into the affairs of Respondent No. 1. After considering the pleadings of the parties and arguments advanced on their behalf the Tribunal found that the Appellant had agreed for the transfer of firm to Respondent No. 1 and since he was only entitled to 100 shares based upon the value of the assets and liabilities of the transferor firm, allotment of 100 shares in his favour did not constitute an act of oppression or mismanagement. The Tribunal was of the further view that there was no act of oppression or mismanagement that led to the diminishing of shares of the Appellant in the Respondent No. 1. It also held that the Appellant was not single handedly eligible to file the petition under Section 241 of the Act when the number of members was twelve and the shareholding of Appellant was

less than 10 percent. The petition filed by Appellant came to be dismissed at the hands of the Tribunal in terms of order dated 3rd July, 2018 which has been impugned in this appeal on various grounds to which we shall advert to in the forthcoming paras.

2. A brief resume of the factual matrix is inevitable. The genesis of business relationship between the father (since deceased) of Appellant namely 'Nageshwara Rao' and the Respondent No. 2 namely 'Nelakuditi Tirupataiah' can be traced back to year 2007 when a firm in the name and style of 'Sri Gayathri Cold Storages' came to be registered wherein the Appellant was a partner with a holding of 23%. 'Nageshwara Rao' died in the year 2008. Allegedly Respondent No. 2 assumed complete control of the firm when the Appellant was a teenager. It was alleged that in year 2014, Respondent No. 2 alongwith his wife and other family members incorporated a company in the name of 'Sri Vijaya Gayathri Cold Storage Pvt. Ltd.', whose objects were similar and identical with the objects of 'Sri Gayathri Cold Storages'. The assets of the firm were taken over by the Respondent No. 1 Company in terms of resolution dated 24th November, 2014 allegedly passed by Respondent No. 2 to 5 with fraudulent intention. The Appellant claims to have no knowledge about the resolution, nor was a party to the meeting and did not sign the resolution. He further alleged that at the time of takeover the firm was valued at Rs.1.10 Crore. FIR No.353 of 2017 alleging commission of offence under Section 420 and 465 of IPC came to be registered at Nandigama Police Station, Krishna District in Andhra Pradesh

at the instance of Appellant. A takeover agreement dated 26th December, 2014 was entered into between the firm and Respondent No.1 in terms whereof the firm was dissolved and merged into Respondent No.1. Respondent No. 1 allotted 11,00,000 shares to all partners of the erstwhile firm. According to Appellant the allotment of shares was not proportionate to the holding of shares in the partnership firm which is demonstrated as under:-

Partner in the firm	***Holding in the firm***	***Shares allotted in the company***
N. Subadhra	*27%*	*5,86,686*
P. Jaganmohan Rao	*23%*	*100*
N. Rajya Lakshmi	*27%*	*5,13,114*
N. Hari Krishna	*23%*	*100*
Total		***11,00,000***

According to Appellant, Respondents 2 to 5 purposely allotted bare minimum shares to Appellant so as to reduce him to the status of a minority shareholder so as to deprive him of any role in the management of the Company. This was assailed by the Appellant through a petition filed under Section 241-242 before the Tribunal at Hyderabad which came to be dismissed in terms of order impugned in this appeal.

3. Heard learned counsel for the parties and perused the record. Resolution dated 24th November, 2014 passed in regard to takeover of the

firm by the Respondent No. 1 Company, though claimed by the Appellant at his back and not bearing his signatures was admittedly followed by a 'Takeover Agreement' dated 26th December, 2014 between the firm and Respondent No. 1 Company by virtue whereof the firm was dissolved. Though the Appellant termed the resolution dated 24th November, 2014 as being fraudulent in respect whereof an FIR was lodged alleging cheating and forgery, the 'Takeover Agreement' following the resolution has not been assailed. The Tribunal, after thorough examination of all relevant considerations arrived at the conclusion that the Appellant had agreed for the transfer of business of the firm to Respondent No. 1 Company. This finding is not shown to be erroneous, much less perverse. During the course of hearing learned counsel for Appellant frankly conceded that he was not assailing the 'Takeover Agreement'. In view of this development, we do not propose to pronounce upon the factum and validity of the 'Takeover Agreement', which led to dissolution of the firm and incorporation of Respondent No. 1 Company. Thus the sole grievance of the Appellant requiring consideration is whether the Appellant is entitled to allotment of 23% shareholding in Respondent No. 1 Company as admittedly in the Partnership Deed dated 25th July, 2007 profit sharing ratio of Appellant in the dissolved firm was 23%. The issue for consideration is whether profit sharing ratio can be the basis for allotment of shares in the transferee company viz. Respondent No. 1.

