

Shri Lalit Aggarwal vs Shree Bihari Forgings Pvt. Ltd. & Ors on 22 January, 2020

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI
COMPANY APPEAL(AT) NO.380/2018

(ARISING OUT OF JUDGEMENT DATED 4TH SEPTEMBER, 2018 IN C.P.
NO.15/2018 AND CP NO.47/2008 BY NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI, BENCH III)

IN THE MATTER OF: BEFORE NCLT BEFORE NCLAT

1. Shri Lalit Aggarwal
S/o Late Shri Prabhu Aggarwal,
A-50, Sector 2, Noida. 1st Petitioner 1st Appellant
2. Lalit Aggarwal HUF
Through its Karta,
Shri Lalit Aggarwal
A-50, Sector 2, Noida. 2nd Petitioner 2nd Appellant

Vs

1. Shree Bihari Forgings Pvt Ltd
3/56, Ram Gali, Vishwas Nagar,
Shahdara. 1st Respondent 1st Respondent
2. Pramod Goil
S/o Late Shri Sohan Lal Goil
6 Navyug Market,
Ghaziabad. 2nd Respondent 2nd Respondent
3. Ritesh Goyal,
S/o Shri Pramod Goil,
6 Navyug Market
Ghaziabad 201301 3rd Respondent 3rd Respondent
4. Udit Goyal
S/o Shri Pramod Goil
6 Navyug Market,
Ghaziabad. 4th Respondent 4th Respondent
5. Ruchi Goyal,
W/o Shri Ritesh Goyal,
6 Navyug Market
Ghaziabad 5th Respondent 5th Respondent
6. Registrar of Companies,
4th Floor, IFCI Tower,

61, Nehru Place,
New Delhi-110019.

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6th Respondent

7. The Chief Manager,
Canara Bank,
Mayur Vihar Branch,
Delhi.

6th Respondent

7th Respondent

8. The Chairman & Managing Director,
Canara Bank,
112, J.C. Road,
Bangalore.

7th Respondent

8th Respondent

For Appellant:-Mr Karan Luthra and Niyati Kohli, Advocates.

For Respondents: - Mr.Ankur, Proxy counsel for R1 to R5.

Mr. PS Singh, Advocate, Sr. Panel counsel for ROC.

And

COMPANY APPEAL(AT) NO.23/2019

(ARISING OUT OF JUDGEMENT DATED 4TH SEPTEMBER, 2008 IN C.P.
NO.15/2018 AND CP NO.47/2008 BY NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI, BENCH III)

IN THE MATTER OF

1. Shri Pramod Kumar Goil,
Director,
6 Navyug Market,
Ghaziabad

1st Petitioner

Appellant

Vs

1. Shri Bihari Forging Pvt Ltd,
3/56, Ram Gali, Pandav Nagar,
Shahdara,
Delhi.

1st Respondent

1st Respondent

2. Lalit Aggarwal,
A-50, Sector 2, Noida.

2nd Respondent

2nd Respondent

3. Mr. Mahesh Gupta
M/s Gupta Mahesh & Company,
Statutory Auditor,
Shri Bihari Forgings Pvt Ltd,
C-26B, Basement,
Kalkaj,
New Delhi

3rd Respondent

3rd Respondent

Mr Ankur, Proxy counsel for appellants.

Mr. Karan Luthra and Mr. Niyati Kohli, Advocates for R2.
Mr PS Singh, Advocate for R0C, Delhi.

JUDGEMENT

(22nd January, 2020) MR. BALVINDER SINGH, MEMBER (TECHNICAL) This appeal has been preferred by the appellant under Section 421 of the Companies Act, 2013 against the order dated 4.9.2018 passed by the National Company Law Tribunal, Bench III, New Delhi in Company Petition No.47(ND) of 2008 filed under Section 397, 398, 402 and 403 read with Section 408 of the Companies Act, 1956 whereby the Company Petition was dismissed and the Respondent company was ordered to be wound up. Vide the same impugned order dated 4.9.2018, NCLT, New Delhi has also dismissed the Company Petition No.15(ND)/2008 filed by the Respondent No.2 against the appellant No.1.

Company Appeal (AT) No.380 of 2018

2. The appellants submit that their petition has been dismissed on the sole ground of alleged suppression on part of the Appellants with regard to non-disclosure of allotment of equity shares of Respondent company by Appellant No.1 to various persons including the appellant No.1 himself on 17.12.2007, 28.12.2007 and 27.02. 2008 and the irregularities in the allotment of shares.

