

BEFORE THE COMPANY LAW BOARD, NORTHERN REGION BENCH, NEW DELHI

CA NO.18/2013
IN
CP NO.47(ND)2008
PRESENT: SHRI DHAN RAJ
HON'BLE MEMBER

IN THE MATTER OF SECTIONS 397, 398, 402 AND 403 READ WITH SECTION 237(b) AND 408 OF
THE COMPANIES ACT, 1956

AND

IN THE MATTER OF:

Shri Lalit Aggarwal & Anr.

.....Petitioners

VS.

M/s.Shree Bihari Forgings Pvt. Ltd.& Ors.

.....Respondents

PRESENT ON BEHALF OF THE PARTIES

1. Shri Sulaiman Mohd Khan, Advocate for Petitioner
2. Shri Jitenanya Sahoo, Advocate for Petitioner
3. Shri Gurmeet Singh, Advocate for Respondents

(APPLICATION UNDER REGULATION 44 OF THE COMPANY LAW BOARD REGULATIONS,1991
FOR NECESSARY DIRECTIONS)

ORDER

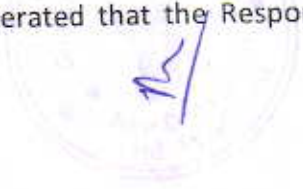
(Date of final hearing : 7th January, 2014)

In this case, the Petition has been by the Petitioners before this Hon'ble Board for alleged acts of oppression and mismanagement against the Respondents and the said Petition is pending for adjudication. In the meantime, the Petitioners filed a present Company Application for appointment of an Interim Administrator to administer the inflow and outflow of money from the Respondent No.1 Company. Precisely speaking, the Petitioners Advocate has submitted that vide Order dated 8.3.2013, this Hon'ble Board appointed M/s.Seema Naresh Bansal & Co., Chartered Accountants to act as an Auditor. However, the Petitioner challenged



the said Order dated 8.3.2013 before this Hon'ble High Court of Delhi and vide Order dated 13.5.2013 Hon'ble High Court modified the Order dated 8.3.,2013 of this Hon'ble Board to the extent that a comprehensive audit of the accounts of the Respondent No.1 Company be undertaken by the Auditor from the year 2007-08 upto 2012-13. The Petitioners Advocate has further submitted that after passing of the aforesaid Order dated 13.5.2013, the Applicants/Petitioners repeatedly approached the Chartered Accountants, M/s.Seema Naresh Bansal & Co. for compliance of the said Order dated 13.5.2013 but no response was received from the Chartered Accountants. However, on 28.5.2013, the Applicant received a letter dated 27.5.2013 addressed to the Hon'ble Member, Company Law Board, New Delhi with endorsement to the Applicant informing the Hon'ble Board that the Auditor will not be able to do a comprehensive audit of the accounts of the company for the relevant time because of his prior commitments/preoccupancy. Immediately thereafter, the Applicant approached this Hon'ble Board for further direction and vide Order dated 4.6.2013, this Hon'ble Board was pleased to dismiss the said application with the observation that the application is vague. However, on the second CA No.4(ND)-II/2013, this Hon'ble Board was pleased vide Order dated 11.6.2013 to appoint Dr.Pradeep Kumar Dhingra, Chartered Accountant, M/s.Pradeep Kumar Dhingra & Co. to act as an auditor as directed by the Hon'ble High Court of Delhi in Order dated 13.5.2013. Further, it has been submitted that several correspondences/attempts have been made to pursue the auditor to complete the audit of the books of accounts of the company. However, as mentioned in the CA, the auditor has taken up the audit but the audit work is yet to be completed. The Applicant Advocate has highlighted that as per Order dated 13.5.2013 of the Hon'ble High Court of Delhi, if for some reasons the time schedule of 8 weeks is not adhered to, it will be open for the parties to seek further interim directions from this Hon'ble Board including the appointment of an Administrator, if the circumstances so warrant. Further, it has been alleged that besides the non-completion of audit even after expiry of aforesaid time schedule given in the Order dated 13.5.2013, the Respondent No.2 along with others are continuously indulging in mass illegalities and misappropriation of funds of the Respondent No.1 Company which is not only prejudicial to the interest of the members, shareholders and applicant but also to the Respondent No.1 Company itself and hence, it is the need of the hour that an interim administrator be appointed to look into the affairs of the Respondent No.1 Company for the larger interest of the members, shareholders and the Respondent No.1 Company itself.

