

IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH

CA No. 90/91 of 2015

Arising out of CP No. 49/ND/2015

*(Under Sections 397, 398, 402, 403
And/ or other applicable provisions of
the Companies Act, 1956)*

IN THE MATTER OF

Registrar of Companies,
U.P. Kanpur & Other

..... Applicants

Versus

1. Sh. Saurabh Kapoor, Kapoor Motor Stores,
Crossing Kapoor Company,
Moradabad- 244001-U.P.
2. M/s Moradabad Club Pvt. Ltd.
Having its registered office at Civil Lines,
Moradabad-244001- U.P.
3. Mr. Amar Nath Kapoor,
S/o Late Mr. Vasdev Lal Kapoor
Crossing Kapoor Company,
Moradabad-244001- U.P.
4. Dr. Satish Kumar Raj,
S/o Late Dr. Hans Raj, Court Road,
Moradabad-244001- U.P.

.....Respondents.

JUDGMENT/ORDER DELIVERED ON 11.09.2017

Coram : Hon'ble Shri H.P. Chaturvedi, Member (J)

For the Applicants (Respondents No. 4, 5, 6): Sh. Sanjay Kumar Om
CGSC

For the Non Applicants (Petitioner) : Sh. Rishi sood Advocate
a/w Pradeep Kapoor PCS

Non-Applicant/Respondents No. 1, 2, 3) : Sh. Deepak Bajaj Advocate

As per..... Hon'ble Shri H.P. Chaturvedi, Member (Judicial)



Order /Judgement

1. The present CA No. 90 & 91 of 2015 arises out of a final order dated 3.12.2014 passed by the Company Law Board in the Main Company Petition No. 49/ND/2014. The present Company Applications are filed by the Registrar of Companies, Uttar Pradesh, Kanpur on behalf of the Central Govt. through the Ministry of Corporate Affairs, (NR), New Delhi. By these applications, the Central Govt. has sought for such relief to recall the impugned order dated 03.12.2014 as passed by the learned Single Member of the Hon'ble Company Law Board, Principal Bench, New Delhi, wherein it pleased to issue such direction to the respondents, (herein the applicants in the present application), which are reproduced herein below: -

i. Clause 6 of the Memorandum of Association and alteration of Articles of Association on 22.09.2007 to create new category of members, viz., "Permanent Members" are illegal and hence, null and void.

(ii) The Respondent Company be got re-registered/converted as a public limited company within 3 months hereof on account of crossing the prescribed limit of members in the private limited company by having 800 Members.

(iii) The Company Petition No.49(ND)2014 and CA No.130/2014 are disposed of accordingly. Stay order, if any, is hereby vacated.

No order as to cost.



It is a matter of record that the Central Govt. through its office of the ROC, Kanpur had earlier preferred a Company Appeal (No. 7 of 2015), before the Hon'ble Allahabad High Court against the above mentioned impugned order. The Hon'ble High Court pleased to disposed of the same with such observation and by granting

a liberty to the appellants (herein Respondent No. 4,5 & 6 (e.g. Secretary, Govt. of India, Ministry of Corporate Affairs, New Delhi, Regional Director, Ministry of Corporate Affairs, New Delhi and the Registrar of the Companies, Kanpur) to move an appropriate application before the Company Law Board for recalling the impugned order dated 03.12.2014.

