(2023) 06 NCLT CK 0045

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

Case No : CP-64/241-242/2022

M/s. Rishabh Buildwell Pvt. Ltd Vs M/s. Nakshatra Residency Pvt. Ltd. And Ors ?

Date of Decision : 15-06-2023

Acts Referred:
Companies Act, 2013 — Section 241,241(1), 242, 244

Citation : (2023) 06 NCLT CK 0045

Hon'ble Judges : Bachu Venkat Balaram Das, Member (J);Rahul Bhatnagar, Member (T)

Bench : Division Bench

Advocate : Abhishek Nahta

Final Decision : Dismissed

Judgement

Rahul Bhatnagar, Member (Technical)

1. The Applicant has filed this petition under the provisions of section 241, 242 and 244 of the Companies Act, 2013 ("The Act") against the Respondent. The brief facts averred by the Applicant for filing the present Petition are as follows:

i. The Petitioner Company is one of the shareholders of Respondent No.1, holding 5,05,000 equity shares of Respondent No.1, with a percentage stake of 15.07 % as on 31 March, 2012.

ii. That the Respondent No.1 Company was incorporated as a "Special Purpose Company" with the intent to meet the objects as specified in the Memorandum of Agreement dated 11.10.2011 executed in Delhi, India among M/s. Nakshatra Infradevelopers Pvt. Ltd. through its director-cum-authorized signatory Mr. Varun Jain, M/s. Parsvnath Developers Ltd through its Senior VP cum authorised signatory Mr. M.C. Jain and M/s. Rishabh Buildwell Pvt Ltd through its director cum authorised signatory Mr. Sanjeev Jain ("the MoA").

iii. That the present Petition is being filed against the egregious acts of oppression and mismanagement in the Respondent No.1 Company by its management, which have nearly brought to naught the very purpose of incorporation of Respondent No.1 Company as the Special Purpose Company ("SPC").

iv. That the Respondent No. 1 Company was incorporated as a Consortium of the Petitioner Company, Respondent No.2 and Proforma Respondent No.7 for specific objective of making a bid under a Scheme named "Scheme -2011-12 (Commercial Builders Plot -1)" ("the Scheme") for allotment of a commercial plot by New Okhla Industrial Development Authority ("NOIDA Authority") for development of commercial complexes. As per the terms of the Scheme, in case of a "Consortium", a registered/notarized Memorandum of Agreement ("MoA") is to be executed and submitted with NOIDA Authority and as per clause I of the MoA, upon allotment of a plot under the Scheme, the Consortium Applicants will incorporate a "Special Purpose Company". Consequently, upon award of the commercial plot situated at "Plot No. C-55/l Sector-62, Noida, Uttar Pradesh ("the Plot" / "Commercial Plot") by NOIDA Authority, Respondent Company 1 was incorporated as a "Special Purpose Company" ("SPC").

v. That the management of Respondent No.1 Company is utterly failing and have risked the very purpose of allotment of commercial plot and development of commercial complexes by defaulting in payment of installments to NOIDA Authority.

vi. That the Respondents other than Proforma Respondent No.7 have committed grave fraud by not disclosing their defaults and liability for paying to the Noida Authority in audited Financial statement of Respondent No. I Company for FY 2020-21 filed before the Registrar of Companies. These fraudulent acts call for urgent prohibitory injunctions and penal action against the management of Respondent No.1 Company. The terms and conditions of the Bid/Scheme in its clause x titled as "Cancellation of the Lease Deed" provides for cancellation of allotment/lease by Noida Authority in case of default by the Respondent No.1 Company in payment of installments. Further, as per clause II (o) of the Lease Deed, the cancellation of allotment and/or Lease Deed will result into forfeiture of 30% of the total premium of the plot or the premium/installments deposited till then along with lease rent, interest and extension charges deposited whichever is less. Ignoring these substantial clauses of the Bid and Lease Deed, the management of Respondent No.1 Company has committed defaults in payment of three consecutive installments for which Noida Authority is legally empowered to cancel the allotment of the plot to Respondent No. I Company.

