

Ram Prakash Gupta vs Radhey Shyam Sharma & Ors on 23 February, 2023

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) No. 183 of 2020

[Arising out of order dated 20.12.2019 passed by the National Company Law Tribunal (New Delhi Bench) in CP-118 (ND)/2013]

IN THE MATTER OF:

Ram Prakash Gupta

12, Raghu Vihar, Maharani Farm,
Durgapura, Jaipur-302018, Rajasthan.

..... Appellant.

Versus

1. Radhey Shyam Sharma

R/o 379, Sachivalaya Nagar,
Vatika Mod, Tok Road,
Jaipur-302022, Rajasthan.

..... Respondent No. 1.

2. M/s Shreemat Mahavir Buildcom Pvt. Ltd.

12, Raghu Vihar, Maharani Farm,
Durgapura, Jaipur-302018, Rajasthan,
Rep. by Director.

..... Respondent No. 2.

3. Smt. Alka Gupta (Director)

M/s Shreemat Mahavir Buildcom Pvt. Ltd.
12, Raghu Vihar, Maharani Farm,
Durgapura, Jaipur-302018, Rajasthan,

..... Respondent No. 3.

Present:

For Appellant:

Mr. Ranvir Singh, Mr. Saraswata Mohapatra, Mr.
Hans Honey Khari, Mr. D. Chetan Khari, Advocates.

For Respondent:-

Ms. Sonia Mathur, Sr. Advocate with Sushil Kumar
Dubey, Mr. Nikhil Jaiswal, Mr. Divik Mathur, Mr.
Simarjeet Singh Saluja, Ms. Pratiksha Mishra, Ms.
Rubika T., Ms. Rupakshi Soni, Advocates for R- 1 &
2.

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JUDGMENT

(23rd February, 2023) Justice Anant Bijay Singh;

The instant Appeal under Section 421 of the Companies Act, 2013 preferred by the Appellant being aggrieved and dissatisfied by the order dated 20.12.2019 passed by the National Company Law Tribunal (New Delhi Bench) in CP-118(ND)/2013 filed before its predecessor Company Law Board under Companies Act, 1956, wherein Respondent No. 1 herein filed petition for mismanagement of the Respondent Nos. 2 and 3 herein company (hereinafter referred as "Company") and oppression at the hands of Appellant and Respondent No. 3 herein on various grounds, primarily being dilution

of his equity, illegal appointment of Appellant herein as the Director on the Board of the Company, illegal sale of the Company's properties and other acts detrimental to the interest of the Company as well as being oppressive to the Respondent No. 1 herein. By which the Tribunal set aside the appointment of Appellant as Director and passed the following orders:

"8. As per the aforesaid facts we find that the act of respondents in diluting the share of the petitioner and including R3 as member of the Board of Director is oppressive to the petitioner. The respondents are liable to render accounts to the petitioner. All financial statements w.e.f. financial year 2012- 13, along with the books of accounts be placed before the petitioner for due inspection. Necessary legal steps to set aside sale transactions of immovable properties done by the illegally constituted Board be initiated through civil courts including Company Appeal (AT) No. 183 of 2020 suits for recovery and/or declaration for cancellation of the sale deeds carried out through an illegally constituted Board.

9. The appointment of respondent no. 3 is hereby set aside in the absence of any documentary proof of his valid appointment. The petitioner and respondent no. 2 would be only two directors of the respondent company. The increase in the Authorised and Paid up share capital stands reduced to its original state. Additional shares issued in favour of respondent no. 3 are directed to be cancelled. Fresh Annual Returns shall be filed with the RoC, Jaipur. The equity of petitioner and respondent no. 2 shall be restored to that of 50% each. With respect to alleged illegal sale and transaction of the immovable assets of the company is concerned, the same is outside the jurisdiction of this Tribunal. The parties have already invoked the jurisdiction of the civil courts for necessary action.

10. It would further be expedient to direct the parties to explore a buy in or buy out at valuation of the share of the respondent company as on 31.03.2013."