3. Pursuant thereto the present CA No. 90 & 91 of 2015 were preferred before the Principal Bench of Company Law Board. As the CLB came to be dissolved after the constitution of NCLT, the present company applications along with main CP No. 49 (ND) 2014 were transferred to this bench for the purpose of hearing and disposal.
4. The Division Bench of this Tribunal, after hearing the submission of counsel for both the parties vide its earlier order dated 06.12.2016 opined such the present C.As are maintainable and partly succeeds on the issue as to whether, impugned order dated 03.12.2014 (as passed by the Learned Single Member) of the Company Law Board needs re-consideration on such limited ground as to whether, the Respondent Nos. 4,5 & 6 (applicants herein or their offices) were effected proper service of a notice issued by the Company Law Board. Such issue needs to be dealt with afresh after hearing of both parties to determine such the impugned order dated 03.12.2014 is required to be recalled or needs for a suitable modification therein.
5. Hence, further argument of learned counsel for both parties on the above stated issue were heard. During the course of argument Sh. Sanjay Kumar Om, the Learned C.G.S.C. appearing for the present applicants (the respondent Nos 4,5 & 6 in main company petition) drew our attention on Hon'ble High Court's observation made in its order dated 03.12.2014, while disposing of the above stated appeal and by granting a liberty to the appellant to move a recall application before the C.L.B, if **the same is passed without issuing notice or hearing of the applicants.** The Learned C.G.S.C. would contend that as per their instruction no proper notice were served upon the Respondent Nos. 4,5 & 6, and as per them the



order impugned has been passed without hearing of them, hence the same is not legally sustainable.

In contra to this the respondents counsel Sh. Rishi Sood (the petitioner in main CP) further filed a list of events evidencing knowledge of service of notice in CP No. 49 (ND) of 2014 as were issued to the Respondent Nos. 4,5 & 6. In support of such evidence, he enclosed photocopies of dispatch through speed post of notices in the main company petition to the office of the Secretary, Ministry of Corporate Affairs, (NR) New Delhi, Registrar of Companies, Kanpur, Regional Director, Northern Region, Ministry of Corporate Affairs, New Delhi. The above stated notices were dispatched on 06.5.2014 through Speed Post to the Respondents (present applicants) informing such the hearing date as fixed in the main company petition No. 49(ND)2014 along with CA No. 130/2014 is Scheduled on 26.08.2014. Since, there was no representation from the present applicants/respondents No 4,5 & 6 on the date hearing hence arguments from petitioner side as well as from other appearing respondents were heard and the order was reserved. However, such order could be pronounced much later on 03.12.2014 after a considerable period. There are no such rebuttal documents placed before us to show that the above such notices are not found to have been issued at all by the Hon'ble CLB or by the petitioner counsel nor were properly dispatched to the office of the respondent 4,5 & 6 nor delivery of such notices was refused by the offices of respondents or returned back to its sender. The burden for proving such allegation mainly lies on the present applicants Central Govt. being respondents in the main company petition. During the course of hearing, this Court advised, the Learned Central Govt. Standing Counsel to produce adequate proof/ relevant documents showing non-receipt of such notices issued by the CLB or as stated to have been dispatched by the petitioner to the Respondents No. 4,5,6.

Therefore, the learned CGSC was directed to produce relevant extract of the Inward Registers those are being maintained in the office of respondents failing which, this court may presume adverse inference. The relevant extract of previous



order dated 10.02.2017 of the Division Bench of this Tribunal may be reproduced herein below.

6. **“However, without expressing our comment on merits, a last chance is given to the Central Government as well as to the office of the ROC for furnish copy of relevant document/necessary proof of non-receipt of notices to this Tribunal within three weeks from today failing which this Court may draw adverse entrance.”**

Pursuant thereto the Central Govt. Standing Counsel has submitted an affidavit annexing therewith the relevant extract of Inward Register showing the position of receipt of such notices by the office of the ROC. The learned CGSC further took such stand that although, such notices were received by the office of the ROC Kanpur, yet, were not placed before its competent authority nor the same were brought to the notice of the office of the Regional Director, MCA (NR), New Delhi. Therefore, no follow up action could be taken to represent the Central Govt. in the present matter. As per him, the Registrar of the companies, Kanpur might not be aware of about pendency of present company petition. Before the CLB. Hence, such impugned order ought not have been passed by the CLB without knowing the stands of and hearing the Central Govt. in the matter. The Ld. Central Govt. Standing Counsel further made efforts to impress us by justifying the facts and circumstances of the present application contending such the dealing clerk/staff of the ROC although had received and acknowledge such notices yet failed to bring it to the notice of the ROC hence, there may be some lapses on their part or there may be some extraneous reason against which an inquiry is being contemplated. However, he could not be able to convince us and to give justification about the notices issued and sent to the other offices of the Central Govt. i.e. Regional Director



