

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

COMPANY APPELLATE JURISDICTION

Company Appeal (AT) No. 72 of 2017

(arising out of Order dated 24th January 2017 passed by NCLT, Allahabad Bench in C.P. NO. 99(ND) of 2012 and C.P. No.86(ND) of 2013)

Shri Bharat Kumar Agarwal

.....Appellant

Vs.

M/s Shri Bankhandi Nath Developers Pvt. Ltd. & OrsRespondents

AND

Company Appeals (AT) No. 108 and 109 of 2017

Dharmendra Kumar Rathore & Anr

...Appellants

Vs

Shri Bankhandi Nath Developers Pvt Ltd & Ors

...Respondents

**Present: For Appellants: Mr. Naveen Dahiya, Mr. Mansumyer Singh, Ms. Manisha Chaudhary and Mr. Karan Malhotra, Advocates in Appeal No.72 of 2017.
Mr. Chandra Shekhar Yadav and Mr. Praful Jindal, advocates in appeal Nos. 108 and 109 of 2017.**

**For Respondents: Mr.Chandra Shekhar Yadav and Mr. Praful Jindal, Advocates in Appeal No.72 of 2017.
Mr. Naveen Dahiya, Mr. Mansumyer Singh, Ms Manisha Chaudhary and Mr. Karan Malhotra, Advocates in Appeal No.108 and 109 of 2017.**

J U D G E M E N T

BALVINDER SINGH, MEMBER (TECHNICAL).

1. As three appeals are interconnected, have been preferred against common judgement passed by National Company Law Tribunal, Allahabad Bench (hereinafter referred to as the "Tribunal") and therefore have been taken up for hearing together to avoid prolixity of repetition. All three appeals are decided by this common judgement. For the sake of convenience, we have

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described the appellant of Company Appeal (AT) No.72 of 2017 as appellant and the appellants of Company Appeal (AT) No.108 and 109/2017 as the Respondents, they being the respondent in the earlier appeal.

2. This appeal has been preferred by the appellant against order dated 24.01.2017 passed by the Tribunal in CP No. 99(ND) of 2012 and C.P. No.86(ND) of 2012, whereby and where under the Tribunal held that both groups, namely Appellants/Petitioners in Company Appeal (AT) No. 72 of 2017 and Appellants/Petitioners in Company Appeal (AT) No. 108 & 109 are guilty of committing acts of oppression and mismanagement.
3. The learned Tribunal while dealing with the petitions left the questions of forgery undecided as being pending before criminal court, reviewed and dealt with the other allegations made by both parties against each other, framed issues and passed the following order

"In view of the above discussion and observations, the following Order is passed

1. *It is declared that both the groups, namely the Petitioners in CP 99/2012 and Petitioners in CP86/2011 are guilty of committing acts of oppression and mismanagement;*
2. *It is declared that both petitioners in CP 99/2012 and Petitioners in CP86/2013 are Directors of the Board of the Company;*
3. (a) *Shri Anil Kumar, Practicing Company Secretary is appointed as 5th Director of the Company to enable the Board to take majority decision on the following issues*
 - (i) *whether any legal action shall be taken by the Company for getting the sale deeds dated 15.11.2011*

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executed by Mr. Alok Goel in favour of 3rd parties cancelled and to specifically enforce the agreement of sale dated 12.07.2011 in favour of the Company executed by Mr. Alok Kumar Goel according to law;

(ii) Whether the Registered office of the Company be shifted or not;

(iii) Any other issue relating to the affairs of the Company in order to put the company on track to continue its business as per the objectives of its incorporation;

- 3 (b) *Shri Anil Kumar is further empowered to supervise that the Board meeting and the meeting of members is convened smoothly by following the procedure according to the Companies Act, 2013 and relevant rules and report to the Tribunal. He shall continue as Director of the Board till the Board elects another independent director within a period of 6 months from the date of this order or such other period as the Tribunal may direct on the application of any of the Directors or the members of the Company.*
- 3 (c) *Each of parties shall pay Rs. 25, 000/ (twenty five thousand only) (total Rs. 50, 000) to Shri Anil Kumar as his honorarium in advance, besides reimbursing his travelling and other incidental expenses, whenever he claims therefor;*
4. *Both parties in both the petitions shall file certified copy of this order before Registrar of Companies, Kanpur within 30 days from the date of this order;*
5. *All the other reliefs claimed in both the petitions are refused and merged in this order;*

6. *All applications if any pending as on today are hereby disposed of and merged in this order;*
7. *The Company Petitions CP 99/2012 and 86/2013 are disposed off accordingly;*
8. *Both parties shall bear their respective costs. Typed by self, corrected by us, delivered in open Court this Tuesday, the 24th day of January, 2017."*

4. Appellant being aggrieved of the findings and order supra, have filed an appeal seeking setting aside of order to the extent of reinstatement of Respondent to the board, nullify the finding as against the Appellant/Petitioners of committing the oppression against the Respondent & set aside the sale deed executed by the respondent 2 & 3 in collusion with other respondents. Whereas, the respondents (being the appellant in Company Appeal (AT) No. 108 & 109) have prayed in the Appeal to set aside the common order except the decision of restoring them on the board.

