

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 77 of 2022

In the matter of

The Hamlin Trust, a family trust,
shareholder of Respondent No. 2 and
having its address at 60, 2nd floor,
Vasant Marg, Vasant Vihar,
New Delhi-110057.

... Appellant No. 1

Anjali Nashier alias Anjali Rattan,
Adult Indian Inhabitant, shareholder of
Respondent No.2 and residing at
60, 2nd floor,
Vasant Marg, Vasant Vihar,
New Delhi-110057.

... Appellant No. 2

Rajiv Rattan, Adult Indian Inhabitant,
Promoter and Chairman, Board of
Directors and erstwhile Chief Executive
Officer of Respondent No. 2 and residing
60, 2nd floor,
Vasant Marg, Vasant Vihar,
New Delhi-110057.

... Appellant No. 3

Versus

LSFIO Rose Investments S.a.r.l., a company
Incorporated under the laws of Luxembourg,
A Shareholder of respondent No. 2
and having its registered office at
Atrium Business Park Vitrum,
33, Rue du Puits Romain, L-8070,
Bertrange, Grand Duchy of Luxembourg.

...Respondent No. 1

Rattan India Finance Private Limited
Non-banking financial company
Incorporated under the provisions of the
Companies Act, 1956 having its
Registered office at Regus Vasant Square,

Company Appeal (AT) No. 77 of 2022

Lelvel-3, Vasant Square Mall,
Pocket V, sector B, Vasant Kunj,
New Delhi-110070.

...Respondent No. 2

Ram Kumar, Adult Indian inhabitant,
Director of Respondent No. 2 and
Trustee of respondent No. 4 and
Residing at B-4/221, Safdar Jang Enclave,
New Delhi-110029.

...Respondent No. 3

Gaurav Toskhani, Adult Indian
Inhabitant, Company Secretary of
Respondent No. 2 and having his office at
Regus Vasant Square,
Lelvel-3, Vasant Square Mall,
Pocket V, Sector B, Vasant Kunj,
New Delhi-110070.

...Respondent No. 4

Manish Chitnis, Adult Indian
Inhabitant, Chief Financial Officer
(CFO) of Respondent No. 2 and having
his office at Regus Vasant Square,
Lelvel-3, Vasant Square Mall,
Pocket V, Sector B, Vasant Kunj,
New Delhi-110070.

...Respondent No. 5

Rattan India Power Limited,
A company incorporated under the
provisions of Companies Act, 1956,
having its registered address at A-49,
Ground Floor, road No.4, Mahipalpur,
New Delhi – 110037.

...Respondent No. 6

IIC Limited, formerly known as
India Bulls Infrastructure Company
Limited, a company incorporated under the
provisions of Companies Act, 1956,
having its registered address at
90/A-207, Khasra No. 412, Ground Floor,
Mahipalpur Extension, New Delhi-110037.... Respondent No. 7

Caitlin Infrastructure Private Limited,
A company incorporated under the
provisions of Companies Act, 1956,
Company Appeal (AT) No. 77 of 2022

having its registered address at B-39,
Shanti Kunj, Mall Road, Vasant Kunj,
New Delhi-110070.

... Respondent No. 8

IIFL Wealth Finance Ltd.,
A NBFC incorporated under the
provisions of Companies Act, 1956,
having its registered address at 6TH
Floor, IIFL Centre, Kamala city,
Senapati Bapat Marg, Lower Parel,
Mumbai-400012 IN

...Respondent No. 9

Bajaj Finance Ltd.,
A NBFC incorporated under the
provisions of Companies Act, 1956,
Having its registered address at
Akurdi, Pune-411035.

...Respondent No. 10

Deutsche Investments India Pvt. Ltd.,
A private limited company incorporated
under the provisions of Companies Act, 1956,
having its registered address at
Block B-1, Nirlon Knowledge Park,
Western Express Highway, Goregaon (East),
Mumbai-400063.

...Respondent No. 11

**BNP Paribas Asset Management India
Pvt. Ltd.,**
A private limited company incorporated
under the provisions of Companies Act, 1956,
Having its registered address at
BNP Paribas House, 1 North Avenue,
Maker Maxity, Bandra Kurla Complex,
Bandra-East, Mumbai-400051.

