

Sh. Surjeet Singh vs Ms. Usha Rani Jha on 4 April, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COMPANY APPEAL (AT) No.140 of 2020
(Arising out of Order dated 08th July, 2020 passed by National Company
Law Tribunal, Kolkata Bench, Kolkata in C.P. (IB) No.-763/KB/2020)

IN THE MATTER OF:

Sh. Surjeet Singh,
242, 4th Floor, Tower 2,
Mangalam City,
Tata-Kandra Main Road,
Adityapur,
Seraikela-Kharswan,
Jamshedpur 831013.

...Appellant

Versus

1. Ms. Usha Rani Jha,
H-7, Nishant Vihar,
Adityapur,
Jamshedpur 831013.

....Respondent No. 1

2. Mr. Prakash Kumar,
Plot No.136, Road No.10,
Aditya Garden,
Adityapur,
Jamshedpur 831013.

....Respondent No. 2

3. M/s. Ranchi Metal & Ispat Pvt. Ltd.
HIG-277, New Housing Colony Adityapur,
Jamshedpur,
Jharkhand 831013.

....Respondent No. 3

4. M/s. Prowess International Pvt. Ltd.
(Proforma Respondent)
A-18, 6th Phase,
Adityapur Industrial Area,
Gamaria,
Jamshedpur 832108

....Respondent No. 4

For Appellant:

Mr. Abhay K Das and Ms. Shabnam
Shalini, Advocates.

For Respondent No. 1: Mr. Ankur S. Kulkarni, Mr. Nirnimesh Dube and Mr. Abhijeet Sinha, Advocates for R-1.

For Respondent No. 1, (Caveator): Mr. Sanwal Tiberwal and Mr. Susheel Cyriac Joseph, Advocates for R-1, (Caveator).

For Respondent No. 2 - 4: Mr. Akash Sharma, and Mr. Akhilesh Kumar Shrivastava, Advocates for R-2 to R-4.

For Respondents: Mr. Aditya Shukla and Mr. Mukesh Jain, Advocates.

JUDGEMENT

[Per: Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 08/07/2020 in C.P. (IB) No.- 763/KB/2020 passed by the NCLT (National Company Law Tribunal, Kolkata Bench, Kolkata), Sh. Surjeet Singh one of the Directors of M/s. Ranchi Metal and Ispat Private Limited, preferred this Appeal under Section 421 of the Companies Act, 2013, (hereinafter referred to as 'The Act').

2. Briefly put, the Appellant herein has challenged in C.P. No. 104/2014, the allotment of shares to Respondents 1 & 4 made in a Board Meeting held on 18/02/2014. In the said Petition, C.P. No. 104/2014, NCLT has held that the Board Meeting dated 18/02/2014 was without mandatory notice to the Appellant herein, who is one of the Directors, and therefore the Resolution passed in the said Meeting allotting the shares was invalid. Ms. Usha Rani Jha/the first Respondent preferred C.P. (IB) No. 763/KB/2020 under Sections 241, 242 & 243 of the Act seeking declaration that the Meetings dated 22/04/2020 and 16/05/2020 are null & void and therefore the Company Appeal (AT) No. 140 of 2020 Resolutions passed therein are illegal. NCLT in the last para of its Order, in C.P. 104/2014, has observed as follows:

"...The alleged board meeting was without any notice, though the petitioner no. 1 was director of the company. Therefore, the impugned act comes under the purview of oppression and mismanagement and Board resolution regarding the permission of shares to respondent no. 4 deserves to be set aside..."

3. Subsequently, on an Appeal preferred before this Tribunal, only the interest portion was modified while confirming the Order of the NCLT and as the Petitioner (Ms. Usha Rani) in the Impugned Order did not prefer any Appeal against the Order of this Tribunal, it is submitted that the Petition C.P. (IB) No.-763/KB/2020, filed by her itself is not maintainable. In the Impugned Order, the Order of 11/11/2016 was sought to be interpreted. NCLT has left the issue open with respect to Ms. Usha Rani being a shareholder or not, for being decided after hearing the entire matter at length. By

the Impugned Order, NCLT has observed as follows:

"16. On a reading of the judgement in C.P. No. 104 of 2014, and Appellate Judgement in CA (AT) No. 31 of 2016, it is made clear that the meeting wherein the resolutions were passed allotting shares to Smt. Usharani and to M/s Prowess International Private Limited was held invalid. However, the Honourable NCLT in its operating part of the Judgement did not quash the resolution but held that "allotment of further shares in favour of Respondents No. 4 is hereby set aside." A bona fide omission which was not brought to the notice of the Hon'ble Appellate Tribunal cannot be ruled out from a reading of the substance of the Judgement which culminated into a conclusion in the operative part of the Judgement. In the operative part, it is silent in respect of allotting shares to Smt. Usharani is the very same meeting wherein the very same resolution allotting shares to R4 in the said case was passed. The said judgment became final. In the given circumstances it appears to us that we are not empowered to clarify the operative part of the judgement. It is left to either parties to get clarification in accordance with law.

