

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.385 of 2018

[Arising out of Order dated 26.09.2018 passed by National Company Law Tribunal, Mumbai Division – II, Mumbai in C.P. 3612/241-242/(MB/2018)]

IN THE MATTER OF:

Before NCLT

Before NCLAT

- | | | |
|--|--------------------------|----------------|
| 1. V.R.G. Healthcare
Private Limited,
Plot No.278, Central
Bazar Road,
Ramdaspath,
Nagpur - 440011 | Original Respondent No.1 | Appellant No.1 |
| 2. Dr. Sameer Narayan
Paltewar,
502, Le Prestige,
Besides Bisne Hospital,
Ramdaspath,
Nagpur - 440011 | Original Respondent No.2 | Appellant No.2 |
| 3. Mrs. Sonali Paltewar
502, Le Prestige,
Besides Bisne Hospital
Ramdaspath,
Nagpur - 440011 | Original Respondent No.3 | Appellant No.3 |

Versus

Mr. Ganesh Ramchandra
Chakkarwar
Chakkarwar Court,
Sitabuldi,
Nagpur

Original Petitioner

Respondent

For Appellant: Shri Rishabh Sancheti, Ms. Padma Priya, Shri Anchit Bhandari and Shri J.K.Gilda, Advocates

For Respondent: Shri P.K. Mittal, Shri Nitin Lalwani and Shri Amit Rajkotiya, Advocates

J U D G E M E N T
(14th February, 2019)

A.I.S. Cheema, J. :

1. This Appeal has been filed against Impugned Order dated 26.09.2018 passed by the National Company Law Tribunal, Mumbai Division – II, Mumbai ('NCLT', in short) in C.P. 3612/241-242/(MB/2018) which Order was passed at 4.30 p.m. on that day.

2. It appears that the Respondent – original Petitioner filed the Company Petition before NCLT at Mumbai on 19.09.2018 making grievances of oppression and mismanagement against the Appellants. It appears that the Respondent also filed Writ Petition No.6154 of 2018 in the High Court of Judicature at Bombay, at Nagpur Bench. Initially, the Writ Petition came up before the High Court on 21.09.2018 (see Reply – Diary No.8635 – Page 64). The High Court passed the following Order:-

“Heard Advocate Shri Dewani for the petitioner. It appears that National Law Company Tribunal is presently not in position to take up the controversy. The petitioner apprehends removal from Board of Directorship of respondent no.1 – company in meeting scheduled on 22-9-2018. Petitioner also has pleaded that after such removal, share holding pattern may itself be drastically changed to reduce the petitioner to minority.

In this situation, notice, returnable on 26-9-2018.

Though the meeting may go on, outcome therein shall not be given effect to till next date.”

It is stated that as the Bench of NCLT due to vacation was not available, the Writ Petition was required to be filed and taken up before the High Court.

3. The matter came up before NCLT on 26.09.2028 at 10.30 A.M. This was at Mumbai and NCLT passed the following Order at 10.30 A.M.:-

“AT 10.30 a.m.

The professional appearing for the petitioner requested this bench for ad interim orders. As the judicial protocol demands, the matter cannot be taken up when the Hon’ble High Court is likely to hear the same today itself and concurrently hearing the same matter by two forums is not proper.

In view of the above, the professional may inform the Hon’ble High Court that the NCLT is taking up the matter for hearing on 03.10.2018 for passing appropriate orders.

The professional representing the petitioner may take up appropriate steps towards the same. List this matter on 03.10.2018 for further consideration.”

4. Thus, the NCLT adjourned the matter to 3rd October, 2018 for further consideration. On the same date of 26.09.2018, the Writ Petition came up before the High Court Bench at Nagpur and the Hon’ble High Court passed the following Order:-

“By way of present petition, the petitioner seeks a writ to the respondent no.1. The petitioner has sought a relief from this Court of directing the respondents to not to hold the General Meeting of the respondent no.1 Company, scheduled to be held on 22.09.2018.

The respondent no.1 is a Private Limited Company. The perusal of the cause title would reveal that all the three respondents are either Private Limited Company or private individuals.

By now it is settled principle of law that a writ under Article 226 of the Constitution of India would lie against the State or its instrumentality.

In view of the law laid down by the Hon'ble Supreme Court in the case of **Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust .vs. V.R. Ruadni** reported in **(1989) 2 Supreme Court Cases 691**, the writ would lie against an institution which is enjoined to perform certain public duties. Nothing of that sort is pointed out in the present writ petition.

Therefore, we do not wish to entertain the present writ petition in extra ordinary jurisdiction under Article 226 of the Constitution of India. The writ petition is, therefore, rejected.”

