(2020) 02 NCLT CK 0045

In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi

Case No : Company Petition No. 133(ND) Of 2012

IL And FS Transportation Network Limited — APPELLANT

Vs

Regional Airport Holdings International Limited And Ors — RESPONDENT

Date of Decision : 28-02-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 11
Companies Act, 1956 — Section 198, 269, 269(2), 309, 309(5A), 311, 397, 398, 399, 402, 403
Companies Act, 2013 — Section 197(9)

Citation : (2020) 02 NCLT CK 0045

Hon'ble Judges : Ina Malhotra, J;L.N. Gupta, Member (Technical)

Bench : Division Bench

Advocate : Vidur Bhatia

Final Decision : Disposed Of

Judgement

L.N. Gupta, Member (T)

1. The present Petition is filed under the Sections 397 and 398, 399, 402 and 403 of the Companies Act, 1956 in connection with oppression and mismanagement of the affairs of the Regional AirportHoldings International Limited (RAHIL). That the Petitioner, a Limited Company namely, IL & FS Transportation Networks Limited (hereinafter referred as ITNL) is claiming to be holding around 40% Share Capital in the Respondent No. 1 Company.

2. That the Respondent No. 1 Company is incorporated on 16.12.2009 with CIN No. U45400DL2009PLC196993. The Authorized Share Capital of the Company is Rs. 5,00,00,000 and Paid-up Share Capital is Rs. 5,00,000. The Registered Office of the Respondent No. 1 Company is located at 2/11-B (Basement), Jangpura-A, New Delhi-110014. The Respondent No. 1 Company is reported to be in the Airline business.

3. It is submitted by the Petitioner that the Respondent No. 4 i.e., Gulbarga Airport Developers Pvt. Ltd. (GADPL) and Respondent No. 5 i.e., Shimoga Airport Developers Pvt. Ltd. (SADPL) entered into project development agreements with the Government of Karnataka for development and management of two airports at Gulbarga and Shimoga [hereinafter, referred as (Projects)] respectively on Build-Operate-Transfer basis.

4. It is submitted by the Petitioner that one Mr. Umesh Kumar Baveja (UKB) i.e., the Respondent No. 3 had approached the Petitioner Company to invest in the 'Projects' for a minority stake.

5. ITNL agreed to invest on the basis that its investment and the investment of RAHI Aviation Holdings Private Limited ("RAHPL", Respondent No. 2), Respondent No. 3's (UKB) investment vehicle, would be in the ratio of 40:60. For the purpose of making the investment, UKB incorporated RAHIL on 16.12.2009 with the sole object of in turn investing in GADPL and SADPL Projects.

6. It is stated by the Petitioner that accordingly, it (ITNL), RAHIL and RAHPL entered into a Subscription-cum-Shareholders Agreement dated 12.03.2010 (hereinafter referred as the Shareholders Agreement in which, it was agreed that the Petitioner would invest Rs. 20 Crore for a 40% stake in the Respondent No. 1 Company. Similarly, the Respondent No. 2 i.e., RAHPL would invest Rs. 30 Crore for a 60% stake in the Respondent No. 1 Company. It is further submitted that the Petitioner was entitled to have two nominees on the Board of Directors of the Respondent No. 1, whereas the Respondent No. 2 was entitled to have three Nominees on the Board of Directors of the Respondent No. 1. The Respondent No. 3 (UKB) was to be the Chairman of the Board of Directors.

7. It is stated that the Shareholders Agreement provided that on receipt of subscription money of Rs. 20 Crore, RAHIL would allot 40% shares to the Petitioner. It is added that the Respondent No. 2 i.e., RAHI Aviation Holdings Pvt. Ltd. (RAHPL) was required to infuse Rs. 30 Crores for a 60% stake in RAHI. The Respondent No. 3 (UKB) represented that the equity amount of Rs. 50 Crore would be sufficient for completion of both the 'Projects'. It is stated that the terms of Shareholder Agreement were incorporated in the Articles of Association of RAHIL.

8. It is submitted that RAHIL acquired a 22% stake in each of Respondent No. 4 i.e., Gulbarga Airport Developers Pvt. Ltd. (GADPL) and Respondent No. 5 i.e., Shimoga Airport Developers Pvt. Ltd (SADPL) and rights to control the management of these Companies. It is added that the Projects were effectively managed by the Respondent No. 3 (UKB).