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17. In view of the matter, the maintainability of the application cannot be heard unless and until a clarification of the operative part of the judgement under challenged is obtained. The clarification would certainly go to the root of the right of Smt. Usharani in holding the disputed shareholding. Since such a dispute has already been entertained in the said CP, prima facie, the very same question cannot be entertained as it would attract constructive res-judicata. However, till the clarification is obtained, it is fair and just to safeguard the only one property held by R-1. Accordingly we are of the opinion that a status quo in regard to the landed property is to be passed till the petition is finally heard.

18. In the result we are inclined to pass an order of status quo pending final hearing of the maintainability of the petition upon the following orders:

I) The parties are directed to maintain status quo till the date of final hearing of the petition after listing it upon lifting the lockdown;

II) The parties to file reply/rejoinder affidavits, if any within four weeks or immediately within one week after lifting of lock down whichever comes earlier by serving copy to the petitioners, and the petitioners are directed to file rejoinder within 2 weeks of receipt of reply affidavit by serving copy to the respondents.

III) Parties are at the liberty to mention the petition for listing after the lockdown is lifted.

IV) The Registry is directed to send e-mail copies of the order forthwith to all parties."

(Emphasis Supplied)

4. Submissions of the Appellant:

It is argued that NCLT has failed to appreciate that the first Respondent has failed to prove that she was Member/Shareholder of the Company and therefore the Petition itself was not maintainable.

The first Respondent was not entitled for equitable relief under Section 241/242 of the Act as in the written version it is fraudulently stated Company Appeal (AT) No. 140 of 2020 that she was holding shares in the Company since 2013, while the Company had only two shareholders in 2013 namely the Appellant and the second Respondent Mr. Prakash Kumar, who was holding 50% shares at that point of time. The first Respondent had intentionally uploaded wrong information on the website of the Ministry of Corporate Affairs ('MCA') about the shareholding pattern of the Company.

The first Respondent had declared herself as the shareholder basing on the wrong interpretation of the Judgement dated 10/11/2016. While the first Respondent agrees with part of the said Judgement that the Board Meeting dated 18/02/2014, which was without notice to the Appellant herein, was invalid, and hence shares allotted to Respondent-

4 is invalid, however, it is the contention of the first Respondent that the shares allotted to her in the same Board Meeting was valid, because her name, (by error) did not appear along with the name of the fourth Respondent in the operative part of the Judgement.

Since the Board Resolution dated 18/02/2014 was declared invalid by NCLT it cannot be partly invalid for Respondent-4 and partly valid for Respondent-1.

Under Section 286(1) of the Act, it is mandatory to send Board Meeting Notices to all the Directors in writing and similar provisions are there in Section 173(3) of the Act. The Judgement dated 10/11/2016 relied on three Supreme Court Judgements observing that in the absence of mandatory Notices to the Directors, the Resolutions passed in such a Meeting is not valid. NCLT, while setting aside the allotment of shares and holding that the alleged Board Meeting was without any notice, as Company Appeal (AT) No. 140 of 2020 erroneously omitted to mention Respondent-3 along with Respondent-

4. The shareholding pattern of the first Respondent has already been decided in the Judgement dated 10/11/2016 in C.P. No. 104/2014 and in Judgement dated 20/02/2017 in Company Appeal

(AT) No. 31/2016 and the Contempt Case against her is also pending before this Tribunal. Hence, the same issues cannot be re-agitated time and again. NCLT has wrongly observed that the maintainability Application cannot be heard until the clarification of the operating part of the Judgement under challenge is obtained.

Since the Impugned Petition was preferred against NCLT Judgement dated 10/11/2016 and this Tribunal passed Judgement dated 20/02/2017 and Contempt Case in the said Appeal is also pending, only this Tribunal requires to clarify the bona fide omission in the operating part of the Judgement and pass appropriate Orders.

5. Submissions of the first Respondent:

Learned Counsel submitted that this Tribunal vide Order dated 20/02/2017 upheld the shareholding of the Respondent and Order dated 10/11/2016 had only set aside the increase in the authorised share capital of the fourth Respondent and hence the first Respondent is entitled to move the Petition under Sections 242 & 244 of the Act.

