

In the National Company Law Tribunal,
Kolkata Bench, Kolkata

CP No.7/2016

In the matter of:

Anup Chakraborty

.....Petitioner

-Versus-

Richbards Properties Pvt. Ltd. & 3 Others

.....Respondents

Order Delivered on 5th September 2017

Coram:

Vijai Pratap Singh, Member (J)

For the Petitioner : 1. Mr. Syamantuk Banerjee, Advocate
2. Ms. Ballari Banerjee, Advocate

For the Respondent : None

ORDER

The petitioner has filed this petition under Sec.241 of the Companies Act, 2013 on the ground of oppression and mismanagement.

2. Brief facts, as stated in the petition, are given below: -

Petitioner has stated that the petitioner is the registered member, Director, and shareholder of the respondent company and he is having 12500 equity shares of Rs.10 each comprising 2% of the total issued subscribed and paid up capital of the company. Shareholding of the petitioner is shown in Form 20B being the annual return for 31/3/2013. Petitioner has stated there are five shareholders of the company and petitioner being more than the 1/10th in some such shareholders. Therefore, they are entitled to file the instant petition.

3. Petitioner has stated that respondent No.2 is a shareholder of R-1 company. Respondent No.2 is registered a holder of 1000 equity shares of the said company. Respondent No.3 is the director as well as a shareholder of the said company who is registered holder and absolute owner of 11500 equity shares of the said

company fully paid up comprising approximately 1.84% of the total issued, subscribed and paid up capital of the R-1 Company. Respondent No.4 is also a director as well as a shareholder of R-1.

4. Petitioner has stated that R-1 company was incorporated as a private company in the year 2009 and had two promoters subscribing to the Memorandum of Association viz. respondent No.2 and one Gobardhan Mondal who were each allotted 12500 shares of the face value of Rs.10 each. R-1 company engaged in the business of real estate at the time of its incorporation and carried on business as builders, promoters and developers of land, buildings sites, townships and other objects as described in the memorandum of association.

5. On 31/3/2012 the issued, subscribed and paid up capital of the company was 62,50,000 which is evident from the balance sheet of the company dated 31/3/2012. Copy of the balance sheet is annexure D.

6. At all time, the respondent No.2 has been the man behind the R-1 and is a promoter director thereof. Petitioner got to know the R-2 through several business associations that the R-2 had invited the petitioner to join the R-1 company as an additional director to impart his expertise in construction business which the petitioner had acquired since the last few decades. Under these circumstances, the petitioner had agreed to join the R-1 company in 2012 and, as such, 12,500 shares issued by the R-1 company and petitioner got appointed as an additional director. Form 32 filed with the Registrar of Companies mentioning the appointment of the petitioner as an additional director. Copy of Form 32 is Annexure E.

7. Petitioner has further stated that in the annual return for the financial year 2012-13 he was made to sign the said return with other directors. Petitioner has alleged that by filing the balance sheet, he came to know that the share application money paid by him was not reflecting in the balance sheet. Respondent had stated

that share application money was kept in suspense account and would be reflected in the next financial year.

8. Petitioner had further alleged that before his appointment sometime in 2010 a joint venture agreement was executed between the owner of the property viz. 1-B, Gariahat Road (Leela Roy Sarani), Kolkata – 700019 and the R-1 company. At that point of time the petitioner was a signatory to the agreement as a witness, but in fact, he was the primary person in forging the deal between the R-1 company and the owner of the property mentioned above.

9. Petitioner has further stated that the owner of the property had agreed to develop the said property in a joint venture with the R-1 company and then spearheaded by the respondent No.2. It was from such negotiation that the association of the petitioner and the and the R-2 had started which later culminated into the induction of the petitioner into the R-1 company as a director. The petitioner has also alleged that on or about 12/1/2012 respondent No.2 had suggested that he should be formally a part of the R-1 company and look after the entire construction and funding part of the said project. The joint venture agreement is Annexure F.

10. After execution of the joint venture agreement for about two years, R-2 and the petitioner with their best endeavor negotiated with the existing tenants and occupiers of the property mentioned above for getting vacant possession of the same. Since about two years time elapsed in such negotiations, the said landlord was not agreeable to proceed further with the project above until and unless a supplementary agreement, demarcating the respective portion of the parties is executed. Accordingly, a supplemental agreement was executed on 19/9/2012 between the landlord, as owner and R-1 company, as a developer, represented by R-2 and petitioner as a director of the company.

