

# Oswal Greentech Ltd vs Pankaj Oswal & Ors on 14 November, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 410 of 2018

IN THE MATTER OF:

Oswal Greentech Ltd. ...Appellant

Versus

Mr. Pankaj Oswal & Ors. ...Respondents

Present:

For Appellant : Mr. Amish Tandon, Mr. Sameer Abhyankar, Mr. Ayush Beotra and Mr. Akshay Joshi, Advocates.

For Respondents: Mr. Sudipto Sarkar and Mr. Arun Kathpalia, Senior Advocates with Mr. Mayank Mishra, Mr. Raghav Sabharwal and Mr. Ashish Joshi, Advocates.

Company Appeal (AT) No. 411 of 2018

IN THE MATTER OF:

Mrs. Aruna Oswal ...Appellant

Versus

Mr. Pankaj Oswal & Ors. ...Respondents

Present:

For Appellant : Mr. Alok Dhir, Mr. Milan Singh Negi, Mr. Abhijeet Sinha, Mr. Soumabho Ghose and Mr. Raza Abbas, Advocates.

For Respondents: Mr. Sudipto Sarkar and Mr. Arun Kathpalia, Senior Advocates with Mr. Mayank Mishra, Mr. Raghav Sabharwal and Mr. Ashish Joshi, Advocates.

Company Appeal (AT) No. 412 of 2018

IN THE MATTER OF:

Oswal Agro Mills Ltd.

...Appellant

Versus

Mr. Pankaj Oswal & Ors.

...Respondents

Present:

For Appellant: Mr. K.P.S. Kohli and Ms. Manpreet Chadha,  
Advocates.

For Respondents: Mr. Sudipto Sarkar and Mr. Arun Kathpalia, Senior  
Advocates with Mr. Mayank Mishra, Mr. Raghav  
Sabharwal and Mr. Ashish Joshi, Advocates.

## J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Mr. Pankaj Oswal (1st Respondent) filed a petition under Sections 241, 242 and 244 of the Companies Act, 2013, alleging certain acts of oppression and mismanagement in the affairs of 'M/s. Oswal Agro Mills Limited'.

2. On appearance, the Respondent/ Appellant herein raised the question of maintainability of the petition under Sections 241-242 of the Companies Act, 2013 with one of the ground that the 1st Respondent/ Petitioner is not a shareholder. All the applications raising objections have been dismissed by the National Company Law Tribunal ("Tribunal" for short), Chandigarh Bench, Chandigarh by impugned order dated 13th November, 2018 and the Company Appeal (AT) Nos. 410-412 of 2018 Tribunal held that the 1st Respondent- Mr. Pankaj Oswal is eligible in terms of Section 244 of the Companies Act, 2013.

3. The brief facts of the case are as follows:

Late Mr. Abhey Kumar Oswal during his life time held 5,35,30,960 shares in 'M/s. Oswal Agro Mills Limited' being the Appellant herein, which is a listed Company. During his lifetime, Late Mr. Abhey Kumar Oswal, on or about 18th June, 2015 filed a nomination in terms of Section 72 of the Companies Act, 2013 in favour of Mrs. Aruna Oswal, the Appellant in Company Appeal (AT) No. 411 of 2018 and the 2nd Respondent in the instant appeal. The nomination was witnessed by two witnesses in the prescribed manner and specifically provided "This nomination shall supersede any prior nomination made by me/ us and also any testamentary document executed by me/ us". Late Mr. Abhey Kumar Oswal expired on 29th March, 2016. Mrs. Aruna

Oswal, in terms of nomination, made a request on 4th April, 2016 to be registered as the holder of the shares held by Late Mr. Abhey Kumar Oswal. In accordance with such request, the said Mrs. Aruna Oswal was registered as the holder of the said 5,35,30,960 shares on 16th April, 2016.

Mr. Pankaj Oswal, the 1st Respondent herein and the Petitioner in C.P. No. 56/CHD/PB/2018 filed a Partition Suit (CS No. 53 of 2017) in February, 2017 before the Hon'ble Delhi High Court claiming to be entitled to 1/4th of the Estate of Late Mr. Abhey Kumar Oswal Company Appeal (AT) Nos. 410-412 of 2018 and also claimed that part of the Estate comprised of the said 5,35,30,960 shares. The Partition Suit is still pending and in the said suit, an order of status-quo was passed on 8th February, 2017. This order is still subsisting.

