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**IN THE NATIONAL COMPANY LAW TRIBUNAL,
SINGLE BENCH, CHENNAI**

CA/57 /2017
in
CP/9/2016

Under Sections 59, 241 and 242 of the Companies Act, 2013

In the matter

St. Mary's Hotels Private Limited & 5 Ors.

...Applicants/Respondents

Vs

Mr. T.O.Abraham.

...Respondent/Petitioner

Order delivered on 06th of March, 2018

CORAM


CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)

For Applicant(s) : Mr. Joseph, Sr. Advocate
Mr. B.Dhanaraj, Advocate

For Respondent(s) : Mr. P.H.Arvinth Pandian, Sr. Advocate,
Mr.K.Gowtham Kumar, Advocate

ORDER


Per: CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)

1. Under consideration is a Company Application No. 57/2017 filed in CP/9/2016. The Applicants are Respondents in Company Petition. The prayer made *inter alia* is to pass an order allowing the Company to convene legally valid AGMs from 31.03.2003 to 

31.03.2016 and to revise the company returns and financial statements to be filed with the RoC.

2. The Applicants/Respondents have stated that the 1st Applicant is the Company and the Applicants 2 to 6 are its shareholders who hold 80% of shares in the Company. It has been averred that the Applicants are constrained to file this Application mainly on account of the hardship arising consequent to the illegal acts of the Respondent/Petitioner. A proper Annual General Meeting (AGM) of the Company had been conducted on 31.03.2002. Thereafter, all such subsequent meetings convened were set aside by the CLB while passing Order in CP/30/2003. The EoGM held on 25.02.2017 is the only validly convened meeting after AGM of 2002. Therefore, the AGM from 31.03.2003 onwards till 31.03.2016 are due now. The audited financial statements and Annual Returns for these years are to be passed in the duly convened meeting and filed with the RoC for making compliance with the statutory requirements.

The Applicants/Respondents further submitted that as per the MCA Portal of the RoC, the 1st Applicant Company filed alleged financial statements up to 2008-2009 and Annual Return filed upto 30.09.2012. The said statements and Return are not adopted or passed in the duly convened AGM of the 1st Applicant Company.

On 14.09.2017, a Memo has been filed by the Applicants/Respondents along with copy of documents wherein it has been stated that the Respondent/Petitioner filed purported financial accounts with the RoC for the year ending 2003 to 2008. The purported meetings had been conducted without the knowledge of majority of the Directors and shareholders of the Company. As stated earlier, all such meetings after 17.04.2002 are nullified by the CLB in CP/30/2003. The Hon'ble High Court of Kerala, vide its Order dated, 09.10.2015 held that the Board of Director as on 17.04.2002 is only the duly constituted Board, and the same was confirmed by the Hon'ble Supreme Court. The alleged accounts filed by the 

Respondent/Petitioner before RoC was also not audited physically.

Written Submissions have been filed by the Applicants/Respondents, in support of prayer made in CA/57/2017. It has been submitted that the last Annual Reports and accounts, which are undisputed were filed upto the year ending 31.03.2002, that relates to the AGM held on 02.11.2002, which is the last validly convened, held and conducted AGM of the Company. Disputes arose thereafter with respect to the minutes of the Board Meeting of the 1st Applicant Company held on 17.04.2002.

It has further been submitted that in the Company Petition No.30/2003, an Order was passed on 27.06.2003 restraining the Company from passing any resolution at any general meeting. The same was upheld by High Court of Kerala on an appeal. An undertaking dated 14.07.2003 was also tendered by the Respondent/Petitioner that no Board Meeting or EoGM will be held till the disposal of the Company Petition. The Company Petition was decided. However,

vide order dated 01.03.2005, the decision of the CLB was set aside and the matter was remanded to the CLB. Subsequently, the matter was finally disposed of by the CLB vide its order dated 05.02.2013. It was held that the resolutions passed at the Board Meetings held on 23.04.2003 and 03.05.2003, as also at the EoGM on 30.06.2003 constituted an act of oppression in the affairs of the Company, and therefore, such resolutions were declared null and void. Consequently, a direction was given by the then CLB that there would be representation on the Board of Directors of SMHHPL in proportion to the shareholding in SMHPL and the term of the Director viz., Mr. T.O.Abraham has expired, the Directors shall appoint one amongst them to be the Managing Director of SMHPL under Article 12(a) of Articles of Association of SMHPL.

It has been submitted that the entirety of the board and the AGMs held after 2002 have all been illegal. It has been prayed that the present board duly elected at the EoGM of 25.02.2017 may be permitted to

draw up the accounts of the 1st Applicant Company for the year from 31.03.2003 onwards after holding valid AGMs and Board Meetings for the purpose by appointing statutory auditors and file the same with the Registrar of Companies.

3. The Respondent/Petitioner has filed objection by way of written submissions, wherein it has been stated that CA/57/2017 came to be filed and pressed by the Applicants/Respondents after it was mutually agreed that the valuation of the shares would be undertaken by the independent Valuer.


It has been submitted that the Applicants/Respondents falsely claiming that they did not attend the AGM of the Company held on 30.01.2008. They not only attended the said meeting but have also submitted a letter protesting the legality of the resolutions therein at the meeting itself. The Applicants/Respondents have signed the attendance register for the meeting which has been part of the record even in the proceedings before the Hon'ble

Supreme Court. Therefore, the allegation regarding their ignorance of the meeting held on 30.01.2008 is bogus and sham.

