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NATIONAL COMPANY LAW TRIBUNAL

GUWAHATI BENCH: GUWAHATI

T. A. No.15 of 2016
(C. A. No. 402 OF 2016)

IN

T. P. No.22/397/398/GB/2016
(Arising out of C. P. No.205 OF 2015)

Under Section 397,398, 402,403,406, 409 and 340

In the matter of:

Ram Swaroop Joshi & others ... Petitioners

-versus-

Buildworth Pvt. Ltd. & others ... Respondents

And

In the matter of:

1. Ram Swaroop Joshi, residing at Ashray, Saraswati Vihar, Sunderpur Bus Stop, Near NRL Petrol Pump, R. G. Baruah Road, Guwahati 781 005
2. Swaroop Capital Markets Pvt. Ltd., a company incorporated under the Companies Act, 1956 and having its registered office at Buildworth Building, G. S. Road, Guwahati 781 005
3. Swaroop Finance Pvt. Ltd., a company incorporated under the Companies Act, 1956 and having its registered office at 23A, N. S. Road, 4th floor, Room No.16, Kolkata 700 001.

...Petitioners

-versus-

1. Buildworth Private Limited, a Company incorporated Under the provisions of the Companies Act, 1956, having its registered office at Buildworth Building, G. S. Road, Dispur, Guwahati - 781 005
2. Deepak Singh, working for gain at Buildworth Building, G. S. Road, Dispur, Guwahati 781 005

3. Vidhushi Singh, residing at Buildworth Building,
G. S. Road, Dispur, Guwahati 781 005
4. Rakesh Singh, working for gain at Buildworth Building,
G. S. Road, Dispur, Guwahati 781 005
5. Dhirendra Singh, working for gain at Buildworth Building,
G. S. Road, Guwahati 781 005
6. Sangeet Singh, residing at Buildworth Building,
G. S. Road, Dispur, Guwahati 781 005

... Respondents

-AND-

In the matter of:

1. Buildworth Private Limited, a Company incorporated
Under the provisions of the Companies Act, 1956,
having its registered office at Buildworth Building,
G. S. Road, Dispur, Guwahati – 781 005
2. Deepak Singh, working for gain at Buildworth Building,
G. S. Road, Dispur, Guwahati 781 005
3. Vidhushi Singh, residing at Buildworth Building,
G. S. Road, Dispur, Guwahati 781 005

... Applicants/Respondents

Coram:

Hon'ble Mr. Justice P. K. Saikia, Member (J)

For the Petitioners:

Mr. R. Banerji, Sr. Advocate
Mr. K. Goswami, Advocate
Mr. R. Sarmah, Advocate
Mr. S. Barman Roy, Advocate

For the Applicants/Respondents:

Mr. Dhruba Ghosh, Sr. Advocate
Mr. S. K. Chakraborty, Advocate
Ms. N. Somani, PCS

Order delivered on 07-08-2017

ORDER

Per Hon'ble Mr. Justice P. K. Saikia, Member (J):

This proceeding has been filed seeking the following relief/s: -

"(1) Cause a preliminary enquiry, if any, as this Hon'ble Board may deem necessary, and/or

- (2) *Record a finding to the effect that offences under section 191, 192, 193, 196 and 199 of Indian Penal Code appear to have been committed by the Petitioners, and/or*
- (3) *Direct a competent officer and/or Registry of this Hon'ble Board to make a complaint in writing under section 340 (1) (b) and/or*
- (4) *Direct a competent officer and/or Registry of this Hon'ble Board to send such complaint in writing to the Magistrate of the First Class having jurisdiction, and*
- (5) *To issue appropriate direction(s) under Section 340 (1) (d) and Section 340 (1) (a) of the Code of Criminal Procedure as may be deemed appropriate by this Hon'ble Board;*
- (6) *Stay of further proceedings in C. P. No.205 of 2015 till disposal of the instant application;*
- (7) *Ad-interim of the instant application;*
- (8) *Such further order or orders and/or direction or directions be passed as to this Hon'ble Board may seem fit and proper."*

2. The non-applicants/ petitioners had initiated C. P. No.205/2015 against Buildworth Pvt. Ltd., (hereinafter referred to as the R-1 Company), Deepak Singh, (R-2) and Vidushi Singh, (R-3) alleging that they have resorted to huge mismanagement in running the affairs of the R-1 company which also resulted in perpetuating oppression upon the petitioners.

3. On receipt of the petition, the Company Law Board, Kolkata (in short, CLB) ordered registration of the same and directed issuance of notice upon the respondents therein. On receipt of the notice served upon them, the respondents entered appearance and having filed counter affidavit controverted the allegations, levelled against them.

