

Before the National Company Law Tribunal
New Delhi Bench II, New Delhi

Company Application 15-CL-II /2016

IN

Company Petition No.30 (ND) Of 2016

IN THE MATTER OF:

Bhanvi Buildtech Pvt. Ltd. & Another

.....

Petitioners

Versus

M/s JSS Buildcon Pvt. Ltd. & Ors.

.....

Respondents

Present on behalf of the parties:

For Applicants/ Respondents 2 & 3 in C.P:

Mr Arun Kathpalia, Sr.Counsel, Mr Sudeep Kumar Shrotriya, Mr Varun Singh, Mr Karan Sachdeva,
Advocates

For Non Applicants/Petitioners in C.P:

Mr Arun Vohra & Aakriti Vohra, Advocates Mr Pawan Sharam, PCS

ORDER

This is an application filed by the applicants who happen to be 2nd and 3rd respondent in the main company petition seeking for the following reliefs:

- a) Hear and allow the application dated 29.04.2016 as filed by Respondents No.2 and 3;
- b) Pass appropriate directions thereby permitting the Respondents to deposit a sum of Rs.35 lacs with this Hon'ble Board in such form and in such manner as may be directed by this Hon'ble Board/Tribunal;



- c) Pass appropriate directions thereby sending the resignation letter as well as the letter of settlement dues, both dated 07.12.2015, for examination and report by government forensic and handwriting laboratory;
 - d) Pass appropriate directions thereby modifying the order dated 04.03.2016 thereby permitting the respondent No.1 Company to accept further bookings of the flats in the project;
 - e) Pass such other and further orders/directions as may be deemed fit and proper in the facts and circumstances of the present case.
1. Before going into the merits of the present application, a brief narration of the background of the case as evident from the pleadings of the parties to the lis as well as a recap of the orders passed by the erstwhile CLB before which the company petition was originally moved and which company petition subsequently came to be transferred before NCLT, New Delhi Bench II after 01.06.2016 is enumerated as under:-
 2. The 1st respondent seems to have been incorporated on 31st January 2007. None of the parties to the lis, it is pertinent to note, are the subscribers to the charter documents of the 1st respondent company nor were they named as first directors of the 1st respondent company. The authorized share capital of the 1st respondent company as per its Memorandum of Association is Rs.100,000/- divided into 10,000 equity shares of Rs.10/- each and at the time of incorporation itself it is evident that the entire capital had been subscribed to, by the subscribers to the charter documents. The petitioners, as well as the respondents 2 to 5 in the main company petition, seem to have become members of the 1st respondent company after considerable lapse of time from the date of its incorporation, through purchase of shares from the erstwhile shareholders of the 1st respondent. From the pleadings we are also able to gather that the 1st respondent has been incorporated for the purpose of carrying out activities connected with real estate business and that the 1st respondent is having only a single project being currently developed in an area of approximately 14724 sq.m located at Plot No. G H 2C, Greater Noida West, Sector 1, Uttar Pradesh



(hereinafter referred to as the "Project"). Before taking into consideration the status of the afore said project it is required to notice as to how the parties to the lis became the shareholders of the 1st respondent company as is evident from the pleadings in the main company petition. It is seen that 2nd petitioner and respondents 2 to 4 along with the wife of the 2nd respondent (who is not a party to the present proceeding) seem to have acquired their shareholdings from one Mr. Piyush Tiwary and one Mr. Diwakar Sharma as follows:

Name of the Transferor	Date of Transfer	No. of Shares	Name of the transferee
Mr. Piyush Tiwary	01.10.2012	2500	Mr. Rishi Agarwal (Petitioner No.2)
Mr. Diwakar Sharma	15.10.2012	5000	M/s Shubhkamana Buildtech (Respondent No.4)
Mr. Piyush Tiwary	15.10.2012	1000	Mr. Pratosh Kumar Sharma (Respondent No.2)
Mr. Piyush Tiwary	15.10.2012	1000	Ms. Neeru Sharma
Mr. Piyush Tiwary	15.10.2012	500	Mr. Ankit Sharma (Respondent No.3)