9. It is submitted by the Petitioner i.e., IL & FS Transportation Network Limited (ITNL) that it had contributed the entire amount of Rs. 20 Crore as envisaged in the Shareholders Agreement between April 2010 and August 2011. At the request of Respondent No. 3, ITNL procured Bank guarantees amounting to Rs. 9.69 Crore and Rs. 12.36 Crore in favour of Government of Karnataka for the

Gulbarga and Shimoga projects respectively, on the basis of which the Government of Karnataka agreed to defer payment of lease rent. The Government also extended the Airport's target opening dates (until May 2012 for the Gulbarga and December 2012 for Shimoga Projects) on the basis of ITNL's involvement in the projects. At the ITNL's instance, the Gulbarga project achieved the financial closure in June 2011 with the Bank of Baroda being the leader of the consortium of lenders.

10. It is submitted by the Petitioner that during 2011-12, the Petitioner sought financial information from the Respondent No. 3 (UKB) on the budgeted cost vs. actual expenditure on the Projects. It is further submitted by the Petitioner that its queries were met with evasive replies from the Respondent No. 3. It is further added by the Petitioner that the Respondent No. 3 further sought infusion of an additional amount of Rs. 15 Crore into RAHIL by the Petitioner for completion of the Gulbarga Project alone without disclosing how the funds already contributed were utilised.

11. It is added by the Petitioner that on 30.07.2012, the Gulberga Project (GADPL) received a Show Cause Notice from the Infrastructure Development Corporation (Karnataka) Limited, as to why liquidated damages should not be imposed on account of delay in completion of the Gulbarga Project. Since the ITNL was not provided with any of the financial information, it sought to exercise its right to carry out an internal audit under Article 123 of RAHIL's Articles of Association. Even this right was denied to ITNL by the Respondent No. 3. The consortium of lender for the Gulbarga project also resolved to appoint an independent auditor to audit the financials of GADPL.

12. It is further submitted that the RAHPL thereafter, filed a petition before the Hon'ble Delhi High Court against the Petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 (being Arb. Petition No. 384/2012) seeking appointment of an Arbitrator in connection with purported disputes under the Shareholders Agreement. It is submitted by the Petitioner that the Petition was only an attempt to seek to threaten the Petitioner and divert attention from the acts of oppression and mismanagement of RAHPL and Respondent No. 3. Subsequently, the RAHPL also filed a petition against the petitioner under Section 9 of the Arbitration Act. (being OMP No. 708/2013).

13. That the question regarding the maintainability of the present Petition has already been decided by the erstwhile Company Law Board vide its Order dated 10.05.2013, which held that :

"The contention the Respondent side stating that this petition is not maintainable on the ground the Petitioner is not a member, has no merit because the Petitioner for all practical purposes has been considered as the shareholder and even given place in the Board of the company.........."

14. It is further submitted by the Petitioner in its additional affidavit dated 03.10.2017 that the Petition (bearing No. 384/2012) filed by the Respondent No.

2 under Section 11 of Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi seeking appointment of Arbitrator in connection with the purported disputes under the Shareholders Agreement and the Petition bearing No. (OMP No. 708/2013) filed by the Respondent No. 2 against the Petitioner under Section 9 of the Arbitration Act were dismissed for non-prosecution on 10.11.2016.

15. That the petitioner has further submitted that the Company Law Board vide its Order dated 10.04.2013 had allowed the interim prayer of the Petitioner and had directed as follows :

"Respondent -1 company is hereby directed to provide audit at the cost of the petitioner with an auditor of its choice, the petitioner is at liberty to take the audit of R-1 Company. The Respondents 1-3 shall allow audit to the petitioner within 10 days from the day the petitioner makes request. R-1 is further directed to provide inspection of the financial statements and accounts of R-4 and R-5, for the reason R-1 has been in the management of the affairs of R-4 and R-5. The reasons will follow later."

16. That accordingly, the Company Law Board vide its Order date 18.06.2013 had appointed KPMG (Registered) Building No. 10, 8th Floor, Tower B, DLF Cyber City, Phase-II Gurgaon, Haryana-12202 vide its Order dated 18.06.2013 for conducting the Audit of Respondent No. 1 Company.

17. That further, the Petitioner has placed the findings of the Audit Report on record depicting siphoning of at least Rs. 36,85,30,000 by the following entities :

(i) Rs. 13,61,30,000 to Comet Advisory;

(ii) Rs. 20,15,00,000 to Chamundi Constructions & Infrastructure Company Private Limited ("Chamundi Constructions"); and

(iii) Rs. 3,09,00,000 to UKB (Respondent No. 3) directly.