...Respondent No. 12

Sharma A & Co.,
a sole proprietorship firm through its
sole proprietor Ashok Kumar Sharma,
An Indian Inhabitant, having its address at
A-21/22, New Panchvati, G.T. Road, Ghaziabad,
Uttar Pradesh-201001.

...Respondent No. 13

K. Kumra & Co.,

A proprietorship firm through its sole proprietor
Karan Kumra, an Indian Inhabitant,
having its address at A-7/7 Basement,
Vasant Vihar, New Delhi – 110057.

... Respondent No. 14

Kumra Bhatia & Co.,

A partnership firm through its partners
Hemant Kumra, Praveen Bhatia and
Karan Kumra, having its address at
1st, 2nd & 3rd Floor, Flat No. 8, Vasant Enclave,
New Delhi -110057.

Also at

Flat No. 8, Vasant Enclave,
New Delhi-110057.

... Respondent No. 15

Mr. Rahul Gochhwal, Adult Indian Inhabitant
Employee of respondent No. 2 and having
his office at 5th Floor, Tower B, Worldmark 1,
Aerocity, New Delhi,
South West Delhi-110037.

... Respondent No. 16

Present

For Appellant:

**Mr. Ravi Shankar Prasad, Sr. Advocate
with Mr. Abhijeet Sinha, Mr. L.C.N.
Shahdeo, Mr. Vijay Kumar Singh, Ms.
Daizy Chawla, Ms. Vijaya Singh, Mr.
Jatin Kapoor, Advocates**

For Respondent:

**Mr. Kapil Sibal and Mr. Arun Kathpalia,
Sr. Advocates with Mr. V.P. Singh, Mr.
Aditya Jalan, Mr. Abhimanyu Chopra,
Mr. Raghav Chadha, Ms. Ambareen
Mujawar, Mr. Raghav Seth, Ms. Urvashi
Misra, Mr. Anant Misra, Ms. Sadhvi
Chhabra, Advocates**

Judgment

(Date: 07.09.2022)

1. This appeal is preferred against the order dated 29.03.2022 (hereinafter called 'Impugned Order') passed by the National Company Law Tribunal, New Delhi in CA No. 19 of 2022 filed in CP No. 76 of 2021, whereby the prayer relating to the appointment of Chief Financial Officer (in short 'CFO') has been allowed alongwith certain directions.

2. Briefly, the facts of the case as they relate to the disposal of this appeal are that the Appellants are shareholders of approximately 50% of the issued, subscribed and paid up share capital of Respondent No. 2 Company (in short R-2 Company) in which the Appellants are Joint Venture partners. Respondent No. 1 (in short 'R-1) has acquired 50% of the issued, subscribed and paid-up capital of R-2 Company by making an investment therein, and consequent to this investment, the Board of Directors of R-2 Company has been reorganized and comprises of four directors,
Company Appeal (AT) No. 77 of 2022

including nominee of R-1. It is claimed by the Appellants that due to some dispute that arose between the Appellants and R-1, the business operations of R-2 Company were affected, and as a result, cross petitions under sections 241-242 of the Companies Act, 2013 (in short 'Act') were filed by rival parties before the NCLT, New Delhi, which are pending adjudication. In addition, the Appellant has also filed a petition before NCLT for winding up of R-2 Company.

3. The Appellants have further stated that several applications were filed by R-1 subsequent to filing of the main petition CP No. 76 of 2021, and more specifically, CA No. 19 of 2022 was filed regarding various reliefs, including that for appointment of CFO in R-2 Company, and NCLT passed the Impugned Order dated 29.3.2022 giving direction for appointment of Mr. Bipin Kabra as CFO of R-2 Company. According to the Appellants, while passing the Impugned Order, the NCLT did not consider the various objections of the Appellants, including those relating to the ineligibility of Mr. Bipin Kabra for appointment as CFO. Subsequent to the passing of the Impugned Order, Mr. Bipin Kabra has filed an affidavit pursuant to direction given by the NCLT. The Appellants have filed this appeal aggrieved by the said Impugned Order.

4. We note that the main company petition bearing CP No. 76/2021 is presently pending adjudication before the NCLT, New Delhi and this appeal is limited to assailing the order, and inter alia, the directions contained in the Impugned Order relating to appointment of CFO in R-2 Company. This judgment shall, therefore, limit itself to the said Impugned Order without going into the issues raised in main company petition, and this order shall not have any bearing on the hearing on merits of the main company petition.