4. In the meantime, the respondents, as being applicants, have filed an application stating that the aforesaid proceeding was initiated by non-applicants/petitioners on the basis of a false and fabricated document and as such, an enquiry, as contemplated in section 340 of the Code of Criminal Procedure (in short, Cr. PC), is required to be initiated to find out whether it is expedient in the interest of justice to enquire into the offence and if so, whether a complaint is required to be filed so that the petitioners/non-applicants could be prosecuted by the appropriate court under the appropriate provisions of law.

5. In that connection, it has been stated that the Companies Act, 2013 requires that the Board of Directors of the Company is to convene at least four meetings in a year, preferably one meeting every quarter. The Board of Directors of the R-1 company is constituted by petitioner and R-2. A board meeting of the R-1 company was scheduled to be held at the registered office of the company on 16-09-2015 at 11.00 AM. As required under the law, statutory notice was sent to the petitioner No.1, he being one of the Directors in the Board of Directors. The matters to be transacted in such meeting were also incorporated in the said notice.

6. The proposal regarding the approval of induction of R-3 as additional director in the Board of Directors of the company was one of such agenda and on such a matter, a discussion was invited. Said R-3, who is a professional architect, is stated to be one of the shareholders of the company. The petitioner No.1 received the notice but objected, amongst others, the induction of Vidhushi Singh as additional

director in the Board of Directors of the company. But then, he refrained from attending the meeting on 16-09-2015. Owing to such abstinence on the part of the non-applicant/ petitioner No. 1, it was not possible to hold any discussion on any of the items in the agenda. Therefore, said meeting had to be postponed.

7. Thereafter, another Board Meeting was convened on 26-10-2015 at 11.00 AM. In that connection, notice dated 19-10-2015 was served on the petitioner No.1. The agenda of the said Board Meeting was incorporated in the notice dated 19-10-2015 which, amongst other things, had an item regarding the induction of Vidhushi Singh as an Additional Director in the Board of Directors but once again, the petitioner No.1 failed to attend the said Board Meeting held on 26-10-2015 despite notice having been served on him in time.

8. In that meeting, Vidhushi Singh was legally and validly appointed as Additional Director of the company. The petitioner states that as per Company Law, details of the induction/removal of director/additional director of the Board of the Directors is to be notified by uploading Form DIR-12 in the portal/website of Ministry of Corporate Affairs. In compliance thereof, Form DIR-12 was uploaded by the applicants/respondents providing details of the induction/appointment of Vidhushi Singh as Additional Director of the Board of Directors of the company.

9. Copy of the Form DIR-12 providing details of induction/appointment of Vidhushi Singh as Additional Director is annexed at pages 38 to 47 and marked as annexure - I to the application. However, the petitioners/non-applicants in a most illegal way and quite superstitiously uploaded another Form DIR-12 showing cessation/removal of Vidhushi Singh on the basis of Board's resolution which was shown to have adopted on 05-08-2015. But the Board resolution which was shown to have adopted on 05-08-2015 is nothing but huge sham since no resolution approving removal of the R-3 was adopted by the Board on 05-08-2015.

10. What is equally important to note was that the R-3 was appointed only on **26.10.2015** and therefore, the Board had no occasion to adopt a resolution on **05-08-2015** for removal of the R-3 from Board of Directors. Such revelation doubly confirms the falsity of the resolution under which the R-3 was purportedly removed from the Board w. e. f. 26.10.2015 which also demonstrates the falsity of the statements, made in Form DIR-12, showing removal of R-3 (Vidhushi Singh) from the Board of Directors of the company with effect from 26-10-2015 on the basis of resolution dated 05-08-2015.

11. The applicants/respondents were totally unaware of this development till receipt of the e-mail dated 07-11-2015, being forwarded by the Ministry of Corporate Affairs and thereafter, they made necessary enquiry and came to know about the fact of alleged illegal removal of the R-3 from the Board of Directors of the company with effect from **26-10-2015** on the basis of resolution adopted on **05.08.2015**.

12. However, while presenting the present petition, the petitioners had annexed the copy of the Form DIR-12 under which the R-3 stood removed from the Board of Directors of the company with effect from 26-10-2015. In the Form DIR-12, so annexed with the petition, the relevant column showing the date of Board's resolution on the basis of which the R-3 stood removed from the Board of Directors

of the company was kept blank, although, the corresponding column in Form DIR-12, which was uploaded in the portal of the Ministry of Corporate Affairs, clearly shows that on the basis of resolution adopted on 05-08-2015, R-3 was removed from the Board of Directors of the company with effect from 26-10-2015.

