

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSICAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
22-07-2024 AT 10:30 AM**

CP No. 35/241/HDB/2022

AND

IA (CA) 272/2023 in CP No. 35/241/HDB/2022

u/s. 241 of Companies Act, 2013

IN THE MATTER OF:

Opus Developers and Builders Pvt Lts

...Petitioner

AND

Sunway Opus International Pvt Ltd & 4 Others

...Respondent

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

ORDER

CP No. 35/241/HDB/2022

Learned senior counsel Mr Avinash Desai, for petitioner present through Video Conference.

Learned Senior Counsel Mr Vivek Reddy along with the counsel on record Mr Sai Sanjay Suraneni, for respondent present physically.

Due to power break down in Hon'ble NCLT, this matter could not be taken up. Matter adjourned to 12.08.2024.

IA (CA) 272/2023

Orders pronounced. In the result, **this application is dismissed. No costs.**

**Sd/-
MEMBER (T)**

**Sd/-
MEMBER (J)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – I, HYDERABAD**

I.A No. 272/2023 in
Company Petition No. 35/241/HDB/2022

*[under Section 241, 244 & other application provision of Companies Act, 2013 R/w Rule 11 & other
applicable rules of NCLT rules, 2016]*

**IN THE MATTER OF M/S SUNWAY OPUS INTERNATIONAL
PRIVATE LIMITED:**

In the matter of:

Opus Developers and Builders Private Limited
Sy No. 162P and 164, Ameenpur village,
Post Miyapur, Bachupally Road,
Sangareddy Dist., Telangana 502 302.

...Applicant

Versus

1) Sunway Opus International Private Limited
No. 8-2-120, 1st Floor, Block A, Palace View Estate,
Road No. 2, Banjara Hills, Hyderabad - 500034,
Represented by its Director.

2) Sunway City India Private Limited
No. 20, Uniworth Plaza, Sankey Road,
Bangalore, Karnataka 560 020.

3) Sunway City (Singapore) Pte. Ltd.
2 Venture Drive, # 11-28, Vision
Exchange, Singapore 608 526.

4) Sunway City Sdn Berhad
Level 17, Menara Sunway, Jalan Lagoon Timur,
Bandar Sunway, 47500 Subang Jaya,
Selangor Darul Ehsan, Malaysia.

5) Sunway Berhad,
Menara Sunway, Jalan Lagoon Timur,
Sunway City, Subang Jaya,
Selangor Darul Ehsan, Malaysia.

6) Mr. Wee Bee Tan

S/o Mr Yew Heng Tan
44, Choa Chu Kang Street 64, #13-20,
Singapore 689105.

7) Mr Chong Choong Chong
S/o Mr Chong Pow Yuen
30, LKK Setiabudi, Bukit Damansara,
50490, Kuala Lumpur, Wilayah Persekutuan,
Malaysia – 50490.

8) Ms. Sow Fun Wai
Daughter of Mr LUM WAI No. 9,
Jalan USJ Height 8/1B USJ Heights,
47500 Shah Alam Selangor Darul Ehsan
Malaysia.

9) Mr. Pradeep Nutalapati
S/o Mr Sambasiva Rao Nutalapati
Flat No.310, Tulasi Apartments,
Opposite Tanvir Hospital,
Srinagar Colony, Hyderabad- 500073.

10) Mr Vignesh Srivastava
S/o Mr Dharminder Pershad Srivastava
House Number 5-9-31/1, Flat No.102,
Bhatnagar Residency, Basheerbagh,
Hyderabad- 500063.

11) M/s S.S. Sravan & Associates
H.No. 6-3-354/9, Flat No. 501,
Sree Ramachandra Nilayam, Dwarakapuri Colony,
Hindi Nagar, Punjagutta, Hyderabad 500 082.

12) Ms Sarena Yean Tih Cheah
Sunway Berhad, Menara Sunway,
Jalan Lagoon Timur, Sunway City,
Subang Jaya, 45700 Selangor Darul Ehsan
Malaysia.

