

NATIONAL COMPANY LAW TRIBUNAL: ALLAHABAD BENCH

Company Petition NO. 76/2002

Dated Thursday , the 10th Day of November, 2016

Quorum: Mr. V.S.R. Avadhani & Mr. H. P. Chaturvedi, Members-Judicial

IN THE MATTER OF:

Shri Arvind Mohan Johari & ors.....Petitioners

Versus

Carlton Hotels Pvt.& Ors. Respondents

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

1. When the Company Petition is listed for final hearing, *Mr. A.M Johari*, the first petitioner in-person raised certain preliminary objections that because the respondents 2 to 4 have ceased to be directors of the Board they can no more represent the first respondent company. We have heard both sides and have perused written summary submitted by both sides, besides considering relevant material available on record.
2. The petitioners' protest was based on the import of Sections 164 and Section 167 of Companies Act, 2013. *Mr. Johari* contends that the Respondents 2 to 4 have committed default in filing annual returns, viz., Audited Balance Sheet, Profit and Loss Accounts, Form 32, and Form 23(b), subsequent to the year 2012 and therefore they ceased to be directors of the Board and they cannot be appointed as directors by holding meeting and they are not eligible for re-appointment. Therefore, it was contended that, they cannot represent company.
3. *Mr. Johari* placed reliance on report of the Companies Law Committee (Feb 2016) and the Judgement of Supreme Court *Union of India and Anr. Vs. Deoki Nandan Aggarwal*¹ to buttress his contention that the court cannot enlarge the scope of provision of law or re-write or recast or reframe legislation to make up deficiency. His argument was, when the provision of law indicates that the respondents have acquired disqualification; court cannot allow them to represent the company in the further proceedings of the matter.
4. *Mr. Uday Chandani* Learned Counsel for the Respondents filed counter affidavit and brought to our notice the fact that non-bailable warrants are pending against *Mr. Johari* besides the pendency of other cases. We are not referring to those facts, as they are not relevant in the present context.

¹ 1992 AIR 96, 1991 SCR (3) 873

Short point for decision is whether the Respondents 2 to 4 are not competent to represent the company.

5. According to Section 167(1) (a) of Companies Act, 2013 the office of a Director shall become vacant in case he incurs any of the disqualifications specified in section 164. Section 164 (2) has listed out various contingencies under which disqualification will accrue to Director. For ready reference, subsection (2) of Sec. 164 is extracted below.

164. Disqualifications for appointment of director.

(1) xxxxxxxx

(2) No person who is or has been a director of a company which—

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

(3) xxxxxxxx

Mr. Uday Chandni Ld. counsel for respondents submits that because of technical snag in the portal of MCA, annual returns could not be uploaded. He filed certain correspondence to that effect. We accept for a moment that the documents/annual returns mentioned by *Mr. Johari* are not filed with the Ministry of Corporate Affairs by the Directors, (Respondents 2 to 4) after the year 2012; and as per the import of Section 164, there was automatic accrual of disqualification.

6. Section 164(2) (a) of the Act provides that those directors who have acquired disqualification shall not be entitled for re-appointment. If we accept the contention of *Mr. Johari* hypothetically, the immediate question would be that who will represent the company in the further proceedings before the Tribunal. It may be noted that unlike in Civil Suits, Companies Act 1956 or Companies Act 2013 or CLB Regulations 1991 or The National Company Law Tribunal Rules 2016, did not contain any provision as to who should be the parties to a Company Petition, analogous to Order I of Civil Procedure Code, 1908.

It takes us to examine the question whether a Company shall be added as necessary party to the Company Petition wherein the reliefs claimed are under Sections 397 and 398 of the Companies Act, 1956. It merits comprehending both the sections for the purpose of this analysis.

Section 397: Application to Tribunal for relief in cases of oppression:(1)

Any member of a company who complains that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the court is of opinion –

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up,

-the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

Section 398: Application to Tribunal for relief in cases of mismanagement: (1) Any members of a company who complain -

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or

(b) that a material change not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company has taken place in the management or control of the company, whether by an alteration in its Board of directors, or manager or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company;

-may apply to the Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Tribunal is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Tribunal may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

7. An evocative reading of Sections 397, 398 would bring in the conclusion that a Company need not be a party to the proceeding initiated under those provisions; and all that the tribunal will grant only against the directors in their individual capacity where the reliefs claimed are against the Directors or other persons/members, who are said to be culpable of committing acts of oppression and mismanagement. These acts in question cannot be ascribed to the Company, a juristic personality, but are endorsed to the Directors, who are managing the affairs of the Company. A reading of the Company Petition demonstrates in several terms that the real targets of the attack of the petitioners are the three opposite parties- the Respondents 2 to 4, who according to the petitioners, have functioned in capacity of Directors, contrary to the provisions of the Act prejudicial to the interest of the members of the company. The petitioners also allege that the three opposite parties are defrauding the company, misappropriating funds, embezzling money and other acts of mismanagement.




