

NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH AT GUWAHATI

T. A. No.34 of 2016
[C. A. No.461/2015]

M. A. No.02/2017
&
M. A. No.04 of 2017

In
T. P. No.07/GB/2016
(Arising out of C.P. No.969/2012)

Under Section: 397/398 of the Companies Act, 1956

In the matter of:

Gomukhi Construction (P) Ltd. ... Petitioner
-versus-
North East Shuttles (P) Ltd. & Ors. ... Respondents

Order delivered on 25th January, 2018

Coram:

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

For the Non-applicant/ Petitioner : Mr. Sanjay Kumar Gupta, PCS
Mr. Narayan Sharma, PCS

For the Applicant/Respondent : Mr. Hiranya Das, Advocate
(R-4- (Phizo Nath)

ORDER

M. A. No.02 of 2017

Mr. S.K. Gupta and Mr. Narayan Sharma, PCS are present representing the applicant/petitioner. Mr. H. Das, learned counsel representing the respondent No.4 (Phizo Nath) is also present. Mr. Ishan Saha, learned counsel for **respondent No.2** could not remain present before this Bench today, since he missed the flight bound for Guwahati.

2. It may be stated here that Mr. S. K. Gupta, learned counsel has already argued the case for and on behalf of the applicant/petitioner. However, since Mr. I. Saha, learned counsel for respondents No.2

could not remain present today for the reason aforementioned. Mr. H. Das learned counsel submits that he may be allowed to advance arguments for and on behalf of the respondent No.4 on the next date.

4. On hearing the parties, the prayer is allowed.

5. List this matter on 13th February, 2018.

M. A. No.04 of 2017

5. Heard Mr. H. Das, learned counsel appearing for the applicant/respondent No.4. Also heard Mr. Sanjay Kumar Gupta and Mr. Narayan Sharma, learned counsel appearing for the non-applicant/petitioner.

6. This application has been preferred by the respondent No.4, Phizo Nath seeking the following relief/s: -

"B. Relief or prayer.

Under the facts and circumstances and in the premises aforesaid, it is humbly prayed that this Hon'ble Bench may be pleased to pass:

- (a) *Delete /strike off the name of the Respondent No.4 i.e. Phizo Nath from all the present/current proceeding in T P No.07/397/398/GB/2016 in (C P No.969/2012) and all connected matters thereon.*
- (b) *Any such further and other order/orders as the Hon'ble National Company Law Tribunal, Guwahati Bench may deem fit and proper."*

7. The facts necessary for disposal of the present application have been narrated in Para 3, 4, 5, 8 and 9. For ready reference, the relevant part of the application is reproduced below: -

"3. That, the applicant humbly begs to submit that he was appointed as an operation director of the respondent company on 1st October, 2008, which is a formal requirement of DGCA like other companies associated with the airline business and which is not a requirement of ROC. He was made an operation director for the sole purpose of smooth operation and maintenance of the aircrafts of the respondent company. He was only a mere employee of the respondent company. He was/is never been a share holder in the respondent company though he was in the board of directors during the year 2010 to 2014 and thereafter he resigned as a director from the respondent company as a director on 28.07.2014.

A copy of the resignation letter as well as the appointment letter are hereto annexed as Annexure 3 & 4 respectively.

4. That, the applicant humbly begs to submit that, he is a pilot and an operations director of the respondent company and he was appointed as an operations director when his mother was alive, and she was made respondent no.3 in the company petition filed by gomukhi construction pvt. Ltd. being C P No.969 of 2012. She was sick during that period and due to her old age ailments she could not look after the affairs of the company as well as the litigation, so she seeks the help of her son Phizo Nath to look after the business and the litigation. Subsequently the final order was passed in C P No. 969 of 2012 on 14.11.2014 on alleged settlement on agreement between the parties, though I was not a signatory to the alleged settlement nor did I made any promise to pay any amount of money to the petitioner company,

but made efforts to settle the issue between the parties on behalf of the company and my deceased mother, but to no result. Situated thus, Phizo Nath has to cooperate with his mother and filed a recalling application together with his mother being T. A. No.37, but soon after the death of his mother his part of endeavor came to an end.

5. *That, the applicant begs to submit that, I hold no liability towards the petitioner company nor I have any obligation so far as the alleged settlement is concern. I never sign any of the agreement/contract/instrument nor did I authorized any one or my representative to sign/vouch towards the alleged settlement on agreement which resulted the final order passed by Hon'ble CLB, Kolkata, on 14.11.2014.*

6.