11. After that, the said landlord, being the owner of the property also executed a registered power of attorney in favor of the petitioner on 12/12/2012 which got

registered before the office of the ADSR, Alipore, South 24-Parganas. A copy of the said supplemental agreement and power of attorney are Annexure G.

12. After such supplemental agreement, the respondent No.2 as a developer started the project of ground along with four storied building at the said site at 1B, Gariahat Road, Kolkata – 700019 after obtaining a sanction plan from Kolkata Municipal Corporation on 24/12/2013 and till date, a super structure up to 4th floor has been erected. During the progress of the construction of the said building, respondent No.2 resigned from the directorship of the R-1 company and inducted his man R-3 with effect from 21/9/2012.

13. During construction of the said building, the R-2 arranged to execute seven different and diverse agreements for sale. Out of which five contracts were in respect of residential flats, one for shop room and one for commercial space out of R-1's allocation in the project mentioned above through the petitioner in dual capacity – as a constituted attorney of the landlord /owner and as one of the directors of R-1 company as confirming party. It is pertinent to mention that the R-1 received payment of around Rs.7.30 crore credited to the bank account of the R-1 company at Bank of India, Kalikapur Branch and HDFC Bank, Golpark Branch in the form of cash as well as cheques.

14. R-2 signed all the cheques of R-1 company, the petitioner used to sign on several blank cheques as one of the directors along with R-3. All cheque books were under the custody of respondent No.3 at all material times.

15. The petitioner has alleged that after joining the R-1 company as director the registered office of R-1 company was also shifted at the residential address of the petitioner for the reasons best known to the R-2. The objection was raised, but R-2 paid no heed. The affairs of the company was however, operated from various places such as 27, Santi Pally, Block BB, P.S. Kasba, Kolkata – 700 107, Rajdanga Main Road, Sarat Park, P.S. Kasba, Kolkata – 700 107, 57A, Southern

Avenue, P.S. Tollygunge, Kolkata – 700 029 and 34, Dr. Sarat Banerjee Road, P.S. Lake, Kolkata – 700 029 as per instructions of R-2.

16. The project above was started on and from 19/5/2010 and petitioner was appointed a director of R-1 company with effect from 12/12/2012. Petitioner was never provided with any cash benefit of the project above as promised earlier , whereas he used to receive remuneration from the R-1 company as Director from January 2014 until April 2015.

17. Petitioner has further alleged that to negotiate with the tenants in the said property, the petitioner had also made cash contribution into the company from time to time in or about September 2012, during the period of the signing of supplemental agreement dated 19/9/2012 for negotiating with the tenants. It was also done at the instance of R-2 who had pleaded with the petitioner to infuse some funds into the company since the company's cash flow at that point of time did not permit of such payments to be made to the tenants. The petitioner did it on the assurance of the R-2 and other respondents that such amount invested by the petitioner would be reflected as a loan to the R-1 company in the annual returns for the financial year 31/3/2014. It was further agreed that such loan would be repaid first upon realization of the advance money received from the prospective flat owners.

18. Petitioner has also alleged that in 2015 the company stopped paying the director's remuneration to the petitioner. Then he tried to contact the R-2 over the phone, who said that the R-1 company is going through difficult times and need some time and directed to co-operate. Accordingly, the petitioner was satisfied and did not bother for the same. The petitioner also continued with the construction of the said project.

19. Petitioner has further alleged that for the first time the petitioner got to know that something is not right in the affairs of the R-1 company and that the respondents are conspiring and colluding against the petitioner and also

apprehending that the said respondents are up to some bigger sinister plan of mismanaging the affairs of the company by trying to siphon off funds thereof rendering the project unworkable. On and from middle of 2015 the R-1 company at the dictate of the other respondents stopped paying even construction workers, raw material suppliers and other logistical support providers in the said project thereby completely stalling the progress thereof. The apprehension of the petitioner further crystallized when the respondent No.3 by way of his letter dated 29/12/2015, inter alia, sought explanation from the petitioner as to the whereabouts of the said project in a language unprecedented in the dealing of the R-1 company vis-à-vis the petitioner. A copy of the said letter received from the respondent is Annexure H.

