

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No. 231 of 2017

[Arising out of Order dated 30th May, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in C.P. No. 29/241-242/NCLT/AHM/2016]

IN THE MATTER OF :

1. **Surgi Aid Lifecare Private Limited,
B-44/3, Hoziwala Industrial Estate,
Sachin, Palsana Road,
At Post Vanz,
Sachin – 394230, Gujarat (Original Respondent No. 1)**

2. **Chetan Nemlawala,
60/2, 72-73, Manusmurti Society,
ParvatPatia, Dumbhal,
Surat – 395010. (Original Respondent No. 2)**

3. **Shammi Nemlawala,
Plot No. -74/75,
Manu Smruti Society,
Parvat Road,
Dumbhal, Surat – 395010, (Original Respondent No. 3)**

... Appellants 1 to 3

- Versus -

**Shri Rahuldev Vyas,
4-A, Anupam Banglows,
New City Light Road,
Surat – 395007.**

... Respondentz
(Original Petitioner)

**Present: For Appellants : Shri Suryanarayan and Ms. Garima Bajaj,
Advocates and Shri Swaminathan Iyer,
Company Secretary.**

**For Respondent : Shri Vivek Chib, Ms. Amrita Narayan and
Shri Akshay Gupta, Advocates**

J U D G E M E N T

A.I.S. Cheema, J :

This appeal has been filed by Original Respondents Nos. 1 to 3 against impugned order dated 30th May, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad ('NCLT' in brief) in C.P. No. 29/241-242/NCLT/AHM/2016, whereby in the petition brought by the Respondent – Original Petitioner under Sections 241 and 242 of the Companies Act, 2013 ('Act' in brief), the same has been allowed setting aside the appointment of Original Respondent No. 3 as Director and setting aside allotment of shares as per Resolution passed on 26th December, 2016 and further directing the Respondent- Petitioner to sell his shares in the company to Respondents Nos. 2 and 3. The Appellants (Original Respondents Nos. 1 to 3), being aggrieved, have moved this Appellate Tribunal.

2. We would be referring to the parties in the manner in which they have been arrayed before the learned NCLT.

3. It would be appropriate to refer to a few facts. The Petitioner-Respondent filed the company petition on 15th November, 2016 claiming that he is one of the Directors of Respondent Company having 5000 equity shares. The Petitioner and Respondents Nos. 2 and 3 came to an understanding to set-up the company and the Petitioner was to provide his medical expertise and Respondents Nos. 2 and 3 were to manage business

of the company. It was registered as Private Limited Company on 26th April, 2010 with the object of dealing in medical devices, instruments etc. The authorised share-capital as on 19th August, 2016 was Rs. 25 Lakhs, divided into 2.50 Lakhs equity shares divided into 10,000 equity shares of Rs. 10/- each. The issued and paid-up share capital was Rs. 1,00,000/-. The Petitioner is one of the Directors. Respondent No. 2 is also having 5000 Equity Shares of Rs.10/- each. Disputes arose between Petitioner and Respondents regarding managing the affairs of the company and the efforts to reconcile failed. The Petitioner chose not to over-see the affairs of the company and let Respondents Nos. 2 and 3 carry on the business. Since January, 2012, he has not been informed about the activities of the company and did not get any notice of Board meetings or shareholders' meetings since 2012.

The Petitioner put up further case before the NCLT claiming that he came to know about suspicious activities in the company from a client in April, 2016 and then he verified the activities of the company on the web-portal of the Ministry of Corporate Affairs and came to know of Resolution dated 8th October, 2013 appointing Respondent No. 3 as Director and the Resolution that anyone of the existing Directors could sign Form – 32 to give effect to the appointment of Respondent No.3 as Director.