7.

8. *That, most humbly and respectfully the applicant begs to say that, after the death of his mother on 18.12.2015, the applicant was in bereavement and could not file the application earlier though he was made verbal prayers for deletion of his name from the present litigation through his authorized counsels on different time and dates.*

9. *That, most humbly and respectfully the applicant begs to say that, there is no scope/ reason to be in the present litigation as the applicant is neither a beneficiary nor a liability to the respondent company, he is mere employee of the company and he ceased to be an operations director when the respondent company's flight operations came to halt."*

8. This Bench of NCLT vide order dated 08-01-2018 had directed the non-applicant/petitioner to file reply within ten days there-from, supplying simultaneously copy thereof to the applicant/respondent. However, the learned counsel appearing for the non-applicant/petitioner submits that the non-applicant/petitioner is not going to file any reply to the contention, made in the present proceeding and urges that the matter in this proceeding be heard on the basis of materials available on record.

9. Mr. Das, learned counsel appearing for the applicant/respondent No.4 contends that the respondent No.4 had never been a "necessary party" to the proceeding, which was registered as CP No.969/2012, since at all the relevant time, he had been working as an operational director of the respondent company and being so, his status is no better than that of an employee of the said company. As he was an employee of the aforesaid company, he could not have been made a party to CP No.969/2012 nor could he be legally subjected to any of the directions, rendered in the order dated 14-11-2014 in CP No.969/2012.

10. He further submits that at no point of time, he ever associated himself with any process seeking the disposal of CP No.969/2012 on the basis of amicable settlement; rather, he had appeared before the learned CLB, Kolkata as well as before this Bench only as an employee of the respondent company, therefore, in that capacity, he did not have any authority to enter into any compromise with the petitioner in CP No.969/2012 so as to bind the company or its office bearers or shareholders with the liability arising out of the order aforesaid. Hence, in this application, the respondent No.4 submits that his name should be deleted from the cause title of TP No.07/397/398/GB/2016 (corresponding to CP No.969/2012) and all other connected proceedings.

11. Such contention of the learned counsel for the applicant/ respondent No.4 was vehemently opposed to by the learned counsel appearing for the non-applicant/petitioner stating that this application is not at all maintainable for reasons more than one. In this connection, he submits that the directions, rendered by the learned CLB, Kolkata in CP No.969/2012 on 14-11-2014, bind one and all who were parties to the aforesaid proceeding including the respondent No. 4 therein. A bare perusal of the order dated 14-11-2014 would make it clear. Being so, there cannot be any escape from the conclusion that the application, filed, seeking the deletion of the name of the applicant from the cause title of the CP No.969/2012 and all other connected proceedings is required to be rejected straightway.

12. It has been further submitted that at no point of time, the respondent No.4 had raised the claim that he was not a "necessary party" in the proceeding which was registered as CP No.969/2012. In that connection, my attention has been drawn to the reply submitted in the CP No.969/2012. What is worse, even in the application filed by him along with his deceased mother (respondent No.3), seeking recalling of the order dated 14-11-2014, those respondents did not utter any word about respondent No.4, not being a "necessary party" in CP No.969/2012.

13. The further contention from the side of non-applicant is that the respondent No. 1 & 2 had also filed an application (which was registered as M. A. 01/2016) seeking recalling of the order dated 14-11-2014 rendered in the CP No.969/2012. In that application too, the applicant therein did not utter a word about respondent No. 4 not being a "necessary party" to the aforesaid proceeding. All these are prolific testimonies to the fact that the claim of the applicant that he was not a "necessary party" in CP No.969/2012 being without any substance.

14. It has again been pointed out from the side of the non-applicant/petitioner that in T. A. 37/2016(corresponding to C. A. No. 867/2015), the respondent No.3 & 4 alleged that the CP No.969/2012 was terminated on the basis of compromise basically between the respondent No. 2 and the petitioner. But such compromise, according to applicants in T. A. No. 37/2016, was arrived at by the aforesaid parties without the knowledge of the respondent No.3 & 4 and therefore, such a compromise between the petitioner and respondent No. 2, which was entered into with some illegal and unlawful motives, could not be binding on the respondent No. 3 & 4.