5. We heard the arguments advanced by the Learned Senior Counsels for the rival parties and also perused the record.

6. The Learned Senior Counsel for Appellants has argued that there is a dispute regarding operations and mismanagement of R-2 Company and cross petitions have been filed by the Appellants and Respondents under sections 241-242 of the Companies Act, 2013. He has argued that insofar as the Impugned Order dated 29.3.2022 is concerned, the parties were directed to strictly follow Article 140 of the Articles of Association of R-2 Company (in short 'AoA') in the appointment of CFO which was being done in compliance of order dated 10.6.2021 in CA No. 237 of 2021. He has elaborated that the appointment of CFO is provided in Article 140 of the AoA, whereby
Company Appeal (AT) No. 77 of 2022

Rose Investments (R-1) have the right to nominate a person to the position of CFO and in the event the JV partners (Appellants in the present appeal) reject the appointment of such nomination, Rose Investments shall have the right to nominate another person and in the event JV partners reject the nomination of second such person or 45 days have elapsed since the position of CFO was vacated (whichever is earlier), Rose Investments shall have the right to engage any person to the position of CFO and the JV partners shall support the appointment of such person as CFO.

7. The Learned Senior Counsel for Appellants has claimed that in pursuance of this clause in AoA, Rose Investments/R-1 first suggested the name of Mr. Devendra Mehta, which was not approved by the Appellants, whereafter the name of Mr. Venkataraman Subramanian was suggested, which was also rejected by the Appellants/JV partners. Expanding his arguments, he has submitted that the candidature of Mr. Devendra Mehta was not approved by the Appellants since he was to continue in his parent company Alvarez and Marsal India Private Limited (in short 'A&M') and would have only rendered services to the R-2 Company in accordance with his engagement agreement while continuing to work with other personnel of A&M, his parent company. He has further submitted that the documents filed before the Board of *Company Appeal (AT) No. 77 of 2022*

Directors regarding appointment of Mr. Devendra Mehta mentioned in clause 2, viz. 'Compensation' that A&M will be paid by the company for the services of CFO and the company shall pay remuneration/salary to Mr. Devendra Mehta.

8. The Learned Senior Counsel for Appellants has added that insofar as the candidature of Mr. Venkataraman Subramanian is concerned, he was also seconded for engagement as CFO by Deloitte Touche Tohmatsu India LLP (in short 'DTT') on the basis of an agreement and payment for the services were to be provided to DTT considering Mr. Subramanian as an employee of DTT who would be deployed with R-2 Company to work as CFO. He has contended that thus the nominations of Mr. Devendra Mehta and Mr. Venkataraman Subramanian suffer from basic ineligibility to work as CFO, and therefore cannot be considered as valid nominations. He has referred to section 203 of the Companies Act, which provides for appointment of Key Managerial Personnel (in short 'KMP'), with CFO being a KMP and that every whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time. As against this provision, he has claimed that the agreements by which these two candidates' services were offered make it clear that they would be employees of their parent companies, namely A&M and DTT and hence, would

Company Appeal (AT) No. 77 of 2022

neither be whole –time employee of R-2 Company nor would be able to provide services as CFO full-time and in an independent, unbiased manner as they shall owe allegiance to their parent companies, from whom their services are being provided as per agreements of engagement.

9. The Learned Senior Counsel for Appellants has also argued that the third candidate Mr. Bipin Kabra, whose name was suggested for the post of CFO also held directorship in many companies and was also Managing Director of Eunoia Financial Services Private Limited in addition to holding directorship and shareholdings in many companies, and he holds a key managerial position in Eunoia Financial Services Pvt. Ltd. as managing director and is, therefore, his nomination and future appointment would be in contravention of sub-section 3 of section 203 of the Companies Act. He has also pointed out that in the affidavit filed by Mr. Bipin Kabra pursuant to the Impugned Order, Mr. Kabra has not explicitly said that he would resign from the positions that may be in contravention of section 203(3) and section 189(2) of the Act. He has further argued that Mr. Kabra has to comply with the provisions of section 203 of the Companies Act, 2013, and therefore resign from the position of managing director of Eunoia Financial Services

Private Limited before being appointed as CFO and in his affidavit, he has not explicitly mentioned that he could do so.