5. It is necessary to give brief background of the facts giving rising to these appeals. The case of the Appellant/Petitioner of appeal No. 72 of 2017 before the tribunal below was as follows:

5.1 That the Company Respondent was incorporated on 07.07.2011 with Respondent 2 & 3 being the only shareholders and directors of the company to carry on the business of construction, infrastructure, real estate & building developers, builders, traders, civil contractors, interior decorators, all types of infrastructure projects, , to sell, let lease or otherwise, apartment therein and to provide for the conveniences commonly provided in flats, suits and residential and business quarters and to do all incidentals acts and

thing necessary for the attainment of the object and such other objects as mentioned in its Memorandum of Articles.

- 5.2 Further, it was alleged that on 11.7.2011 vide a Board Resolution the Respondents 2 & 3 transferred its 50% shares to the Appellants. That on 12.7.2011 an agreement to sale was executed between Respondent 1 Company through Respondent No. 2 with Respondent No. 4 for sale of a land for a total consideration of Rs. 328,00,000 with consideration Rs. 1,00,00,000 to be paid in advance. That the Appellants were approached for the purpose and as per the understanding between appellants and respondent groups the consideration for purchase of aforesaid land was to be shared between the parties on a ratio of 50:50. The advance paid to R4 was paid equally. That on 18.07.2011 the Appellants were duly inducted as Directors of the Respondent No. 1 company.
- 5.3 It is the case of Appellants that they were approached by the Respondent group in first week of October, 2011 for sale of land in favour of one Tulip Infrastructure, which was refused by the Appellant. According to Appellant that on 18.10.2011 the Respondent group resigned from Respondent No.1 Company. That on 5.11.2011 a legal notice was issued by Respondent No.1 Company represented by the Appellants to Respondent 2 to 4 and to Tulip Infrastructure, that the Respondents are representing themselves as directors of company, though they have resigned and are trying to sell the property, for which they are not authorised. That on 15.11.2011 two registered sale deed were executed selling the subject land in two parts to R5 and R8 & R9 respectively without consent and knowledge of the Appellants/Petitioners. There are allegations and rebuttal that respondents while acting detriment of the company's business, played fraud in collusion with other respondents and caused creating liabilities to the tune of Rs.

1,09,28,000 by selling the only property Company had and the same property is shown the only reason of the petitioners for becoming shareholders & directors of the company.

5.4 The respondents have contended that the signatures of the respondents were obtained on blank papers and everything including share transfer, resolutions, resignation etc is manipulated and forged. Thus the appellant/Petitioners are neither shareholders nor directors of the Respondent No.1 company. Simultaneously, Respondents state that they still hold the directorships in the Respondent No.1 company. The both groups have lodged FIR against each other and preferred the Company Petitions also.

6. The issues arise in the appeals are following:

- a. Whether there is oppression on part of both of the parties against each other?
- b. Whether sale deed executed can be set aside by this tribunal?
- c. Whether mismanagement is committed by the respondent 2 & 3 against the company?

7. That on analysing the facts of Company Petitions the tribunal held that the appellant purported false theory of resignation of the respondents precluding them to participate in the management of the company and the respondents denied the shareholding as well as directorship of the appellant which found to be incorrect, hence committed oppression against each other.

8. The counsel for the Appellant submits that the respondents even after voluntary resignation misrepresented themselves as directors of the company and executed sale deed on behalf of company. The counsel for the appellant alleges that on 18.10.2011 respondent 2 & 3 tendered their resignations as directors to the company secretary of respondent no 1

company. The counsel for the appellant further submits that the tribunal recorded a wrong fact that the thumb impression on the letter of resignation are of the resigning respondents to which the appellant did not give any explanation, in fact the thumb impressions are of the appellant/petitioners witnessing and accepting the resignation. The respondents contend that only on receiving the legal notice dated 5.11.2011 on 16.11.2011, they got conversant with the facts that the appellants in collusion with the company secretary transferred 50% shares in their name on 9.7.2011, appointed themselves as directors on 18.7.2011 with fabricated board resolution and filed form 32 of resignation of respondent 2 & 3 on 18.10.2011. The F.I.R. Against such forged transaction lodged by respondents on 19.11.2011 should not have been held as delayed. The counsel for the appellant alleges that the share certificates were duly transferred and approved through a board resolution.