18. The Petitioner has also made allegations against Sh. Sandeep Mendiratta (Petitioner's nominee Director), Sh. Gaurav Jain and Sh. Rajagopal Joshi for the acts of oppression and mismanagement. Since none of them is a party in the present case, no relief can be sought against them. Accordingly, this Tribunal sought a clarification on 20.12.2019, whether the Petitioner would like to amend the Petition and make the abovementioned persons as a party.

19. The Petitioner had filed an affidavit on 24.01.2020 and has specifically submitted that it does not wish to amend its Petition to array the names of the abovementioned persons.

20. In this background, this Bench deems fit to consider only those findings of the Audit report and allegations in the Petition, which pertain to the parties to the present case.

21. The main grievance of the petitioner is that the Respondent No. 1 Company

has not allotted its shares to the Petitioner. It is submitted that as per the Article 8 of the Articles of the Association of the Respondent No. 1, it should have allotted the fully paid-up shares to the Petitioner as and when the following payments towards subscription of shares were received by it:

Amount (in Rs.)

Date of call notice

Date of payment

2 Crore

28-Mar-10

7-Apr-10

6 Crore

September 21,2010

30-Nov-10

12 Crore

5-Aug-11

25-Aug-11

22. It is further submitted by the Petitioner that on 15.03.2010, a Resolution was passed at an Extraordinary General Meeting (EGM) of the Respondent No. 1 for authorising the Board to issue 2,00,000 Equity Shares of Rs. 10 each at a premium of Rs. 90 per Share to the Petitioner in respect of the first tranche Rs. 2 Crore. To support its contention, the Petitioner has placed a copy of the EGM Resolution dated 15.03.2010 on record.

23. It is added by the Petitioner that on 19.03.2010, the board of Respondent No. 1 Company, which comprised of Respondent No. 3 and two Representatives of Respondent No. 2 approved a Resolution to issue a call notice to the Petitioner to subscribe an equity of Rs. 2 Crore. However, no steps were taken to allot shares to the Petitioner.

24. It is further stated by the Petitioner that it had further paid Rs. 6 Crore on 21.09.2010 and Rs. 12 Crore on 05.08.2011 as subscription money to the Respondent No. 1, in good faith and even after receipt of the full subscription money, the Respondent No. 1 Company did not allot shares to the Petitioner, which is a clear violation of the 'Shareholder's Agreement and the Articles of Association of the Respondent No. 1.

25. That the Petitioner has also challenged the appointment of Respondent No. 3 as a whole-time Director. It is submitted by the Petitioner that the Respondent No. 3 had arranged for a resolution to be passed at the EGM purportedly held on

01.02.2010, approving his own appointment as whole-time director of the Respondent No. 1 Company for a period of five years. The terms of the appointment mentioned in the Resolution passed at the EGM of Respondent No. 1 held on 01.02.2010 are reproduced below :

"7. Subject to the provisions of Sections 269, 309, 311, 198 and Schedule XIII and other applicable provisions, if any, of the Companies Act 1956 or any statutory modification or re-enactment thereof, the Whole-time Director shall be entitled to receive remuneration of Rs. 13.50 lacs p.m. including salary, perquisites and other benefits w.e.f. 01.03.2011 subject to receipt of debt approval for any one of the projects and the same shall be increased to Rs. 27 lacs p.m. from the date of debt closure of the projects at Gulbarga and Shimoga including additional Rs. 13.50 lacs p.m. as arrears since 01.03.2011 or such other remuneration as may be fixed from time to time subject to the requisite approvals".

26. The Petitioner in this context has relied upon the provisions of the Section 269(2) of Companies Act, 1956, which required the following compliance of obtaining approval of Central Government unless :

(i) the appointment is in accordance with Part I and II of Schedule XIII; and

(ii) a return in the prescribed form (Form 25C) is filed within 90 days of the appointment.

27. It is stated by the Petitioner that Part II of the Schedule XIII prescribes conditions of remuneration payable by companies having profits (Section I) and by companies having no or inadequate profits (Section II). The remuneration payable by a Company having profits cannot exceed 5% of its net profits for one managerial person and if there is more than one such managerial person, 10% for all of them together. These limits were breached in case of Respondent No. 3 by Respondent No. 1 in the Financial Years ended 31.03.2012 and 31.03.2013 as found by KPMG.

