

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH, CHENNAI.**

Arguments heard on 05.04.2017

Orders passed on 07.06.2017

T.C.P.No.113 of 2016
(C.P.No.23 of 2013)

(Under Sections 397, 398, 402, 403 and other applicable provisions of
the Companies Act, 1956)

Rojer Mathew P

Vs

M/s.P.T.Mathai Construction Company Pvt Ltd.& 5 Ors.

Petitioner rep. by : Counsel Ms.V.Gowri for M/s.Ramani & Shankar

Respds 1 to 3 rep by : Counsel Ms.Srivarshini for PCS Mr.V.Mahesh
Respd 4 rep by : Counsel Ms.Manjula Devi for KSR & Co.

CORUM

ANANTHA PADMANABHA SWAMY & CH MOHD SHARIEF TARIQ,
MEMBERS (JUDICIAL)

ORDER

CH MOHD SHARIEF TARIQ, MEMBER (JUDICIAL) :- (ORAL)

1. The company petition No.23 of 2013 was filed under Sections 397, 398, 402, 403 and other applicable provisions of the Companies Act, 1956 against the 1st Respondent company viz. M/s.P.T.Mathai Construction Company Private Limited and 5 others before the CLB, that stood transfer to NCLT and renumbered as TCP 113 of 2016.


The petitioner and Respondent-3 are brothers and Respondent-2 is their father. The company is a closely held, which came to be incorporated on 15.12.2003 having its registered Office at KV-29, Parambalinagar, Ernakulam, Cochin. The authorised capital of the company is Rs.5 crores divided into 50,00,000 equity shares of Rs.10/- each. The issued, subscribed and paid up share capital of the company is Rs.2,50,00,000/- divided into 25,00,000 equity shares of Rs.10/- each. The petitioner holds 11,62,500 equity share out of 25,00,000 shares of Rs.10/- each, constituting 47.5% of the paid up share capital of the company.

2. The petitioner is the promoter and Director of 1st Respondent company. The object of the company is to construct and carryout contract works of construction and the matters related thereto. The petitioner, R2, R3 and the mother of the petitioner are shown as the promoters of the company in the Memorandum and Articles of Association and have been named as first Directors of the company to hold office for life. It has been stated by the petitioner that his mother being housewife is not taking any active part in the management of the affairs of the company and she is not made a party to the proceedings. The petitioner and 3rd Respondent each hold 47.5% shares and the 2nd Respondent with his wife (mother of


petitioner) holds the balance 5% shares in the company. The petitioner claims that when the company was promoted, it was envisaged that each Director (Petitioner, R2 and R3) and projects under them should, for all purposes, be managed and administered as separate cost/profit centres. So, the operations in the company were divided among three functioning Directors, viz. the petitioner, R2 and R3 based on the work each one contracted on behalf of the company. In other words, each Director was to look after his projects independently and was to be completely accountable for the work contracted by him on behalf of the company including in respect of execution and closure in all aspects of such projects. If two Directors have contracted any project, then for such projects there remained a cost centre administered by the said two Directors and to facilitate the implementation of this arrangements. The monies of the company which came into the Master Account of the company was transferred from time to time to three individual current accounts again in the name of the company but operated only by three respective Directors through sub-accounts. The money required for carrying out individual work falling within the scope of individual Director was transferred from the master account to the sub account from where individual Director will administer the sub-account vis-à-vis projects falling within his scope. The Director

within whose scope the project fallen used to prepare various reports including the work-in-progress, financial statements, etc. and consolidate for circulation to the company record. In other words, each Director has been functioning as individual cost and profit centres and individual cost/profit centre would be must to arrive at the consolidated figures of the company.

3. It is also averred in the company petition that by successful execution of the Government projects, the company earned a very good reputation in the market and becoming a force to reckon with and was amazed by any other company in terms of its track record in the State of Kerala. So, in the normal course of business, the company had a Overdraft facility from South Indian Bank Limited (Respondent-4) and the same was renewed from time to time and in relation to monies drawn from the Overdraft A/c also, the monies were transferred from time to time to the sub-accounts and realisation transferred back to the Master Account to repay the Overdraft amounts for which the petitioner, R2 and R3 along with other members of the family have created charge on their properties with South Indian Bank Limited (R4) as stated under Para 5 of the company petition.


