

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 402 of 2018

IN THE MATTER OF

**M/s. MTS Logistics Pvt. Ltd.
Through its authorized signatory
Having its registered office at:-
L-126 A, Ground Floor, Street No. 5,
Mahipalpur Extension,
Delhi-110037**

...Appellant

Versus

**1.Shri Brijesh Uppal
S/o. Late Shri. K.L. Uppal
R/o. V-11, Green Park,
New Delhi,110016**

....Respondent

**2.Shri Parvesh Kumar Jain
S/o. Sh. Ved Parkash Jain
R/o. 124 A, Street No. 4,
Friends Enclave, S.P. Road,
Delhi-110086**

... Proforma Respondent

Present:-

For Appellant:- Mr. Nittin Mittal, Advocate.

For Respondent:- Mr. P. Nagesh, Mr. Harshal Kumar, Advocates for R5.

WITH

Company Appeal (AT) No. 407 of 2018

IN THE MATTER OF

**Shri Parvesh Kumar Jain
S/o. Sh. Ved Parkash Jain
R/o. 124 A, Street No. 4,
Friends Enclave, S.P. Road,
Delhi-110086**

...Appellant

Versus

1.Shri Brijesh Uppal

**S/o. Late Shri. K.L. Uppal
R/o. V-11, Green Park,
New Delhi, 110016**

....Respondent

**2. M/s. MTS Logistics Pvt. Ltd.
Through its authorized signatory
Having its registered office at:-
L-126 A, Ground Floor, Street No. 5,
Mahipalpur Extension,
Delhi-110037**

... Proforma Respondent

Present:-

**For Appellant:- Mr. P. Nagesh, Mr. Harshal Kumar, Advocates for
Appellant.**

For Respondent:- Mr. Nitin Mittal, Advocate for R2.

J U D G M E N T

[21st July, 2020]

JARAT KUMAR JAIN, J.

The Appellant M/s MTS Logistics Pvt. Ltd. and Appellant Parvesh Kumar Jain filed Company Appeal (AT) No. 402 of 2018 and Company Appeal (AT) No. 407 of 2018 respectively, against the impugned order dated 31.08.2018 passed by National Company Law Tribunal, New Delhi, Bench. (In brief Tribunal) both the Appeals are heard together and disposed of by this common Judgment.

2. Brief facts of these Appeals are that on 01.05.2016 Appellant Parvesh Kumar Jain and Respondent No. 1 Brijesh Uppal have incorporated a Company named as Tryambakam Logistics Pvt. Ltd. (In Short TL Company) under the Companies Act, 2013 having its Registered Office at L-126 A, Street No. 5, Mahipalpur Extension, New Delhi. The Company was incorporated to carry on

the business of Transportation. The Appellant Parvesh and Respondent Brijesh being shareholder/director of the Company each one contributed Rs. 5 Lakhs towards the paid up share capital. The Appellant MTS Logistics Pvt. Ltd. Company (in short "MTS Company") was incorporated under the Companies Act, 1956 on 16.03.2011 having its Registered Office at L-126 A, G.F Street No. 5, Mahipalpur Extension, New Delhi. The MTS Company is also engaged in the Logistics Business and the same was incorporated with its promotor/directors Viresh Kumar Jain and Dinesh Kumar Jain and subsequently, Appellant Parvesh Kumar Jain was inducted as director in the MTS Company on or about 15.10.2012. The Respondent No. 1 TL Company started its business with purchase of five trucks worth Rs. 63 Lakhs and had also spend huge amount on building the body of those trucks. The Company has taken a huge amount of loan from the Bank to buy those trucks.

3. The TL Company started its operations and trucks started running for MTS Company. That initially for few days the MTS Company made regular payments and the business was running smooth till 15.08.2016. Thereafter, Appellant Parvesh started raising problems. He was unhappy with the drivers engaged by Brijesh. Therefore, he replaced them. This was done with a specific and oblique purpose to ensure that the drivers would not report to Brijesh. So that Brijesh should not know where the trucks were plying. First month potential income of the business was generated but in subsequent months the revenue declined sharply. It was alleged that the trucks of TL Company have been used for the

business of MTS Company without remittance to the TL Company which has resulted in causing financial loss to the TL Company and Brijesh.