2. The Respondent Advocate has submitted the reply mentioning therein that the Order dated 13.5.2013 does not state that the Audit is to be done in presence of Petitioner No.1 and Respondent No.2. Further, it has been submitted that the Respondent No.1 had provided full cooperation and support for conducting a comprehensive Audit by the Chartered Accountant in compliance of the Order of this Hon'ble Board and Hon'ble High Court. In addition, it is reiterated that the Respondents are not responsible for the rejection/recusal/refusal by the

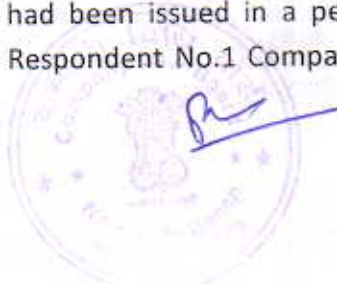


Chartered Accountants viz.M/s.Seema Naresh Bansal & Co., CAs to conduct the comprehensive Audit. Besides, it has been denied that the audit had to be conducted in the presence of Petitioner No.1 and Respondent No.2 because the Order dated 8.3.2013 stood modified in terms of Order dated 13.5.2013 passed by the Hon'ble High Court of Delhi. Over and above, it has also been mentioned that the son of Respondent No.2 only helped the said Chartered Accountant viz. Dr.Pradeep Kumar Dhingra by providing him with the necessary documents/details in compliance of the Order dated 11.6.2013 of this Hon'ble Board and Order dated 13.5.2013 of the Hon'ble High Court. The Respondent Advocate has also pointed out that the Petitioner has failed to point out the circumstances which warrant appointment of an Administrator. It has also been denied that the Respondent No.2 is indulging in mass illegalities and misappropriation of funds of Respondent No.1 Company.

3. In the rejoinder, the Petitioner Advocate has pointed out that despite the Order dated 8.5.2008 passed in CP No.15/2008 granting status quo in respect of fixed assets, shareholding and composition of Board of the Respondent No.1 Company, the Respondents illegally and willfully acted in contravention of the said status quo by appointing Respondent No.3, Mr. Ritesh Goil as Additional Director on the Board of the Respondent No.1 Company and further representing that Respondent No.3 was appointed pursuant to directions of the Hon'ble Board. Further, it has been alleged that the Respondent Nos. 2 to 5 in collusion and connivance with each other are indulging in the following illegal and malafide forgeries while representing them to be genuine which has caused grave oppression to the rights of the Petitioners:-

- (i) Forging of Balance Sheet and Profit and Loss Account for the year ending 31.3.2008 for obtaining loans from Bajaj Auto Finance Ltd., Indiabulls Financial Services Ltd., ABN Amro Bank, Kotak Mahindra Bank, Megama Finance, Standard Chartered Bank and Religare Fincap Ltd.
- (ii) Forged signatures of the Petitioner No.1 on the Account Opening Form and other relevant document for opening of bank account with Union Bank of India, Sales Tax Department, Service Tax Department etc.
- (iii) Forged signatures of the Petitioner No.1 on various loan application/guarantee documents to illegally and unlawfully procure loans for the Respondent No.1 Company.
- (iv) Forged signatures of the Petitioner No.1 on the document filed before the Department of Commercial Taxes, Government of Utter Pradesh.