2. The facts giving rise to the instant Appeal are as follows:

i) The Respondent No. 1 incorporated the Respondent No. 2 Company M/s Shrimat Mahavir Buildcon Pvt. Ltd. on 20.12.2004 with 50% ownership with 5000 shares with the other 50% ownership being with one Archana Bhansali holding the remaining 5000 shares with authorized, issued and paid-up capital being Rs. 1,00,000. The Respondent No. 2 company is into sale-purchase and development of land parcels, among other things, as per the objects mentioned in the MoA of the company.

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ii) The said Archana Bhnansali resigned from the directorship of the Respondent No. 2 company on 15.07.2005 and transferred her 50% ownership to Respondent No. 3 who was appointed a director of the company on the even date with one Suresh Saharan also being appointed as the other new

director of the company on said date at the instance of the Respondent No. 1 since said Mr. Saharan was an acquaintance of the Respondent No. 1. The appointment of said Suresh Saharan was concealed by the Respondent No. 1 in his petition possibly to make out a false case of board decisions being allegedly made by Respondent No. 2 company without a quorum while in reality all decisions of the board were made by the requisite quorum as required by the articles of association of the Company.

iii) In the year 2008, the company appointed appellant as a non-executive director in the category of promoter w.e.f. 15.06.2008 and Form-32 to that effect was filed with the RoC. In this regard, notice dated 13.05.2008 calling for said meeting with agenda to appoint Appellant as a Director was issued. The company then increased its authorized share capital from Rs. 1,00,000 to Rs. 2,00,000 and the increased capital was allotted to the Appellant vide issuance of 1000 additional shares therein raising his holding in the company to 50% while the Respondent No. 3 and the Respondent No. 1 held 25% each in Respondent No.2.

iv) The Respondent No. 1, apparently with the motive to profiteer, got into various agreements to sell with some land-holders of Tehsil Sanganer, District- Jaipur, Rajasthan in his personal capacity and also became their GPA holder Company Appeal (AT) No. 183 of 2020 permitted to sell their land, among other things, to the company. It now appears and seems clear that the motive of the Respondent No. 1 was to profit from both ends i.e. by selling said land at high rates to the company and keeping the surplus profits with him of the money paid by the company for the said land after making payments to the farmers and then selling it at a higher price to a third party as representative of company and benefit from being a shareholder of the company.

v) The Company in the year 2009 twelve registered sale deeds with the above- mentioned landowners, with their consent, and entered into mutually agreed transactions of sale to purchase said land parcels from them after paying valuable consideration. In the meanwhile, the other Director of the Appellant company, Suresh Saharn, behind the back of the other three directors, sold the land owned by company without any authority/authorization of company in that regard. The matter was taken up by the board at its meeting dated 28.04.2010 wherein it took cognizance of the same and decided to initiate legal action against said Saharan and in that regard, authorized the Respondent No. 1 to initiate both civil and criminal actions against said Saharan. The next EGM dated 21.06.2010, it was noted that inspite of it being resolved to appoint the Respondent No. 1 to initiate civil and criminal actions against Suresh Saharan, no such action was initiated and in view of the same authorized the Appellant to initiate both civil and criminal actions against said Saharan. It was clear to the Appellant and the other director Respondent no. 3 that the Respondent No. 1 is not keen to act against Saharan and hence he was replaced with the Appellant. Company Appeal (AT) No. 183 of 2020 Thereafter, the company, acting through Appellant and filed a civil suit being Civil Suit No. 02/2010 in the Court of Ld. Civil Judge, Jaipur seeking a declaration that said sale be declared null and void and thus the sale deed be set aside.

vi) Further case is that the Respondent No. 1 sought impleadment in above said suit of company filed against Saharan as a defendant in the year 2011 and though opposing conduct of Saharan, which was clearly against the interests of the company, on the face of it, he filed a counter claim in

said suit of the Appellant company only in the year 2013 thereby opposing the company and alleged for the first time about the improper appointment of Appellant as a director on the board of the company, almost five years after his appointment which he had throughout been not only aware of but also acquiesced with at all times as mentioned in the preceding paragraphs while the registered office of Respondent No. 2 which is residence of the Appellant and his wife the Respondent No. 3, thus they were managing the affairs of the company all along much to the knowledge, consent and acquiescence of the Respondent No. 1. The petition being CP-118(ND)/2013 clearly seems an after-thought to build a case for the company petition which was filed 2-3 months after said counter-claim in the suit lest it becomes hit by bar of limitation if directly raised for the first time in the company petition.