15. However, such a stand taken by the applicants/respondent No.3 & 4 in T. A. No. 37/2016 not only contradicted the claim of the applicant in MA 01/2016 (which was filed by the respondent No.1 & 2 seeking recalling of the order dated 14.11.2014) but also contradicted the claim of the respondent No. 4 in present proceeding that he was not a necessary party to CP No.969/2012 .Those disclosures, therefore, demolish claim in this proceeding –since--- the claim, which the respondent No. 3 & 4 had taken in T.A. No. 37/2016, by implication, demonstrates that the respondent No.4 along with respondent No. 3 were very the necessary parties in the CP No.969/2012. Such revelations, now, come down heavily upon the claim which the applicant made in the present proceeding.

16. The non-applicant /petitioner again submits that the respondent No. 1 & 2 as well as respondent No. 3 & 4 had filed two applications (which was registered as M.A. 01/2016 and T. A. 37/2016 respectively) seeking recalling of the order dated 14-11-2014, rendered in the CP No.969/2012 on some other grounds as well contending that the order dated 14-11-2014 is not tenable in law as well as in fact. This Bench on hearing the parties thereto in great detail was pleased to dismiss both the applications aforesaid vide order dated 25-4-2017 rendered in M.A. 01/2016 and T. A. 37/2016.

17. It has been pointed out that while dismissing the T. A. No. 37/16 and MA.No 01/2016, this Bench inter alia held that the grounds on which T.A. 37/16 were structured completely contradicted the grounds which were the basis of M. A. 03/16 and such revelations further show the falseness of the claims, made in the aforesaid proceedings, vide order dated 25-4-2017 rendered in T. A. 37/2016 and M. A. 01/16. Since the order dated 14-11-2014 and order dated 25-4-2017 had already attained finality, it is no longer possible even for this bench to render any order in the line of prayers made in the present proceeding----argues the learned legal representative appearing for the non-applicant /petitioner.

18. It has again been argued that the plea of the applicant / respondent No.4 that he had never associated with any process seeking disposal of CP No.969/2012 on the basis of amicable settlement is not correct. In this connection, my attention has been drawn to various orders passed by the learned CLB, which was made part of the order of this Bench dated 25th April, 2017. For ready reference, the relevant part of the aforesaid order is also reproduced below: -

"39) In support of such contention from the side of non-applicant / petitioner, my attention has been drawn to several orders, rendered during the period between 17.09.2013 and 14.11.2014. In order to know which side of the story was true, I also find it necessary to look into some orders, so referred to by Mr. Gupta appearing for the petitioner. For ready reference, some of those orders, I have gone through are also reproduced below: -

"ORDER

27.06.2014

As per meeting conducted on 20.06.2014 in the office of the undersigned, the director of the petitioner company in person and respondent No.2, Shri Phizo Nath appeared and expressed willingness to settle the matter amongst themselves. The respondents agreed to pay Rs.5.60 Crores (approximately) to the petitioner in totality for exit of the petitioner by transferring its shares held in the respondent Company in favour of the respondent group or any agents or associates nominated for this purpose by the respondent group. R-2 agreed to pay part consideration by way of draft to the petitioner on 27.06.2014 and the petitioner agreed to handover the shares held by it in the respondent company on the said date.

Ld. Pr. C.S. of the petitioner appeared and produced the share certificates for being handed over on receipt of consideration to be paid by the respondent as per assurance given on 20.06.2014. Ld. Counsel of the respondent submitted that he is yet to receive any instruction from his clients i.e. the respondent No.2 and others in this regard. However, he has agreed to consult his clients in this regard and come back to the Bench with the offer, if any, on the returnable date.

After looking into the above submissions of the rival parties, the matter is fixed for discussion on 14.07.2014 with the specific offers and compliance thereof as agreed upon by the concerned parties to be present in person on that date.

Sd/- A. Bandopadhyay
Member

ORDER

14.07.2014

Learned counsel of the respondents appeared along with R-2 and R-4 in person. It has been submitted by R-2 that the moneys receivable from the concerned party as per the agreement have not yet been received and as a result, it has not been possible to pay the consideration to the petitioner and therefore, it has been requested that a further time of one month may be allowed to discharge the obligation cast on the respondents to make necessary payment to the petitioner.

Counsel of the petitioner has submitted that as indicated in order dated 27th June, 2014, the respondents have agreed to pay Rs.5.60 Crores (approximately) to the petitioner in exchange of transfer of shares held by the petitioner in the Company to the respondents and R-4 has further agreed to make part payment of the obligation on 27th June, 2014, but no payment has been received so far. Therefore, it has been requested that a fortnight's time may be granted to the respondents to discharge their obligations either in full or in part failing which it should be construed that the settlement has failed and further necessary action in the matter may be taken by the Hon'ble Bench.

