

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI
BENCH-III**

CA- Nil/2019 filed in **CP- 102/ND/2019**
under section 244 r/w Section 241 of the
Companies Act, 2013.

In the matter of Omega Icehill Pvt Ltd

Anil Agrawal

....Applicant/Petitioner

Versus

Omega Icehill Pvt Ltd& Ors.

...Non-applicants/Respondents

Order Delivered On 22nd July 2020

CORAM

CH. MOHD SHARIEF TARIQ, Member (Judicial)

For Applicant:

Mr. Rohit Sharma, Mr. Atul Agrawal,
Mr Rounak Nayak, Mr. Anshul Chowdhary
(Advocates)

For Respondents:

Mr. Anil Airi Sr. Advocate,

Ms. Kavita Sarin, Mr. Abhishek Birthray,
Mr. Deepesh, Mr. Shafiq Ahmed,
Ms. Sukanya Lal, Mr. Siddhartha Jatar,
Mr. Prateek Seth (Advocates)
through M/s.Kochhar & Co.,

ORDER

Per, CH. MOHD SHARIEF TARIQ, Member (Judicial):

1. Under consideration is the I.A. No.-NIL-/241/242/ND/2019 filed under Section 244 of the Companies Act, 2013 for seeking waiver of the requirements for filing the Company Petition under Section 241 read with 242 of the Companies Act, 2013.
2. It is stated in the Application that the ***Applicant/petitioner*** is one of the Director of the 1st Respondent Company i.e. *Omega Icehill Private Limited*, incorporated on 11th November, 2009 and the Applicant has been holding the position of Managing Director in the Company since incorporation till 14.5.2019 and the Applicant was removed from the position of Managing Director. It is averred in the application that the Applicant is holding 5000 Shares i.e. 0.04% of the total issued Share capital of 1st Respondent Company. The Applicant has submitted that facts stated in the accompanying Company Petition need not to be repeated for the sake of brevity and craves leave to rely upon the contents of the Petition proposed to be filed under Sections 241 and 242 of the Companies Act, 2013.
3. The Company Petition gives the details of the matter complained of and the reliefs sought for i.e., setting aside the unlawful Board Resolution dated 14th May, 2019, by which, all the powers, privileges and rights of the Applicant as Managing Director were taken away and

it is also prayed to set aside the unlawful Circular Resolution No.1, 2, 3 & 4 and 5 of 2019 passed on 14.5.2019 to remove the Authorized Signatory of the 1st Respondent Company, and to set aside the unlawful Board Resolution dated 6th May, 2019 seeking to remove the Applicant from the post of MD of the 1st Respondent Company and restrain the Respondents 3 & 4 from interfering with the functioning of Applicant as the MD and Authorized Signatory of 1st Respondent Company.

4. The Applicant alleges that there is a violation of the provisions of the Articles of Association. He has referred to Article 52 of the Articles of Association of 1st Respondent Company, which provides that the *controlling Shareholders shall have the right to appoint MD of the Company and the powers of removal are vested with the controlling Shareholders and not with the directors as in his case, the Board of directors vide Resolution dated 14th May, 2019 has resolved to remove the Applicant from the position of the Managing Director and the removal from the position of the Authorized Signatory on the same date but under different Circulars.*
5. The applicant has also referred to Para 10.4 of the *Joint venture Agreement (herein referred as JVA)* entered into between M/s. Omega Engineering holding BV, (Omega Group and the Friends Refrigeration & Associates) and the 1st Respondent Company, wherein the parties *agreed that the Terms of the Agreement are bona fide and in the interest of JVC, and that each such party shall at all times comply with*

the terms and conditions of the Agreement, and refrain from undertaking any act, or omit to do any act, as a consequence of which JVC acts in a manner, which is contrary to the Agreement and the undertakings recorded in the Agreement.