vii) The Respondent No. 1 then approached the Ld. CLB, Delhi vide company petition under Section 397 and 398 of the Companies Act, 1956 being CP- Company Appeal (AT) No. 183 of 2020 118(ND)/2013 and concealed the above mentioned facts from the Ld. Tribunal and the Tribunal, instead of appreciating the factum of the petitioner being complicit in the so-called and alleged 'mismanagement' and having acquiesced with the appointment and functioning of the Appellant as a Director for a period of almost five years from 2008, overlooked the said aspects and countenanced the indiscretions and delay and laches on the part of the Respondent No. 1 herein and refused to use its ample discretionary powers as provided in Sections 397 and 398 to life the corporate veil and investigate into the real affairs of the company vide appointment of an administrator or ordering any other independent investigation and instead chose to simpliciter partly allow the said petition on hyper-technical considerations and even cancelled the sale deeds entered into by the Respondent No. 2 company when the said purchasers of those lands were not even made parties before the Tribunal. Hence this Appeal.

3. The Ld. Counsel for the Appellant during the course of argument and in his memo of appeal along with written submissions submitted that the impugned order dated 20th December, 2019 merely on account of purported claims of oppression and mismanagement made by the Respondent No. 1 herein against the appellant while the former was throughout in acquiescence with other directors in the management of the company and thus had approached the tribunal with unclean hands in abuse of the process of law to sub-serve his individual and nefarious interests. The said petition before NCLT was barred by limitation as it was filed well beyond three years from 2008, the year of appointment of the appellant as director, as the Respondent No.1 was not only Company Appeal (AT) No. 183 of 2020 aware of the appointment throughout but also acquiesced with it at all times, as detailed in the appeal, as further evident from the factum that the registered office of Respondent No.2 company was 12, Raghu Vihar, Maharani Farm, Durgapura, Jaipur-302018, Rajasthan which is the residence of the Appellant and his wife the Respondent No.3. Thus, they were managing the affairs of the company together all along much to the know/edge, consent and acquiescence of the Respondent No. 1. The petition being CP-118 (ND)/2013 clearly seems an after-thought relying on mere technicalities without any substance as such and ought to have been dismissed on grounds of limitation itself.

4. It is further submitted that the Tribunal overlooked the conduct of the Respondent No. 1 herein that he did not approach it with clean hands and allowed the petition by following a hyper-technical

approach and without any application of mind to the contumacious behaviour of the Respondent No. 1. The Tribunal, in a way, allowed him to benefit from his own wrong(s) and thus countenanced his abuse of the process of the court for his nefarious and self-serving means of running the company for his own benefit and did not 'pierce the corporate veil' to understand the real conduct of the Respondent No. 1 in the background as was required in a case of this nature especially when the same were brought before it by the Appellant vide his pleadings. Further, the Tribunal, instead of appreciating the factum of the petitioner being complicit in the so-called and alleged 'mismanagement' and having acquiesced with the appointment and functioning of the Appellant as a Director for a period of almost five years from 2008, overlooked the said aspects and countenanced the indiscretions and delay Company Appeal (AT) No. 183 of 2020 and laches on the part of the Respondent No. 1 herein and refused to use its ample discretionary powers as provided in the act to lift the corporate veil and investigate into the real affairs of the company vide appointment of an administrator or order any other independent investigation, but instead it chose to simpliciter partly allow the said petition on hyper-technical considerations. In doing so, it fell in error in allowing technicalities to prevail over substantial justice.

