IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No.14395 of 2018 (O&M)
Date of Decision :07.02.2019

UNION OF INDIA ....PETITIONER

V/S

M/S H.S. TULI & SONS BUILDERS (P) LTD. ....RESPONDENT

CORAM : HON'BLE MR. JUSTICE B.S. WALIA

Present: Mr. Arun Gosain, Advocate, Counsel for the petitioner.
Mr. Harkrishen Singh Tuli, for the respondent.

B.S. WALIA, J.,

1. Challenge in the revision petition under Article 227 of the Constitution of India is to order dated 13.10.2018 (Annexure P-5) issuing warrant of attachment for the decretal amount and directing release of the amount deposited in the treasury to the respondent/decree-holder as also to order dated 5.11.2018 (Annexure P-10) dismissing objections (Annexure P-1) dated 21.10.2017 filed by the petitioner/Judgment Debtor, rejecting calculations given by the parties and holding the respondent/decree-holder entitled to recover ₹30,54,570.17 from the petitioner-Judgment Debtor.

2. Learned counsel for the petitioner contended that objections had been filed to the execution application by the petitioner/Judgment Debtor on 21.10.2017 inter alia taking up the plea of the execution application not having been presented by the person competent to do so. Elaborating on the same, learned counsel contended that the execution application was filed on 03.03.2016 on the basis of resolution of same date passed by the Board of Directors of M/s Harbans Singh Tuli and Sons Builders Pvt. Ltd, Chandigarh whereas the same had been dissolved on 16.06.2007 and its assets and liabilities had been taken over by M/s H.S. Tuli and Sons Builders Pvt. Ltd but even the

same was dissolved on 30.06.2017, thereafter, the execution application could not have been filed on the basis of resolution of M/s Harbans Singh Tuli and Sons Builders Pvt Ltd and in any case even if the institution of the execution application on the basis of resolution dated 03.03.2016 was held to be valid, the execution proceedings could not have been continued without getting M/s H.S. Tuli and Sons Builders Pvt. Ltd revived.

3. Learned counsel for the petitioner further contended that the execution application was also not maintainable on account of having been filed by a person not competent to do so as neither the Directors constituting the Board of Directors of M/s H.S. Tuli and Sons, Builders Pvt Ltd nor Shri Harkrishen Singh Tuli who claimed to be the Managing Director of M/s H.S. Tuli & Sons Builders Pvt. Ltd. possessed Director Identification Number (DIN) as per requirement of the Companies Act, 2013 (for short 'the Act') nor for that matter had any mention been made in the resolution or in the execution application of the DIN of respective Directors, therefore none of the Directors of M/s H.S. Tuli and Sons Builders Pvt. Ltd. were competent to transact any business on behalf of the respondent/decree-holder. Learned counsel contended that despite the plea of incompetence to file the execution application having been raised in the objections and elaborated in the written submissions/ arguments filed before the Executing Court on 23.03.2018 as were taken on record vide order dated 18.08.2018, the same had not been dealt with by the learned Executing Court while deciding the objections.

4. Learned counsel for the petitioner relied on the provisions of Section 149 to 172 of the Act as also Rule 2(1)(d) of the Act (Appointment and Qualification of Director), Rules, 2014 as referred to in the written submissions / arguments. Learned counsel made categorical reference to Section 152 of the Act as per which no person can be appointed as a Director of a company in the absence of allotment of DIN under Section 154 besides Section 164 which

stipulates disqualifications for appointment as a Director and Section 167 which stipulates the situations in which the office of Director shall become vacant and in view of the above, reiterated prayer as made in the objections / written submissions/arguments for dismissing the execution petition as not maintainable on account of not having been filed by the competent person.-

5. Lastly, learned counsel for the petitioner contended that the objection w.r.t. the calculations submitted by the decree holder being incorrect was not considered by the Executing Court. Learned counsel contended that interest on the awarded amount till date of judgment and decree or date of payment whichever was earlier could not be added to the principal amount for award of future interest on the clubbed amount from date of judgment and decree till date of payment. Learned counsel further contended that the amount to be paid to the decree holder as on 29.10.2018 in terms of order dated 14.08.2017 of Hon'ble the Supreme Court was to be worked out by adding simple interest @ 12 % on the principal amount w.e.f. 01.04.1980 till date of payment whereas the Executing Court had arrived at the figure of ₹30,54,570.7/- by adding interest @ 12 % p.a. on the awarded amount from 01.04.1980 till date of decree and thereafter by calculating interest @ 12 % p.a. on the amount so arrived at by clubbing the awarded amount and interest as on date of decree, till date of payment.