...Respondents

Date of order: 22.07.2024

Coram:

Dr. Venkata Ramakrishna Badarinath Nandula, Hon'ble Member (Judicial)

Shri Charan Singh, Hon'ble Member (Technical)

Appearance:

For Applicant : Harsha T. P. S, Advocate

For Respondent : Mr Sanjay Suraneni, Advocate

PER: BENCH

ORDER

This is an application filed under section 241, 244 & other application provision of Companies Act, 2013 R/w Rule 11 & other applicable rules of NCLT rules, 2016 by the Petitioner in the main company petition seeking to implead the proposed respondents in CP No. 35/241/HDB/2022 to meet the proper ends of justice the reliefs are as follows;

- a) *Implead the nominee directors of Respondent No. 3 on the Board of Respondent No.1 Company including Proposed Respondent Nos. 6, 7, 8, and 12 as Respondents in the Company Petition No. 35 of 2022;*
- b) *Implead Proposed Respondent Nos. 9, 10, and 11 as Respondents in the Company Petition No. 35 of 2022;*
- c) *Consequently, permit the Applicant to amend the cause-title of the Company Petition to include the Proposed Respondents No. 6 to 12 as Respondents 6 to 12 in the memo of parties in the Company Petition;*

1) Brief of averment in the Application:

- 1.1. It is averred that the current application to implead the Respondents in the company petition is based on the master data of Respondent No. 1. The data indicates that Respondent No. 1 is an ACTIVE company but non-compliant. It is noted that there are three directors, nominees of

Respondent No. 3, on the Board of Respondent No. 1. Additionally, two alternate directors have been appointed for unknown Sunway group nominee directors. Furthermore, there are no directors on the Board of Respondent No. 1 who are nominees of the Petitioner Company. It is also mentioned that the last AGM of Respondent No. 1 was held on 30.09.2019.

- 1.2. It is averred that as per the MGT-7 of Respondent No. 1, dated 19.03.2020, for the financial year 2018-2019, it was filed under the digital signature of Mr. Pradeep Nutalapati (Respondent No. 9) as a 'Director' and not Alternate Director appointed on 31.08.2017. The said change from Alternate Director to Director was not supported by any Member's meeting nor was the appointment reported to the RoC.
- 1.3. It is averred that the Master data reveals three nominee directors of the Applicant i.e., Venkata Swamy, Srinivasa Reddy, and Mahavir Jain resigned from the board effective 19.10.2019. It is further averred that these directors submitted their resignation letters on 29.09.2019. However, these resignations were not accepted vide a valid board meeting, no communication of acceptance was recorded, and no e-Form DIR-12 was filed in respect of the resignations.
- 1.4. It is averred that following the resignations on 19.10.2019, Respondent No. 1 was effectively managed by three nominee directors of Respondent No. 3. Due to these resignations, the board of Respondent No. 1 did not have a validly constituted board. According to Article 10.2 of the Articles of Association, the board must consist of a minimum of 1 and a maximum of 4 directors nominated by the Applicant. Furthermore, Article 12.2 of the Articles of Association stipulates that

a validly convened Board Meeting requires a quorum of at least 2 directors nominated by the Applicant. Due to the lack of the prescribed quorum, no validly convened board meeting or member's meeting could take place.

- 1.5. It is averred that following the resignations, the Applicant nominated three directors via a letter dated 5.10.2019, and informed Respondent No. 1 of these appointments. However, in clear violation of the Articles of Association, no action was taken to affect these appointments. In its affidavit dated 25.08.2022, Respondent No. 3 admitted it did not implement the appointments, citing the Applicant's default on a Rs. 40 crore loan from HSBC. This mismanagement has left Respondent No. 1 without validly constituted board or key management personnel, leading to the non-filing of annual returns and the absence of audited financial statements for the financial years ending March 2020, 2021, and 2022.
- 1.6. It is averred that that the current Board Members of Respondent No. 1 (Proposed Respondent Nos. 6 to 10 and 12) have engaged in oppressive behaviour towards the Applicant by neglecting their duties as Directors, violating Section 166 of the Act for nearly four years. This misconduct renders these Proposed Respondents unfit to hold their positions. Additionally, due to the failure to make requisite statutory filings for the past three financial years, the Applicant cannot ascertain the current board composition with certainty. However, the Applicant has learned that Proposed Respondent No. 12 has also been appointed as a nominee on the Board. Therefore, the Petitioner seeks to implead the nominee directors of Respondent No. 3 currently on the Board of Respondent No. 1 as necessary parties to the Company Petition.

