

Upper India Steel Manufacturing And ... vs Gurlal Singh Grewal & Ors on 14 November, 2017

I

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No. 150 of 2017

(Arising out of Order dated 1st March, 2017 passed by the National Company Law Tribunal, Chandigarh Bench, Chandigarh in Company Petition No. 49 of 2007]

IN THE MATTER OF:

Upper India Steel Manufacturing and Engineering Co. Ltd. & Ors.	.. .Appellants
Vs	
Gurlal Singh Grewal & Ors.	.. .Respondents

Present: For Appellants:- Shri Shanti Bhushan and Shri S.N.
Mukherjee, Senior Advocates with Mr. Saurabh Kalia, Mr.
Sameer Chaudhary and Mr. Palash, Advocates.

For Respondents: - Mr. Abhimanyu Mahajan, Mr. Sarad K.
Sunny and Sanam Tripathi, Advocates for Respondents 1, 3,
5, 7, 8& 15.

Mr. Sandeep Das and Ms. Aayushi Sharma, Advocates for
Respondent No. 10.

With Company Appeal (AT) No. 189 of 2017

IN THE MATTER OF:

Gurlal Singh Grewal & Ors.	...Appellants
Vs	
Upper India Steel Manufacturing and Engineering Co. Ltd. & Ors.	.. .Respondents

Company Appeals (AT) Nos. 150 and 189 of 2017

2

Present: For Appellants: - Mr. Abhimanyu Mahajan, Mr. Sarad K. Sunny and Mr. Sandeep Das, Advocates.

For Respondents: - Shri Shanti Bhushan and Shri S.N Mukherjee, Sr. Advocates with Mr. Saurabh Kalia and Mr. Sameer Chaudhary and Mr. Palash, Advocates.

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

As both the appeals have been preferred against common order dated 1st March, 2017 passed by National Company Law Tribunal (hereinafter referred to as "Tribunal") Chandigarh Bench, Chandigarh in Company Petition No. 49/2007, they were heard together and are being disposed of by this common judgment.

2. The brief fact of the case is that the Respondent- Gurlal Singh Grewal & Others (Appellants in Company Appeal (AT) No. 189 of 2017) -(hereinafter referred to as "Petitioners") preferred a petition under Sections 397 and 398 of the Companies Act, 1956 alleging 'Oppression and Mismanagement' against M/s. Upper India Steel Manufacturing & Engineering Company Limited (Appellants in Company Appeal (AT) No. 150 of 2017) and others (hereinafter referred to as "Respondents").

3. The Tribunal by impugned judgment dated 1st March, 2017 while held that the Petitioners and Respondents cannot get along to decide the conduct Company Appeals (AT) Nos. 150 and 189 of 2017 of the business, disposed of the Company Petition with following orders and directions: -

"A. As discussed in Para 1.2 above of the judgment, the alleged violators of section 314 namely, S. Gursimran Singh Grewal (R-3), S. Paramvir Singh Grewal (R-4), S. Saminder Singh Grewal (R-6), S.Mandeep Singh Grewa) (R-10) and Mrs.Harsimran Dutta (R-11) are required to refund to the respondent company. the amount paid to them in excess of the permissible limits u/s 314 along ,with interest payable at the bank rate enhanced by 2% within 30 days of receipt of this order. For this purpose, the bank rate applicable as on 31st March of each of the financial year shall be taken.

B. MIS Ernst & Young, 6th floor, Wing & B, Worldmark- 1, Aero city, IGI airport

Hospitality District, Opp. Holiday Inn, Mahipalpur, New Delhi 110037 is appointed from out of the list of valuers submitted by the petitioners and agreed to by the respondents, as an independent valuer for fair value of the shares held by the petitioners of the company. The cut-off date for determining the value of the shares will be 31.3.2007 i.e. the date nearest to the filing of the petition. While computing the share value, the Valuers shall also consider the asset based valuation as the Respondent Company has a large asset base. Company Appeals (AT) Nos. 150 and 189 of 2017 C. The date of filing of the petition is April 2007. Hence, the said valuer will find out the fair value of the shares of the company as on 31.3.2007 on the basis of going concern by all recognised methods and applicable rules and regulations as applicable on the said date in this regard. The respondent company is being managed by the respondents only since the filing of the petition and thus, they are alone responsible for any increase or decrease in both the profitability and liability of the company. As the date of valuation is almost 10 years ago, the fair price of the shares of the petitioners shall be enhanced by Compound interest payable at the bank rate enhanced by 2%. For this reason, the bank rate applicable as on the 31st March of each of the financial year shall be taken.

