IN THE NATIONAL COMPANY LAW TRIBUNAL
AT NEW DELHI

Reserved on: 10th November, 2016
Date of Pronouncement: 25th November, 2016

Company Petition No. 123(ND) 2010

In the matter of
The Companies Act, 1956 under sections 397 & 398 r/w Sections 402 & 403

Sanjay Gambhir & Ors. .....Petitioners

Versus

M/s Renaissance Buildcon Pvt. Ltd. & Ors ...Respondents

CORAM:
MS. INA MALHOTRA, MEMBER (JUDICIAL)

For Petitioner (s) Mr. Krishendu Dutta and Mr. Diggaj Pathak, Advocates
For Respondent(s) Mr. Sanjeev Puri, Senior Advocate with Mr. Kamal Shankar and Mr.Atul Menon, Advocates
Mr.P.K.Mittal and Mr. Ashutosh Gupta, Advocates for Respondents no.3 to 5

ORDER
25.11.2016

The petitioners have filed the present case against the respondents alleging various acts of mismanagement and oppression.

2. The brief background of the case is that the petitioners acquired Respondent no.1company in February 2007 for developing an integrated township over land measuring about 130 acres located at Zirakhpur Greater Mohali, Chandigarh.

3. In May 2007, Respondent no. 2, a company incorporated under the laws of Mauritius, and engaged in the business of investments in Asia, including in India,

invested a sum of Rs. 93 Crores in Respondent no.1 Company and became a 50% equity partner, acquiring 11,00,000 shares. Respondent no.2 also entered into a shareholders agreement with the Promoters (the Petitioners herein), which stipulated the terms and conditions interse the parties. As per the agreement, the money received was to be kept in a separate bank account exclusively opened for the expenses relating to the development of the Zirakhpur project. It was to be jointly operated by a nominee appointed by each side. However, the petitioner's case is that as finances were required for urgent environmental clearances, scrutiny and other charges for development of the project, money was withdrawn in an emergency without due notice to Respondent no.2. The petitioners submit that on account of a dispute raised by Respondent no.2, they were coerced into executing an Acknowledgement cum Agreement date 5th March 2010, agreeing to deposit shares for petitioner no.2 as security along with signed blank transfer deeds with a Custodian ie. Respondent no.8 herein, for reimbursing the Claim made towards the withdrawal. The original title deeds of the land belonging to Respondent no.1 company were also deposited with the custodian. The petitioners aver that this was done on the understanding that they would procure a buyer for discharging the Claim made by Respondent no.2. The petitioner submits that the deposit of the shares along with signed blank transfer deeds (which were to be renewed periodically) and original title deeds of the property were only offered by way of security, and it was never their intention that their shares could be sold. It was also agreed that the petitioners would try to find a potential buyer for the land to whom Respondent no.2 would also sell their holding, as they were no longer interested in the project and wanted to exit. The nominee director of Respondent no.2 also resigned in furtherance of this intention which is affirmed by the Form 32 filed with the RoC.

4. The petitioners further state that they found a buyer viz. M/s. BCL Homes (represented by Respondent no. 4) which agreed to buy 100 kilas of land for Rupees 125 Crores. MOU was duly executed for sale of the aforesaid land between the

prospective buyer and the petitioner no.1. He also accepted Rs.2 crores from M/s. BCL Homes as part consideration towards the sale proceeds. Since respondent no.2 desired a crystallised amount, another MoU for sale of 65 kilas was executed with one of the petitioner's group companies, viz. M/s. Virnoir Group. It is stated that despite intimation, Respondent no.2 went ahead and sold their shares to Respondents 3 and 4, who are none other than the people behind M/s. BCL Homes, thereby greatly prejudicing their interest and depriving them of their holding inspite of having communicated that they could sell their holding for a higher amount.

