

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

COMPANY APPEAL (AT) NO.89 OF 2019

(ARISING OUT OF JUDGEMENT AND ORDER DATED 06.02.2019 PASSED BY THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH IN CP NO.4365/140(5)/MB/2018)

In the matter of:

Mukesh Maneklal Choksi,
101, Mickey's Heritage,
7th Road, TPS-III, above HDFC Bank,
Santacruz (East)
Mumbai 400055

Appellant

Vs

1. Union of India,
Ministry of Corporate Affairs,
Through Regional Director, (Western Region),
100, Everest, 5th Floor, Marine Drive,
Mumbai 400002

2. Zen Shaving Limited,
Anmol CHS-C Wing,
Flat No.1602, SV Road, Goregaon (West),
Mumbai 400062

Respondent

Mr. Nesar Ahmed, PCS, Mr. Rohit Chaudhary, Advocate for the appellant.
Mr. C. Balooni, Asstt. Director for R1.

JUDGEMENT
(17th FEBRUARY, 2020)

JUSTICE JARAT KUMAR JAIN, MEMBER (JUDICIAL)

The appellant, Mukesh Maneklal Choksi, filed this appeal against the order dated 06.02.2019 passed by National Company Law Tribunal, (in brief 'NCLT') in CP No.4365/140(5)/MB/2018.

2. The brief facts of this case are that M/s Zen Shaving Ltd, Respondent No.2 herein, incorporated on 07.03.1995 under the Companies Act, 1956. On

10.10.1996, Respondent No.2 company came out with initial public offer and issued prospectus to raise public funds. On 12.03.2014 the appellant was appointed statutory auditor of the Respondent No.2 company. The appellant issued auditor report for the financial year 2014-15 and 2015-16 on 5.9.2015 and 5.9.2016 respectively. On 20.3.2017 Respondent No.1 herein through Ministry of Corporate Affairs ordered inspection of Respondent No.2 company on the basis of complaint received from Jagdip H Vaishnav against Respondent No.2 company inter alia alleging syphoning of investors' money and also about irregularities in statutory compliances including non-listing of company with Pune Stock Exchange, non-issuance of financial statements after 1995. On 10.5.2018 the Inspecting Officers of Respondent No.1 submitted its inspection report wherein it was highlighted that many times notices were sent to Respondent No.2 company through post but postal articles were returned with endorsement "Left". On 13.8.2018 Inspecting Officer furnished supplementary inspection report to Respondent No.1.

3. Respondent No.1 through MCA addressed a letter to the Regional Director, Western Region and forwarded inspection report of Respondent No.2 company, with a direction to take action under Section 140(5) of the Companies Act, 2013 (hereinafter referred to as the "Act"). On the basis of the inspection report, Asstt. Registrar of Companies, Maharashtra, Mumbai filed a Special Company Case No.34 of 2018 before the City Civil & Sessions Court under Section 447 of the Act against the appellant for providing clean audit reports to Respondent No.2 company for the financial year 2014-15 and 2015-16. On 26.11.2018 Respondent No.1 through the office of Regional Company Appeal (AT) No.89/2019

Director, Western Region, filed Company Petition No.4365/140(5)/MB/2018 before the National Company Law Tribunal, Mumbai Bench (hereinafter referred to as NCLT) under Section 140(5) of the Act. On 3.1.2019 NCLT passed ad interim order whereby it was directed that the appellant shall cease to act as statutory auditor of Respondent No.2 company and further permitted Respondent No.1 to appoint an independent auditor for Respondent No.2 company.

4. After hearing the parties NCLT vide order dated 6.2.2019 directed that appellant shall not be eligible to be appointed as an Auditor of any company for a period of five years and also directed to refund the remuneration received by him during the period he acted as Auditor, back to the Respondent No.2 company. It is also directed that the auditor shall also be liable for action under Section 447 of the Act.

