

Aurosagar Estates 'Private Limited & ... vs M.C.Davar Holdings Private Limited on 21 July, 2017

IN THE NATIONAL COMPANY LAW APPELLATE
TRIBUNAL
COMPANY APPELLATE JURISDICTION

Company Appeal (AT) No. 100 of 2017

(arising out of Judgment dated 10th March, 2017 passed by
National Company Law Tribunal, Mumbai Bench, in
Miscellaneous Application No. 90 of 2016 in Company Petition
No 18/241/NCLT/MB/Mah/2016)

Aurosagar Estates 'Private Limited

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V .

M C Davar Holdings Private Limited

Respondent

Present;

For Appellant:- Mr Amit Sibal, Senior Advocate, Mr
Rakesh Kumar and Mr Nitesh Vasudeva, Advocates.

For Respondent:- Mr Somasekhar Sundaresan, Mr
Rohan Deshpande, Mr Rishad A Choudhury, Mr
Kulkarni Ninad and Mr Uddym Mukherjee,
Advocates.

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by Appellants against judgment dated 10th March, 2017 passed by National Company Law Tribunal (hereinafter referred to as Tribunal), Mumbai Bench, in Miscellaneous Application No. 90 of 2016 in Company Petition No. 18/241/NCLT/MB/Mah/2016 whereby and where under the Tribunal allowed the Miscellaneous Application for amendment of pleading and prayer filed by Respondent in a petition under section 24 and 242 of the Companies Act, 2013 (hereinafter referred to as Act, 2013) and ordered to list the case for hearing.

2. Brief facts of the case are as follows.

A petition under Section 241 of the Act, 2013 was filed by Respondent alleging failure on the part of the Appellants (being the lessee) to pay certain instalments as under a lease agreement. It was also

alleged that in lieu of Inter Corporate Deposits (hereinafter referred to as JCDs) provided to Appellants must transfer all his shares held in the 1st Appellant company to persons known as AMP Group and the companies they control.

It is pertinent to note in this regard that the persons to whom the shares are prayed to be transferred in the Company Petition are entities disentitled to approach the Tribunal by virtue of being disqualified under sub-Section (1)(a) of Section 244 of the Act, 2013.

3. According to Appellants, the Company Petition was filed by the Respondent before the Tribunal on 22.8.2016 and by way of an application moved on 4.10.2016 the Respondent sought to amend the Company Petition seeking to raise a fresh cause of action by challenging certain amendments to the Articles of Association (hereinafter referred to as Articles) of the 1st Appellant company carried out as early as on 15.10.2012. It is the Appellant's case before the Tribunal that the Respondent had full and complete knowledge of all the said amendments to the Articles and that the challenge to these amendments is barred in view of Section 433.1, of the Act, 2013 read with Limitation Act, 1963 (hereinafter referred to as Act, 1963).

4. Ld. Counsel for the Appellants submitted that the impugned order permitting the amendments sought to be made by the Respondent to their Company Petition is wholly erroneous, legally untenable and therefore liable to be set aside. In support of the Appellant's contention for the setting aside of the impugned judgment Ld. Counsel submitted that the Limitation Act, 1963 should be made applicable to the proceeding before the Tribunal, including the amendment to the pleadings to introduce a fresh cause of action.

5. Ld. Counsel for the Appellants further submitted that under the Companies Act, 1956 (hereinafter referred to as Act, 1956), the applicability of the provisions of the Limitation Act, 1963 was restricted only to proceedings under Section 10F of the Act, 1956, as per Section 1 OGE of the said Act. Section 433 of the Companies Act, 2013 specifically incorporates the Limitation Act, 1963 by reference. More particularly, the language of Section 433 of the Companies Act, 2013 makes it clear that the provisions of Limitation Act, 1963 shall 'as far as may be' apply to the proceedings or appeal before the Tribunal and the Tribunal.

6. Ld. Counsel for the Appellants further submitted that in this context, judicial precedent with regard to the phrase 'as far as may be' has been enunciated that all the provisions of the statute incorporated by reference (i.e. Limitation Act, 1963 in the instant case) must necessarily apply to the legislation into which it is incorporated, except where it is not at all possible to apply such provisions that have no role to play in the legislation into which they are incorporated. The argument that the words 'as far as may be' is meant to give discretion to apply the provisions or not to apply the same in specific facts and situations was specifically rejected by Hon'ble Supreme Court in "C.N. Paramasivam v. Sunrise Plaza" (2013) 9 SCC 460.

