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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 3296/2015 & CM No.17927/2015 (of Pragati 47 Development Ltd. for impleadment)

RAJ SHEKHAR AGRAWAL AND ANR. Petitioners

Through: Mr. Jayant K. Mehta, Mr. Abhijeet Chatterjee, Mr. Saurabh Dev Karan Singh, Ms. Shivani Lohiya and Ms. Madhvi Khare, Advs.

Versus

UNION OF INDIA AND ANR.Respondents

Through: Mr. Anil Soni, CGSC with Mr. Naginder Benipal, Adv. for R-1&2.
Mr. Sanjiv Sen, Sr. Adv. with Ms. Snigdha Sharma, Adv. for applicant in CM No.17927/2015.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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14.09.2015

CM No.19536/2015 (of petitioners for directions)

1. The two petitioners / applicants, during the pendency of the writ petition, seek a direction to the Registrar of Companies (RoC) to, without prejudice to the rights and contentions of all the parties including the applicant seeking impleadment in this petition, upload digital signatures of the petitioners / applicants on its website, to enable the petitioners / applicants to file and upload the Annual Returns and Financial Statements

for the Financial Year 2014-2015 with respect to the subject company i.e. Pragati 47 Development Ltd.

2. Though the senior counsel for the applicant seeking impleadment appearing on advance notice has at the outset objected that the relief claimed in the application is the same as the relief claimed in the writ petition and it also appears to be so to the undersigned but on the contention of the counsel for the petitioners / applicants that while the petitioners / applicants in the writ petition are seeking, though the same direction to the RoC, but on a regular basis, they in this application, are seeking the said direction, without prejudice to the rights and contentions and only as an interim measure and subject to the final outcome of the petition, the counsels have been heard in detail on the aforesaid aspect.

3. The counsel for the petitioners / applicants has argued:

(i) that the three Directors of the subject company have ceased to be Directors under Section 164 of the Companies Act, 2013 which has come into force on 1st April, 2014, owing to the failure on their part to file the statutory records of the said company for three consecutive years;

(ii) that the two petitioners / applicants, being promoters of the subject company holding 23.1% shares, have appointed themselves and one Mr. Y.K. Gauba, not a party to the petition, as Directors of the subject company;

(iii) that though the petitioners / applicants and the said Mr. Y.K. Gauba have applied to the RoC for uploading their signatures on RoC's website as Directors of the subject company, to enable them to make statutory compliances, but the RoC, without any reason or explanation, has not permitted so;

(iv) that the petitioners / applicants along with said Mr. Y.K. Gauba, having become Directors of the company, are now desirous of making the statutory compliances which have to be made latest by 31st October, 2015 and if the petitioners / applicants and the said Mr. Y.K. Gauba, inspite of being Directors default in the same, they would also incur a similar disqualification under Section 162 of the Companies Act, 2013 and the relief aforesaid is required to prevent such disqualification on the part of the petitioners / applicants.

4. On enquiry, whether the appointment of the petitioners / applicants is undisputed, it is stated that the petitioners / applicants have intimated the

RoC of their appointment and have also filed an affidavit to the said effect before the Company Law Board (CLB) before which proceedings under Sections 397 and 398 of the Companies Act, 1956 filed by the petitioners / applicants are pending. On further enquiry, whether there is any order of the CLB with respect to the affairs of the company pending those proceedings, it is stated that there is none.

5. The counsel for the RoC also appearing on advance notice states that Minutes of a Board appointing the petitioners / applicants as Directors were received from the petitioners / applicants but a letter was also received from the Joint Commissioner of Police (Crime) of Kolkata, Govt. of West Bengal stating that a First Information Report (FIR) of the offence of forgery etc. is pending with respect to the same board meeting. It is stated that the RoC is the appropriate authority to decide, whether to accept the person as Director or not and in view of the said position, the RoC has not accepted the petitioners / applicants as Directors and for which reason the signatures of the petitioners / applicants were not uploaded. It is also stated that a civil case is also pending before the High Court of Calcutta.

6. The senior counsel for the applicant seeking impleadment has contended that the petitioners / applicants had on 22nd January, 2010

resigned from the Board of Directors of the subject company and has drawn attention to the prayers in the petition pending before the CLB and to the order dated 20th October, 2010 of the CLB, stated to be still in force, restraining the petitioners / applicants herein from writing any letters to the third parties, causing prejudice against the interest of the subject company.

7. I have in the aforesaid state of affairs, enquired from the counsel for the petitioners / applicants, as to how the petitioners / applicants can be permitted, even if subject to the outcome of this petition and without prejudice to the rights and contentions, to as Directors of the company upload the Annual Returns of the company and as to how the petitioners / applicants can be so permitted to upload whatever returns and statements they desire to upload and which would constitute a representation to the public a statement of the affairs of the company and whether not the appropriate fora for considering, as to who should be the person responsible for the affairs of the company during the pendency of the disputes relating to the affairs of the company would be, the CLB before which the matter is stated to be now pending at the final stage.