9. On perusal of the record we notice that both parties have lodged criminal complaints against each other. The charge-sheet has been filed on the F.I.R lodged by the respondents and a closure report by the police authorities have been submitted on F.I.R lodged on 3.1.2012 by the appellant and re-investigation has been ordered for the same.
10. We find that the above facts are repetition of pleadings and have already appropriately been dealt by the tribunal without encroaching into the jurisdiction of the criminal court. We do not find this issue calls for any intervention by this tribunal.
11. The appellant has prayed for setting aside the sale deed being illegal and submitted that respondent have misappropriated Rs 1,00,00,000 paid as advance consideration under the agreement to sale dated 12.07.2011, illegally grabbed the land to which respondent company was legally entitled to and escaped all the liabilities in by resigning as directors on 18.10.2011.

12. It is pertinent to note the findings of the tribunal on the issue whether the sale of disputed land to Respondent No.5 Mari Gold Infrastructure, Respondent no. 9 Satyendra Kumar and Respondent No.10, Prem Shanker under the registered sale deeds dated 15.11.2011 is binding on the Company? If not whether this Tribunal is competent to declare that the sale deeds are null and void? That after examination of pleading, documents and citation relied upon by the parties the tribunal below observed that R1 Company on 12.07.2011 has agreed to purchase the property and the Company is at liberty to obtain sale deed either in its own name or in the name of any other else within a period of six months, subject to other conditions of contract. On 15.11.2011 the respondent on behalf of the company without taking consent of the petitioners decided to part with its equitable right to seek sale deed executed in favour of 3rd party contending to be the beneficial deal for the company. The Tribunal has gone further with an observation that it is unknown whether the advance consideration paid by the Company under the agreement of sale was returned to it by the vendees under the sale deeds. The Respondents did not produce any evidence to that effect. Though, the Tribunal has reached to the conclusion of mismanagement against the company by the respondent but such will not disturb the right of third parties. Therefore, the Company has to take legal action for getting those sale deeds cancelled and obtain a sale deed in its favour and for that the Board of the Company has to take decision with the ratification by the members. Whether or not the Board will take a decision is left to the wisdom of the Directors and the Members of the company.
13. The sale has been executed between respondent no 4 and the third parties, here Respondent no. 5 and Respondent 8 & 9. The property never belonged to the company. While executing the agreement to sale in favour of company the property belonged to respondent no 4 and the company opted to part with its right to get it transferred in the name of third parties within

6 months of execution of agreement to sale, failing which would have invoked the forfeiture clause of the agreement i.e. clause 9 of the agreement

".....Similarly in case the purchaser fails in getting the sale deed executed and registered in the manner as mentioned herein, the seller may by notice forfeit the advance amount of sale consideration and shall stand released from the commitments under this agreement and shall also be free to transfer the property in question to any third person."

Further, the appellant have been failed to put any argument before this tribunal to show the wrong in the following reasoning and finding of tribunal:

"5.5. The next important question that remains with us is whether the sale deeds dated 15.11.2011 can be declared as 'null and void' as sought for in CP 99/2012. The jurisdiction of this tribunal is summary in nature and the powers thereof while dealing with causes of oppression and mismanagement are spelt out in Sec. 402 of 1956 Act and Sec. 242 of Companies Act, 2013. Two important clauses of Sec. 242 are relied upon by the learned counsel for the Petitioners in CP 99/2012 to contend that 13 the Tribunal is competent to set aside any transfer of property under Sec. 242. Those two clauses are:

(e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;

(f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e): Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

(g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

Clause (e) is with respect to termination of any agreement between directors of the company; and clause (f) is between company and 3rd parties. To fall back on the spirit of clause (f), the 3rd party shall give consent. Here the 3rd party, other than the directors is Respondents No. 11, 5 to 6 who are vendees under two registered sale deeds executed by Respondent No. 4. They are resisting the CP 99/2012 substantially and so, there is no consent as such they are giving to terminate any agreement i.e., the sale deeds, if they are taken as 'agreements' for the purpose of cl. (f) of sec. 242 above.

Clause (g) cannot be attracted because the tribunal can set aside any transfer etc made or done within three months before the date of the application. Obviously this is also not applicable. Further, it is pertinent to note that there is no transfer of property as such effected by the Company but it is by the 4th Respondent. Had the sale deeds in question dated 15.11.2011

are executed by or on behalf of the Company, this provision could have been very well attracted.

5.6. To sum up, what the right possessed by the Company under the agreement of sale is only an equitable right to demand the vendor to execute a regular sale deed and nothing more. Moreover, a transaction under agreement of sale is not a 'sale'. Sec. 54 of the Transfer of Property Act reads:

Section 54: "Sale" defined: "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.