5. Being aggrieved with this order the appellant filed the present appeal.

6. Learned counsel for the appellant filed written submissions and submitted that Second proviso to sub-section (5) of Section 140(5) of the Act was enforced w.e.f. 1.6.2016. From this date the NCLT was conferred with the jurisdiction to exercise powers under Second Proviso to sub-section (5) of Section 140 of the Act. Therefore, the NCLT cannot invoke the jurisdiction for the offence relating to financial years 2014-15 and 2015-16. It is further submitted that above referred provision is a penal provision and cannot be invoked retrospectively. Article 20(1) of the Constitution provides that no person shall be convicted of any offence except for violation of law in force at the time of the commissioning of the act charged as an offence, nor be

subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

7. It is further submitted that the appellant was appointed as an Auditor of Respondent No.2 company for the financial year 2014-15 and 2015-16. During this period the company had not carried on any business activity. Previous auditor of the Respondent No.2 company i.e. SM Bhatt & Associates CAs (outgoing auditors) issued a letter dated 10.3.2014 to the appellant stating that they had certified balance sheets and Profit & Loss Account of the company for the year ending on 31st March, 2013 on the basis of information given to them that there were no business transactions during the year. They have also clarified that Respondent No.2 company was not carrying on any business since many years and no books of accounts were produced before them for the purpose of audit. After considering the fact that the previous auditor had also adopted the same process the appellant has prepared the audit report for the financial year 2014-15 and 2015-16.

8. It is also submitted that Inspecting Officer before recording appellant's statement has not provided the material documents, therefore, the appellant answered the questions as per the knowledge. Thus the reasonable opportunity has not been given to the appellant and the statement recorded by the Inspecting Officer cannot be used against the appellant.

9. Learned counsel for the appellant submits that Respondent No.1 except filing the inspection report has not placed on record any evidence to prove that the appellant directly or indirectly acted in a fraudulent manner or colluded in any fraud by or in relation to the company or its directors or its officers. The funds collected through initial public offer by the

promoters/directors have already been siphoned off by them and in the financial year 2014-15 and 2015-16 Respondent No.2 has not carried out any business. The NCLT without giving any finding in this regard punished the appellant which is a major punishment without evidence.

10. Learned counsel for the appellant further submits that NCLT before passing the order that the appellant would be ineligible to be appointed as an auditor of the company has not given reasonable opportunity to put up his defence and solely gives his findings on the report of Inspecting Officer. The appellant has not committed any act, omission or concealed any fact in any manner with intent to deceive or gain undue advantage from Respondent No.2 and its stakeholders.

11. Learned counsel for the appellant submits that due to financial hardship the appellant could not engage counsel and did not file a formal reply to the company petition. However, he has filed an affidavit dated 18.1.2019 with the Respondent No.1 stating that he accepted the interim order passed by NCLT. He did not expect that any further adverse order to be passed against him. The appellant being a senior citizen and is a sole bread earner for his family, hence taking sympathetic view impugned order be set aside.

12. Learned counsel for the Respondent No.1 has also filed the written submissions and submits that the appellant has accepted the interim order passed by the NCLT, hence on this ground alone appeal may be dismissed. Inspecting Officers conferred with the powers of Civil Court under Section 207(3) of the Act, therefore, during the inspection he has recorded the

statement of appellant and appellant admitted that he has not called for any books of accounts and statutory register from the company and not audited the books of accounts of the company. It was found during the inspection that the company has defaulted/siphoned off funds, in such a situation it was duty of the statutory auditor to point it out and highlight the frauds committed by the company and its directors. However, the appellant being a statutory auditor fails to do so.

13. It is also submitted that as per appellant he has received a letter from earlier statutory auditor that Respondent No.1 was not maintaining any books of accounts. However, such letter has not been brought to the notice of Inspecting Officer nor before the NCLT. This letter was produced before this Appellate Tribunal. At this stage the appellant may not be allowed to raise new submissions. The appellant has specifically admitted that the Respondent No.1 has not produced any accounts books and without the accounts books he has prepared the audit report and has given a conclusion report. It seems that he is actively colluded with the Management of the company in perpetrating frauds. The appellant has failed to discharge his duty as statutory auditor. The impugned order is well reasoned order. Hence the appeal may be dismissed.