7. Ld. Counsel for the Appellant also submitted that the provisions of the Limitation Act, 1963 must be fully applied to the proceedings instituted under Section 241 of the Act, 2013. This being the case, Ld Counsel submitted that any cause of action sought to be agitated before the Tribunal must

satisfy the preliminary test of limitation. It would be equally applicable to all fresh cause of action sought to be introduced into ongoing proceedings by way of an amendment to the pleadings.

8. Per contra, according to Ld. Counsel for the Respondent an amendment of pleading only works to the aid of the 2nd party. It enables a notice of the issues being agitated and thereby enables a full and substantive response from their end to meet the case of the plaintiff (1st party) as amended. Reliance was placed on Hon'ble Supreme Court's decisions in "Pirgonda Hongonda v. Kalgonda Shidgonda Patil" 1957 SCR 595 and in "Sampath Kumar v. Ayyakannu" (2002) 7 SCC 559.

9. Insofar as law of limitation is concerned, according to Ld. Counsel for the Respondent, whether or not the amendment sought to be made relates to a cause of action is actually barred by limitation is a mixed question of fact and law. The period prescribed under the relevant provisions of the Limitation Act, 1963 begins to run from the time the party affected by action becomes aware of injury occasioned to him.

10. It was also contended that opposition on the ground of limitation has to be considered in the context of the time at which the Respondent got notice of injury, inflicted by Al ehlauts, and the stage at which the Respondent preferred Application for amending its Company Petition.

11. Further according to Respondent, under Section 17 of the Limitation Act, 1963, the clock of limitation starts ticking from the time the fraud becomes aware of being defrauded. Once these issues are taken into account, it is manifest that in exercise of its inherent powers and in accordance with the settled principles applicable to amendment of pleadings, the Ld. Tribunal is indeed empowered to grant on merits any amendment to pleadings.

12. The question arises for consideration are -

(i) Whether the Tribunal is empowered to amend a petition under Section 241 of the Act, 2013 and if so, to what extent?

(ii) Whether the amendment sought for and allowed by Tribunal in the impugned order amounts to amendment with regard to a fresh cause of action ?;

and

(xiii) Whether the amendment as sought and allowed by the impugned order is barred by limitation

13. The Central Government in exercise of power conferred by Section 409 of the Companies Act, 2013 promulgated the National Company Law Tribunal Rules, 2016 (hereinafter referred to as NCLT Rules). Rule 155 of the NCLT Rules provides general power to amend defect or error in any proceeding before the Tribunal, as quoted below: -

"155. General power to amend. - The Tribunal may, within a period of thirty days from the date of completion of pleadings, and on such terms as to costs or otherwise,

as it may think fit, amend any defect or error in any proceeding before it; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

14. While Rule 17 (1) (b) of the NCLT Rules allow the Registrar to receive application for amendment, Rule 32 prescribe interlocutory application, indicating that a party may approach the Tribunal with an application seeking amendment of its plaint. Ability of the parties to amend their plaint is circumscribed by terms of Rule 155 for appropriate appreciation. Rule 17 (1) (b) and Rule 32 of NCLT Rules, 2016 are quoted herein: -

"17. Functions of the Registrar. - (1) The Registrar shall have the following functions, namely: -

(b) receive applications for amendment of appeal or the petition or application or subsequent proceedings.

"32. Interlocutory applications. - Every Interlocutory application for stay, direction, condonation of delay, exemption from production of copy of order appealed against or extension of time prayed for in pending matters shall be in prescribed form and the requirements prescribed in that behalf shall be complied with by the applicant, besides filing an affidavit supporting the application."

