NATIONAL COMPANY LAW TRIBUNAL: ALLAHABAD

COMPANY PETITION 58 (ND) 2015 TP 10A/397-398/16CLB

(OLD COMPANY PETITION 58 (ND) OF 2015)

TUESDAY THE 27thDAY OF SEPTEMBER, 2016

CORAM: MR. V.S.R. AVADHANI & MR. HARIHAR P. CHATURVEDI, MEMBERS (JUDICIAL)

Between

1. Pradeep Kumar Goil S/o Late Shri Sohan Lal, 164, Richpal Puri, Ghaziabad – 201001 (UP)
2. Vibhu Seth S/o Raj Kumar Seth, D 348, Shastri Nagar, Meerut-250005 (UP)

.... Petitioners

AND

1. M/s Sarveshwar Infrastructure Pvt Ltd, Having its Regd Office at D.348, Shastri Nagar, Meerut-250004
2. Manish Kumar Gupta, H. No. 135, Krishan Puri, Meerut-250002
3. Suresh Chand, 135, Kishan Puri, Meerut-250002
4. Avnish Gupta, 135-Kishan Puri near Baghpat Gate, Meerut-250002
5. Neeraj Tyagi, C-12, Adarsh Nagar, Meerut-250002
6. Pradeep Kumar Sarin, Krish Nagar Roshanapur Dorali, Meerut-250002
7. Anuj Kumar Goel, 346/222, Chahshore, near Jama Maszid, Old Tehsil, Meerut – 250002
8. Bank of Baroda, Sadar Bazar Branch 1090, Foota Road, Near Bara Tooti Chowk, Deolhi-110006
9. Deepak Raj Goel, C-12, Raj Makala Enclave, Delhi Road, Meerut-250002

...Respondents

Advocates for Petitioners: *Shri Rajnish Sinha,*
Advocates for Respondents: *Shri Nawal Kishore Mishra*

Claim: Petition under Sections 397, 398, 402 and 403 of the Companies Act 1956 for the reliefs of (1) To declare the appointment of Respondents No. 5, 6 and 7 as unlawful, illegal, null and void and (2) To declare the creation of mortgage of the property and fixed assets of the Respondent No. 1 Company to secure term loan and credit limit aggregating to Rs. 5 Crores , 85 lakhs in favour of *M/s Shambhu Steels & Forgings Pvt Ltd* as unlawful, illegal and null and void; and (3) to pass such other/further orders/directions which the Board may deem fit and proper in the facts and circumstances of the present case.

This matter came before us finally on 06.09.2016 for hearing in the presence of *Shri Rajnish Sinha*, Advocate for the Petitioners and of *Mr. Nawal Kishore Mishra*, Advocate for Respondents 2, 3 and 4, and none appeared for the Respondents 1, 5 to 8, and 9 and having stood over till this day for consideration, this Bench delivers the following

ORDER

(Per Mr. V. S. R. Avadhani, Member (Judicial)

1. The Company Petition is filed under sections 397, 398, 402 and 403 of the Companies Act, 1956 (hereafter called the 'Act') for (1) to declare the appointment of Respondents 5 to 7 as directors as unlawful and, illegal, null and void; and (2) to declare, the creation of mortgage of the property and fixed assets of the Respondent No. 1 Company to secure term loan and credit limit of Rs. 5 crores 85 lakhs sanctioned by Bank of Baroda – the 8th Respondent, in favour of *M/s Shambhu Steels & Forgings Pvt Ltd* as unlawful, illegal, null and void and (3) any other reliefs.

Originally the petition was filed before the Company Law Board, New Delhi and consequent upon constitution of this Tribunal under the Companies Act, 2013, the matter has been transferred to this Bench and re-numbered.

2. The petitioners 1, 2 and the Respondent No.2 to 4 are the Directors of the Respondent No. 1 Company holding requisite percentage of equity shares. The main shove of the Petitioners' claim is, without convening any board meeting on 20.03.2015, the Respondents 2 to 4 have illegally inducted Respondents 5 to 7 as 'Directors' of the Company and that the meeting notice and agenda are not served on the petitioners who are directors of the Company, and that the appointment is consequently illegal.