5. It is further submitted that the Appellant in view of the mutual mis-trust between the two sets of promoters as evident from the pleadings in the petition as well as the pending cross-cases (both civil and criminal) filed by them against each other and in the interests of the company in particular and public in general, seeks appointment of an independent administrator to manage the affairs of the company or initiate investigation under Section 213, Companies Act, 2013 while maintaining status quo in the share-holding of the company as existed prior to the impugned order. Further, the NCLT erred in law in entertaining the petition and partly allowing the same as the Respondent No. 2 company, whose mis-management was alleged in the said petition, did not exist in law on said date of adjudication as it stood removed from the register of companies in view of company being in violation of provisions of Section 248 of the Act. Thus, the petition was void and deserved to be dismissed as an abuse of the process of court.

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6. It is further submitted that the impugned order needs to be set aside in view of the contumacious conduct of the Respondent No.1 wherein he played fraud on the court and in spite of being throughout complicit in the management of the company and the entire purpose of the company being frustrated resulting in its removal from the register maintained by MCA, abused the process for the court for his own nefarious purpose by alleging purported oppression and mis-management of affairs merely on the ground of improper appointment of the Appellant as a Director, a factum very well known to him since the time of appointment but challenged only in 2013 on legal advice in view of his tensions with fellow directors. This Hon'ble Appellate Tribunal should not condone the conduct of Respondent No.1 in benefiting from his own wrong and order investigation under Section 213 of the Companies Act, 2013 into the affairs of the company or appoint an independent administrator to look in to the workings of the company. It is submitted that once the investigation commences or a third party looks into the affairs of the company, the real truth of the company being run by the Respondent No.1 as a sham, more of a shell entity, shall come out.

7. The Ld. Sr. Counsel for the Respondent Nos. 1 and 2 during the course of argument and in his Reply along with Written Submissions submitted that the Appellant and Respondent No. 3 have indulged into several illegal functions without any authorisation, board resolution and against the interest of the company which are interalia summarised as below:

- Illegal appointment of Appellant as Director in the company.

Company Appeal (AT) No. 183 of 2020 • Increase of Authorised Share Capital of company from Rs. 1 Lakh to Rs.

2 lakhs and allotment of entire increased share capital to appellant thereby reducing the Share Capital of the Respondent No. 1 to minority.

- Appointment of Divya Aggarwal as C.A. of company without any board resolution and further authorising him to submit and file any documents, Form/s with the ROC on behalf of company.
- Opening of Additional/New Account in the name of company to siphon off the money.
- Fraudulent sale and purchase of immovable properties in the name of company.
- Appellant and the Respondent No. 3 vide Extra Ordinary General Meeting dated 05.11.2016 passed resolution thereby removing Respondent No. 1 from the Directorship of the Respondent No. 2/Company. Removal from Directorship during the pendency of proceedings before NCLT clearly shows the arbitrary act of mismanagement of affairs of the company.

8. It is further submitted that the Appellant and Respondent No. 3 herein have not placed on record any document such as notice, Board Resolution, Minutes of Meeting in the order to justify appointment of the Appellant as Director. No intimation/notice has been given to its other existing Directors. Form 32 has been filed with Registrar of Companies by forging digital signature of Respondent No. 1 with the help and in collusion with Divya Aggarwal against whom Respondent No. 1 has already filed a criminal case. The Appellant in his testimony in Civil Suit No. 02/2010 filed against Sh. Suresh Saharan for Company Appeal (AT) No. 183 of 2020 unauthorizedly and fraudulently selling the immovable properties of the Company/Respondent No. 2, pending before the Ld. Additional Session Judge, Jaipur has admitted the fact that there was no meeting of Board of Directors held in presence of Respondent No. 1 and Suresh Saharan, passing the resolution appointing him as Director of the company. Resolution appointing Appellant as Director was solely passed by Respondent No. 3/his wife. It is also stated by Appellant that no documents were attached along with FORM 32 which was submitted before Registrar of Companies.

9. It is further submitted that the acts of oppression and mismanagement as alleged against Appellant and Respondent no. 3 are having continuous effect and therefore, the question of the petition before NCLT being time barred does not arise. In this regard, relied on judgment of "Harish Kumar Berry Vs. S. Berry's Automotive Udyog P. Ltd. (2005) 64 CLA 274 (CLB)". Further, in the case of "Dankha Devi Agarwal V. Tara Properties (P) Ltd. : AIR 2006 SC 3068", It has been held by

the Hon'ble Supreme Court that a decision taken in a meeting without due notice of such meeting for removal or induction would be instance of oppression and mismanagement.