3. The appellants submit that the Respondent No.2 has handled the affairs of Respondent Company in a 'dishonest manner' and the same has been accepted by the Tribunal.

4. The appellants submit that the Hon'ble High Court of Delhi vide order dated 13.5.2013 (Page 362 of appeal) directed that the Auditor appointed by Company Law Board will undertake a comprehensive audit of accounts of Respondent No.1 company from the year 2007-08 to 2012-13. The appellants submits that the Respondent No.2 did not produce any record but filed a police complaint No.1727/2013 dated 6.7.2013 (Page 470) that during the shifting of office of Shahdara, Delhi to Ashok Nagar, Delhi one bundle containing various documents were not found and lost in transit. The appellants submits that Respondent No.2 intimated the Administrator that his son who was carrying the record in his car and all the records of the company in the car burns out (Page 528 of Appeal).

5. The appellant submits that the assets of the Respondent No.1 company has been illegally dissipated under the watch of Respondent No.2 as recorded by the Administrator. The appellant submitted that on the basis of the final report of the Administrator, the Hon'ble High Court initiated suo moto contempt proceedings against the Respondent No.2.

6. We have heard the parties and perused the record.

7. Learned counsel for the appellant argued that the allotment of equity shares on 17.12.2007,

28.12.2007 and 27.02.2008 were legal and were allotted with the consent of Respondent No.2. Form No.2 filed with the ROC for the allotment of equity shares on these dates was digitally signed by Respondent No.2 alongwith the Chartered Accountant of Respondent No1 company.

8. Learned counsel for the Respondent argued that the shares were allotted by the appellants illegally, therefore, the allotment of shares be set aside. Learned counsel argued that the appellant in connivance with the Chartered Accountant allotted shares to his own HUF and even to his wife and friends in order to fraudulently increase his share holdings in the company. The said allotment was without any corresponding authorization by the Board of Director and/or without Respondent's consent as per Articles of Association of the company.

9. We find that no Board Resolution has been placed before the NCLT or before this Appellate Tribunal to establish that the shares were allotted as per law and the Respondent No.2 has also contradicted that the allotment were made with his consent. The appellant has himself admitted in C.P.No.47/2008 that no board meetings were held in SBF and that no board meeting was held for the allotment of shares. Further the appellant's wife has also made a statement that she had never consented to issue of shares to her against the unsecured loan advanced by her to Respondent No.1. All these facts point towards suppression of facts and false clais being made by the appellant. Therefore, we are in agreement with the findings of the NCLT on this issue.

10. We have heard the parties on the issue of producing of record before the Administrator. We find that in the year 2013, Respondent No.2 lodged police complaint stating the during the shifting of office, the statutory record was not found and lost in transit. We also note that in the year 2015 Respondent No.2 is stating that the record of the company which was carried by his son, has been burn out due to fire in the car. On this issue we doubt that two instances cannot happen again and again. Thus there was an attempt not to produce the record by the Respondent. 11 We have perused the proceedings dated 18.11.2015 (Page 532) of Administrator and noted that the Administrator has clearly stated that all the tangible assets of the Company had been removed from the said premises at Pilukhawa, Hapur, We also note that the Hon'ble High Court of Delhi vide its orders dated 11.3.2016 (Page 545) has ordered to initiate suo moto proceedings for contempt against the Respondent No.2 for disobeying the order of Hon'ble High Court and Company Law Board. On these basis we find that the conduct of the Respondent No.2 is not upto the mark.

12. We also note that a complaint was filed against the Chartered Accountants by Respondent No.2 which was dismiss vide order dated 10.2.2014 (Page 394) and this order was finally upheld all the way upto the Hon'ble Supreme Court (Page 409). On the basis of these we are of the view that the Respondent No.2 has filed false cases against the Chartered Accountant.

