

OD-12

IA NO. GA/2/2022

In CS/211/2019

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

ORIGINAL SIDE

MUKESH JAISWAL

Vs.

PHOOL CHAND GUPTA & ORS.

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Heard On: 23.11.2022

Order On: 05.12.2022

Appearance:

Mr. Swatarup Banerjee, Adv.
Mr. Sourav Sengupta, Adv.
Mr. Aman Baid, Adv.
...for the petitioner

Mr. Reegobroto Kr. Mitra, Adv.
Mr. Sayantak Das, Adv.
...for the defendant no. 1

ORDER

The question raised by the defendant in the instant application is that the dispute and the consequential prayer made by the plaintiff in instant suit falls within the exclusive jurisdiction of the National Company Law Tribunal and suit is not maintainable.

The plaintiff filed the suit being CS No. 211 of 2019 prayed for following reliefs :

“(a) Declaration that the recordings of the names of the defendant nos. 2 and 3 as holders of 55,000 and 1,15,000 shares of and in the defendant no. 4 respectively in the books and the register of the defendant no. 4 are illegal, fraudulent, null and void;

(b) Decree for delivery up and cancellation of the share certificates issued in favour of the defendant nos. 2 and 3 by the defendant no. 4 in respect of the shares mentioned in prayer (a) above;

(c) Decree for perpetual injunction restraining the defendant nos. 1 to 3 and each one of them by themselves or through their respective servants, agents or assigns from exercising any ownership right in respect of the said shares mentioned in paragraph (a) above in any manner whatsoever;

(d) Decree for perpetual injunction restraining the defendant nos. 1 to 3 and each one of them either by themselves or through their respective servants, agents or assigns from exercising any voting right in respect of the said shares in any manner whatsoever;.”

Learned Counsel for the defendant by referring Section 9 of the Code of Civil Procedure submits that this Court has no jurisdiction as the suit filed by the plaintiff is impliedly barred in terms of the provisions of Companies Act, 2013.

Learned counsel for the defendant has referred Section 430 of the Companies, Act, 2013 and submits that this Court has no jurisdiction to entertain the suit filed by the plaintiff.

Learned counsel for the defendant has also relied upon Section 56(4), 58(3) and Section 59 read with Rule 70(5)(a) of the National Company Law Tribunal Rule, 2016 and submits that in prayer (a) and (b) of the plaint relates to declaring the recording the names of the defendant nos. 2 and 3 in the books and register of the defendant no. 4 as illegal, fraudulent, null and void and for delivery of cancellation of share certificate issued in favour of defendant no. 2 and 3 by the defendant no. 4.

Counsel for the defendant relied upon Section 447 and 449 of the Companies Act, 2013 and submits that Tribunal had jurisdiction to decide the fraud as claimed by the plaintiff.

Counsel for the defendant relied upon the following judgments :

- i. (2019) 18 SCC 569 (Shashi Prakash Khemka & Ors. -versus- NEPC Micon Ltd. & Ors.)*
- ii. (2018) 7 SCC 709 (Adesh Kaur -versus- Eicher Motors Limited & Ors).*

Learned Counsel for the plaintiff submits that Section 430, 56(4), 58(3) and Section 59 and Rule 70 (5) (a) National Company Law Tribunal Rules, 2016 are not applicable in the instant suit and the Tribunal cannot decide the fraud as the plaintiff has taken specific ground of fraud.

Learned counsel for the plaintiff relied upon Section 65 of the Insolvency and Bankruptcy Code, 2016 and submits that if any person initiates the insolvency resolution process or liquidation proceedings fraudulently, the Adjudicating Authority may impose penalty upon such person but cannot decide the fraudulent committed by the person for recording the names of shareholder.

Learned Counsel for the plaintiff submits that only after if this Court held that the defendants have committed fraud then only the plaintiff can approach the Tribunal for transfer of shares.

Learned Counsel for plaintiff submits that as per Rule 70 (5) of the National Company Law Tribunal Rule, 2016 first qualify the provisions of Section 58 and 59 of the Companies Act, 2013 by declaring title.

Learned Counsel for the plaintiff submits that the as per the provisions of Section 447 of the Companies Act, 2013, first finding is to be arrived with regard to the fraud and the Tribunal is holding summary procedure, cannot decide the fraud. He further submits that Section 449 is with regard to any person intentionally gives false evidence and in the present case is not of the false evidence.