The Petitioner claimed that he did not get any notice for the meeting dated 8th October, 2013. The Petitioner further claimed that there was another Board of Directors' meeting held on 23rd January, 2014 regarding

which also he was not given any notice. In this meeting, the decision to permit any Director to file requisite e-forms was taken. There was yet another meeting dated 27th September, 2014 without giving notice to the Petitioner in which Balance-Sheet, Statement of Profit and Loss, Cash-Flow Statements and Directors' Report for year ending 31st March, 2014 was approved and Mitul P. Shah & Associates were appointed as 'Auditors'. The Petitioner claimed that the Petitioner and Respondents Nos. 2 and 3 were shown as Directors and Petitioner and Respondents Nos. 2 and 3 are having 5000 shares each as per the Form MGT-7 for the Financial Year 2013-14. The Petitioner claimed that although he did not attend, he was shown as present in the meetings.

The Petitioner further claimed that he wrote letter dated 19.08.2016 to IDBI Bank Ltd. and Surat People's Cooperative Bank Ltd. claiming that there was dispute between him and the Respondents regarding conducting of the affairs of the Company. While IDBI Bank Ltd. asked him to get Board Resolution, the Manager of Surat People's Cooperative Bank Ltd. accepted his letter. After this, Respondents Nos. 2 and 3 approached Petitioner for settlement and meetings took place on 24th August, 2016 and 11th September, 2016 but no solution was found. The Petitioner had gone out of city on 7th December, 2016 and when he returned he found an envelope at his door regarding notice for next Annual General Meeting (AGM) of the Company on 30th September, 2016. The notice was received after the date of meeting.

Raising such grievances, the Petitioner claimed that an independent Committee needs to be appointed; Central Government should appoint Inspector to investigate and Board of Directors should be removed.

4. In response, Respondents Nos. 1 to 3 put up their case before the NCLT claiming that relying on the Petitioner, Respondent No. 2 had asked his cousin brother, Respondent No. 3 to join his business and after negotiations, a Memorandum of Understanding was entered between the parties and it was agreed that proprietorship 'Surgi Aid Medical Equipments' would be taken over by newly promoted company, namely, 'Surgi Aid Medical Equipments Private Limited' – the 1st Respondent. All the parties were to have 1/3rd share each. The assets and liabilities were taken over on incorporation. The parties decided to have work-division based on individual expertise. At the time of take-over of 'Surgi Aid Medical Equipments', which was earlier proprietary concern, its cash credit account with 'Surat People's Cooperative Bank Ltd.' having cash credit limit of Rs. 40 Lakhs, was also taken over. At the time of incorporation, 2nd Respondent was appointed Director and Shareholder along with Petitioner. It was agreed that after incorporation, Respondent No. 3 also would be inducted as Director and shareholder. Respondents Nos. 2 and 3 invested their money in the bank. The assets and liabilities, which were taken over as per Balance Sheet made available by the Petitioner, later on showed that there was no physical stock with the firm as per the Balance Sheet and the Petitioner has cheated the respondents to the extent of having stock of Rs. 66.67 Lakhs.

The respondents gave particulars as to how there was negative value of the proprietary concern which affected the business of the company also. It was claimed that there were fictitious stocks and big debts. The respondents and other shareholders pumped funds by way of unsecured loans between 2010-11 and 2015-16. The Company released personal property of Petitioner from the bank in September, 2012 – November, 2012 by mortgaging personal property of Respondents Nos. 2 and 3. Respondent No. 3 was appointed Director on 8th October, 2013.

Respondents claimed that the Petitioner himself chose not to attend the day-to-day management of the affairs of the Company. They have given details of the meetings of Board of Directors held between 2012 and 2016. Respondents claimed that in August, 2016, the Petitioner wrote letters to IDBI Bank Ltd. and Surat People's Cooperative Bank Ltd. informing that there are disputes. The Respondents claimed that on 20th October, 2016, the Petitioner was served with notice of the Board Meeting fixed on 12th November, 2016. The Agenda was against the Petitioner and although the Petitioner attended this Board meeting, he suppressed facts about the same while he filed this petition on 15th November, 2016.