In addition to above, as stated in the rejoinder, there are various legal cases under the statutory provisions of Section 138 of the Negotiable Instruments Act, 1882 for cheques that had been issued in a period when the Petitioner was not part of the management of the Respondent No.1 Company. Moreover, vide Order dated 8.5.2008 passed in CP No.15(ND)of



2008, this Hon'ble Board had restrained from operating the bank accounts of the Respondent No.1 Company. Not only this, as per the statement of the Respondent No.2 with the Commercial Tax Department, the Respondent Company produces 50 Tonnes of M.S. Ingots per day, however, the Respondent No.2 has malafidely filed false statements in the Income Tax Returns alleging therein that the Respondent Company produces 20 Tonnes of the said material per day. Over and above, despite the repeated requests and reminders of the Electricity Department, the Respondent No.2 deliberately and willfully did not clear the dues of the Electricity Department and due to this, the Electricity Department has disconnected supply of the Respondent No.1 Company. Furthermore, it has been stated that there is a huge liability pending against the Respondent No.1 Company of the Income Tax Department of more than Rs.10 crore due to illegal acts and omissions of the Respondents and the Income Tax Department vide its Assessment Order dated 30.12.2010 for Assessment Year 2008-2009 stated that the Assessee (Respondent No.1) has shown Net loss of Rs.6,46 crores on a sale of Rs.25.46 crores giving a net loss rate of 25.40% which is highly unbelievable. Apart from this, there are huge liabilities is pending against the Respondent No.1 Company from the Central Excise Department as well as Commercial Tax Department to the tune of more than Rs.2 crores.

4. The Petitioner Advocate argued that the Respondent No.2, Shri Promod Goil in connivance with his family members/other Respondents siphoned off huge amount of money from the bank account of Respondent No.1 Company for his personal use and benefits which is detrimental to the interest of the shareholders and Respondent No.1 Company. Further, Respondent No.2 without the consent of the Petitioner, illegally enhanced the Cash Credit Limit of the Respondent No.1 Company from Rs.85 lacs to Rs.2 crores. It has also been pleaded that the arguments of the Counsel for the Respondents that vide Order dated 11.6.2010 passed in CA No.294/2010 in CP No.15/2008, they have invoked Regulation 75 of the Companies Act and appointed Mr.Ritesh Goil as the Director of the company, is totally baseless and against the principles and sprit of the Regulation as contained. In fact, this Hon'ble Board has not directed them to invoke Regulation 75 but gave them a liberty which they were already had and the said application was dismissed as withdrawn by the Respondent No.2. It is also submitted that it is a well settled principle of law that Regulation 75 of the Companies Act on which the reliance was placed by Respondent No.2 is applicable only in case of any vacancy in the Board of Directors which may be created and the number of directors is reduced below the quorum only in such a case the continuing director may appoint an additional director to complete the quorum. But, in the preset case, the Petitioner No.1 being one of the directors of the Respondent No.1 Company had neither resigned nor expired but was continuing as a director and there was no vacancy which could have been filled by invoking Regulation 75 as alleged. Further, it has been alleged that the registered office reflecting on the website of MCA is not accessible and all the correspondences made on the registered office of the company received undelivered. The Petitioner Advocate has also pleaded that no Board meeting of the Respondent No.1 Company



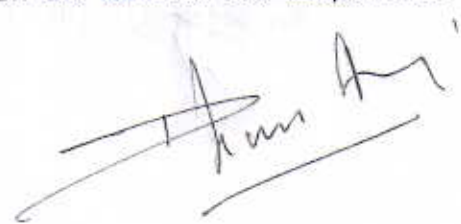
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has been held since 22.8.2008 and the Respondent No.2 in connivance with other Respondents fraudulently opened bank accounts without the knowledge of the Petitioner. Apart from this, it has been contended that creditors of the Respondent No.1 Company have filed several cases of recovery and other cases u/s 138 of Negotiable Instruments Act for non-payment/cheque bouncing for clearance of their dues. Besides, there are several statutory liabilities of the company towards Income Tax Department, Sales Tax and Excise Department. Lastly, the Petitioner Advocate has submitted that there is an urgent need for appointment of an Administrator to look into the affairs of Respondent No.1 Company due to the mismanagement, illegalities and liabilities mounting and prevailing in the day to day affairs of Respondent No.1 Company. With regard to siphoning of funds, the Petitioner Advocate has pointed out that on examining the documents submitted with rejoinder to the reply to CA No.18/2013, it is observed that all compensation deals had followed a modus operandi consisting of essentially two steps viz:-

- (i) An Agreement to sell vide which assessee company agrees to purchase a plot of land;
- (ii) A deed of settlement vide which the old agreement to sell is cancelled and the seller of land in turn pays compensation to assessee company.