5. The above Order shows that when the matter was taken up at Nagpur, the Appellants – original Respondents were represented by an Advocate. However, it appears that immediately, if not soon after such Order was passed by the Hon'ble High Court Bench at Nagpur, the Respondent – original Petitioner again moved NCLT at Mumbai and NCLT, which had already adjourned the matter to 3rd October, 2018, appears to

have taken up the matter again at 4.30 p.m. and proceeded to pass the following Order:-

“At 4.30 p.m.

When the matter was taken up in the morning a direction was given to the petitioner to inform the Hon’ble High Court that this Tribunal would take up the matter on 03.10.2018. In view of the rejection of the Writ Petition by the Hon’ble High Court, this matter was heard in the afternoon on an urgent motion by the petitioner.

Heard Shree Mahesh A. Athavale, PCS. The contention of the petitioner is that the petitioner holds 33% shares in the company and apart from that he had advanced unsecured loans for the smooth functioning of the company. Further, the petitioner was the original signatory to the Memorandum along with the Respondent No. 2 and another person. The company was incorporated in the year 2006. Subsequent to the incorporation, the objectives, as mentioned in the Memorandum has been carried out, the construction of the hospital is completed and is functioning till this date. Sometime in the middle of 2017 the petitioner on the advice of the respondent No 2 and for the smooth functioning and betterment of the company and to facilitate bank finances, had transferred about 17% shares to the Respondent No. 2. It has come to light that the competent committee constituted by the Government had de-empanelled the Respondent No. 1 hospital from the MGPJAY scheme which was intended to serve the poor patients. As a result of de-empanelment, the petitioner submits, the company would lose lot of income and would incur bad name in the medical circles. The petitioner who invested his money in the company made efforts to find out the reasons as to why such de-empanelment had taken place and in the said process of enquiry he had come to know that several irregularities pertaining to the management had taken place. The Respondent No. 2 who is a Managing Director of the company, as submitted by the petitioner, could not have created such a

situation warranting the interferences of the Government authorities for the de-empanelment. The petitioner was making his own efforts to safeguard the interest of the Company and his investments. While the matters stood thus, the Respondent No. 2 had issued notice on 6th September, 2018 for the inclusion of an Agenda item to the Annual General Meeting for the removal of petitioner as the Director of the Company.

Subsequently, notice was issued to the members by the Respondent No. 3 proposing a resolution for the removal of the petitioner as the Director. The explanatory statement attached to the said notice, evidently does not contain any reasons, let alone tenable reasons, for the removal of the petitioner as the director of the Company. In exercise of his rights as substantial shareholder of the company, the petitioner had approached this Forum for an appropriate relief on 19th September, 2018 and as the Tribunal was on vacation and on account of transfer of the Judicial Member who is supposed to hold the vacation court was transferred, the matter could not be taken up and appropriate relief could not be passed. However, the petitioner had approached the Hon'ble High Court, Nagpur Bench under Article 226 of the Constitution projection the reasons and the urgency involved in the matter. The Hon'ble High Court had passed an Interim Order on 21st September, 2018 stating that the Annual General Meeting may go on but the outcome therein shall not be given effect to till next date and posted the matter today for further consideration. It is submitted by the petitioner that the Hon'ble High Court had dismissed the said Writ Petition. The petitioner, left with no other choice had moved urgent motion before this Bench praying for ad-interim orders.

We have considered the contentions, statements made by the petitioner and we are convinced that there is a prima facie case in favour of the petitioner and balance of convenience is also in favour of the petitioner and if interim orders are not passed, the petitioner will suffer irreparable loss which cannot be compensated in terms of money for the reason that in the event the company which runs the hospital suffers bad name, being the director and substantial

shareholder of the company, the petitioner has to bear the negative image apart from losing valuable investments made in to the company. Therefore, in this background of the matter, we hereby direct the respondent not to alter the shareholding pattern of the company and also not to give effect to resolution, if any, removing the petitioner as director of the company until further orders. ‘A’

In the event, the respondent had uploaded the resolution removing the petitioner as a director of the company, respondents are directed to immediately remove/ delete the said resolution from the MCA postal, the DIR-12 must be cancelled and take appropriate steps to restore the name of the petitioner as a director of the company. ‘B’

The respondents are directed to file their counter within four weeks by duly serving the copies to the petitioner and get ready to argue the matter on 15th November, 2018.

Hence this order.”

