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[2020] 222 Comp Cas 1 (Mad)

[IN THE MADRAS HIGH COURT]

CA. VENKATA SIVA KUMAR

v.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI) AND OTHERS

A. P. SAHI C. J. and **SENTHILKUMAR RAMAMOORTHY** J.

July 28, 2020.

HF ▸ Respondent

LEGISLATIVE POWERS—DELEGATED LEGISLATION—INSOLVENCY AND BANKRUPTCY BOARD OF INDIA—REGULATIONS—POWERS—POWER TO CHARGE FEES AT PERCENTAGE OF REMUNERATION OF INSOLVENCY RESOLUTION PROFESSIONAL—DOES NOT SUFFER FROM ANY CONSTITUTIONAL INFIRMITY ON ACCOUNT OF ABSENCE OF QUID PRO QUO—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 196, 207—INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY PROFESSIONALS) REGULATIONS, 2016, REGLNS. 7(2)(ca), 13(2)(ca).

The petitioner, a chartered accountant, registered himself as an insolvency professional with the Insolvency and Bankruptcy Board of India. The Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 were framed by the Board under sections 196, 207 and 208 read with section 240 of the Insolvency and Bankruptcy Code, 2016. Regulation 7 of the Regulations provided that the registration of the insolvency professional with the Board was subject to the conditions stipulated therein. Regulation 7(2)(ca) thereof stipulated the requirement that the insolvency professional should pay a fee calculated at 0.25 per cent. of the professional fee earned for services rendered as an insolvency professional in the preceding financial year to the Board. Regulation 13(2)(ca) stipulated payment of a fee at 0.25 per cent. of the turnover of the entity in the preceding financial year to the Board. On a writ petition challenging both regulations 7(2)(ca) and 13(2)(ca) on the

ground that they violated articles 14, 19 and 21 of the Constitution and were, therefore, liable to be struck down :

Held, *dismissing the petition, that the fee making power was not subject to any fetters except that it should be for carrying out the purposes of the Insolvency and Bankruptcy Code, 2016. Given the statutory framework, the Board was duly empowered under sections 196 and 207 of the Code to levy a fee on insolvency professionals, including at a percentage of the annual remuneration as an insolvency professional in the preceding financial year. The Board provided significant services, including in relation to insolvency professionals and there was broad correlation between the fees and services. Given the fact that direct or arithmetical correlation between the fee received and services rendered was not necessary especially in the context of regulatory fees, regulation 7(2)(ca) of the Regulations did not suffer from any constitutional infirmity on account of the absence of quid pro quo. The Code contained adequate safeguards to ensure that Parliament effectively supervised all rules and regulations with the power to modify or even annul them. Likewise, adequate safeguards were in place to ensure that the funds of the Board were utilized for the purposes of fulfilling the role of the Board under the Code. The conferment of the power to charge a fee and the charging of such fee using the annual remuneration as a measure did not amount to delegation of an essential legislative function. Therefore, it could not be said that there was excessive delegation of powers to the Board.*

AVINDER SINGH *v.* STATE OF PUNJAB [1979] AIR 1979 SC 321 *and* STATE OF TAMIL NADU *v.* SHYAM SUNDER (K.) [2011] AIR 2011 SC 3470 *relied on.*

Cases referred to :

Avinder Singh *v.* State of Punjab [1979] AIR 1979 SC 321 (paras 5, 14)

B. S. E. Brokers Forum *v.* Securities and Exchange Board of India [2001] 104 Comp Cas 506 (SC) (paras 8, 12)

City Corporation of Calicut *v.* Thachambalath Sadasivan [1985] 2 SCC 112 ; [1985] SCC (Tax) 211 (para 12)

Goodricke Group Ltd. *v.* State of West Bengal [1995] 98 STC 32 (SC) (para 12)

Sirsilk Ltd. *v.* Textiles Committee [1989] Supp (1) SCC 168 ; [1989] SCC (Tax) 219 ; [1989] AIR 1989 SC 317 (para 12)

State of Punjab *v.* Devans Modern Breweries Ltd. [2004] 11 SCC 26 (para 8)

State of Tamil Nadu *v.* Shyam Sunder (K.) [2011] AIR 2011 SC 3470 (paras 5, 14)

State of Tamil Nadu *v.* TVL. South Indian Sugar Mills Association [2015] 13 SCC 748 (para 12)

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V. Venkata Sivakumar party-in-person for the petitioner.

