

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT) NO.13 OF 2018

(Arising out of order dated 23.11.2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in CP No.68/241&242/NCLT/AHM/2017 with IA No.183 of 2017).

BEFORE BEFORE
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IN THE MATTER OF:

1. Shailesh P. Gonawala,
S/o Pranal Gonawala,
Residing at 3/1884, Chandi Bhavan
Khangad Sheri, Salabatpura, Surat-395003
Petitioner Appellant No.1

2. Rameshchandra A. Morawala
S/o Amaratlal Morawala,
Residing at 8, Abhinav Park,
Ghod Dod Road,
Surat-395001
Petitioner Appellant No.2

Vs

1. Shree Saisang Associates Pvt Ltd
3/2169, Near Ram Mandir
Salabatpura, Surat-395003. Respondent No.1 Respondent No.1
2. Shailesh U. Vakharia,
15, Narayan Bldg, B/H, Rajhans Talkies,
Vesu, Surat-395007 Respondent No.2 Respondent No.2
3. Navinchandra P Indorwala,
22/23, Bhairav Nagar, PO Bhestan,
Udhna, Surat-395023. Respondent No.3 Respondent No.3
4. Indrajit H. Mashruwala,
3/2020, Sidhi Sheri,
Salabatpura, Surat-305003 Respondent No.4 Respondent No.4
5. Harishchandra C. Marvawala,
3/2321, Khangad Sheri,
Salabatpura, Surat-395003. Respondent No.5 Respondent No.5
6. Kamlesh C. Gotawala,
3-1928, Sidhi Sheri,

- Salabatpura, Surat-395003. Respondent No.6 Respondent No.6
7. Manoj Kumar H. Singapuri,
202/2nd Floor, Shradha Saburi Apt.,
Khanbhati Wadi, Rustampura,
Surat-395002. Respondent No.7 Respondent No.7
8. Kiritkumar R. Vanawala,
3/2350, Khangad Sheri,
Salabatpura, Surat 395003. Respondent No.8 Respondent No.8
9. Registrar of Companies,
ROC Bhavan, Opp Rupal Park Society,
Behind Ankur Bus Stop,
Naranpura, Respondent No.9 Respondent No.9
Ahmedabad-380013.
10. The National Company Law Tribunal
Anand House, Jalsa Plot,
Sola Road,
Ahmedabad. ----- Proforma Respondent

Present: For Appellant:-Mr Suryanarayanan and Ms Garima Bajaj,
Advocates Mr. Swaminathan Iyer, CS.

For Respondents: - Mr. Dhiren R. Dave, PCS for Respondent No.1 to 8. Mr. Sanjib K. Mohanty, Sr. Panel Govt Counsel for Respondent No.9.

JUDGMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

01.The present appeal has been preferred under Section 421 of the Companies Act, 2013 by the appellants against the impugned order dated 23.11.2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (hereinafter referred to as the 'Tribunal').

02.The brief facts of the case are that the Respondent No.1 company was incorporated on 30.05.2007 with appellant No.1 and Mr. Anil Ghariwala as first directors. The main object of the company is to

acquire land, divide it into plots and construction of independent houses etc. In order to augment the financial resources of the company, Respondent No.1 introduced various shareholders and directors. Respondent No.1 bought 35,511 sq. mtrs of land at Surat with a view to develop the said land and selling the plots as developed plots or by constructing row houses and 179 plots were made and the Respondent No.1 also constructed Sai Unity Row Houses on the said plots. The Board of Director of the Company in its Meeting held on 15.12.2009 authorised Appellant No.1 to execute the conveyance deeds in favour of third parties in respect of Sai Unity Row Houses for and on behalf of Respondent No.1. The Appellant No.1 executed 51 conveyance deeds in favour of various buyers of the row houses/plots till 19.7.2013.