(NR), Ministry of Corporate Affairs as well as to the office of the Secretary MCA, Govt. of India New Delhi, which as per their own inward Register are found as duly received. The relevant extract thereof (inward Register) the office of the M/o Corporate Affair New Delhi and O/o Regional Director (N.R.) have been produced before this Court later on pursuant to an order dated 13.07.2017 of this Tribunal, to provide one more opportunity to Central Govt. to submit proof for non-receipt of notices. However, as per the extract of inward Register, as produce before us, such notices are found as duly received by the offices of Respondents/ Applicant on 29.04.2014 and thereafter in the month of May, 2014.

As in the present matter the notice is found to be issued on 1st May 2014 to the office of the Registrar of Companies Kanpur, Ministry of Corporate Affairs New Delhi and to the Regional Director Northern Region New Delhi. As per the proof of dispatch of speed post as placed before us, that apart pursuant to a further direction of this Court on 13th July of 2017 by providing further opportunity to the Central Govt. to furnish a copy of the relevant extract of its inward Register as are being maintained in the office of Ministry of Corporate Affairs, as well as in the Regional Director, Northern Region and the ROC Kanpur. A perusal of such extracts goes to show that Ministry of Corporate Affairs has received notices on 28.04.2014, 01.05.2014 to 06.05.2014 from the Company Law Board and/or from the petitioner, in respect of the present matter. Equally the office of the Regional Director Northern Region is also found to receive communication/letter on 28.04.2014 to 29.04.2014 and 02.05.2014, in respect of Muradabad Club. Further, office of the ROC has already admitted in its affidavit that notices are found to have been



received by its office on 01.05.2014. But the same could not be placed before the Competent Authority for taking further necessary action.

However, it is matter of record the date for final hearing was fixed on 26.08.2014 and even after passing of a considerable period the order impugned was pronounced on 03.12.2014, hence, no any justification is given in the supplementary affidavit of the Deputy Registrar of Companies, Kanpur as to why the officer concern/or dealing staff of the Ministry of Corporate Affairs/Regional Director (N.R.) did not bring such service of notices to its competent Authority even elapse of couple months. Therefore, we are of the considered view that the Central Govt. has been issued proper notice by the Hon'ble CLB and/ or by the petitioners in respect of the present CP No. 49(ND)2014 and was afforded proper and sufficient opportunity of hearing.

It is settled position in law that there is presumption of receipt of notices, if, dispatched properly through the registered post and even then its acknowledgment is not received back. Thus, there is a legal presumption for its due delivery, obviously such presumption is always rebuttable by furnishing rebuttable evidence. The Hon'ble **Supreme Court of India in the matter of Basant Singh & Another Vs. Roman Catholic Mission (2002 (2) Apex Court Judgement 420 (S.C)** has pleased to rule and observe as such in relevant paras of its judgment that may be reproduced herein below.

The sole question that falls for consideration in this appeal is, whether the service of notice sent by registered post with acknowledgment card in terms of order 5 second to proviso to Rule 19A of the Code of Civil Procedure read with Section 27 of the General Clauses Act, 1897 can be accepted as a sufficient notice. Order 9 Rule 13 of Code of Civil



Procedure insists that the applicant must satisfy the Court two conditions (a) that the summons was not duly served and (b) that the applicant was prevented by any sufficient cause from appearing before the Court when the suit was called on for hearing. In the present case second condition is not attracted.