3. From the above table it is clear that the transfer of shares to the parties to the lis have taken place on two dates, namely 01.10.2012 and 15.10.2012. Prior to transfer of shares it is also pertinent to note that the 2nd petitioner and respondents 2 and 3 were appointed as directors in the 1st respondent company on and from 01.09.2012 and the petitioner had also made available a sum

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of Rs.35 lakhs as unsecured loan. It is also equally pertinent to note that even though the said Mr Piyush Tiwari had transferred all his shareholdings in the 1st respondent company, it is claimed by the parties that the 4th respondent company is owned and controlled by the said Mr Piyush Tiwari. Similarly the 2nd petitioner it seems on 15.10.2012 had transferred his shareholding in the 1st respondent company to the 1st petitioner company owned by him. Thus after the transfers effected in October 2012, the 1st petitioner came to hold 2500 equity shares, 2nd respondent along with his family including the 3rd respondent came to hold 2500 equity shares and the said Mr Piyush Tiwari through his company the 4th respondent came to hold 5000 equity shares, all in the 1st respondent company. According to the petitioners this is the status of shareholding which is accepted and recognized by them even as of today and anything to the contrary is challenged. Further it is also contended by the 2nd petitioner that he continues to be a director of the 1st respondent company, even as of today, and records produced by the respondents, if any, to the contrary are all only fabricated.

4. However, the respondents in the main company petition and the applicants herein contend that the 2nd petitioner-non applicant has ceased to be a director on and from 07.12.2015 as he had resigned from the 1st respondent company to which effect he had also sent a resignation letter dated 07.12.2015 along with a covering letter and had also categorically confirmed that no right, title, entitlement, ownership etc., in or against the 1st respondent company or its affairs is left with the petitioners. Since it has been expressly acknowledged by the petitioners-non applicants themselves that nothing is required to be settled vide the above letter dated 07.12.2015, the applicants contend that the sum of Rs.35 lakhs made available as unsecured loan is not required to be paid, as in any event the same according to them also has been duly paid, which according to applicants actually prompted the non-applicants-petitioners to give the settlement of dues letter as termed by the applicants dated 07.12.2015. The applicants also further contend that the

shareholding of the 4th respondent in the main company petition held in 1st respondent company had been transferred in entirety on 18.04.2014 to the 5th respondent in the main company petition which corporate entity it is claimed is wholly owned by the 1st applicant and his family members. The said transfer of shares is vehemently disputed by the non-applicants /petitioners on the ground that the articles of the company has been violated and they have not been put on notice about the offer or transfer of shares and hence the said transfer of shares between the 4th and 5th respondents in the main company petition is not valid and binding.

5. In the meanwhile in relation to the development of the project it is seen that the 1st respondent company has actively canvassed for and obtained from the general public flat bookings and that the total flats proposed to be constructed in the project approximates to 639 flats out of which a major portion has been sold out and advances have also been received from the general public and the work of flat development has already commenced and the construction is also steadily progressing at the project site at an advanced stage.
6. While so, assailing, inter alia the alleged resignation letter of the non-applicant /2nd petitioner from the Board on 07.12.2015 as counterfeited including the covering letter and denying any settlement of dues and also challenging the transfer of shares between the 4th and 5th respondents and also insisting that the name of the 2nd petitioner be appointed as authorized signatory to operate the bank accounts, the main company petition has been filed seeking for various reliefs including interim reliefs under the provisions of Sections 397 and 398 read with Section 402 of the Companies Act, 1956.
7. The main company petition seems to have been mentioned before the erstwhile Company Law Board on 01.03.2016 and subsequently on 04.03.2016 and the CLB had passed certain interim directions wherein further bookings of flat had been stayed and the respondents in the main company petition were directed to file their reply and also a statement was also directed to be



