IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

CA-350(PB)/2017

IN THE MATTER OF:

Cyrus Investment & Anr. .... Applicant/Petitioners

Vs.

Tata Sons Ltd. & Ors. .... Respondents

Under Rule 16 of the NCLT

Order reserved on 05.10.2017

Order delivered on 06.10.2017

Coram:
CHIEF JUSTICE (Retd.) M.M.KUMAR
Hon'ble President

Ms. Deepa Krishan
Hon'ble Member (T)

For the Applicant/Petitioners : Mr. C.A. Sundaram, Sr. Adv.
with Mr. Som Sekhar Sundareshan, Mr. Manik Dogra, Ms. Sonali Jaitley Bakhshi, Mr. Jaiyesh Bakhshi, Mr. Rohan Jaitley, Ms. Rohini Musa, Mr. Ravi Tyagi, Mr. Shubhanshu Gupta, Ms. Rini Badoni, Mr. Gunjan Shah, Mr. Puneet Bindra, Advs.

For the Respondents : Mr. Mukul Rohatgi, Sr. Adv.
Dr. Abhishek Manu Singhvi, Sr. Adv.
Mr. Mohan Parasaram, Sr. Adv.
Mr. Amit Sibal, Sr. Adv.
Mr. Sandeep Sethi, Sr. Adv.
with Mr. Saswat Pattnaik, Mr. Ashwin Kumar, Ms. Aditi Dani, Mr. Dhruv Dewan, Mr. Nitesh Jain, Mr. Rohan Batra, Mr. Arjun Sharma, Mr. Nikhil Rohatgi, Ms. Neeha Nagpal & Mr. Rajiv Kumar, Advs.

ORDER

M.M.KUMAR, PRESIDENT

This is an application filed by the petitioners under Rule 11 read with Rule 16 (d) of the National Company Law Tribunal Rules, 2016 with a prayer for transfer/reassignment of the Company

Petition No. 82/2016 pending consideration before the NCLT, Mumbai Bench to any other appropriate Bench other than the Bench Comprising of Shri B.S.V. Prakash Kumar, Member (J) and Shri V. Nallasenapathy, Member (T).

In order to appreciate the prayer made in the application it would be necessary to advert to few facts. The applicants filed Company Petition No. 82/2016 under Section 241 read with Section 242 of the Companies Act, 2013 against the respondents with the allegation of oppression and mismanagement which came up for hearing before the NCLT, Mumbai Bench. According to the averments made in the application the NCLT, Mumbai Bench directed the parties to file their respective replies and rejoinders in a tight timeframe and passed the consent order dated 22.12.2016 for an expeditious disposal of the Company Petition. The applicants also preferred an application under the proviso to Section 244 of the Companies Act, 2013 seeking waiver of the qualification requirement as per the provisions of subsection (1) (a) of Section 244 of the Companies Act, 2013 in the event of the Bench was to find that the Company Petition was not maintainable as it lacks requisite percentage of share of 10%. The respondents took an objection with respect to the maintainability of the Company

Petition and vide order dated 06.03.2017 the NCLT, Mumbai dismissed the petition on the ground that it was not maintainable (Annexure A-1).

Thereafter the matter was heard on the issue of waiver as per the direction issued by the Hon'ble National Company Law Appellate Tribunal to hear the matter first on maintainability, then waiver, and thereafter, if waived, on merits. It has further been asserted that detailed arguments were addressed on the issue of waiver and vide order dated 17.04.2017 the NCLT, Mumbai Bench dismissed the waiver application (Annexure A-2). It is alleged that while dismissing the waiver application the NCLT, Mumbai Bench recorded firm findings on merits of the controversy and ruled that there was no cause of action. The Company Petition on that ground itself was found without merit. It also discussed the allegations of oppression labelled by the applicants point wise and rendered firm findings on merits of each allegations.

The order dated 06.03.2017 was challenged in Appeal before the Hon'ble NCLAT bearing Company Appeal (AT) No. 133 of 2017 and the order dated 17.04.2017 was challenged in Company Appeal (AT) No. 139 of 2017. The Hon'ble NCLAT pronounced the common judgment on 21.09.2017 deciding both the Company

Appeals. According to the applicants it has been held that shareholding of 10% must be computed by including preference share capital along with equity share capital, leading to the Company Petition filed by the applicants as not maintainable. However, the Hon'ble NCLAT, explicitly granted the waiver. A copy of the judgment has been placed on record (Annexure A-3).