The Respondents further claimed that when they had analysed the account of proprietary firm 'Surgi Aid Medical Equipments', they came to know that debts of Rs. 11.34 Lakhs due from B. Hasamal and Cie, which was due to proprietary concern was recovered by the Petitioner and he siphoned off the funds to his personal accounts although the proprietary

concern was already taken over by the 1st Respondent Company along with its debtors. The respondents gave further details of withdrawals made by the Petitioner behind their back.

Respondents further claimed that the Petitioner was Director in M/s. Zest Orthocare Private Ltd. and M/s. Zyro Woundcare Pvt. Ltd. and his wife was shareholder in these companies. They came to know of this when they made search in this regard. Thus, those Companies took credit from 1st Respondent Company without disclosing to these Respondents that the Petitioner and his wife have got interest in those companies which was in violation of Section 185 of the Act. The Respondents also claimed that the Petitioner was doing competitive business against Respondent No. 1 Company and it was resolved to issue show cause notice in the Board meeting dated 12th November, 2016. The notice of this meeting was served on 28th October, 2016. Non-participation of the Petitioner was with full knowledge and express consent of the Petitioner himself and thus he was estopped from raising issues. There was provision in the settlement of 2012 itself which provided that Respondent No. 3 would be appointed Director of the Company and, accordingly, he was appointed Director on 8th October, 2013. Respondents have given particulars as to how the Petitioner was changing his addresses because of which service of notice of Board Meetings on him became difficult. The Petitioner did not question appointment of 3rd Respondent in earlier correspondences of 2016. In fact, he signed the Balance-Sheets of 2014 and 2015. According to the Respondents, the Petitioner as a Director was himself also bound to take

steps to conduct meeting of the Board as per the requirement of the Act but he took no steps after 2012. On 30th September, 2014, it was an Annual General Meeting which was held and not Extra-Ordinary General Meeting. Respondents claimed that notice of the AGM dated 30th September, 2016 was posted to the Petitioner and as Petitioner was complaining that he had not received notices, Respondent No. 2 visited the given residential address of the Petitioner but came to know that the Petitioner was not staying there. Respondent No. 2 then went to the clinic of the Petitioner and dropped the notice of the meeting at the premises which Petitioner is claiming to have later on received on 7th October, 2016. Even SMS was sent to the Petitioner and replies were sent via e-mail ID of the Petitioner.

Pending the Company Petition, to arrange finance, Board Meeting was held on 7th December, 2016 and it was decided that the Petitioner should contribute to the shortfalls of unsecured loans to tide-over the financial crunch. The notice of the Board Meeting was circulated in advance which meeting was scheduled on 7th December, 2016. One day before the meeting, the Petitioner sought adjournment of the meeting on the ground of ill-health. The Respondents were willing to postpone the meeting if the Petitioner deposits his share of unsecured loans as mentioned in the agenda papers but the Petitioner did not remit nor replied. On 7th December, 2016, Board's Resolution was passed offering 50000 Rights Shares of Rs. 10/- each at par to the existing shareholders.

On 17th December, 2016, notice was issued for Board Meeting to be held on 26th December, 2016 to allot Rights Shares. Petitioner did not apply in response to the Rights Shares offered. Respondents have given particulars of the shares thereafter allotted to the other respondents. Before the meeting dated 26th December, 2016, Petitioner moved the NCLT vide I.A. No. 38 of 2016 and the advocate of the Respondents gave an undertaking to the NCLT that the Company would not give effect to the Resolution as may be passed on 26th December, 2016 till next date. On 2nd March, 2017, as the Petitioner sought adjournment in the NCLT, counsel for the Respondents withdrew the undertaking and thus the Company acted upon the Resolution dated 26th December, 2016.

5. The learned NCLT heard the parties and recorded its reasons. It held that the Petitioner was not served with the notice of Board Meeting dated 8th October, 2013 appointing Respondent No. 3 as Director. NCLT found that oppression of the Petitioner had not been proved but proceeded to pass orders to set aside allotment of shares dated 26th December, 2016. It also directed the Petitioner to sell his shares to the Company and directed Respondents Nos. 2 and 3 to purchase the shares at fair market value fixed by independent Valuer to be confirmed by the Tribunal.