[Emphasis supplied – Highlighted and marked portions – See para 12 infra]

Aggrieved by such Order passed at 4.30 p.m., the present Appeal has been filed by the Appellants – original Respondents. The case Original Petitioner put up before NCLT to seek the “ad-interim orders”, we can see in the Impugned Order itself. Although at the time of arguments before us, the Counsel for Respondent – original Petitioner tried to say that he had sent Notice by speed post and e-mail before Impugned Order was passed by the learned NCLT, the Counsel accepted that the Impugned Order does not show anywhere noting that Notice had been served either by the party

or by the NCLT on the Appellants – original Respondents before passing such Order at 4.30 p.m.

6. The Appellants in the Appeal are claiming and it has been argued for the Appellants that the Appellant No.1 Company was Incorporated in 2007 and commenced operations in 2012. According to the Appellants, the Respondent – original Petitioner was Chairman-cum-Managing Director of the Company and it was the Respondent – original Petitioner who was responsible for management of day-to-day affairs and finances of the Company. The Respondent – Petitioner, a CA, having financial expertise and knowhow was solely in-charge of the finances and statements of the Company. In spite of specific understanding amongst the Directors, that the Directors would not charge interest on unsecured loan advances by them, the Respondent charged interest @ 18% on unsecured loan advanced by him; Respondent, without authorization, advanced interest free loan to private entities which included his relatives to the extent of Rs.1,75,03,009/-; Respondent advanced interest free loans to his relatives; Respondent referred 523 patients for treatment to the hospital on the understanding that the expenditure would be offset against income of the Respondent, but no such offset was done; and that the amounts were waived off by Respondent. Resultantly, the Company suffered loss of Rs.38,96,780/-. According to the Appellants, explanation was called for from the Respondent – Petitioner but he did not respond and resigned from the post of Chairman of the Company and the Appellant No.2 came to be

nominated as Chairman/CMD on 24.11.2017. According to the Appellants, various letters were sent to the Respondent – original Petitioner for the amounts outstanding, but he did not respond. Ultimately, it was decided that during the AGM scheduled on 22.09.2018, issue of removal of Respondent from directorship should be discussed. Appellants claimed that Respondent falsely alleged financial mismanagement by the Appellant No.2 and moved NCLT with the Company Petition as well as filed Writ Petition claiming that the General Meeting dated 22.09.2018 may not be held. The Appellants claimed that the learned NCLT did not consider maintainability of the Petition and by Order, which if it was to be passed, should have been Interim Order, granted final relief to the Respondent contrary to the law. Order in the nature of mandatory permanent injunction has been passed without affording any opportunity to the Appellants and is in complete violation of principles of natural justice. According to the Appellants, the Respondent obtained the above Impugned Order misleading the NCLT by keeping NCLT in dark regarding his own financial misconduct because of which, he had already tendered his resignation from the chairmanship of the Company on 24.11.2017. According to the Appellants, the Respondent suppressed that he had been issued letters dated 09.07.2018, 25.07.2018 and 27.08.2018 to pay back amounts. At interim stage, no such orders in the nature of final orders could have been passed without hearing both sides.

7. The learned Counsel for the Respondent accepted that the Respondent was Managing Director in the Company since before and till November, 2017. According to the Counsel for Respondent, the Respondent had invested about 12 Crores of rupees in the Company against hardly one Crore on the part of the Appellant No.2. The Counsel stated that the Respondent earlier had 50% shareholding and Appellant No.2 had 50% shareholding. The Appellant No.3 is the wife of Appellant No.2. The Counsel stated that out of the 50% shareholding of the Respondent – original Petitioner, due to certain representations made by the Appellant No.2, the Respondent transferred 17% of his shares to the Appellant No.2 because of the relations and understanding between them. The Counsel claimed that the Respondent – original Petitioner had resigned in November, 2017 on his own as he could not bear bungling being done by the Appellants. The Counsel for Respondent – Petitioner referred to Notice, which was sent by original Respondent No.2 (Appellant No.2) for removal of the Respondent – Petitioner as Director, copy of which has been filed at Page 401 (Diary No.8869) and the subsequent Notice issued by original Respondent No.3 - Appellant No.3, copy of which is at Page – 402. Reference was made to the statement under Section 102 of the Companies Act, 2013 ('new Act', in short), which is at Page 404, to say that the statement did not contain any reasons, let alone tenable reasons, as has been observed in the Impugned Order.

8. The learned Counsel for the Respondent was unable to convince us at the time of arguments that there could be any justification to suddenly take up the matter at 4.30 p.m. by NCLT when it had already adjourned the matter to 3rd October, 2018 at 10.30 a.m., without serving the original Respondents/Appellants with any Notice.