10. The Learned Senior Counsel for Appellants has clarified that the Appellants have never disputed or concealed inapplicability of section 203 of the Companies Act, 2013 read with rule 8 of the Companies (Appointment and Qualification of Director) Rules, 2014 and the same form part of the pleadings/written submissions filed by the Appellants before the NCLAT and earlier before NCLT. Elaborating, he has stated that this fact was mentioned by the Appellants in the Written Submission dated 22.7.2022 filed by them before NCLT, and also noticed in para 15 of the Impugned Order. He has pointed out that the NCLT has accepted that section 203 of the Companies Act, 2013 shall be applicable in the present case, and has, therefore, ordered that Mr. Bipin Kabra shall file an affidavit before the NCLT.

11. The Learned Senior Counsel for Appellants has submitted that it is a well-settled law that merely the fact that complying with a law may cause hardship, does not mean the law should not be

followed as it would defeat its object. In support of his contention, he has cited the following judgments: -

(i) Ahmedabad Municipal Corporation and Ors. Vs. Ahmedabad Green Belt Khedut Mandal and Ors. (2014 7 SCC 357);

(ii) Rohitash Kumar and Ors. Vs. Om Prakash Sharma and Ors (2013) 11 SCC 451);

(iii) Jagadesan vs. State of Tamil Nadu and Ors. (2015) 1MHN (Cri) 451.

12. The Learned Senior Counsel for Appellants has submitted that the role and responsibilities of CFO should be such that they allow the person to work independently, full-time in the company and provide services in an unbiased manner as a whole – time KMP and this is envisaged in rule 8 of the Companies (Appointment and Remuneration of the Managerial Personnel) Rules, 2014 which shall apply to a company which voluntarily appoints CFO, like the R-2 Company, since the CFO has to work as a KMP. He has contended that the consent order dated 10.6.2021, while directing parties to appoint a CFO in accordance with the Article 140 of AoA, did not imply that R-1 had absolute and unfettered right to nominate an *Company Appeal (AT) No. 77 of 2022*

ineligible and invalid candidate for appointment as CFO. Moreover, he has submitted, the CFO being a Key Managerial Personnel (KMP) as per section 2(51) of the Companies Act, 2013 and also as stated in AoA of Respondent No. 2 Company, the R-2 Company must comply with the requirements of section 203 of the Act. This need for complying with sections 189 and 203 has also been accepted in the Impugned Order which is not contested by the Respondents which is also shown by the fact of Mr. Kabra filing an affidavit in pursuance of the Impugned Order. He has also referred section 6 of the Companies Act, 2013 to claim that the AoA cannot override the provisions of the Companies Act and claimed that since Article 140 of the AoA does not stipulate any procedure or eligibility conditions for appointment of CFO, it is perfectly logical and rational that reference be made to the Act and rules made therein to consider the eligibility conditions for CFO. The Learned Senior Counsel for Appellants has also submitted that the suggestion of ineligible and disqualified persons for appointment as CFO as candidate nos. 1 and 2 is a ploy by R-1 to ensure that its chosen candidate, who is a third suggested name, is by default appointed as CFO.

13. In reply, the Learned Senior Counsel for Respondents has strongly argued that the contention of the Appellants that the first two nominations made by the Rose Investments/R-1 are void *ab Company Appeal (AT) No. 77 of 2022*

initio was not raised before the NCLT and the Appellants are, therefore precluded from raising new arguments at the stage of appeal. He has further submitted that Article 140 of AoA does not contemplate that a person's nomination can be considered to be valid or invalid for any particular reason and the Impugned Order accepts this argument and notes in paragraph 23 that article 140 does not contemplate that 'a person's nomination can be considered to valid or invalid for any particular reason'. He has cited the judgment in the matter of **Manohar Nathurao Samarth v. Marotrao, (1979) 4 ACC 93** to buttress his claim that the ineligibility criteria must flow from specific provision of law, and the applicability of section 203 does not hold, and so the NCLT has correctly rejected the Appellants' contention that the nomination of first two candidates Mr. Devendra Mehta and Mr. Venkataraman Subramanian are invalid. He has also contended that the Appellants cannot decide unilaterally whether a candidate is ineligible or disqualified for appointment as CFO, and in the event the Appellants do not find a candidate as qualified or eligible they can consider the second suggested name, but if he disagrees with the second suggested name, he is bound to be accept the third name suggested by Rose Investments/R-1.