6. As per the allegations of the applicant/Petitioner, the 1st Respondent Company has violated the conditions that are laid down under para 8.1 of the JVC which read as follows:

*“The total number of Representatives from Omega Group and FRA (Friends Refrigeration and Associates), shareholders of the JVC shall be maximum Four (4) , of which (a) two (2), namely, Mr. Herman J. Oank and Mr. Harm-Jan Oank being nominated for appointment by Omega Group (‘Omega Group’) and (b) two (2) , namely, Mr. Tushar Kant Jindal and **Mr. Anil Agarwal** being nominated by ‘**FRA**’ Mr. Herman J Oank will be the Chairman of the Board and Mr. Anil Agarwal, be the Managing Director of the JVC as agreed between Omega and FRA. Mr. Anil Agrawal will manage the operations of the JVC. The management of each Party under this Clause 8.1 to nominate Representatives shall be eligible to nominate their Alternate Representatives as well. Such Alternate Representatives of management shall be entitled to attend and vote at meetings of the Representatives and to be counted in determining whether a quorum is present in the absence of the appointing/nominating Representatives only if the appointing/nominating Representative is absent due to sickness or not*

being present in the state in which meetings of the Representatives are ordinarily held”.

7. From the conditions mentioned above, it becomes clear that the Applicant viz; Mr. Anil Aggarwal will manage the operations of the JVC, i.e. Omega IceHill Private Limited, i.e., 1st Respondent Company. Further, the Counsel for the Applicant has referred to Annexure A-16 wherein vide e-mail dated 24.4.2019, an Agenda for Meeting of 1st Respondent Company was circulated. However, a mail has been sent by Respondent -3 on 6th May, 2019 calling for convening the Board Meeting at 1.30 PM on the same day, wherein the Agenda Item was to remove the Applicant from the post of the Managing Director and the Authorized Signatory of the 1st Respondent Company. By pointing out towards the conduct of the respondents, it is submitted that Respondent-3 with other respondents have acted in an arbitrary manner, and the act constitutes the act of oppression as far as the rights and the privileges of the Applicant/petitioner are concerned. It is noted that on 6th May, 2019, a proposal was moved for the removal of the Applicant as stated above and on 14.5.2019 the applicant was removed without serving any Charge Sheet or the Summary of allegations on the basis of which, the removal was sought by the Respondents.
8. It is submitted by the Counsel for the Applicant/petitioner that the applicant's removal from the position of Managing Director and the

Authorized Signatory did not benefit the 1st Respondent Company or the Shareholders in any way. In other words, the action of the Respondent in no way is in the interest of the Company and the Shareholders.

9. The Ld. Counsel for the *non-applicants/respondents* has referred to I.A. No. Nil/2019 filed with the proposed CP No.102/241/242/ND/2019 for seeking waiver of the requirements of Section 244(1) for filing the Company Petition, wherein under para 1, it is stated that the Petition is filed against the acts of oppression and mismanagement committed by Respondent No.2,3 and 4 in seeking to oust the Applicant viz., *Anil Agrawal* from the position of Managing Director of 1st Respondent Company viz., *Omega Icehill Pvt Ltd & Ors.*, (hereinafter referred as "*1st Respondent Company*"). It is further pointed out that the Applicant/Petitioner is holding merely 5000 shares i.e. 0.04% of the total issued share capital of 1st Respondent Company. The Ld. Counsel for the Respondents submitted that presently the Applicant/Petitioner is the Director of the 1st Respondent Company and has claimed that he has been performing the duties of Managing Director of the 1st Respondent Company since its incorporation. It is noted that the Ld. Counsel for the Respondents has admitted that during the ordinary course of business certain communications have been made by the Applicant /Petitioner, wherein he has mentioned his designation as Managing Director of the 1st Respondent Company, but never filed any document with the Registrar of Companies (hereinafter referred as

“RoC”)with respect to his appointment as Managing Director of the 1stRespondent Company.