R. Sankaranarayanan, Additional Solicitor General of India assisted by *K. Jaiganesh* for respondents Nos. 1, 3 and 4.

JUDGMENT

The judgment of the court was delivered by

SENTHILKUMAR RAMAMOORTHY J.—The petitioner is a chartered accountant and has registered himself as an insolvency professional (IP) with the Insolvency and Bankruptcy Board of India (the IBBI). The Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (the IP Regulations), were framed by the IBBI under sections 196, 207 and 208 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (the IBC). Regulation 7 of the IP Regulations provides that the registration of the IP with the IBBI is subject to the conditions stipulated therein. Regulation 7(2)(ca) thereof stipulates the requirement that the IP should pay a fee calculated at 0.25 per cent. of the professional fee earned for services rendered as an IP in the preceding financial year to the IBBI. Regulation 12 of the IP Regulations provides for the recognition of a company, registered partnership firm or a limited liability partnership as an insolvency professional entity (IPE) subject to the conditions set out therein. Regulation 13(2)(ca) stipulates payment of a fee at 0.25 per cent. of the turnover of the IPE in the preceding financial year to the IBBI. Both regulations 7(2)(ca) and 13(2)(ca) are under challenge in this writ petition whereby the petitioner seeks a declaration that the said IP Regulations violate articles 14, 19 and 21 of the Constitution and are, therefore, liable to be struck down. **1**

The power to levy fees on IPs is conferred on the IBBI under sections 196 and 207 of the IBC. In section 196, sub-section (1)(a), (aa) and (c) are relevant and are set out below : **2**

> "(1) The Board shall, subject to the general direction of the Central Government, perform all or any of the following functions, namely :—

(a) register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations ;

(aa) promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code ;

(c) levy fee or other charges for carrying out the purposes of this Code, including fee for registration and renewal of insolvency professional agencies, insolvency professionals and information utilities."

Section 207 of the IBC deals with the registration of IPs and for the payment of fees in respect thereof. The said provision is as under :

"207. *Registration of insolvency professionals.*—(1) Every insolvency professional shall, after obtaining the membership of any insolvency professional agency, register himself with the Board within such time, in such manner and on payment of such fee, as may be specified by regulations.

(2) The Board may specify the categories of professionals or persons possessing such qualifications and experience in the field of finance, law, management, insolvency or such other field, as it deems fit."

Section 208 deals with the broad functions and obligations of IPs and stipulates that an IP shall undertake such actions as may be necessary in respect of the different forms of insolvency resolution processes, bankruptcies and liquidation. Section 240 contains the general power to make regulations and reads, inter alia, as under :

"240. *Power to make regulations.*—(1) The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code."

The IP Regulations were framed in the year 2016 and were amended subsequently with regard to the conditions for registration of an IP and IPE, respectively, by inserting clause (ca) in regulations 7(2) and 13(2). This amendment was made by Notification No. IBBI/2018-19/GN/REG036, dated October 11, 2018[1] with effect from even date and the provisos thereto were inserted by a subsequent amendment with effect from March 28, 2020. Regulation 7(2)(ca) is as under :

"7. (2) The registration shall be subject to the conditions that the insolvency professionals shall—

1. See [2019] 5 Comp Cas-OL (St.) 11.

(ca) pay to the Board, a fee calculated at the rate of 0.25 per cent. of the professional fee earned for the service rendered by him as an insolvency professional in the preceding financial year, on or before the 30th April every year, along with a statement in Form E of the Second Schedule :

Provided that for the financial year 2019-2020, an insolvency professional shall pay the fee under this clause on or before the 30th June, 2020."

