

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****COMPANY APPEAL (AT) No.152 of 2019**

(Arising out of impugned order dated 26th April, 2019 passed by National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in IA No.209/2018 in CP No.116/NCLT/AHM/2013)

1. Sudama Chemtech Pvt Ltd.
Basement 4, Anand Apartment,
Opposite Rajshree Cinemas,
Sayaji Gunj,
Vadodara 390005
2. Donald Austin Lyall,
S/o Mr. Emmanuel George Lyall
2, Krishna Dham Bungalow, Kalali Road,
Vadodara 390012

Appellants

Vs

1. Girish Jetly,
6-B, Greenland Society,
Gotri Road,
Vadodara 390021
2. Vivek Girish Jetly,
6-B Greenland Society,
Gotri Road,
Vadodara 390021

Respondents

Ms Anannya Ghos, Advocate for Appellant.
Mr Ketur J Shah, PCS for Respondent

JUDGEMENT
(16th December, 2019)**JUSTICE JARAT KUMAR JAIN, MEMBER (JUDICIAL)**

This appeal is preferred by Sudama Chemtech Pvt Ltd and its director, Donald Austin Lyall, against the order of NCLT Ahmedabad Bench thereby

allowing I.A. No.209/2018 filed in CP No.116/NCLT/AHM/2013 on 26th April, 2019.

2. Mr Girish Jetly, Respondent No.1 herein (Petitioner No.1 in CP) is one of the promoter/director and shareholder of the appellant company holding 10687 equity shares of Rs.100/- each constituting 48% total issued capital. Mr. Vivek Jatley, Respondent No.2 (Petitioner No.2 in CP) filed Company Petition No.116/2013 before erstwhile Company Law Board under Section 397, 398 and 402 of the Companies Act, 1956 alleging siphoning of funds by Appellant No2 (Respondent No.2 in CP), illegal allotment of shares and illegal appointment of directors on the Board and illegal removal of Mr. Vivek Jetly from the Board of Directors. The original petition sought relief to allow MR. Vivek Jetly to act as whole time Director inter alia with other reliefs.

3. In the petition, Respondent No.1 and 2 filed IA No.209/2018 making a prayer that appellant be instructed to pay the remuneration of Rs.30000/- per month to Respondent No.1 from November, 2013 and Rs.20,000/- per month to Respondent No.2 from September, 2013 with interest and to continue making the payment of remuneration.

4. The application was opposed by the appellant on the ground that Respondent No.1 was not attending the Board Meetings due to his ill health and Respondent No.2 was removed by the shareholders of the company. The Respondents are non-functional directors. Therefore, as per Board of Director's meeting decision 16.10.2013 such directors are not entitled for any remuneration. The application was opposed on the ground that under the Income Tax the salary/remuneration of a non-functional director of the company is not allowed to be debited from company's funds nor it can be

shown as business expenses. As per the Board Resolution the company has filed relevant documents with the ROC for making the change in the designation of Respondents from Executive to Non-Executive Directors within stipulated time. The Respondents were aware of such change but remained silent for all these years, but abruptly filed the present application in the year 2018. Hence, even otherwise, such application is an after thought and barred by limitation.

5. NCLT held “that the present application can be disposed on this short ground, without going into details of other controversy involved in the present Company Petition, by directing to the respondent to restore back the position of petitioner in the directorship of the company with all attended benefits including the remuneration, which was being paid to them on 31.10.2013 and further not to make any change in their remuneration or other attending benefits or terms and condition of their directorship until further order. We further made clear that our aforesaid direction/order is subject to the final outcome of the main Company Petition and we have not conclusively decided the eligibility of salary/remuneration to a non-executive non-functional director. The issue of the illegal/unauthorized removal of petitioner from the directorship of the company alongwith these issue shall be dealt along with in accordance with the law, while hearing and disposing of the main Company Petition.”

6. Being aggrieved with the order appellants have filed this appeal.

7. Learned counsel for the appellant submits that the Respondents are guilty of gross suppression of facts as much as they have failed to disclose that they had been designated as non-executive directors of the Appellant

No.1 vide Board Resolution dated 4.9.2013 hence they are re-designated. The Respondents have been well aware of this position and accepted the same. It is further submitted that the impugned order proceeds on an incorrect premise to the effect that it was incumbent upon the appellants to maintain status quo with regard to the status of directorship of the Respondents herein alongwith attended benefits to them whereby the erstwhile Company Law Board had directed that the Resolution to the extent removing the Respondents as director will not be implemented to the next date. The Respondents have suppressed the material fact that while deciding the application IA No.334/2013 in CP No.116/2013 Company Law Board vide order dated 27.5.2014 rejected the prayer for granting remuneration to the Respondents. It is also submitted that as per Income Tax Act remuneration paid to non-functional director of the company is not allowable to be debited from Company's funds. Thus the impugned order is not sustainable in law. It be set aside.

8. On the other hand Learned counsel for the Respondents supports the impugned order and submitted that the Respondent NO.1 is the founder director of the company. Respondent No.2 is his sone who has been illegally removed from the Board of Directors because they have filed the petition for oppression and mismanagement against the appellants. NCLT has rightly held that the Respondents are entitled for remuneration as directors.