13. According to the applicants/respondents, the petitioners/ non-applicants had forged the original Form DIR-12 which was uploaded in the portal of the Ministry of Corporate Affairs and the Form DIR, so forged, was made one of the foundations of the case of the non-applicant /petitioners in order to secure the reliefs, so mentioned in the petition aforesaid. But then, having resorted to such forgery of huge proportion **again and again**, the petitioners, the petitioner No.1 particular, have exposed themselves to charge of committing offences under sections 463/465/473 of IPC affecting the administration of justice and therefore, this Tribunal is duty bound to initiate an enquiry as contemplated in section 340 Cr. PC, to ascertain whether it is expedient in the interest of justice to enquire into the offence /offences committed in or in relation to a proceeding before the Tribunal.

14. The learned Sr. Counsel for the petitioners Mr. R. Banerjee further submits that in an enquiry under Section 340 of the Cr. P.C., a person, alleged to have committed offences in or in relation to a proceeding in the Tribunal, has no right of hearing, since the very purpose of such a proceeding is to decide whether it is expedient in the interest of justice to enquire into the offence and not to find whether a person guilty or not. In support of his contention, the decision of Hon'ble Apex Court in the case of *Pritish Vs State of Maharashtra and others*, reported in (2002) 1 SCC 253. Therefore, Mr. R. Banerjee urges this Tribunal not to give any audience to the person arrayed as respondent in the present proceeding.

15. The learned Counsel appearing for the non-applicants/petitioners submit that though under the law, the petitioners cannot have any right to participate in the proceedings under Section 340 of the Cr. P.C., yet then, when the petitioners/ non-applicants had already been served with the notice, they may be given a chance to place their views on the allegation made in proceeding in hand, now, pending before this Tribunal.

16. Considering the submissions, advanced by the counsel for the parties and also having regard to the fact that the non-applicants/petitioners have appeared before this Tribunal in response to the notice served upon them requiring them to answer the allegations made against them in the present proceeding, I find it necessary to hear them on those allegations though, under the law, they are not entitled for the same.

17. The non-applicants/petitioners did not deny that the relevant column in Form DIR-12, which was uploaded in the portal of Ministry of Corporate Affairs, had disclosed that the R-3 was removed from the Board of Directors of the company with effect from 26.10. 2015 on the basis of resolution adopted on 05.08.2015. They also did not deny that the relevant column ----- meant for showing the date when board resolution was adopted for removal of R-3 from the Board of Directors with effect from 26-10-2015 ----- in Form DIR-12, which was annexed with the present petition, remained blank. However, according to them, it was not an intentional error. Rather, it occurred accidentally while such form was downloaded from the portal of Ministry of Corporate Affairs.

18. In that connection, it has also been stated that the Ministry of Corporate Affairs too has admitted that for some technical problems, it may be possible that certain portion/portions of a document, obtained from the portal of the Ministry of Corporate Affairs, may remain blank while downloading such document from the portal of the Ministry of Corporate Affairs. This not only shows the authenticity of the above claim of the non-applicants/petitioners but also shows that what the applicants had submitted before this Tribunal is based on this facts and facts alone.

19. He further submits that this proceeding is legally not tenable for other reason as well. In that connection, it has been stated that even if one assumes for the sake of argument that the document in question is false and fabricated --- yet then --- such document was evidently fabricated even before filing of the present proceeding. In other words, aforesaid document was fabricated even before the filing of the present proceeding before the Company Law Board, Kolkata.

20. According to the counsel for the non-applicant/ respondents, if the fabrication of false evidence takes place or the document is tampered with "before filing in court", the provisions of Section 195 of Cr. PC would not be attracted. It is only when the document is tampered with "after filing in court" then only Section 195 Cr. PC would be attracted. In that connection, the non-applicants /respondents have relied on the decision of the Hon'ble Apex Court rendered in the case of Kishorbhai Gandubhai Pethani Vs State of Gujarat and another reported in (2014) 13 SCC 539

21. In Kishorbhai Gandubhai Pethani, (supra), an FIR was lodged by 'R' before the concerned police station alleging commission of offence U/s. 323/324/394A/506(2) and 114 IPC, read with section 135(1) of the Bombay Police Act, 1951 and aforesaid offences were alleged to have been committed by one Kishorbhai Gandubhai Pethani and another. Subsequently, section 307 IPC was added and in due course, charge sheet had been filed against said Pethani and his wife. Eventually, the case was committed to the Court of Session. Thereafter, the trial commenced.

22. The prosecution examined one Dr. Ghanshyam Chunilal Patel as PW-3 who claimed that he treated the informant of the case and prepared a report in that regard. It was alleged that some portion of the said medical report was forged and Kishorbhai Gandubhai Pethani, being the beneficiary of the same, was suspected to be the person responsible for such forgery. In that connection, an FIR was lodged against the appellant allegedly for having committed offence U/s. 463/465/468/471/111 IPC for tampering the medical report.