Learned Counsel for the plaintiff submits that when the plaintiff has filed the suit, the plaintiff has also filed an application for grant of injunction and this Court has granted injunction. The defendant has challenged the said order of injunction in appeal but the same was dismissed for default.

Learned Counsel for the plaintiff relied upon the following judgments :

- i. *(2017) 203 Com Cases 574 (Mad) (N. Ramji – versus- Ashwath Narayan Ramji & Ors).*
- ii. *(2020) 13 SCC 308 (Embassy Property Developments Private Limited – versus- State of Karnatka & Ors.).*

Heard the Learned Counsel for the respective parties, perused the pleadings and the judgment relied by the respective parties.

The plaintiff has pleaded fraud in paragraph 28 of the plaint which reads as follows :

“28. The plaintiff states that the defendant No. 1 while acting as the Auditor of the defendant no. 4 had committed fraud on late Shambhu Nath Shaw and his family as well as on the defendant no. 4 by illegally causing the defendant no. 4 to issue shares in favour of companies in which he had substantial interest and control. The particulars of fraud so perpetrated by the defendant nos. 1 to 3 and particularly by the defendant no. 1 which the plaintiff could ascertain after 14th August, 2018 are, inter alia, as follows:

- (a) The defendant no. 1 actively connected the fact that the defendant nos. 2 and 3 are companies owned and controlled by him though the defendant no. 1 had knowledge of the said fact.*
- (b) The defendant no. 1 suggested as a fact that the defendant nos. 2 and 3 were independent companies, which were not true and which the defendant no. 1 did not believe to be true.*
- (c) The defendant no. 1 caused the defendant no. 4 to issue shares in favour of the defendant nos. 2 and 3 with an intention to deceive.*
- (d) The defendant no. 1 knowing that as an auditor he was not entitled to acquire shares of and in the defendant no. 4 directly in his name actively concealed that the defendant nos. 2 and 3 were companies controlled and managed by him.*
- (e) The defendant no. 1 while causing the defendant no. 4 to issue shares in favour of the defendant nos. 2 and 3 omitted to indicate*

that the said defendant nos. 2 and 3 were companies owned and controlled by him to deceive the lawful shareholders of the defendant no. 4.

The plaintiff is unable to give full particulars of the fraud so perpetrated by the defendant nos. 1 to 3 and particularly by the defendant no. 1 until full discovery is made by the said defendants.”

In the case of Adesh Kaur (Supra), the Hon'ble Supreme Court held that :

“2. *It appears that sometime in 2012, another Ms Adesh Kaur, who is a resident of Mumbai impersonated the appellant and requested Respondent 2 to change the address from Punjab to Mumbai. It is not disputed before us that the standard procedure to be followed was not followed by Respondent 2, and the aforesaid change of address was despite the requirements of Circular No. 1 dated 9-5-2001. The impersonator then went on to execute an indemnity bond by forging the appellant's signature for issue of duplicate share certificates of the 903 equity shares mentioned above. This being done, on 28-9-2012, Respondent 2 issued duplicate certificates in favour of the impersonator who, in turn, on 10-12-2012, transferred the said shares to one Vikas Tara Singh, Respondent 8, resident of Malad, Mumbai by using the forged signature of the appellant.*

3. *At this stage, it is important to note that Respondent 8, though served in the present proceedings, has not appeared either before the Tribunal or before the Appellate Tribunal and has not appeared before us. The appellant, sometime in 2014, came to know through the Company Secretary of Respondent 1 that duplicate share certificates had been given to somebody else who had subsequently transferred them to a third party. As soon as she became aware of the fraud that was perpetrated on her, the appellant requested the Company to issue revalidated fresh share certificates for the said 903 equity shares on 17-9-2014. Since this was not done, despite repeated reminders for the same, a company petition was filed on 31-7-2015 before the Company Law Board, which was then taken up under the amended Act by the National Company Law Tribunal.*