15. It is pertinent to notice that thirty days' time provided under Rule 155 NCLT Rules 2016 to amend a petition has been newly introduced into the Rules. No corresponding time period was provided under the erstwhile Company Law Board Regulation, 1999, thereby ensuring expeditious disposal of the application by Tribunal/ Appellate Tribunal, keeping in view Section 422 of the Act, 2013, as quoted below: -

"Expeditious Disposal by Tribunal and Appellate Tribunal - 422 (1) Every application or petition presented before the Tribunal and every appeal filed before the Appellate Tribunal shall be dealt with and disposed of by it as expeditiously as possible and every endeavour shall be made by the Tribunal or the Appellate Tribunal, as the case may be, for the disposal of such application or petition or appeal within three months from the date of its presentation before the Tribunal or the filing of the appeal before the Appellate Tribunal. (2) Where any application or petition or appeal is not disposed of within the period specified in sub-

section (1), the Tribunal or, as the case may be, the Appellate Tribunal, shall record the reasons for not disposing of the application or petition or the appeal, as the case may be, within the period so specified; and the President or the Chairperson, as the case may be, may, after taking into account the reasons so recorded, extend the period referred to in sub-section (1) by such period not exceeding ninety days as he may consider necessary."

16. From the provisions as referred to above, we find that the Tribunal having power to regulate its own procedure, may exercise its discretion and permit any amendment to the pleadings within a period of thirty days from the date of completion of pleadings -

(i) to rectify any defect or error in the proceeding before it, for the purpose of determining the real question or issues raised by or depending on such proceeding; and

(ii) to facilitate expeditious disposal and determination of matters before it (as per Section 422 of the Companies Act, 2013).

17. As such the NCLT Rules in general do not provide right to the parties to file a petition for amendment of their respective pleading or prayer and the Tribunal is also not clothed with wide power, except the limited power, as noticed and discussed above.

18. At this stage it is pertinent to note that under sub-section (2) of Section 420 of the Act, 2013, the Tribunal is empowered to amend any order passed by it, as quoted below, but the said provision do not amount to amendment of a petition or pleading or prayer.

"Orders of Tribunal - 420.

(1)w.

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act."

sing of any proceeding and appeal before it or as the case may, is not bound by the procedure laid down under the Code of Civil Procedure 1908, but shall be guided by the principles of natural justice and subject to other provisions of the Act and of any Rules made thereunder, as prescribed under Section 424 of the Companies Act, 2013 and reads as follows: -

"Procedure Before Tribunal and Appellate Tribunal - 424. (1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act ["or of the Insolvency and Bankruptcy Code, 2016] and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act ["or under the Insolvency and Bankruptcy Code, 2016], the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely: -

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) dismissing a representation for default or deciding it ex parte;

(g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed (3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a civil court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction, -

(a) in the case of an order against a company, the registered office of the company is situated; or

(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973."

20. Section 422 of the Act, 2013, stipulates disposal of application or petition before the Tribunal or appeal before the Appellate Tribunal preferably within three months from the date of presentation before the Tribunal. The question of entertaining any petition for amendment of pleading or prayer after three months of filing of a petition in general, does not arise, except in special circumstances, to be recorded in writing.

21. In "M/ s. Esquire Electronics and Ann, v. Netherlands India Communications Enterprises Limited & Ors" - Company Appeal (AT) 26 of 2016, the Appellate Tribunal by judgment dated 15th February 2017 while held that continuing cause of action during a certain period was barred by limitation insofar inaction in regard to the alleged 'oppression and mismanagement' within a period of three years of filing of the Company Petition. The Appellate Tribunal held that such inaction is not barred by limitation.

22. The Company Petition in question was filed by Respondent/ Petitioner on 22nd August 2016 alleging 'oppression' and 'mismanagement'. It was alleged that in line of payment schedule every year, the 1st Respondent/ 1st Appellant received money from Respondents in the form of ICDs and in terms of original understanding between the Respondent/ Petitioner and the Appellants, the share of Appellant!1st Respondent were to be transferred to the Respondent. However, despite prolonged proceedings with one Mr J.S Patel and 2nd Appellant/2nd Respondent, the aforesaid transfer of shares of the Respondent /Petitioner was never completed by 2nd Appellant! 2' Respondent, which was deliberate and malafide aimed at retaining control over 1St Appellant company - M/s. Stokester Estaes Private Limited. Similarly, allegations with regard to the annual general meeting held between 2007 till 2015 were also levelled.