After the order dated 21.09.2017 the applicants filed Company Application No. 454/2017 before the NCLT, Mumbai Bench seeking hearing of the Company Petition No. 82/2016. According to the prayer made in para 5 (i) a request was made to the NCLT, Mumbai Bench to expeditiously place the captioned Company petition, along with amendments as pleaded, for final hearing at an appropriate date in accordance with the directions issued by the Hon'ble NCLAT as set out in order dated 21.09.2017. The matter is posted for hearing before the NCLT, Mumbai Bench on 06.10.2017 i.e. tomorrow. However, on 29.09.2017 Miscellaneous Application/Praecipe No. 454/2017 has been filed stating that the application be placed before the Principal Bench for it to be listed before an appropriate Bench since the Bench of NCLT, Mumbai have already rendered findings at a preliminary

stage which are final in nature as is evident from the order dated 17.04.2017 passed in Company Petition No. 82/2016.

We asked learned counsel for the non-applicants/respondents to file reply and all the learned counsel has stated in one voice that no reply is required to be filed.

We have heard arguments at length.

Mr. Sundaram, learned Senior Counsel for the applicants has argued that he does not wish to urge anything against the Members of the NCLT, Mumbai Bench personally and the anchor sheet of his arguments appears to be para 30 of the judgment of the Hon'ble Supreme Court rendered in the case of ***State of West Bengal and Ors. v. Shivananda Pathak***, (1998) 5 SCC 513. The fundamental thesis propounded by Mr. Sundaram is that a judge who has prejudged facts specifically relating to a party, as against preconceptions or predispositions about general questions of law, would disqualify himself, in dealing with the matter whereas observations made with regard to preconceptions and predispositions about general questions of law would not result in any such thing. The aforesaid formulations propounded by Mr. Sundaram emerges from para 30 of the judgment rendered in the case of Shivanandan Pathak (supra). To support of his view

learned counsel has made a detailed reference to the judgment of the NCLT, Mumbai Bench dated 17.04.2017. Our attention has been specifically drawn to the observations made in para 16, 17 and the various allegations dealt under sub headings. Reference has also been made in para 29, 30, 31, 34, 37 & 53. On the basis of the observations and findings given in these paras Mr. Sundaram has argued that it must be concluded that the NCLT, Mumbai has prejudged the facts specifically relating to the applicants and there is a reasonable inference that the same Bench would not be able to deal with the issues fairly.

Learned Senior Counsel than made a reference to para 144 of the judgment of the Hon'ble NCLAT wherein it has been held that the NCLT, Mumbai cannot deliberate on the merit of an application under Section 241, while deciding the application for waiver under proviso to sub-section (1) of Section 244 of the Companies Act. Mr. Sundaram has also placed reliance on para 130 of the judgment rendered in the case of ***Subrata Roy Sahara v. Union of India***, (2014) 8 SCC 470 to argue that if the NCLT, Mumbai Bench was not to determine the merits than there was nothing wrong to entrust the hearing of this petition to the same very bench and if it was to decide other issues such as contempt

where no finding on merits was to be recorded then it must be left to some other bench.

Dr. Singhvi, learned Senior Counsel for the respondents' states that there is active concealment on the part of the applicants in order to obtain the relief by forum shopping. According to learned counsel a perusal of the prayer made in the Company Appeal (AT) No. 139 of 2017 clearly shows that the applicants sought the relief to remand the Company Petition to such Bench of the learned Tribunal as may be appropriate for hearing the same of the merits of the case. According to learned Senior Counsel the application is liable to be dismissed for concealment of these facts which ought to have been put forward during the submissions made on the application. It has been urged that in any case the prayer made before the Hon'ble Appellate Tribunal must create a bar on the principles of Order 2 Rule 2 CPC. In other words, the submission seems to be that once the prayer has been made and is not pressed then it is deemed to be rejected.

It was then submitted that after the judgment of the Hon'ble Appellate Tribunal dated 21.09.2017 the applicants filed application before the NCLT, Mumbai Bench on 27.09.2017 being Company Application No. 454/2017 for expeditious disposal of the

petition in the light of the order passed by the Hon'ble Appellate Tribunal. It was thereafter on 29.09.2017 a letter/praecipe was issued to refer the matter to Principal Bench.

Mr. Rohtagi, learned Senior Counsel for respondent No. 2 has vehemently argued that the provisions of Rule 16 (d) of the NCLT Rules, 2016 deal with the functions of the President and President is to exercise the power including the power to transfer any case from one bench to another bench when the circumstances so warrant. Mr. Rohtagi submits that the power contemplated by Rule 16 (d) of the NCLT Rules, 2016 is administrative in nature and not a judicial power. According to Mr. Rohtagi the President has no judicial superintendence over the various Benches of the NCLT functioning in the whole country. The efforts of the applicants/petitioners are only to indulge in forum shopping. Mr. Rohtagi adopts all the arguments of Dr. Singhvi and submits that the example of Order 7 Rule 11 CPC given by Dr. Singhvi is classical example and argued that if the plaint is once rejected for want of disclosure of a cause of action or on any other ground then in no case while reversing the order the Appellate Court would entrust the case to the same Bench which rejected the plaint and such a precedence cannot be acquiesced with.