6. We have heard learned counsel for both the sides.

7. Learned counsel for the Appellants criticised the impugned judgement of the NCLT and stated that the finding that Resolution dated 8th October, 2013 is invalid is wrong. The counsel submitted that the

record itself showed that the Original Petitioner was changing addresses and was not being found on the recorded address and it was an admitted fact that the Petitioner himself had chosen not to take part in the day to day affairs of the Company since 2012. The impugned order itself mentioned that the Petitioner had himself kept away from the affairs of the Company from 2012 and that he was changing his residence which was recorded with the Registrar of Companies. Reference was made to Paragraph 15 of the impugned order. The NCLT itself recorded in Paragraph 16 of its judgement, that it was the duty of the Petitioner to inform about change of his address and it was not for the company or other shareholders to find out the change in residential address of the Petitioner. According to the Counsel for the appellants/Respondents, the NCLT with regard to delay and laches on the part of the Petitioner observed in paragraph 17 of the impugned order as under :

“Delay and laches on the part of the petitioner:

17. *It is a fact that the petitioner himself kept away from the affairs of the company from 2012. Again in the year 2016, petitioner started inquiring about affairs of the company. Thereafter, he filed this petition in November, 2016. Petitioner being 50% shareholder and being director kept quiet for more than four years without bothering what is happening in the company. Petitioner did not even*

chose to inform change in his address. Petitioner did not chose to find out whether statutory obligations which are required to be complied by the company have been complied or not. Such a petitioner, after lapse of four years is not entitled to ask for any equitable relief other than appointment of respondent 3 as Director was not valid. Therefore, it is on the ground of delay and latches, Petitioner is not entitled to any equitable relief in this case even though the appointment of respondent No. 3 is not valid.”

8. It is further pointed out by the appellants that the NCLT found in Paragraph 18 of the impugned order that admittedly the Petitioner had floated two companies without informing the Respondents and the material on record showed that the Respondents were made to sell the products of the Respondent Company to the companies floated by the Petitioner.

9. In paragraph 18 of the impugned order, it was observed :

“18. Petitioner having kept quiet without bothering about affairs of the company for four years, chose to write to the bankers to freeze accounts of the company. Moreover, petitioner, admittedly floated

two companies viz. M/s. Zest Orthocare P. Ltd. and M/s. Zyro Woundcare P. Ltd. without informing the respondents. Material on record also show that respondents were made to sell the products of 1st respondent company to the Companies floated by the petitioner. A perusal of annexure R-10 and annexure R-11 give support to the aforesaid facts. Further, perusal of annexure R-9 to reply show that petitioner after having sold 1st respondent company all the debtors including debtor B. Hasamal and Cie from whom Rs. 11.34 lacs were recoverable, recovered the said amount and siphoned off the said amount to his personal account without knowledge and consent of other Directors. In the bank statement issued by State Bank of India it is mentioned that Rs. 4,93,007 was credited in May 2010 in the bank account of Surgi Medical Equipments towards export proceeds and an amount of Rs. 6,17,820 was credited in October, 2010. Both these amounts were not shown in the accounts of the 1st respondent company.”

10. From the above, it is clear that the learned NCLT could see from the record that the original Petitioner was not with clean hands. Rather, the

last paragraph of the impugned order shows that the NCLT was not in a position to give a finding on 'oppression and mismanagement' but strained itself to pass orders for setting aside appointment of Respondent No. 3 and cancelled the allotment of shares on 26th December, 2016 (which development had occurred pending the Company Petition). When it is on record that Petitioner himself opted not to oversee affairs of the Company since 2012 to 2016 and failed to discharge statutory duties, equity should hardly stand in his favour. It is also on record that he was changing addresses without bringing the same on record. It is also held against him that he illegally diverted money due to the Company to his account. It is surprising that NCLT should still have given any relief to such Petitioner.