Secondly, it has been contended that the petitioners came to know in the first week of March 2015 that on 5.3.2015 the Bank of Baroda (Respondent No. 8) has served a notice under Sec. 13 (2) of the SARFAESI Act, 2002 wherefrom it came to their notice that the Respondents 2 to 4 representing the Company have given 100% corporate guarantee by creating mortgage on the immovable property of the Company on 21.03. 2013 to secure a loan/credit limit of Rs. 5, 95, 76, 764 to *M/s Shambhu Steel & Forgings Pvt Ltd*, and that the Respondents are never authorised to create such mortgage and the

alleged Board Meeting of the Company held on 08.03.2013 wherein the authorisation to create mortgage is said to have been given to the Respondents 2 to 4, is unfounded and no such meeting was ever convened and the mortgage created by the Respondents is without authority. In substance, the petitioners claim that the above narrated acts of the respondents would amount to oppression and mismanagement prejudicial to the interests of the company and the share-holders, particularly the petitioners.

3. In reply to the above material assertions, the Respondents 2 to 4 filed a detailed reply. The Bank of Baroda-the Respondent No. 8 is duly served but did not enter appearance. In the reply statement, the Respondents 2 to 4 have totally denied every allegation made in the petition however without making any specific plea. They have affirmed that the mortgage of the properties of the Company was approved in the 'duly convened Board meeting' on 08.03.2013 at its Registered Office and necessary filing was also done with the Registrar of Companies which was hosted on the website. In para 6 of the reply, it is maintained that the petitioners have knowledge of the Board Resolution dated 8.3.2013 and they cannot plead want of knowledge because the statutory Form-8 has been duly filed with the ROC and is available for inspection on the website of Ministry of Corporate Affairs. They further contend that there is no mismanagement in this regard.

So far as the induction of Respondents 5 to 7 as Directors in the company is concerned, it is pleaded in Paragraph 3.8 of the reply statement that the appointment of Respondents 5 to 7 is as per the procedure and norms under the Companies Act and rules thereunder as evidenced by Form DIR-12 filed by the Company with the ROC.

In the rejoinder filed by the petitioners, the assertions made in the reply statement are denied.

4. We have heard the arguments of both sides. Ld. Counsels for both the parties have taken us through the copies of documents and the pleadings. The Ld. Counsel for petitioner has also placed reliance on certain judicial precedents to sustain his contention that from the non-production of attendance registers, and original minutes of the alleged Board Meetings dated 8.3.2013 (relating to authorising the company to create mortgage) as also of 20.3.2015 (relating to appointment of Respondents 4 to 7 as Directors) an adverse inference has to be drawn against the respondents. He has further canvassed that mere displaying the statutory form in the website of MCA does not absolve the respondents from proving, as a matter of fact, that the petitioners were given notice of meeting and they have attended and subscribed their

signatures to the minutes of the meeting. We will make reference to those points in detail at the appropriate places in the order.

5. The following points arise for our consideration:

(1) Whether the creation of mortgage on the assets of the company in favour of Bank of Baroda to secure a loan and credit limit to M/s Shambhu Steel and Forgings Pvt Ltd is not legal? If so whether the said transaction is liable to be declared as illegal, null and void?
(2) Whether the appointment of Respondents 5 to 7 as Directors is not legal? If so, whether their appointment is liable to be set aside.

6. Point No. 1: The Company is owning three items of immovable property, namely 2110 Sq. Mtrs, 1740 Sq. mtrs and 2490 sq. mtrs of land in Khasra No 1210 (items purchased on 19.7.2007,01.05.2008, and 30.12.2009 respectively) and there is no dispute on this fact. There cannot be any dispute that unless Board authorises the Directors to create mortgage, it cannot be done.