4. At one point of time, the 3rd Respondent sought to secure the release of personal properties charged with the South Indian Bank Limited without the consent and knowledge of the petitioner, when there remained huge outstanding from the 3rd Respondent's projects/cost centre having 3rd sub-account to the Master Account and consequent arrears to the bankers in discharging the Overdraft liability. The petitioner addressed a letter dated 5.8.2010 to South Indian Bank Limited to object the release of the properties without the knowledge of the petitioner. Thereafter some issues arose between the petitioner and 3rd Respondent. It has been averred in the petition that the projects taken by the petitioner and 2nd Respondent substantially completed. However, in respect of projects undertaken by 3rd Respondent, there was gross mismanagement, siphoning off funds leading to projects not being completed and remaining at work-in-progress stage. In respect of time limits stipulated for completion of the projects, having been expired. The petitioner has given details of various projects wherein the projects were abandoned half way or the contracts were cancelled which created huge liability on the sub accounts of the 3rd Respondent, as he had overdrawn his sub account to the tune of Rs.16.48 crores as on 31.03.2012 and defaulted in completing several of the projects undertaken by him. The petitioner started to raise the issue about 

gross mismanagement in relation to the projects falling within the exclusive scope of 3rd Respondent that has created bitterness between the petitioner and the 3rd Respondent and for personal reasons 2nd respondent also started to take the side of 3rd Respondent and the efforts were not made to remedy the situation. But on the contrary, R2 and R3 started to sideline the petitioner from the company and the meetings between the parties completely stopped. The petitioner was not invited to any Board meeting or general meeting and was advised by the father (R2) not to come to the premises of the company.

5. The allegation that has been levelled by the petitioner against 3rd Respondent is that he started dealing with the properties mortgaged with the bank and effected sales therefor, with the intention of complicating security enforcement by the bank against collateral of 3rd Respondent with the bank. It has further been alleged by the petitioner that even at this stage, the 3rd Respondent was not looking at completion of the projects, accounting for monies realised from the projects, to the company and consequently to the bank and settling the Overdrafts but was siphoned out the funds and also defaulting in completing the projects. In these circumstances, the petitioner addressed series of letters in June 2, 2012 to the bankers 

and also R2 and R3 placing on record the objection of the petitioner to the conduct of the respondents. The petitioner alleges that R2 and R3 allowed the track record, reputation of R1 company to be used by third party and have sought to divert projects which were to be awarded to the company to 5th Respondent and thereby allowing the 5th Respondent (third party) to become a competitor to the company.

6. It has also been stated by the petitioner that 3rd Respondent is liable and responsible for making good the sum of Rs.16.45 crores plus interest overdrawn in his sub account to the company and consequently to the bank. According to the petitioner, the 3rd Respondent cannot seek to enforce the liability arising on account of short fall in his sub account and the company or on the petitioner, because the petitioner/company cannot be mulcted with liability arising due to mismanagement and siphoning off funds resorted to by 3rd Respondent from his sub account. In the premises, the counsel for petitioner inter alia pressed for the prayers as follows :-

(1) declare that Respondents 2 and 3 are not fit and proper persons to be in management of the affairs of 1st Respondent company and consequently direct their removal from the Board of Directors of the company ; 

(2) direct the 3rd Respondent to pay to the company the sum of Rs.16.45 crores with bank interest being the money overdrawn by the 3rd Respondent through Current Account No.2233 operated by the 3rd Respondent as a sub-account ;

(3) direct the 3rd Respondent to indemnify the company and the petitioner against any default in payment by the company to South Indian Bank and to Third parties/creditors of the company including in respect of dishonoured cheques, to the extent of short fall arising from monies overdrawn by the 3rd Respondent through Current Account No.2233 ;


(4) direct an enquiry into the acts of commission and omission by Respondents 2 and 3, including diversion of business of the Respondent company, quantify the damages caused thereby to the company, direct Respondents 2 and 3 to pay up such damages and surcharge the properties of Respondents 2 and 3 for realisation thereof.