D. The parties are directed to extend every co-operation to the said Valuer the Company shall submit all the necessary documents and papers for the purpose of Valuation as desired/ required by the said Valuer. E. The valuation report shall be prepared within 90 days from the date of receipt of copy of this order. F. Copy of the report shall be supplied to the parties who shall be entitled to file their respective Objections, 7zf any, to the valuation of the shares. After receipt of the Company Appeals (AT) Nos. 150 and 189 of 2017 objections the valuer shall dispose of the same within four weeks and Shall prepare a comprehensive/ speaking supplementary report dealing with each and every objection. Thereafter, the Valuer shall send final report to the parties.

G. After determination of the value of the shares, the respondents 2 to 13 shall pay the amount to the petitioners, other than those who have withdrawn from the petition and whose application for withdrawal is pending (as per the petitioners' shareholding proportions) within 30 days thereof and upon receipt of the amount, the petitioners shall execute all the documents / deeds necessary for the transfer of the shares held by the petitioners of the company in favour of the respondents and/or their nominees within two weeks.

H. In case, the respondents decline to purchase the' shares of the petitioners as aforesaid at the determined share value, the petitioners shall have the right to purchase the same from the respondents. The procedure and the time line as detailed above shall be followed. I. The remuneration of the Valuer shall be negotiated and paid by the company in three equal instalments. First instalment shall be paid on the commencement of valuation process and the second instalment shall be Company Appeals (AT) Nos. 150 and 189 of 2017 paid after submission of the valuation report

by the Valuer within the stipulated period. The third and final instalment shall be paid to the valuer after submission of the final report together with objections and the supplementary report.

I Other reliefs sought for by the petitioners are declined. K Interim Order, if any, stands vacated. This order disposes off all the pending company applications. L. No order as to costs.

M. Let copy of this order be supplied to the parties and another copy to the independent valuer named above. N. In case of any difficulty in implementation of this order, the parties are granted liberty to mention the matter."

4. The Respondents (Appellants in Company Appeal (AT) No. 150 of 2017) have challenged the impugned judgment mainly on one of the grounds that the findings that returns to the minority group have systematically whittled due to non-payment of dividend and reduction in the number of directors and salaried employees is contrary to record. 1st Petitioner has been getting the same salary as 3rd Respondent (JMD), 1st Petitioner has continued to receive his salary, perks and all other incidental benefits from 2007 till the date of order without contributing or taking up any work in the Appellant Company, 10th Respondent/ 10th Petitioner continues to be on the board as a Company Appeals (AT) Nos. 150 and 189 012017 non-executive Director, and Petitioners' group along with other shareholders has received dividend till 2011.

5. With regard to number of Directors, it was submitted that the same is also a wrong finding as the number of Directors of the Respondent Group has always remained constant, whereas, the number of the directors of Appellant Group reduced from 9 (nine) in 2007 to 6 (six) on the date of the impugned order.

6. It was further submitted that no prayer was made by the petitioner for payment of interest, nor ever raised during the proceedings. There is no provision for interest much less for compound interest. The order is contrary to the provisions of the Interest Act, 1978 and that no reason is shown much less any special reason in the order for grant of interest or why interest has been awarded at 2% above the bank rate and why compound interest has been awarded.

7. It was also submitted that as a general Rule interest is not payable, especially when valuation is ordered. There is no liability to buy out before an order enabling buyout is passed, thus there can be no question of payment of interest from a prior date.

8. It was further submitted that there is no finding recorded that the Appellants were responsible for delay. In fact, the Hon'ble Tribunal did not consider the adjournments taken by the Petitioners/ Respondents and made the Appellants liable for payment of interest without any justification. Company Appeals (AT) Nos. 150 and 189 012017

9. It was further submitted that the Tribunal failed to consider that Appellant Company is on-going concern engaged in the Steel Industry, and it is well known fact world over that the Steel Industry is

highly volatile industry and has been struggling for many years.

10. It was also submitted that there was no question of any payment of interest till an order enabling purchase/buyout is made and thus, interest cannot run prior to any period of order, but could have only been ordered from the date of valuation till the date of payment.