11. Learned counsel for the Appellants - Original Respondents referred to Annual Return for financial year 2014-15 (copy of which is at Page 189 of the Paper Book) to show (from Page 198) that three Directors were shown including Respondent No. 3. It has been argued that although such return had been filed, the Petitioner did not object for long. The counsel referred to the Memorandum of Understanding dated 9th January, 2010 subsequent to which the Company was incorporated (the document is at Page 313 of Volume -II of the Paper-Book). It has been submitted that this document bore signatures of the Petitioner as well as Respondents Nos. 2 and 3. It is argued that initially when the Company was incorporated, the Petitioner had expressed that if there are more than two Directors shown, it would be more time-consuming to form the Company and thus initially Respondent No. 3 was not shown as Director but it was agreed between

the parties since beginning that Respondent No. 3 would also be made Director. Reference has been made to Paragraph 4 of the affidavit in reply filed by Respondents Nos. 1 to 3 in the company Petition (Page 244 of Volume-II of Paper-Book). The counsel then referred to the minutes of the meeting dated 12th November, 2016 where without raising objections to Respondent No. 3 signing as Director, the Petitioner also had signed the minutes. No doubt, the minutes are dated 12th November, 2016 and the petition came to be filed on 15th November, 2016 but the submissions are that if the Petitioner had objections, he would not have signed the minutes without protest. We find substance in these arguments. The learned counsel for the Respondent – Petitioner was asked at the time of hearing as to why there was delay in questioning the appointment of Respondent No. 3 which was made on 8th October, 2013 till the petition came to be filed in 2016. However, the learned counsel for the Respondents made submissions with reference to subsequent issue of further shares and when again asked regarding the appointment of Respondent No. 3, the counsel stated that he was not pressing the matter as regards the appointment of Respondent No. 3 as Director.

12. Looking to the submissions as well as the record, for above reasons recorded, we find that the conclusions drawn by the NCLT that the appointment of Respondent No. 3 as Director was not valid, deserves to be set aside.

13. The other question which arises for decision in this matter is the act of the original Respondents calling for a meeting on 7th December, 2016 and resolving that the Petitioner should contribute Rs. 14.54 Lakhs to tide-over the financial crunch, failing which, Rights Shares of Rs. 5 Lakhs should be issued. These developments are pending matter before NCLT. Counsel for the Appellants referred to notice dated 7th December, 2016 which was sent to the Original Petitioner (Copy at Page 816 in Volume –IV of Paper-Book). It is submitted that the Petitioner was given notice regarding the meeting to be held on 7th December, 2016 and after the meeting of 7th December, 2016, this offer was sent to the Original Petitioner offering him 25000 Equity Shares of Rs. 10/- each at par to subscribe to the additional share capital of the company. The offer was kept open for 15 days but the Petitioner did not avail the same. In this regard, learned NCLT observed in Paragraph 20 of the impugned order as under :

“20. Subsequent to filing of this petition, 1st respondent company called for a meeting on 07.12.2016 and resolved that petitioner should contribute Rs. 14.54 lacs to tide over the financial crunch failing which right shares of Rs. 5.00 lacs should be issued. According to the respondent, notice of the meeting scheduled on 07.12.2016 was sent to the petitioner on 29.11.2016. Petitioner did not attend the meeting but one day prior to the meeting he

sought for postponement of the meeting on the ground of his sickness. Company agreed to postpone the meeting in case petitioner pay Rs. 14.50 Lacs towards shortfall of his deposit. Since the petitioner neither remitted the money nor replied to the notice dated 29.11.2016, Board of Directors on 07.12.2016 passed resolution for issuance of 50000 right shares of Rs. 10/- each at par to all the shareholders. All the shareholders except petitioner applied for right shares. Respondent 2 applied for 43000 equity shares against his eligibility of 22000 shares and respondent 3 applied for 5000 equity shares against his eligibility of 500 shares. Necessary cheques were deposited with bank account of the 1st respondent company.”