6. *Per contra*, Shri Tuli, appearing-in-person on behalf of the respondent/decree-holder contended that he was duly authorized to present and prosecute the execution application dated 03.03.2016 not only in terms of the resolution of the company M/s H.S. Tuli & Sons Builders Pvt. Ltd., but also in terms of Clause 31 of the Memorandum and Articles of Association of the company being its Managing Director notwithstanding that the company i.e. M/s H.S. Tuli and Sons Builders Pvt. Ltd had been dissolved on 30.06.2017 as in view of the provisions of Section 250 of the Act, the right of a company to

recover the amount owed to it subsists even after dissolution. It needs to mention here that Sh. Tuli had on February 01,2019, produced the original resolution book of M/s H.S. Tuli and Sons Builders Pvt. Ltd. containing resolution dated 03.03.2016 in support of the plea that he was duly authorized in terms of resolution passed by the Board of Directors of M/s H.S. Tuli and Sons Builders Pvt. Ltd. and that copy of the resolution attached with the execution application contained an inadvertent typographical error in mentioning the resolution to be of M/s Harbans Singh Tuli and Sons Builders Pvt. Ltd. Original Register containing resolution book of M/s H.S. Tuli and Sons Builders Pvt. Ltd. containing resolution dated 03.03.2016 was shown to learned counsel for the petitioner besides, photocopy of the same duly signed by Shri Tuli was handed over to learned counsel for the petitioner. On perusal of the original register containing the resolution of M/s H.S. Tuli and Sons Builders Pvt. Ltd. dated 03.03.2016 learned counsel for the petitioner stated that he did not press the objection w.r.t. resolution not being of M/s H.S. Tuli and Sons Builders Pvt., Ltd.

7. Plea of the petitioner that none of the Directors of M/s H.S. Tuli & Sons Builders Pvt. Ltd. possessed DIN or had applied for the same was frankly conceded by Shri Tuli to be the correct factual position. However, he argued that the objection with regard to non possession of DIN was not taken in the objections dated 21.10.2017 and that an objection not taken before the Executing Court could not be raised before the High Court in revision. Sh Tuli further contended that preliminary objection No.1 taken was with regard to the execution application being not maintainable as the case had not been presented by the competent person as Shri Harkrishen Singh Tuli was not authorized to present the execution application and that he be asked to furnish strict proof that he was competent to present and maintain the execution application. Sh Tuli contended that he had already provided proof of authorization and

competence in view of resolution dated 03.03.2016 as well as Clause 31 of the Memorandum and Articles of Association which in capacity of Managing Director empowered him to exercise all such powers and to do all such acts and things as may be exercised or done by the Company.

8. Lastly, Shri Tuli contended that calculations of the amount due and payable by the petitioner to the respondent/decree-holder as on 29.10.2018 had correctly been worked out by the Executing Court in view of order dated 04.10.2006 passed by the learned Civil Judge Jr. Divn., Chandigarh whereby the awarded amount along with interest @ 12 % p.a. w.e.f. 01.04.1980 till date of decree was made principal / decretal amount with aforesaid amount to carry interest @ 12 % p.a. w.e.f. date of decree till date of payment. He submitted that identical plea of Union of India as now raised with regard to calculations had been rejected by the learned Civil Judge (Jr. Division), Chandigarh vide order dated 04.10.2006 by holding as under:-

> *"Therefore, this Court is of the opinion that the awarded amount as upheld by the Court on 1.10.2003 along with the interest at the rate of 12% per annum simple with effect from 4.10.1980 till 19.2.2001 will become principal/decretal amount and on the said amount an interest at the rate of 12% per annum simple is to be paid by the JD to the decree holder till 01.10.2003 and thereafter, at the rate of 9% per annum simple till the payment in full and final and the amount to be paid by the JD's is first to be adjusted towards the interest and then towards the principal.*

Sh. Tuli contended that order dated 04.10.2006 was not challenged by the petitioner and had thus attained finality, consequentially, the same plea could not be re-agitated again by way of objections before the Executing Court.

9. Brief facts of the case leading to the filing of the revision petition are that a contract for construction of married accommodation for JCOs and ORs at Dharamshala was executed between M/s Harbans Singh Tuli and Sons, Sole Proprietor and the Union of India on 30.03.1978 with the work to be completed by 11.10.1980.