10. It is further submitted that time and again it has observed that where a shareholder complains of lack of service of notice of an EGM, the burden of proof lies on the majority to prove that service of notice was affected in accordance with law, in the absence of which the minority shareholders are entitled to obtain relief from oppression under Section 397 of the Act. In this regard relied on Company Appeal (AT) No. 183 of 2020 judgment of "Palak Kumar Mondal Vs. Satyabrata Jana, (2003) 115 Comp. Case 481".

11. It is further submitted that it is settled law that while issuing further shares, the Board of Directors discharge their fiduciary responsibilities. If the shares are issued with the sole object of creating a new majority or with the view to convert a majority into a minority, then the action of the Board is not only in breach of the fiduciary responsibilities but also a grave act of oppression against the existing majority. Reliance placed on "Mrs. Uma Pathak and Shri Rajat Pathak Vs. Eurasian Choice International Pvt. Ltd. : (2004) 122 Comp. Case 922 (CLB) and Puneet Goel Vs. Khelgaon Resorts Ltd., C.P. No. 6/1999 decided on 17.04.2000 (Principal Bench New Delhi).

In view of the facts and circumstances stated as above and documents placed on record, the instant Appeal may be dismissed.

12. The Section 286 of the Act provides that notices for Board meetings should be given to every director in writing. The requirements of Section 286 of the Act, being mandatory, notice to all the directors of meeting is essential for the validity of resolution passed at the Board meeting. Any Board meeting or general meeting held without quorum is illegal. In this regard the judgments of "D.K. Chatterjee Vs. Rapti Supertronics (P) Ltd. : (2003) 114 Comp. Case 265; Rohit Churamani Vs. Disha Research & Marketing Services (P) Ltd. : (2005) 123 Comp. Case 467".

13. The Ld. Counsel for the Respondent No. 3 in his Reply along with Written Submissions submitted that Respondent No.1 incorporated Respondent No. 2 Company Appeal (AT) No. 183 of 2020 Company on 20.12.2004 with 50% ownership with 5000 shares while the other 50% being owned by one Ms. Arachana Bhansali holding the remaining 5000 shares with authorized, issued and paid-up capital being Rs. 1,00,000. Registered office of Respondent No. 2 company is 12, Raghu Vihar, Maharani Farm, Durgapura Jaipur-302018, Rajasthan. The place is also the residence of Respondent No.3 and the Appellant. Respondent No.2 is into the sale, purchase and development of land apart from other things as mentioned in MOA of Respondent No. 2 company. The MOA and AOA of Respondent No.2 Company are already annexed by Respondent No.3 in the reply filed.

14. It is further submitted that Ms. Archana Bhansali resigned from the post of director of Respondent No.2 company in 15.7.2005 and her 50% share was then transferred to Respondent No.3 who was appointed as director along with Mr. Suresh Sharan. Mr. Suresh Sharan was appointed on the instance of Respondent No.1. The copy of Form No. 32 filed by Respondent No. 2 company vide which Respondent No.3 was appointed as Director is already annexed by Respondent No.3 in the reply filed. In 2008 Respondent No.2 company then appointed Appellant as a

