

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI
COMPANY APPEAL(AT) NO.219 OF 2018

(ARISING OUT OF THE ORDER PASSED BY NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI BENCH, NEW DELHI ON 10.05.2018 IN CP NO.15/04/2016)

IN THE MATTER OF:**Before NCLT****Before NCLAT**

Shree Kumar Mundhra
 3 Wood Street,
 Flat No.9/6,
 Kolkata -700017

Petitioner

Appellant

Vs

1. Spell Organics Ltd,
 16/3-B, Ansari Road,
 Daryaganj,
 New Delhi-110002.

1st Respondent1st Respondent

2. Suresh Kumar Mundhra,
 16/3-B, Ansari Road,
 Daryaganj,
 New Delhi-110002.

2nd Respondent2nd Respondent

3. Registrar of Companies,
 NCT of Delhi & Haryana,
 4th Floor,
 IFCI tower,
 61, Nehru Place,
 New Delhi-110019

3rd Respondent3rd Respondent**Present:**

For Appellant:- Mr. Shreyans Singhvi and Ms Ekta Mehta, Advocates.

For Respondents:- - Mr.Dinesh Kumar Gupta and Mr. Vidit Gupta, Advocates for Respondent Nos 1 and 2.

JUDGEMENT

JUSTICE A.I.S. CHEEMA, MEMBER (JUDICIAL)

The appellant, original petitioner, has filed this appeal being aggrieved by the impugned order passed in CP No.15/04/2016 filed in National Company Law Tribunal, New Delhi (NCLT in short) whereby the Company Petition was dismissed on 10th May, 2018.

2. The appellant filed the Company Petition under Section 46 and 56 of the Companies Act, 2013 (Act in short). The dispute relates to 87010 shares held by the appellant in Respondent No.1 Company-M/s Spell Organics Ltd. Respondent No.2, Mr Suresh Kumar Mundhra is brother of appellant who is managing the Respondent No.1 Company, M/s Spell Organics Ltd. The company petition referred to an earlier Memorandum of Understanding and as to how the family members divided their business, assets and liabilities and how 87010 shares came to the appellant. The shares were reflected in the Annual Returns dated 31st August, 2005 and thereafter. The appellant stated in the company petition that the shares were handed over to him and were in his possession. It is stated that in or around April, 2015 the appellant learnt that original share certificate in respect of 87010 shares of the appellant were lost and/or were untraceable. He recorded a General Diary dated April 20, 2015 with the Shakespeare Sarani, Police Station, Kolkata (Page 101 Annexure-5). Simultaneously he wrote a letter to the Respondent No.1 company (Page 102) on 20.4.2015 informing that the shares certificates under Folio No.S-026 have been lost and were untraceable and made a request for duplicate shares certificate. It is the case that as the company neglected to issue duplicate shares he wrote a letter dated 4th August, 2015 to Respondent No.3, Registrar of Companies, making complaint (Page 103 –Annexure P-7) that inspite of request duplicate shares had not been issued. It is claimed that the ROC sent letter dated 5th October, 2015 which was received by the appellant on 12th October, 2015 and the ROC sent copy of letter dated 9.9.2015 sent by Respondent No.1 company in which the company claimed that:-

“Shree Kumar Mundhra has misrepresented, concealed and suppressed the real facts from goodself, he purchased from time to time total –shares, certificates were issued, however in 2008 he in

the name of his wife acquired 88.19% equity in Apsom Turner Pvt Ltd, became himself a director therein and his wife Smt Sangita Mundhra as employee, diverted funds thereof for their personal gains. Moreover, obtained loan from Celica Developers Pvt Ltd.

To obtain loan approached Spell Organics Ltd to furnish Corporate Guarantee, same was granted subject to handing over in original share certificate to secure the payment by Spell, thus same are in custody of Spell Organics Ltd. No explanation relating to originals certificate given in the application.”