10. Union of India cancelled the contract on 04.10.1980, took over all stocks and material lying at the site and got the unfinished work executed through another contractor allegedly on account of the respondent/decree-holder having failed to execute the work as per the terms and conditions of the contract. Dispute between the parties was referred to arbitration leading to passing of award dated 19.02.2001 by Shri S.S. Goyal. Claims raised therein were partly allowed and ₹8,18,247.09 was awarded along with interest @ 12% per annum on the awarded amount w.e.f. 04.10.1980 to the date of decree / date of realisation whichever was earlier.

11. It needs noticing here that on the death of Shri Harbans Singh Tuli, Sole Proprietor, all his legal heirs joined together and incorporated M/s Harbans Singh Tuli & Sons Builders Pvt. Ltd on 30.01.1985 and took over the assets and liabilities of the Sole Proprietorship. Said company i.e. M/s. Harbans Singh Tuli & Sons Builders Pvt. Ltd. was dissolved on 16.06.2007 but before its dissolution, another Company by the name of M/s. H.S.Tuli & Sons Builders Pvt. Ltd was incorporated on 27.02.2006 and all assets and liability of M/s Harbans Singh Tuli and Sons Builders Pvt. Ltd. were taken over by M/s H.S. Tuli and Sons Builders Pvt. Ltd. However M/s H.S. Tuli and Sons Builders Pvt. Ltd was dissolved on 30.06.2017 by the Registrar of Companies due to non carrying on of business / operations.

12. Award dated 19.02.2001 in favour of M/s Harbans Singh Tuli and Sons Builders Pvt. Ltd. was made Rule of Court vide judgment and decree dated 01.10.2003 by the learned Civil Judge (Jr. Division), Chandigarh who accepted majority of the claims allowed by the Arbitrator except Claim No.2(K) and 2(L) while claim No.2(M) was modified and rate of interest from date of decree till realization was allowed @ 9% per annum.

13. Judgment and decree dated 01.10.2003 making the award Rule of Court was challenged by the parties before the learned Additional District Judge,

Chandigarh by filing separate appeals which were dismissed vide judgment and decree dated 07.03.2008. Thereafter, the respondent/decree-holder filed Civil Revision No. 5770 of 2008 before this Court which was disposed of vide order dated 25.02.2016 by restoring the award passed by the Arbitrator with reference to Claim No.2(K) and 2(M) while confirming the rejection of Claim No.2(L) besides holding the respondent/decree-holder entitled to interest @ 9% instead of 12% per annum from the date of decree till realisation.

14. Both parties filed SLPs against the aforementioned decision of this Court in CR No.5770 of 2008. Vide order dated 14.08.2017 SLP No.28616 of 2016 filed by the Union of India was dismissed while Civil Appeal Nos.10496-97 of 2017 filed by the respondent/decree-holder was partly allowed, interest granted by the Arbitrator was restored and the respondent/decree-holder held entitled to interest @ 12% p.a. on the award as modified by this Court vide its order dated 25.02.2016 in CR No.5770 of 2008 with the amount to be paid within three months.

15. Since the payment was not made to the respondent/decree-holder in terms of aforementioned order's of Hon'ble the Supreme Court, Contempt petition was filed by the decree holder wherein as per Shri Tuli, the petitioner herein took up the stand that it had deposited the entire amount and the Court had made the payment of the entire amount due to the respondent/decree-holder. The said stand was disputed by decree-holder as according to Shri Tuli over ₹30 lakh was recoverable by the decree holder. Eventually, Hon'ble the Supreme Court vide order dated 26.10.2018 was pleased to direct the Executing Court to pass orders as to whether the deposit already made by the respondents before it was in tune with the orders passed by the Supreme Court within 10 days from 26.10.2018. Thereupon, vide order dated 05.11.2018 the Executing Court held that as on 29.10.2018 an amount of ₹30,54,570.17 was the amount payable by the petitioner-JD to the respondent/decree-holder, accordingly, the amount paid

by the judgment-debtor to the decree-holder was not in tune with the orders passed by Hon'ble the Supreme Court.

16. I have considered the position as noted above as also the submissions of learned counsel for the petitioner as well as Shri H.S. Tuli appearing on behalf of the decree-holder.

17. Plea of the petitioner of the execution application not having been filed by the competent person in view of resolution dated 03.03.2016 being of M/s Harbans Singh Tuli and Sons Builders Pvt Ltd need not be dealt with in view of statement of counsel for the petitioner of his not pressing said objection on perusal of the original resolution of M/s H.S. Tuli and Sons Builders Pvt Ltd dated 03.03.2016 and in view of explanation of Sh. Tuli that the copy of the resolution attached along with the execution application contained an inadvertent typographical mistake mentioning the resolution to be of M/s Harbans Singh Tuli and Sons Builders Pvt Ltd instead of M/s H.S. Tuli & Sons Builders Pvt. Ltd.