10. The Ld. Counsel for the Respondents has referred to the provisions of Section 196 of the Companies Act, 2013, which have been brought into force with effect from 01.04.2014 which prescribes the procedure for appointment of the Managing Director. It is contended by the counsel for the respondents that there is nothing on record to suggest that applicant/petitioner was appointed as Managing Director in compliance with the procedure prescribed under the said provisions. However, it is noted that in case of a private company like the present one the provisions of Section 196(4) and (5) were not applicable with effect from 05.06.2015. Therefore, the arguments of the counsel for respondents are misplaced.

11. The Ld. Counsel for the Respondents has referred to the Annual Returns and Balance Sheets of the 1st Respondent Company for the period starting from 2010 to March, 2018 wherein the name of the Applicant/Petitioner has been shown as one of the Directors and not as Managing Director. It also reflects from Form 20-B that the Applicant/Petitioner is Director of the 1st Respondent Company. The Ld. Counsel for the Respondents has referred to Article No. 38 of the Articles of Association (herein referred as AoA), and submitted that the said Article does not provide for appointment of Managing Director of 1st Respondent Company, it only empowers the Directors who may from

time to time appoint one or more of their body to the office of the Managing Director for one or more of the divisions of the business carried on by the Company and to enter into agreement with him in such terms and conditions,as they may deem fit. The Ld. Counsel for the Respondents further referred to Article No. 52 of the AoAthat provides that the controlling shareholders shallhave the right to appoint the Managing Director of the Company and submitted that the Applicant/ Petitioner was never appointed as Managing Director of the 1st Respondent Company in accordance with the Article No. 52 of the AoA.

12. Further, the Ld. Counsel for the Respondents has referred to "JVA" dated 20.01.2010 wherein under Para 8.1, provision has been made for appointment of Mr. Anil Agrawal as Managing Director of the JVC as agreed by 1st Respondent Company (JVC)and Friends Refrigeration and Associates (FRA), who will manage the operations of the JVC but as per the counsel, it was open to the parties of the JVC to nominate their Alternate Representatives.*It is further submitted by the Ld. Counsel for the Respondents that the JVA did not form part of the Articles of Association and in case of any conflict between the Articles of Association and the JVA, the Article of Association will prevail.* The Ld. Counsel for the Respondentsfurther referred to para 29 of the 'JVA' that provides the dispute resolution mechanism by way of Arbitration. The counsel has submitted that as per para 29 of the 'JVA' all disputes, questions or differences etc., arising out of or in connection with the

agreement could be referred to a single Arbitrator in India, in case parties agree upon one, otherwise two Arbitrators in India, one being appointed by each party to this agreement in accordance with and subject to the provisions of the Arbitration and Reconciliation Act, 1996. After having submitted as above, the Ld. Counsel for the Respondents prayed not to grant waiver of the requirements of Section 244(1) for the purpose of filing the company petition under Section 241 r/w 242 of the Companies Act 2013.

13. In **reply arguments**, the Ld. Counsel for the Applicant/Petitioner has referred to the e-mail communication dated 14.05.2019, to which there attaches a copy of the minutes of the Board meeting held on 14.05.2019 and under para 6 of the minutes the Agenda recorded is to withdraw powers, privileges and rights of the Managing Director viz., Mr. Anil Agrawal (Applicant/Petitioner) and to terminate his appointment as the Managing Director of the 1st Respondent Company with immediate effect. The Ld. Counsel for the Applicant/Petitioner has also referred to para (vi)(d) of the reply filed by the Respondents which reads as follows:

“...Petitioner has been the Managing Director of the First Respondent No.1 since the incorporation of Respondent No.1 i.e. for last 10 years without seeking any formal re-appointment upon completion of his five years term.”

14. After having made a reference to the above, it is submitted by the Ld. Counsel for the Applicant/Petitioner that the arguments of the Ld. Counsel for the Respondents are contradictory to the records of the proceedings of the Board which has passed the impugned resolution on 14.05.2019, the detail of which is already noted in the preceding paragraphs.