23. It is not in dispute that by way of amendment, the Respondent requested to carry out amendment with regard to proceeding dated 15th October 2012 whereby Article of Association of the Appellant company was amended. Therefore, it is clear that the Respondent by way of amendment raised a question about the legality of amendment of Article of Association as took place on 15th October 2012, unrelated to the allegation of 'oppression and mismanagement' made in the original petition.

24. As the amendment petition related to a different cause of action as took place in October 2012, we are of the view that the Tribunal was not competent to allow the petition for amendment with regard to separate cause of cause in respect of which no pleading was made nor any prayer made in the original application under Section 241.

25. Section 433 of the Companies Act, 2013 relate to 'limitation' as quoted below:

"Limitation - 433. The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be."

26. In "C.N. Paramasivam v. Sunrise Plaza" (2013) 9 SCC 460, the Hon'ble Supreme Court while dealing with provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 held that the expression "as far as possible" in relevant sections (Section 29 therein) only indicates that all those provisions of Act and Rules (Income Tax Rules therein) are applicable except those who do not have any role to play in the matter. Hon'ble Supreme Court further held while the phrase "as far as possible" may be indicative of certain inbuilt flexibility, the scope of that flexibility extends only to what is ' not at all practicable".

27. In view of provisions of Section 433 of the Act, 2013 and the decision of the Hon'ble Supreme Court with regard to "C.N. Paramasivam v. Sunrise Plaza", we hold that Section 433 is applicable in all cases filed before the Tribunal, including the present one.

28. In "M/s.Esquire Electronics and Ann, v. Netherlands India Communications Enterprises Limited & Ors" - Company Appeal (AT) 26 of 2016, the question of applicability of Section 433 of the Act, 2013 came for consideration before the Appellate Tribunal. By its judgment dated 15th February 2017, the Appellate Tribunal held:-

"12. We agree with the finding of Tribunal that Section 433 of the Companies Act, 2013 (hereinafter referred to as Act of 2013) makes it clear that the provisions of Limitation Act, 1963 (36 of 1963) apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be. The Tribunal also rightly held that the petitions under Section 397 and 398 are enforceable like decree and for all purpose a suit within the meaning of Code of Civil Procedure. We also agree with the finding of the Tribunal that the suit for which there is no prescribed period is provided as per Article 113 of the Limitation Act, 1963, period of limitation is three years. For the reason aforesaid we agree with the finding of the Tribunal that appellant (s) cannot rake up any issue which is barred by limitation i.e., for a period which is three years prior to the date of filing of the Petition."

29. In the present case we have observed that the Tribunal otherwise is not empowered to amend any petition except to the extent as prescribed under the Act and the Rules; the Tribunal cannot allow substantial amendment to the petition/application/appeal, on merely asking for it, unrelated to the original cause of action or prayer, though it is open to the Tribunal to allow the party to file additional affidavit! reply affidavit bringing to the notice of the Tribunal the other relevant fact which are related to the original cause of action and the prayer as has already been made.

30. In any case the Tribunal cannot allow any petition for amendment with regard to a fresh cause of action other than the cause of action for which the petition under Section 241 of the Companies Act, 2013 has been preferred.

31. In "Radhika Devi vs. Bajrangi Singh & Ors." (1996) 7 SCC 486, the Hon'ble Supreme Court while dealing with Rule 17 of Code of Civil Procedure, 1908, held amendment of plaint seeking to take right of opposition party acquired by bar of limitation cannot be allowed.

32. In the present case, as the amendment sought with regard to a fresh cause of action which has taken place more than three years back on 15th October, 2012, prayer made in amendment petition being barred by limitation, the Tribunal was not competent to allow the amendment.

33. In view of discussion as made above, impugned order cannot be upheld. We, accordingly, set aside the impugned order dated 10th March 2017 and direct the Tribunal to hear the petition on the basis of the pleadings as already made in the petition under Section 241 of the Companies Act, 2013, reply thereof and rejoinder, if any, filed. However, it will be open to the Tribunal to peruse any

document and call for any document if it is satisfied related to the cause of action and allegation, originally made. It is desirable that the petition be disposed of expeditiously, more than three months having already passed. The appeal is allowed with aforesaid observations. However, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
21st July, 2017