4. The 'Takeover Agreement' dated 26th December, 2014 admittedly executed inter-se the firm and Respondent No. 1 Company reflects the names of the partners of the erstwhile firm with their profit/ loss sharing ratio as well as capital balance as under:-

Sl. No.	**Partner**	**Address**	**Profit/loss Sharing Ratio**	**Capital Balance as on 10.12.2014 (Amt. in Rs.)**
1.	N Subadhra	6-29, Raithupeta, Nandigama	0.27	58,66.860
2.	P Jaganmohana Rao	59a-8/12-3/1, Vasavi Nagar, Patamata, Vijayawada	0.23	1,000
3.	N Rajaya Lakshmi	6-29, Raithupeta, Nandigama	0.27	51,31,140
4.	N Hari Krishna	6-61, Raithupeta, Nandigama	0.23	1,000
Total			**1.00**	**1,10,00,000**

Consideration for the takeover has been stated as Rs.1,10,00,000/-. The Takeover Agreement mentioned that the Respondent No. 1 Company shall allot 11 Lakh equity shares of Rs.10 each to the partners of the erstwhile firm i.e. the transferor firm in the same proportion in which their capital accounts stood in the books of the firm on the cut of date. The resolution dated 24th November, 2014 preceding the Takeover Agreement is said to have approved the Draft Takeover Agreement but such Draft Takeover Agreement is not forthcoming from record. Valuation of the business of the firm is said to have been carried out by the Chartered

Accountant, based whereon the value of the business of the firm was fixed on Rs.1,10,00,000/-. It is not denied that the Takeover Agreement, not called in question by the Appellant, is signed by the Managing Partner of the firm. The shares in Respondent No. 1 Company are stated to have been allotted on the basis of valuation fixed by the Chartered Accountant as on 16th December, 2014. Appellant has not assailed the certificate of the Chartered Accountant. In absence of any challenge to such valuation assessment, the valuation of the assets and liabilities of the firm as assessed by the Chartered Accountant has to be accepted. The question arising for consideration in regard to allotment of shares in Respondent No. 1 Company would be whether the book value of the assets and liabilities of the firm or the sharing of profit/ loss ratio as per the Partnership Deed would be the relevant consideration.

5. It is not in controversy that the Takeover Agreement stipulated its main object behind takeover for developing the business of the transferor firm drawing the business of transferor firm under the umbrella of a private limited company. As per Terms of Agreement book value of Rs.10 each i.e. 11,00,000 equity shares were to be allotted to the partners of the firm in proportion to their capital balance in the firm. Since, the Appellant held only 0.01% of the capital ratio he was allotted only 100 shares in Respondent No. 1 Company. Ex-facie this allocation of shares is based on the capital balance ratio as stipulated in the Takeover Agreement. It is indisputable that the capital ratio is the basis for the allocation of the equity

shares in the Respondent No. 1 Company. According to Appellant there is nothing on record to show the Appellant had contributed only 0.01% of the capital to the firm. This is countered by the Respondents, who bank upon the admission of Appellant in this regard. It has already been noticed that the Appellant has not assailed the Takeover Agreement. Therefore, he cannot be heard to say that he is relying upon the Takeover Agreement only to the extent of it being a proof of agreement inter-se the parties for takeover of business of the firm by a private limited company. The Appellant cannot be permitted to aprobate and reprobate. The Takeover Agreement forming part of the record is the primary evidence of its recitations, stipulations and terms. No stand or evidence supporting such stand contrary to the stipulations of the Takeover Agreement is admissible or of any value.