vii. That as per the audited financial statements for the FY 2020-21 of Respondent No. 1, the funds are being utilized for the purposes of providing financial assistance to related parties and are not being used for making pending installment payment to NOIDA 'Authority against the Plot, which is thereby causing a wrongful financial loss to the Petitioner Company.

viii. That the Petitioner Company was critical & essential in the Bid for successful application by Respondent No. I to participate in the Scheme. It is on the basis of financial strength, technical know-how, expertise and credentials of the Petitioner Company, the Respondent No.1 Company could meet the essential qualifications of the bid including financial eligibility criteria and technical eligibility criteria and eventually the allotment of commercial plot was awarded to the Respondent No. I by the Noida Authority.

ix. That as per Clause 12 of the MoA, the shareholding in the SPC will be held by the members in the same proportion as their respective shares in the Consortium. However, based on the information submitted by Respondent No. 1 with the Registrar of Companies (ROC) and records as available on MCA portal, the Petitioner Company came to know that its shareholding in the Respondent No. 1 has been reduced to 6.12% by way of various illegal fresh issue & allotment of shares in Respondent No.1 to various parties in various tranches as follows, behind the back of the Petitioner Company.

x. (xvi) That pursuant to the aforesaid allotments in the Respondent No.1, the shareholding stake of Petitioner Company has been drastically reduced from 15.07% to 6.12% of the total paid-up share capital in the Respondent No. 1, leading to no control or say in any corporate actions/decisions by the Petitioner Company in the Respondent No. 1.

xi. That no lawful and adequate notice was served by the Respondent No.1 to the Petitioner Company for convening general meetings for aforementioned allotments.

2. The Respondent No. 1-6 have filed their reply stating as under:

i. That the present petition is not maintainable u/s 241-242 of the Act.

ii. That the Petitioner is attempting to seek specific performance of MoA which is impermissible in the present proceedings.

iii. That there was no default in making payments to NOIDA Authority. Out of the total allotment price of Rs.124.84 crores towards the said plot, the Respondent No.1 company had already made payment of Rs.102.29 crores i.e the major portion of the amount. The subsequent instalments were not paid by the Respondent No.1 due to the reason that they are entitled for the zero benefit period since the actual possession of the plot was not given to them by the Authority and hence the Respondent was entitled to credit of the interest amount already paid by them which was to be adjusted with the balance amount to be paid towards the allotment price. This was only for the purpose of avoiding unjustified loss to the Respondent No.1 Company and to protect the interests of the Respondent No.1 company and thereby to protect the interests of all its stake holders including the Petitioner. Further, the NOIDA Authority cancelled the plot illegally and the Respondent No.1 is duly pursuing its legal remedies before the Hon'ble High Court of Judicature at Allahabad by filing a writ petition and has also obtained a status quo order. The matter is subjudice before the Hon'ble High

Court. The Respondent Company has taken all steps necessary to protect and preserve the interest of the Company and its stakeholders.

iv. That since funds were required for payment of the allotment price of the project land and also for the construction cost of the proposed commercial project, it was absolutely necessary for the Respondent No.1 company to enhance its Authorised Share Capital. As such a notice dated 10.02.2012 was circulated to all the then existing shareholders including the Petitioner calling for an Extra Ordinary General Meeting of the Members of the Respondent No.1 Company scheduled to be held on 10.03.2012 with a specific agenda of increasing Authorised Share capital of the company from Rs.1 Crore to Rs.10 crores. Thereafter, in order to raise further fund, the Board of Directors had further decided to allot 27,00,000 Equity Shares by the Board Meeting held on 25.03.2013. As such 27,00,000 Equity shares of Rs.10/- each were allotted at a premium of Rs.90/- per share.

3. The parties were directed to file written submissions which have been duly filed.

4. We have gone through the submissions of both the parties. The Petitioner has filed this Petition alleging Oppression & Mismanagement on the following grounds:

i. That the shareholding of the Petitioner has been diluted in violation of law.

ii. That there has been gross mismanagement in Respondent No. 1 Company and the Company has defaulted in making payment of installments due to NOIDA Authority.