The Ld. Counsel raised the following points to challenge validity of this mortgage. (i) It is not authorised by the meeting of the Board; (ii) The Company is not making any profits and instead of raising funds for the financial strength of the Company there is no justification to mortgage property of the company to raise loan for a third party company which is not related to the Respondent No. 1 company in any manner and on the other hand it is belonging to the Respondent No.2. That would therefore amount to siphoning off the funds and mismanagement.

We will first examine whether any Board Meeting as such was held on 8.3.2013 and whether it is attended by the petitioners. The Petitioners in para 6.16 of the petition have specifically asserted that-

> "No Board meeting of the Respondent No.1 was ever conducted or held approving the mortgaging of property to M/s Shambhu Steel & Forgings" and that "said illegal and unlawful act has been done by the Respondents unilaterally without due knowledge, consent and concurrence of the petitioners who are not only the Directors but major shareholders in the company".

Sec. 286 of the Companies Act, 1956 provides that

> ***Sec. 286-Notice of Meetings:***
>
> (1) Notice of every meeting of the Board of directors of a company shall be given in writing to every director for the time being in and at his usual address in India to every other director.
>
> (2) Every officer of the company whose duty it is to give notice as aforesaid and who fails to do so shall be punishable with fine which may extend to one thousand rupees.

The law is well settled that notice to the Directors under the above provision is a condition precedent for the validity of meeting. As correctly relied upon by the Ld Counsel for the Petitioners, *Shri Parmeshwari Prasad Gupta vs. The Union of India*[1] is the leading authority on this subject. When it was argued before the Apex Court that the meeting of the Board of Directors was not properly convened for want of notice of the meeting to all the Directors, the Court observed thus:

> "Now, it cannot be disputed that notice to all the Directors of a meeting of the Board of Directors was essential for the validity of any resolution passed at the meeting and that as, admittedly, no notice was given to Mr. Khaitan, one of the Directors of the company, the resolution passed terminating the services of the appellant was invalid."

The Supreme Court in the above case held, as a consequence of invalidity of the meeting, the resolution becomes inoperative.

7. In the light of the above position of law, the question however is whether a notice was not sent to the petitioners, who are admittedly Directors, for the meeting said to have been held on 8.3.2013. We find from the material on record, there is hardly any evidence to prop-up the contention of the respondent that in fact notice was given. In the reply statement, it is only stated that the meeting was held as per rules. There is no specific denial to the assertion of the petitioner that notice of meeting was not issued to him.

The following documents are produced by the Respondents to substantiate their contention that the meeting was convened according to statutory requirements. They are: (i) true copy of the Resolutions passed at the meeting on 8.3.2015, certified by the Chairman. (ii) Copy of Form No. 8 uploaded on the MCA website showing that resolution was passed at the meeting to create a charge. These two documents will at best, testify the fact that a meeting of Board of Directors was held on 8.3.2015 but they do not indicate service of notice to all the Directors including the petitioners, as postulated by Sec. 286 of the Act.

The Ld. Counsel for the petitioners pointed out various cynical features from the above documents to heave suspicion on the factum of convening of the meeting.. As rightly highlighted by Ld. Counsel, Form - 8 shows the Directors' resolution number is not given and is left blank. It is signed by the Director who is authorised by a resolution dated 9.3.2015, a day after the meeting was held and a decision was taken to create mortgage on assets of the company in favour Bank for securing loan to *M/s Shambhu Steel & Forgings*. Though there is force in the argument of the Ld. Counsel for petitioner, we are of the considered view that it is not germane to go into

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[1](1973) 2 SCC 543

the niceties of the fact whether meeting was held or not but confine ourselves to explore into the issue whether notice of meeting was served on the petitioners.