20. However, it soon became apparent to the petitioner that the R-2 is only interested in siphon off the entire money deposited with the R-1 company's bank account paid by the prospective purchasers and has no intention of completing the said project regarding the obligation undertaken by the R-1 company. Petitioner had also realized that since he is not in principle in agreement with such sinister plan of the respondents, they would try to make him as a scapegoat in their evil plan and try to scuttle all financial liability under the agreement executed by the R-1 company. It is at this juncture the petitioner started making his stand clear to the prospective purchasers and also disclosed the plans of the respondent to them asking them to take appropriate steps to safeguard their money.

21. In January 2016, the petitioner came to know from a reliable source, and in particular, one of the prospective purchasers apparently held out to all and sundry that any negotiations with the petitioner or anything said by him in respect of the said property or the R-1 company should not be believed. On getting the above news, the petitioner applied before the Registrar of Companies in February 2016, then he came to know that by way of a forged and fabricated letter of his

resignation, containing his purported signature, from the R-1 company with effect from 10/1/2016 and the relevant Form 32 has been uploaded with the digital signature of the respondent No.3. Certified copy of Form 32 along with the purported letter d is Annexure I.

22. Petitioner has alleged that being a director even as on 10/1/2016 he was never served with any notice calling for a Board meeting of the R-1 company. On obtaining the purported resignation letter from ROC he found that by way of forging his signature and on the basis of alleged resignation letter he was removed from directorship of the company thereby depriving his due share of profit of the project to the tune of 25% of the net profit as settled and committed by the R-2 before undertaking the development project.

23. Petitioner has further contended that his removal from the director of the R-1 company is invalid, illegal, inoperative and should be set aside. The petitioner has further alleged that the registered office of the R-1 company has also been shifted to the construction site which is nowhere near completion and no completion certificate has yet been issued by the Kolkata Municipal Corporation (KMC). The petitioner has further alleged that these are all the acts of mismanagement and oppression in the affairs of the R-1 company as stated hereinabove.

24. Petitioner has further contended that given the fraud committed by the respondents in siphoning of the entire money as deposited with the prospective purchasers and given absolutely no funds in the coffers of the R-1 company the only way to complete the said project would be to infuse funds from new investors for returns. However, the petitioner alleged that the respondents should be restrained from dealing with any affairs of the R-1 company, their bank accounts or with new purchasers in respect of the said property.

25. Petitioner has also sought relief of injunction restraining the respondents No.2 to 4 to take any administrative decisions concerning the said R-1 company

and further restraining the Board of directors of R-1 company from making any decision in respect of the affairs of the R-1 company. Petitioner has further prayed that order of investigative audit regarding the company for the financial year 2013-14 to 2015-16 be ordered. Petitioner has further sought relief of purported appointment of R-4 as director and declaring board resolution dated 10/1/2016 for removal of petitioner from the post of Additional Director is void.

26. It appears from the record that notice was served on the respondents through Speed Post and petitioner has filed an affidavit of service. But even after service of notice the respondents never appeared before the Tribunal. So the case proceeded ex parte against the respondents.

27. Heard Ld. Counsel for the petitioner and perused the record. Petitioner has filed this petition under Sec.241 of the Companies Act, 2013 on the ground of oppression and mismanagement. Petitioner has alleged that he was allotted 12,500 shares face value of Rs.10 each and his total shareholding is about 2% of the issued and subscribed and paid up capital of the company. Petitioner has alleged that there were five shareholders in the said company and petitioner has more than 1/10th of such shareholders. Therefore, he is competent to file the instant petition.

28. Requisite clarification to apply Sec.241 is given under subsection (1) (b) of Sec.244 of Companies Act, 2013. It provides that a petition under this section can be filed, with the consent of not less than 1/10th of the total number of its members. Here, in this case, the petitioner has alleged there are only five shareholders/members in the company, and he happens to be one of them. Therefore, it appears that petitioner is fully competent to present a petition under Sec.241 of the Companies Act, 2013.

29. Petitioner has further alleged that he is director and shareholder of the R-1 company and in support of his averment the petitioner has filed copy of annual return which is in Form 20B, for the financial year 2013, Annexure B, which

shows that petitioner is a director of the company since 12/1/2012 and in this return it is also mentioned that 12500 equity shares are held by petitioner.

30. Petitioner has further alleged that when annual return filed in 2012-2013, he pointed out that share application money is not shown in the account. Respondents informed that share application money is being kept in suspense account which would be reflected in the next financial year. Petitioner's above statement is also uncontroverted.

31. Petitioner has further alleged that sometime in 2010 joint venture agreement was executed with the owner of the property situated at 1B, Gariahat Road (Leela Roy Sarani), Kolkata – 700 019 with the R-1 company and at that time petitioner was witness to that joint venture agreement. At that point petitioner has put his signature as a witness on the joint venture agreement.