11. The other ground taken is the date of valuation/ buyout should be the date of filing of the petition i.e. 31st March, 2007, which according to the Respondents/Appellants is perverse and cannot be sustained for the following reasons: -

(a) Offer was made to the Respondents! Petitioners group for buyout in 2008 itself, erstwhile Company Law Board order dated 25th February, 2009 passed providing for exit of the Respondents/ Petitioners. However, they opted to stay in the Company and challenged the said order when exit on valuation was provided to them before the Hon'ble High Court of Punjab and Haryana and the same was set aside vide order dated 4th August, 2010. It was also clarified that during the pendency of the appeal the proceedings were stayed before the erstwhile Company Law Board. Company Appeals (AT) Nos. 150 and 189 of 2017

(b) The Respondents/ Petitioners group during the pendency of the present petition has all along participated in the management of the Appellant Company for example:

(i) Respondents/ Petitioners group all along represented on the Board of Directors through 1st Respondent and 10th Respondent.

(ii) 1st Respondent continued to hold the position as a whole time director and received remuneration at par with members of the Appellant Group.

(iii) 1st respondent and 10th Respondent regularly attended Board's meetings. It is the case of 1st Respondent that he had carefully examined and scrutinized all books and papers pertaining to the functioning of the company while discharging his duties as a working director.

(iv) The Respondents Group accepted dividends by virtue of their shareholding till 2011.

(c) Respondents/ Petitioners from the date of filing of the petition continue to be in management till the final disposal.

(d) There is no basis as to why interest was awarded as compound interest or at 2% above bank rate.

(e) Direction to consider asset based valuation is not sustainable as valuation and methodology is the sole prerogative of the valuer. More so in a company like the

Appellant which is a going concern the assets and business are indivisible.

Company Appeals (AT) Nos. 150 and 189 of 2017

12. It was submitted that the judgment in "T. Ramesh Pai Vs. Canara Land Investments Ltd. (2005) 123 CC 869 (CLB)" relied upon by Tribunal being contrary to the basic principles of valuation, the said judgment of erstwhile Company Law Board has already been set aside by Hon'ble Karnataka High Court in "Canara Land Investments Ltd. Vs. T. Ashok Pai & Ors. (2012) 169 CC 35 (Kar)". Normally, the valuation should be as on the date of the order in facts and circumstances like in the instant case.

13. It was further submitted that the majority shareholder cannot be compelled to sell their shares. In support of submission, reliance has been placed on judgment of Hon'ble Supreme Court in "Dale and Carrington Invt. (P) Ltd. and Anr. V. P.K. Prathapan & Ors., AIR 2005 SC 1624 Paras 22-24)".

14. On the 'other hand, according to the Petitioners (Appellants in Company Appeal (AT) No. 189 of 2017), the impugned judgment is bad as the Tribunal failed to notice various facts.

15. It was submitted that there are materials in support of allegations pertaining to two whole time directors being paid salary without discharging any duty whatsoever.

16. In this connection, we are of the view., that mere allegations that two whole time directors have been paid without discharging any duty ipso facto will not amount to 'Oppression and Mismanagement', till it is shown by Company Appeals (AT) Nos. 150 and 189 of 2017 placing evidence that such payment is detrimental to one or other member or against the interest of the Company.

17. Next it was contended that Shri Ashok Singh Garcha's family holds the largest shareholding i.e. 14.1% yet, the majority refused to appoint him as a working Director and rejected the same by resolution moved by the minority for his appointment in the EGM held on 10th January, 2007.

18. In this regard, we are of the view that non-appointment of Shri Ashok Singh Garcha, ipso facto will not amount to 'Oppression and Mismanagement', in absence of any specific evidence and allegations. If he has not been appointed as Director in view of decision of the majority shareholders by resolution dated 10th January, 2017, the same cannot be held to be illegal.

19. Next, it was contended by the counsel for the Petitioners (Appellants in Company Appeal (AT) No. 189 of 2017) that the appointment of Shri Gursimran Singh Grewal as Managing Director is illegal. However, such allegation is not based on any evidence.

20. In this regard, it is desirable to notice the findings of the Tribunal which is as follows.

21. The Tribunal held that no evidence has been produced by petitioners to show that 9th Respondent did not perform any work and since she has passed away and there is no cogent

evidence to show that 9th respondent was Company Appeals (AT) Nos. 150 and 189 of 2017 paid without performing any work and the petitioners never raised such issue till the filing of the petition, such allegation cannot be accepted.

22. The Tribunal further held that 8th Respondent held relevant educational qualification and had requisite experience and the Petitioners have not pressed the allegation regarding payment and salary against him.

23. The Tribunal also held that there is no infirmity in the appointment of 2nd Respondent and 3rd Respondent as Managing Director.