5. Further acts of oppression alleged by the petitioners are that Respondents 3 & 4 have been appointed Directors on 23.11.2010 behind their back. Respondent no.5 has also been appointed as an Additional Director on 26.11.2010.The Respondents, in connivance, have also given notice for holding an EoGM for removal of Petitioner no.1 as a Director of the Respondent no.1 Company.

6. On account of the high handedness of the respondents and their surreptitious acts, the petitioners who still hold 5% equity in the Company, apprehend that respondents 3-5 may sell the asset/land of the Respondent no.1 Company for a minimal consideration.

7. As a relief, the petitioners have prayed interalia for:

a. declaring the transfer of their shares by Respondent no.2 to Respondents 3 & 4 as null and void,
b. restraining Respondent no.2 from selling its shares without first offering it to the petitioners.
c. declaring the appointment of Respondents 3-5 as Directors as being illegal, null and void.
d. Restraining the Respondents from allotting further shares or appointing other Directors.

e. declaring the alleged board meeting held on 23.11.2010, 26.11.2010 and all subsequent Board meeting and resolutions passed thereinafter as illegal, null and void.

8. At the first blush, it appears that the Petitioners have been gravely wronged and oppressed. Disposing off the assets of Respondent no.1 company at a lower rate than what the petitioners were able to procure appears to be mismanagement and prejudicial to the interest of the Company and oppressive to the petitioners. The Respondents however have repudiated these allegations and have duly corroborated their arguments with irrefutable documents on record.

9. Respondent no.2 was the Investor and a shareholder to the extent of 50%. Respondent 3-5 are the subsequent purchasers to whom Respondent no.2 sold its shares in addition to the shares of Petitioner no.2, being 45% equity held as security in the Escrow account. Respondents 6 & 7 are the nominee Directors, while Respondent no.8 is the Custodian of the Escrow Account.

10. Though different applications have been filed by the Respondents for their deletion from the array of parties, which have been pending over the years, the same are not being dealt with individually as the Company Petition itself is ripe for disposal.

11. Defending the allegations made against them, Respondent no. 2 has accused the petitioners of cheating them. The undisputed facts are that Respondent no.2, also referred to as the Investor, invested 93 crores in Respondent no.1 company for development of the Real Estate Project. It was allotted 50% shareholding and a shareholders' agreement was executed with the petitioners in May 2007. A discord arose between the parties even before the business of the Company commenced. A designated account was opened with Indian Overseas Bank, New Rajinder Nagar branch, New Delhi which was to be jointly operated by the authorised representatives of each party. In February 2010, upon receipt of the Statement of account from the

bank, Respondent no.2 discovered that a sum of Rs. 51.5 Crores approximately had illegally and without any authorisation been siphoned out from the designated account by the petitioners for their personal use and liabilities.

12. On being confronted with this fraudulent act and warning them of potential consequences including institution of criminal proceedings, Petitioner no.1 acknowledged that he had withdrawn Rs.52,90,43,764/- and misappropriated the same for his personal use and liabilities. In view of the same, the Respondent no.2 exercised its right of OPTION Event under Article 57 of the Articles of Association and their Shareholders Agreement. The Petitioners promised to repay the aforesaid amount, now referred to as the CLAIM amount with interest, no later than 30th June 2010. An Acknowledgement cum Agreement dated 5th March 2010 was signed, the relevant clauses being as follows:

> *2.1 "The Promoters hereby unconditionally acknowledge, admit and agree that they have intentionally, in breach of applicable Law, the Shareholders Agreement and without any consent or authorizations from the Investor or the Company, withdrawn no less than INR 529,043,764 (the "Withdrawn Fund") from the Company's Designated Account and used such amounts for their own personal benefit, including in payment and satisfaction of their own personal liabilities (including among other things by causing the Company to incur loan liabilities against the Fixed Deposits causing a negative balance in the Designated Account) (the "Default"). The facts relating to the foregoing are not disputed in any way by the Promoters, and the Promoters acknowledge, admit and agree that the Investor is entitled to judgment in its favour against the Promoters, including without limitation pursuant to the indemnity provisions of the Shareholders Agreement, for the Claim Amount plus any Default Interest. Without limiting the generality of the foregoing, the Promoters and the Company hereby waive any defense or claim that disputes or denies the occurrence of the Default.*