8. In addition to the absence of any indication in the form of Sections 397 and 398 to insist the presence of the Company as a party to the Petition, the Form No. I under Regulation 13, 14 and 42A of the Company Law Board Regulations, 1991 also make it very clear that the Company, whose affairs are conducted in a questioned manner, need not be a party to the petition. The Form I in the title part reads:

"Before the Company Law Board...Principal Bench/Regional Bench,
Bombay/Calcutta/Madras/New Delhi.

In the matter of the Companies Act, 1956 Section...or (where applicable) the Monopolies and Restrict Trade Practices Act, 1969, Section 2A or (where applicable) the Reserve bank of India Act, 1934, section 45QAS and in the matter of (State the name and registered office address of the Company)

(State the name and address of the petitioner) or (where applicable)

AB (Petitioner/s)

Versus

CD (Respondent/s)

Details of the petition:

1. Particulars of the Company, whether petitioner or not
2. 2. Particulars of the petitioners....
3. Particulars of the respondent(s) (need not be stated where company is the respondent)
4. Xxxxxx"

Section 241 of the Companies Act, 2013 falling in Chapter XVI under the heading "Prevention of oppression and mismanagement" is comparable to sec. 397 and 398 of the 1956 Act by pith and substance. The Application under sec. 241 shall be in Form NCLT-I read with Form 4, as per National Company Law Tribunal Rules, 2016. These statutory Forms as well did not indicate that the Company shall be shown as party to the proceedings under sec. 241 except showing in the general heading for proceedings, the name of the Company against the column "in the matter of..."

9. The above pro-formats do not indicate that the Company shall be shown invariably as Petitioner or Respondent in all the Company Petitions. There are certain proceedings relating to affairs of the company in relation to the management, like the proceedings under sections 397 and 398. There are certain other proceedings in the Companies Act or other legislations where the acts of the company themselves are called in question. For example, Sec. 58AA of the Act, 1956 relating to payment of deposits and default committed by the 'Company'; and, on the petition by the small depositors under sub-section (3) of Sec. 58AA, the Tribunal may pass appropriate order against the 'company'. Similarly under Sec. 117B of the Act, 1956, where a debenture trustee comes to the conclusion that the assets of the company are insufficient

or, are likely to become insufficient to discharge the principal amount as and when it becomes due, the debenture trustee may file a petition before the Central Government and the Central Government may, after hearing the company and any other person interested in the matter, by an order, impose such restrictions on the incurring of any further liabilities as the Central Government thinks necessary in the interests of holders of the debentures.



10. It is pertinent to note that Form I is intended not only for the petitions under Sections 397 and 398 of the Act but also to the petitions under sections 58AA, 117B of the Act, where the Company itself is required to be shown as party. We have referred to this Form only because the Company Petition was filed under that Form.

11. For that reason, keeping in view the scope and compass of sections 397 and 398 of the Act, and also in view of the nature of allegations made in the Company Petition and also examining the question from the perspective of the reliefs claimed, we find that the Company as such need not be a party to the Company Petition and the necessary parties are only those members who are responsible for conducting the affairs of the company in a way prejudicial to the interests of the members. But in practice, almost in all the Company Petitions, the Company is impleaded as respondent, may be for the reason that its presence on the record would facilitate convenient production of relevant records. By that, it cannot be assumed that the Company is a necessary party to the petition. At best, it has to be treated as a pro-forma party and no harm or prejudice is ensued to the Company as such, even if it is not properly represented in the present proceedings.

12. If respondents 2 to 4 have acquired the incapacity of representing the company, and petitioners who filed the lis against the Directors and also against the company showing it as pro-forma respondent, are equally not entitled to represent the company, because law does not envisage a situation of petitioner representing the respondent, then the survival or continuation of Company Petition itself will be doubtful, if nobody is entitled to represent the company in the proceedings. The petitioner in-person was unable to explain, if not respondent who is the other competent person to represent the company. The Cause Title of Company Petition did not show anybody representing company.

13. Because the reliefs in Company Petition are directed against the Respondents 2 to 4 only, and because the records and assets of the company are continuing in the custody of Respondent 2 to 4 till date, for limited purpose of representation of facts relating to the Company and for production of relevant records of the company, the respondents 2 to 4 are entitled to represent the Company till a fresh Board is constituted.

14. Therefore, the objections are overruled. We have noticed from the Record of Proceedings till date that the parties are delaying the final hearing of the Company Petition for one reason or the other, resulting in the matter pending for the last several years. The Bench is recording its displeasure over



the lukewarm conduct of the parties and we make it clear that such conduct is no more tolerable.

List it on 21.11.2016 for final hearing. Both sides shall file synopsis of arguments by 17.11.2016.

List on 21.11.2016

V.S.R. AVADHANI, MEMBER-JUDICIAL

H.P. CHATURVEDI, MEMBER-JUDICIAL

10/11/20/6

Dated 10th November,2016