03.After approval of accounts for the financial year 2011-12, disputes started amongst the directors in respect of a piece of land bought at Bamroli in which Respondents Nos 2, 5 and 7 directors insisted on the payment of heavy amounts by way of compensation to the sellers of the land but the Appellant No.1 resisted the same. This triggered a lot of disputes amongst the directors and the directors were divided on this issue and Respondent No.2 mustered the support of other respondents directors to get elected the Chairman of the Board and Respondent No.1. A Resolution dated 2.5.2013 was passed by the Board of Directors of Respondent No.1, without notice to appellant No.1, authorising Respondent No.2 to execute conveyance deeds on behalf of company. The Appellant No.1 submitted that even after passing the said alleged resolution dated 2.5.2013, copy of which was not served to

appellant No.1, the appellant No.1 continued to execute the conveyance deeds after 2.5.2013 till 19.7.2013. The appellant executed 12 conveyance deeds selling 1039.59 sq mtrs of land and deposited the money with the Respondent No.1. The appellant No.1 purchased plots from Respondent No.1 at the same price per square meter at which the plots were sold to outsiders and the sale proceeds were duly credited in the account of Respondent No.1. Later on the appellant No.1 received copy of the minutes and resolution passed on 2.5.2013. Appellant No.1 also got a copy of the resolution passed on 2.5.2013 from the Mamlatdar Office. Both the resolutions were different from each other and no resolution revoked the authority granted to the appellant No.1 though Respondent No.2 was also authorised to execute conveyance deeds from 2.5.2013 onwards and it was also not mentioned that the Respondent No.2 was the Chairman of Respondent No.1. Resolution received from the office of Mamlatdar Office mentions that the appellant No.1 ceased to be the Chairman of Respondent No.1 and Respondent No.2 became the Chairman of Respondent No.1 with effect from the date of passing of the resolution. Since the tenor of the resolution was different from each other, therefore, it was crystal clear that the minutes of Respondent No.1 has been tampered with by the Respondent directors. Respondent No.2 on behalf of Respondent No.1 lodged an FIR with PS Surat against the appellant No.1 stating that the houses/row houses sold by appellant No.1 during the years 2012-13 and 2013-14 for Rs.134.44 lakhs was not credited to Respondent No.1. The appellant No.1 was arrested and was in judicial custody from

11.12.2014 to 2.1.2015. Later on the appellant No.1 was granted bail subject to deposit of Rs.134.44 lakhs in the High Court of Gujarat pending trial of criminal case.

04.The financial statement of Respondent No.1 for the years 2011-12 was approved by the Board and certified by the auditors on 31.8.2012 but the Respondent directors did not hold the annual general meeting of Respondent.1. Though the appellant No.1 was the Chairman during that period but he was not allowed to hold the meeting.

05.In July, 2010 the registered office of the Respondent No.1 was changed. On 8.7.2010 Mr. Anil Ghariwala resigned from the directorship of the company. On 9.8.2010, Respondent No.1 held EGM and passed resolution for appointment of Respondents No.2, 5 to 8 as the directors of company. On 18.9.2010 various directors resigned from the Respondent No.1 and the same was accepted in the Board of Directors Meeting held on 18.9.2010. Thus only the three directors remain on 18.9.2010 i.e. Appellant No.1, Respondent No.3 and 4. The new Chairman violated all the provisions of company law wilfully. Being aggrieved the appellant No.1 filed Company Petition before the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad alleging the following acts of omission and commission that amounts to acts of oppression/mismanagement in the affairs of Respondent No.1.

a) Falsification of minutes of Board Meetings and General Meetings violating Section 118; Non-compilation of financial statements for the financial years 2011-12, 2012-13, 2013-14 and 2014-15 as

mandated under the provisions of Section 129 of the Companies Act, 2013.

- b) Non holding of annual general meetings.
- c) Denial of inspection of registers and records to the shareholders/directors.
- d) Acting as director without valid appointment.
- e) Forging of the physical signature of the petitioner director and the digital signature.
- f) Harassment of individual director by other directors acting in concert.
- g) Holding of illegal extraordinary general meetings and trying to pass resolution without the authority of law.

06. After hearing the parties, the Tribunal dismissed the company petition and held as under:

“48. In view of the above discussion, this Tribunal holds that petitioner No.1 fail to establish alleged acts of oppression and mismanagement said to have been committed by respondents in the conduct of the affairs of the first respondent company.

49. Considering all these aspects, this Tribunal is of the considered view that it is not a fit case even to exercise its powers under Section 242(2) of the Companies Act, 2013.

50. In view of the above discussion, CP no.68 of 2017 is dismissed. IA No.183 of 2017 is closed. No order as to cost.”

07.Learned counsel appearing on behalf of the appellants stated that the company petition was dismissed only due to lodging of FIR against the appellants. Learned counsel further submitted that the said FIR stands stayed by the Hon'ble High Court of Gujarat and the company petition was wrongly dismissed.