2.2. Without prejudice to all rights and remedies of the Investor and the Company, and their respective affiliates, under the Transaction Documents and the process of Law and/or equity or otherwise, the Promoters hereby unconditionally agree and commit and promise to repay to the Investor, or if required by the Investor, to the Company or a nominee of the Investor, the Claim Amount plus Default Interest and rectify the Default along with the defaults under the Shareholders Agreement and otherwise resulting therefrom, immediately and without delay but in any event by no later than June 30, 2010. The Promoters also hereby provide the Investor the assurances and protections set out in this Agreement.

2.3. Each of the Promoters, on behalf of itself and its subsidiaries, divisions, affiliates, past and present directors, officers, employees and agents, an predecessors, successors and assigns (the "Releasing Parties"), does hereby release, remise, resign and forever discharge each of the Company and the Investor and its respective subsidiaries, affiliates, past and present directors, officers, employees and agents and predecessors, successors and assigns (the "Released Parties") from any all manner of actions, causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, covenants, contracts and agreements, controversies, variances, trespasses, damages, judgments, extents, executions, claims and demands of any nature whatsoever, in law or in equity, of every king and description, which any of the Releasing Parties ever had, now has, or which it or its successors and assigns hereafter can, shall or may have against the Released Parties arising out of or in any way connected with the Transaction Documents.

2.4 The Promoters have made the acknowledgements and agreements set out in this Agreement voluntarily and without any coercion or influence by the Investor or any other person. The Promoters have had the time and opportunity to consult with their own legal advisors should they choose to do

so and have the full legal capacity to make the acknowledgements and agreements set out in this Agreement. The Promoters fully understand the terms and conditions set out in this Agreement and confirm that the same shall be fully enforceable against them. No provisions of this Agreement shall be interpreted in favour of, or against, any party by reason of the extent to which such Party or its counsel participated in the drafting hereof or by reason of the extent to which any such provision is inconsistent with any prior draft hereof."

III ESCROW ARRANGEMENTS.

"3.1 Notwithstanding anything to the contrary in this Agreement or any Transaction Document, on the Signature Date, the Promoters shall deposit all documents and deeds relating to the Escrow Properties as more particularly listed in Annexure A, with AZB & Partners ("Custodian"), including without limitation, those relating to the Escrow Shares (including blank share transfer forms). The Promoters and the Company represent and warrant that Annexure A sets out a true, accurate and complete list of documents and title deeds pertaining to the Escrow Properties and that there are no other documents, deeds or other written instruments or any verbal agreements concerning the Escrow Properties. Other than the Escrow Properties, the Promoters do not own or otherwise have rights over any asset of value in excess of INR 5,000,000. In the event that any such asset is or comes into the possession of the Promoters after the Signature Date, the Promoters shall immediately notify the Investor in writing and immediately cause such assets to become Escrow Properties or take such other actions with respect to such assets as required by the Investor.

3.2 The Promoters understand that the Company and the Investor have suffered irreparable harm and loss as a result of the Default, and hereby agree and promise to protect the interests of the Company and the Investor

including by way of escrowing any and all of their respective assets (as and to the extent required by the Investor), now or whenever available, pending satisfaction of its obligations under this Agreement, including without limitation, payment of Claim Amount plus Default Interest. Further, the Promoters and the Company hereby unconditionally and irrevocably acknowledge and agree that, in enforcing any rights under the Transaction Document and / or this Agreement, the Investor shall be entitled to take recourse to all personal assets (including investments) of the Promoters and all assets (including investments) of the Company in each case, existing and future assets, located in any part of the world.