Second proviso to Order 9 Rule 13 casts an embargo on the court that a decree passed ex-parte shall not be set aside merely on the ground that there has been an irregularity in the service. Order 5, proviso to sub-rule (2) of Rule 19A of C/P.C. provides that where the summons is properly addressed, prepaid and duly sent by registered post with acknowledgment due, notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of the issue of the summons, the Court shall presume that notice is duly served. Further, Section 27 of the General Clauses Act, 1897 (in short 'Act') provides similar provision. The presumption is rebuttable. It is always open to the defendants to rebut the presumption by leading convincing and cogent evidence.

It is nobody's case that the postal addresses of the defendants are not properly addressed and, therefore, the registered summons could not be served. It is also nobody's case that the registered summons, bearing receipt Nos. 875 and 876 dated 24.04.1986, were issued is borne out from the record. Once it is proved that summons was sent by registered post to a correct and given address, the defendants' own conduct becomes important, before the Trial Court.

As noticed above, the registered summons were sent to Basant Singh and Hari Singh vide postal receipt Nos. 875 and 876 dated 24.04.1986 on the correct and given address is borne out from the



record. Ex-parte proceedings were ordered on 22.08.1986 and ex-parte decree was passed on 30.09.1986.

In the facts and circumstances as noticed above, this appeal is devoid of merit and it is, accordingly, dismissed.

By following the above stated judicial precedents from the Hon'ble Supreme Court we are of the view that the Central Govt. is not able to rebutted the presumption of delivery of the notices. In fact, there are sufficient evidences of proper dispatch of and duly receipt of notices by the office of M/o Corporate Affair, Regional Director N.R. Region and as well as the ROC Kanpur. Hence, such contention of learned CGSC carries no force that such notices although were received, yet either misplaced or could not be placed before its competent authority for taking further needful action in the matter. In facts, in the present matter no further explanation has been given about service of notices duly received by the office of the Secretary, Ministry of Corporate Affairs, New Delhi nor any cogent reason is shown to us as to why offices of Respondents (Central Govt.) could not appear nor could able to engage a Govt. Counsel to pursue their case before the Hon'ble C.L.B., New Delhi.

7. Further, such contention of the learned C.G.S.C. on behalf of the ROC Kanpur as well as RD (N.R.) that notices/ letter of petitioner are found to be received but presently are not traceable in their office is neither convincing nor tenable in the eye of law, because there may be some lapses/foul play found in a particular office of the Central Govt. but, in normal prudence such thing cannot be expected from all the three offices, that notices were received but not placed (deliberately) before its Competent Authority/s with such a motive to prevent the Central Govt.



from taking needful action in the matter before the CLB. Even assuming so that one office of the ROC could not be able to represent the case before the Company Law Board but no reason is given about other offices of respondents e.g. the office of the Secretary, Ministry of Corporate Affairs and the Regional Director (Northern Region) for not appearing before the CLB despite such notices are found to be received and sufficient time was available with them to represent to or engage Counsel.

As in the present matter the notice is found to be issued on 1st May 2014 to the office of the Registrar of Companies Kanpur, Ministry of Corporate Affairs New Delhi and to the Regional Director Northern Region New Delhi. As per the proof of dispatch of speed post as placed before us, that apart pursuant to further direction of this Court on 13th July of 2017 by providing further opportunity to the Central Govt. it furnished a copy of the extract of its inward Register as being maintained in the office of Ministry of Corporate Affairs as well as Regional Director, Northern Region and ROC Kanpur. A perusal of such extracts goes to show that Ministry of Corporate Affairs received notice on 28.04.2014, 01.05.2014 to 06.05.2014 from the Company Law Board and/ or from the petitioner, in respect of the present matter. Equally the office of the Regional Director and Northern Region is also found to have received communication/letter on 28.04.2014 to 29.04.2014 and 02.05.2014, in respect of Moradabad Club. Further, the office of the ROC has already admitted in its affidavit that notices are found have been received by its office on 01.05.2014. But it could not be placed before the Competent Authority for taking further necessary action.