In this context, the Petitioner cited the case of M/s.Om Sai Infosoft Pvt. Ltd. and M/s.Magaon Papers Pvt. Ltd. where an agreement to sell for was prepared and after 3-4 months, deed of settlement to buyback was prepared and thereby, assessee received the sum of compensation. Likewise, there are submissions that the Registration Numbers of the vehicles as mentioned in the Central Excise Invoices issued by manufacturers/dealers of Iron and Steel of various locations which were shown to have been used for transportation of impugned raw material from the premises of raw material supplier to the factory premises of the party, the reports received from Transport Authorities in this regard reveals that some of the vehicles used for transportation of goods were Motor Cycle, Crane, Three-Wheelers etc. which were unfit for transportation of goods.

5. In his arguments, the Respondent Advocate has stated that the Hon'ble High Court of Delhi upheld the Order dated 8.03.2013 passed by this Hon'ble Board on the application filed by the Petitioner for appointment of the Administrator with the stipulation that if the time schedule is not followed then it will be open for the parties to seek further interim directions from this Hon'ble Board including appointment of the Administrator if the circumstances to warrant. However, it has been contended that there is not such circumstances arose in favour of the Petitioner after passing the Order by the Hon'ble High Court for filing the application bearing No.18 of 2013 for appointment of the Administrator. The Respondent Advocate alleged against the Petitioner that the Petitioner siphoned off the funds of the Respondent



No.1 Company in conspiracy with the previous Auditor of the Company Mr. Mahesh Chand Gupta, wherein Mr. Mahesh Chand Gupta illegally used the signatures of the Respondent No.2 to issue fresh equity in the company thereby lessened the share of Respondent No.2 in the Company. Further, on the complaint made by the Respondent No.2 before the Institute of Chartered Accountant against Mr.Mahesh Chand Gupta and the Disciplinary Directorate, the Institute of Chartered Accountants of India found prima facie, Mr.Mahesh Chand Gupta to be liable for professional misconduct and specifically stated that he has done all this in connivance with one of the directors, Shri Lalit Aggarwal. Further, it has also been alleged that the Petitioner to disturb the functioning of the company filed various complaints in various forums so that the Respondent No.1 Company may stop functioning and hence, the conduct of the Petitioner and the Respondent No.2 have been at loggerheads and both cannot reach a consensus on any issue of hardships. Lastly, it has been pleaded that no reason is specified by the Petitioner for the appointment of the Administrator and the compensation is received only as the opposite party failed to keep up their promise for selling the property and the said compensation is shown as profit in the company. Besides, it has been mentioned that the Respondent No.2 paid the loans of the company and there are no outstanding of any bank loan as on date against the company.

6. Having considered the averments made in the CA, reply, rejoinder and arguments (oral and written), it is amply clear that the Hon'ble Board has appointed Dr.Pradeep Kumar Dhingra, Chartered Accountant, M/s.Pradeep Kumar Dhingra & Co. as an Auditor vide Order dated 11.6.2013 as per the direction given by the Hon'ble High Court of Delhi in the Order dated 13.5.2013. However, some practical problems are emerging on some issues like non-furnishing of information to Auditor, place of audit, presence of Petitioner & Respondents. Consequently, the time schedule of 8 weeks to complete the audit of the books of accounts of the company vide the Order dated 13.5.2013 of the Hon'ble High Court of Delhi could not be fulfilled. Apart from this, the Petitioner Advocate has alleged that the Respondent No.2 along with others are continuously indulging in mass illegalities and misappropriation of funds of the Respondent No.1 Company which is not prejudicial not only to the interest of the members, shareholders and applicant but also to the Respondent No.1 Company itself. The Respondent Advocate has raised the issue relating to audit stating therein that the Order dated 13.5.2013 does not specify that the audit is to be done in the presence of Petitioner No.1 and the Respondent No.2. On the contrary, the Petitioner Advocate has alleged that the Respondent No.2 to 5 in collusion and connivance with each other are indulging in the following illegal and malafide forgeries while representing them to be genuine which has caused grave oppression to the rights of the Petitioners:-

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