23. The Kishorbhai Gandubhai Pethani filed a criminal Misc Application U/s. 482 of the CrPC seeking quashing of the FIR lodged before the Police. High Court dismissed the said application rejecting the contention of the appellant "that such an FIR was not maintainable unless it is made by the Court itself under the provisions of Section 195 of Cr. PC". The decision of the High Court was challenged before the Hon'ble Apex Court.

24. Hon'ble Apex Court dismissed the appeal on holding that since the alleged forgery etc. were committed in respect of the aforesaid document when it was not in the custody of the Court, a complaint by the concerned Court under Section 195 of Cr PC on making an enquiry u/s 340 of Cr. PC, was not necessary. The relevant portion of the said judgment is reproduced herein below: -

"10. This Court in Ram Dhan v. State of U.P. and Anr. MANU/SC/0303/2012: AIR 2012 SC 2513 considered this very aspect of the matter and relying upon the earlier judgment of this Court in Sachida Nand Singh and Anr. v. State of Bihar and Anr. MANU/SC/0077/1998: (1998) 2 SCC 493 came to the conclusion that if the fabrication of false evidence takes place or the document is tampered with before filing in court, the provisions of Section 195 Code of Criminal Procedure would not be attracted. It is only when the document is tampered with after filing in court then the bar provided in Section 195 Code of Criminal Procedure would be attracted.

11. A similar view has been reiterated on the issue by this Court in P. Swaroopa Rani vs. M. Hari Narayana @ Hari Balm MANU/SC/7280/2008: AIR 2008 SC 1884; Mahesh Chand Sharma v. State of U.P. and Ors. MANU/SC/1552/2009: AIR 2010 SC 812; C. Muniappan and Ors. v. State of T.N. NU/SC/D655/2010: AIR 2010 SC 3718; Institute of Chartered Accountants of India v. Vimal Kumar Surana and Anr. MANU/SC/1015/2010: (2011) 1 SCC 534; and C.P. Subhash v. Inspector of Police Chennai and Ors. MANU/SC/0094/2013: JT (2013) 2 SC 270.

12. This Court while considering the issue in Rugmini Ammal (Dead by L.Rs.) v. V. arayana Reddiar and Ors. MANU/SC/8228/2007: AIR 2008 SC 895 reiterated a similar view while placing reliance upon Sachida Nand Singh (Supra) explaining as under

25. An enlarged interpretation to Section 195(1)(b)(iii), whereby the bar created by the said provision would also operate where after commission of an act of forgery the document is subsequently produced in court, is capable of great misuse. As pointed out in Sachida Nand Singh 2 after preparing a forged document or committing an act of forgery, a person may manage to get a proceeding instituted in any civil, criminal or revenue court, either by himself or through someone set up by him and simply file the document in the said proceeding. He would thus be protected from prosecution, either at the instance of a private party or the police until the court, where the document has been filed, itself chooses to file a complaint. The litigation may be a prolonged one due to which the actual trial of such a person may be delayed indefinitely. Such an interpretation would be highly detrimental to the interest of the society at large.

26. Judicial notice can be taken of the fact that the courts are normally reluctant to direct filing of a criminal complaint and such a course is rarely adopted. It will not be fair and proper to give an interpretation which leads to a situation where a person alleged to have committed an offence of the type enumerated in Clause (b)(ii) is either not placed for trial on account of non-filing of a complaint or if a complaint is filed, the same does not come to its logical end. Judging from such an angle will be in consonance with the principle that an unworkable or impracticable result should be avoided....

In view of the above, we do not hesitate to hold that no fault can be found with the impugned judgment rendered by the High Court. The facts and circumstances of the case do not warrant any interference. The appeal lacks merit and is accordingly dismissed".

25. Therefore, the counsel appearing for non-applicants / petitioners have urged this Court to dismiss this proceeding for not satisfying the requirements of law as stated in Section 195 read with section 340 of the Cr. P.C.

26. I have considered the rival submissions. It is not in dispute that the documents, alleged to be fabricated, appears to have been manufactured even before filing of the present proceeding. In other words, fabrication of documents, if any, did not take place in or in relation to the proceeding pending before this Tribunal.

27. In my considered opinion, law laid down in Kishorbhai Gandubhai Pethani (supra) is clearly applicable to the case in hand since the facts and circumstances in both the cases are fairly identical.

28. Being so, I am constraint to hold that the allegations made in the present proceeding do not meet the requirements of law as enunciated under Section 195 read with Section 340 of the Cr. P. C. and, therefore, I have no difficulty in dismissing the present proceeding as not maintainable.

29. However, the applicants/respondents if so desire, may initiate a proper proceeding before the appropriate court in regard to the allegations made in the present proceedings.

30. This proceeding in T. A. No.15/2016 in T.P. No.22/2016 (connected with C. P. No.205/2015), is accordingly disposed of.



Member (Judicial)

National Company Law Tribunal
Guwahati Bench: Guwahati.

Dated, Guwahati the 07th August. 2017