4. The affairs of the TL Company were totally in control of Parvesh and he mismanaged the TL Company. After 20.08.2016 he did not deposit the business proceeds in the bank account of the TL Company. Lack of funds resulted in defaults in payment of EMIs towards financial assistance availed from Bank. The trucks were finally surrendered to the banks by Parvesh and sold without consulting Brijesh, and no resolution was passed by TL Company in this regard. This unilateral action of Parvesh caused a huge loss to the TL Company. It is also alleged that TL Company earned huge revenue till 20th August, 2016 but all its revenue was siphoned off by Parvesh. Therefore, the TL company was not able to pay the monthly EMIs of the loans. The Malafide intention of the Parvesh and his fraudulent acts has resulted into huge loss to the TL Company and its shareholder Brijesh. On these allegations Brijesh filed a Company Petition under Section 241 and 242 of the Companies Act, 2013 against the TL Company, Parvesh and MTS Company claiming following reliefs:-

- a. To Order Parvesh to deposit all the revenue that he has earned since 20th August, 2016 till date into the account of the TL Company.
- b. To order Parvesh to render the true accounts of the transactions after 20th August, 2016.
- c. To give the possession of the all the five trucks to the TL Company and Brijesh.
- d. To order Parvesh not to use the trucks for benefit of his own Company i.e. MTS Logistics Pvt. Ltd.

- e. Impose huge costs on Parvesh for misappropriating the funds of the TL Company and causing huge loss to the TL Company and Brijesh.
- f. Pass order to Parvesh for removing Logo of MTS Company from the trucks of the TL Company.
- g. Pass order to give Brijesh his due amount of dividend received from Parvesh.
- h. Remove Parvesh as the Director of the TL Company.
- i. Pass order to impose huge cost on Parvesh.
- j. Any other order the Tribunal thinks fit and proper under the circumstances of the case.

5. In reply, Parvesh denied all the allegations and stated that the Petition is filed as a counter blast to the Civil Suit for perpetual, mandatory injunction and for rendition of accounts filed by Parvesh against Brijesh and the same is pending in the Court of Civil Judge, Saket Court, New Delhi. The Petition under Section 241 and 242 of the Companies Act, 2013 is not maintainable as there is no act of oppression or mismanagement of Parvesh had been shown in the Petition and the Petition is malafidee. It is also stated that the Petition is liable to be dismissed as infructuous as already the relief so claimed in the Petition does not survive. The trucks through which revenue to be generated has already been taken over by the financier i.e. ICICI Bank and has been auctioned. Brijesh concealed the material facts from this Tribunal. The five trucks were purchased after getting financed from ICICI Bank on the personal guarantee of MTS Company and its director Viresh Kumar Jain. The trucks so purchased were converted into closed body containers for which expenses were made from the account of Parvesh and the advance of Rs. 2 lakhs, so taken from MTS Company against the Vehicle Hiring Agreement with TL Company. Parvesh made counter

allegations that Brijesh handled the operation of the Company and has mismanaged by paying to drivers without submitting any account and therefore, Brijesh is liable to account for a sum of Rs. 3,71,500 withdrawn from the bank on the ground of disbursing salary and expenses of the drivers. In the absence of any vouchers produced, the said amount withdrawn could not be reconciled and hence, it amounted to illegal withdrawals. Parvesh alleged that illegal and unjustified withdrawals led to shortage of funds in the bank Account therefore EMIs could not be paid to the bank. It is stated that it was due to non-cooperation of Brijesh that the business came to a complete halt. The bank therefore, exercised its lien under the loan agreement and repossessed the hypothecated trucks and auctioned them.

6. Learned Tribunal after hearing the parties found that on behalf of TL Company Parvesh entered into an agreement with MTS Company. As per the agreement five trucks of TL Company were handed over for the exclusive use of MTS Company in which Parvesh was the beneficiary. Parvesh has however, not been able to produce any resolution which authorized him to enter into a business arrangement on behalf of TL Company. He has also failed to provide details of the accounts before the Tribunal. The Tribunal found that mismanagement of the business is at large and there is no cogent explanation why sufficient income was not generated to meet the business expenses and payment of EMIs to the Bank. The Tribunal found that Parvesh categorically admitted that the trucks were used for the business of MTS Company. But the

revenue generated from the business operation were not paid to the TL Company. Therefore, Parvesh and MTS Company are jointly and severally liable to compensate Rs. 20 lakhs to Brijesh. The Tribunal also directed the RoC to initiate action against Parvesh for the deliberate violation for the statutory provisions of Section 188 of the Companies Act, 2013. Being aggrieved with this order MTS Company and Parvesh have filed these Appeals.