Regulation 13(2)(ca) is as under :

"13. (2) The recognition shall be subject to the conditions that the insolvency professional entity shall—

(ca) pay to the Board, a fee calculated at the rate of 0.25 per cent. of the turnover from the services rendered by it in the preceding financial year, on or before the 30th of April every year, along with a statement in Form G of the Second Schedule :

Provided that for the financial year 2019-2020, an insolvency professional entity shall pay the fee under this clause on or before the 30th June, 2020."

By circular dated April 12, 2019[1], all registered IPs and all recognized **3** IPEs were informed about the necessity to comply with the requirement of paying a fee calculated at the rate of 0.25 per cent. of the professional fees/ annual turnover of the IP or IPE, as the case may be, for services rendered in the preceding financial year. Such fee is required to be paid on or before April 30th, of every year, other than financial year 2019-20, by filing Form E, as regards IPs, and Forms G and H as regards IPEs. The petitioner obtained a certificate of registration as an IP from the IBBI on August 7, 2017 and has been appointed as a resolution professional thereafter by the National Company Law Tribunal. An IP who is appointed to conduct the corporate insolvency resolution process is defined as a resolution professional (RP) as per section 5(27) of the IBC. Upon the entry into force of the amendment and even prior to the circular dated April 12, 2019 by communication dated October 13, 2018 to the Chairperson of the IBBI, the petitioner stated that the charging of fees based on a percentage of the RP's earnings is in violation of the principles of natural justice. He called upon the IBBI to withdraw the notification levying fees on the remuneration received by the IP/RP in the preceding financial year. He also made a request under the Right to Information Act, 2005 (the RTI Act) to the Central Public Information Officer, IBBI, on January 13, 2020 asking for

1. See [2019] 6 Comp Cas-OL (St.) 3.

information as to the basis for charging the fee of 0.25 per cent. of the remuneration received by the IP and as to the manner in which such monies were utilized during the year 2018-19. In response, a reply dated February 25, 2020 was received. On account of being dissatisfied with the response, the petitioner filed the present writ petition.

4 We heard the petitioner as a party-in-person and the learned Additional Solicitor General of India (ASGI), Mr. R. Sankaranarayanan, for respondents Nos. 1, 3 and 4.

5 The petitioner raised the following contentions. His first contention was that the impugned regulations are ultra vires section 196 of the IBC. According to him, section 196 does not empower the IBBI to levy fees on the basis of the annual remuneration or the annual turnover of the IP or IPE, as the case may be, and that a registration fee of Rs. 10,000 is charged every five years after the certificate of registration is granted. His second contention, in this regard, was that there is excessive delegation and, therefore, the regulation is liable to be struck down. In support of this contention, he relied upon the judgments of the hon'ble Supreme Court in *State of Tamil Nadu* v. *K. Shyam Sunder*, AIR 2011 SC 3470 and *Avinder Singh* v. *State of Punjab*, AIR 1979 SC 321, wherein it was held that conferring unfettered powers on the delegate would be an abdication of legislative responsibility, and that essential legislative functions cannot be delegated. His third contention was that the IBBI has not provided services to IPs and, therefore, there is no quid pro quo to justify the charging of fees as a percentage of the annual remuneration/turnover. In support of this submission, he referred to the request for information under the RTI Act. In specific, he pointed out that in response to the question as to the information/documents/legal opinion, if any, on the basis of which the decision was taken to charge a fee of 0.25 per cent. of the remuneration received by the IP, the reply was as under :

> "Please refer to the information available on the meetings of Governing Board of IBBI held on March 15, 2018, June 26, 2018 and September 28, 2018 as available on IBBI website."