7. The reply has been filed on behalf of the 1st Respondent company and R2, R3 & R5 have filed separate counters. The counter that has been filed by R1 company is a detailed one which seems to have been followed by rest of the answering respondents. The reply that has been filed on behalf of 1st Respondent company, *per*

inter alia, states that the company having Overdraft facility with South Indian Bank Limited, MG Road, Ernakulam, with a limit of Rs.17 crores originally, was increased from time to time. For the purpose of OD security of the directors' immovable properties were provided. As Directors have also furnished some of their properties as collateral security and they are jointly and severally liable, because the total profit or loss is the total profit or loss of the company. It has also been admitted that even assuming that because of any delegation the work is managed by the Directors separately, it is only for the purpose of execution of the work. The Directors are given remuneration by way of salary for the services rendered by them to the company and the total salary paid to the petitioner during the year ending 31.03.2011 was Rs.7.5 lakhs. It has also been admitted that in addition to the OD account, the company is also operating five other accounts with South Indian bank Ltd., MG Road, Ernakulam and the said accounts are accounted in the books of company from which it is clear that accounts are for and on behalf of the company and withdrawals from the said Accounts are accounted in the books of company, it cannot be considered as drawn by any of the Directors which could be confirmed from the books of accounts. It has also been averred in the counter filed on behalf of the 1st Respondent company that the petitioner being one of the Directors

has signed the Profit & Loss Account and the balance sheet till 31.03.2011 and did not raise any objection about the books of accounts or financial statements. It has also been averred that the company has filed returns and also Form 20AC, but the petitioner did not raise any objection against the accounts and never pointed out any irregularity in the management of the company. So, the allegations raised later on are only an afterthought and are baseless, false and vague. It has also been mentioned in the counter that the company is maintaining regular books of accounts, audited income tax returns, sales tax returns and annual returns that are filed with the ROC without demur and the petitioner signed the balance sheet, etc. In short, the allegations levelled by the petitioner against the answering respondents have been denied by explaining the reasons for delay of the projects and cancellation of contracts undertaken by 3rd Respondent. It is worthwhile to mention that under Para 40 and 41, it has been submitted on behalf of the 1st Respondent company that the petitioner has been tendering for contracts and competing with the 1st Respondent company in the bids and the petitioner was falsely claiming experience on the basis of a certificate issued by the Executive Engineer, PWD, Bridges Division, Ernakulam, purporting to certify that the petitioner has executed the construction of New Venduruthy Bridge which is absolutely incorrect because the said

work was executed by the company and the company alone is entitled to obtain experience certificate on that basis. It has been stated in the reply that the petitioner could not bid in his individual capacity when the company has decided to participate in the tender and the petitioner deliberately competed despite being aware fully of the company's participation and such act of the petitioner is grossly against the interest of the company besides being breach of fiduciary duties as a Director of the company. So, he has not come with clean hands and totally abdicated his responsibility and position as Director of the company.

8. The counter filed on behalf of 1st Respondent company also states that the petitioner has floated a company M/s.Rober Mathews and company and attempted to independent bids against 1st respondent company in contracts bids as a competitor. Therefore, any person or individual who comes without clean hands is not entitled to any remedy, it has been asserted in the counter. In relation to the contract with 5th Respondent, it has been stated that the same has already been concluded and cannot be interfered with. The counter filed on behalf of the 1st Respondent company also makes a mention that there is no OD so much so of Rs.16.45 crores by 3rd Respondent and even if there is any liability, the same is the 

liability of the company which is not the liability of any particular Director. In the premises, it has been averred in the counter that there is no deficiency whatsoever in the management. The petitioner has never been denied of any participation either in decision making or in the financial affairs and the company and its Directors are collectively responsible for the execution of the projects and the individual's role is purely supervisory. It has been prayed in the counter that the company petition did not disclose any cause of action and therefore, the petitioner is not legally entitled to any of the reliefs prayed for.