The Respondent/Petitioner has submitted that it is true that the company has not had an AGM since 2009, but, it cannot be denied that the company has been operational for all the years, it was in the control of the Respondent/Petitioner and the Respondent/Petitioner has ensured that the income-tax returns have been duly filed. For the purposes for filing the income tax returns, the AGMs are not required. However, the accounts based on which the taxes have been remitted cannot be reopened based on the false assumption of the Applicants/Respondents.


It has been stated in the reply arguments that the Applicants/Respondents are seeking a direction from this Tribunal to exercise a jurisdiction which is not even vested with tax authorities i.e. to open the books for the company for the last 15 years. The opening of the books can only be in terms of Section 130 of the Companies Act, 2013, which pre-requisites that there

be a fraud on the books. The Respondent/Petitioner is open to any extent of scrutiny by an independent auditor but the present exercise by the Applicants/Respondents is to delay the valuation from happening, while they continue to divert monies from the operations of the company. Therefore, the Respondent/Petitioner has prayed to reject the memo dated 14.09.2017 filed by the Applicants/Respondents.

4. On perusal of the record placed on file, it becomes clear that the 1st Applicant Company could not conduct AGMs since 2009. But, during the said period, the Income-Tax Returns have been filed, for which conducting of AGMs was not required. But, the accounts have neither been audited nor adopted from 2009 onwards. It also reflects from the record that the AGM dated 02.11.2002 was validly convened, held and conducted, thereafter, a Company Petition No.30/2003 was filed before the then CLB, wherein vide Order dated 27.06.2003, the 1st Applicant Company was restrained from passing any Resolutions on General 

Meeting. Even an undertaking dated 14.07.2003 was tendered by the Respondent/Petitioner that no Board Meeting or EoGM will be held till the disposal of the Company Petition. However, the Company Petition was finally disposed of by the then CLB on 05.02.2013 whereby the Resolution passed at the Board Meeting held on 23.04.2003 and 03.05.2003 and also EoGM held on 30.06.2003 were held as acts of oppression and declared null and void.

5. It is also on record that the Hon'ble High Court of Kerala, vide its Order dated 09.10.2015, held that shareholding and the constitution of the Board of Directors shall be as on 17.04.2002, which was also confirmed by the Hon'ble Apex Court vide Order dated 27.09.2016 passed in SLP(C).No.30483 of 2015. It is also correct to state that the accounts filed by the Respondents/Petitioners before RoC subsequent to AGM held on 02.11.2002 were not audited physically.

6. The issue under reference is as to whether or not permission can be granted to the 1st Applicant 

Company for re-opening of its books of accounts relating to the period with effect from 31.03.2003 onwards.

7. The ground for re-opening or re-casting of the accounts may either be the incidents of fraud or mismanagement, to an event of manifest or patent error, and for any other reasons that the Tribunal may deem just and proper, subject to certain pre-requisites as has been provided under Section 130 of the Companies Act, 2013. For the sake of convenience, the provision of Section 130 of the Companies Act, 2013, are reproduced as follows:-

*“(1) A company shall not re-open its books of account and not recast its financial statements, unless an application in this regard is made by the Central Government, the Income-tax authorities, the Securities and Exchange Board, any other statutory regulatory body or authority or **any person concerned** and an order is made by a court of competent jurisdiction or the Tribunal to the effect that—*

(i) the relevant earlier accounts were prepared in a fraudulent manner; or

(ii) the affairs of the company were mismanaged during the relevant

period, casting a doubt on the reliability of financial statements:


Provided that the court or the Tribunal, as the case may be, shall give notice to the Central Government, the Income-tax authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned and shall take into consideration the representations, if any, made by that Government or the authorities, Securities and Exchange Board or the body or authority concerned before passing any order under this section.

(2) Without prejudice to the provisions contained in this Act the accounts so revised or re-cast under sub-section (1) shall be final.”

8. The pleadings of the parties reveal that the earlier accounts have not been prepared properly and audited physically, and there are instances of mis-management during the relevant period, which is casting doubt on the reliability of the financial statements stated to have been filed till 2008. Thereafter, there is nothing on record to suggest that the accounts of the Company were prepared, audited physically and adopted.

9. In totality of the circumstances, as have been brought to the notice of this Tribunal, there requires an Order for re-opening of the books of accounts for the

purpose of re-casting the financial statements through validly appointed Auditors in respect of the 1st Applicant Company. However, before passing any Order, it is incumbent upon this Tribunal to issue notice to the RD, RoC, Income-Tax Authority and to other regulators. Therefore, the Registry is directed to issue notice to the RD, RoC, Income-Tax Authority including the concerned "Assessing Officer", and other regulators to whom the notice is required to be issued, with a direction to the Authorities concerned to make representation, if any, within 30 days from the date of receipt of this Order, failing which, it shall be presumed that they have no objection for re-opening of the accounts of the 1st Applicant Company for the period as mentioned above.

10. The Applicants/Respondents are also directed to issue private notice to the said Authorities concerned along with the copies of CA/57/2017 and Memo date 14.09.2017 filed in CP/9/2016, and file the proof of 

service of notice along with an Affidavit in the Registry before the next date of hearing.

11. Registry is directed to place the matter before this Bench on 20.04.2018. Order pronounced in open court in presence of the Counsels for the parties.


(CH. MOHD. SHARIEF TARIQ)
MEMBER (JUDICIAL)

P. ATHISTAMANI