Non-Executive Director from 15.06.2008 onwards and Form-32 was filed therein to that effect. The said Form No. 32 along with related documents are already annexed by Respondent No.3 in the reply filed. The Respondent No.2 company then went on to increase its authorized share capital from Rs. 1,00,000 to Rs. 2,00,000. The Respondent No.3 held 25% share in the new share capital of Respondent No.2 company. That Respondent No.1 had entered into many different agreements to sell in Tehsil Sanganer, Jaipur, Company Appeal (AT) No. 183 of 2020 Rajasthan in his own personal capacity and vide General Power of Attorney holder sold the lands to Respondent No.2 Company. In the year 2009 Respondent No.2 Company executed twelve registered sale deeds with certain landowners and entered into mutually agreed transactions of sale to purchase land from them. Sh. Suresh Sharan then without the consent of Respondent No.3 sold the land owned by Respondent No.2 company without any consent or authorization. The issue was then taken up on 28.4.2010 by the board of Respondent No.2 company and through cognizance of the matter legal action was initiated in this regard. The Respondent No.1 was to initiate civil and criminal legal actions against Sh. Suresh Sharan. The resolution passed in the Extraordinary General Meeting for the same dated 28.4.2010 authorising Respondent No.1 for action against Sh. Suresh Sharan is already annexed by Respondent No.3 in the reply filed. The Respondent No.1 then sought an emergency of the board of directors of Respondent No.2 company vide notice dated 14.6.2010 to discuss the annual report of the last two years Respondent No.2 company regarding management of its affairs.

15. It is further submitted that at the Extra Ordinary Meeting dated 21.6.2010 it was noted that Respondent No.1 failed to initiate any legal-civil or criminal action against Sh. Suresh Sharan. The appellant was then authorized to initiate action against Sh. Suresh Sharan at the said Extra Ordinary Meeting dated 21.6.2010. The resolution passed at the Extra Ordinary Meeting dated 21.6.2010 with regard to the above said context. The Respondent No.2 company then filed a civil suit being No. 02/2010 before the Court of Ld. Civil Judge, Jaipur seeking Company Appeal (AT) No. 183 of 2020 a declaration of the sale deeds as null and void & thus to be set aside. The conduct of Respondent No.1 in making himself a party as a defendant in the aforementioned civil suit. With this act Respondent No.1 was supporting the actions of Sh. Suresh Sharan against interests of Respondent No.2 company. In fact, a counterclaim was also filed by Respondent No.1 company in the aforesaid suit. The Respondent No. 1 then approached the erstwhile Company Law Board under Sections 397 and 398 of the Companies Act, 1956 vide CP118 (ND)/2013. The Ld. NCLT Tribunal had cancelled the aforesaid sale deeds and allowed the petition of Respondent No.1 without appreciating the merits of the case or without even investigating into the facts of the case. The Respondent No.1 who had opposed Respondent No.2 company before the Tribunal and the Tribunal is being represented herein along with Respondent No.2 by the same set of counsel. The Respondent No.3 is opposing the same. The onus of proof is on Respondent No.1 to show as to under which authority Respondent No.1 and Respondent No.2 company are being represented together.

16. After hearing the parties and going through the pleadings made on behalf of the parties, we are fully in agreement with the reasons returned by the NCLT whereby the appointment of Respondent No. 3, the Appellant herein was set aside in the absence of any documentary proof of his valid appointment. Further, the NCLT held that the Respondent Nos. 1 and 3 only be two directors of the Respondent company. The increase in the Authorised and Paid-up share capital was reduced to its

original state. Additional shares issued in favour of Appellant herein / Respondent No. 3 before NCLT was directed to be cancelled and Fresh Company Appeal (AT) No. 183 of 2020 Annual Returns was directed to be filed with the RoC, Jaipur. The equity of Respondent No. 1 herein / Petitioner and Respondent No. 3 herein / Respondent No. 2 before NCLT was also directed to be restored to that of 50% each. With respect to alleged illegal sale and transaction of the immovable assets of the company was concerned, the same was outside the jurisdiction of the Tribunal. The parties have already invoked the jurisdiction of the civil courts for necessary action. Keeping in view of the aforementioned facts, we do not find any merit in the Appeal to interfere with the order impugned passed by the NCLT. The impugned order dated 20.12.2019 passed by the National Company Law Tribunal (New Delhi Bench) in CP-118(ND)/2013 is hereby affirmed. The instant Appeal is hereby dismissed. No order as to costs.

17. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the National Company Law Tribunal (New Delhi Bench), forthwith.

[Justice Anant Bijay Singh] Member (Judicial) [Mr. Shreesha Merla] Member (Technical) New Delhi 23rd February, 2023 R. Nath.

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