- 1.7. It is averred that the Statutory Auditor (Proposed Respondent No. 11) was re-appointed for five years and signed audit reports for the financial years 2016-2019. That the applicant highlights certain entries in the reports that validated balance sheet. It is averred that one of the entries included a debit of Rs. 60.21 crores under "Cost of Sales" against Rs. 25.52 crores earned as Project Revenues, the said was done without explanation. Furthermore, the financial statements do not comply with Section 129 of the Act, which mandates a true and fair view of the company's state of affairs and compliance with accounting standards. Another unexplained entry was a debit of Rs. 17.93 crores for "Advertisement & Sales Promotion" during a year when project revenues were nil. Given these discrepancies and the lack of clarification in the Auditor's Report or Notes on Accounts, the Statutory Auditor is a necessary party to address these issues under the Companies Act, 2013, including Section 143.
- 1.8. It is averred that in light of the aforementioned facts, it's clear that the respondents have failed in fulfilling their statutory obligations, leading to losses for Respondent No. 1. Therefore, it is necessary to include Respondent Nos. 6 to 12 in the main company petition.

2) **Brief of averments in the counter by respondent no. 3:**

- 2.1. In response to the allegations, the respondent contends that the applicant and its joint managing director, Mr. Prem Kumar, are misusing the legal process by filing the current application. It is averred that the company petition is a counter-blast to Company Petition No. (IB) No.103/7/HDB/2023 filed by Respondent No.1 against the petitioner under Section 7 of IBC. That the Respondent No.1 was compelled to

file the petition as the petitioner failed to fulfill its corporate guarantee to pay 50% of the working capital loan obtained by Respondent No.1.

- 2.2. That the respondent denies the allegation that the applicant had no knowledge of the debit entries under "Cost of Sales" in the financial years 2016-2017 and 2018-2019. As a 49.99% shareholder in Respondent No. 1, the applicant was represented by its three nominee directors on the Board, who were fully aware of the financial statements. The minutes of the AGM dated 27.09.2017, confirm the participation of Mr. P.S. Reddy, the nominated director of the applicant. Furthermore, since the applicant and its nominee directors did not raise any objections for these entries at that time, challenging their validity now is legally barred by the statute of limitations.
- 2.3. It is averred that the applicant relied on the same financial statements to support its claims before the Arbitral Tribunal but is now objecting to them in the present application. This inconsistency warrants dismissal of the application. It is further averred that the applicant is not entitled to implead new parties as they have not raised these grounds in the company petition. That the applicant seeking reliefs on the alleged grounds before the tribunal are contradicting to the grounds taken before the Arbitral Tribunal.
- 2.4. It is averred that as per rule 155 of the National Company Law Tribunal Rules, 2016, any amendment to the petition could have been sought by the petitioner within 30 days from the date of completion of the pleadings. That the said allegation put forth by the applicant are not maintainable as the applicant has the knowledge when the present

company petition was filed on 25.08.2023. But the allegation put forth in the application are not pleaded in the main company petition.

- 2.5. It is averred that the respondent no. 3 was in talks with Mr. Prem Kumar, the joint managing director of the Applicant regarding the sale of the respondent no. 3's shareholding in Respondent no. 1 company. This indicates the applicant's awareness of the company's operations. However, the applicant failed to fulfill its obligation to inject capital into Respondent no. 1, leading to a halt in business operations. Moreover, instead of assisting Respondent no. 1 in overcoming financial challenges, the applicant seems solely interested in acquiring respondent no. 3's shareholding in the company. The current application appears to be another attempt to pressure respondent no. 3 into selling its shares to the applicant.
- 2.6. It is averred that the respondent refutes the applicant's claims, stating that the resignation of nominee directors was acknowledged, evidenced by their submission of e-Form DIR-11 on 28.09.2021. Additionally, the respondent asserts that the applicant was aware of the alleged irregularities in Respondent No.1's board constitution since 09.10.2019, but have raised these issues only now. It is again averred that the failure of the Respondent No.1's business was due to the applicant's failure to inject capital. It is further averred that the respondent argues that the statutory auditor's actions were ratified and approved by the board, which included the applicant's nominee directors. They assert that the applicant was aware of these actions and could have raised objections earlier if warranted. It is further averred that the applicant was the original party that entered into a joint development agreement with the land owners of the land intended to be developed by the respondent no.

1, it is applicant who has failed to come to a settlement with the land owners from 2019 till date which resulted in the present financial situation of the respondent no. 1 company.

3) **Brief of Written submissions filed by the applicant:**

While reiterating the averments in the application placed reliance on the judgement passed by the Hon'ble NCLAT in *Deloitte Haskins & Sells LLP v. Union of India, 2020 SCC OnLine NCLAT 381* for allowing the whilst statutory auditor to be impleaded.