3.3 The Promoters hereby unconditionally and irrevocably agree to immediately create any and all security interests that the Investor may require in favour of the Company, including without limitation by way of pledge of shares or hypothecation or pledge of assets or mortgage of properties. The Promoters hereby unconditionally and irrevocably agree and acknowledge that, notwithstanding any to the contrary under the Shareholders Agreement or elsewhere, the Investor shall be entitled to case the Company to take such steps and actions for enforcement of any such security interests and the Promoters hereby unconditionally consent to such enforcement actions and agree to vote in accordance with the decisions made by the Investor or by the majority of the directors on the Board.

3.4 The Promoters hereby represent and warrant that each of the Escrow Properties (including the Escrow Shares) is free and clear of any Encumbrances. The Promoters shall not directly or indirectly, dispose or attempt to dispose (including through the Company) of any of the properties or assets in relation to which documents have been provided to the Custodian as Escrow Properties, unless such disposal is with the written consent of or at the direction of the Investor. The Promoters and the Company

unconditionally and irrevocably acknowledge and agree that the Investor shall solely be entitled to issue instructions to the Custodian in connection with the Escrow Properties and that the Custodian shall not be bound by any instructions issued by the Company and/or the Promoters unless such instructions jointly agreed in writing by the Investor. The Promoters and the Company undertake to take all necessary steps as may be required by the Investor to cause the sale by the Promoters and/or the Company (as applicable) in accordance with applicable Laws of any of the Escrowed Properties to any person identified by the Investor and on terms and conditions determined by the Investor."

*3.5 **

3.6 The promoters and the Company have provided the Investor with true, accurate and complete disclosures regarding the Designated Account, Fixed Deposits and the Escrow Properties. The Promoters have provided the Investor with true, accurate and complete disclosures regarding their assets and liabilities. The Promoters shall provide to the Investor and/or the Company, all details relating to their assets and liabilities, including their bank accounts and investment details on or prior to the 5th day of each month and in any event, promptly upon demand by the Investor. The promoters undertake that they will not incur or cause to be incurred any further liability/liabilities, without the prior written consent of the Investor. The Promoters further agree and undertake that they have no authority whatsoever, to represent the Company in any manner or incur any liability on behalf of the company.

3.7

a. the Promoters unconditionally and irrevocably agree to deliver blank transfer forms to the Custodian on the Signature Date and to ensure that the same are renewed or replaced from time to time in order to ensure that such

blank transfer forms do not expire. Without prejudice to the generality of the foregoing, each of the Promoters shall procure that the blank transfer forms relating to the Escrow Shares are replaced with fresh duly executed blank transfer forms by no later than the 10th day of each month starting from April 10, 2010. If required by the Investor, the Promoters shall issue in favour of the Investor a power of attorney authorizing a person nominated by the Investor to execute such blank transfer forms on behalf of the Promoters;

b. the Investor may at any time exercise 'Drag Rights' in relation to shares of the Company upon the terms and conditions agreed and determined by it with any potential purchaser; and

c. subject to Clause 3.7(b) above, at any time after June 30, 2010, the Investor shall be entitled to cause the sale of any Escrow Shares to any person upon the terms and in the manner determined by the Investor, at its sole discretion."

13. As per the Shareholder's Agreement, the petitioners ceased to have any right over the assets of the Respondent Company. In acknowledgement of their misdeeds they were obliged to place all documents and title deeds of the Respondent Company's land in an Escrow with the Custodian which included the shares held by the Petitioner no.2, being 45% equity of Respondent no.1. The Acknowledgment and Agreement also entitled Respondent no.2 to take recourse to all or any of the assets of the petitioners in discharge of the amount siphoned off. Petitioners also undertook not to dispose off or attempt to dispose off any of the properties or assets kept with the Custodian of the Escrow account, unless it was with the written consent of the respondent no. 2, who was vested with the sole discretion to issue instructions to the Custodian.The petitioners also undertook not to incur any liability on the assets of the Company, nor could they represent the Company in any capacity.