furnished based on the representation of the counsel for applicants as evident vide the said order dated 04.03.2016. Aggrieved by the order dated 04.03.2016, the applicants had approached the appellate forum, at the said point of time being the Hon'ble High Court, New Delhi and after withdrawing the appeal there from, had again come before this Tribunal, subsequent to its formation on and from 01.06.2016 with the application for modification of order dated 04.03.2016 and the application was listed on 12.07.2016 wherein the applicants herein were directed to comply with the order dated 04.03.2016 and also provide a comprehensive statement of all the flats sold and the advances received against them. The applicants thereafter have moved two applications one being the application of which we are presently seized and the other being to take note of the compliance with the orders dated 04.03.2016 as well as 12.07.2016 and claiming that the said information as ordered by the NCLT, New Delhi Bench being confidential has been placed in a sealed cover. In the interest of justice the petitioners in the main company petition were permitted to access the information contained in the sealed cover and also to file their rejoinders which has made the petitioners, upon perusal of the statement and details furnished and contained in the sealed cover filed by the respondents to file in addition to rejoinders, an application in Application No.17/C-II/16 inter alia seeking for 2nd petitioner's reinstatement in the Board of the 1st respondent company and also for securing the interest of all concerned in view of the lack of the compliance with the orders of the erstwhile CLB and presently NCLT in letter and spirit and alleging that a fraud is sought to be played upon the non-applicant petitioners and NCLT, by the applicants herein, by providing only sketchy particulars. While the non-applicant /petitioners do not have any objections to the signatures contained in the resignation letter and covering letter termed as settlement letter in the instant application, both dated 07.12.2015 being referred to Central Forensic Science Laboratory (CFSL) and as well as to the deposit of a sum of Rs.35 lakhs towards unsecured loans with the NCLT, the same being

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respectively prayers (b) and (c) of the above application, the non-applicant petitioners raises serious objections relating to prayers (a) & (d) of the instant application, being that of modifications of the orders dated 04.03.2016 and for hearing and disposal of the present application per se. Since this Tribunal is not a court for recovery of monies, we do not propose to go into the legality or otherwise of the unrecovered loan or its repayment in the present order nor do we propose to direct the applicants/ respondents to deposit the amount before the NCLT.

8. However, both the parties to the applications have made their oral submissions in detail in relation to the application and already we have taken note of the consensus between the parties that the disputed letter of resignation as well the settlement letter both dated 07.12.2015 be referred to CFSL, vide our order dated 19.09.2016 subject to the documents in original as well as the undisputed signature of the 2nd petitioner as reflected in the minutes of the Board of Directors meeting on 14.8.2014 for comparison being made available to the Bench Officer of this New Delhi Bench II, NCLT for onward transmission to CFSL. However in the interim, till the disposal of the company petition the interim measures which are required to be taken in the interest of the 1st respondent company and the stake holders including the allottees of the flat in the property developed by the 1st respondent company are to be considered as rightly pointed out by the applicants herein. The following facts stare at our face, however, much the applicants may try to wish away the same:

- a) That with respect to the Board of the 1st respondent company, serious disputes have arisen between the parties and particularly where the petitioners throw serious allegations of fraud and forgery against the respondents 2 to 5 and both parties providing diametrically opposite findings/conclusions by handwriting experts, a substantial element of uncertainty is prevalent what with the 'disputed documents' is also being referred to CFSL, and the fate of expert opinion is also required to be awaited;