7. Learned Counsel for the Appellant MTS Company submitted that the Respondent Brijesh had never claimed any relief against the Appellant MTS Company however, without any basis the MTS Company has been held liable to pay damages to the tune of Rs. 20 Lakhs to Brijesh. Such order is affecting the rights of shareholders of the MTS Company and before passing such an order against the Company no show cause notice has been served by the Learned Tribunal. Even otherwise the Tribunal had no jurisdiction to inflict any damages against the alien Company while deciding the inter-se dispute between two directors of a TL Company. There is no evidence against the MTS Company. It is also submitted that the impugned order is harsh and against the natural Justice.

8. Learned Counsel for the Appellant Parvesh submitted that Learned Tribunal had ignored the fact that TL Company had accepted Rs. 2 lakhs as an advance from MTS Company for entering into Vehicle Hiring Agreement. The Tribunal erroneously came to a conclusion that Parvesh hold 80% equity and his brother hold 20% equity in the MTS Company. In support, there is no material

on record before the Tribunal hence, such finding is based on surmises and conjectures. Therefore, liable to be set aside.

9. Learned counsel for the Appellant Parvesh submitted that Learned Tribunal in the impugned order held that the leasing of the trucks to MTS Company was without proper authorization and resolution passed by the TL Company, such finding is illegal. The Appellant Parvesh categorically asserted that the minute book is in possession and custody of Brijesh which contains all resolution so passed with regard to the business. The entering into vehicle hiring agreement with MTS Company by TL Company was within the knowledge of Brijesh. Therefore, he never objected.

10. Learned Counsel for the Appellant Parvesh submitted that Tribunal had ignored the Bank statements filed by Appellant Parvesh which shows the entire transactions of the TL Company during the entire period of its operation. The Tribunal while passing the impugned order had ignored that Parvesh and Brijesh were managing the affairs of the TL Company. Therefore, they both are equally responsible.

11. It is further submitted that Tribunal had failed to consider that the involvement of Parvesh in a grave Criminal Case by Brijesh owing to business dispute and due to non-assistance of Brijesh, the Company could not generate sufficient income to meet the business expenses and to pay EMIs of the Bank.

12. Learned Counsel for the Appellant Parvesh submitted that Learned Tribunal had observed that Brijesh is seeking compensation of Rs. 50 Lakhs but

the same is not founded on any cogent and calculable evidence and on the other hand, Learned Tribunal awarded the compensation of Rs. 20 lakhs without any evidence. The Tribunal while awarding compensation Rs. 20 Lakhs to Brijesh had ignored that Brijesh invested only 5 Lakhs and kept 3.71 Lakhs unaccounted funds of the Company. It is further submitted by Learned Counsel for the Appellant that in case the TL Company or that the MTS Company could earn profits from hiring of the said trucks then Parvesh would never allowed the trucks to be repossessed by the financier due to non-payment of EMIs. Parvesh is put to more loss than Brijesh as Parvesh had invested complete capital Rs. 10 Lakhs. Hence, such an order is a non-speaking order and is liable to be set aside.

13. Learned Counsel for the Appellant Parvesh submitted that negligence or inefficiency do not amount to mismanagement or oppression under Sections 397 and 398 of the Companies Act 1956. For this purpose he cited the Judgement of the Hon'ble Delhi High Court in the case of Suresh Kumar Sanghi Vs. Supreme Motors Limited and Ors. (1981 SCC Online Del 199). Learned Counsel for the Appellant Parvesh also submits that the burden to prove oppression or mismanagement is upon the Petitioner (Brijesh). For this purpose, he cited the judgment of the Hon'ble Supreme Court in the case of Sangram Singh Vs. Santa Devi. P Gaekwad (2005) 11 SCC 314. He submits that in such a situation, Brijesh has failed to make out a case of oppression or mismanagement against Parvesh. Therefore, the impugned order be set aside.

14. Learned Counsel for the Respondent Brijesh supports the impugned order and submitted that Learned Tribunal has rightly, held that Parvesh was incharge of the operation of hiring trucks. However, he has not explained as to why earnings not deposited in the bank account of TL Company and the trucks were not hired to the other parties when sufficient business could not be generated through MTS Company. The TL Company's business was in control of Parvesh and he has without sharing the details and without maintaining record, conveniently pocketed the money. Thus, the Appellant Parvesh cheated and defrauded Brijesh. It is also submitted that Parvesh has deliberately not produced statement of accounts before the Tribunal. There is no substance in these Appeals. Therefore, the Appeals are liable to be dismissed.