14. The Learned Senior Counsel for Respondents has submitted that article 140 of AoA fully governs the appointment of CFO of R-2 Company and the provisions of Companies Act, 2013, particularly section 203, are not applicable since the company is a private limited company. He has argued that even if one were to accept the applicability of section 203, R-1 has demonstrated that Mr. Bipin Kabra fulfills the criteria set out in section 203 (3) of the Act, and the Appellants cannot escape responsibility of accepting the candidature of Mr. Bipin Kabra as the third nomination, as stipulated in Article 140 of AoA.

15. He has further submitted that by the Impugned Order the NCLT has directed that Mr. Kabra shall, after being appointed as CFO, disclose all particulars about his concern or interest in any other company or companies, specified in sub-section (1) of Section 184 of the Companies Act, 2013 and also take necessary steps for relinquishment of his other interest in other companies in terms of sub-section (3) of section 203 of the Act. He has contended that thus the requirement of section 189(2), wherein every director or KMP has to disclose to the company the particulars specified in sub-section 1 of section 184 relating to his concern or interest in the other association within a period of 30 days of his appointment is satisfied. He has clarified that, therefore, the CFO appointed by the *Company Appeal (AT) No. 77 of 2022*

company has to only disclose his interest in other companies, after his appointment and he would be required to step down from other offices after appointment in the event the Board of Directors of the company does not consent to other directorships, disclosed by him within 30 days from his appointment which Mr. Kabra is ready to resign from such positions. He has further clarified that Mr. Kabra would resign from managing directorship of Eunoia Financial Services on appointment as CFO in R-2 Company.

16. The Learned Senior Counsel for Respondents has further submitted that Mr. Kabra has filed an affidavit as required by the Impugned Order, and has bound himself to complying with the requirements of section 189(2) and section 203(3) of the Act. Regarding the contention of the Learned Senior Counsel of Appellants that Mr. Kabra should first resign from the position of Managing Director of Eunoia Financial Services and directorship in other companies he has argued that if Mr. Kabra were to resign from the post of managing director and directorship of Eunoia Financial Services and other companies respectively, he would be put to great hardship as may be left completely high and dry, in case he were not to be appointed as CFO of R-2 Company.

17. The Learned Senior Counsel for Respondents has clarified that the reliance placed by the Appellants upon the judgments of Hon'ble Supreme Court in matters of **Rohitash Kumar and Ors. vs. Om Prakash Sharma and Ors. (supra)** and **Ahmedabad Municipal Corporation and Ors. Ahmedabad Green Belt Khedut Mandal & Ors. (supra)** is misplaced, because the hardship faced by an individual is relevant as CFO appointment as per article 140 of AoA is a contractual act. He has strongly argued that the principles of statutory interpretation should not to be used for interpreting contractual terms, as AoA is a contract between the shareholders and the company. In support, he has cited the judgment of Hon'ble Supreme Court in the matter of **Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257**. He has, thus, argued that if NCLT has accepted the application of section 203 in the matter, it is only by way setting a higher standard of norms in the appointment of CFO even though it is not necessary.

18. The Learned Senior Counsel for Respondents has rebutted the argument of the Appellants that NCLT has assumed the powers of Board of Directors by appointing Mr. Bipin Kabra as CFO, by stating that NCLT has only directed the company to "issue an appropriate order appointing Mr. Bipin Kabra as CFO of the Company", although NCLT does have the power to give direction to the Company under *Company Appeal (AT) No. 77 of 2022*

section 242 of the Act, by way of providing interim relief to ensure proper operation and management in the company

19 The two issues that arise for consideration in this appeal in regard to appointment of CFO are: -

- (i) Whether Article 140 of AoA is the only provision which is applicable with regard to appointment of CFO in R-2 Company and no reference to and compliance of any provision of the Companies Act, 2013, particularly sections 203, 184 and 189 therein is necessary? and
- (ii) If reference to section 203 is found to be necessary for looking at eligibility of a suggested nomination, whether R-1's suggestions of the names of Mr. Devendra Mehta and Mr. Venkataraman Subramanian as first and second nominations complies with the requirement of article 140 of the AoA for appointment of CFO?