28. That the KPMG audit report annexed at Page 153 has observed the following :

29. It is further submitted by the Petitioner that Form 25C (now MR-1) was filed on 01.07.2011, which was after the expiry of 90 days period from the date of appointment of Respondent No. 3. Petitioner has stated that the Central Government approval was, therefore, required and no document in support of such approval were provided to KPMG at the time of Audit.

30. It is submitted by the Petitioner that the KPMG had further found that the Respondent No. 3 claimed travel reimbursement of Rs. 66,00,000 towards travel, which were booked with no supporting documents and a fixed day rate was claimed. These claims were approved by Respondent No. 3 himself.

31. That the Petitioner had alleged that due to the actions of the Respondent No. 3 along with his associates (Sandeep Mendiratta, Rajagopal Joshi, Gaurav Jain,

KBV Narayan, Raja Chabbra and Nikhilesh Guruprasad) not only resulted in loss of Rs. 20 Crore infused as contribution towards Share Capital by the Petitioner but also resulted in the loss of additional Rs. 22 Crore mobilised in the form of Bank Guarantees furnished by the Petitioner to the Government of Karnataka on behalf of the Projects. It is added by the Petitioner that it has suffered losses on account of loss of value of its investment and loss of business opportunity.

32. That the Respondents were proceeded as ex-parte vide Order dated 01.07.2019 passed by this Bench.

33. Basing on perusal of the documents, Audit Report and submissions made by the Petitioner, this Bench is of the view that the Respondent No. 1 and Respondent No. 3 have violated the Article 8 of the Articles of Association by not allotting shares to the Petitioner against receipt of the full subscription capital of Rs. 20 Crore. Further, the Respondent No. 1 and 3 have not acted upon its Resolution dated 15.03.2010, which was passed in the Extraordinary General Meeting (EGM) of the Respondent No. 1 Company. Therefore, the Petitioner has been able to establish the act of mismanagement committed by Respondent No. 1 and 3.

34. In view of the above, this Bench allows the prayer made by the Petitioner with regard to the allotment of shares. Accordingly, the Respondent No. 1 Company i.e., Regional AirportHoldings International Ltd. is directed to allot 20,00,000 Equity Shares of Rs. 10 each at premium of Rs. 90 per Share to the Petitioner i.e., IL & FS Transportation Networks Ltd. The Respondent No. 1 Company is also directed to rectify the register of members. The Respondent No. 1 Company is granted 30 days time to make compliance of this direction.

35. That the appointment of Respondent No. 3 i.e., Mr. Umesh Kumar Baveja, as a whole-time Director of the Respondent No. 1 Company, required the approval of Central Government as a necessary condition and it is noted from the submissions that no documents regarding such approval from Central Government were produced at the time of audit. This Bench, therefore, takes adverse inference against the Respondent No. 3. The Respondent No. 3 has also not filed the Form 25C with RoC within 90 days of his appointment. In view of the above, this Bench sets aside the appointment of the Respondent No. 3 as a whole-time Director.

36. That the Section 309 (5A) of Companies Act, 1956 and Section 197(9) of Companies Act, 2013 provide for reimbursement of the unauthorised remuneration claimed by the Director. The contents of the quoted Sections are reproduced below :

a) Section 309 (5A) of Companies Act, 1956

"If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without the prior sanction of the Central Government, where it is required, he shall refund such sums to the company and until such sum is refunded, hold it in trust for the company."

b) Section 197(9) of Companies Act, 2013

"If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without approval required under this section, he shall refund such sums to the company, within two years or such lesser period as may be allowed by the company, and until such sum is refunded, hold it in trust of the company."

37. Since the appointment of Respondent No. 3 is not in accordance with law, he is liable and directed to refund the remuneration and expenses claimed by him during his tenure as a whole-time Director to the Respondent No. 1 Company maximum within a period of 2 years.

38. That this Bench is not inclined to give any direction regarding reimbursement of Rs. 22 Crore, which was given in the form of Bank Guarantees by the Petitioner to the Government of Karnataka. The Petitioner itself has alleged that the loss has occurred due to the acts of oppression and mismanagement by the Respondent No. 3 and his associates namely, Sandeep Mendiratta, Rajgopal Joshi, Gaurav Jain, KBV Narayan, Raja Chabbra and Nikhilesh Guruprasad. The abovementioned Associates not being arrayed as party to the Petition, no relief can been granted.

39. The Petition is disposed off accordingly.