After due consideration of the aforesaid submissions of the rival parties, it is hereby directed that the respondents shall either make full or part payment within 15 days hereof by way of bank draft made available to the Bench Officer and further time not exceeding 30 days is hereby granted to discharge the balance consideration to be paid by way of bank draft by the respondents and the same may be made available to the Bench Officer and on receipt of such full consideration, the petitioner is directed to handover the original share certificates to the Bench Officer for carrying out further action in the matter. In absence of compliance of aforesaid direction, the settlement shall be considered as failed and the order will be passed in respect of the pending C.P. No.969 of 2012 in accordance with law.

Sd/- A. Bandopadhyay
Member"

19. The orders aforesaid, in no uncertain time, establish that the respondent No.4 was very closely involved in process seeking disposal of the aforesaid company petition on compromise. Being so, it does not, now, lie in the mouth of the respondent No.4 to contend that he never got himself associated with in any capacity whatsoever, with the aforesaid resolution process seeking disposal of C.P. 969/2012 on compromise.

20. Attacking the proceeding on some other count as well, it has also been submitted that the respondents No.3 and 4 had also prayed for withdrawal of application which they had filed seeking recalling of the order and which was registered as T. A. No.37 of 2017. Such prayers were opposed to by the non-applicant/petitioner contending that withdrawal of the application would adversely affect their claims in the T.A. No.34/2016 –since---- the application in T. A. No. 37/16 was treated as reply to the application by the applicant/petitioner which was registered as T.A. No.34/2016 (CA No.461 of 2012). On hearing both the sides, the said prayer seeking withdrawal of T.A. No.37/2017 was rejected.

21. On all those counts, it has been submitted by the legal representatives appearing for the non-applicant petitioner to dismiss the proceeding with exemplary cost.

22. I have heard the rival submissions having regard to the materials on record. On the perusal of the record, it is found that the Order dated 14-11-2014, rendered in CP No.969/2012 was sought to be

recalled by the respondents therein beforehand too. But, this Bench on considering the arguments, advanced by the parties thereto at length, came to the conclusion that the order aforesaid cannot be recalled on any count since said order was passed in accordance with the prescription of law, vide order dated 25-04-2017 rendered in T. A. 37/2016 and M.A. 01/2016.

23. The order dated 25-04-2017 rendered in T. A. 37/2016 and M.A. 01/2016 had now attained finality. So also the order dated 14-11-2014 in C. P. No. 969/2012. The various orders, passed in these proceedings make such position more than clear. Being so, in the event of accepting the prayer, made in the present proceeding, same would tantamount to interfering with the aforesaid orders in one way or other which is not permissible in law. On this count alone the prayer in the present proceeding required to be rejected.

24. In regard to the allegations that the applicant/respondent No.4 had never associated in any proceeding seeking resolution of the dispute on compromise, it is found that such allegation too has no basis whatsoever. A perusal of the order dated 14-06-2014 and 17-06-2014 rendered in CP No.969/2012 makes it abundantly clear that the respondent No.4 was very much involved in the process seeking disposal of aforesaid proceeding on the basis of formula mutually acceptable to all of them.

25. Coming to the allegation that applicant/respondent No. 4 was not a necessary party in C.P. No. 969/2012, I have also found that the plea is afterthought one. The argument, advanced from the side of non-applicant/petitioner in this proceeding has established it more than clear that the applicant/respondent No. 4 had been the necessary party in in CP No.969/2012. The fact that such a vital plea had never been raised in any of the earlier rounds of litigations makes us a conclusion inevitable.

26. It is worth noting that the matter relating to non-joinder or misjoinder of parties to a proceeding is to be raised at the earliest possible time and if same is not done, the right to raise such point at the subsequent stage even of the same proceeding stand waived. It is found that respondent No. 4 has raised such a vital plea for the first time in the present proceeding although the parties to CP No. 969/1012 had in the meantime fought several round of litigations. All these evince that the present proceeding was initiated in order to frustrate the directions rendered in various earlier orders including the order dated 14-11-2014 rendered in C. P. No. 969/2012. No other conclusion is found compatible with the materials available on records.