Similarly, in response to the question as to the purposes for which the fee would be utilized, the response was as follows :

> "Please refer to the information available on the meetings of Governing Board of IBBI held on March 15, 2018, June 26, 2018 and September 28, 2018 as available on IBBI website."

In response to a question as to how the amounts that were received towards fees were utilized during the year 2018-19, the reply was as follows :

"The Board treats the amount as revenue income and uses it accordingly."

According to the petitioner, these responses are evasive and clearly indicate the complete absence of quid pro quo.

Consequently, the petitioner contended that his rights under articles 14, 19 and 21 of the Constitution are violated. He concluded his submissions by pointing out that IPs were functioning under extremely difficult conditions and that the impugned regulations are causing immense financial hardship to IPs. 6

In response, the learned ASGI submitted that section 196 of the IBC expressly empowers the IBBI to levy fees or other charges for registration and renewal of registration of insolvency professional agencies, insolvency professionals and information utilities and that the only fetter is that such fee should be for carrying out the purposes of the Code. In addition, he pointed out that section 207 provides for the registration of IPs with the IBBI and for the payment of fees, in connection therewith, as specified by regulations. Therefore, he submitted that the power to levy the fee is beyond question and that there are sufficient safeguards in the IBC. With regard to quid pro quo, he submitted that it is not necessary that there should be a direct correlation between the fee received and the services provided. Indeed, it is not even necessary that the petitioner and other IPs should be direct beneficiaries of the services provided by the IBBI. As a matter of fact, he pointed out that the IBBI is entrusted with several functions under the IBC qua insolvency resolution, in general, and IPs in particular. By way of illustration, he referred to section 16(3) and (4) of the IBC whereby the IBBI is empowered to recommend an IP in case no proposal is made by the operational creditor concerned. 7

He invited the attention of the court to the report of the Financial Sector Legislative Reforms Commission (the FSLRC Report), Volume-I, dated March 22, 2013 and, in particular, to the fact that the FSLRC recommended that the regulator should be self-sufficient and funded through the collection of fees levied. For this purpose, he referred to page 26 of the said Report. He pointed out that the recommendations in the FSLRC Report, inter alia, formed the basis for providing for a regulator under the IBC, i. e., the IBBI, which is self sufficient at least with regard to operational expenses. He also referred to the Report in November, 2015 of the Bankruptcy Law Reforms Committee (the BLRC Report). In particular, he pointed out that paragraph 4.1.13 of this Report provides as follows : 8

"Insolvency and bankruptcy regulation, especially for individuals, is likely to be a resource intensive function. The Board should be

equipped with the capability and the resources required to perform a wide range of function and is responsible for building and maintaining the credibility of the bankruptcy and insolvency resolution process. There is need for financial independence which allows the Board to have the required flexibility and human resources that are more difficult to achieve within a traditional Government setup."

The draft insolvency and bankruptcy bill was drafted by the aforesaid BLRC and the IBBI was therefore designed to be self-sufficient. The learned ASGI submitted that the fixation of fees as a percentage of the annual remuneration/turnover should be viewed against this backdrop. The question as to whether a fee could be charged as a percentage of the turnover is no longer res integra and is settled by the judgment of the hon'ble Supreme Court in *B. S. E. Brokers Forum* v. *Securities and Exchange Board of India* [2001] 104 Comp Cas 506 (SC) ; [2001] 3 SCC 482. The hon'ble Supreme Court was dealing with the levy of fees by the SEBI under the SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992. In that context, the hon'ble Supreme Court concluded that quid pro quo is not a condition precedent for the levy of regulatory fees. The specific question as to whether the fee could be imposed on the basis of the annual turnover of the brokers was considered in this case and the hon'ble Supreme Court concluded that the annual turnover is not the subject-matter of the levy but is only a measure of the levy. Consequently, it does not amount to a turnover tax or a tax on income. The learned ASGI also referred to the judgment of the hon'ble Supreme Court in *Sudhindra Thirtha Swamiar* v. *Commissioner for Hindu Religious and Charitable Endowments, Mysore*, AIR 1963 SC 966, wherein, at paragraph 18, it was held that "it is not necessary that the fee must have direct relation to the actual services rendered by the authority to each individual who obtained the benefit of the service". In addition, he relied upon the judgment of the hon'ble Supreme Court in *State of Punjab* v. *Devans Modern Breweries Ltd.* [2004] 11 SCC 26, wherein it was held that the import fee on alcohol was fully authorized by the Punjab Excise Act, 1914, and delegated legislation thereunder and it is clearly intra vires.