24. Having heard learned counsel for the parties, we are of the view that the Tribunal rightly held that rejection of appointment of Sardar Ashok Singh Garcha(10th Respondent) as whole time Director cannot be interfered with as it was well within the domain of the shareholders to reject the same.

25. We also agree with the finding of the Tribunal that the violation of Section 314 does not constitute 'oppression and mismanagement'.

26. We also agree with the finding of the Tribunal that purchase of 22 Rolling Mill is a business decision taken by the management of Company and cannot be adjudicated in the aforesaid proceedings.

27. We find no illegality in the findings of the Tribunal in holding that cheque signing power is solely a business decision and cannot be interfered with.

Company Appeals (AT) Nos. 150 and 189 of 2017

28. In view of the aforesaid specific findings of the Tribunal and for the reasons mentioned in the preceding paragraphs, we reject the plea taken by the Petitioners (Appellants in Company Appeal (AT) No. 189 of 2007).

In so far it relates to the relief granted by Tribunal, it is desirable to refer some of the provisions of the Companies Act, 2013.

29. The Company Petition in question was filed by petitioners before the erstwhile Company Law Board and was subsequently transferred under, Clause (a) of sub-section (1) of Section 434 of the Companies Act, 2013, which reads as follows: -

"434. Transfer of certain pending proceedings. -

(1) On such date as may be notified by the Central Government in this behalf, -

(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 1 OE of the Companies Act, 1956 (1 of 1956), immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act"

30. From the aforesaid provisions, it is clear that on transfer of the case the Tribunal was required to decide the case in accordance with the Company Appeals (AT) Nos. 150 and 189 of 2017 Companies Act, 2013 i.e. Section 241 read with Section 242 of the Companies Act, 2013.

31. From bare perusal of Section 242 of the Companies Act, 2013, it is clear that the Tribunal if it comes to a definite conclusion that the Company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company and that to wind up the company would unfairly prejudice such member or members, then only with a view to bring to an end the matters complained of, may make such order as it thinks fit including the order in terms of sub-section (2) of Section 242.

32. In the present case, the Tribunal has come to a definite conclusion that the Petitioners (Appellants in Company Appeal (AT) No. 189 of 2017) have failed to make out a case of 'Oppression and Mismanagement'. Having given such findings, we are of the view that the Tribunal had no jurisdiction to pass, any order in terms of sub-section (1) or (2) of Section 242 of the Companies Act, 2013.

33. Learned Counsel for the Respondents (Appellants in Company Appeal (AT) No. 150 of 2007) has rightly contended that the Tribunal has failed to notice that the 10th Respondent! Petitioner continued to be on the Board as its non-executive Director, and the Petitioners' group along with other shareholders have received dividend till 2011. In this regard, the finding of Company Appeals (AT) Nos. 150 and 189 of 2017 Tribunal being not based on record; it was not, open to the Tribunal to pass any direction under Section 242.

34. The Respondents (Appellants in Company Appeal (AT) No. 150 of 2007) have also rightly pointed out that in absence of any prayer made by the Petitioners and in absence of any provisions for compound interest the Tribunal having held that no case of 'Oppression and Mismanagement' have been made out, it was not open to the Tribunal to pass order regarding interest, which is also against the provisions of the Interest Act, 1978.

35. Even if it is accepted that the parties have agreed to sell out their shares, in absence of any power vested with Tribunal, after its specific finding there was no 'Oppression and Mismanagement', the Tribunal had no jurisdiction to direct any party to sell or buyout any share. Further finding about, the date of valuation/ buyout as the date closest to the filing of the petition i.e. 31st March, 2007 being perverse and contrary to the offer made by parties in the year 2008, and the order dated 25th February 2009, passed by Tribunal such order cannot be upheld.

36. For the reasons aforesaid, while we uphold the findings of the Tribunal in so far as it relates to failure of petitioners to prove 'Oppression and Mismanagement', the last part of the order and direction to the extent of sale of shares, date of valuation/ buyout and the order regarding payment of interest and the findings that the minority group have systematically whittled Company Appeals (AT) Nos. 150 and 189 of 2017 due to non-payment of dividend, and reduction in the number of directors being perverse, such portion of the impugned order are set aside.

37. In the result, the Company Appeal (AT) No. 150 of 2007 is allowed to the extent indicated above and Company Appeal (AT) No. 189 of 2017 is dismissed. However, in the facts and circumstances of the cases, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Balvinder Singh)
Member(Technical)

NEW DELHI
14th November, 2017

AR

Company Appeals (AT) Nos. 150 and 189 of 2017