The first Respondent had proved her shareholding as a prerequisite for maintaining the Application before the NCLT. The allotment of shares was never cancelled and therefore NCLT passed the Interim Order only after being satisfied with the Order dated 20/02/2017 passed by this Company Appeal (AT) No. 140 of 2020 Tribunal confirming the Order dated 10/11/2016 passed in C.P. 104/2014.

6. Submissions of the Respondents 2 - 4:

Counsel for the second and third Respondents submitted that the Appellant filed a Petition C.P. 104/2014 claiming that he was the owner of 50% shares of the Company along with the second Respondent who held the remaining 50% of the shares. It is the allegation of the Appellant that the first Respondent connived with the second Respondent to increase the authorised share capital of the Respondent-

3 Company in EOGM dated 18/02/2014 and went on to allot 5,000 shares to the first Respondent and shares of Rs.2,01,00,000/- to another Company/Respondent No. 4/M/s. Prowess International Pvt.

Ltd. against the loan outstanding for equal amount in the Board Meeting dated 18/02/2014 for which no notice was sent to the Appellant. It is submitted that by passing a Status Quo Order, NCLT has virtually passed an injunction in its Order dated 10/11/2016 by directing the Respondents to file affidavits under the Petition, NCLT has virtually re-opened the same lis already adjudicated and which has attained finality by the Order of this Tribunal in 20/02/2017. The Hon'ble Supreme Court in 'Lily Thomas' Vs. 'Union of India', AIR 2000 SC 1650, held that power of review can only be exercised for correction of a mistake and not to substitute a view and that the power of 'Review' could only be exercised within the limits of the statute dealing with the exercise of such powers hence 'Review' cannot be treated like an Appeal in disguise.

Company Appeal (AT) No. 140 of 2020 The Respondents have already filed their Affidavits in C.P. No. 104/2014 and as such any alternative stand may lead to a proceeding of perjury and as such the Impugned Order needs to be set aside. The Hon'ble Supreme Court in a catena of Judgements has held that the power of Review is not an inherent power and needs to be conferred either specifically or by necessary implication. It is also submitted that Section 11 of CPC provides that no Court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit between the same parties and has been heard and finally decided. It is not the date on which the suit is filed that matters but the date on which the suit is decided; so that even if a suit was filed later, it will be a former suit within the meaning of Explanation I if it has been decided earlier.

It is further submitted that it is trite that a party is bound to bring forward his whole case in respect of the matter in issue and cannot abstain from replying or giving up any ground which is in controversy and for consideration before a Court and afterwards make it a cause of action for a fresh suit. Constructive res judicata is an 'artificial form of res judicata'. It provides that if a plea could have been taken by a party in a proceeding between him and his opponent he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject matter. Assessment:

7. For better understanding of the case on hand, the shareholding pattern as per the Annual Return dated 30/09/2013 is detailed as hereunder:

Company Appeal (AT) No. 140 of 2020 Sl. Name No. of Value of Percentage No.
shares as Shares (Rs.) (%) on 30.09.2013

1. Mr. Surjeet 5000 50,000 50% Singh/Appellant

2. Mr. Prakash 5000 50,000 50% Kumar/Respondent No. Total 10,000 1,00,000/-
100%

8. It is the case of the Appellant that shares were illegally allotted to the first and fourth Respondents and the table of shareholding pattern of the Company at the time of filing CP No. 104/2014 is set out as hereunder:

Name of shareholders	Date of Transfer/ Allotment	Number of share	% of shareholding (approx.)	Remark
Mr. Surjeet Singh/Appellant	2.02.13	5000	0.24%	
Mr. Prakash	2.02.13	5000	0.24%	
Ms. Usha Rani Jha/Resp. No. 1	18.02.14	5000	0.24%	Impugned Allotment
Prowess International Pvt.	18.02.14	20,10,000	99.25%	Impugned Allotment
Total		20,25,000	100%	

9. It is the main case of the Appellant Mr. Surjeet Singh (the Petitioner in C.P. No. 104/2014), is that Respondents 1 & 2, illegally held a Meeting of the Board of the Company dated 18/02/2014 and issued 20 lakhs shares to Respondent-4 and 5000 shares to the first Respondent herein, thereby reducing the shareholding of Mr. Surjeet Singh, the Appellant herein from 50% to 0.24% in the Company. NCLT vide Order dated 10/11/2016 (in CP 104/2014) observed as follows:

"...The respondent no. 1 company was originally incorporated with a view to fabricate and manufacture steel parts. However, respondent no.1 company has never conducted any business even though it is holding of land only. The respondents failed to show proof to Company Appeal (AT) No. 140 of 2020 the effect that increased authorised share capital was taken for the benefit of the company because company was not running and only the entire authorised share capital has been increased which leads to a presumption that there was an ulterior motive or extraneous purpose or it was simply to gain management control of the company, resultantly, the petitioner's shareholding has been reduced from 50% to 0.24%. The alleged board meeting was without any notice, though the petitioner no.1 was director of the company. Therefore, the impugned act comes under the purview of oppression and mismanagement and Board resolution regarding the permission to increase the authorised share capital and allotment of shares to respondent no. 4 deserves to be set aside. The petition is allowed. The impugned Board resolution dated 18.02.2014 for increase in authorised share capital and in pursuance of that, allotment of further shares in favour of respondent no. 4 is hereby set aside. The application money to Respondent no. 4 to be refunded by the Respondent no. 1 company."

(Emphasis Supplied)

10. On an Appeal preferred this Tribunal vide Order dated 20/02/2017 upheld the Order of NCLT with a limited modification of interest percentage and observed as follows:

"25. The Ld. Tribunal has noticed that no notice was served on the Respondents, and no EGM held to allot shares in favour of the 4th Appellant. The respondent had no knowledge, and in the result the share of Respondent/Petitioner had reduced.

26. For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 10 th November, 2016. However, in the facts and circumstances of the case, we direct the respondent and the other directors and the company to refund the amount of Rs.2,01,00,000/- (Rs. Two Crore One Lakh only) with 18% per annum simple interest to the 4 th appellant within one month. The Registrar of Companies will ensure such payment.

27. The order passed by Tribunal dated 10th November 2016 stands modified to the extent above. The appeal stands disposed of with aforesaid directions."

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11. Subsequently, I.A. 827 of 2017 in Company Appeal (AT) No. 31 of 2016 was filed by the Company M/s. Ranchi Metal & Ispat Private Ltd. seeking clarification of the Order which was disposed of by this Tribunal on 17/11/2017 observing as follows:

"The appeal was heard on merit and disposed off on 20.02.2017. In the circumstances, interlocutory application for modification of the said order at this belated stage does not arise. Interlocutory application otherwise is also not maintainable.

I.A. No. 827/2017 stands disposed off."

12. It is also the case of the Appellant that vide Order dated 18/01/2019 in Contempt Case (AT) No. 01 of 2019 in Company Appeal (AT) No. 31 of 2016, this Tribunal had directed a formal Notice to be issued on the Respondents intimating them that the Tribunal may initiate Contempt Proceedings against the first and second Respondents. In the Order dated 03/09/2019 this Tribunal in Contempt Case (AT) No. 01 of 2019 directed the Contemnors/Respondents Mr. Prakash Kumar, Ms. Usha Rani Jha to be present before this Tribunal with their reply for deliberate violation of the Order dated 20/02/2017. The Reply Affidavit was to be filed within four weeks.

13. It is significant to mention that there was no reply to this Notice. NCLT sought to decide the matter with respect to the shareholding of Ms. Usha Rani and directed Status Quo to be maintained till the date of final hearing. On instructions, Learned Counsel submitted that no Reply was filed before the NCLT and that the matter is still pending before NCLT for adjudication. While observing that the clarification would certainly go to the root of the matter regarding the disputed shareholding, NCLT observed that such a dispute had Company Appeal (AT) No. 140 of 2020 already been entertained in CP 104/2014 and prima facie, the very same question cannot be entertained as it would attract constructive res adjudicata, however, till the clarification is obtained, Status Quo was directed to be maintained.

14. NCLT in C.P. 04 of 2014 has placed reliance on the Judgement of the Hon'ble Supreme Court in 'Dale and Carrington Investment (P) Ltd.' Vs. 'P.K. Prathapan' [2004] 54 SCL 601 (SC), wherein it was laid down that 'in the absence of any proof to show that a Meeting was held, it could not be accepted that a Meeting of Board of Directors was indeed held. If no Meeting of Board of Directors took place on the date, the question of allotment of shares to the Respondents could not arise'. Placing reliance on the aforementioned ratio, NCLT has categorically observed that the Respondents have failed to prove that the notice of the Board Meeting for increasing the authorised share capital and the allotment of shares to Respondent-4 was served on the Petitioner/Appellant herein who happens to be a Director of the Company. Without any Notice to one of the Directors, i.e., in his absence if any decision is taken by the Board of Directors, that will not be binding. NCLT has set aside the Board Resolution dated 18/02/2014 for increase in authorised share capital and in pursuance of that, the allotment of further shares in favour of Respondent-4 was set aside.