8. The counsel for the petitioners / applicants has drawn attention to Section 167(2) of the Companies Act, 2013 and has argued that the same

empowers a promoter to appoint a Director, when the existing Directors have vacated the office under Section 167(1) of the Act, as has happened in the present case. It is contended that earlier three Directors having incurred the disability which is to attract Section 167(1) of the Act, the petitioners, being promoters, under Section 167(3) of the Act became entitled to appoint Directors and having appointed themselves and Mr. Y.K. Gauba, the said appointment would be valid.

9. Section 167(3) of the Companies Act, 2013 is as under:

“167(3) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.”

10. Attention is next invited to Section 2(69) of the Companies Act, 2013 containing the definition of promoter and which is as under:

“2(69) “Promoter” means a person—

- (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in Section 92; or*
- (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or*

(c) *in accordance with whose advise, directions or instructions the Board of Directors of the company is accustomed to act:*

Provided that noting in sub-clause (c) shall apply to a person who is acting merely in a professional capacity.”

11. It is argued that the petitioners / applicants being undisputedly 23.1% shareholders, are promoters and entitled to make appointments of Directors under Section 167(3) of the Act supra.

12. I have enquired from the counsel for the petitioners / applicants, whether a shareholder holding say 0.1% of the shareholding of the company, would qualify as promoter and would also be entitled to appoint a Director under Section 167(3) of the Act supra.

13. The counsel for the petitioners / applicants tends to suggest so, though not clearly, highlighting that the petitioners / applicants hold much more than 0.1% i.e. 23.1% shares.

14. In my opinion, Section 167(3) of the Act is not and could not have been intended to provide for a mode of appointment of a Director, contrary to the provisions elsewhere in the statute. A promoter, desirous of appointing a Director in the company, will have to propose the same either

to the Board of Directors, if permitted to appoint an additional Director or if only the shareholders have reserved to themselves the right to appoint a Director, to the shareholders in the meeting of the shareholders to be held. Section 167(3) of the Act cannot be interpreted as entitling each and every promoter of a company, upon contingencies mentioned therein having occurred, to appoint a Director. The appointment has to be made by following the procedure elsewhere provided in the statute for appointment of a Director and thus the contention of the petitioners / applicants that they as promoters have a special right under Section 167(3) of the Act to appoint a Director *de hors* the opinion of the other shareholders / promoters, cannot be accepted. The petitioners / applicants are required to follow the procedure ordinarily provided for appointment of a Director and which procedure admittedly has not been followed. Moreover, from the order dated 20th October, 2010 of the CLB, it is evident that as of today, the petitioners / applicants stand restrained from writing any letters to the prejudice of the subject company. It can safely be assumed that the said order has been made assuming the petitioners / applicants to be not in control and management of the subject company.

15. As far as the argument of the counsel for the petitioners / applicants, of petitioners suffering a disability unless permitted to act so is concerned, the same is also subject to the petitioners / applicants being accepted as of today as Directors. The question, whether the petitioners can be said to be Directors of the subject company is doubtful and without the petitioners / applicants having a clear right to act as Directors and which is being opposed, the question of the petitioners / applicants incurring any disqualification or liability under Section 162 of the Act also, would not arise.

16. This Court in these proceedings cannot go into the question of *prima facie* case or the other disputes relating to the affairs of the subject company and which are seized of by the CLB and thus it is best that the CLB only, if deems necessary, makes a provision for interim compliances of the statutory mandates with respect to the subject company.

17. I may record that the senior counsel for the applicant seeking impleadment controverts that the earlier Directors stand disqualified automatically. It is stated that there is an order of injunction restraining the said persons from making statutory compliances. (The same is controverted by the counsel for the petitioners / applicants).

18. The application is thus dismissed with liberty to the petitioners / applicants to apply to the CLB for the same reliefs.

19. The counsel for the petitioners / applicants at this stage states that it be clarified that the observations made in this order shall not come in the way of the petitioners / applicants applying to the CLB for being authorised to make statutory compliances.

20. Subject to the opposition by the opposing parties before the CLB, merely because the petitioners / applicants have filed this application, would not disentitle them from seeking authorisation from the CLB for making compliances.

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21. In view of the aforesaid, no purpose will be served in keeping this petition pending.

22. The counsel for the petitioners fairly states that with liberty to pursue the rights of the petitioners before the CLB, the petition be disposed of.

23. Ordered accordingly.

24. The date of 20th January, 2016 is cancelled.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 14, 2015/bs