4. *In a significant order that was passed by NCLT on 20-3-2017 [Adesh Kaur v. Eicher Motors Ltd., 2017 SCC OnLine NCLT 668] , NCLT recorded that it was acknowledged, both by the Company as well as by SEBI, that procedural aspects and due care were not adhered to in the process of issuance of duplicate shares, as otherwise such fraud would easily have been unearthed. In the order passed by NCLT, NCLT adverted to the aforesaid facts and afforded relief to the appellant in the following terms:*

“The objection of Respondent 1 that the case in hand cannot be adjudicated by the Tribunal is a frivolous attempt to escape any liability and or grant relief to the petitioner. This Bench fails to understand why the petitioner should resort to a civil court in order to prove her title. Apart from her oral testimony and her original share certificates, there is little else to be adduced in evidence even in a civil suit. She has her original certificates in hand. The respondents are aware of the fraudulent acts perpetuated on her and have even initiated criminal proceedings. There is no reason for the petitioner to be deprived of her assets for the outcome of the criminal investigation or wait for the criminal to be brought to book. Her documents and her entitlement are not denied to by the respondents. Under such circumstances, vague denial to escape any liability and to suggest that the petitioner initiates a civil suit is viewed as an attempt not to redress the grievance which has primarily arisen out of the fraud played by the employees of the respondent Company or their agents. Apart from guidelines of Respondent 3 that unequivocally make the respondent Company liable for the acts of their Register-cum-Share Transfer Agents, the law on the point is clear that the principals are liable for the acts of their agents.”

8. *We are of the view that the Tribunal was absolutely correct in not relegating the appellant to any further proceedings inasmuch as this is an open and shut case of fraud in which the appellant has been the victim, and Respondent 2, the perpetrator.*

10. *We are, therefore, of the view that the Appellate Tribunal in relegating the appellant to a further proceeding was not correct. We, therefore, set aside the Appellate Tribunal's order and reinstate that of the Tribunal dated 20-3-2017 [Adesh Kaur v. Eicher Motors Ltd., 2017 SCC OnLine NCLT 668] . It goes without saying that if Respondent 8 does not happen to be on the register at all, then there would be no difficulty whatsoever in restoring the appellant back to its original position. Even if Respondent 8 has been entered on the register, his name will have to be deleted in view of the fact that the transfer to him has been declared to be void in law.”*

In the case of Shashi Kumar Khemka & Ors. (Supra), the Hon'ble Supreme Court held that :

“430. Civil court not to have jurisdiction.—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.”

6. It is not in dispute that were a dispute to arise today, the civil suit remedy would be completely barred and the power would be vested with the National Company Law Tribunal (NCLT) under Section 59 of the said Act. We are conscious of the fact that in the present case, the cause of action has arisen at a stage prior to this enactment. However, we are of the view that relegating the parties to civil suit now would not be the appropriate remedy, especially considering the manner in which Section 430 of the Act is widely worded.

7. We are thus of the opinion that in view of the subsequent developments, the appropriate course of action would be to relegate the appellants to remedy before NCLT under the Companies Act, 2013. In view of the lapse of time, we permit the appellants to file a fresh petition within a maximum period of two months from today.”

In the case of N. Ramji (Supra), the Hon’ble Madras High Court held that :

“28. From the provisions of the Companies Act, 2013 and 1956, it is clear that the Tribunal or Board as the case may be can decide only the rectification of register of members with regard to shares and connected incidental issues. In the present suit, a reading of the averments in the plaint as well as the relief sought for by the first respondent shows that to decide the issue raised by the first respondent, the title to the shares in question has to be considered. The first respondent has not only prayed for rectification of register of members by substituting his name in the place of the petitioner and issue share certificates to him, but also prayed for permanent injunction restraining the petitioner from claiming any title over the shares in question. Whether the first respondent is entitled to relief of permanent injunction and also payment of dividends and bonus in respect of the shares can be decided only when the title to the shares are decided. Only if the first respondent proves by acceptable evidence that he is the owner of the shares in question and that the petitioner fraudulently in collusion with the officials of the second respondent got transferred the shares in his name due to estranged relationship between the petitioner and his wife, mother of the first respondent, the first respondent cannot succeed in the claim of the rectification of register of members of the second respondent. The petitioner has not stated that first respondent is

not the owner of shares at any point of time and that there was no fraudulent transfer in collusion with the officials of the second respondent. In this circumstance, the issue on title of shares is the main issue to be decided in the suit filed by the first respondent.”