Company Appeal (AT) No.23 of 2019

13. The appellant submitted that the impugned order is liable to be set aside, being a non-speaking, non-reasoned order. The appellant submitted that the following nine issues were framed on the basis of pleadings in both the petitions:-

- a) The jurisdiction under Section 397/398 of the Companies Act, 1956 being that of an equitable jurisdiction whether the parties have approached this Tribunal invoking the equitable jurisdiction with clean hands and if not, whether the petitions are liable to be dismissed on this ground?
- b) Whether R2 illegally issued 3,66,750 equity shares of R1 in violation of the provisions of the Companies Act, 2013 and behind the back of the PG to himself, to his HUF, wife and other friends and business associates?
- c) Whether R2 and R3 have misused the digital signature of the PG for illegally allotting the above shares?
- d) Whether allotment of shares alleged to be made by R2 were in violation of the terms imposed by Canara Bank in its term loan?
- e) Whether R2 siphoned off money from R1's bank account?
- f) Whether R2 replaced his Gurgaon property mortgaged with Canara Bank with property of BSL Buildcon for which the PG also paid Rs.15 lac?
- g) Whether the PG has siphoned off sums of R1?
- h) Whether the PG has manipulated the books of accounts, financial statements and other records of R1?
- i) Whether the enhancement of the cash credit limit from Rs.85 lacs to 200 lacs by Canara Bank in favour of R1 was in violation of specified procedure?

The appellant submitted that both the petitions were dismissed summarily, while deciding only one issue under the cover of Equity.

14. The appellant submitted that once the Tribunal has framed issues, it is for the Court to decide all the issues and giving its findings on each issue. The appellant submitted that he has filed the petition on the arbitrary and illegal allotment of shares by Respondent No.2 to himself and to his friends and relatives.

15. The appellant submitted that no Board Meeting took place for the allotment of shares by Respondent No.2. The appellant submitted that the said allotment is rightly set aside and shareholding is liable to be restored to its original position and pattern as on 30.09.2007.

16. The appellant submitted that the records were actually burnt in car accident and the appellant approached various authorities for reconstruction of documents but the same were denied by the authorities. The appellant submitted that ultimately the appellant informed the Arbitrator to pass directions in this respect to procure the entire record. The appellant submitted that the Respondent

No.2 opposed the request of the appellant.

17. The appellant submitted that the Respondent No.2 in connivance with the Chartered Accountant allotted shares to his own HUF and even to his wife and friends in order to fraudulently increase his shareholding in the Company. The said allotment was without any Board Meeting. The appellant stated that the Respondent No.2 with Chartered Accountant did the fraudulent acts of illegal allotment by misusing the digital signatures of appellant (contained in pen drive) which used to be in the possession of Chartered Accountant.

18. The appellant submitted that the Respondent No.2 committed fraud on the company and withdrew crores of rupees from company's account for his own gratification and for satisfying debts, which were in no way related with the Company's affairs and thereby siphoned off huge funds of the company. The appellant submitted that the encashment of cheques and transfers of funds of the company to other accounts was not related to company's affairs and Respondent No.2 did not give any explanation.

19. The appellant stated that the Respondent No.2 filed counter petition No.47(ND)/2008 before Company Law Board against the appellant to avoid penal consequences and also filed various false complaints before various authorities with the sole object to obstruct the growth and day to day functioning of the company and to bring the company at the brink of closure.

20. The appellant stated that the Respondent No.2 has filed affidavit before the Police Authorities wherein he has falsely stated on oath that all transactions and dealings of the company are illegal and unlawful and that the appellant has been opening various bank accounts by fabricating board resolutions without any substance.

21. The appellant submitted that the Respondent No.2 did not cooperate with the Auditors and Administrator.

22. On the other hand Respondent No.2 submitted that appellant failed to abide by the orders of the Hon'ble NCLT, Hon'ble High Court and Learned Arbitrator with regard to directions to produce the books of accounts and records of Respondent No.1 company.

23. Respondent No.2 submitted that the appellant has avoided furnishing the documents of the Respondent No.1 company and then claimed that the documents were accidentally destroyed and thereafter failed to reconstruct the same.

24. Respondent No.2 submitted that the appellant was in exclusive control of the Respondent No.1 company since the year 2008 and the appellant is responsible for the state of affairs of the Respondent NO.1 company.

25. Respondent No.2 submitted that the appellant did not cooperate with the Auditor and did not produce the documents of Respondent No.1 company though they were directed to produce by the Hon'ble High Court. 24.

Respondent No.2 submitted that the appellant filed a false complaint with the Police that the statutory record has been lost.

26. Respondent No.2 submitted that the appellant undertook to produce the record on 16.9.2015 before the Administrator but he did not produce the same and later on informed the Administrator that the record has been burnt.

27. Respondent No.2 submitted that due to non-cooperation extended to Administrator by the appellant, the Hon'ble High Court initiated suo moto contempt proceedings against the appellant.