8. Further, we are conscious enough about our limitation, and proper jurisdiction for deciding the issue involved the present application, in the light of the observation of the Hon'ble Allahabad High Court while, disposing the present the Company Appeal No. 7/2015. The relevant portion of such order for the sake of convenience may be reproduced herein below: -

"This appeal has been preferred under Section 10-F of the Companies Act, 1956 against the order dated 03.12.2014 passed by the Company Law Board, New Delhi in the matter of M/s Moradabad Club Private Limited, Moradabad having its registered office at Moradabad.

The main submission of Sri Ashok Mehta, Senior Advocate learned counsel for the appellants is that the impugned order has been passed without any notice or any opportunity of hearing to the petitioners and that the order itself reflects that the appellants were not heard before passing the same.

The above submission can be raised by the appellants before the Company Law Board by filing an application for recall of the above order on the above ground. In view of the above, the appeal is dismissed at this stage with liberty to the appellants to move appropriate application for recall of the above order dated 03.12.2014, if the same has been passed without notice or hearing the appellants."

9. The contention of the Ld. Central Govt. Standing Counsel by making such interpretation of the observation made by the Hon'ble High Court is that the impugned order dated 03.12.2014 must be recalled as it has ~~not~~ been passed without hearing the appellants/Central Govt. However, with due respect we are unable to accept such contention as in our humble view the obiter dictum (observation) of the Hon'ble Supreme Court alone can have binding effects on the subordinate court. Further, such observation of Hon'ble High Court cannot be purported in such manner, which is not in conformity with a settled practice



and procedure of law. In normal prudence and as per the principle of natural justice obviously a court of law is expected to pass an order only after affording an opportunity of being heard to concern parties. The provisions for issuance of notice have been made in all procedural law and statutes but nowhere such are purported that despite issuance of a proper notice and affording sufficient opportunity if a party chooses to remain absent even then a court of law is not competent enough to proceed further to pass a consequential order against ~~him~~ ^{it} ^{him} until such party makes appearance and is heard; such ^{to} plea would amount as a fetter on courts power to proceed ex-parte or to pass consequential order against such defaulting party, which is not legally permissible. As the legal position in this respect stands well settled by following the above stated judgment of Hon'ble Supreme Court therefore, such contention of the CGSC is not legally tenable because, there is sufficient proof of proper service of notice to the Central Govt. as per material placed before us.

In the light of above stated discussion we do not find any cogent reason to recall the impugned order dated 03.12.2014 as passed by the learned Single Member of the Hon'ble Company Law Board Principle Bench New Delhi.

In the result the present application No. 90 & 91 of 2015 filed by the applicants (in the respondent No.4,5 &6) must fails being lack of substance. Hence, the same are rejected, however, there is no order as to costs.

10. Notwithstanding the above, It would not be out of contest to make such observation suggesting such the definition of the Public Limited Company now stands changed/amended for the purpose of the incorporation of a Public Limited Company, as there is no minimum share capital prescribed under Section 2 (71) of the Companies Act 2013. Hence the Hon'ble Company Law Board's order needs to be understood in the light of the subsequent statutory changes/made in the Act and the respondent company can be allowed to be re-registered by treating as a Public Limited Company on account of having more member than prescribed for a Private Limited Company. As the respondent



company is reported having more than 800 members thus it has lost its characters of being a Private Limited Company. Therefore, in our view, such company obviously needs its reregistration under Section 2 (71) of the Companies Act, 2013. Therefore, the Central Govt. through Ministry of Corporate Affairs ^{is} expected to look into ^{to the} ~~in~~ this statutory aspect and may consider to take needful steps for removal of procedural difficulty, if any, in making compliance of the order dated 03.12.2014 ~~of~~ and direction issued by the Hon'ble Company Law Board in its right perspective.

With the above stated observation, the present Company Applications are disposed of. Consequently, the main Company Petition also stands disposed of.



Dated: 11.09.2017

— Sd —

Shri H.P. Chaturvedi, Member (Judicial)