14. As per clause 3.7 (c) of the aforesaid Acknowledgement and Agreement reproduced above, it was agreed by the petitioners that at any time after 30th June 2010, the Investor/ Respondent no.2 would be entitled to cause sale of any escrow

shares to any person upon the terms and manner determined by it in its sole discretion. It was also irrevocably and unconditionally confirmed and acknowledged by the petitioners that that they did not have any claim against the Company, and in the event of the same existing the same was expressly waived by them. Petitioner no. 3 ceased to be a Director with immediate effect, while petitioner no.1 continued to be a Director, but all power of attorneys and authorisation in his favour stood duly revoked. The said agreement also provided for removal of Petitioner no.1 as Director at any time. The aforesaid agreement was followed by a letter of the same date (referred to as a Side letter), agreeing not to initiate litigation upto 30th. June 2010 subject to conditions, and reiterating the terms of the Agreement, which were duly accepted by Petitioner no.1.

15. It is submitted that R2 waited till 30th June 2010 as agreed upon, for recovery of the Claim amount illegally withdrawn and misappropriated by the petitioners. Thereafter respondent no.2 became entitled to cause sale of the Escrow shares to any person upon terms and in the manner determined by it at its Sole discretion.

16. On 22nd October 2010, Respondent no.2 was informed by the petitioners that on 15th October 2010 they had entered into an MoU with one Virnoir Group for sale of 65 kilas of land belonging to the respondent Company and had also accepted part of the sale consideration. The MOU was executed for and on behalf of the respondent Company by petitioner no.1 without authority and in gross violation of the terms of the Acknowledgement and Agreement dated 5th March 2010. Respondent no.2 vide its letter dated 01.11.2010 objected to the petitioner entering into an independent agreement as being one without authority and conveyed that an OPTION Event as envisaged in the Shareholder's Agreement had occurred. The proposed buyer was also put to notice of the illegal and fraudulent acts of the petitioners. By way of abundant precaution Respondent no.2 also informed Sub-Registrar Zirakhpur that the petitioner was not authorised to deal or dispose off the assets of Respondent no.1 Company. Publication was also effected to caution the public against dealing with the

petitioners in respect of the assets of Respondent no.1. Finally in order to get out of the clutches and to retrieve whatever was possible, they entered into an agreement with one M/s. Black Stone Infracon for the sale of their equity shares as well as those belonging to the Petitioner no.2 lying in the Escrow account as security. Since it seemed unlikely that the petitioners would repay the claim amount to Respondent no.2, they settled for a much lower consideration.

17. Given these facts, Mr. Sanjeev Puri, Ld. Sr. Counsel appearing for Respondent no.2 has argued that having disposed off their entire stake of 50% in Respondent no.1 to M/s. Black Stone Infracon on 23rd November, 2010, they have no interest left in the Company and therefore they may be dropped from array of parties. Respondent no.2 acted strictly in accordance with the agreement with respect to the 45% equity of petitioner no.2 and no allegation of oppression and mismanagement could be attributed to them.

18. The submissions made by the Ld. Senior Counsel merit consideration. The various documents on record fully substantiate and corroborate his arguments. The Acknowledgement cum Agreement dated 5th March 2010 reflects that the petitioners acknowledged their misdeeds. It is not denied that an Escrow account was opened wherein the petitioners had offered 45% of the equity held by Petitioner no.2 in Respondent no.1 Company as security towards the amount defalcated. Vide their agreement, they had agreed to procure a buyer by 30th June 2010, after which it was agreed that Respondent no.2, in its sole discretion could dispose off the shares. These facts are not disputed. What is argued by Mr. Diggaj Pathak, Ld. Counsel for the petitioners, is that not having disposed off the shares till October 2010, Respondent no.2 is deemed to have waived off its rights to dispose off the shares. It is further argued by the Ld. Counsel for the Petitioner that since they had a much higher offer in hand for sale of their shares / land of the Respondent Company, from Respondent no.4 representing M/s. BCL Homes Pvt. Ltd., the disposal at a much lower price to

them was not only oppressive, but also amounted to mismanagement being against the interest of the company.