Subsequent to filing of the Partition Suit, Mr. Pankaj Oswal instituted proceedings under Sections 241 and 242 of the Companies Act, 2013 being the Company Petition. On the date of institution of the said proceedings, Mr. Pankaj Oswal did not hold 10% of the total issued, paid-up and subscribed capital of the Appellant Company in his own name. He, however, did not seek any waiver in terms of Section 244 of the Companies Act, 2013 but claimed that he was entitled to more than 10% of the issued, subscribed and paid-up capital of the company on the basis that he was one of the four heirs on intestacy of Late Mr. Abhey Kumar Oswal and thus was entitled to claim 1/4th of 5,35,30,960 shares which were registered in the name of Late Mr. Abhey Kumar Oswal during his lifetime and on that basis claimed that he had more than 10% of the shareholding in the Appellant Company.

From an order dated 21st May, 2018 passed in Company Petition, Mrs. Aruna Oswal preferred an appeal being C.A. No. 172 of 2018 in which an order was passed by this Appellate Tribunal on 29th May, 2018 directing that maintainability issue should be heard first. The issue of maintainability was decided in favour of Mr. Pankaj Oswal by the impugned order dated 13th November, 2018. Company Appeal (AT) Nos. 410-412 of 2018

4. According to the Appellant, in view of the nomination filed by Late Mr. Abhey Kumar Oswal during his lifetime and the registration of the name of Mrs. Aruna Oswal pursuant to such nomination after the death of Original Shareholder, namely-- Late Mr. Abhey Kumar Oswal, Mr. Pankaj Oswal cannot claim to be entitled to exercise rights in respect of shares standing in the name of Late Mr. Abhey Kumar Oswal at the time of his death nor can claim any right over the shares.

5. Reliance was placed on Section 72(1) which relates to nomination of members and Section 72(3) which prescribes vesting of rights of securities, as follows:

"72. Power to Nominate. (1) Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.

xxx xxx xxx (3) Notwithstanding anything contained in any, other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of

the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the Company Appeal (AT) Nos. 410-412 of 2018 nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner."

6. It was further submitted that as per Rule 19(8) of the 'Companies (Share Capital and Debentures) Rules, 2014', the vesting of securities and right owing out of the same can be claimed. Rule 19(8) reads as follows:

"19(8) A person, being a nominee, becoming entitled to any securities by reason of the death of the holder shall be entitled to the same dividends or interests and other advantages to which he would have been entitled to if he were the registered holder of the securities except that he shall not, before being registered as a holder in respect of such securities, be entitled in respect of these securities to exercise any right conferred by the membership in relation to meetings of the company; Provided that the Board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the securities, and if the notice is Company Appeal (AT) Nos. 410-412 of 2018 not complied with within ninety days, the Board may thereafter withhold payment of all dividends or interests, bonuses or other moneys payable in respect of the securities, as the case may be, until the requirements of the notice have been complied with".

7. Therefore, according to the Appellants, on plain reading of the aforesaid provisions Section 72(1) & (3) read with Rule 19(8), the title to securities vests in the nominee and the nominee is entitled to all the rights in the securities, nominee i.e. Mrs. Aruna Oswal to the exclusion of all other persons. Only she is entitled to receive the dividends, interest and other advantages as the registered holder of such securities would be entitled to.

8. Learned counsel for the Appellants relied on Section 2(81) of the Companies Act, 2013 which defines "Securities" as under:

"2. Definitions. □.....(81) "securities" means the securities as defined in clause (h) of Section 2 of the Securities Contract (Regulation) Act, 1956 (42 of 1965)".

9. Reliance has also been placed on Section 2(h) of the 'Securities Contract (Regulation) Act, 1956', as follows:

"In this Act, unless the context otherwise require,-

(a).....

.....

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(h) "Securities" include

(i) Shares, scripts....."

10. It was submitted that in view of the above provisions, the securities mentioned in Section 72 of the Companies Act, 2013 include shares of a company.

11. Therefore, according to the counsel for the Appellants, it is only Mrs. Aruna Oswal who is entitled to exercise all the rights and receive all benefits in respect of the said 5,35,30,960 shares standing in the name of Late Mr. Abhey Kumar Oswal at the time of his death to the exclusion of all persons.