9. The rejoinder has been filed by the petitioner wherein the allegations levelled in counter statements have been denied except those stated under Paras 40, 41 and 42 of the reply filed on behalf of 1st Respondent company. The petitioner reiterated the allegations and contentions made in the petition. However, interestingly he has not given any reply to Para 40, 41 and 42 that contains the allegations against the petitioner for competing with the company in the contract bids. It is stated in the Rejoinder that the work that was awarded to Kerala State Construction Corporation Limited was undertaken by the petitioner as sub-contract from them and the petitioner gained experience as the contractor of the company in bridge construction *gu*

and it is this fact that was mentioned in the certificate of experience given to him. It has also been admitted by the petitioner in the rejoinder that there is no dispute about the internal arrangement, P&L A/c and balance sheet were signed by the petitioner till 31.03.2011. However, it has been asserted by the petitioner in the rejoinder that in the circumstances, R2 and R3 are to be surcharged and made accountable personally for discharging all the liabilities of the company relating to their sub accounts to the bank and other creditors. Consequently, the petitioner having faithfully executed the projects allotted to him without any mismanagement. Therefore, he claims to be protected from the debts of the creditors and bankers in relation to the losses suffered to the sub account of 3rd Respondent. In short, the petitioner specifically pleaded that from conception stage to final execution, projects within one Director's domain remained with the said Director and that there was no interference in taking up and managing the projects being regarded as separate cost/profit centres.


10. On perusal of the pleadings and the documents placed on record, the issues that arise for consideration are as follows ; *ju*

1) As to whether the acts of omission and commission of R2 and R3 constitutes the acts of oppression and mismanagement of the affairs of R1 company?

2) If so, Respondent-3 is not liable for the losses allegedly caused to R1 company by R2 and R3?

3) Reliefs ?

11. The petitioner has stated that the shareholders of the company have devised a mutual arrangement by which the petitioner, R2 and R3 will perform the work of construction as per the object of R1 company falling within the scope of each individual Director and the money was to be transferred from the Master Account to the Sub-account from where each individual Director will administer their respective sub-accounts, for purpose of the Project falling within their scope. In other words, each Director function as an individual cost and profit centre. It is on record that while the petitioner and R2 have completed their projects successfully, R3 was not in a position to complete the projects allotted to him. Not only this, some of the work contracts were cancelled; because the projects being handled by R3 could not progress as per the time line specified. R3 has also overdrawn from his sub-account to the tune of Rs.16.48 crores as on 31.03.2012, defaulted in completing several projects

which has caused losses to the company. The plea of the petitioner is that he performed well and completed the projects allotted to him and brought profit to 1st Respondent company whereas huge losses have been incurred by 1st Respondent company on account of the projects undertaken by R3. Therefore, the petitioner could not be made liable for the losses suffered by 1st Respondent company due to failure of R3 to commission the projects handled by him, within the stipulated time. R2 has also not taken corrective measures in order to overcome the losses suffered by 1st Respondent company. The petitioner has legitimate expectations that he will be benefitted in relation to the business of the company, as he has completed his projects well in time. Therefore, in the facts and circumstances of the case, the petitioner cannot be made liable for the losses incurred by 1st Respondent on account of mismanagement and overdrawn money to the tune of crores of rupees. Thus, R3 is responsible for the losses suffered by 1st Respondent company. The collateral security given by the petitioner to the bank cannot be charged for such losses caused to 1st Respondent company. The acts of omission and commission of R2 and R3 have caused losses to 1st Respondent company which are against the legitimate expectations of the petitioner. The same may not be oppressive in nature, but constitutes mismanagement of 1st Respondent company. In the light of the 

discussion, issue No.1 partly proved against R2 and R3. Since we have concluded that issue No.1 is partly proved against R2 and R3, the petitioner is not liable for the losses that have been suffered by R1 company, due to the acts of omission and commission of R3, and R2 failed to initiate corrective measures. Therefore, it is held that R3 alone shall be liable to pay 1st Respondent company a sum of Rs.16.48 crores with bank interest being the money overdrawn by him through current A/c No.2233 operated by R3 as sub-account.

12. For the reasons stated above, R3 is hereby removed from the Directorship of the company and the petitioner is appointed as Director-cum-Managing Director of the company who shall perform his duties diligently to run the day to day affairs of the company smoothly along with R2 who is directed to render all assistance and support to the newly appointed Director-cum-Managing Director. Further, 1st Respondent company shall not allow third party to use the goodwill of the company for the benefit of third party. The petitioner is also forbidden to compete with 1st Respondent company in any manner, so that the company could grow in future. Accordingly, the petition is disposed of. There is no order as to costs.


(K. ANANTHA PADMANABHA SWAMY)
(MEMBER (JUDICIAL))


(CH. MOHD. SHARIEF TARIQ)
(MEMBER (JUDICIAL))

vp