Mr. Sibal, learned Senior Counsel for some other respondent has argued that the efforts for Bench hunting are visible at three stages. Firstly, prayer was made before the Hon'ble Appellate Tribunal for placing the matter before any other appropriate Bench which is deemed to be rejected and then by way of letter dated 29.09.2017 similar effort was again made before the NCLT, Mumbai and despite that the Company Petition No. 82/2016 having been posted for hearing on 06.10.2017 a third-time effort has now been made by filing instant application before the Principal Bench. According to the learned counsel such an attempt should be defeated as it is likely to prove as a bad precedent.

We have thoughtfully considered the submissions made by the learned counsel for the parties. The question which falls for determination whether any case is made out for transfer of the proceedings from the NCLT, Mumbai Bench to any other appropriate Bench. It seems to us that the cardinal principle for exercise of power of transfer is that the ends of justice demand the transfer of the Company Petition from one Bench to another Bench. For the aforesaid view we placed reliance on the observation made in para 8 by Hon'ble Supreme Court in the case

of ***Dr. Subramaniam Swamy v. Ramakrishna Hegde***, reported in (1990) 1 SCC 4 which reads as under:-

> "The present Section 25 confers the power of transfer on the Supreme Court and is of wide amplitude. Under the present provision the Supreme Court is empowered at any stage to transfer any suit, appeal or other proceeding from a High Court or other Civil Court in one State to a High Court or other Civil Court of another State if it is satisfied that such an order is expedient for the ends of justice. The cardinal principle for the exercise of power under this section is that the ends of justice demand the transfer of the suit, appeal or other proceeding. The question of expediency would depend on the facts and circumstances of each case but the paramount consideration for the exercise of power must be to meet the ends of justice.....Words of wide amplitude--for the ends of justice--have been advisedly used to leave the matter to the discretion of the apex court as it is not possible to conceive of all situations requiring or justifying the exercise of power. But the paramount consideration must be to see that justice

according to law is done; if for achieving that objective the transfer of the case is imperative, there should be no hesitation to transfer the case even if it is likely to cause some inconvenience to the plaintiff. The petitioner's plea for the transfer of the case must be tested on this touch-stone."

It is trite to observe that when any Member decide a controversy he is bound to travel into realm of facts and while doing so he has to consider the issues in the light of the facts because the averments made by the parties alone would not constitute 'facts'. Objection has been raised on the basis of observation made in various paras. To test the fundamental thesis propounded by Mr. Sundaram we refer to para 16 of the order dated 17.04.2017 passed by the NCLT, Mumbai Bench which reads as under:-

"16. In pursuance of the Order passed by the Honourable Appellate Tribunal, this Bench heard maintainability plea wherein a detailed order has been passed stating that the Petition is hit by Section 244 qualification. Since there is direction of Honourable Appellate Tribunal to hear Waiver Plea, this Bench has

heard on Waiver Plea. In this background, when this Bench expected that the petitioners counsel would show prima facie case, the counsel argued that at the time of hearing waiver plea, this Bench need not look into the merits of the case. Of course, this proposition is not correct at least in a case where already maintainability point has been decided against the petitioners. It is to place that pleadings in main petition are already complete."

We are unable to commend to ourselves that reading of the aforesaid para would not lead us to conclude that the NCLT, Mumbai has committed an act of prejudging the facts. Let us take another example by reading para 17 (II) of the order dated 17.04.2014 passed by NCLT, Mumbai which was read out to us. There was an allegation made by the applicants-petitioners made and the NCLT, Mumbai has observed as under:-

"By going through this allegation, it appears that this transaction took place in the year 2007 that was almost 9 years before filing this Company Petition, in all these 9 years, these petitioners never complained of Tata Steel entering into this transaction. Moreover, it is the case of the petitioners that RI Company holds only 31.35%