20. We note that the NCLT has held in para 23 of the Impugned Order that the provision in under Article 140 of AoA does not contemplate that a person's nomination can be considered to be valid or invalid for any particular reason and hence rejects the submission of the Appellants (Respondents before the NCLT) that

Company Appeal (AT) No. 77 of 2022

the nomination of the first two candidates, namely Mr. Devendra Mehta and Mr. Venkataraman Subramanian were invalid. It has further held that in case, the Respondents before the NCLT do not accept the petitioner's first and second nominations, the petitioner could nominate a third candidate, which would have to be accepted by the Respondents (Appellants in the present appeal). Further, after holding the nomination of Mr. Bipin Kabra as a valid nomination, the NCLT has, in the section titled 'Conclusion' in the Impugned Order The NCLT, directed Mr. Bipin Kabra to file an undertaking by way of affidavit for abiding by fulfilling the requirements of sections 184, 189 and 203 of the Companies Act, 2013.

21. The relevant provision of the AoA which is relevant to this appeal is reproduced hereunder:-

“140. **CFO**

- (i) *Rose Investments shall, from time to time, have the right to nominate a person to the position of chief financial officer of the Company (“CFO”). In the event that the JV Partners reject the appointment of such nominee to the position of CFO, rose Investments shall have he right to nominate another person to the position of CFO.*
- (ii) *In the event the JV Partners reject the appointment of the second such person nominated by Rose Investments to the position of the CFO or at least (forty five) days have passed since the position of CFO was vacated*

Company Appeal (AT) No. 77 of 2022

(whichever is earlier), Rose Investments shall have the right to nominate any person to the position of CFO and the JV Partners shall support the appointment of such person as CFO. Provided that such person's appointment as CFO may be terminated by the JV Partners after at least 12 (twelve) months have lapsed from the date of appointment (unless terminated earlier by the Company for cause).

xxx xxxx xxxx xxxx

22. The relevant provisions in sections 184 (2), 189 (2) and 203 (1)(2) and (3) of the Companies Act, 2013 are also reproduced hereunder for better appreciation: -

“184. Disclosure of interest by director.—

Xx xx xx xx

(2) Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into—

- (a) with a body corporate in which such director or such director in association with any other director, holds more than two per cent. shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or*
- (b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting:*

Provided that where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested.

Xx xx xx xx”

189. Register of contracts or arrangements in which directors are interested. —

Xx xx xx xx

(2) Every director or key managerial personnel shall, within a period of thirty days of his appointment, or relinquishment of his office, as the case may be, disclose to the company the particulars specified in sub-section (1) of section 184 relating to his concern or interest in the other associations which are required to be included in the register under that sub-section or such other information relating to himself as may be prescribed.

Xx xx xx xx

203. Appointment of key managerial personnel.— (1) *Every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key managerial personnel,—*

- (i) managing director, or Chief Executive Officer or manager and in their absence, a whole-time director;*
- (ii) company secretary; and*
- (iii) Chief Financial Officer :*
Provided that an individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the

managing director or Chief Executive Officer of the company at the same time after the date of commencement of this Act unless,—

- (a) the articles of such a company provide otherwise; or*
- (b) the company does not carry multiple businesses:*

Provided further that nothing contained in the first proviso shall apply to such class of companies engaged in multiple businesses and which has appointed one or more Chief Executive Officers for each such business as may be notified by the Central Government.

- (2) Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.*
- (3) A whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time:*

Provided that nothing contained in this sub-section shall disentitle a key managerial personnel from being a director of any company with the permission of the Board:

Provided further those whole-time key managerial personnel holding office in more than one company at the same time on the date of commencement of this Act, shall, within a period of six months from such commencement, choose one company, in which he wishes to continue to hold the office of key managerial personnel:

Xx xx xx xx

23. A reading of the section on KMP in the AoA, under which Article 140 is included, indicates that the CFO is considered a KMP,

Company Appeal (AT) No. 77 of 2022

and Rose Investments (R-1) has the right to nominate a person for the position of CFO, and in the event the JV Partners/Appellants reject the appointment of such nominee to the position of CFO, Rose Investments shall have the right to nominate another person, and if nomination of the second person is also rejected or at least 45 days has lapsed since the position of CFO is vacant (whichever is earlier), Rose Investments shall have the right to nominate any person and the JV Partners shall support the appointment of such person as CFO.