15. The Ld. Counsel for the Applicant/Petitioner has submitted that reference made by the counsel for respondents to the provisions of Section 196 of the Companies Act, 2013 is *mis-leading* as the same is not applicable to the private companies. It is further submitted that reference to Section 134 of the Companies Act, 2013 is also *misleading*, as it is not mandatory that the Financial Statements need to be signed by the Managing Director only. In relation to Article 38 of the Articles of Association, the Ld. Counsel for the applicant/petitioner submits that the same is not relevant for the appointment of the Managing Director of the Company but the relevant Article is 52 of the Articles of Association, as is referred herein above. The Ld. Counsel for the Applicant/Petitioner further submitted that the 1st Respondent Company is signatory to the JVA. Even if, the 'JVA' is not made as part of the Articles of Association, the Company is legally bound to follow the provisions of the JVA and it is an admitted position that the Applicant/Petitioner has been performing the duties as Managing Director of 1st Respondent Company since incorporation and there was no need to pass any resolution for appointment of the Managing

Director, as the same position has already been accepted by the 1st Respondent Company being signatory to the 'JVA'. It is further submitted by the Ld. Counsel for the applicant that even if it is not mentioned in the other documents that the Applicant/Petitioner was appointed as Managing Director that makes no difference, because the applicant has been performing the duties of Managing Director of the 1st Respondent Company since its (the company) incorporation.

16. On perusal of the pleadings the issue that arises is as follows;

Whether the applicant/petitioner has made out a prima facie case for waiver of the requirements of section 244(1) of the companies Act 2013 for filing the company petition under Section 241 r.w.242?

17. As per the details noted herein above, the ***Applicant/petitioner*** is one of the Directors of the 1st Respondent Company i.e. Omega Icehill Private Limited, incorporated on 11th November, 2009 and holding 5000 Shares i.e. 0.04% of the total issued Share capital of 1st Respondent Company. Although it is correct to state that the 1st Respondent Company did not file any prescribed form with the RoC to indicate that the ***Applicant/petitioner*** was appointed its Managing Director, yet it admitted fact that during the ordinary course of business certain communications have been made by the Applicant /Petitioner, wherein he has mentioned his designation as Managing Director of the 1st Respondent Company, but there was no objection by

the respondents at the relevant point of time. Further, the Ld. Counsel for the Respondents has also referred to the Pay Slip for the month of April, 2014 wherein the Applicant/Petitioner's designation is shown as Managing Director of the Department of Administration of the 1st Respondent Company. It needs to be examined as to whether the applicant has been holding the position of the Managing Director of the Company as a whole or not.

18. Besides the above, it is pertinent to note that under para 6 of the minutes of the Board meeting held on 14.05.2019, the agenda is to withdraw powers, privileges and rights of the Managing Director viz., Mr. Anil Agrawal (Applicant/Petitioner) and to terminate his appointment as the Managing Director of the 1st Respondent Company with immediate effect. The Ld. Counsel for the Applicant/ Petitioner has also referred to para (vi) (d) of the reply filed by the Respondents, which is again reiterated as follows:

"...Petitioner has been the Managing Director of the First Respondent No.1 since the incorporation of Respondent No.1 i.e. for last 10 years without seeking any formal re-appointment upon completion of his five years term."

19. The above stated facts are being supported with the recitals of para 8.1 of the JVA that provides that *Mr. Anil Agarwal, be the Managing Director of the JVC as agreed between Omega and FRA and Mr. Anil*

*Agrawal will manage the operations of the JVC, i.e., 1st Respondent Company i.e. Omega Icehill Private Limited(being the "JVC"). Thus, prima facie it is established that the **Applicant/petitioner** has been the Managing Directors of the 1st Respondent Company i.e. Omega Icehill Private Limited, till his removal on 14.5.2019.*

