

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AT NEW DELHI**

Date of Pronouncement: 2nd February, 2017

Company Petition No. 29 (ND) 2006

In the matter of

The Companies Act, 1956 under sections 397 & 398.

Mr. Daya Kishan Goel & Ors.

.....Petitioners

Versus

M/s Dinesh International Limited & Ors.

...Respondents

CORAM:

MS. INA MALHOTRA, MEMBER (JUDICIAL)

For Petitioner(s): Mr. Manish K. Jha, Advocate.

For Respondent(s): Sh. P.D.Gupta, Senior Advocate with Mr. Dinesh Sabharwal and Mr. Abhishek Gupta, Advocates for Respondents 2 to 8.

ORDER

A closely held family concern was incorporated in 1990 as the Respondent No.1 Company with an authorised share capital of 10 crores divided into 1 crore equity shares of Rs.10/- each. Its main object was to carry out the business of export and import of various items ranging from handicrafts and food grains to toys and machine tools. Petitioner no.1 and Respondent no. 2 are real brothers and sons of Petitioner no.3. While Petitioners are immediate family members of Petitioner no. 1, Respondent no.3 to Respondent no.6 are from the family branch of Respondent no.2.

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Respondent no.8 is their nominee Director. The holding of the petitioner group is 40.2% while that of the respondents is 59.8%. Petitioner no.1 and Respondent no.2 were the initial directors of Respondent no.1 Company. Respondent no.2 subsequently shifted to Sri Lanka to manage another company, entrusting the day to day affairs of the Respondent Company in the hands of his sons Respondents 3 & 4 and his nominee Respondent no.8.

2. As per averments, pursuant to a notification dated 9th January 2006, issued by the Indian Railways inviting Private Sector registration for operating container trains, Respondent No.1 Company along with another company namely M/s. ETA Engineering Pvt. Ltd. entered into a collaboration to bid for the Contract. For this purpose, the consortium so formed by the two was required to deposit a registration fee of Rs.50 Crores for the project. As per their Memorandum of Understanding executed between Respondent no.1 Company and ETA, the contribution was to be in proportion of 40:60. Accordingly, Respondent No.1 Company paid their share of Rs.20 Crores. Interse the parties herein, the petitioner group and the respondent group agreed to share the said payment equally as per their agreement dated 03.03.2006.

3. The petitioners approached the erstwhile Company Law Board when the respondents intended to increase the authorised share capital of the company ostensibly for a new project. Such a decision was taken at an EGM held on 25.04.2010. The petitioners who allege that they did not receive any

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prior notice or the explanatory statement became aware of the same when they received the notice for the EGM fixed for 25.04.2006. The petitioners therefore claim that the Board Meeting of 25th April 2006, is illegal and void as no notice of the Board meeting/EGM allegedly held on 1st April 2006 had been given to Petitioner no.1. Moreover, there was no need for any increase in the share capital of the Respondent Company. Further in the alleged meeting of 1st April 2006, it was also resolved that superseding all previous resolutions, Respondents 3 & 4 would be authorised to take all necessary action in respect of the Railway project. Apprehending the illegal designs of the respondents, the present petition has been filed.

4. The petitioners have alleged oppression on grounds of non-receipt of notice of the Board Meeting dated 01.04.2010, and consequently the decision taken in the EoGM held on 25.04.2010, the agenda being increase in the share capital through allotment of shares. It is submitted that the aforesaid design was to increase the shareholding of the Respondents and a consequential reduction in the equity of the petitioners' from 40% to 25%. Such an act, where no prior notice of the meeting of the Board of Directors was given in writing to every director intending to pass the aforesaid resolution, was not only in violation of Section 286 of the Companies Act 1956 but also violative of Clause 41 of the Articles of Association.