24. We note that section 2(51) and section 6 of the Companies Act, 2013 stipulates as follows:-

“2. Definitions.— *In this Act, unless the context otherwise requires,—*

xx xx xx xx

(51)—*key managerial personnel, in relation to a company, means—*

- (i) the Chief Executive Officer or the managing director or the manager;*
- (ii) the company secretary;*
- (iii) the whole-time director;*
- (iv) the Chief Financial Officer; and*
- (v) such other officer as may be prescribed.”*

“6. Act to override memorandum, articles, etc.— *Save as otherwise expressly provided in this Act—*

- (a) the provisions of this Act shall have effect notwithstanding anything to the contrary*

contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be.”

25. Thus, the position of CFO is included as a KMP in sub-section 51 of section 2 of the Act. Section 6 of the Companies Act provides that the provisions of this Act shall override anything to the contrary contained in the memorandum or articles of association of the company. We also note that the Impugned Order accepts the applicability of sections 184, 189 and 203 of the Companies Act, 2013 in that it directs Mr. Bipin Kabra to file an affidavit undertaking to abide by the requirements of these provisions. These provisions under sections 184, 169 and 203 of the Act provide rational and reasonable norms and standards regarding eligibility of a KMP (CFO in the present case) and which are quite relevant and useful in conducting the affairs of the company in a transparent, independent and unbiased manner keeping the interest of the company foremost.

26. Section 203 of the Act lays down that the CFO is a whole-time KMP and is prohibited from holding office in more than one company except in its subsidiary company at the same time. There are other elements of conduct that are provided in the Act as being relevant to the functioning of a KMP. A perusal of Article 140 of AoA makes it clear that in case JV Partners/appellants reject appointment of two suggested candidates, it has to accept the nomination of the third candidate. While the right of Rose Investments has been made primary the text of this article does not imply that any person, even if ineligible by the normal standard of eligibility given in section 203 of the Companies Act and the requirement of the CFO to be a whole-time KMP, can be considered a valid candidate for the position of CFO.

27. In the absence of any specific mention regarding eligibility and the method of selection of the CFO in the AoA, it would be logical to take recourse to section 203 of the Companies Act, 2013 in the selection and appointment of CFO, and also keep in view sections 184 and 189 in adjudging the eligibility of the KMP. We also note that the Appellants have, as Respondents before the NCLT in IA 19/2022, argued through their Written Submissions dated 16.3.2022 that even though the R-2 Company is a private limited company, and the provisions of the Companies Act, 2013 do not *Company Appeal (AT) No. 77 of 2022*

apply thereto, the principles governing the appointment and qualification of the KMP under section 203 can be taken for guidance *de hors* Article 140 of the AoA of R-2 company. Thus, we are of the view that the Appellants are not precluded from arguing the applicability of section 203 at the stage of appeal.

28. Let us now look at the names suggested by Rose Investments as first two nominations for the position of CFO in the R-2 Company. A perusal of the note proposing the nomination of Mr. Devendra Mehta (at pp. 1924-1935 in Convenience Compilation, filed vide Dy. No. 35560 dated 2.5.2022) makes it clear that A&M shall make available to R-2 company the services of Mr. Devendra Mehta for deployment as CFO of R-2 company, who will continue to be employed by A&M and while rendering services to R-2 Company he will continue to work with other personnel of A&M in connection with other unrelated matters. Furthermore, clause 2 of the engagement agreement by which the services of Mr. Devendra Mehta are to be provided to R-2 Company for working as CFO, which relates to 'Compensation', the R-2 Company is required to pay to A&M for the services of CFO and the A&M shall, in turn, pay salary to the CFO. There is no mention in the agreement to the effect that Mr Mehta will sever his connection with A&M so it is reasonable to assume that he will continue to be in the employment of A&M.
Company Appeal (AT) No. 77 of 2022

29. Insofar as nomination of Mr. Venkataraman Subramanian, who is the second suggested candidate is concerned, the note and proposed engagement agreement (attached at pp.1936-1949 of Convenience Compilation, filed vide Dy. No. 35560 dated 2.5.2022), shows that the R-2 Company shall engage DTT to provide the services of CFO, and the suggested candidate Mr. Subramanian shall continue to be in the employment of DTT and be paid by it, from payment received by DTT from R-2 Company. Furthermore, the CFO is to be appointed on the basis of the term and period of engagement between DTT and R-2 Company.