18. As regards the objection of non maintainability of execution application on behalf of the decree-holder on account of non possession of Director Identification Number (DIN) by any of the Directors of M/s H S Tuli and Sons Builders Pvt. Ltd. including by Sh Harkrishen Singh Tuli, its Managing Director as per the requirement of the Companies Amendment Act, 2006, Companies Act, 2013 as also Rule 2(1)(d) of the Companies (Appointment and Qualification of Directors) Rules, 2014, it would be appropriate to refer hereunder to the relevant extract of the relevant applicable provisions.

Section 266 A of the Companies Amendment Act, 2006 :

"[266A. Application for allotment of Director Identification Number

Every--

(a) individual, intending to be appointed as director of a company; or

> *(b) director of a company appointed before the commencement of the Companies (Amendment) Act, 2006,*
>
> *shall make an application for allotment of Director Identification Number to the Central Government in such form, and manner (including electronic form) alongwith such fee, as may be prescribed:*
>
> *Provided that every director, appointed before the commencement of the Companies (Amendment) Act, 2006, shall make, within sixty days of the commencement of the said Act, such application to the Central Government:*
>
> *Provided further that every applicant, who has made an application under this section for allotment of a Director Identification Number, may be appointed as a director in a company, or, hold office as director in a company till such time such applicant has been allotted the Director Identification Number.*"

Rule 2(1)(d) of the Companies (Appointment and Qualification of Directors) Rules, 2014:-

> *"(d) "Director Identification Number" (DIN) means an identification number allotted by the Central Government to any individual, intending to be appointed as director or to any existing director of a company, for the purpose of his identification as a director of a company:*
>
> *Provided that the Director Identification Number (DIN) obtained by the individuals prior to the notification of these rules shall be the DIN for the purpose of the Companies Act, 2013:*
>
> *Provided further that "Director Identification Number" (DIN) includes the Designated Partnership Identification Number (DPIN) issued under section 7 of the Limited Liability Partnership Act, 2008 (6 of 2009) and rules made thereunder;"*

A perusal of Section 266 A of the Companies Act, 2006 reveals that every person intending to be appointed as a Director of a company or a Director of Company appointed before commencement of the Companies Amendment Act, 2006 was required to make an application for allotment of Director Identification Number to the Central Government and that every director appointed before the commencement of the Companies Amendment Act, 2006 was required to make the application within 60 days of the commencement of the said Act to the Central Government.

Further Rule 2(1)(d) of the aforementioned Rules stipulates Director Identification Number as a requirement not only for any person to be appointed as Director but also for an existing Director of a company *for the purpose of his identification as a Director of a company*.

19. Further, Section 152(3) stipulates that no person shall be appointed as a Director of a company unless he has been allotted the Director Identification Number under Section 154. Section 152 (3) of the Act is reproduced as under:-

> *"(3) No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number under section 154."*

Section 164 of the Act, on the other hand stipulates the disqualifications for appointment as Director and *inter alia* provides that a person shall not be eligible for appointment as a Director of a Company if he has not complied with Section 152(3). Section 164 (1) (h) of the Act, which is relevant is reproduced as under :-

> *"(1) A person shall not be eligible for appointment as a director of a company, if-*
>
> *(h) he has not complied with sub-section (3) of section 152."*

Thus, as per the provisions referred to above, a Director Identification Number is a requirement not only for a person to be appointed as Director but also for existing Director of a company i.e. even for a company which had been incorporated under the Companies Act, 1956.

20. Aforementioned aspect of the matter assumes significance in the context of Section 174 read with Section 167 of the Act. Although in terms of Section 174, the quorum for the meeting of the Board of Directors was complete while passing resolution dated 03.03.2016 yet the resolution passed in such meeting cannot be deemed to be a valid resolution in view of non possession of DIN by either of the Directors, as non possession of DIN would constitute a disqualifications under Section 164(1) (h), which lays down that a person not having been allotted a DIN under Section 154 cannot be appointed

as a Director of a company and as per Section 167 the office of Director shall become vacant in case he incurs any of the disqualifications specified in Section 164. Section 167 of the Act is reproduced as under:-

> *"**167. Vacation of office of director**.—*
> *(1) The office of a director shall become vacant in case—*
> *(a) he incurs any of the disqualifications specified in section 164;*
> …….
> *(2) If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in subsection (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.*
> *(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.*
> *(4) A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified in sub-section (1)."*

