

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

IA 133/17 in TP 22/16 and C.P.54/2010

Under Section 397/398 of Companies Act, 2013

Order delivered on. 17th January 2018

IN THE MATTER OF KIRTHI D. SHAH & OTHERS

VS

M/s. DELUXE ROADLINES PRIVATE LIMITED & 3 OTHERS.

Coram: Hon'ble Shri RatakondaMurali, Member (Judicial)

Hon'ble Shri Ashok Kumar Mishra, Member (Technical)

BETWEEN:

1.Kirti D Shah S/o.DhanjiDharmaji

Aged 62 years, R/a.No.420,10th cross,
17th main, L.P.Nagar II Phase,
Bengaluru – 560 078.

2.TarunD.Dharmshi S/o.DhanjiDharmaji

Aged 59 years, R/a.No.601, 52 Swastik Society
Joy Apartment, 4th Road, JVPD Scheme, Juhu,
Ville Parle(W), Mumbai-400056.

3.Kalpana T. Dharmaji

W/o.Tarun D.Dharmshi

R/a.No.601, 52 Swastik Society
Joy Apartment, 4th Road, JVPD Scheme, Juhu,
Ville Parle (W), Mumbai-400056.

4.VirenK.Dharmshi S/o. Kirti Shah

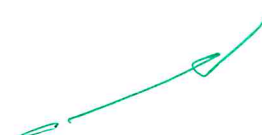
Aged about 39 years, R/a.No.420,10th cross,
17th main, L.P.Nagar II Phase,
Bengaluru – 560 078.

5.Jyothi K Dharamshi D/o.Kirti Shah

Aged Major, R/a.No.420,10th cross,
17th main, L.P.Nagar II Phase,
Bengaluru – 560 078.

6. JathinTarunDharmshi S/o. Tarun Dharamshi,

Aged 35 years, R/a.No.601, 52 Swastik Society



Joy Apartment, 4th Road, JVPD Scheme, Juhu,
Ville Parle(W), Mumbai-400056. ... Applicants/Petitioners.

AND:

1. M/s. Deluxe Road lines Private Limited,

A company Registered under Companies Act
Having its Registered Office at No.79,
4th Cross, Narasimharaja Road,
Kumbaragudi Road, Bangalore.

2. Khushalchand D.Shah S/o.Dhanji Dharamshi;

Aged 65 years; R/a.No. 8908, 10th cross; 22nd main,
J.P.Nagar II Phase, Bangalore-78.

3. Rahul K Dharamshi, S/o. Khushalchand D.Shah

Aged 43 years; R/a.No. 8908, 10th cross,
22nd main, J.P.Nagar II Phase,
Bangalore-78.

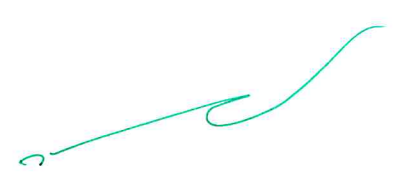
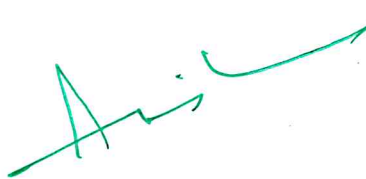
4. Mehul K. Dharmamshi, S/o. Khushalchand D.Shah

Aged 40 years; R/a.No. 8908, 10th cross,
22nd main, J.P.Nagar II Phase,
Bangalore-78. Opponents/Respondents.

Parties Present: 1. Mr. Deshpande, Advocate for M/s. Udayashankar Associates,
For petitioners.