08.Learned counsel for the appellant submitted that the appellant No.1 was granted authority since 15.12.2009 to execute conveyance deeds and the same was withdrawn by passing a fake board resolution on 2.5.2013 without following the procedure of law. Learned counsel for the appellant No.1 further submitted that the copy of the resolution/minutes produced by Respondent No.1 completely differed from the copy of the resolution obtained by appellant No.1 from the Mamlatdar Office (Revenue Office). Learned counsel for the appellant No.1 submitted that the minutes have been tampered with. Learned counsel for the appellant No.1 further argued that the notice/agenda and speed post receipts placed by Respondents were neither addressed to Appellant No.1 nor received by the appellant No.1.

09.Learned counsel for the appellants No.1 submitted that the accounts of the Respondent No.1 for the Financial Year 2015-16 were approved on 20.9.2016 whereas the accounts for FY 2012-13, 2013-14 and 2014-15 were under compilation. Learned counsel for the appellant No.1 stated that after filing the Company Petition on 22.5.2017, Respondent No.1 company compiled the accounts and mentioned the dates of approval which are manipulated and are completely fabricated and even the reports were fully manipulated.

10. Learned counsel for the appellant No.1 further argued that the AGM for the years 2011-12, 2012-13, 2013-14 and 2014-15 were not held within the stipulated time and inspection of books of accounts, bank statements of all banks, all expenses and revenues earned by the company beginning from the year 31st March, 2012 was denied to the appellant by Respondent No.1 vide letter dated 17.3.2017 (Page No.355 of the Paper Book).
11. Learned counsel for the appellant No.1 further stated that Respondent No.1, as per the FIR, accounted for a sale of Rs.37,92,300/- in the FY 2012-13 and showing the same as recoverable from appellant No.1. Learned counsel for the appellant stated that an amount of Rs.96,51,800/- mentioned in the same FIR was wilfully omitted to be recorded both in sales as well as recoverable amount in the FY 2013-14 by the Respondent No.1.
12. Learned counsel for the appellant No.1 stated that Respondent No.1 has not filed annual returns for the FY 2011-12, 2012-13, 2013-14 and 2014-15 within the time stipulated under the Companies Act, 2013.
13. Learned counsel for the appellant No.1 stated that EGM was held on 20.5.2017 without convening a Board Meeting for the same to consider the alleged requisitions purportedly received from the shareholders for the removal of Appellant No.1 from the directorship of Respondent No.1. Learned counsel for the Appellant No.1 stated that no notice was issued to Appellant No.1 and the Respondent No.1 did not consider the submission of Appellant No.1.

14. Learned counsel for the appellant No.1 submitted that Respondent No.1 does not maintain any registered office as alleged in the site at 3/2169, Near Ram Mandir, Salabatpura, Surat-395003.
15. Learned counsel for the appellant No.1 stated that the respondents sold plots of higher areas in the same location around the same time at a lower price of Rs.6,96,600/- and only one plot of same size was sold for Rs.12,00,000/-
16. Learned counsel for the appellant No.1 submitted that the above acts and omissions merit investigation. However, the same has been denied vide paras 35-44 of impugned order. Therefore, the appellant No.1 has sought the following reliefs:
- a) That the impugned order dated 23.11.2017 passed by the Tribunal be set aside by holding that the alleged criminality of the appellant No.1 in the year 2013 cannot preclude him to exercise his rights as shareholders of R1 company and to uphold the various acts and omissions mentioned in the Company Petition as acts of oppression/mismanagement and to grant all the reliefs prayed for under the Final Reliefs before the Hon'ble NCLT.
 - b) To order an investigation into the affairs of R1 company as there are series of continuous and recurring financial mismanagement, illegal sale of R-1's assets at rock bottom prices and serious irregularities in the conduct of the affairs of R1 company.
 - c) To pass such other order as may be deemed necessary, fit and proper in the facts and circumstances of the case to do complete justice to the appellants.

17. In rebuttal, Learned counsel for the respondents stated that the appellant No.1 has approached this Appellate Tribunal with uncleaned hands. Appellant No.1 was granted bail by the Hon'ble High Court against cash security of Rs.1,33,44,000/-, the entire amount alleged to be siphoned off by the appellant No.1. Relevant portion of the High Court order dated 02.01.2015 is as under:

“4. Therefore, without adverting to the merits of the matter on the ground that it appears that against the allegation of misappropriation, now the accused is ready to deposit alleged amount before the Sessions Court and also looking to the totality of the facts and circumstances, it would be appropriate to release the applicant on bail.”