14. The learned NCLT found fault with such decision of the respondents calling upon the Petitioner to deposit Rs. 14.54 Lakhs to tide over the financial crunch and on failure to proceed to issue Rights Shares to other shareholders. It can be seen that the Petitioner had before the meeting moved I.A. No. 38 of 2016 to restrain the Respondents from holding the meeting dated 26th December, 2016. At the time of hearing on 23rd December, 2016, counsel for the Respondents gave an undertaking that the Resolutions as may be passed in the Board Meeting scheduled to be

held on 26th December, 2016 will not be given effect to till the next date of hearing.

15. On the next date, as the Original Petitioner sought adjournment, the undertaking was withdrawn. It appears that the Petitioner had sought adjournments of the meeting from Respondents but for reasons recorded in the Minutes that was not acceded to. The NCLT interfered with the issue of the Rights Shares on the basis that there was no justification for the Respondents to demand Rs. 14.54 Lakhs or else they will issue Right Shares. It held that there was undue haste and against interest of Petitioner and contra to the Articles of Association.

16. We find that these were developments pending the company petition. The learned counsel of the Respondents was asked at the time of arguments as to why the Petition was not amended to claim setting aside such shares issued. Learned counsel accepted that the petition was not amended but submitted referring to the Minutes dated 7th December, 2016 (Page 844 in Volume –V of Paper-Book) to show that there were no *bonafide* in the decisions taken by the Respondents. He claimed that there was urgency to the extent of Rs. 5 Lakhs but still 50000 shares were issued although the funds were available with the company as can be seen from the Statement of Accounts from Surat People's Cooperative Bank Ltd., which have been filed (Page 881 in Volume-V of Paper-Book). Thus, according to the counsel, the NCLT rightly held that the Respondents had

proceeded with undue haste. The Counsel however agreed that he cannot show how the issue of Right Shares was contra to Articles of Association.

17. After going through the material on record and the Minutes dated 7th December, 2016, we find that notice had been issued to the Petitioner regarding the meeting to be held on 7th December, 2016 and he submitted detailed comments which the Board of Directors considered and discarded. There was then further meeting on 26th December, 2016, Petitioner filed the I.A. No. 38 of 2016 in the NCLT, but he did not participate in the meetings. The Board of Directors took decision considering the affairs of the company to tide over their financial difficulties and if that was done, the same could not have been set aside merely by observing that there was no justification for the acts of the Respondents or that there was undue haste. The justification is borne out from the Minutes of these meetings. Minutes dated 7th December, 2016 took account of the contributions and shortcomings of all the other Directors and concluded that Petitioner should be asked to contribute Rs.14.54 Lakhs by way of deficit unsecured loan to equalize funds pumped in by Nemlawala family and Vyas family failing which Rights Shares will have to be issued. If facts and figures of contributions of other Directors was put on record and Petitioner was asked to match it or accept issue of further Right Shares under Section 62 of the Companies Act, 2013, it was internal decision. When procedure is followed and steps taken, the acts could not have been questioned branding them as undue haste. Such considerations of the Board cannot be found fault with being matters of company affairs. If the Petitioner had

difficulty, he should have participated in the meetings to say whatever he wanted. In the facts of present matter, we find ourselves unable to agree with the learned NCLT.

18. We find that when the NCLT could not record finding of oppression or mismanagement and there was material to show that the Petitioner had not come with clean hands, it was not open for the learned NCLT to still go on to set-aside the appointment of Respondent No. 3 and set aside shares issued as per the Resolution passed on 26th December, 2016 or give direction that the Respondents will purchase the shares of the Petitioner.

19. For the above reasons, the appeal is allowed. The impugned order of the NCLT is quashed and set aside. The Company Petition filed by the Respondents (Petitioner) before NCLT is dismissed. The Respondent (Original Petitioner) shall pay costs of Rs. 1 Lakh to the account of Appellant No. 1 Company.

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

[Justice Bansi Lal Bhat]
Member (Judicial)

[Balvinder- Singh]
Member (Technical)

New Delhi

13th December, 2017.

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