20. The reliefs prayed for in the proposed company petition are to aside the unlawful Board Resolution dated 14th May, 2019, by which, all the powers, privileges and rights of the Applicant as Managing Director were taken away and it is also prayed to set aside the unlawful Circular Resolution No.1, 2, 3 & 4 and 5 of 2019 passed on 14.5.2019 to remove the Authorized Signatory of the 1st Respondent Company, and to set aside the unlawful Board Resolution dated 6th May, 2019 seeking to remove the Applicant from the post of MD of the 1st Respondent Company and restrain the Respondents 3 & 4 from interfering with the functioning of Applicant as the MD and Authorized Signatory of 1st Respondent Company.
21. As discussed herein above, the applicant/ petitioner has made out a prima facie case by establishing that he has been holding the position of the Managing Director of the company and was authorized signatory before his removal by the respondents on 14.05.2019. Admittedly the applicant/petitioner was removed by the respondents without following the due process of law, as he was not afforded an opportunity of being heard. Thus, it is a fit case for inference by this

Tribunal, as the matter complained is more than a directorial complaint. Therefore, there requires an enquiry to be conducted into the acts of oppression and mismanagement alleged to have been committed by the respondents. The applicant/ petitioner is holding 5000 Shares i.e. 0.04% of the total issued Share capital of 1st Respondent Company and not fulfilling the requirements of Section 244(1) for filing the petition under Section 241 r/w 242 of the Companies Act, 2013. Therefore, it is prayed by the applicant/ petitioner to grant waiver of the requirements of Section 244(1) for filing the petition under Section 241 r/w 242 of the Companies Act, 2013 against the Respondents. For the sake of convenience, the provisions of Section 244 of the companies Act, 2013 are reproduced as follows:

"Section 244 of Indian Companies Act 2013 "Right to apply under section 241

(1) The following members of a company shall have the right to apply under section 241, namely: -

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members:

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

Explanation. For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(2) Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them."

22. The proviso to sub-section(1) of Section 244(1) provides that the Tribunal may, on an application made to it in this behalf, **waive all or any of the requirements specified** in clause (a) or clause (b) so as to enable the members to apply under section 241(emphasis supplied). In the present case, the requirements of sub-clause (a) of sub-section (1) of Section 244 were to be fulfilled, [as the company is *having a share capital*], which the applicant/ petitioner is falling short of. However, the applicant being member of 1st Respondent Company is holding 5000

Shares i.e. 0.04% of the total issued Share capital and is eligible to seek waiver as prayed for.

23. The proviso to Section 244 has to be interpreted liberally so as to advance the cause of justice. For liberal interpretation of the said proviso, we get strength from a well-established maxim, *ut res magis valeat quam pereat*. This Latin maxim of interpretation when translated into English means "that it is better for a thing to have effect than to be void". In other words, to avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, it would be justified in giving ordinary and natural meaning to the language used in the provision to give effect to the object and purpose of the enactment as envisaged by the legislature. This has been laid down by the Apex Court in ***Girdharilal & Sons v. Balbir Nath Mathur***, MANU/SC/0544/1986: AIR 1988 SC 1499.
24. In the fact and circumstances of the case, we are of the view that it is a fit case where the requirements laid down under Section 244(1)(a) of the Act, 2013 need to be waived off and allow the applicant/petitioner to file company petition under Section 241 r/w Section 242 of the Act, 2013, as the company petition cannot be dismissed at the threshold because it requires a detailed enquiry into the matter complained of. Thus, the issue framed stands decided in favour of the applicant and against the respondents. Therefore, in exercise of the powers

against the respondents. Therefore, in exercise of the powers conferred under proviso to section 244(1) of the Act, 2013, we waive all the requirements of section 244(1)(a) of the Act, 2013 and treat the company petition under Order 1, Rule 8 of the Code of Civil Procedure, as a representative petition read with sections 241 and 242 of the Act, 2013 for the purpose of proceeding to enquire into the matter complained of. Accordingly, **CA- Nil/2019** filed in **CP-102/ND/2019** under Section 244 r/w Section 241 of the Companies Act, 2013 is allowed. However, any of the observations made above shall have no bearing on the merits of the case.

25. The Registry is directed to number the company petition and list the same on 17.08.2020 for hearing.

26. The Order is pronounced.


(CH. MOHD. SHARIEF TARIQ)

MEMBER (JUDICIAL)