18. Learned counsel for the Respondents submitted that the appellant No.1 has not disclosed before this Appellate Tribunal that he has threatened, by a public newspaper (Page 544 of the Paper Book), the statutory auditor, company secretary and all the directors of the Respondent No.1 for initiating criminal proceedings for raising fake resolution.

19. Learned counsel for the Respondent stated that the appellant No.1 run away from the company after siphoning of huge funds of the company in 2011 with all books of accounts and documents of the company.

20. Learned counsel for the Respondents stated that the appellant No.1 produced false and concocted unsigned copy of minutes of R1 company which is at Page No.322-324 of the Appeal Paper Book. Further the

appellant No.1 has transferred/sold plots of land in his own favour/third parties and did not deposit the amount in the company's account even after knowing fully well that his authority to execute sale deed for and on behalf of the company has been withdrawn. The list of such plots is given at Page No.329 of the Appeal Paper Book.

21.Learned counsel for the Respondents submitted that the appellant No.1 is making false statement that he never received Notice of Board Meeting at which his Authority to execute sale deed for and on behalf of the company is withdrawn. Learned counsel for the Respondents submitted that notice of Board Meeting and proof of dispatch were submitted by the respondent in their reply and the same are at Page No.536 to 538 of Appeal Paper.

22.Learned counsel for the respondents further submitted that the notice of Board Meeting dated 17.4.2017 was duly sent to the appellant No.1 and proof of service and proof of despatch are at Page No.546 to 548 of appeal paper book.

23.Learned counsel for the respondents stated that the company has now all years audited accounts approved and filed with the ROC till date. There are no remarks about siphoning of funds by the respondent but there are remarks about siphoning of funds by the appellant. Learned counsel for the respondent further submitted that the appellant has unwontedly dragged the company in to as many as 39 litigations causing harm to the reputation of the company.

24.Learned counsel for the respondents has argued that the Tribunal has passed a well reasoned and speaking order and may be upheld.

25. We have heard the parties and perused the entire record including the impugned.

26. The first point raised by the appellant No.1 that the Tribunal erred in concluding that the board meeting dated 2.5.2013 was validly held and the authority granted to appellant No.1 was validly withdrawn. On this point we have observed from the appeal filed by the appellant No.1 at para 7.5 as under:

“xxxxxxxx This triggered a lot of disputes amongst the directors and the directors were divided on this issue. Taking advantage of the situation, R2, Shri Shailesh U. Vakharia, mustered the support of the other Respondent directors to get elected as Chairman of the Board and R1 company.”

On a careful reading of the above lines, seeing the Minutes of the Meeting of Board of Directors held on 2nd May, 2013 and the copy of company petition, we find that notice of the Board Meeting to be held on 2.5.2013 was sent to the appellant No.1 as the respondents has also annexed postal receipt dated 25.4.2013 of the Indian Postal Department. Therefore, the appellant No.1 has wrongly stated that he has not been given notice of Board Meeting to be held on 2.5.2013. It clearly goes to show that the appellant No.1 chose to remain absent as he was very well aware that one of the agenda was to withdraw the authority given to him earlier. When the appellant cleverly chose to remain absent it was his duty to obtain the copy of the minutes and the

resolution passed in the Board Meeting from the company. When he was informed about the Meeting, the appellant No.1 cleverly chose to remain absent and the required quorum was present in the Meeting, Respondent No.2 was elected Chairman of the Board, R1 company and to give/change authority relating to execution of sale deed was validly given to Respondent No.2. Therefore, the appellant No.1 has no right to question about the resolution passed in the said Meeting. However, the appellant No.1 knowing fully well that his authority has been validly withdrawn still he continued to execute the sale deed. We observe from the record that the appellant No.1 has executed 12 sale deeds subsequent to Meeting dated 2.5.2013 and out of these 12 sale deed, he executed 7 sale deeds in his own name (Page 329 of the Appeal Paper Book). Even if he has the authority to execute the sale deed and for executing sale in his own name/favour, he can only do after prior disclosure to all other Directors/Board of Directors as per Section 297 of the Companies Act, 2013. In this case his authority has been validly withdrawn by passing a valid resolution and he is continuing to execute sale deed, therefore, the conduct and behaviour of the person is a relevant factor.

27. The next point raised by the appellant is that the company petition was dismissed only due to FIR and the said FIR stands stayed by High Court in 2015. The point raised by the appellant is not acceptable. On going through the impugned order which runs into 34 pages approximately, we observe that the company petition has dismissed on various points.