15. Learned Counsel for the Respondent submitted that Appellants have not raised any question of law arising out of the impugned order and the Appeals are based on factual matrix, disputed facts and issues arising out of those disputed facts. These issues have been judicially tested determined and adjudicated by the Tribunal by way of a self-speaking and a reasoned Judgment. Hence, the Appeals are devoid of merit and thus, liable to be dismissed.

16. After hearing Learned Counsel for the parties we have perused the record.

17. In the Appeal of MTS Company the contention of the Appellant is that before passing an order against the Company, no show cause notice has been served and the Tribunal had no jurisdiction to inflict any damages against the

alien Company, while deciding the inter-se dispute between two directors of a TL Company.

18. It is seen that the MTS Company was Respondent No. 3 before the Tribunal. However, it choose not to file reply of the Petition. Therefore, it can't be said that before passing of the order against the MTS Company, no opportunity of hearing was given by the Tribunal.

19. Now, we have considered, whether the Tribunal had Jurisdiction to inflict damages against the MTS Company. It is admitted fact that Parvesh is a director in the MTS Company since 15.10.2012 and he is also a promotor director of TL Company since incorporation of the TL Company i.e. 01.05.2016. Parvesh being a director entered into a vehicle hiring agreement with MTS Company on 25th June, 2016. As per this Agreement all five trucks of TL Company were under the exclusive hiring contract with MTS Company and the same were run by them till their possession was taken over by the financier, ICICI Bank Ltd on 05.01.2017. Under the said Agreement Rs. 2 Lakhs as an advance has been paid to TL Company (See Para 13 of Reply of Petition filed by Parvesh before NCLT).

20. The Appellant Parvesh and TL Company as co-borrower purchased five trucks after getting them financed from ICICI Bank on the personal guarantee of MTS Company and its director Viresh Kumar Jain (See Para 4(b) of Reply of Petition filed by Parvesh before the NCLT).

21. With the above facts, it is clear that both the Companies have close business relations and Appellant Parvesh is a Director in both the Companies.

Hence, it cannot be said that the Tribunal had no Jurisdiction to inflict any damages against the MTS Company. Therefore the Tribunal held that Parvesh and MTS Company are jointly and severally liable to pay compensation to Brijesh.

22. Thus, we find no substance in the objection raised in Company Appeal (AT) No. 402 of 2018.

23. Now we have examined the finding of the Tribunal that Parvesh, without consent of Brijesh and without any resolution of the TL Company, entered into hiring agreement with MTS Company.

24. We have considered arguments of the parties, It is true that on 25th June 2016 Parvesh being a director of the TL Company entered into Vehicle Hiring and Transportation Agreement with MTS Company. Parvesh in his Affidavit dated 23.11.2017 affirmed that TL Company authorized him for entering into agreement with MTS Company and such minute book of the Company is in possession of Brijesh. Brijsh has not controvert this fact. On 12.09.2016 Brijesh sent a notice to Parvesh. Para 10, 11 and 12 of the notice are reproduced as under:-

“10. That contrary to my suggestion of running the trucks with Om logistic private company a renowned company in logistic solutions you insisted on running the trucks for your own company i.e MTS Logistic.
11. That the trucks started running for your own company from your Mahipalpur office to your pune office it is irrelevant to mention that you have offices at both Mahipal Pur, Delhi and Pune, Maharashtra.

12. That initially for few days your company namely MTS logistics paid regular payments and the business was running smooth however soon you started raising one problem or the other.”

25. With the above statement it is clear that Parvesh entered into hiring agreement with the consent of Brijesh and under the authority of the TL Company. It is pertinent to note that in the Petition there is no allegation that Parvesh entered into hiring agreement with the MTS Company without the authority of the TL Company. Hence the finding of the Tribunal that Parvesh entered into above referred agreement without resolution of TL Company and without consent of Brijesh is erroneous.

26. It is alleged in the petition that all five trucks were in possession of the MTS Company and Pravesh has not given any statement of account since 20th August 2016 onwards. It is also alleged that without the consent of Brijesh, Parvesh has surrendered all five trucks to ICICI Bank.

27. Parvesh in reply to the Petition specifically admitted that the trucks were under exclusive hiring contract with MTS Company and the same were run by them till their possession was taken over by the financier, ICICI Bank on 05.01.2017. Parvesh stated that the earnings of the trucks have already been deposited in the bank account of TL Company.