When an explicit stand is taken by the petitioners that no notice of meeting was served on them, the burden is on the respondents to prove that notice was sent as required by Sec. 286 of the Companies Act, 1956. Evidently it is the respondents who are in possession of the relevant records like dispatch register, attendance register of the meeting dated 8.3.2015. None of them are filed before the Tribunal. When the 'true copy' of the minutes of the meeting is filed and it shows that Shri *Pradeep Kumar Goil* and Shri *Vibhu Seth*, who are petitioners 1 and 2 herein, are present in the meeting, the Respondents ought to have filed the original resolution book as evidence to prove that the petitioners were present in the meeting and subscribed to the minutes thereof, so that the Bench will infer that notice was served on them.

As rightly contended by the Ld. Counsel for the petitioners even though the burden of proof does not lie on the respondents and even if the petitioners did not call upon the respondents to produce the original documents, withholding of the material documents by the respondents to establish their case would compel the Bench to draw adverse inference against non-production of the material documents. To this extent, it is useful to refer the law laid down by the Apex Court in *Gopal Krishnaji vs. Mohd Haji Latif*[2]. Adding to it, there is no explanation from the respondents why the originals are not produced to rebut the specific plea of the petitioners about non service of notice of meeting of Board of Directors.

Therefore, we are satisfied to record a finding by drawing adverse inference, that the respondents failed to establish that notice of meeting was served on the Directors, the petitioners herein, for the meeting held on 8.3.20156. This finding of fact next takes us to decide whether the mortgage created by the respondents is void. In view of the law laid down by *Shri Parmeshwari Prasad Gupta (Supra),* the resolution is undoubtedly void. Yet, we have certain other important reservation in reaching that conclusion. That reservation is in the form of legal impediment created by section 402 of the Companies Act, 1956.

Sec. 402 reads thus:

> ***Sec. 402-Powers of tribunal under Section 397 or 398***: Without prejudice to the generality of the powers of the Tribunal under section 397 or 398, any order under either section may provide for-
>
> (a) The regulation of the conduct of the company's affairs in future'

[2]AIR 1968 SC 1413=(1968) 3 SCR 1110

(b) The purchase of the shares or interests of any members of the company by other members thereof or by the company;
(c) In the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;'
(d) The termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand; and any of the following persons, on the other, namely: - (i) the managing director, (ii) any other director....(v) the manager,

Upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in all the circumstances of the case;

(e) The termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;
(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under section 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;
(g) any other matter for which in the opinion of the tribunal it is just and equitable that provision should be made.

Clause (f) of the above provision is noteworthy. The Tribunal is competent to set aside any transfer of property of the company, provided the application under sec. 397 or 398 of the Act is made within three months from the date of the transaction and further that transfer would amount to a fraudulent transfer, had it been in case of an individual.

8. The petitioners' contention is that the mortgage on the property of company for securing loan of a third party is a fraudulent act and it amounts to oppression and mismanagement and therefore, it would fall within the hypothesis contained in the second limb of clause (f) of Sec. 402 because, had it been a case of individual, it would be an act of insolvency. The mortgage was executed by the Company at the behest of Respondents 2 to 7 on 21.03.2013 as can be seen Column 10 of Form No. 8 filed by the respondent and also from paragraph 6.12 of the petition. The Company petition under sec. 397 and 398 is filed on 23.07.2015. It is manifestly beyond three months as mandated by sec. 402 (f) of the Act. Clause (f) did not place any rider on the commencement of three months' period except saying 'within three months before the date of the application'; particularly, it is not stated in the clause that three months' time will also commence, in the alternative, from the date of knowledge of the alleged fraudulent transaction. Even if that facet of 'knowledge' is also considered, it does not

save the relief from being affected by the provision in this case because, in paragraph 6.11 it is stated by the petitioners-

> "That around 1st week of March, 2015, the Petitioner No. 1 was informed by the Petitioner No. 2 that a notice had been received from Bank of Baroda under Sec. 13 (2) of SARFAESI Act, 20012 dated 5.3.2015 at Registered office of the Company. The petitioner was shocked to read the contents of the said notice that the Directors of the Respondent NO. Company had been shown as guarantor for avail8ing the credit facility sanctioned to M/s Shambhu Steel & Forgings Pvt Ltd for an aggregate credit limit of...'