ORDER ON I.A.NO.133/2017

Counsel for petitioners has filed I.A. No. 133/17 under Rule 11 of National Company Law Tribunal Rules, 2016, praying to allow the application by recalling the order dated 5.8.2015 and hear the Company Petition No. 54/2010 on merits and for grant of other further reliefs as this Tribunal deems fit and proper under the circumstances of the case for the following reasons:



Originally the Company Petition was filed before the Company Law Board under section 397 and 398 of Companies Act, 1956. Consequent upon the establishment of National Company Law Tribunal, Bengaluru Bench, Bengaluru, and consequent upon abolition of Company Law Board, C.P. No.54/10 was transferred from Company Law Board to this Tribunal and it was renumbered as T.P. No.22/2016. Accordingly this matter is periodically listed before this Hon'ble Tribunal. At the time of hearing Counsel appearing for Respondent brought to the notice about the order passed by Company Law Board(for brevity CLB) dated 5.8.2015 wherein adjourning the case sine die and contended that, unless this order is recalled or modified, the Tribunal cannot proceed further in the matter.

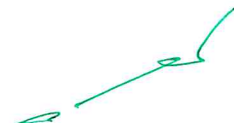
Hence, the Petitioner filed the present application under Rule 11 of National Company Law Tribunal for recalling the order dated 5.8.2015 and to hear Company Petition No.54/2010.

The averments made by the applicants in the Application are:

- a. That the Order dated 5.8.2015 was not passed on merits and is not a speaking order.
- b. That the order was passed without any arguments or hearing from both sides and as such the principle of audi alteram partem is violated.
- c. That there is no findings on the basis of which the Hon'ble Judge came to such a conclusion.
- d. That the Company Law Board has not abided to the order of the High Court wherein it was held both proceedings under Section 433 and u/s. 397 and 398 are separate and distinct.
- e. That the CLB was bound by the findings of the High Court of Karnataka in O.S.A No 1/2011 since it was made clear that proceedings under section 433(f) under Companies Act, 1956 for Winding up and Section 397 and 398 under Companies Act, 1956 for Oppression & Mismanagement are separate and distinct proceedings which can run parallel to each other was not taken into account in spite of it being a court superior to the Company Law Board.

The averments made by the Respondent in his reply dated 09-11-2017 are as follows:

1. The order dated 5.8.2015 of the CLB is on merits and a speaking order, though the order might be a short order. It clearly conveys the well settled provision of law that when the matter is seized by the Higher Court, the Tribunal Forum which is subordinate to the higher Court cannot proceed with the matter and has to wait for the orders to be pronounced by the Higher Court. The correctness of this proposition of law laid down by the Company Law Board was well accepted by the Petitioner and that is the reason why the Petitioners did not file any application for review or recalling of the order before Company Law Board.
2. It is incorrect to contend that the order was passed without any arguments or hearing for both the sides. The Company Law Board apart from being informed that a winding up Petition before the High Court of Karnataka has been filed during the pendency of this Petition. The Company Law Board has passed the order in the presence of both the parties. If the Petitioner being really aggrieved of the impugned Order nothing prevented him from filing an appeal against the said order or taking up any other remedial measures.
3. The contention of the Petitioner that the Company Law Board has not disclosed the basis for coming to such a conclusion is totally opposed to the facts of the case. The basis is, in fact the Petitioner has filed a winding up petition before the High Court of Karnataka during the pendency of this proceeding and the pendency before the Higher Court only. The contention that the Company Law Board is not guided by the orders of High Court of Karnataka is again false and misleading and opposed to the facts of the case this is because the Original Side Appeal was filed against the order of the learned single judge in Co.P.No.149/2011 and not against the impugned order which was filed against the order of the single judge in Co.P.No.149/2011 and

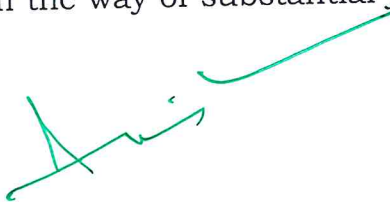
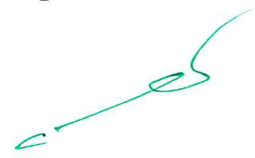


not against the impugned order herein which was passed on 5.8.2015 by the CLB.

4. The order in OSA 1/2012 was passed on 21.1.2015 itself but, the impugned order was passed by the CLB on 5.8.2015 only. The petitioner did not chosen to bring to the notice of the Company Law Board about the order passed in OSA 1/2012. Further, the CLB has passed the order knowing fully well that it is perfectly lawful for the Higher Court to proceed to dispose of the matter before it. Though a similar issue is pending between the same parties before the Lower Court and passed the order.