The Tribunal has given his findings on each of the points raised by the appellants in the company petition.

28.The other point raised by the appellant No.1 is that the appellant No.1 was granted authority since 15.12.2009 for execution of conveyance deeds and the said authority was withdrawn by a fake resolution passed on 2.5.2013 without following the procedures of law and tampering with the minutes of Respondent No.1 company. We observe from the record that proper notice was given to the directors for holding of Board Meeting on 2.5.2013 and the proof of despatch of the said notice has been placed at Page No.538 of the Appeal Paper Book. It appears that the appellant No.1 chose to remain absent in the Board Meeting held on 2.5.2013 as he was aware that proper procedure of law has been complied with and there is no tampering with the minutes of Respondent No.1 company.

29.The next point raised by the appellant No.1 is that the company approved the accounts for the FY 2015-16 on 20.9.2016 whereas the accounts for 2012-13, 2013-14 and 2014-15 were said to be under compilation. After the filing of the company petition on 22.5.2017, the company compiled the accounts and dates of approval were manipulated. On going through the impugned judgement, the Tribunal has observed on this point as under:

“30. It is pertinent to mention here that petition continued to be Director of the first respondent company till he was removed in the EOGM on 20.05.2017 but petitioner No.1 being a Director of the first respondent company did not

raise his little finger for non-finalisation of accounts from the year 2011-12 to 2014-15. Even after criminal case was filed against petitioner No.1 he did not chose to raise the issue of non-finalisation of accounts. The fact remains that SB Vaidya & co resigned as statutory auditor of the first respondent company on 21.3.2016 and it was accepted in the EOGM held on 19.4.2016. Form No.ADT-3 filed by M/s S.B. Vaidya & co clearly disclose that the company did nto communicate with the auditors since 2013. In the EOGM held on 19.4.2016 itself M/s T.R. Mody & associates were appointed as statutory auditors. The statutory auditors in the first instance prepared accounts for the year 2015-16 and, thereafter finalised the accounts for the years 2011-12 to 2014-15. No doubt, such practice of finalising the accounts for the year 2015-16 without finalising accounts for previous years is against the established practice but in the given facts and circumstances when there are disputes between Directors and when there was non-cooperation from the management and the Directors, non-finalisation of accounts cannot be treated as a ground of mismanagement and more so it cannot be alleged by a Director of the company. Petitioner No.1 being Director of the first respondent company is equally responsible for non-finalisation of accounts of the first respondent company from 2011-12 to 2014-15. This point is answered

accordingly. Non-filing of accounts within time is punishable under the Companies Act and it is for the regulating authority to take action against the company. Therefore, it cannot be treated as a ground of mismanagement in the facts and circumstances of this case.”

On this issue we uphold the views of the Tribunal as mentioned above.

30.The other points raised by the appellant No.1 is that he was denied inspection, holding of an EGM on 20.5.2017 without convening a Board Meeting etc. We observe that all the record of the company are available online and the appellant can take the copies from there. As regard the holding of EGM on 20.5.2017 without convening a Board Meeting is concerned, the Tribunal has held as under:

“25.A perusal of the material placed on record disclose the following facts. Some of the shareholders gave requisition for removal of petitioner No.1 as Director. Board of Directors meeting was held on 17.4.2017 in which meeting it was decided to call for the EOGM on 20.5.2017 for the purpose of considering the removal of petitioner No.1 as Director.

26.xxxxxxxxxxxxxx Therefore, it is not a case where the petitioner No.1 has no knowledge about the Board of Directors Meeting held on 17.4.2017 or EOGM dated 20.5.2017. It is the case of the petitioner that he reached

the place of EOGM on 20.5.2017 and gave letter but he left. Therefore, from the facts, it can only be concluded that petitioner No.1 has knowledge about the meeting of the Board of Directors and EOGM and also he has submitted his representation. xxxx”

From the above it is clear that the appellant No.1 was very well aware of the Board Meeting held on 17.4.2017 and when he went to EOGM but left he got the opportunity but did not avail it before General Body.

31. In view of above discussions, we are of the considered view that it is not a fit case to interfere in the impugned order dated 23rd November, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad. Accordingly, the appeal is dismissed. No order as to costs.

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

(Mr. Balvinder Singh)
Member (Technical)

New Delhi

Dated:23-05-2018

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