3. The petitioner claims that the Respondent No.1 and 2 after taking such stand in 2008 have added condition on this count to the shareholding of the appellant in the Annual Return for the financial year ended on March 31, 2016. According to the petitioner the respondent company has taken a stand that the petitioner handed over original share certificates to the company as a security for loan alleged to have been advanced to Apsom Turner Pvt Ltd. According to him no document was executed by the petitioner allegedly pledging the original share certificate as security to the respondent Nos. 1 and 2. Consequently he filed a General Diary (Page 158-Annexure P11) with the Police Station on 1.12.2015 making allegations that the Respondent No.2 had committed theft of the share certificate from his house. It was mentioned in the report to the police that :-

“that after receiving such reply, I got shocked but after recovering from the shock, I realised that the said Share Certificates have been stolen by Suresh Kumar Mundhra in the last week of December, 2014 when he came to Kolkata for attending a family wedding ceremony and visited my residence. It is my firm belief that when Suresh Kumar Mundhra had visited my residence at that time and misusing the relationship in between us, stole away the Share Certificates of 87010 shares of M/s Spell Organics Ltd whose present value would be more than Rs.1.5 crores.”

4. According to the appellant, Respondents failed and neglected to hand over or deliver the original share certificate Folio No.S026 to him. Thus the petition was filed claiming directions to the Respondent No.1 to deliver original share certificates to the petitioner/appellant.

5. Respondent No.1 and 2 appeared before NCLT and claimed that the petitioner is a director in Apsom Turner Pvt Ltd and his wife in 2008 acquired 88.19% equity. The said company obtained loan from Celica Developers Pvt Ltd, and a Corporate Guarantee to secure loan was furnished by the Respondent No.1, and in lieu of the Corporate Guarantee the appellant deposited as security with the Respondent No.1, his share certificates. The appellant had made false complaint to the Police that the shares have been lost and made false claim to ROC as well as the subsequent complaint of theft to Police were all false. The respondents pointed out to the NCLT in their reply that appellant had concealed filing of Civil Suit No. 109/2013 which was filed in the High Court of Calcutta to declare 1/3rd share and partition of the properties detailed in the plaint which includes Respondent No.1 company. The Respondents pointed out that the appellant had suppressed regarding obtaining ex parte order and when Respondent No.2 sought leave for revocation, the suit was withdrawn with liberty to file action before the appropriate forum. Subsequently, however, the appellant was claiming independent rights in the shares which was contrary to the suit which he had filed and withdrawn. The Respondents pointed out that the appellant had suppressed that yet another Company Petition bearing No.CP-33/ND/2013 which he alongwith other had filed against Respondent No.1. The Respondents pointed out that the appellant has also concealed the factum of A.P. No.748/2014 under Section 9 of Arbitration and Conciliation Act, 1996 was filed by M/s Celica Developers Pvt Ltd against M/s Apsom Turner Pvt Ltd & Others which included the appellant and Respondent No.1 before the High Court of Calcutta. In the reply the Respondents referred to details relating to the arbitration and matter before the High Court. In para 6 of the reply it was mentioned:-

“6. That at the instance of M/s Celica Developers Pvt Ltd reference to adjudicate the dispute was submitted to the Sole Arbitrator finally award dated 13.02.2015 was pronounced, by adjusting a

sum of Rs.1.2 crores paid by Respondent No.1, further there is a liability of the petitioner of Rs.34,77,893/- and interest thereon @ 18% per annum. It is not known whether the said liability has been discharged by the petitioner or not and/or order dated 30.07.2014 of the Hon'ble High Tribunal of Calcutta restraining the petitioner from selling his shares in respondent No.1 is modified or vacated or not, therefore, the present application is liable to be dismissed. The True copy of Award dated 13.02.2015 is annexed herewith as Annexure R-4."

6. According to the Respondents, they had to discharge the liability of the company in which the appellant is director and his wife is majority shareholder. They pointed out the RTGS payment to the extent of Rs.1.20 crore which they had to pay, particulars of which are at Page 304 of the appeal. According to the respondents the appellant has no right to claim shares of the company in question without making payment of Rs.1.2 crores. If this liability is discharged the shares certificates can be delivered by it. Respondents have pointed out the plaint of suit filed by them to recover the Rs.1.2 crores which they were required to pay under circumstances.