32. It is further alleged that after entering into joint venture agreement for about two years respondent No.2 and petitioner negotiated with the existing tenants of the said property and after much negotiation it was finalised between the owner of the property and R-1 company that unless a supplemental agreement to the effect demarcating the respective portion in the said project is executed, then only project can start and in response to that supplemental agreement was executed on 19/9/2012 between the said owner of the property and respondent No.1, as developer, represented by respondent No.2 and the petitioner as director of the said company.

33. Petitioner has also alleged that the landlord being the owner of the property executed the registered power of attorney in favour of the petitioner on 12/12/2012 and finally after getting sanction from KMC on 24/12/2013 construction project of four storied building on the said property started and during construction of the said building, respondent No.2 resigned from directorship of R-1 company and inducted his men as respondent No.3 with effect from 21/9/2012.

34. Petitioner has led emphasis on the fact that during the construction work of the building respondent No.2 arranged to execute seven different and diverse agreement for sale out of which five contracts were in respect of residential flats and one for shop room and one for commercial space out of R-1's allocation of the project, through the petitioner in dual capacity, i.e., as a constituted attorney of the owner and secondly as one of the directors of the R-1 company as confirming party. Petitioner's apprehension is that R-1 company received Rs.7.30 crore from the prospective purchasers of residential flats, shop room and commercial space which amount got credited to the bank account of R-1 company and all cheques of R-1 company were signed by two directors as instructed by R-2. It is further contended by petitioner that he used to sign on several blank cheques as one of the directors along with respondent No.3, and all the cheque books were under the custody of respondent No.3 .

35. Petitioner has further alleged that registered office of the R-1 company was also shifted at the residential address of the petitioner on the instruction of respondent No.2 but the affairs of the company was handled at different places. Petitioner is apprehending that the respondents are up to some bigger sinister plan of mismanaging the affairs of the company by trying to siphon off funds thereof rendering the project unworkable.

36. Petitioner further alleged that from the middle of 2015, the R-1 company at the dictate of other respondents stopped paying even construction workers, raw material suppliers and other logistical support providers in the said project thereby completely stalling the progress thereof.

37. Petitioner's main apprehension is that the respondent No.3 sought an explanation from the petitioner through a letter dated 29/12/2015 as to the whereabouts of the said project. When it became apparent to the petitioner that the respondents are only interested in siphon off the entire money deposited with the R-1 bank account, from the advance money paid by the prospective purchasers

and R-1 company has no intention of completing the said project as per contract, then he has filed this petition.

38. When the respondents came to know that petitioner will not participate in the sinister design of them, then they fabricated the resignation letter of the petitioner from the directorship of R-1 company and accepted the resignation letter on the same day and filed Form 32 filed.

39. It is also apparent from the record that alleged resignation letter is of dated 10/1/2016 which is at page 151. It also appears from the letter that the said resignation letter dated 10/1/2016 was accepted on behalf of the R-1 company on the same day, i.e., on 10/1/2016 itself. It is pertinent to mention that on 10/1/2016 petitioner was also a director but no information was given to him regarding alleged board meeting. It is also relevant to mention that in the alleged resignation letter in the column of date after the word date number 10 is handwritten and all other contents of that letter are typed. The fact that resignation letter was given on 10/1/2016 and it got accepted by the Board of directors on, the same day, itself creates suspicion about alleged proceeding of acceptance of resignation letter by Board of directors.

40. It is also important to point out that the petitioner has filed the Form DIR 12 which at page 149 of the petition shows that by Board Resolution No.4 dated 10/1/2016 that Form 32 with the digital signature of the respondent No.3 was also filed on the same day. Copy of the Form 32 is Annexure I. Petitioner has alleged that on 10/1/2016 he being a director was entitled to participate in the Board meeting but he was ever served any notice of calling a Board meeting.

41. Petitioner has further alleged that after the alleged act of the respondents, petitioner sent a complaint letter to the ROC claiming that the purported resignation letter is forged and without his signature. Petitioner has also filed a copy of the letter submitted to ROC which is Annexure J.

42. Petitioner has further alleged that for the reasons unknown to him R-1 company's registered office was firstly shifted to his residential address whereas in fact work of the R-1 company was being done at different places. Petitioner has further alleged company's registered office was further shifted to the construction site itself where in fact building is incomplete, and no room exists there.