5. It is submitted that the pith and substance of the winding up petition, and the present proceedings filed by the Petitioners are one and the same. It is another matter that the contents of such petition in some cases may vary. The Petitioner has not contended in the winding up Petition that the substratum of the company has been wiped out and it is not in the interest of the public for permitting the company to carry out the business. Then the ground of winding up petition and the present petition could very well different but in the instant case of Oppression and Mismanagement is the only ground urged in both the petition, therefore it is submitted that two parallel petitions on the same cause of action i.e., Oppression and Mismanagement cannot be allowed to be continued. In that event this Hon'ble Tribunal being subordinate forum to High Court. Hence, this Court is prohibited from the proceeding with the matter till the disposal of the winding up Petition.

The counsel for the applicant in his arguments submitted the following points for consideration by the bench.

- i. That the dispute between the Petitioners and the Respondents would need to reach conclusively and impugned order by Company Law Board has come in the way of substantial justice to the parties being delayed since the
- 
- 

Petition is pending with the Company Law Board from 22.2.2010 as per the impugned order.

ii. That the adjournment granted sine die by the Company Law Board is prejudicial to the interest of the Applicants and is in grave violation of the principles of natural justice of the Applicants.

iii. That the inherent powers vested in the National Company Law Board is vast and the Tribunal is superior in comparison with the Company Law Tribunal and therefore this tribunal has the powers to review/re calling the non-speaking order which has been passed by mistake by the CLB and placed the reliance on the decision passed by the Hon'ble High Court of Jammu and Kahmir in the matter of A.K.Puri and others Vs. Devi Dass Gopal Kishen Ltd. And others [reported in AIR 1995 J&K].

Upon hearing both the parties and after considering the materials available on record the following points arise for consideration.

1. Whether the order dated 5.8.2015 passed by the CLB deserved to be recalled.
2. Whether the order passed by the Hon'ble High Court of Karnataka in Co.P.No. 149/2011 prohibits this Tribunal for passing the order.

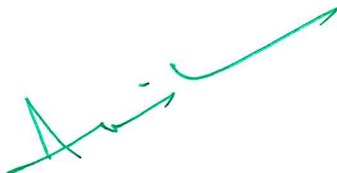
We answer the points in the following manner for the reasons set out below:

Point No. 1 : In the affirmative.

Point No. 2 : In the Negative.

The order passed by the CLB on 5.8.2015 reads as follows:

“ The petitioner filed winding up petition before the High Court of Karnataka and the same is pending. In view of the winding petition filed by the petitioner herein, this CP cannot be taken up for the reasons that if the winding up of the company is



ordered, the present CP will not survive in view of winding up of the company. Accordingly, the matter is adjourned sine die."

Hence, it is not a reasoned and speaking order. Apart from that, the CLB is not aware of the subsequent filing of OSA, before the Division Bench of the Hon'ble High Court of Karnataka and orders passed thereon. Hence, at that juncture; the order passed by the CLB may be correct.

Further, the proceedings under section 433 and under section 397-398 are separate and distinct as per the reported decision in the matter of A.K.Puri and others Vs. Devi Dass Gopal Kishen Ltd. And others [reported in AIR 1995 J&K].

Further, in view of the Notification passed by the Government of India, the CLB's are abolished and the matters pending are transferred to the National Company Law Tribunals i.e., virtually, the powers of CLB have been entrusted to the this Tribunal. Hence, this Tribunal has powers to review/recall the order passed by the CLB.

In view of the above reasons, the I.A.No.133/2017 filed by the applicants deserves to be allowed.

Accordingly, the I.A.No.133/2017 is allowed and the order dated 5.8.2015 passed by the CLB is recalled.

List the main matter for hearing on 08.02.2018.


(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL


(RATAKONDA MURALI)
MEMBER, JUDICIAL

17.1.18