5. The petitioners who had not been served with the notice of the EGM on 01.04.2006 have impugned the resolutions passed therein whereby all

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powers in respect of the project were conferred on Respondents 3 & 4 to the exclusion of the petitioners. The petitioners submit that such a resolution was illegal, void and non est in the absence of any notice to them. The petitioners alleged that Respondents 2 to 6 have in some way or other made attempts to siphon off the funds of the Respondent no.1 Company. The petitioners further allege that surreptitiously, without any due notice to them, the Respondents passed a resolution replacing Petitioners 1 and 3 as authorised signatories to operate the Company's Bank Account maintained with ABN Amro Bank, Hansalia Building, 15 Barakhamba Road, New Delhi. The Bank duly informed Petitioner no.1 vide their letter dated 12.04.2006, that the names of Petitioners 1 and 3 had been deleted from the list of authorised signatories and replaced by Respondents 4 and 8. It is submitted by the petitioners that without due notice to them or a resolution to this effect, the same could not have been done. As petitioner no.1 never received any notice of the board meeting of the directors, this was in violation of Clauses 42 & 54 of the Articles of Association.

6. The petitioners further allege that the Respondents had illegally siphoned a sum of Rs.40 lacs leaving a paltry amount of Rs.37,000/- in the Company's Bank Account.

7. Further grievance of the petitioner is that the respondents removed all the statutory books from the registered office of the company. The EGMs were called for at the residential address of the respondents and not at the

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registered office address. Being in possession of all records the respondents had defaulted in statutory compliances. Due to the negligence and mismanagement of the Respondents, huge liabilities are outstanding against the company. The petitioners have further argued that the respondents have violated the Status Quo order by passing resolutions appointing advocates to represent the company.

8. The petitioners apprehend that the only asset of the company which is 20 crores returned by the consortium and currently in custody with the Registrar of the Hon'ble Delhi High Court would also be taken away by the respondents.

9. The respondents in their Affidavit do not categorically repudiate that no notice of the Board Meeting was given to P1. Admittedly neither the notice nor any postal record has been relied upon by them.

10. The respondents submit that the petition which has been pending for more than a decade has become infructuous as it had been adjourned Sine Die vide order dated 30.05.2011. Admittedly the company is lying defunct since 2006 and no business has been transacted by it nor its bank accounts operated since 2006. There are no tangible asset, movable or immovable, except for Rs.20 crores released by the Railways and deposited in the Hon'ble High Court of Delhi in CS(OS) 645 of 2006, and presently in CS(OS) 180 of 2010. It is argued by the Ld. Senior Counsel that the reliefs claimed



in the petition do not survive and have become otiose. Further other than making bald allegations of siphoning of funds there is nothing material to substantiate the same. The respondents confirm that sum of Rs. 40 lacs was transferred on 06/07th April, 2006 from the Account of the Respondent no.1 company to the account of M/s. Vipin Enterprises which again is a partnership concern of Petitioner no.1 and Respondent no.3. It is argued that the petitioner no.1, as partner of said firm has never challenged this amount in the account of partnership firm.

11. Ld. Senior counsel for the respondent has pointed out that the reliefs claimed in the Civil Suit (OS) 180/2010 filed in the Hon'ble High Court of Delhi (now transferred to the District Courts) are the same as claimed by the petitioner here. It is submitted that in view of the same the relief prayed for cannot be pressed before two forums. It is therefore submitted that the petitioner is not entitled to any decision with respect to disbursal of the amount lying with the Hon'ble High Court of Delhi.

12. The sum and substance of the allegations made in the petition and shorn of all details can broadly be bulleted to four points, to which this Bench does not find any real repudiation by the Respondents.

These are:

1. Allegation of no notice of meeting of 1st April, 2006 given to the petitioner no.1.

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The Respondents have not denied this fact.

It is stated that the respondent no.1 being a closely held company of the family members of two real brothers, no formal notice was ever issued as a matter of practice. It is submitted that the petitioner no.1 was fully aware of the Board Meeting but has falsely alleged that it was without due intimation to him.

2. Removal of the petitioner as an authorised signatory of the Company's Bank Account

Removal of petitioners 1 & 3 as an authorised signatory is not denied.

No cogent explanation has been given by the respondents that the same was done after due notice to the Petitioners.

3. Siphoning of Rs.40 Lacs from the bank account of the company.

The respondents submit that allegations of siphoning the money from the Respondent Company's account are nothing short of bald allegations without any substantial corroboration. The respondents however admit transfer of Rs.40 lacs from the company's account but seek to justify this action by stating that the said amount was transferred to the partnership account of Petitioner no.1 and Respondent no.3 viz M/s. Vipin Enterprise.

4. Removal of statutory books from the registered office of the Company.

The respondents have not been able to demolish this allegation also. There is no denial by them in this respect.