14. Respondent No.2 company is unrepresented.

15. Having considered the submissions on behalf of the parties we have perused the record.

16. The findings of the NCLT is based on the report of Inspecting Officer, hence firstly we would like to refer the allegations raised in the complaint by

Mr. Jagdip H. Vaishnav and findings of Inspecting Officer in his report which are as under:-

- i) shares are not listed at Pune Stock Exchange.
- ii) Siphoning of investors money.
- iii) Company has not issued financial statement after 1995.
- iv) Company changes registered office frequently.
- v) No company representatives attends calls given by ROC Mumbai.
- vi) Investors are complaining about serious irregularities but do not get any response from regulators, investigating agency.

17. Pursuant to inspection, the Inspecting Officer has submitted an inspection report dated 10.5.2018 and supplementary inspection report dated 13.8.2018 wherein it is stated that:

1. *Many of the allegations raised by the complainant, Mr. Jagdip H. Vaishnav, are true due to the sheer fact that no registered office for the Respondent No.2 company, existed.*
2. *No books of accounts of the Respondent No.2 company were produced to the Inspecting Officer despite notices and summons being issued to the R2 company, its directors and statutory auditors.*
3. *The Director/Managing Director at the helm of affairs failed to respond to the notices issued by the Inspecting Officer.*
4. *The R2 company came out with Initial Public Offer(IPO) and issued prospectus to raise public funds on 10.10.1996. Thereafter the team of directors has completely changed. The Initial Promoters of the*

Company are not involved in the affairs of the Company after 29.09.2005. The R2 company is not listed on any stock exchange despite the assurances given in the Prospectus dated 10.10.1996.

- 5. The date or retirement of Shri Ketan A Gaglani, Managing Director who was involved in the day to day affairs of the Respondent No.2 company since 18.12.1995 (the company was incorporated on 07.03.1995) had retired on 29.09.2005.*
- 6. The present directors, who took over the affairs of the R2 company since 04.10.2014, are not traceable.*
- 7. The present directors of the R2 company are dummy/shadow directors of Mr. Arvind Goyal Babulal, the Chairman of the R2 company, who dodged his responsibilities to assist in the inspection.*
- 8. All the commonly known attributes of a shell company exist in the case of R2 company under inspection.*
- 9. Mr Arvind Goyal Babulal, the Chairman of the R2 company, regarding provisions of Section 2(60)(v) of the Companies Act, 2013, is the "officer in default."*
- 10. The actions of the company and its directors prove that all the allegations raised are true and correct."*

18. The Respondent company came up with an initial public offer vide prospectus dated 10.10.1996 with issue of 3955000 equity shares of Rs.10/- each as per aggregating Rs.39550000/-. As per the statement made in the prospectus the shares of Respondent Company were to be listed on Pune, Vadodara and Ahmedabad Stock Exchange. However, it has been noted by the Inspecting Officer that the company is not listed in any of the Stock

Exchange. In the report the details of funds collected and siphoned off has been mentioned. As per report before public issue loans and advances as on 31st March, 1996 amounting to Rs.33,14,592/- and post public issue the said amount is tremendously increased to Rs.3,41,04,407/- as on 31st March, 2016. The Respondent company has diverted funds to loans and advances. Apart from this the Respondent Company has used public issue proceeds to write off more than Rs.15.33 lakhs as expenses pertaining to capital issue, prospectus and registration fee/expenses etc.

19. It is clear that the directors of Respondent No.2 company have not spent public issue money for the purpose for which the public issue was made, have not met the promise made in the prospectus, have diverted the funds and thus the prospectus dated 10.10.1996 issued by the Respondent company contains false and misleading promises. In the report, it is also found that the earning per share basic/diluted for 31.3.2014, 31.3.2015 and 31.3.2016 is Rs.0.00055, company has enjoyed all the benefits given by the government for 12 years from the date of public issue and there is clear cut indication that the respondent company is heading for salvation.