shareholding in Tata Steel Limited, when shareholding of R1 is less than 50% in Tata Steel, can such company be called as subsidiary to R1 Company? Moreover, this Tata Steel Limited and its directors are not made as parties to this Petition. It is purely an affair of Tata Steel Limited. Therefore, this action, basing on the facts available, could not even remotely be called as the affair of R1 Company. Besides all these aspects, R2 is not presently continuing as either Director or Chairman of R1 Company. Until before filing this case R11 only continued as chairman of the company. This petition averment is not supported by any annexure. When it is not a case that Petitioners are not members of Tata Steel Limited, when this affair is not the affair of R1 Company, when Tata Steel is not a party, when Tata Steel is not subsidiary to R1, when this transaction is a past and concluded action i.e. in the year 2007, on top of all, when these petitioners never raised objection over this acquisition in the past, even for imagination also, this issue can be considered as an issue to invoke jurisdiction u/s 241 of the Act, 2013. The case of the petitioners is it is bleeding, if that is so, it is a business decision to be taken by general body of TSL or if it is related to R1, then by its general body. Therefore, we have not seen any cause of action to take it up as an issue to be decided under section 241 -threshold bar to consider it as cause of action is, it is not the affair of R1, TSL is not made as party, it is not said TSL is subsidiary

of R1 Company, moreover this decision was taken in the year 2007 and it is purely a business decision. In any sense, we have not found any merit to consider it as a point to be decided u/s 241."

A perusal of this para would show that the NCLT, Mumbai is commenting upon lack of evidence with regard to the applicants-petitioners being Director/Chairman for Respondent No. 1 Company and the stale-ness of the claim made. We are not able to persuade ourselves to conclude that there is any prejudging of questions of facts. There is no rule of universal application that if finding has been recorded while discussing a preliminary issue then such a judge is disqualified to hear the matter. Moreover, para 30 of the judgment rendered in the case of Shivanandan Pathak (supra) which is the basis of the formulations propounded by Mr. Sundaram has to be viewed in the facts and circumstances of the case before their Lordships. In that case their Lordships of the Hon'ble Supreme Court culled out bias on account of judicial obstinacy. It was held that once a judgment of the Single Judge is overruled by the Division Bench then that learned judge cannot sit in the Division Bench in a collateral proceeding between the same parties to rewrite the overruled judgment. It is further clear that para 30 of the judgment of the Hon'ble Supreme Court in

Shivanandan Pathak (supra) case was the result of analysis of a US Court judgment as given in para 29. We are therefore, of the view that the formulations propounded by Mr. Sundaram would not have any bearing on the issue before us.

In any case the direction of the Hon'ble Appellate Tribunal in para 172 is that "the case is remitted to the Tribunal to register the (proposed) application under Section 241, admit the same and after notice to the parties decide the application on merit *uninfluenced by impugned orders preferably within three months*". The aforesaid observation clarifies that the matter was remitted to the NCLT, Mumbai and it was not to be influenced by any observations made in the order dated 06.03.2017 & 17.04.2017. Likewise, the observation in other paras read out to us by Mr. Sundaram, learned Senior Counsel would not commend us to take a view that NCLT, Mumbai have anyway displayed any such bias which would constitute a basis for us to exercise jurisdiction, if any, to transfer Company Petition No. 82/2016 to another appropriate Bench of the NCLT.

We find further substance in the submissions of the learned Counsel for the non-applicants that the applicants have made

prayer before the Hon'ble Appellate Tribunal as has been rightly pointed out by them which is in the following words:-

> "(b) Remand the company petition to such bench of the Ld. Tribunal as may be appropriate for hearing the same on merits of the case"

A perusal of the aforesaid prayer does not leave any manner of doubt that the prayer was made for entrusting the Company Petition No. 82/2016 to such Bench of the NCLT as may be appropriate for hearing the same on the merits of the case. However, there is no mention of any such prayer in the order of the Hon'ble NCLAT. In other words, the prayer is deemed to have been made an Order 2 Rule 2 and in law it is presumed to be rejected apart from the allegations of concealment on that count in the present application. We are constrained to observe that during the course of hearing we asked the learned counsel for the applicants specifically with regard to any such prayer made before the Hon'ble NCLAT but no reply by the applicants was furnished. Therefore, we are of the considered view that this application is devoid of merit and thus liable to be dismissed.

We may observe before parting that we have not opined on the nature of jurisdiction under Rule 16 (d) of the NCLT Rules,

2016 as to whether it is administrative or judicial. Suffice is to say that the cardinal principle is as to whether ends of justice demand the transfer of the Company Petition or not. We find that directing the transfer of the petition would attract a unsavoury tendency of seeking transfer on minor excuses which needs to be discouraged. Therefore, we are unable to persuade ourselves to accept the prayer made in the application.

As a sequel to the above discussion this application is fails and same is dismissed with cost of Rs. 10 lacs. The cost shall be paid to all respondents in equal share.

-Sd-

(CHIEF JUSTICE M.M. KUMAR)
PRESIDENT

-Sd-

(DEEPA KRISHAN)
MEMBER(TECHNICAL)

06.10.2017
VINEET