15. The basic point for consideration in this Appeal is whether the shares allotted to Smt. Usha Rani in the Board Meeting dated 18/02/2014 still hold good and whether she continues to be the

shareholder as the last para of the Order does not mention the subject party/i.e., the first Respondent/Ms. Usha Rani.

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16. At this juncture, this Tribunal finds it relevant to reproduce the extract of the Minutes of the Meetings of the Board of Directors of the Company held on 18/02/2014:

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17. When the aforementioned Resolution itself is set aside in its totality, merely because the name of the first Respondent was not categorically mentioned in the operative portion of the Order it has to be interpreted in its truest sense as NCLT has categorically set aside the Resolution dated 18/02/2014 whereby the authorised share capital was increased. In pursuance of the Resolution having held to be illegal, the allotment of further shares in favour of Respondent-4 was also set aside. Learned Counsel for the Appellant vehemently contended that only Mr. Surjeet Singh and Mr. Prakash Kumar have equal shareholding of 50% each and that Ms. Usha Rani was not at all a shareholder and therefore she does not have the locus standi to move an Application under Sections 241/242 of the Act. The only reference with respect to Ms. Usha Rani/first Respondent being a shareholder is the copy of an Annual Return MGT - 7 dated 27/02/2018 wherein it is shown as the Shareholder/Director having 5,000 shares and the list of shares annexed dated 31/03/2018 showing the Applicant as well as M/s. Prowess International Private Ltd. as Directors and shareholders having 5,000 shares and Rs.2,01,00,000/- shares respectively, but the same cannot be relied upon in the light of the Judgement dated 10/11/2016 in C.P. No. 104/2014.

18. The contention of the Learned Counsel for the first Respondent, that the last para does not mention the subject party/first Respondent and therefore the Order in C.P. 104/2014 does not pertain to the first Respondent is completely untenable, in the light of the observation of NCLT in that order that 'The Respondents failed to show proof to the effect that increased authorised share capital was taken for the benefit of the company because Company was not running and only the entire authorised share capital has been increased which leads to a presumption that there was an ulterior motive Company Appeal (AT) No. 140 of 2020 or extraneous purpose or it was simply to gain management control of the Company, resultantly, the Petitioner's shareholding has been reduced from 50% to 0.24%. The alleged Board Meeting was without any notice, though the Petitioner No.1 was director of the Company. Therefore, the Impugned Act comes under the purview of oppression and mismanagement and Board Resolution regarding the permission to increase the authorised share capital and allotment of shares to Respondent No. 4 deserves to be set aside. The Petition is allowed. The Impugned Board Resolution dated 18.02.2014 for increase in authorised share capital and in pursuance of that, allotment of further shares in favour of Respondent No. 4 is hereby set aside. The Application money to Respondent No. 4 to be refunded by the Respondent No. 1 Company'. It has to be read in totality. These findings that there were no substantial grounds to increase the authorised share capital; that the Meeting was held in the absence of any Notice to the Director/Appellant herein; and hence the Board Resolution dated 18/12/2014 is set aside, have attained finality in the absence of any Appeal preferred against the Order of this Tribunal. Hence,

the argument of the Counsel for the first Respondent that though the 18/02/2014 Resolution has been set aside, it does not pertain to the first Respondent cannot be sustained.

19. For all the foregoing reasons, this Appeal is disposed of with the clarification that in the light of the Resolution dated 18/02/2014, having been set aside and having attained finality pertains to the setting aside of the allotment of shares to the first Respondent/Ms. Usha Rani also. In view of this clarification, the matter is remitted back to the NCLT to decide the maintainability of Petition C.P. (IB) No.- 763/KB/2020 as expeditiously as practicable but not later than two months from the date of this Order. The Company Appeal (AT) No. 140 of 2020 Status Quo on the subject property shall be maintained only for these two months.

20. The Registry is directed to upload the Judgement on the website of this Tribunal and send a copy of this Judgement to NCLT (National Company Law Tribunal, Kolkata) forthwith.

[Justice Anant Bijay Singh] Member (Judicial) [Ms. Shreesha Merla] Member (Technical) New Delhi 04th April, 2022 himanshu Company Appeal (AT) No. 140 of 2020