4) **Brief of brief notes filed on behalf of respondents:**

4.1. While reiterating the averments in the counter the respondent placed reliance on Rule 155 of the NCLT Rules, 2016 and stated that the amendment sought by the applicant is barred by while relying on the Hon'ble Supreme court's findings in the case of *M.C. Davar Holdings Private Limited vs. Aurosagar Estate Private Limited and other [2017 SCC Online SC 2129]*.

4.2. The respondent submitted that the parties who are sought to be impleaded are neither necessary nor proper parties to the company petition and placed reliance on the Hon'ble Supreme court's findings in the case of *Globe Ground (India) Employees Union vs. Lufthansa Germa Airlines (2019) 15 SCC 273*.

4.3. The respondent further submitted that the applicant has not approached this tribunal with clean hands and the applicant has taken opportunistic stand before different judicial fora to suit its case, stating the said reliance was placed on the Hon'ble Supreme court's findings in the case

of *Kishore Samrite vs. State of U.P.*, [(2013) 2 SCC 398] and the Hon'ble Madra High court's decision in the case of *K.R.S. Mani vs. Anugraha Jewellers Limited and ors* [(2005) 126 Comp Cas 878].

- 5) In the light of the contest put forth by both the parties the following point is framed for our consideration:

Point

Whether the proposed parties are necessary and proper parties for the just, proper and complete adjudication of the subject dispute?

- 6) We have heard the Learned Senior Counsel Mr Avinash Desai and Learned counsel on record Harsha T. P. S, for the Petitioner and Learned Senior Counsel Mr Vivek Reddy and Learned counsel on record Mr Sanjay Suraneni, for respondent. Perused the records, the written statements and other documents filed before the Tribunal.

The Submissions:

- 7) Learned Senior counsel Mr. Avinash Desai for the applicant would submit that, according to the Master Data record of Respondent No. 1 Company, extracted from the MCA portal, there are three directors and two alternate directors who are nominees of the Sunway Group, i.e., 3rd Respondent. These three directors, namely the respondents No. 6, 7, and 8, are foreign nationals, and the respondent no. 9 and 10 are two alternate directors.
- 8) The learned senior counsel submits that the appointment of Respondents No. 6 to 10 as directors, by the Respondent is an act of mismanagement, and their induction as directors resulted in making Respondent No. 1 Company a rudderless ship since 19.10.2019, as such they are the necessary and proper parties to the present company petition. Learned senior counsel

further submits that the resignation of the three nominees of the applicant from the board effective from 19.10.2019, were not accepted through a valid board meeting, and no communication of acceptance was recorded, nor was there any e-Form filing in this regard.

- 9) The Learned senior counsel also referred to Articles 10.2 and 12.2 of the Articles of Association, stating that the board must have a minimum of one and a maximum of four directors nominated by the applicant. Article 12.2 specifies that a valid board meeting requires a quorum of at least two directors nominated by the applicant. On 05.10.2019, the applicant nominated three directors in a letter to Respondent No. 1, but this was rejected by Respondent No. 3 in an affidavit dated 25.08.2022, citing a default by the applicant. This rejection violated the Articles as no action was taken. Therefore, it is necessary and proper to include the proposed respondents in the petition to ensure justice.
- 10) In so far as the 11th respondent a statutory auditor is concerned, learned senior counsel submitted that the same is a necessary party to the company petition because the reports filed by Respondent No. 11 have approved debit entries in the financial year 2016-2019 that are misleading and do not comply with Section 129 of the Act. Additionally, it was submitted that Respondent No. 12 was also appointed as a nominee on the board of Respondent No. 1 Company, making it a necessary party.
- 11) Per contra, the learned counsel for Respondent No. 3 denied the allegations and submitted that the applicant and its joint managing directors have filed this current application to misuse the legal process. Additionally, this application is a retaliatory measure against Company Petition (IB) No. 103/7/HDB/2023 filed by Respondent No. 1, which claims that the

petitioner failed to fulfill its corporate guarantee to pay 50% of the working capital loan obtained by Respondent No. 1.