It is further averred in paragraph 6.12 thus:

> "The petitioners were further shocked to know that the equitable mortgage had been created on 21.3.2013 on the land of the Respondent No. 1 Company of the properties located at ...."

The above passages from the Company Petition would make obvious that the petitioners came to know about the mortgage fraudulently created even in first week of March 2015. That must be invariably before 7.3.2015 and after 5.3.2015 whereas the petition was presented as above said on 23.07,2015 which is also ahead of three months postulated by clause (f) of sec. 402 of the Act.

Our view is fortified from yet another fact borne on record. After having knowledge of notice issued by the Bank to the Company, the petitioners gave reply notice to the Ban on 29.4.2015, (vide paragraph 6.14); the tenor of that reply notice, as per the above paragraph, is that there was no meeting of the company on 8.3.2013 authorizing the Respondents No. 2 and 3 to mortgage the property of the Company to the extent of 100% corporate guarantee. However, the copy of the notice is not placed before this Tribunal. What made us more surprising is the fact that the Company filed a Writ Petition in the High Court challenging the notice issued by the Bank. In paragraph 21, the petitioners stated-

> "The petitioners declare that the Petitioners have not filed any application, writ petition or suit before any other court covering the matters in respect of which the present petition has been filed. The Respondent No. 1 Company through the petitioner No. 1 had filed a Writ petition against the Bank of Baroda in High Court of Judicature at Allahabad in 2015 which has been dismissed. However, the said writ petition has no bearing on the allegations of the present petition."

The copy of that Writ petition and the order of the High Court are not filed before us. What seems to be important from the above circumstance is the Company filed the Writ through the Petitioner No. 1. For filing a Writ

petition on behalf of the Company, the petitioner No. 1 must have been authorised by the Board. If there is such authorisation given by the Board, the meeting should have been attended by the Chairman and other directors of the Company, including the Respondents 2 to 7.

Therefore, it is obviously, the Petitioners and Respondents 2 to 7 have a common stand as against the notice issued by the Bank under the provisions of SARFAESI Act, 20012. To that extent during March, 2015 and thereafter till filing of Writ Petition in the High Court, there was no conflict of interest among the Directors, including petitioners and the Respondents 2 to 7. The conflict has cropped up only after dismissal of the Writ Petition by the High Court of Allahabad. It is an admitted fact that Bank has approached the Debt Recovery Tribunal and the proceedings are pending there. We therefore, are constrained to infer that this Tribunal's jurisdiction is invoked by the parties under section 397 and 398 of the Act to foil the proceedings pending before the Debt Recovery Tribunal.

This Tribunal for the aforesaid reasons, find that it cannot be declared as such that the mortgage of the Company's property in favour of Bank of Baroda, the 8th Respondent herein, was unlawful, illegal, null and void, as claimed by the petitioners. We place on record that our observations, if any, would not stand in the way of the Debt Recovery Tribunal to decide the validity of mortgage, if raised before it, in accordance with law.

It is startling to note, the Bank of Baroda (R8) did not chose to enter appearance to reveal its stand and contest this matter. If this Tribunal declares that the mortgage is void, then, we are sure; the Bank may face difficulty in realising the debt due to it by enforcing the 100% corporate guarantee furnished by the first Respondent Company. With a view to protect the interest of the Bank which has invested its public funds in the transaction, we direct the Registry of this Tribunal to mark copy of this order to the General Manager of the Bank of Baroda for information and to examine the reasons why the Bank has not taken interest to protect the interest of the Bank and the public funds advanced by it on the strength of the Corporate Guarantee furnished by the First Respondent Company, by putting forth its case in this matter.

It is suggested to the Respondent No. 8 Bank to take initiative to pursue the Company to hold Annual General Meeting and get ratification for the authorisation given to the Directors to create mortgage over the assets of the Company towards corporate guarantee. We are alive to the fact that there is conflict among the directors and therefore, it is necessary to place this subject in the agenda before the AGM.

With those observations, Point No. 1 is answered against the petitioners.

