

**NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH**

**C.A. No. 194/2017
in
C.P. No. 3(ND)/2016**

In the matter of

Ms. Punita Khatter

..... Petitioner

V/s.

Explorers Travels and Tours Private Limited & Ors. Respondents

SECTION: U/s 397/398

Order delivered on 14.07.2017

Coram:

SMT. INA MALHOTRA, HON'BLE MEMBER (J)

SH. S. K. MOHAPATRA, HON'BLE MEMBER (T)

For the Petitioner (s) : Mr. K. Datta, Advocate
Mr. Ankur Mahindra, Advocate
Ms. Sonal Dangri, Advocate
Mr. Shanfam Poradran, Advocate

For the Respondent (s) : Mr. Vivek Mallik, Advocate for R-1
Mr. Mukul Thakur, Advocate for R-1
Mr. Rakesh Khanna, Advocate for R-2 to 4
Mr. Nitin Gupta, Advocate for R-2 to 4

Order

AS PER SMT. INA MALHOTRA, MEMBER (J)

1. This application bearing CA No. 194/2017 has been filed by the petitioner praying for ad-interim urgent relief. The grievance of the petitioner is that the report of the Statutory Auditor contains material which

tantamounts to personal vilification and character assassination and has little relevance to the financial statements of the company as prepared by him. A portion of the said report, more specifically at no. 20 to the Notes of Account as reproduced below is being objected to:

“ a) Consequent on conviction of Ms. Punita Khatter, the then Managing Director of the Company by a Hong Kong court in a shoplifting case in 2013, serious trust deficit developed between the Chairperson, majority shareholders and her. In 2014-2015 Ms. Khatter who also holds 35% equity shares in the company served legal notices making inter-alia frivolous, unwarranted & fabricated allegations, claims and demands, which were strongly responded to and counter-claims lodged against her. She thereafter filed a petition before Hon’ble Company Law Board(CLB), making other shareholders and the Company as respondents, which is being strongly contested and is now pending before the Hon’ble National Company Law Tribunal (NCLT).

b) Simultaneously Ms. Khatter started adopting a very disruptive and uncooperative attitude. Not only that she was very reluctant to get the audit of the accounts of the company for the financial year 2014-1015 duly completed and resolve the auditors queries arising out of audit being conducted by them, she and her staff on her behest, went to the extent of forcibly snatching their audit papers and their other documents. The incident was brought to the notice of the Board of Directors vide Auditor’s letter dated 20th September, 2015. Based on the auditor’s queries which included unexplained and unsupported payments and other material which came to the knowledge of the management, an FIR being Number an FIR No. 0595 dated 13/09/2016 for siphoning of funds to the tune of Rs. 95 lakhs and criminal breach of trust has been filed in Saket Police Station through Mr. Arjun Mehta one of

the directors of the company against Ms. Punita Khatter. In the aforesaid FIR complaint has also been made of an illicit withdrawal of Rs. 3 lakhs from the account of the company with ICICI Bank and transfer of huge sums of money from HDFC Bank account of the company on February 06, 2016 immediately after issue of a restraint order by the Hon'ble High Court on 05.02.16, to her known persons with a view to siphon the moneys for her personal benefits."

2. The said auditor's report is required to be adopted in toto in the Director's report. It is the grievance of the applicant that once the same is done and uploaded, it shall cause a great prejudice by way of defamation. In view of the same it is prayed that the AGM which is fixed for Sunday, 16th July, 2017 be deferred till the defamatory/incorrect material/statements made therein are removed.

3. Ld. Counsels appearing on behalf of the Respondents have vehemently opposed the same. It is submitted that as per a catena of judgments, an AGM so fixed cannot be restrained from being convened.

4. While we are inclined to accept this proposition of the Respondents and are hesitant to pass any orders restraining the holding of the AGM, we find that the objections raised by the petitioner in the auditor's report does amount to character vilification and not wholly relevant for the purpose of projecting the financial statements.

5. Since it was argued by the Respondents that the Auditor's report being independent had to be incorporated in the Directors Report so as to apprise the shareholders of the true situation and there was no discretion in omitting the same, this Bench thought it fit to hear the Chartered Accountant as well as seek an opinion from the Institute of Chartered Accountant whether the statements such as those made in the aforesaid objected paragraphs would fall within the jurisdiction of a Chartered Accountant to opionate and

incorporate the same in the financial statement to be approved by the shareholders in the AGM to be convened.

6. Pursuant to the notice issued Mr. Prakash Banwal, CA is present in court and has categorically made a statement on Oath that the said note no. 20 annexed to the accounts had been prepared and given to him by the Management of the Respondent Company which he had to incorporate in his report and has therefore filed a disclaimer.

7. Representatives from the Institute of Chartered Accountant have prayed for some time to assist this Bench whether disparaging remarks of a personal nature would fall within the purview of a Chartered Accountant to be mentioned in the Audit report.

8. Ld. Counsels for the Respondents today admit that the said statements were provided to the auditor to enable him to give a true and correct picture of the affairs of the Respondent Company. In support of his arguments, Mr. Khanna, Ld. Counsel for the Respondent Company has relied upon a decision of the Apex Court in the matter of Life Insurance Corporation of India V/s. Escorts Limited and Others reported in (1986) 1 SCC 264, to fortify his arguments that every shareholder has a right to call an extraordinary general meeting and he cannot be restrained from making disclosures. It is emphasised that it is a duty cast on the management to disclose in the explanatory note all material facts relating to the resolution coming up before the general meeting to enable the shareholders form a judgment on the business before them.

9. There is no dispute with respect to the aforesaid proposition. No doubt, every member is entitled to a true and correct picture of the affairs relating to the business of the company, but not extraneous to the same. There are allegations and counter allegations made by both the parties which are subjudice before various courts. While it may be worthwhile to mention the pendency of lis at the instance of both the parties in the Auditor's/Director's

report, it would not be prudent to suggest conclusive findings on facts while the matters are sub-judice.

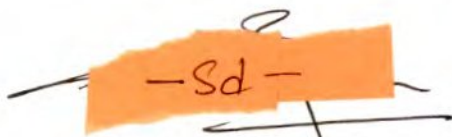
We are also unable to appreciate the Respondent's arguments that if the incorporated remarks be defamatory in nature, the recourse to seek remedial measures by way of damages or criminal action would be open to the petitioner/applicant. It does not stand to reason as to why any petitioner should not be protected by courts if they have been vigilant to take pre-emptive steps rather than first being made to suffer despite seeking protection, only to be told to suffer first and then move the court for adjudication for any cause of action that may arise after the damage has been done. That would indeed be a travesty of justice.

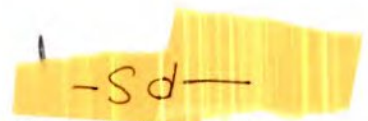
10. We are therefore of the opinion that while the respondents shall go ahead with convening of the AGM called for on the 16th July, 2017 at the appointed time, all derogatory remarks of a personal nature, having no relevance on the financial statements shall stand deleted/expunged from the Auditor's/Director's report.

11. CA 194/2017 stands disposed off in terms of the above.

12. This case is already listed for final arguments on the 2nd & 3rd of August. The Institute of Chartered Accountants may file their comments for the assistance of the Bench of the point of reference.

To come up on 2nd August, 2017, the date already fixed.


(S. K. Mohapatra)
Member (T)


(Ina Malhotra)
Member (J)