27. Even otherwise, the prayer in the present proceeding cannot be accepted. A careful perusal of the order dated 14-11-2014 reveals that under said order, parties thereto including respondent No. 4 saddled with the several obligations and duties incorporated therein. In that connection, I find it necessary to have a look at the order dated 14-11-2014. For ready reference, the relevant part of the same is reproduced below:-

"ORDER

1) Parties present today as shown above with their counsel and authorized representatives acting on instructions made a positive effort again with my assistance and reached a full and final settlement as per terms agreed below:

a) The petitioner company shall exit from North East Shuttles Pvt. Ltd. on receiving a consideration of Rs.5 crores as per payment chart given below:

i) The respondents undertake to pay the sum of Rs.5 crores to the petitioner company by depositing account payee demand drafts with the Bench Officer, as under:

a) Rs. 1 crore on or before 14/02/2015

b) Rs. 2 crores thereafter on or before 14/05/2015

c) Rs. 1 crore thereafter on or before 14/08/2015

d) Rs. 1 crore thereafter on or before 14/11/2015

a) The respondents undertake to pay interest @ 18% p.a. on the unpaid amount of any instalment from the date it falls due upto the date of payment.

b) The petitioner shall on or before 14/02/2015 deposit the share certificates along with duly executed transfer deeds in favour of the respondents with the Bench Officer who shall keep such share certificates along with duly executed transfer deeds in safe custody in a sealed cover.

c) The share certificates and transfer deeds so deposited by the petitioner, shall be released by the Bench Officer in favour of the respondents only after the deposit of all the instalments mentioned above in sub-para (i)(a) to (d).

d) Unless the petitioner deposits the share certificates along with duly executed transfer deeds with the Bench Officer on or before 14/02/2015 the respondents shall be under no obligation to deposit the amount of instalments with the Bench Officer.

e) After verification that the respondent company has paid off the loan arranged by the petitioner company, the petitioner company shall issue a no due certificate in favour of the respondent company.

f) The petitioner company shall not indulge in any correspondence or activity detrimental to the interest of the respondent company and render its fullest co-operation in enforcement of the settlement.

g) The respondents shall maintain status quo as on today on the assets of the company till completion of the settlement terms.

h) The Bench Officer shall after the deposit of the share certificates along with duly executed transfer deeds by the petitioner, release the periodical deposit of instalments made by the respondents in favour of the petitioner.

i) The Company Petition No.969/2012 is disposed of in terms of the settlement which is final and binding on the parties and shall be enforceable at the instance of either party under Section 634A of the Companies Act, 1956.

2) Counsel, Authorized Representatives for the parties and the Managing Director of R-1 company, after reading the above terms, prayed that the Company Petition No.969/2012 be disposed of on the above terms.

- 3) *I, accordingly, dispose of Company Petition No.969/2012 in terms of the above settlement which shall be binding on the parties and shall be enforceable at their instance under Section 634A of the Companies Act, 1956.*
- 4) *Interim order passed on 12/12/2012 stands vacated. All pending Company Applications stand closed.*

No order as to costs."

28. On careful perusal of the aforesaid order, it clearly demonstrates that the directions given therein are very much binding on the petitioner as well as on the respondents including respondent No. 4 and, therefore, now, it does not lie in the mouth of the respondent No.4 to say that said order is not binding on him, more so when the order dated 14.11.2014 had attained finality and therefore, name of the respondent No. 4 cannot be deleted from the cause title of TP No.07/397/398/GB/2016 (arising out of CP No.969/2012) on all other connected proceeding .

29. However, the last nail in the coffin of the present proceeding come from the statements which the applicant made in the present preceding. The highlighted portion in the petition which I have reproduced herein before shows that during the period from 2010 to 2014, the applicant /respondent No.4 had been one of the directors of the North East Shuttles (P) Ltd. as well which clearly demonstrates the falseness of the claim that the applicant had only been the employees of the company in question at all the times.

30. In view of what have been discussed herein before and what have emerged there-from, it needs to be concluded that this application seeking deletion of the name of the respondent No.4 from the cause title of TP No.07/397/398/GB/2016 (arising out of CP No.969/2012) is without any substance and the same needs to be dismissed which I accordingly do.

3i. The Registry is directed to list the other matters viz. T. A. No.34 of 2016 [C. A. No.461/2015] along with M. A. No.02/2017 and T. P. No.07/GB/2016 (Arising out of C.P. No.969/2012) for further hearing on **13th February, 2018**.


Member (Judicial)
National Company Law Tribunal
Guwahati Bench: Guwahati.

Dated, Guwahati, the 25th January, 2018
Deka/25-01-2018