In the case of Embassy Property Developments Private Limited (Supra), the Hon’ble Supreme Court held that :

“Question 2

47. *The second question that arises for our consideration is as to whether NCLT is competent to enquire into allegations of fraud, especially in the matter of the very initiation of CIRP.*

49. *In the light of the above averments, the Government of Karnataka thought fit to invoke the jurisdiction of the High Court under Article 226 without taking recourse to the statutory alternative remedy of appeal before the NCLAT. But the contention of the appellants herein is that allegations of fraud and collusion can also be inquired into by NCLT and NCLAT and that therefore the Government could not have bypassed the statutory remedy.*

50. *The objection of the appellants in this regard is well founded. Section 65 specifically deals with fraudulent or malicious initiation of proceedings. It reads as follows:*

“65. Fraudulent or malicious initiation of proceedings.—(1) *If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency or liquidation, as the case may be, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.*

(2) *If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.”*

51. *Even fraudulent tradings carried on by the corporate debtor during the insolvency resolution, can be inquired into by the adjudicating authority under Section 66. Section 69 makes an officer of the corporate debtor and the corporate debtor liable for punishment, for carrying on transactions with a view to defraud creditors. Therefore, NCLT is vested with the power to inquire into (i) fraudulent initiation of proceedings as well as (ii) fraudulent transactions. It is significant to note that Section 65(1)*

deals with a situation where CIRP is initiated fraudulently “for any purpose other than for the resolution of insolvency or liquidation”.

52. *Therefore, if, as contended by the Government of Karnataka, the CIRP had been initiated by one and the same person taking different avatars, not for the genuine purpose of resolution of insolvency or liquidation, but for the collateral purpose of cornering the mine and the mining lease, the same would fall squarely within the mischief addressed by Section 65(1). Therefore, it is clear that NCLT has jurisdiction to enquire into allegations of fraud. As a corollary, NCLAT will also have jurisdiction. Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in Section 61.*

Conclusion

53. *The upshot of the above discussion is that though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under the MMDR Act, 1957 and the Rules issued thereunder, especially when the disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the High Court was justified in entertaining the writ petition and we see no reason to interfere with the decision [State of Karnataka v. Tiffins Barytes Asbestos & Paints Ltd., 2019 SCC OnLine Kar 2463] of the High Court. Therefore, the appeals are dismissed. There will be no order as to costs.”*

Section 65 of the Insolvency and Bankruptcy Code 2016 reads as follows :

“65. Fraudulent or malicious initiation of proceedings. – (1) *If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.*

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

[(3) If any person initiates the pre-packaged insolvency resolution process –

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or

(c) with the intent to defraud any person,

the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.]”

The plaintiff has categorically pointed out the fraudulent act of the defendants in paragraph 28 of the plaint and the said fraudulent act is not committed while initiating proceeding before the NCLT. The plaintiff has also prayed for other relief with regard to perpetual injunction relates to the title of share of the plaintiff. Section 58 and 59 of the companies Act, 2013 deals with refusal by company to transfer of shares but in this case before transfer of share it is to be declared that the recording of share in the name of the defendants have been made fraudulently. The specific case of the plaintiff is fraud and the said fraud is to be adjudicated upon adducing evidence by both the parties before the Civil Court only. Section 65 of the Insolvency and Bankruptcy Code, 2016 has no manner of application in the instant case as the challenge is against issuance of shares by the auditor of a company in derogation of his fiduciary with the company and whether the said act of the auditor is in contravention of the provisions of Company Act, 2013 is on act of fraud or not is to be decided by the Civil Court. This court finds that the judgment relied by the plaintiff is distinguishable and the judgment relied by the defendants are squarely applicable in the instant case.

In view of the above, this Court finds that NCLT is not competent to enquire into the allegation of fraud specifically when the plaintiff has prayed for declaration of recording the names of defendant no. 2 and 3 as share holders in the books and the register of defendant no. 4 fraudulently and also prayed for perpetual injunction against the defendant nos.1 to 3. Accordingly, the suit filed by the plaintiff is maintainable.

G.A. No. 2 of 2022 is thus dismissed.

(KRISHNA RAO, J.)

p.d/