Sale how made: Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a 14 registered instrument or by delivery of the property. Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale: A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.

Therefore, the Company did not transfer the property got by it under the agreement of sale; the sale was actually affected by the Vendor - the 4th Respondent. This tribunal cannot set aside or declare a transfer of property transpired between to 3rd

parties to a company, by virtue of Sec. 242 of the Companies Act. It is the civil court which is competent to grant such relief."

Thus we are not inclined to honour this prayer of the appellant to set-aside the sale deeds executed.

14. We have perused the chequered career of the matter and also the exchange of additional affidavits by the Appellant and Respondents before this Tribunal. It is observable that the Appellant/Petitioner believing on the rosy picture painted by the respondents found the deal of property lucrative and invested money. The Respondents parted with its right to sale in favour of 3rd party. Appellant/Petitioners knot the story of resignation of respondents. Though we are not into the details of the finding of the tribunal below concluding the failure on the part of both of the groups in maintaining standard of probity, fair play and business ethics thus committed oppression against each other and as has been dealt in the previous paras, but it is pertinent to take a note of the Additional Affidavits filed by the Respondents:

- a. M/s Oak Infradevelopers Pvt Ltd Respondent No. 13 has claimed that they purchased on the southern side of the said property from Mr. Satyendar Rathore & Prem Shankar Rathore vide sale deed 01.12.2012, for sale consideration of Rs. 1,75,00,000.
- b. Respondent 9 & 10 i.e. Satyendar Rathore & Prem Shankar Rathore has contended that they purchased the southern side of the property vide sale deed dated 15.11.2011 registered with the Registrar of Regional Office Bareilly for consideration of Rs. 1,14,00,000 and got adjusted the half of the advance amount of Rs. 50,00,000. Further contended that they tendered a cheque of Rs 55,00,000 dated 15.11.2011 in terms of demands of M/s Bankhandi Nath Developers

Pvt Ltd was returned by Mr Dharmindar Kumar director of M/s Bankhandi Nath Developers Pvt Ltd, stating that "we are returning herewith the cheque as we are finding it difficult to en-cash the same due to dispute in the company."

- c. Respondent No. 5 has stated in its additional affidavit that Respondent 4 was agreed to sale for a total sale consideration of Rs. 328,00,000 and advance was already paid by Respondent No. 1 to the vendor. So the Respondent No 1 agreed to take 55,00,000 as against the 50% share of the advance paid by them to the vendor. And balance sale consideration of Rs. 1,14,00,000 by adjusting the half of the advance amount of Rs. 50,00,000.

Further stated that the cheque dated 15.11.2011 was returned to them by Mr Dharmendra Kumar vide letter dated 21.11.2011 stating that "we are returning herewith the cheque as we are finding it difficult to en-cash the same due to dispute in the company."

15. The statements by the Respondents above leaves it no more a grey area that the money which ought to have been received from the 3rd parties have been denied to be accepted and returned by the Respondent No. 2 on ground of dispute in the company finding it difficult to en-cash the same. Till date the Respondent has not produced any evidence on record whether the company has received the money proposed by the vendee Respondents. What seem opaque to the Tribunal is, if Company was experiencing internal dispute in the management, Respondent 2 should not have taken decision of parting with its right to sale under the agreement to sale on behalf of company. It is an intriguing situation that the Respondent 2 & 3 did not find it difficult to sell the property but found it difficult to accept the money on behalf of company which should have come to the coffers of the company. We hold the conduct of respondent as prejudicial to the interest of the company. The only property the company

had was sold, claiming to be a beneficial deal, ended with neither receipt of money nor profitable continuous operation of the company in furtherance of its objectives, in fact halted its operation.

16. In view of the additional facts brought into notice through additional affidavits, while keeping all the directions in the order of NCLT intact, we uphold the decision of the Tribunal with the following modification:

"i) As the decision of returning money was a major decision, which was to be taken by the company but unilaterally taken by Respondent No.2 have caused prejudice to the company. The Respondent No. 2 is directed to ensure that the money which was returned comes to the account of company. The Respondent directors are also directed to compensate the company equal to 12% of interest p.a. on the amounts outstanding from 15.11.2011 to till date within one month from the date of order.

ii) The new 5th director appointed in the company will continue to enable the board to take majority decision w.r.t.

- a. Whether the registered office of the company be shifted or not*
- b. Any other issue relating to the affairs of the company in order to put the company on tract to continue its business as per objectives of its incorporation."*

Appeals are disposed off accordingly. Parties to bear their own cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Mr. Balvinder Singh)
Member Technical

New Delhi
Dated: 23rd August, 2017

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