43. Petitioner's main allegation against the respondents are that R-1 company has collected Rs.7.30 crore from prospective buyers of flats and syphoning off money and stopped paying even construction workers, raw material suppliers and other logistical support providers in the said project. Petitioner has alleged that removal from the directorship on the basis of forged resignation letter and without any notice of any board meeting. All these acts are clear violation of Companies Act, 2013 which comes under the purview of oppression and mismanagement.

44. Petitioner has further alleged that by syphoning off the fund of R-1 company entire project work has stopped and the petitioner apprehends if he signs as director of the R-1 company then will be made a scapegoat. Respondent No.2 resigned from the directorship of R-1 company and inducted his own man as respondent No.3 with effect from 21/9/2012. These all under a pre-plan manner only to siphon off the R-1 company's money which was collected from the prospective purchasers on the promise to deliver the constructed flats, shops and commercial space to the potential buyers. In the circumstances, petitioner has prayed for investigative audit regarding the affairs of the R-1 company with effect from 2013-14 to 2015-16.

45. It is pertinent to mention that in spite of service of the notice, the respondents have not contested the case and the case proceeded ex parte. Petitioner's statement is sufficiently corroborated by the affidavit of the petitioner himself. Petitioner has also filed all the documents to prove the fact that he was allotted 12500 equity shares in the company and appointed as additional director. It is also proved that by alleged resignation letter dated 10/1/2016 was accepted

the same day and petitioner was not even informed of the alleged board meeting. Respondent No.2 with a sinister design siphoning off money from the R-1 company put his person, respondent No.3, as director of the R-1 company. It is also proved on the basis of the statement of the petitioner that Rs.7.30 crore was collected from the prospective buyers of the residential flats, shop room and commercial space in the alleged project and the money was deposited in the account of R-1 company and respondents No.2 to 4 are siphoning of the fund of the R-1 company and has stalled project work. They are not making payment to the contractor and labours, and with sinister design first they shifted the company's registered office at the residence of the petitioner, whereas in R-1 registered office never existed at the applicant's residence whereas all the activities were done from different places and after the alleged resignation of the petitioner from the board of directors again company's registered office has been shifted to the project site, which is yet incomplete.

46. Above facts indicate that there is mismanagement in the affairs of the R-1 company and there is a justification which requires investigative audit under Sec.210 of the Companies Act, 2013.

47. It is important to mention that in the case of Rohates Industries (1969) 1 SCC 325 Hon'ble Supreme Court has held that company's affairs may be investigated if the business of the company was conducted with the intent to defraud its creditors etc. and the person concerned in the management of its affairs were guilty of fraud.

48. By law laid down in the case mentioned above, it is clear that where there is an allegation that business of the company is conducted with the intent to defraud its creditors than in such situation order of investigative audit by the Central Government is justified.

49. In this case, petitioner was a director and constituted attorney on behalf of the owner of the property on which the alleged project has started, and he has

signed the agreement on behalf of the owner as a constituted attorney and behalf of R-1 company as director along with co-directors as respondent No.2. Respondent No.2 with sinister design has resigned from the company and put his man respondent No.3 in his place as director. It is thus evident that public money of Rs.7.30 crore has been collected from prospective purchasers of residential flats and commercial space and to defraud the creditors respondent, No.2 has resigned from the R-1 company. R-1 company has frequently been shifting registered office, and finally, it has been shifted to an incomplete building, i.e., project site wherein, in fact, no office exists. The petitioner has also been removed from the directorship by alleged forged resignation letter. All these facts fully justify that there is a complete justification for investigative audit regarding the affairs of the company.

50. On the above basis, the petition deserves to be allowed.

ORDER

The petition filed by the petitioner is allowed. Central Government is being directed to order investigative audit regarding the affairs of R-1 company under the provision of Sec.210 of the Companies Act, 2013 and for this purpose, the Central Government may appoint any inspector to investigate into the affairs of the company and call for a report. It may authorize an inspector to investigate into the affairs of the R-1 company. Petitioner and respondents are directed to fully co-operate in the investigation.

It is further directed Central Government to issue direction for completing the investigation within four months from the date of this order and during this period no major decision should be taken without prior approval of the Tribunal.

It is also declared that the alleged Board resolution dated 10/1/2016 for removal of petitioner from the directorship of the R-1 company as void.

sd/-
Vijai Pratap Singh,
Member (J)

Signed on 5th September 2017