12. According to the Appellants, Section 241 of the Companies Act, 2013 is a statutory right and benefit given to a shareholder in a company under the Companies Act, 2013. As the name of Mrs. Aruna Oswal is entered in the Register of Members of the Appellant Company pursuant to the nomination in accordance with Section 72 of the Companies Act, 2013, it is Mrs. Aruna Oswal alone who is entitled to exercise all rights in respect of the said shares including the right to institute proceedings under Sections 241 and 242 of the Companies Act, 2013.

13. Reliance was placed on the decision of the Hon'ble Delhi High Court in "Dayagen Private Limited v. Rajendra Dorian Punj & Anr. □2008 (105) DRJ 29" wherein the Hon'ble High Court held that Section 109A of the Companies Act, 1956 which is in pari-materia with Section 72 of the Company Appeal (AT) Nos. 410-412 of 2018 Companies Act, 2013 overrides the general law of succession and vests the nominee upon the death of the shareholder with full and exclusive ownership rights in respect of the shares. According to the decision of the Hon'ble Delhi High Court which relates to proceedings under Sections 397 and 398 of the Companies Act, 1956 a valid nomination confers on the nominee the exclusive title to the shares.

14. It was further submitted by the learned counsel for the Appellants that even if it were to be assumed that shares formed part of the Estate of Late Mr. Abhey Kumar Oswal and even if it were held that Mr. Pankaj Oswal is entitled to 1/4th of such Estate, Mr. Pankaj Oswal cannot claim any part of the shareholding standing in the name of Late Mr. Abhey Kumar Oswal at the time of his death as any allotment of any part of the Estate of Late Mr. Abhey Kumar Oswal in favour of his heirs can only be decided in the Partition Suit and cannot be claimed as a matter of right in proceeding under the Companies Act, 2013.

15. According to Mr. Sudipto Sarkar, learned Senior Counsel appearing on behalf of Mr. Pankaj Oswal- 1st Respondent/ Petitioner, Late Mr. Abhey Kumar Oswal was a Hindu by religion and was a member of 'M/s. Oswal Agro Mills Limited'. At the time of death, he was holding approximately 40% shares in the Company i.e. 5,35,30,960 shares. He died intestate on 29th March, 2016 and is survived by four Class I legal heirs i.e. his widow, two sons and a daughter. Mr. Pankaj Oswal being

the eldest son of Late Mr. Abhey Kumar Oswal is one of the four legal heirs. Company Appeal (AT) Nos. 410-412 of 2018

16. According to the 1st Respondent, all heirs of Late Mr. Abhey Kumar Oswal acquired the ownership interest in 13382740 shares each i.e. 1/4th of 53530960 shares in the Company by operation of law on 29th March, 2019. However, on 16th April, 2016, the Company illegally transmitted all the shares held by Late Mr. Abhey Kumar Oswal in favour of Mrs. Aruna Oswal on the basis of an alleged nomination.

17. It is stated that the 1st Respondent/ Petitioner is a member of the Company and registered owner of 42,900 (0.03%) shares in the Company. Further, he has ownership interest in 13382740 shares (9.97% shares) which devolved on him automatically as per law of succession on death of Late Mr. Abhey Kumar Oswal; together, more than 10% of the shares of the Company.

18. It was in this background, on 16th March, 2018, the 1st Respondent/ Petitioner filed a Company Petition alleging acts of oppression and mismanagement in the affairs of the Company which has objected by Appellants herein.

19. Learned counsel for the 1st Respondent relied on Section 8 of the Hindu Succession Act, 1956 and the decision of the Hon'ble Supreme Court in "M/s. World Wide Agencies Pvt. Ltd. and Another v. Margarat T Desor and Others" (1990) 1 SCC 536.

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20. Initially, the case aforesaid was filed before the Hon'ble Delhi High Court by 'Worldwide Agencies (P) Ltd. & Anr' against 'Margaret T. Desor and Others'. The Division Bench of the Hon'ble Delhi High Court by its judgment dated 31st August 1989 (1989 SCC OnLine Del 318) while discussing the provisions of Sections 397, 398 & 399 of the Companies Act, 1956 held:

"24. The Supreme Court referred to its earlier decision in the case of Howrah Trading Co. Ltd. v. CIT [1959] 29 Comp Case 282 and observed that even where the holder of a share whose name is entered in the register of members hands over his share with blank transfer forms duly signed, the transferee would not be able to claim the rights of a member as against the company concerned until his name is registered in the register of members."