20. It is clear that in the terms of provisions of Section 62(1) of the Companies Act, 1956 the persons who are authorised to issue or prospectus of the public/persons to subscribe for shares in/or debentures of the company shall be liable to pay compensation to every person who subscribes any shares in/or debentures of the company on the faith of prospectus for any loss or damage. It is also found that the company came out with Initial Public Offer and issued prospectus to raise public funds on 10.10.1996.

Thereafter the team of directors has completely changed. The initial promoters of the company are not involved in the affairs of the company subsequent to 29.9.2005 the directors who took over the affairs of the company since 4.10.2004 are not traceable. The present directors of the company are apparently dummy/shadow directors. Mr. Arvind Goyal Babu Lal, the chairman of the company who dodged his responsibility to assist in the inspection.

21. Thus it is apparent that Inspecting Officer could not trace out the directors who have actually defraud the shareholders and for last many years the company is not carrying out any business. In this background we have considered the submission of appellant. The appellant was appointed as an Auditor on 12.3.2014 and he has issued audit report for the financial year 2014-15 and 2015-16. During this period the company has not carried out any business activity. Previous auditor of the company i.e. SM Bhatt and Associates issued letter dated 10.3.2014 to the appellant stating that they have certified balance sheets and profit and loss account of the company for the year ending on 31.3.2013 on the basis of information given to them that there were no business transactions during the year. Appellant submitted that he adopted the same process and prepared the audit reports for the Financial Years 2014-15 and 2015-16. It is true that during the audit he has not called for any books of accounts and statutory register from the company. However, he has signed audit report of the company for the relevant period. Only on this ground it cannot be inferred that the appellant being an auditor acted in a fraudulent manner or abated or colluded in any fraud by or in

relation to the company or its directors. It is apparent from the report of the Inspecting Officer that the funds collected by IPO has already been siphoned off by the earlier directors and the directors who are looking to the affairs of the company till 2004 are not traceable.

22. We have carefully examined the balance sheets and financial statements for the financial year 2014-15 and 2015-16 which shows that the company has not carried out any business. We have also found that the respondent company has not filed any statements before the ROC since its incorporation. However, the ROC has not taken any action against the company and its directors. We have also seen that the directors have siphoned the money between 1996 to 2004. However, the inspection was ordered on 20th March, 2017 and the report submitted on 10.5.2018 and supplementary report on 13.8.2018 and the Inspecting Officer is unable to trace out real culprits i.e. the then directors.

23. Now we have considered the legal issue raised in this appeal is that NCLT has passed the order against the appellant under 2nd proviso to sub-Section (5) of 140 of the Act which came into force on 1.6.2016. However, the appellant issued report for the FY 2014-15 and 2015-16 i.e. prior to the provision came into force. Therefore, NCLT cannot invoke jurisdiction retrospectively.

24. The appellant was appointed on 12.3.2014 as statutory auditor of the Respondent No.2 company. The appellant issued audit report for the Financial Year 2014-15 and 2015-16 on 5.9.2015 and 05.09.2016 respectively. The appellant has issued the audit report for the FY 2015-16 on

5.9.2016 before that the 2nd proviso to sub-section (5) of Section 140 of the Act came into force with effect from 1.6.2016. Hence NCLT can exercise the powers in above referred provision.

25. We are of the view that the act of the appellant is certainly a negligent act but there is no material on record to infer that he has acted fraudulently and colluded with the directors of the company in relation to affairs of the company or he has misused his position as statutory auditor of the company.

26. We are of the considered view that the findings of the NCLT are not sustainable in law as well as in facts. Therefore, the appeal is hereby allowed and the impugned order is set aside. However, no order as to cost.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

New Delhi
Bm