9. The learned Counsel for the Respondent – original Petitioner submitted that mandatory directions passed in the Impugned Order are not material as they are not effective as no DIR 12 has actually been submitted although the Respondent – original Petitioner has been removed by Resolution dated 22.09.2018.

10. We have gone through the Company Petition and its Annexures which have been filed with Diary No.8869. We have also gone through the Appeal and grievances being raised by the Appellants – original Respondents in the Appeal as well as Rejoinder.

11. Going through the material, on one hand, the Company Petition filed by the Respondent – original Petitioner is showing various acts on the part of Appellants 2 and 3, who are husband and wife and on the other hand, the Appellants in their Appeal and Rejoinder are pointing out various acts on the part of Respondent – original Petitioner as grievances of both sides against each other. Keeping the fact in mind that the learned NCLT is yet to consider and analyse the cases of both sides, we refrain from referring to the allegations and counter allegations in details. Brief

reference to the rival cases is already reflected in the Impugned Order and arguments of the parties against each other. We are not making detailed references to the rival cases because on the face of the Impugned Order, we are convinced that it was improper on the part of NCLT to pass the Impugned Order, in the manner in which it has been passed foreclosing further considerations on the Impugned Order, as the Impugned Order does not say that it is Interim Order subject to conformation after hearing the other side. When a Company Petition is filed, the Petitioner may show the NCLT that circumstances exist for passing immediate Interim Orders. In such circumstances, NCLT would be justified in passing Interim Orders, if the case of extreme urgency is made out. Such Orders would and should be subject to confirmation on hearing the other side for which opportunity should be left open. In the present matter, NCLT has noted that the Petitioner moved NCLT for "Ad Interim Orders" but the Orders as have been passed, do not purport to say that they are Interim Orders and the original Respondents (Appellants) are to be heard. When the Hon'ble High Court itself in its wisdom had on 21.09.2018, preferred to issue Notice and in the meanwhile, directed that the meeting may go on but the outcome therein shall not be given effect till next date, the NCLT could have itself adopted similar recourse and the Order could have stated that the Resolution as may have been adopted would remain stayed till the next date. Instead of that, NCLT simply pronounced magic words that there was a prima facie case in favour of the Petitioner and balance of convenience is also in favour

of Petitioner and that if Interim Orders are not passed, Petitioner will suffer irreparable loss on the basis that if the Company which runs the hospital suffers bad name, the Petitioner will bear the negative image apart from losing valuable investments. The question of Company suffering bad name appeared to be based on de-empanelment of the hospital. Record shows (Annexure P8 of the company Petition – Diary No.8869 – Page 118) that the hospital had already been de-empanelled from the Mahatma Jyotiba Phule Jan Arogya Yojna on 28th February, 2018 itself. Thus, whatever harm had to take place on that count had already taken place. NCLT not only restrained the Respondents – Appellants from altering shareholding and from giving effect to the Resolution removing the Respondent – Petitioner as Director until further Orders, but also went ahead to pass Orders which are in the nature of mandatory Orders to cancel DIR 12 etc. which were not necessary.

12. We are not setting aside the Impugned Order as a whole as, going through the rival cases, it appears to us that both sides would require explaining to be done as interest of Company as a whole is to be protected.

We pass the following Orders:-

ORDER

A) For the above reasons, we set aside the portions of Impugned Order (highlighted and marked 'B' in para 5 – supra) where it is directed that if the (original) Respondents have uploaded the Resolution, they

should remove/delete the same from MCA portal and that DIR 12 must be cancelled.

B) As regards the other directions (highlighted and marked 'A' in para 5 – supra) where NCLT has directed the (original) Respondents not to alter the shareholding pattern of the Company and also not to give effect to the Resolution, if any, removing the original Petitioner as Director of the Company, we set aside the words suffixed “until further orders”. We direct that rest of this direction of NCLT (highlighted and marked 'A' in para 5 – supra) shall be treated as Ad-Interim Orders which shall remain in force till Appellants – original Respondents are heard giving opportunity as to why the Ad-Interim Order should not be confirmed pending decision of the Company Petition.

14. The Impugned Order is modified accordingly and the Order passed by NCLT shall be treated as Ad-Interim Order. The parties before us are directed to appear before NCLT on 05.03.2019. The Appellants shall file Reply to the Company Petition and Reply to the Ad-Interim Relief claimed by the Respondent – Petitioner to be filed within time NCLT may specify. NCLT is directed to hear both the parties and decide regarding the Interim

Relief expeditiously. If any party protracts, NCLT may take any further suitable decisions and pass appropriate orders.

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

[Balvinder Singh]
Member (Technical)

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