21. The aforesaid decision was challenged before the Hon'ble Supreme Court in "M/s. World Wide Agencies Pvt. Ltd. and Another v. Margarat T Desor and Others" (1990) 1 SCC 536 wherein the Hon'ble Supreme Court having noticed the provisions of Sections 397, 398 & 399 of the Companies Act, 1956 (now Sections 241, 242 & 244 of the Companies Act, 2013) observed:

"12. On behalf of the appellants it was contended that the right which is a specific statutory right, is given only to a member of the company and until and unless one is Company Appeal (AT) Nos. 410-412 of 2018 a member of the company, there is no

right to maintain application under Section 397 of the Act. Mr Nariman contended that there was no automatic transmission of shares in the case of death of a shareholder to his legal heir and representatives, and the Board has a discretion and can refuse to register the shares. Hence, the legal representatives had no locus standi to maintain an application under Sections 397 and 398 of the Act. Mr Nariman submitted that the rights under Sections 397 and 398 of the Act are statutory rights and must be strictly construed in the terms of the statute. The right, it was submitted, was given to "any member" of a company and it should not be enlarged to include "any one who may be entitled to become a member".

13. In order to decide the question involved, it would be necessary to examine certain provisions of the Act. Section 2(27) of the Act states that "member" in relation to company does not include a bearer of a share-warrant of the company issued in pursuance of Section 114 of the Act. Section 41 of the Act provides as follows:

"41. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.

Company Appeal (AT) Nos. 410-412 of 2018 (2) Every other person who agreed in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company."

14. Section 26 of the English Companies Act, 1948 is substantially the same.

15. Section 109 of the Act states as follows:

"A transfer of the share or other interest in a company of a deceased member thereof made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer."

16. In this connection, it would be relevant to refer to Articles 25 to 28 of Table A of the Act, which deal with the transmission of shares and which are in the following terms:

"25. (1) On the death of a member the survivor where the member was a joint holder, and his legal representatives where he was a sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares.

(2) Nothing in clause (1) shall release the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by him with other persons.

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26. (1) Any person becoming entitled to a share in consequence of the death or insolvency of a member may, upon such evidence being produced as may from time to time properly be required by the Board and subject as hereinafter provided, elect, either --

(a) to be registered himself as holder of the share; or

(b) to make such transfer of the share as the deceased or insolvent member could have made.

(2) The Board shall, in either case, have the same right to decline or suspend registration as it would have had, if the deceased or insolvent member had transferred the share before his death or insolvency.

27. (1) If the person so becoming entitled shall elect to be registered as holder of the share himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects.

(2) If the person aforesaid shall elect to transfer the share, he shall testify his election by executing a transfer of the share.

(3) All the limitations, restrictions and provisions of these regulations relating to the right to transfer and the registration of transfers of shares shall be applicable to any such notice or transfer as aforesaid as if the death or insolvency of the member had not occurred and the notice or transfer were a transfer signed by that member.

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28. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends or other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company:

Provided that the Board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the share, and if the notice is not complied with within ninety days, the Board may thereafter withhold payment of all dividends, bonuses or other moneys payable in respect of the share, until the requirements of the notice have been complied with."

17. Article 28 is more or less in pari materia to Article 32 of Table A to the English Companies Act. It may also be mentioned, as it has been mentioned by the High Court, that Section 210 of the English Companies Act, before its amendment in 1980, was substantially the same as Section 397 of the Act."

22. After discussing the 'English Law' and the decision of the Hon'ble Supreme Court of Victoria etc., the Hon'ble Supreme Court held:



Company Appeal (AT) Nos. 410-412 of 2018 "24. We do not agree for the reason mentioned before. It further appears to us the Australian judgment does not reconcile to logic in accepting that legal representative can petition for winding up, which is called the "sledge-

hammer remedy", but would refuse the lesser and alternative remedy of seeking relief against oppression and mismanagement though the latter remedy requires establishment of winding up on just and equitable ground as a precondition for its invocation. It would be rather incongruous to hold that the case for winding up on just and equitable ground can be made out by the legal representatives under Section 439(4)(b) of the Act but not the other. This does not appear to be logical. It appears to us that to hold that the legal representatives of a deceased shareholder could not be given the same right of a member under Sections 397 and 398 of the Act would be taking a hyper-technical view which does not advance the cause of equity or justice. The High Court in its judgment under appeal proceeded on the basis that legal representatives of a deceased member represent the estate of that member whose name is on the register of members. When the member dies, his estate is entrusted in the legal representatives. When, therefore, these vestings are illegally or wrongfully affected, the estate Company Appeal (AT) Nos. 410-412 of 2018 through the legal representatives must be enabled to petition in respect of oppression and mismanagement and it is as if the estate stands in the shoes of the deceased member. We are of the opinion that this view is a correct view. It may be mentioned in this connection that succession is not kept in abeyance and the property of the deceased member vests in the legal representatives on the death of the deceased and they should be permitted to act for the deceased member for the purpose of transfer of shares under Section 109 of the Act.