- 12) The learned counsel submitted that the resignation of the nominee directors was well within the knowledge of the applicant and the same is evident from the e-Form DIR-11 dated 28.09.2021. It is further submitted that the allegations put forth in the application against the proposed respondents pertain to the period which is prior to the filing of present petition and the same were well within the knowledge of the applicant.
- 13) The Learned counsel submitted that the proposed respondents are neither necessary nor proper parties to adjudicate issues raised by the petitioner in the captioned company petition. It is further submitted that the amendment prayed for is not for the purpose of deciding the real question of law making the present application not maintainable as per Rule 155 of National Company Law Tribunal Rules, 2016. In support of this contention, the Learned counsel placed reliance on the findings of the Hon'ble Supreme Court in ***Globe Ground (India) Employees Union vs. Lufthansa Germa Airlines (2019) 15 SCC 273***, wherein it was held as follows:

“10. Whenever, an application is filed in the adjudication proceedings, either before the Industrial Tribunal in a reference made under the Industrial Disputes Act, 1947 or any other legal proceedings, for impleadment of a party who is not a party to the proceedings, what is required to be considered is whether such party which is sought to be impleaded is either necessary or proper party to decide the lis. The expressions “necessary” or “proper” parties have been considered time and again and explained in several decisions. The two expressions have separate and different connotations. It is fairly well settled that necessary party, is one without whom no order can be made effectively. Similarly, a proper party is one in whose absence an effective order can be made but whose presence is necessary for complete and final decision on the question involved in the proceedings.”

Our Analysis and Findings:

- 14) At the outset we wish to state that in a petition under section 241 and 242 of the Act, generally the reliefs are claimed against the company in which the Petitioner is a member and also against other members or non-members of the company alleging acts of oppression and mismanagement causing prejudice to the interest of the petitioner or the company. The necessary parties who can be made as respondent can be a member and also at times a non-member, against whom reliefs are prayed.

In *Moreshar Yadaorao Mahajan vs Vyankatesh Sitaram Bhedi (D)*, *CIVIL APPEAL NO. 5755 & 5756 OF 2011*, the Hon'ble Supreme Court observed that a suit is liable to be dismissed if a necessary party is not impleaded. For being a necessary party, the Hon'ble Apex Court laid down the following twin test that are to be satisfied:

- (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings;*
(2) that no effective decree can be passed in the absence of such a party.

- 15) In the case at hand, a perusal of the petition under section 241 and 242 of the Act makes it clear that no allegation or any relief was sought against the proposed respondents herein. The applicant herein contends that the proposed respondents no. 6 to 10 are shown as director of respondent no. 1 on the MCA website and hence are to be made party to the petition. Apart from the said contention the applicant could not provide any reasonable ground as to why the said respondents are necessary or proper parties in this petition. Merely because the proposed respondent no. 6 to 12 are directors of the respondent no.1 they cannot be made parties to the petition,

unless allegations having some basis are levelled against the persons. Having perused the Pleadings and reliefs prayed for in the petition, we are of the view that the adjudication on the said pleadings and reliefs can be made even in the absence of the proposed respondents no. 6 to 10, and at the same time their presence also is of no help to this petition.

- 16) In so far as the Respondent No. 11 who is a Statutory Auditor, is concerned we are unable to find any allegations against this respondent in the original company petition. The detailed allegations made in the application were not present in the petition. Furthermore, the Hon'ble NCLAT discussed whether the Statutory Auditor is a necessary party in ***Shanta Prasad Chakravarty vs M/S. Bochapathar Tea Estate Private Ltd 2017 SCC OnLine NCLAT 335***, it held that:

5.The acts of oppression and mismanagement under these Sections could be averred against the Company, Board of Directors, Shareholders or its members. The Statutory Auditors are admittedly none of these. Before NCLT petition was not under Section 245 of the Companies Act 2013.....
Perusal of the Section shows that it provides for complete procedure as to when and how it can be invoked. It is necessary to comply the requirements laid down before it is admitted. Procedure after admission is also laid down. Again, the Section is enforced w.e.f. 1st June 2016 and Annual Financial Report questioned in the petition is of 2014-15. Apart from this, the Appellants in the petition filed in November 2016 did not invoke Section 245 of the above Act which has a procedure of its own. In absence of invoking procedure under Section 245, the Appellants cannot import action possible under Section 245, in a proceeding under Sections 241, 242 of the Act. If Appellants want to rely on Section 245, they will have to do needful under Section concerned and satisfy the requisites.

- 17) Therefore, the point is accordingly answered.

- 18) In the light of our finding on the point above, we are of the view the present application is not maintainable in law and also on merits. Hence, the same is liable to be dismissed.
- 19) Accordingly, this application is dismissed, however without costs.

Sd/-

Charan Singh
Member (Technical)

Sd/-

Dr. Venkata Ramakrishna
Badarinath Nandula
Member (Judicial)

Bhargavi Kinhalakar