9. POINT NO. 2: There is no dispute that Respondents 5 to 7 are appointed as 'Directors' in the Board meeting dated 20.3.2015. But the quarrel is as to the legitimacy of resolution taken in that meeting, because (i) notice of meeting was not served on the petitioner-directors; and (ii) that appointment of Directors can be done only in a general meeting and the Board can appoint only 'additional directors'.

On the first ground, similar to the discussion made by us in answer to point No. 1, the original resolution, attendance registers containing the signatures of the petitioners, or the proof of despatch of notices to the petitioners, are not filed and for that reason, adverse inference has to be drawn. Where a shareholder complains of lack of service of notice of an EGM, the burden of proof lies on the majority to prove that the service of notice was effected in accordance with law, in the absence of which the minority shareholders are entitled to obtain relief from oppression under sec. 397 of the Act. (Vide *Re Palak Kumar Mondal vs. Satyabrata Jana)*[3] In this regard also, we adopt the same approach as was adopted in our answer to Point No. 1. This is on factual side of the issue. On legal side also, we find ample force and justification in the arguments of the Ld. Counsel for the petitioners.

The Companies Act has provided provisions for the appointment of Directors and Additional Directors. Sec. 255 provides for appointment of directors and proportion of those who are to retire by rotation. It is at every annual general meeting. Sec. 256 deals with ascertainment of Directors retiring by rotation and filling of vacancies. This filling up of vacancy shall be in the annual general meeting of the company. Sec. 258 provides a right to the Company to increase or reduce the number of Directors. This right has to be exercised in the annual general meeting only. Sec. 260 then deals with the appointment of 'additional directors'. This provision reads:

> **Sec. 260- Additional Directors:** Nothing in sections 255, 258, 259 shall affect any power conferred on the Board of Directors by the articles to appoint additional directors:
>
> Provided that such additional directors shall hold office only up to the date of the next annual general meeting of the company;
>
> Provided further that the number of the Directors and additional directors together shall not exceed the maximum strength fixed for the Board by the Articles

[3] (2003) 115 Comp Cas 481 (CLB)

The letters of appointment issued to the Respondents 5 to 7 are in pages 364, 365 and 366 of the Petitioners' paper book and these letters are not disputed by the respondents. These documents show that the Respondents 5 to 7 are appointed as 'Directors' and not as 'Additional Directors'. In Form DIR-12 (page No. 352 of the Petitioners' paper Book) also shows that it is appointment of 'Director'. This is therefore clearly in defiance of Sec. 260 of the Act, in as much of the Board of Directors has no power and authority to appoint Directors. It is not the case of the Respondents that the Respondents 5 to 7 are appointed as Additional Directors and later appointed as Directors in the annual general meeting of members. In view of the precedent reported in *Varshaben S Trivedi vs. Shree Sadgun Switchgears Pvt Ltd*[4] we hold that the appointment of Respondents 5 to 7 as Directors of the Company is unauthorised, and against the provisions of law and thus, is liable to be set aside.

Point No. 2 is answered in favour of the petitioners.

Result: The Company petition is allowed partly to the effect of declaring the appointment of Respondents 5 to 7 as Directors of the Company in the meeting of the Board dated 20.03.2015 is illegal and it is set aside. The petition is partly dismissed so far as the creation of mortgage by the Respondents over the assets of the First Respondent Company to secure a loan/credit facility to an extent of Rs.5, 95, 76, 764. Both parties shall bear their respective costs of the proceedings.

Dictated to the Shorthand writer, typed by her, corrected and pronounced by us on this 27th day of September, 2016.

27.09.2016

Shri V.S.R. AVADHANI, MEMBER (JUDICIAL)

Per Shri Harihar P. Chaturvedi, Member (Judicial):

27/09/2016

Shri HARIHAR P. CHATURVEDI MEMBER (JUDICIAL)

27TH DAY OF SEPTEMBER, 2016

[4](2015) 188 CompCas 485 (CLB)