28. We have considered the submissions. The TL Company was incorporated on 01.05.2016. The Company has purchased five trucks between 17.06.2016 to 30.06.2016 after getting financed from, ICICI Bank. Vehicle Hiring Agreement

was executed between TL Company and MTS Company on 25.06.2016. The operation of the TL Company commenced on 08.07.2016 onwards and as per the Vehicle Hiring Agreement Trucks were operated under the Vehicle Hiring Agreement with MTS Company. The business of the Company ran smoothly for one month i.e. up to 15th August, 2016. Thereafter, differences started between Brijesh and Parvesh. On 12.09.2016 Brijesh served a notice to Parvesh and in the notice it is alleged that Brijesh misappropriate the funds by not showing the true accounts since 20th August, 2016 and perhaps he has been keeping the entire earnings of trucks himself. Parvesh stated that the earnings of the trucks have been deposited in the bank account however he has not filed any bank statement since 20.8.2016 to 7.1.2017. Therefore the learned Tribunal has rightly held that Parvesh has not account for the earnings for the above referred period. Parvesh has not produced any evidence that the trucks were surrendered to ICICI Bank with the consent of Brijesh. Hence the findings of Tribunal is correct.

29. Learned Tribunal directed Parvesh and MTS Company to compensate Rs.20 Lakhs jointly and severally to Brijesh. This finding is seriously challenged in these appeals.

30. We have considered the submission of the parties. Learned Tribunal in Para 8 of the impugned order held that in the Petition, Brijesh claimed on average basis Rs. 50 lakhs for 5 months. Such a prayer is unsustainable as it is not found on cogent and calculable evidence. Thereafter, Learned Tribunal without

any evidence on record awarded damages to Brijesh to the tune of Rs. 20 lakhs for not accounting for the use of revenue generated from the five trucks of TL Company.

31. We are of the view that while awarding the compensation of Rs.20 Lakhs the Tribunal has not taken into consideration following circumstances:

(i) Admittedly Parvesh deposited the revenue earned since 8.7.2016 to 15.8.2016 in the bank account of the TL Company. However, Brijesh has not produced such statement. If that statement has been produced, then on that basis average earnings for the period of 20.08.2016 to 05.01.2017 can be calculated.

(ii) Under the hiring agreement, the MTS Company has given Rs.2 lakhs as advance to the TL Company.

(iii) There is a counter allegation of Parvesh that Brijesh has withdrawn Rs.371500/- from the bank account of TL Company however Brijesh has not produced any voucher or accounts for this amount.

(iv) In case the MTS Company could earn profit from hiring of the said trucks then Parvesh had never allowed the trucks to be repossessed by the Bank due to non- payment of EMIs.

(v) Brijesh invested Rs.5 lakhs, the business commenced since 8.7.2016. Parvesh has not account for the earnings of trucks from 20.8.2016 to 5.1.2017 i.e. for about four and half months. In such a short

span the capital of Rs.5 Lakhs will multiply four times i.e. 20 Lakhs does not seem to be feasible.

32. We are of the view that it is proved that Parvesh has not accounted for the earnings of the trucks from 20.8.2016 to 5.1.2017. However, Learned Tribunal without considering the above referred circumstances ordered Parvesh and MTS Company to pay Rs. 20 Lakhs is not justifiable.

33. Brijesh has not produced any voucher for the amount Rs. 3,71,5000/- and has not satisfied how the advance amount of Rs. 2 Lakhs received under agreement from MTS Company was adjusted. For the sake of arguments we presume that Brijesh has accounted for above amount. Apart from this we have assumed the earnings for four and half months on the capital of Rs. 5 Lakhs to be 10% per month of the amount invested i.e. which comes to Rs. 2.25 Lakhs. After having been considered the above mentioned facts and circumstances we are of the view that the capital of Rs. 5 Lakhs in four and half months would earn Rs. 2.25 Lakhs. Hence, Brijesh is entitled for capital Rs. 5 lakhs plus 2.25 lakhs total Rs. 7.25 lakhs which is just and proper compensation. It shall be paid by Parvesh and MTS Company jointly and severally within a month from today and in default, they have to pay interest on Rs. 7.25 Lakhs at the rate of 8% p.a from the date of the order of the NCLT till realization.

34. As we discussed above, Parvesh entered into an agreement with the consent of Brijesh therefore, he is not guilty u/s 188 of the Companies Act, 2013.

Hence, the direction of the Tribunal for initiation of action against Parvesh is quashed.

With the aforesaid the appeals are allowed with the above modification. No cost.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

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