

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No. 10 of 2016

IN THE MATTER OF:

Sanjiv Gupta

.....Appellant

Vs.

Getit Infoservices Pvt. Ltd. & Ors.

....Respondents

29.09.2016

Present: Shri Virender Ganda, Senior Advocate with Shri Vipul Ganda, Shri Tarun Mehta and Ms. Shelly Khanna, Advocates for the Appellant

Shri Abhinav Vashisht, Senior Advocate with Shri Vidur Bhatia, Advocates for Respondent No. 1

Shri Sudipto Sarkar, Senior Advocate with Shri Susmit Pushkar, Shri Abhijeet Swaroop and Shri Ankur Khandelwal, Advocates for Respondent No. 2

ORDER

Issue Notice. The respondents have appeared pursuant to the advance Notice served on them. No further Notice need be issued on the respondents. We do not find any reason to issue any Notice on the Registrar of Companies for the reasons recorded hereunder.

2. This Appeal has been preferred by Appellant Mr. Sanjiv Gupta against order dated 5th September 2016 passed by National Company Law Tribunal, Principal Bench, New Delhi (hereinafter referred to as "Tribunal" for short) in C.P.No. 122(ND)/2016. By the impugned order, the Tribunal refused to clarify its earlier order dated 30th August 2016 and also refused to grant any further Interim Relief.

3. The Company Petition was filed by the Appellant to declare that the respondents are guilty of oppression and mismanagement in terms of

Section 241(1)(b) read with Section 242 of the Companies Act 2013 with prayer to protect the interest of the employees and creditors of the company and allow the Appellant to proceed with MBO in terms of Section 242(2)(b) of the Companies Act and to allow the petitioner to induct a strategic investor to keep the Respondent No. 1 company as a going concern.

4. On Notice, the respondents opposed the maintainability of the Petition under Section 244 of the Act. It was contended that the Appellant has 0.06% shareholder and thereby not entitled to file the petition under Section 241. In reply, the Appellant contended that he has filed C.A.75/PB/2016 seeking waiver of requirement to enable a member to apply under Section 241.

5. The Company Petition was filed on 22nd August 2016 and when the matter was taken up on 24th August 2016, Learned Tribunal observed to place the C.A. seeking waiver for arguments on 29th August 2016.

6. In the meantime, the respondents were allowed to file their reply to the C.A.

7. The matter could not be taken up on 29th August 2016 but was taken up on 30th August 2016. On 30th August 2016, the Appellant requested to pass Interim Relief and to direct the Respondent No. 2 Company to maintain the status quo ante (Pre 16th June 2016) and to restrain the respondents from effecting any change in the Board of Directors or the Respondent No. 1 Company.

8. On 30th August 2016, the Tribunal, having noticed the rival contentions advanced on behalf of the parties on the question of maintainability of the petition left the matter open to decide the question on a subsequent date. Having heard the counsel for the parties on the question of grant of Interim Relief, the Tribunal observed as follows:-

“3. There is a consensus between the parties that the respondents shall maintain status quo as on date with regard to the constitution of the Board of Directors and that no meeting of the

Board of Directors of Respondent No. 1 Company shall be held without prior permission o the tribunal.”

9. Subsequently, the Appellant filed an Application under Rule 11 of the National Company Law Tribunal Rules 2016 in C.A.No. 85(PB) of 2016 for following relief:-

- i) Declare the abovementioned E-Form DIR 12 as *non est* and direct that the same be disregarded;
- ii) Issue clarification that the order dated August 30, 2016 in respect of maintaining status quo as on the date of filing of the petition (i.e. August 22, 2016) and not as on date of passing of the Order i.e. August 30, 2016 and accordingly, clarify that the Application continues to be the Managing Director of the Respondent No. 1 Company;
- iii) Direct the Respondents not to indulge into any further action of oppression and mismanagement during the pendency of the Company Petition No. 122(ND)of 2016; and
- iv) Pass such other order or orders as may be deemed fit and proper by this Hon’ble Tribunal in the facts and circumstances of the case.

10. On 5th September 2016 when the matter was taken up, it was contended on behalf of the Appellant that after filing of the Company Petition and before taking up the petition for Interim Relief, on 29th August 2016, the respondents forwarded an E-Form DIR 12 with SRN No. G10189538 to the Registrar of Companies to be taken on record under Straight through Process (STP). On 30th August 2016 when the matter was taken up, it was not to the knowledge of the Appellant though it was known to the respondent from the act of filing of E-Form DIR 12. It was contended that the information with regard to filing of E-Form DIR 12 was withheld from the Learned Tribunal on the 30th august 2016. Because of suppression of the fact about E-Form DIR 12, the Appellant consented for Interim Relief of status quo as was existing on 30th August 2016. Later on, the Appellant

could come to know in the evening of 30th August 2016 that by E-Form DIR 12, the Registrar of Companies has been informed of resignation of appellant which he submitted on 12th August 2016. On behalf of the Appellant, it was contended that the resignation was not approved by the Board of Directors and, therefore, there was no occasion for the company to forward the intimation of resignation by E-Form DIR 12 on 29th August 2016 at 9 P.M. by Straight through Process (email).

11. In the said petition, a declaration was also sought for that E-Form DIR 12 be declared as *non est* and to direct the respondents, including the Registrar of the Companies to disregard the same. All the aforesaid submissions were noticed by the Learned Tribunal by impugned order dated 5th September 2016. The Tribunal noticed that the Appellant has only 0.06% shareholding and there is a serious preliminary objection raised about maintainability of the Petition under Section 244(1) of the Act. The Tribunal also observed that on 30th August 2016, it has turned down the prayer of Appellant to stay day to day interference of the newly appointed two Additional Directors of the company in the affairs of the company and thereby refused to grant status quo ante as existed before 12th August 2016 or to restore the Appellant as Managing Director of Respondent No. 1 company.

12. The Tribunal also perused the provision of Section 168(1) and (2) of the Act. Under sub-section (2) of Section 168 resignation of Director shall have effect from the date on which the notice is received by the company or the date, if any, given by the Director in the Notice whichever is later.

13. Referring to sub-section (54) of section 2 of the Act, the Appellant submitted that the 'Managing Director' as defined therein cannot be termed to be Director for the purpose of sub-section (2) of Section 168 of the Act. The appellant as Managing Director is not covered by Section 168 (2) of the Act.

14. In this appeal the only relief sought for by Appellant is to allow the company appeal and to set aside the impugned order dated 5th September

2016 passed by the Tribunal in CA No. 85/PB/2016 and to declare the E-Form DIR 12 as *non est* with further prayer to direct the Respondents to disregard the E-form DIR 12 and to clarify that the Order dated 30th August 2016 directing the parties to maintain status quo as on the date of mentioning of the petition (i.e. 24th August 2016) and to clarify that the Appellant continues to be the Managing Director of the Respondent No. 1 Company.

15. Having noticed the rival contentions we are not inclined to clarify or modify the interim order passed by the Tribunal. We make it clear that we find no merit in this appeal. It is accordingly dismissed.

16. However, the observation made by this Appellate Tribunal shall not come in the way of Appellant while in deciding the question of maintainability of the Company Petition on merit.

(Justice S.J.Mukhopadhaya)
Chairperson

(Mr. Balvinder Singh)
Member (Technical)