6. It is submitted on behalf of Respondents that the Respondent No. 1 Company took over the firm as a going concern in the interest of the Company to save it from the liability of capital gains after complying with the conditions laid down in Section 47(xiii) of the Income Tax Act, 1961, one of which postulated that the partners of the firm immediately before the succession become the shareholders of the Company in the same proportion in which their capital accounts stood in the books of the firm on the date of succession and their shareholding continues to be as such for a period of five years from the date of succession. To appreciate this argument it is necessary to refer to the relevant provisions of Income Tax Act, 1961 to the extent same are relevant for our purposes.

*"**Capital Gains***

45. (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place."

However, all transactions falling within the ambit of Section 45 are not regarded as transfers. Section 47 carves out exceptions to such transactions which are not regarded as transfers. It provides as under:-

*"**Transactions not regarded as transfer:-***

47. Nothing contained in section 45 shall apply to the following transfers:—

x….x….x….x

(xiii) any transfer of a capital asset or intangible asset by a firm to a company as a result of succession of the firm by a company in the business carried on by the firm, or any transfer of a capital asset to a

company in the course of demutualisation or corporatisation of a recognised stock exchange in India as a result of which an association of persons or body of individuals is succeeded by such company :

Provided that—

(a) all the assets and liabilities of the firm or of the association of persons or body of individuals relating to the business immediately before the succession become the assets and liabilities of the company;

(b) all the partners of the firm immediately before the succession become the shareholders of the company in the same proportion in which their capital accounts stood in the books of the firm on the date of the succession;

(c) the partners of the firm do not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of allotment of shares in the company; and

(d) the aggregate of the shareholding in the company of the partners of the firm is not less than fifty per cent of the total voting power in the company and their shareholding continues to be as such for a period of five years from the date of the succession;

(e) the demutualisation or corporatisation of a recognised stock exchange in India is carried out in accordance with a scheme for demutualisation or corporatisation which is approved by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992);"

From the aforesaid provisions it is clear that the gains arising from the transfer of a capital asset effected in the previous year, subject to exceptions, are deemed to be the income of the previous year and chargeable to income tax under the head 'Capital Gains'. However, transfer of capital assets falling within the clauses enumerated under Section 47 including transfer of a capital asset or intangible asset by a firm to a Company as a result of succession of the firm by a Company carrying on the same business as the firm would be exempted from being chargeable to income tax under the head 'Capital Gains' as such transactions are not regarded as transfer of a capital

asset within the meaning of Section 45. Clause (xiii) of Section 47 clearly provides that the exemption clause will come into play provided all the assets and liabilities of the firm relating to business immediately before its succession become the assets and liabilities of the Company and all partners of the firm immediately before the succession become the shareholders of the Company in the same proportion in which their capital accounts stood in the books of the firm on the date of the succession. This is apart from the fact that the partners of the firm do not receive any consideration or benefit other than by way of allotment of shares. In the instant case since the Takeover Agreement is not the subject of challenge, therefore for purposes of deriving advantage under Section 47(xiii) of the Income Tax Act, 1961, if the partners of the firm have agreed to allotment of shares in proportion to the capital account, same cannot be regarded as causing prejudice to the Appellant as a member of the successor company viz. Respondent No. 1 when it is not denied that the Respondent No. 1 Company has succeeded the erstwhile firm in the business carried on by the firm with all partners of the firm becoming shareholders in the company proportionate to their capital account as per books of the firm on the date of succession. Appellant has not been able to demonstrate that his capital holding in the firm was different than the one reflected in the books and that there was a basis for allotment of share in Respondent No.1 proportionate to the profit sharing ratio of the partner in the firm. Appellant does not appear to have questioned the allotment of 100 shares to him for about two and a half years. This is apart from the fact that the Appellant holding only 0.009% shareholding and being the only

aggrieved member out of 12 was ineligible to file petition under Section 241 of the Companies Act, 2013. Admittedly, no waiver has been sought and obtained from the Tribunal for filing the petition. In these circumstances, the Appellant cannot be heard to say that the acts complained of constituted oppression and any prejudice was caused to him.

7. Having considered the matter from all perspectives, we are of the considered opinion that the impugned order is a reasoned one and does not suffer from any legal infirmity. There being no merit in this appeal, the same is dismissed. However, there shall be no orders as to costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

NEW DELHI

3rd July, 2019

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