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- b) That in relation to the shareholding of the 1st respondent company is also in dispute due to the petitioners challenging the transfer of shares between the 4th respondent and 5th respondent in violation of the Articles of Association of the 1st respondent company which according to the non-applicants / petitioners has seriously undermined their shareholding strength vis-à-vis the 2nd respondent and his family and has tilted the balance in favour of the respondents 2 and his family irrevocably and if the petitioners contentions are proved correct, both the parties will be holding 50% each of the share capital;
 - c) That the accounts of the 1st respondent company has not been made available to the petitioners despite several requests and that they have been consistently been kept away from the affairs of the 1st respondent company and it is admitted that the annual accounts of the 1st respondent company has not been closed or audited for the past two years;
 - d) That the respondents have been opaque in respect of financial dealings of the 1st respondent company as despite the orders of 04.03.2016 by the CLB and subsequent orders by this Tribunal, the respondents have been reluctant to come out with a full and true disclosure about the flat bookings and amounts received and the particulars from whom the amounts have been received;
 - e) That virtually the project of the 1st respondent company is sought to be taken over by the 5th respondent company after the alleged transfer of shares challenged in the petition from the 4th respondent company to the 5th respondent which is evident by the change in the name of the project advertised from "SHUBHKAMNA-MONARCH" to "NCR-MONARCH" by the applicants/respondents 2-3 to the detriment of the non-applicants/petitioners.
9. It is pertinent to note that due to dispute between the two group of shareholders, namely the petitioners on the one side and the respondents 2 to 5 on the other, the affairs of the 1st respondent company has suffered irreparable damage what with the respondents initially changing the name of the project, for whatever reasons known to them, and subsequently the petitioners going public about the dispute after filing of the petition and there by virtually crippling the development of the project. In the inter se dispute between the petitioners on the one hand and the respondents 2 to 5 on the other, the persons who have booked for the flats investing their valuable monies are caught in the cross fire and the project has virtually come to a standstill which is not in the interest of the public, nor in the interest of the 1st respondent

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company or its shareholders. The last available audited financial statements before us for the year ended 31.03.2014 discloses that the amount received as advance against flat booking stands at a whopping Rs.358,735,824.84 and amount payable to Greater Noida Development Authority (probably a statutory body) at Rs.173,881,146.54. Further, the net worth of the 1st respondent company is also found to be negative implying erosion of capital. Subsequent to 31.03.2014, the respondents in the main Company Petition despite the allegations made by the petitioners have not chosen to produce any financial statements duly audited for the year ended 31.03.2015 leave alone for the current year which precludes from ascertaining the present financial position and / or whether the accounts for the year ended 31.03.2015 and 31.03 2016 have been closed or not by the respondent company and duly audited. Further even as per the admission of the applicants herein, approximately 400 flats have been booked and in the circumstances the company is answerable to the purchasers of flat and their interest also cannot be ignored by this Tribunal even though they are not before us. Further it is the contention of the applicants that unless further bookings are opened for the remaining flats the project cannot be completed. There is some merit in the contentions of the applicant which calls for the intervention, but whether it should be by way of mere modification of the earlier order dated 04.03.2016 allowing the respondents to have a free reign over the affairs of the 1st respondent company or a sort of check is required to be imposed over the affairs of the 1st respondent company in the interest of all stakeholders, including the public who have booked flats and are vitally thereby interested not only in the successful completion and handing over of their flats but also in the immovable property on which the project of the company is to be completed. Further we cannot lose sight of the amount owed by the 1st respondent company to the Government/ statutory body and in addition the shareholders interest are also required to be balanced and thus the wellbeing of the company becomes paramount to all the stakeholders.