9. Having heard learned counsel for the parties we have gone through the records.

10. The appellants for first time raised the objection in this appeal that Company Law Board while deciding the Interim Application No.334/2013 vide

order dated 27.5.2014 rejected the prayer for remuneration of the respondents. We have examined this objections.

11. Respondents have filed the application before Company Law Board CA No.334/2013 for following relief:-

- i) Right to file reply by the respondents be closed as they have failed to submit the reply within time limit stated in the order.
- ii) Copies of all documents stated in Para 6 above and all other statutory records be sent to the petitioner forthwith.
- iii) Petitioners be allowed to act as director and use their rights as directors by respondents.
- iv) Directors' remuneration be paid to petitioners until outcome of the petition.
- v) R-5, R-6 and R-7 are be ordered to disclose their indebtedness to the company and amount received in addition to the professional assignments.

12. Company Law Board decided as many as four IA applications vide order dated 27.5.2014. The order in regard to CA 334/2013 is as under:-

“6. Heard. The application is disposed off with the direction that the Respondent No.1 and 2 will allow the inspection to the Petitioners or their authorised representative of the statutory records of the Company to which they are entitled to under law in the capacity of the shareholders and Directors of the Company.

7. In case, the Respondents find that the Petitioners are not entitled to inspect the documents sought for inspection as per law, they will file an

Affidavit pointing the details of such documents. The same will be considered by the CLB, on the next date of hearing.

8. The remaining prayers made in the application have already been considered earlier and were not found in favour of the Petitioners. Therefore, they are rejected.”

13. It is true that if we read relief (iv) “Directors’ remuneration be paid to petitioners until outcome of the petition” with this order “the remaining prayers made in the application have already been considered earlier and were found in favour of the petitioners. Therefore, they are rejected.” Then it seems that the Company Law Board has earlier rejected the prayer for directors’ remuneration to be paid by the Company. However, the appellants have not placed on record any such order to show that earlier such prayer was considered and rejected. It seems that inadvertently Company Law Board while deciding the application with other reliefs have made this observation.

14. We have also noted that the appellants in the reply of present application before NCLT have not raised this ground. It means that they are well aware that earlier Company Law Board or NCLT has not considered and rejected the prayer of respondents for directors’ remuneration.

15. NCLT has elaborately discussed the orders of Company Law Board dated 31.10.2013 and 20.03.2014 which is as under:-

“6. As per material available on record, it is undisputed position in the matter that the respondent company had passed a Board Resolution to remove the petitioner from the Directorship of the company, which has been done subsequent to filing of the present Company Petition before the

Court, i.e. erstwhile Company Law Board, wherein the Company Law Board, vide its order dated 31.10.2013, has pleased to issue following directions to the Respondents:

a) The EOGM scheduled on 2.11.2013 may be held as per schedule. However, the resolution to the extent removing the Petitioner as director will not be implemented until the next date fixed.

b) Respondent will provide Inspection of the documents along with the consulting company secretary to the Petitioner, for which petitioner will serve an advance notice of 7 days indicating the details of documents sought to be inspected.

c) No Board Meeting/EOGM/AGM shall be held without service of proper and valid notice upon the Petitioner atleast 7 days in advance.

7. A plain reading of the above stated direction, goes to show that the Board Resolution, pertaining to the removal of the petitioner from the Directorship cannot be given effect without informing to and prior permission of the Court, i.e. The Company Law Board. In such a peculiar circumstance of the present case, it was incumbent upon the respondents to maintain status quo with regard to the status of the directorship of the present petitioner along with attended benefits to them. However, it is alleged that despite the above stated direction, the respondents have stopped making payment of remuneration of directorship to the petitioners, who claims themselves to be full time director and executive

chairman of the company, which is the main issue involved in the present petition for consideration of this Tribunal, even though, this being disputed by the respondent.

8. IT is a matter of record that the then Company Law Board, further in its subsequent order dated 20.03.2014 read with order dated 31.10.2013 had observed that the Board Meeting of the company may take place, but resolution, if passed, with respect to withdrawal of the car given to the petitioner will not be implemented till the next date of hearing that gives such impression that the then Company Law Board was pleased and conscious enough to maintain equilibrium in the affair of the company as well as to maintain status quo with regard to alleged proposal for removal of petitioner from the directorship or to withdraw their attended benefits or to make material change in existing terms and conditions. Despite this it is a matter of record that the Board of Directors of the respondent company went to take deliberate decision without informing to the Company Law Board or this Court in respect of stopping payment of remuneration which was being paid to the petitioner No.1, as being the executive chairman of the company an Executive Chairman is presumed as full time Director. Further they stopped making payment of remuneration to the petitioner No.2 allegedly on such ground that its shareholding stood transferred, as he was no longer shareholder of the company. However, such being a dispute question of facts is now sub judice before this Court, for consideration in accordance with law.”

16. We are convinced with the reasoning of NCLT and appellants are unable to convince us to take another view.

17. With the above discussions we are of the view that we find no ground to interfere in the interim order passed by NCLT. Thus the appeal is dismissed. No order as to cost.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

New Delhi

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