9 We considered the submissions of the party-in-person and the learned ASGI and examined the records.

10 At the outset, we note that the petitioner has not pleaded or established that he is a partner or director of an IPE, as defined in regulation 12 of the IP Regulations. Therefore, he does not have the locus standi to challenge regulation 13(2)(ca). Consequently, we decline to exercise the discretion to examine the constitutional and statutory challenge to regulation 13(2)(ca)

at the instance of the petitioner. However, as an IP, he has the locus standi to challenge regulation 7(2)(ca) and, therefore, we propose to examine the constitutional and statutory challenge to regulation 7(2)(ca). Although regulations 7(2)(ca) and 13(2)(ca) are substantially in pari materia, different considerations could arise as regards regulation 13(2)(ca) and we do not propose to examine the same in this proceeding.

11 The first question to be examined is whether regulation 7(2)(ca) is ultra vires sections 196 and 207 of the IBC. On examining the IBC, we find that section 196(1)(a) expressly confers power on the IBBI to register insolvency professional agencies and IPs, and to renew, withdraw, suspend and cancel such registration. Section 196(1)(aa) expressly empowers the IBBI to regulate the working of IPs, insolvency professional agencies and information utilities and section 196(1)(c) thereof expressly empowers the IBBI to levy fees or other charges including for registration of insolvency professional agencies and IPs and for the renewal of such registration. In addition, we find that section 207(1) mandates that every IP should register himself with the IBBI within such time, in such manner, and on payment of such fee as may be specified by regulations. Moreover, section 240 is the general regulation making power of the IBBI and section 240(1) does not impose any restraints on the powers of the IBBI, except that regulations should be consistent with the IBC and the rules thereunder and should be for the purposes of carrying out the provisions of the IBC. From the above, we find that there can be no question whatsoever with regard to the powers of the IBBI to frame regulations with regard to the fee payable by IPs and insolvency professional agencies. As regards the charging of fees as a percentage of remuneration, we note that the fee making power is not subject to any fetters except that it should be for carrying out the purposes of the IBC. Given this statutory framework, we conclude that the IBBI is duly empowered under sections 196 and 207 of the IBC to levy a fee on IPs, including as a percentage of the annual remuneration as an IP in the preceding financial year.

12 The next issue to be considered is whether quid pro quo is absent in the levy of fees as a percentage of the annual remuneration/turnover and whether regulation 7(2)(ca) is liable to be set aside for such reason. The law, in this regard, has evolved significantly and the classical clear-cut distinction between a tax and fee no longer holds the field, particularly in the context of a regulatory fee. In *B. S. E. Brokers Forum* v. *Securities and Exchange Board of India* [2001] 104 Comp Cas 506 (SC) ; [2001] 3 SCC 482, the hon'ble Supreme Court held categorically, at paragraph 38, that quid pro quo is not a condition precedent for the levy of regulatory fees and that

it is sufficient if there is a broad correlation as between services provided and the fee charged. Paragraph 38 is as under (page 523 of 104 Comp Cas) :