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10. Exerting our minds over this issue it can be spelt out unequivocally that neither the Companies Act of 1956 since repealed, nor the Companies Act, 2013, precludes us from also considering the 'public interest' in a petition for oppression and mismanagement, other than the interest of the shareholders. We are fortified by this view by the following decisions wherein the term "in a manner prejudicial to public interest" as found in the Sections 397, 398 and 408 of the Companies Act, 1956 concerning Oppression and Mismanagement has been elucidated, namely:-

- (i) In **Bhalchandra Dharmajee Vs. Alcock, Ashdown & Co. Ltd.** as reported in (1972) 42 Company Cases 190 at Paragraph 6

"After the amendment of sections 397 and 398 of the Companies Act by sections 10 and 11 of the Companies (Amendment) Act (LIII of 1963), it would appear that the affairs of the company have to be conducted not only in the best interest of its members for their profit but also in a manner which is not prejudicial to public interest. The element of public interest enters into the management of the companies after 1963. The modern corporation has become the accepted instrument of social policy, because it affects a large part of the economic life of the community. It has become an instrument for the improvement of the economic standards of the people and for economic growth of the nation. Society depends for some of its needs on corporate enterprise. It has therefore an interest in its stability and efficiency as an economic institution. The element of public interest also arises from the responsibility for ensuring a minimum wage to the numerous employees in the corporate sector. It is necessary to see that people who put their labor and lives into a concern get fair wages, continuity of employment and a recognition of their right to their jobs where they have trained themselves to highly skilled and specialized work. In deciding whether the court should wind up a company or change its management the court must take into consideration not only the interest of the shareholders and creditors but also public interest in the shape of the need of the community and the interest of the employees. This, in my opinion, is the requirement of section 397 and 398 of the Companies Act."

- (ii) Again In **N.K.Mohapatra vs State of Orissa and others** reported in 96 Company Cases/ 49 Orissa /AIR 1994 Orissa 301

"The words in a manner prejudicial to public interest' were introduced in Sections 397, 398 and 408, by the Companies (Amendment) Act (53 of 1963), in order that the Court or the Central Government may have jurisdiction to interfere in cases where even though there may be no prejudice to any shareholders, the oppression or mismanagement complained of is prejudicial to the public interest. The expression 'public interest' is an elusive abstraction meaning general social welfare or regard for social good and predicated interest of the general public in matters where regard for the social good is of the first moment. To be meaningful, it must relate to the good life of those with reference to whom it is used. Justice Felix Frankfurter of the United States Supreme Court has said

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that the idea of public interest is a vague, impalpable, but all controlling consideration. While no one can formulate the abstract principle called 'public interest' and it cannot be considered in vacuo, it can fairly be understood and applied to policy decisions. It indicates a standard of goodness for judging private acts and conduct in the social context.

As observed by Mahajan, C.J. in *State of Bihar v. Kameshwar Singh*, AIR 1952 SC 252, the expression 'public interest' is not capable of precise definition and has not a rigid meaning, and is elastic and takes its colours from the statute in which it occurs, the concept varying with the time and state of society and its needs. In the case of a company, the concept of public interest takes the company outside the conventional sphere of being a concern in which the shareholders alone are interested. It emphasizes the idea of the company functioning for the public good or general welfare of the community at any rate not in a manner detrimental to the public good. Public interest or commercial interest of the company has received statutory recommendations. Further the creditors or individual shareholders of a company cannot be permitted to initiate proceedings for feeding private grudges of warring groups or for the purpose of fighting out their private grudges".

11. Even though in the first of the decisions cited, namely *Bhalchandra Dharmjee's case*, the Hon'ble High Court of Bombay was grappling with the need of the community and the interest of employees, while considering a petition for winding up in addition to a petition filed by some of the shareholders for oppression and mismanagement, in the instant case the situation of the flat buyers seem to be more onerous for the simple reason that huge sums of monies have been paid to the 1st respondent company by the residential flat buyers on the premise that on completion of their flats they will be handed over with a residential accommodation and any delay or non-completion of the project is going to land the company as well as the flat buyers into serious jeopardy and perpetuate further litigations. In the 2nd case cited above further amplification of the concept of "public interest" is defined to mean something in which the public has a vital interest either a pecuniary one or in the personal sense. It can mean purely an inquisitive interest as well as a material interest.
12. In the instant case we find that the construction activity, apart from the private sources of the shareholders, is pre-dominantly funded by the amounts received from the purchasers of flats by way of advances and it is in their interest and in the interest of the company we are forced to