28. We have heard the parties and perused the record.

29. Learned counsel for the appellant argued that the allotment of equity shares on 17.12.2007, 28.12.2007 and 27.02.2008 were illegal. Learned counsel for the Respondent No.2 argued that the shares were legally allotted. We find that no Board Resolution has been placed before the NCLT or before this Appellate Tribunal to establish that the shares were allotted as per law. Therefore, we have no material that the findings of the NCLT on this issue are not reasonable.

30. We have heard the parties on the issue of producing of record before the Administrator. We find that in the year 2013, Respondent No.2 lodged police complaint stating that during the shifting of office, the statutory record was not found and lost in transit. We also note that the appellant undertook to produce the record before the Administrator but did not produce and informed the Administrator that the record has been burnt in car. As stated above we doubt that two instances cannot happen again and again. This was a clever attempt not to produce the record by the appellant. Admitted the record was in his custody and it was also his duty to take adequate care of the record so that the statutory record preserved to be produced before the Administrator. Apparently he has not taken due care of the record while shifting and hindering the work of administrator for which he cannot avoid his responsibility for the same.

31. We have perused the proceedings dated 18.11.2015 (Page 532) of Administrator and noted that the Administrator has clearly stated that all the tangible assets of the Company had been removed from the said premises at Pilukhawa, Hapur, We also note that the Hon'ble High Court of Delhi vide its orders dated 11.3.2016 (Page 545) has ordered to initiate suo moto proceedings for contempt against the appellant for disobeying the order of Hon'ble High Court and Company Law Board. On these basis we find that the conduct of the Respondent No.2 is not upto the mark and he has siphoned off the assets of Respondent No.1 company.

32. Section 242(1)(b) provides as under:

"(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up.

the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

33. It is apparent that there is dispute between the two directors regarding their shareholding of the company. Whenever any one of the director has been in control of the company admittedly before 2008 by Lalit Agarwal and after 2008 by Pramod Goil, both of them have taken action in such a manner that the company has been mismanaged to the extent that it has lost its substratum. Once the company has lost its substratum that itself is a valid ground for winding up of company on just and equitable ground. However, when the substratum is lost and both directors have been in destruction mode whenever they were in control of the company and having dubiously destroyed the company, the winding up of the company would not unfairly prejudice its members thus the winding up will be just and proper order.

34. As to the averment made by the appellant that there were 9 issues framed but only one issued has been decided. Looking at the issues framed and in absence of any record and destruction of the company we are of the considered opinion even if these issues are decided separately it will not bring back the substratum of the company. Hence the arguments that these issues have not been decided by the Tribunal are not material to the decision made.

35. We also note that a complaint was filed against the Chartered Accountants by appellant which was dismissed vide order dated 10.2.2014 (Page 394) and this order was finally upheld all the way upto the Hon'ble Supreme Court (Page 409). On the basis of these we are of the view that the appellant has filed false cases against the Chartered Accountant. CONCLUSION

36. On the basis of the pleadings and arguments we have come to the conclusion that allotment of shares has been done without getting it approved in any Board Meeting. Mr. Parmod Kumar Goil, appellant in Company Appeal (AT) No.23/2019, has not cooperated with the Auditor and Administrator to produce the statutory documents and one hand he is admitting that the documents have been lost while shifting the premises and second time he is admitting that the statutory records has been burnt in car accident. This is clever attempt to disobey the orders of Hon'ble High Court for which the Hon'ble High Court has rightly initiated contempt proceeding against him. The appellant in Company Appeal (AT) No.23/2019 has also siphoned off the assets of the Respondent No.1 company. The order of winding up of the company is also justified. In the absence of any record available to be produced by either of the parties and non-existence of the assets of the company, it will be futile exercise to make any order except winding up of the company in the circumstances.

37. In view of the above discussions and observations we are of the view that the NCLT has passed a speaking and well reasoned order and there is no merit in the appeals to interfere with the impugned order. The impugned order is upheld. The appeals are accordingly dismissed. 1st appellant in both the appeals are imposed a cost of Rs.5 lakh each to be deposited with National Defence Fund within one month from the date of this order. Proof of depositing the cost with the National Defence Fund will be submitted before the Registrar of this Tribunal within fifteen days thereafter.

(Justice Jarat Kumar Jain) Member(Judicial) ((Mr. Balvinder Singh) Member (Technical) (Dr. Ashok Kumar Mishra) Member (Technical) New Delhi bm