> "As noticed in the *City Corporation of Calicut* v. *Thachambalath Sadasivan* [1985] 2 SCC 112 ; [1985] SCC (Tax) 211 the traditional concept of quid pro quo in a fee has undergone considerable transformation. From a conspectus of the ratio of the above judgments, we find that so far as the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not lose the character of a fee provided the fee so charged is not excessive. It is also not necessary that the services to be rendered by the collecting authority should be confined to the contributories alone. As held in *Sirsilk Ltd.* v. *Textiles Committee* [1989] Supp (1) SCC 168 ; [1989] SCC (Tax) 219 ; AIR 1989 SC 317, if the levy is for the benefit of the entire industry, there is sufficient quid pro quo between the levy recovered and services rendered to the industry as a whole. If we apply the test as laid down by this court in the abovesaid judgments to the facts of the case in hand, it can be seen that the statute under section 11 of the Act requires the Board to undertake various activities to regulate the business of the securities market which requires constant and continuing supervision including investigation and instituting legal proceedings against the offending traders, wherever necessary. Such activities are clearly regulatory activities and the Board is empowered under section 11(2)(k) to charge the required fee for the said purpose, and once it is held that the fee levied is also regulatory in nature then the requirement of quid pro quo recedes to the background and the same need not be confined to the contributories alone."

By applying the said standard, in the context of the charging of a regulatory fee on stockbrokers as a percentage of annual turnover, the hon'ble Supreme Court concluded that the amount collected under the impugned levy is being used by the SEBI on various activities relating to the securities market, with which the petitioners therein were concerned. On that basis, it was held that the levy is valid although the entire benefits of the levy do not accrue to the contributors. More importantly, with regard to the levy of fee on the basis of the annual turnover of the brokers, the hon'ble Supreme Court concluded that the annual turnover is not the subject-matter of the levy but is only a measure of the levy. Therefore, it does not amount to a turnover tax or tax on income. Paragraph 45 is relevant, in this regard, and is as under (page 529 of 104 Comp Cas) :

"It cannot be disputed that the 'annual turnover' of a broker is not the subject-matter of the levy but is only a measure of the levy. In other words, the fee is not being levied on the turnover as such but the fee is being levied on the brokers making their annual turnover as a measure of the levy which is a fee for regulating the activities of the securities market and for registration of the brokers and other intermediaries in the said market. Therefore, it is futile to contend that such levy would be either a tax or a fee on the turnover. It is a settled principle in law that if the State has the authority to impose a levy then it has a wide discretion in choosing the measure of levy, provided of course, it withstands the test of reasonableness. Many levies may have a similar measure but by such similarity in the measure, the levies do not become the same. Therefore, if the impugned levy adopts a measure which is either similar to the one adopted while levying turnover tax or income-tax, the impugned levy ipso facto by adoption of such measure, would not become either an income-tax or a turnover tax or even a fee on income or a fee on turnover. This court in the case of *Goodricke Group Ltd.* v. *State of West Bengal* [1995] 98 STC 32 (SC) ; [1995] Supp (1) SCC 707 while upholding a cess on tea estate which is a tax on land by the measure of yield by quantum of tea leaves produced in the tea estate held (SCC headnote) :

'A tax imposed on land measured with reference to or on the basis of its yield, is certainly a tax directly on the land. Apart from income, yield or produce, there can perhaps be no other basis for levy. "A tax on land is assessed on the actual or potential productivity of the land sought to be taxed". Merely because a tax on land or building is imposed with reference to its income or yield, it does not cease to be a tax on land or building. The income or yield of the land/building is taken merely as a measure of the tax ; it does not alter the nature or character of the levy. It still remains a tax on land or building. There is no set pattern of levy of tax on lands and buildings—indeed there can be no such standardisation. There cannot be uniform levy unrelated to the quality, character or income/yield of the land. Any such levy has been held to be arbitrary and discriminatory. No one can say that a tax under a particular entry must be levied only in a particular manner, which may have been adopted hitherto. The Legislature is free to adopt such method of levy as it chooses and so long as the character of levy remains the same, i. e., within the four corners of the particular entry, no objection can be taken to the method adopted'."