21. Thus, a person not possessing a DIN under Section 154 of the Act is not eligible to be appointed as a Director or to continue as a Director of a Company as he incurs a disqualification for appointment as a Director in terms of Section 164(1)(h) of the Act and in terms of Section 167 of the Act, the office of such a Director becomes vacant as he incurs the disqualification specified under Section 164 which *inter alia* includes ineligibility for appointment as a Director of a Company in the absence of allotment of DIN read with Rule 2(1)(d) of the Rules, which defines DIN as an identification number allotted to an individual intending to be appointed as director or to any existing director of a company for the purpose of his identification as a director of a company. Therefore, Shri Tuli purporting to act as Managing Director of M/s H.S. Tuli & Sons Builders Pvt. Ltd. was not competent to function/exercise such powers as a Director in view of the aforementioned provisions as per which his office as director stood vacated for incurring disqualification under Section 164 for want of DIN.

22. It follows that a Director who does not possess DIN would not be legally entitled to participate in the proceedings of the meeting of Board of Directors. Consequently, a resolution passed by a Board of Directors of which no Director possesses a DIN would be no resolution in the eyes of law, therefore, any proceedings instituted by the company pursuant to such a Board resolution would be a nullity in the eyes of law.

23. It also needs noticing here that although the objections dated 21.10.2017 had raised a general objection to the competence of Sh Harkrishen Singh Tuli to file the execution application and did not explicitly contain a challenge to the maintainability of the execution application on account of non possession of DIN yet the fact remains that written submissions/arguments dated 23.03.2018 were filed by the petitioner before the learned Executing Court and the same were taken on record by the learned Executing Court vide order dated 18.08.2018. In paragraph No. 2 of the said written submissions/arguments filed on behalf of the petitioner/judgment debtor it has been mentioned that the same had been filed to fortify the oral submissions addressed at the time of arguments in furtherance of the objections filed. Once the aforementioned written submissions/arguments had been taken on record then it was incumbent upon the learned Executing Court to have decided the point raised therein.

24. In the circumstances, although proceedings for effecting recovery on behalf of the company are maintainable by M/s H.S. Tuli and Sons Builders Pvt Ltd despite its name having been removed from the Register of Companies in view of Section 250 of the Act, yet in the absence of possession of DIN in terms of Section 152 read with Section 164(1)(h) and 167 of the Companies Act, 2013 read with Rule 2(1)(d) of the Companies Appointment and Qualification of Directors) Rules, 2014, the Board of Directors, which passed the resolution dated 03.03.2016 was not a valid Board on account of the

Directors of M/s H.S. Tuli & Sons Builders Pvt. Ltd having incurred disqualifications of not possessing DIN, thereby vacating their office in terms of Section 167 read with Section 164(1) (h), Section 152(3) and Section 154 of the Act. Accordingly, it is held that the execution application filed on behalf of M/s H.S. Tuli & Sons Builders Pvt. Ltd could not have been entertained nor proceedings continued without removing the disqualifications noticed above nor could Sh H.S. Tuli act as Managing Director of M/s H.S. Tuli and Sons Builders Pvt. Ltd. on account of not possessing DIN and thereby having vacated his office.

25. As regards objection qua calculations made by the Executing Court not being correct on account of addition of interest on the principal amount as on date of award and further awarding interest on the said clubbed amount, till date of realization, it needs to mention here that the aforementioned aspect of the matter was decided by the learned Civil Judge (Junior Division), Chandigarh vide order dated 04.10.2006 in favour of the respondent/decree-holder. As per affidavit dated 04.02.2019 filed on behalf of the petitioner, it has been stated that the aforementioned order had not been challenged as it was not to the knowledge of the petitioner. No findings are required to be given qua the aforementioned objection in view of the acceptance of the objections of the Union of India with regard to non maintainability of the execution proceedings on account of non possession of DIN by either of the directors of M/s H.S. Tuli and Sons Builders Pvt. Ltd. as also in view of order dated 04.10.2006 having attained finality due to absence of challenge till date despite the petitioner having been represented by counsel therein.

26. Accordingly, objections of the Union of India are partly accepted. Order dated 05.10.2018 (Annexure P-10) is set aside and execution application

is held to be non maintainable. Resultantly, order dated 13.10.2018 (Annexure P-5), is also set aside.

27. However, it is made clear that subject to the above finding, M/s H.S. Tuli & Sons Builders Pvt. Ltd. (decree holder) shall be at liberty to recover the amount owed to it by the petitioner in accordance with law.

(B.S. WALIA)
JUDGE

February 07, 2019
'rajneesh'

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No