7. The matter was heard by NCLT and by the impugned order NCLT took note of the admitted facts regarding relationship of the parties and that the appellant has held 87010 shares in Respondent No.1 company were not in dispute. The NCLT took note of the fact that the shares had been issued to the petitioner and there is no dispute that he was in possession of the same after the company issued the same. The fact that the appellant was director and his wife had 89.19% (or 88.19%) equity in Apsom Turner Pvt Ltd is not in dispute. It was noticed that the Apsom Turner Pvt Ltd availed loan from Celica Developer Pvt Ltd was also not in dispute. Similarly it was not in dispute that arbitration proceedings took place and the Respondent No.1 and 2 who had given corporate guarantee as well as personal guarantee have paid Rs.1.2 crores. The NCLT taking note of all these factors observed in para 9 and 10 as under:

"9. The point involved in the present petition is short. There is no denial by the petitioner that the respondent No.1 company had offered a corporate guarantee for the loan availed by M/s Apsom

Turner Pvt Ltd at his instance. Copy of the Corporate Guarantee and personal undertaking of respondent No.2 to remain liable to liquidate the debt of Apsom Turner has been placed on record. It is also not repudiated that the Respondent No.1 company has paid a sum of Rs.1.2 crores on invocation of the guarantee to M/s Celica Developers Pvt Ltd which they seek to recover from Apsom Turner in a suit filed by them. The only resistance to this plea is that there was no agreement in writing pledging the shares, and therefore holding on to them as security is wholly illegal and unauthorised.

10. On appraisal of the facts of the case it emerges that the petitioner had deliberately made false averments with respect to the loss of shares and its consequent formal reporting with the police. It is not denied that loan was availed from Celica Developers Pvt Ltd by Apsom Turner in which the petitioner alone had interest being a Director on its Board and his wife holding a major stake therein. This Bench is unable to appreciate the petitioner's stand that the respondents cannot hold on to a security in the absence of a written agreement. Under such circumstances the right to claim the shares or to redeem the pledge cannot be adjudicated by this forum. The pledge of shares necessitates only possession to be handed over. The pledgee has a right to hold on to them as security in the event of bailing out the pledger, till he is duly paid. The respondents submit that they are ready and willing to return the shares upon their claim being satisfied.

8. For such reasons the NCLT found and held that the entitlement of the respondents to recover their claim is already a subject matter of adjudication. It observed that should the suit for recovery be adjudicated in their favour, they would well be within their rights to appropriate the proceeds under the shares in execution proceedings if the pledge is not redeemed. NCLT was of the view that it would be grossly inequitable to direct the respondents to hand over the shares. The NCLT also found that considering the facts of the matters the prayer of the petitioner was beyond the scope of Sections 46 or 56 of the Companies Act, 2013 and declined to give any directions.

9. Aggrieved, the appellant in the appeal is claiming that there was no document of pledge and the name of the appellant continues to be reflected in the company record as shareholders of these shares. Learned counsel for the appellant relied on the report filed to police on 1.12.2015 where theft has been alleged against Respondent No.2. It is claimed that the appellant has not executed transfer form and the Respondents will not be able to use the shares held by them. It is stated that in the Returns of 2016, after the dispute was raised by appellant, the Respondent have shown encumbrance of pledge in the record.

10. Learned counsel for the Respondent has in arguments reiterated the stand of the respondent taken before NCLT and is supporting the reasoning of the NCLT to add that the appeal deserves to be rejected.

11. Sub-sections (1) and (2) of Section 46 are relevant for decision of the present matter. Sub-section (1) and (2) of Section 46 reads as under:

“46. Certificate of Shares-

(1) A certificate, issued under the common seal, if any, of the company or signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary, specifying the shares held by any person, shall be prima facie evidence of the title of the person to such shares.

(2) A duplicate certificate of shares may be issued, if such certificate-
(a) Is proved to have been lost or destroyed; or
(b) Has been defaced, mutilated or torn and is surrendered to the company.

12. Reference needs to be made to sub-section (1) of Section 56 also which is as follows:

“56-Transfer and transmission of securities –(1) A company shall not register a transfer of securities of the company, or the interest of a member in the company in the case of a company having no share capital, other than the transfer between persons both of whose names are entered as holders of beneficial interest in the records of a depository, unless a proper instrument of transfer, in such form

as may be prescribed, duly stamped, dated and executed by or on behalf of the transferor and the transferee and specifying the name, address and occupation, if any, of the transferee has been delivered to the company by the transferor or the transferee within a period of sixty days from the date of execution, alongwith the certificate relating to the securities, or if no such certificate is in existence, alongwith the letter of allotment of securities;

Provided that where the instrument of transfer has been lost or the instrument of transfer has not been delivered within the prescribed period, the company may register the transfer on such terms as to indemnity as the Board may think fit.”