5. The first issue deals with dilution of the Shareholding of the Petitioner Company. The Petitioner has alleged that its shareholding was diluted by further issue of shares which is in contravention of the Act and the MoA dated 10.11.2011 on the basis of which the Respondent No. 1 Company was incorporated. However, Clause 5 of the MoA clearly states that the other members of the consortium except M/s. Nakshatra Infradevelopers Private Limited (Respondent No. 2) shall have shares in excess of 5% each and hence will qualify as relevant members. The Petitioner in the instant case presently holds 6.12% shares in the Respondent No. 1 Company. Further, the Respondents have stated that funds were required for payment of the allotment price of the project land and also for the construction cost of the proposed commercial project and so it became necessary for the Respondent No.1 Company to enhance its Authorised Share Capital. Therefore, the Respondents had duly issued notices dated 10.02.2012 and 01.03.2016 for calling Extra Ordinary General Meetings convened on 10.03.2012 and 26.03.2016 respectively. The Petitioners never challenged the aforesaid meetings and have now raised a contention that they did not receive the notices. The Petitioners have also contended that since the Respondents did not have physical possession of the land, they were not set for construction and hence did not need money. However, the Respondents are already embroiled in a legal battle to get the physical

possession of the land to start work and the very purpose for which the Respondent No. 1 Company was formed was for development of commercial complexes on the land. It is common practice to increase share capital so as to raise funds for development of project. The Respondents have duly filed Statutory Returns before the RoC depicting the increased share capital. The details of allotment of shares are in Public Domain and hence there is no justification on the part of the Petitioner to allege that the Petitioner was not aware of his diluted shareholding until the filing of this Petition. Therefore, we do not find any act of Oppression in this regard.

6. The second issue which has been raised by the Petitioner is that there has been gross mismanagement in Respondent No. 1 Company and the Company has defaulted in making payment of installments due to NOIDA Authority. The Petitioner has mainly raised the allegation against Respondent No. 1 Company that it had not paid the instalments due to the plot allotted by NOIDA, which resulted in the cancellation of the plot by NOIDA and thereby resulted in loss to the company. With respect to the same, the Respondents have stated that out of the total allotment price of the plot i.e., Rs.124.84 crores, the Respondent No.1 company had already made a total payment of Rs.102.29 crores. Subsequent payments were not made since the Respondent No.1 was entitled for zero period benefit i.e the non-charging of any interest from the Company because the physical possession of the said plot was always with the NOIDA and the same was never handed over to the Respondent No.1 Company. However, without appreciating the same NOIDA issued a Cancellation Order dated 05.02.2021. Challenging the illegal cancellation order dated 05.02.2021 and the various Demand Notices issued by NOIDA and also for claiming for Zero Period benefit, Respondent No.1 Company filed Writ Petition No. 16821 of 2021 before the Hon’ble High Court. During the pendency of the present Company Petition, the Hon’ble High Court of Judicature at Allahabad vide Judgment dated 05.05.2022 had duly allowed the Writ Petition filed by the Company and thereby held that the Respondent No.1 herein is entitled for the Zero Period benefit. Further, vide the said Judgment, Hon’ble High Court set aside the Cancellation Order dated 05.02.2021 and also the various impugned demand notices issued by NOIDA. The relevant portion of the judgment is reproduced herein below:

20. This Court finds that when the claim of the petitioner for grant of zero period benefit was pending consideration being in consonance with the 192th Board Meeting Resolution dated 02.06.2017, and placed before the Standing Committee, the same ought to have been considered and decided before passing the order impugned. We accordingly, set aside the order dated 05.02.2021 canceling the allotment of the plot of the petitioner. The impugned demand notices dated 07.11.2019, 27.07.2019, 27.10.2020 and 31.12.2020 issued by the respondent Development Authority also stand quashed. It is held that the petitioner is entitled for grant of zero period benefit pursuant to 162nd meeting vide Board Resolution dated 03.07.2009 from the period of allotment, i.e. 03.02.2012 till date. The respondent Development Authority is also directed to

remove the constructions made on the plot of the petitioner and hand over the actual physical possession of Plot No.55/1 Sector-62, NOIDA within 30 days from the receipt of this order to enable the petitioner to raise constructions thereon.