Keeping the pleadings in view and the arguments advanced by the Ld. Counsels, this Bench finds merit in the petitioners' allegation of oppression in as much as they were required to be given notice in writing about the Board Meeting held on 01.04.2006 and the proposed Agenda/Explanatory statement for the EGM to be held on 25th April 2006. Though it may have been a matter of practice to orally communicate about holding such a meeting, when a relationship is at its nadir, it would be expedient to ensure compliances not only according to the statute, but also in accordance with the Articles of Association. The respondents have defaulted on all these aspects. In fact the petitioner's allege that no meeting on 1st April 2006 was actually held and the minutes recorded or the resolution passed were subsequently fabricated. The petitioners are based in Mumbai, while the respondents were looking after the day to day working of the company in Delhi where the Registered Office is situated. It appears that all decisions were taken by Respondents 3, 4 & 8 to the exclusion of the petitioners' group. This lends strength to the petitioners' allegations of oppression. Accordingly, the decisions/resolutions passed on 1st April 2006 and/or on 25th April, 2006 are liable to be set aside. Similarly, the decision to remove

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the petitioners 1 & 3 as authorised signatory from the bank accounts of the Respondent no.1 company was a unilateral one without due notice to the Petitioner no.1. The acts of the respondents were clearly to deprive the Petitioner no.1 of his rights as a Director in the company and be reduced to zilch. Moreover, the removal of the records of the company from the registered office was not only against the statutory requirements but also was kept out of the petitioners' reach. Further there is no justification of the transfer of Rs.40 Lakhs from the Company's account to the bank account of M/s. Vipin Enterprise, a partnership firm of Petitioner no.1 and Respondent no.3. Transfer of the assets of a Corporate Body company to another entity is wholly unjustified and inexplicable even if it is to the partnership account of both the parties. There is nothing on record to show that the same was accorded due approval of the Board or any resolution passed according acceptance to justify taking the step. This is clearly against the interest of the Respondent Company. Petitioner no.1 has not only been kept away from the accounts of Respondent No.1 Company but it appears also from the affairs of the alleged partnership concern.

13. The acts of the respondents were undoubtedly oppressive and prejudicial of the interest of the petitioners' group which held 40% equity. It appears that the lucrative business formed in the 1990's was reduced to a naught, clearly giving strength to allegation of mismanagement. Unfortunately, due to the passage of time, the company's business has come to a standstill and its assets have dissipated and therefore no substantial

relief can be granted to the petitioners. The only asset of Rs.20 crores which was returned by M/s. ETA/ Railways is lying in custody with Hon'ble High Court of Delhi. This amount is required to reduce the huge liability on account of various Government dues. Increase of the statutory liability to such a high proportion in itself speaks of gross mismanagement of the affairs of the company which vested in the hands of Respondents 3, 4 & 8. The petitioner had sought release of this amount in the Civil Suits which are still pending adjudication but the same was not permitted.

14. The argument advanced by the Ld. Senior Counsel for the Respondents that the reliefs prayed for have become otiose has merit. The respondents have succeeded in ensuring the same. There is neither any business nor any asset of the company to grant any redressal. On the contrary, it is saddled with enormous statutory liabilities.

15. However having come to the conclusion that the petitioners suffered unfairly at the hands of the respondents on account of non compliances of statutory requirements, being prejudicial to the interests of the petitioners, it is basic to jurisprudence that the right to relief must be judged to exist as on the date of the petitioners instituting the proceedings. Ld. Counsel therefore prays that Status Ante be restored. Accordingly, the two resolutions dated 1st April 2006 and 25th April 2006 are set aside with the consequential effect of setting aside any decision taken therein being declared void, illegal and non est.

16. The petitioners 1 & 3 are entitled to be signatories to the Respondent Company's Bank account. However, to safeguard the interests of both the parties, the said account shall be operated jointly by a member of the petitioner group and of the respondent group.

17. In the unlikely event of release of the sum of Rs.20 Crores, or any part thereof, lying with the Registrar General of the Delhi High Court, the same would be deposited in the account of the Respondent Company. The residual amount, if any, after meeting the Company's liabilities shall be shared equally between the two groups as per their original agreement.

18. Petition disposed off in terms of the above.

Sd—

(Ina Malhotra)
Member Judicial