13. Sub-Section (4) of Section 56 of the Act requires the company to deliver the certificate of shares at the time of incorporation, allotment etc in periods as detailed in the Section. In present matter the shares had been initially delivered to the appellant is not in dispute. Looking to the admitted facts in this matter, there is not dispute regarding the fact that the company had indeed issued shares certificates to the appellant.

14. Duplicate shares certificate can be issued if the certificates issued are proved to have been lost or destroyed as provided in Section 46(2) referred above. This is not the case here. Duplicate share certificates may be issued also if the certificate has been defaced, mutilated or torn and is surrendered with the company. This is also not the matter here. This is not a case to attract contingencies stated in Proviso of Sub-Section (1) of Section 56 also. Thus we find that the NCLT was right in its observations made in para 12 of the impugned order that the prayer of the petitioner where he seeks orders to the company to deliver the original share certificates was beyond the scope of Section 46 or Section 56 of the Companies Act, 2013.

15. Vide Diary No.6439 the respondents have filed a copy of the Plaint of Suit CS(OS) No.3169 of 2015 filed by the Respondent No.1 against Apsom Turner Pvt Ltd and the appellant and his wife and others to recover Rs.1.2 crores. The pleadings give details which have been put up by the respondents in the Civil Court on the Original Civil Jurisdiction of the High Court. In para 23 of the Suit, the respondents have pleaded as under:

“That the Plaintiff company is having its registered office at New Delhi, the original shares were handed over by defendant No.2 to the plaintiff for furnishing the Corporate Guarantee in Delhi, the amount of Rs.1.2 crores was paid by the plaintiff company to M/s Celica Developers Pvt from the plaintiff’s accounts maintained at Delhi, and the defendants are liable to reimburse the same at Delhi, the legal notice was also sent from Delhi, thus cause of action arose at New Delhi, therefore, this Hon’ble Court has pecuniary and territorial jurisdiction to hear, try and decide the present suit between the parties.”

16. In the written statement of the suit filed by the appellant and others this claim of the respondent has been denied by the appellant. The matter is naturally before the Hon’ble High Court and is sub-judice.

17. Learned counsel for the appellant has taken us through the judgement in the matter of ***“P.N. Krishna Patter Vs Kannembra Nayar & Others”*** reported in 1941 Indian Law Reports Madras Series Page 419 to submit that valid pledge of shares of a company registered under the Indian Companies Act cannot be created by mere deposit of shares certificates as a security for a debt. We have gone through the judgement and seen the observations of the Hon’ble High Court at specially at Page No.421 Page 426 and the law discussed by the Hon’ble High Court as well as the facts which was involved in that matter. The counsel for the appellant further wanted to rely on the Indian Stamp Act, 1899 to say that agreement relating to deposit of title deed pawn or pledge required payment of stamp duty and thus according to the learned counsel written document was necessary but there is no written document creating the pledge.

18. Learned counsel for the respondent, however, relied on judgement in the matter ***“State of Haryana and others Versus Narvir Singh and Another”*** reported in (2014) 1 Supreme Court Cases 105 which basically relates to mortgage by deposit of title deed and submitted that the judgement of Hon’ble Supreme Court shows that a difference has to be made between documents creating right and document which is evidence of handing over of the title deed.

19. Although learned counsel for both sides are making these submissions, we are not entering into the question of deciding whether or not there has been

a valid pledge. The fact remains in the present matter that the respondents are in possession of the shares certificates and it is not a case that they have on their own taken any action with regard to the transfer of shares. In the present matter, especially when civil proceedings in the High Court are pending we need not enter into these disputes whether or not the pledge is there. We find that appellant failed to make out case under Section 46 or 56 of the Act and has not approached with clean hands. He suppressed the earlier litigation and wanted us to believe that he had reason to say that the shares were lost and that later he had reason to claim theft. Facts show that these claims were not true. We find that Respondents No.1 and 2 have justifiable reasons to show how they are in possession of the shares and that, in the facts of the present matter they may not be directed to hand over the shares.

19. We agree with the reasons recorded by NCLT in impugned orders. No case is made out for us to interfere in the impugned order in this appeal. In equity and in law we have no reason to interfere in the matter to aid appellant like the present one.

20. The appeal is dismissed with costs of Rs.1 lakh to be paid by the appellant to Respondent No.1.

(Mr. Balvinder Singh)
Member (Technical)

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

New Delhi
Dated: 29 -10-2018

Bm