25. In some situations and contingencies, the "member" may be different from a "holder". A "member" may be a "holder" of shares but a "holder" may not be a "member". In that view of the matter, it is not necessary for the present purpose to examine this question from the angle in which the learned Single Judge of the Calcutta High Court analysed the position in the case of Kedar Nath Agarwal v. Jay Engineering Works Ltd. [(1963) 33 Com Cas 102 (Cal)], to which our attention was drawn.

26. Admittedly in the present case, the legal representatives have been more than anxious to get their names put on the register of members in place of deceased member, who was the Managing Director and Company Appeal (AT) Nos. 410-412 of 2018 Chairman of the company and had the controlling interest. It would, therefore, be wrong to insist their names must be first put on the register before they can move an application under Sections 397 and 398 of the Act. This would frustrate the very purpose of the necessity of action. It was contended on behalf of the appellant before the High Court that if legal representatives who were only potential members or persons likely to come on the register of members, are permitted to file an application under Sections 397 and 398 of the Act, it would create havoc, as then persons having blank transfer forms signed by members, and as such having a financial interest, could also claim to move an application under Sections 397 and 398 of the Act. The High Court held that this is a fallacy, that in the case of persons having blank transfer forms, signed by members, it is the members themselves who are shown on the register of members and they are different from the persons with the blank transfer forms

whereas in the case of legal representatives it is the deceased member who is shown on the register and the legal representatives are in effect exercising his right. A right has devolved on them through the death of the member whose name is still on the register. In our opinion, therefore, the High Court was pre-eminently right in Company Appeal (AT) Nos. 410-412 of 2018 holding that the legal representatives of deceased member whose name is still on the register of members are entitled to petition under Sections 397 and 398 of the Act. In the view we have taken, it is not necessary to consider the contention whether as on the date of petition, they were not members. In that view of the matter, it is not necessary for us to consider the decision of this Court in *Rajahmundry Electric Supply Corpn. Ltd. v. A. Mageshwara Rao* [AIR 1956 SC 213 : (1955) 2 SCR 1066 : 36 Com Cas 91] . In view of the observations of this Court in *Life Insurance Corporation of India v. Escorts Limited* [(1986) 1 SCC 264 : AIR 1986 SC 1370, 1412] it is not necessary, in our opinion, to consider the contention as made on behalf of the appellant before the High Court that the permission of the Reserve Bank of India had been erroneously obtained and consequently amounts to no permission. In the present context, we are of the opinion that the High Court was right in the view it took on the first aspect of the matter."

23. The right arising out of an instrument does not vest with nominee automatically on the death of the original holder of the instrument. Nominee does not mean that the amount or the share belongs to the nominee. On the death of the holder of the instrument, the amount/ share vests with the Company Appeal (AT) Nos. 410-412 of 2018 legal heirs, the nominee merely holds the amount/ share herein till the matter of vesting is decided in favour of the legal heirs.

24. In view of the decision of the Hon'ble Supreme Court in "*M/s. World Wide Agencies Pvt. Ltd.*", whereby the Hon'ble Supreme Court affirmed the decision of the Hon'ble Delhi High Court, we hold that the application under Sections 241, 242 & 244 of the Companies Act, 2013 was maintainable at the instance of Mr. Pankaj Oswal (1st Respondent) otherwise also, in view of the matter that his claim relating to the shares of Late Mr. Abhey Kumar Oswal which is pending in a suit before the Court of Competent Jurisdiction, we hold that this is a fit case for waiver under sub-section (4) of Section 244 of the Companies Act, 2013 and for that the application under Sections 241, 242 should be heard on merit.

We find no merit in these appeals. They are accordingly dismissed. No costs.

[Justice S.J. Mukhopadhyaya] Chairperson [ Justice A.I.S. Cheema ] Member (Judicial) NEW DELHI  
14th November, 2019 /AR/ Company Appeal (AT) Nos. 410-412 of 2018