19. The argument advanced by the Ld. Counsel for the Petitioners that the agreement entered between the parties, was given a go by is unsustainable. Besides the terms of agreement having been explicitly reduced into writing entitling Respondent no.2 to sell the assets shares at their sole discretion, and divesting Petitioner no.1 of all authority to deal in respect of the assets of Respondent no.1, it is pointed out that the MOU alleged to have been executed for sale of the land with M/s. Virnoir Group was a sham and a fabricated document. The demand draft relied upon as receipt of part sale consideration from the said Virnoir Group was in fact an advance given by Respondent no.4 to the petitioner on behalf of BCL Homes. The petitioners have falsely represented that it was tendered by Virnoir Group Ltd. Besides being a bogus company of the petitioners, the alleged MoU provided for the sale consideration to be paid by March 2011.

20. Respondent no.3 and Respondent no.4 are transferees of the shares disposed of by Respondent no.2 which also includes 45% equity of petitioner no.2. The petitioners have relied upon MOU dated 15th October, 2010 whereby the sale consideration had been agreed as Rs. 125 Crores. Mr. P.K.Mittal, Ld. Counsel for Respondents 3 to 5 has submitted that they were unaware that the petitioners had no authority to deal with the assets of the Respondent Company. They were put on vigil, as was the general public, by Respondent no.2 about the fraudulent acts of the petitioner. Since there was an agreement in writing authorising Respondent no.2 to dispose off the equity of 45% of Petitioner no.2 to any party and at any price at their sole discretion after 30th June 2010, there was no illegality attached to it.

21. Respondents no. 3-5 are also aggrieved by the actions of the petitioners. They have asserted that the petitioner no.1 is involved in several such actions of cheating. In a bid to iron out the problems, and proceed with the business of respondent Company, they agreed to purchase 5 % equity still held by petitioner no.1 & 3 for a

consideration of Rs. 48 Crores. Though a major portion of the agreed amount has already been paid by them, they have now learnt that the land in question is heavily encumbered. The petitioners have mortgaged the land of the respondent Company for personal loans or offered it as collateral security for loans taken by their other Companies. The claims over the assets of the Respondent Company are being pursued by M/s. S.E. Investments Ltd., M/s. B.D.R. Builders and Developers and many others. An arbitral Award has also been passed in this respect. Ld. Counsel for the petitioner does not deny the Award, but submits that they shall be filing their objections to the same.

22. With respect to appointment of Respondents 3 and 4 as Directors or that of Respondent no.5 as an additional director, steps in accordance with statutory requirements were taken and there is nothing illegal about the same. Respondents 6-7, being nominee directors passed the resolution to that effect, passing on the reins of the Company to the majority share holders before they tendered their resignations. Removal of petitioner no.1 was contemplated under section 284 of the Companies Act 1956.

23. In the light of the above facts and arguments advanced by the parties, I do not find any act of oppression or mismanagement by the respondents. Action taken in pursuance of an agreement for transfer of shares cannot be termed as oppressive. Respondent no.2 was well within its rights to secure its investments. Moreover, this tribunal is a court of equitable jurisdiction. No relief can be granted to one who comes with unclean hands. The petitioners have admitted defalcating the amount invested for the business development of respondent company. They have even gone to the extent of encumbering the assets of the respondent company for personal gains. Clearly no case is made out under sections 397/398 of the Companies Act 1956 is made out against the respondents. The relief as claimed by the petitioners cannot be granted, as neither the transfer of shares, not the appointment of Directors has been conducted in a manner to render the same illegal, null and void.

24. It is highly regrettable that the petitioners have filed this frivolous litigation, adjudication of which has spanned to almost seven years. It would therefore be appropriate to dismiss the petition with costs.

25. Petition dismissed with costs of Rs. 1 Lakh to be deposited in the Prime Minister's Relief Fund Account.

Sd/-

(Ina Malhotra)
Member Judicial