30. Thus, we find that proposals for deployment of Mr. Devendra Mehta and Mr. Venkataraman Subramanian in R-2 Company are in the nature of 'secondment'. We thus find that the first two suggested names, viz. Mr. Devendra Mehta and Mr. Venkataraman Subramanian, are clearly ineligible for appointment as CFO as they contravene sub-section (3) of section 203 of the Companies Act.

31. The import of article 140 of the AoA is certainly not that the first two suggestions could be of ineligible candidates so that the Appellants have to then accept the name of the third candidate as Hobson's choice. Thus the effect of first two suggestions being of ineligible candidates could also mean that the Appellants would be

Company Appeal (AT) No. 77 of 2022

forced to accept the name of the third candidate who may be, for some reason, not acceptable to them.

32. We are, therefore, of the view that all the suggested candidates should satisfy the basic conditions of eligibility as required under section 203 of the Companies Act, 2013 so that the Appellants can exercise their right of selecting the most appropriate and suitable candidate in the true letter and spirit of the article 140 of the AoA. We, therefore, conclude that the NCLT has committed error in inferring that provision in article 140 of the AoA 'does not contemplate that a person's nomination can be considered to be valid or invalid for any particular reason'. On this basis the NCLT has held that in case the Appellants did not accept the first two nominations, they will have to accept the third nomination of Mr. Bipin Kabra for appointment as CFO.

33. If we take the view that only article 140 of the AoA were to be relevant and applicable in the appointment of CFO, and there is no need to look at the ineligibility of the suggested names, we could have a situation where all the three suggested names are ineligible, or at least unsuitable, and not fit to carry out the duties of CFO properly and professionally, and the Appellant would be bound to accept the third nomination even though he may also be unfit or

Company Appeal (AT) No. 77 of 2022

unsuitable to hold office as CFO of the Company. Such a situation could only exacerbate the situation of mismanagement in the company that is already beset with issues of mismanagement of its operations. Such a situation could prove to be detrimental for the company's management and should not be allowed to happen.

34. Thus the Impugned Order fails to interpret the import of Article 140 of the AoA in its true letter and spirit and takes the first two suggested names as being valid nominations which were rejected by the Appellants, and in the result directs that the third suggested candidate namely Mr. Bipin Kabra should be appointed as CFO of R-2 Company.

35. We have looked into the citations submitted by the rival parties in support of their respective contentions. Insofar as the judgments cited in the matters of **Rohitash Kumar and Ors. vs. Om Prakash Sharma and Ors. (supra)** and **Ahmedabad Municipal Corporation and Ors. Ahmedabad Green Belt Khedut Mandal & Ors. (supra)** are concerned we find that the sections 184 and 189 of the Act give the opportunity to the newly-appointed CFO to bring the information relating to his interests in other companies to the knowledge of the company within 30 days (under section 189) and relinquish position as a KMP in any other company within six

Company Appeal (AT) No. 77 of 2022

months of taking over as CFO. Thus there does not appear to be a strict requirement to resign from all positions held in other companies before being appointed as CFO.

36. The decision in the matter of **Patel Engg. Ltd. v. Union of India (supra)** cited by the Learned Senior Counsel of Respondents also does not apply strictly in the present case as there are specific provisions for KMP which are enshrined in the Act, and since the AoA is silent on any specific condition of eligibility a logical recourse has to be taken to the relevant provisions in the Act.

37. We hold the view that the suggested candidates should be eligible as per the provision of section 203 of the Companies Act, while applying article 140 of the AoA. The Impugned Order is, therefore, set aside and the parties are directed to take necessary action for appointment of CFO of the R-2 company as per article 140 of the AoA, after making valid nominations keeping in view section 203 of the Companies Act, 2013 and completing the appointment of CFO within a period of sixty days from the date of this order.

38. We wish to clarify that any comment made or view taken in this judgment shall not have any bearing on the main company petition currently under consideration of the NCLT.

39. There is no order regarding costs.

(Justice Anant Bijay Singh)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

(Mr. Barun Mitra)
Member (Technical)

New Delhi

7th September, 2022.

/aks/