

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 356 of 2019

IN THE MATTER OF:

Focus Energy Limited

....Appellant

Vs.

Reebok India Limited & Ors.

....Respondents

Present:

For Appellant: Ms. Vibha Dutta, Senior Advocate with Mr. Praveen Gaur, Aditya Mishra, Ms. Priyanshi, Mr. Ujjal Banerjee, Mr. Swapnil Gupta and Mr. Akash, Advocates.

For Respondents: Mr. Sanjeev Puri, Senior Advocate.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

‘Focus Energy Limited’ (Appellant) filed petition under Sections 237, 247, 397, 398 read with Sections 402, 403 and 406 of the Companies Act, 1956 (now Sections 241-242 of the Companies Act, 2013 and other provisions) before the Company Law Board being Company Petition No. 126(ND)2015.

2. The matter was subsequently transferred before the National Company Law Tribunal (“Tribunal” for short), New Delhi Bench, New Delhi in terms of Section 434 of the Companies Act, 2013.

3. A Company Application No. 97 of 2016 was filed by the Appellant/ Petitioner praying for amendment of the original petition. As per averments, the Appellant/ Petitioner wishes to elucidate certain facts which have already been averred in the main petition against the Statutory Auditors of the Respondent Company ('Reebok India Limited') and also to take steps to amend the name of Respondent No.11- 'BSR and Co.' and implead proposed Respondent No.12.

4. The Tribunal by detailed impugned order dated 22nd October, 2019 refused to amend the name of Respondent No.11 from 'BSR and Co.' to 'BSR and Co. LLP' and to implead proposed Respondent No.12- 'BSR and Company'.

5. The petition was filed for oppression and mismanagement alleging serious acts of financial irregularities and fraud by the Directors and Management of the Respondent Company. Respondent No.1 Company is a joint venture Company with 'Reebok (Mauritius) Ltd.' and is engaged in the business of selling apparels and footwear under the brand name 'Reebok'. The Appellant (Petitioner), whose original equity in the Respondent Company was 20%, was brought down to 6.85% in the year 2003. The dilution of their stake in the company was effected through issuance of Compulsory Convertible Debentures (CCD).

6. As per allegations, the Respondents are in complete control of Respondent No.1 Company and are conducting its affairs in a manner

which is highly prejudicial to its interest and to those of its major stakeholders. The Appellant (Petitioner) wishes to amend its petition based on the reply filed by Respondent No.11 and the role of the proposed Respondent No.12. It also seeks to elucidate its submissions and allegations made in the petition against them as Auditor for covering up financial irregularities by conniving with the Directors while auditing the financial statement for the years 2007-15.

7. The basic allegation being made by the Appellant (Petitioner) while praying for amendment is that there have been various holes in the Auditing System which has given rise to a massive and systematic fraud of at least Rs.1500 crores, if not Rs.8700 crores, in the form of siphoning off the funds based on fraudulent transactions, which could not have gone unnoticed by the auditors. The Appellant (Petitioner) has submitted that pursuant to the report of the SFIO, which indicts the auditors in preparing the profit and loss statements, their connivance with the Directors of the respondent company has clearly emerged. Though the Appellant (Petitioner) has impleaded the Auditors in the present petition, the amendment sought pertains to defining their explicit role in the alleged fraud. Mr. P. Nagesh, Ld. Counsel for the Appellant (Petitioner) submits that upon the reply being filed, they have been informed that 'BSR & Co.' is now 'BSR & Co. LLP' and during the relevant period i.e. between 2007 to 2015, 'BSR and Co. LLP' was the Competent Auditor and its Statutory Auditor for the Financial Years

2014 & 15. It is further submitted that 'BSR and Company', a separate entity was the respondent's Auditor for the financial years ending March 2014 and 2015. It is for the reason that having been informed about the change of name that they wish to amend the name of Respondent No.11 from 'BSR and Company' to 'BSR & Co. LLP', and array 'BSR and Company' as the proposed Respondent No.12. In the light of the above submission, the Appellant wishes to incorporate Para 3.8 in the main petition as under:

“Respondent No.11 BSR and Co. LLP (earlier known as BSR and Co.) and their affiliates who are liable for professional mis-conduct were inducted in serious acts which are highly unbecoming of a professional. BSR and Co. LLP (earlier known as BSR and Co.) was engaged as Statutory Auditor for Financial years ending March, 2014 and March, 2015 and as component auditor for the period from 2007 to 2015, the period during which siphoning of funds in Respondent No.1 company took place with the help and assistance from Respondent No.11. The elaborated details of the same are mentioned in the petition.”

8. Learned counsel for the Appellant submitted that material on record shows that the commission of fraud and siphoning of funds and

role of Auditors highlighted by SFIO clearly bringing out the active role of the auditors in perpetuating fraud and wide scale mismanagement and diversion of funds of the company. It is submitted that the amendment sought of elucidating the grounds had already been taken in the petition.

9. SFIO investigation report relates to F.Y. 2011 to 2012. Diversion of business and illegal repatriation of company money etc. is still continuing for which the Appellant Company has specifically prayed relief of appointment of independent auditor since the year 2010 to 2015, calling for an investigation into the affairs of the Respondent No.1 Company under Section 237 of the Companies Act, 1956.

10. Respondent Nos. 1 to 3 and 7 to 9 have opposed the prayer. It was submitted that the Appellant was in full knowledge of the fact that the Respondent No.1 Company had issued the Compulsorily Convertible Debentures on 1st February, 2013 and 2nd August, 2013 respectively, details in respect of which had been duly enumerated by the Respondent No.1 Company in the Balance Sheets filed for the F.Y. 202-13 and 2013-14 respectively.

11. According to the Respondents, the amendment application was filed by the Appellant with the sole intention of causing further delay in the present proceedings in light of the fact that the Compulsorily

Convertible Debentures had to be converted into equity shares of the Respondent No.1 Company in February, 2018.

12. It was further submitted that the acts of oppression and mismanagement cannot be averred against the Statutory Auditor of the Company.

13. Learned counsel for the Respondents relied on the decision of this Appellate Tribunal in **“Shanta Prasad Chakravarty v. M/s. Bochapathar Tea Estate Private Limited- 2017 SCC OnLine NCLAT 335”**. In the said petition under Sections 241-242 of the Companies Act, 2013, the Statutory Auditors were impleaded as Respondent Nos. 5 & 6. The said Auditors have filed Interlocutory Application 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 Tribunal has, after hearing the parties, deleted the original Respondent Nos. 5 & 6 from the array of parties. The appeal was filed against the said decision by the Petitioner- ‘Shanta Prasad Chakravarty’, which was dismissed by this Appellate Tribunal. The Hon’ble Supreme Court also refused to interfere with the impugned order passed by this Appellate Tribunal by its order dated 16th July, 2018 passed in Civil Appeal No. 675 of 2018- **“Shanta Prasad Chakravarty & Ors. v. M/s. Bochapathar Tea Estate Private Limited & Ors.”**

14. In the present case, the Appellant having failed to show the ground to implead the other Auditor as party Respondent No.12 and the reasons to amend the name of Respondent No.11, they having knowledge of all the facts, Company Petition filed in the year 2015 merely because SFIO is investigating into the matter under Section 212 of the Companies Act, 2013, cannot be a ground to amend the name of the Auditor as Respondent No.11 nor can be a ground to implead another Auditor as Respondent No.12.

We find no merit in this appeal. It is accordingly, dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

[Justice Venugopal M.]
Member (Judicial)

NEW DELHI
12th March, 2020

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