The said order of the Hon’ble High Court has been challenged before the Hon’ble Supreme Court is pending adjudication. However, the intent of the Respondents behind filing the Writ Petition bearing No. 16821 of 2021 was to protect the interests of the Respondent No.1 Company. This can in no way be interpreted as mismanagement of the affairs of the Company. The intent and efforts made by the Respondents in the interest of the Company and its shareholders has not been appreciated by the Petitioner.

7. Before deciding these issues, we would like to refer to section 241(1) of the Companies Act, 2013 which reads as under: -

Section 241: Application to Tribunal for relief in cases of oppression, etc- Any member of a company who complains that—

(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors , or manager, or in the ownership of the company’s shares , or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

8. We would also like to refer to the judgement of the Hon’ble Supreme Court in S.P. Jain vs Kalinga Tubes Ltd 1965 AIR 1535, 1965 SCR (2) 720 wherein it was held as follows:

“It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder.”

9. A perusal of Section 241 and the judgement referred above, it can be said that to constitute oppression, the affairs of the Company must be conducted in a manner which is prejudicial to public interest or in a manner prejudicial or oppressive to the Petitioner or any other member or members or prejudicial to the interests of the company. The Petitioner however, has failed to establish how that affairs of the Respondent No. 1 have been carried out in any of such manner so as to constitute oppression. Further, the dilution of shareholding of the Petitioner has also in no way led to a material change in the management of the Company so as to qualify as Oppression & Mismanagement u/s 241(1)(b) of the Act. The dilution, as a result of further issuance of shares has diluted the shareholding of other members of the Company including the Respondent No. 2 as well without contravening the MoA dated 10.11.2011 on the basis of which the Respondent No. 1 Company was formed. The shareholding pattern of the Respondent No.1 Company as on 03.01.2012 was:

SL. NO.	NAME OF SHREHOLDER	NUMBER OF EQUITY SHARES HELD	PERCENTAGE OF HOLDING
1.	Mayank Jain (R-3)	1	0.002
2.	Varun Jain (R-4)	1	0.002
3.	Nakshathra Infradevelopers Pvt. Ltd. (R-2)	39,998	

79.99

4.

Parsvnath Developers

Limited (Proforma R- 7)

5000

10

5.

Rishabh Buildwell Pvt.

Ltd./ Petitioner

5000

10

The current Shareholding pattern of the Respondent No.1 Company is as follows:

SL.

NO.

NAME OF

SHREHOLDER

NUMBER OF EQUITY

SHARES HELD

PERCENTAGE

OF HOLDING

1.

Mayank Jain (R-3)

1

0

2.

Varun Jain (R-4)

1

0

3.

Nakshathra Infradevelopers Pvt. Ltd. (R-2)

26,49,998

32.12

4.

Parsvnath Developers

Limited (Proforma R- 7)

5000

0.6

5.

Rishabh Buildwell Pvt.

Ltd./ Petitioner

5,05,000

6.12

6.

Atoot Buildcon Pvt. Ltd.

26,10,000

31.64

7.

Utkrisht Realcon Pvt.

Ltd.

21,40,000

25.94

8.

Ashok Kumar Jain

1,00,000

1.21

9.

Compeer Portfolio Ltd

2,40,000

2.90

Total

82,50,000

100

10. It is clear from the above that the shareholding of the Respondents has also got diluted and hence, it cannot be said that the increase in share capital was specifically done to dilute the shareholding of the Petitioner. Nonetheless, the Petitioner continues to be a relevant member in terms of Clause 5 of MoA dated 10.11.2011. The Petitioner has therefore, failed to reasonably establish a case of Oppression & Mismanagement against the Respondents.

11. In light of the above, the Petition is dismissed and the interim order dated 09.05.2022 stands vacated.

Let a copy of order be served to parties.