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consider, more so when the 1st respondent company does not have any worthwhile asset or other projects in hand. The activities of the 1st respondent company have come to a standstill due to internecine disputes between two group of shareholders is evident. Under the circumstances we pose ourselves with the question whether the Tribunal, given the powers vested in the Companies Act, is not in a position to act to remedy the situation at the interim stage pending the disposal of the Company Petition given a plethora of cases right from that passed by the highest court of the land wherein it has been held that the reliefs that can be granted, including the interim reliefs in a petition for oppression and mismanagement are not bound within a narrow compass and that the Tribunal is vested with the power to make any interim order which it thinks fit for regulating the conduct of the affairs of the company upon such terms and conditions as appear to it to be just and equitable.

Taking into consideration the facts and circumstances of the case and pending the disposal of the company petition we are constrained to appoint an Interim Administrator who shall be Mr S.Balasubramanian, Ex-Chairman, Company Law Board failing him Justice D.R.Deshmukh, Ex-Chairman, Company Law Board in relation to the affairs of the company who shall take interim custody of the assets and properties of the company and also its books of accounts, vouchers and papers and the Interim Administrator is initially to do the following:-

- i) In relation to the present status of the sole building project of the company carried out at Plot No.G H 2C, Greater Noida West, Sector 1, Uttar Pradesh he will inspect the site and also take a complete inventory of the assets of the company including cash in hand as well as at Bank and file a detailed report about the up to date status of the project, assets and cash in hand;
- ii) Ascertain and obtain a statement from the statutory auditor of the company about the audit of the annual accounts of the company for the years ended 31.03.2015 and 31.03 2016 and whether the company has held any Annual General Meetings for the approval of the annual accounts of the Company;


 

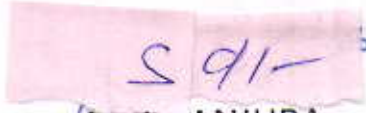
- iii) A statement of the actual number of flats which have been booked by the company hitherto along with the details of each of the persons who have booked the flats and actual amounts paid by them including advances, if any and the balance amount payable by them and the time span within which the company is required to construct the flats and deliver physical possession thereof as per the respective construction agreements entered into by each of the customers with the company ;
- iv) Details of Statutory liabilities if any required to be paid to the Government as well as amounts which are required to be paid for the purpose of acquisition of land by the company to the Government or statutory agencies;
- v) Details of wages to be paid to Workers and contract labourers dues if any, required to be paid by the company;
- vi) Details of any pending legal or other restraint proceedings pending against the assets of the company for loan taken, if any by the company
- vii) Statement of Liabilities to financial institutions and banks, if any and charges or encumbrances created, if any over the assets of the company

The Interim Administrator shall file an interim report in relation to the above within a period of three weeks from the date on which he is served with the certified copy of the order and await further or future directions. The parties to the lis, more particularly the respondents who claim to control the affairs of the 1st respondent company, shall co-operate with the Interim Administrator in furnishing all the particulars that may be required of them for the preparation of the interim report on the above terms as expeditiously as possible.

In the meanwhile the Bench Officer is directed to make a questionnaire with regard to the documents filed by respondent's side in compliance with our orders dated 19.09.2016 in relation inter alia, to the admitted signature of the 2nd petitioner with the disputed one, age of the documents, age of writing if any and age of signature. A sum of Rs.2500/- shall be deposited by the petitioners and respondents to defray the cost of sending and bringing the documents produced for forensic examination through a Special Messenger to Central Forensic Science Laboratory, Chandigarh within a period of 2 weeks hereof.

List the matter on 30.11.2016 for the Interim Report by the Interim Administrator and for the report of CFSL, Chandigarh.


R.VARADHARAJAN
Member-Judicial


M.K.HANJURA
Member-Judicial