The above judgment was cited and followed subsequently in *State of Tamil Nadu* v. *TVL. South Indian Sugar Mills Association* [2015] 13 SCC 748.

13 In this case, it is evident that Parliament enacted the IBC by drawing on the BLRC Report and the bill prepared by the BLRC. In both the FSLRC and BLRC Reports, it was recommended that the regulator should be self-sufficient at least with regard to operational expenses by collecting fees to finance its activities. When viewed in this context, it is clear that sections 196(1)(c) and 207 of the IBC and the IP Regulations are intended to fulfil the object and purpose of the IBC as regards the functioning of the IBBI. On examining the IBC, it is also clear that the IBBI plays a significant role as the principal regulator as regards insolvency and liquidation. Even with specific reference to IPs, as pointed out by the learned ASGI, under section 16(3) and (4) of the IBC, the IBBI is entrusted with the responsibility of recommending a RP if the operational creditor concerned fails to do so. In addition, by way of illustration, under section 22(4) and (5) and section 27(4) and (5), respectively, the IBBI is required to confirm the proposal of the committee of creditors (the CoC) with regard to the appointment of the RP or the replacement RP, respectively. Under section 25(2)(d), (h) and (k), the RP is required, in the discharge of duties, to act in the manner specified by the IBBI. Under section 28(4) and (5), if the RP acts without seeking the approval of the CoC, the CoC is entitled to report the matter to the IBBI for taking necessary action against the RP. Even with regard to proposing the name of an IP as a liquidator, the IBBI plays a role under section 34. Furthermore, we find that the IBBI has been tasked with several responsibilities under the IBC as is evident from the fact that the IBC is replete with references to the IBBI. Thus, we conclude that the IBBI does provide significant services, including in relation to IPs and that there is broad correlation between fees and services. Given the fact that direct or arithmetical correlation as between the fee received and service rendered is not necessary especially in the context of regulatory fees, we are of the view that regulation 7(2)(ca) of the IP Regulations does not suffer from any constitutional infirmity on account of the absence of quid pro quo.

14 This leads to the question as to whether regulation 7(2)(ca) suffers from excessive delegation. Section 241 of the IBC provides for the laying of all rules and regulations made thereunder before each House of Parliament and further provides for either modification or annulment thereof by Parliament. With regard to the utilization of fees and other financial resources by the IBBI, we find that section 222 of the IBC mandates that the IBBI

shall credit all grants, fees and charges received by it into the fund of the IBBI. The said section 222 reads as follows :

"222. *Board's Fund.*—(1) There shall be constituted a Fund to be called the Fund of the Insolvency and Bankruptcy Board and there shall be credited thereto—

(a) all grants, fees and charges received by the Board under this Code ;

(b) all sums received by the Board from such other sources as may be decided upon by the Central Government ;

(c) such other funds as may be specified by the Board or prescribed by the Central Government.

(2) The Fund shall be applied for meeting—

(a) the salaries, allowances and other remuneration of the members, officers and other employees of the Board ;

(b) the expenses of the Board in the discharge of its functions under section 196 ;

(c) the expenses on objects and for purposes authorised by this Code ;

(d) such other purposes as may be prescribed."

Moreover, section 223 provides for the maintenance of accounts by the IBBI and for the audit thereof by the Comptroller and Auditor General of India. Section 223 is as under :

"223. *Accounts and audit.*—(1) The Board shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Board shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Board to the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Board shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of the Government accounts and, in particular, shall have the right to demand the

production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Board.

(4) The accounts of the Board as certified by the Comptroller and Auditor General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament."

In light of the above safeguards, we have no hesitation in concluding that the IBC contains adequate safeguards to ensure that Parliament effectively supervises all rules and regulations with the power to modify or even annul the same. Likewise, adequate safeguards are in place to ensure that the funds of the IBBI are utilized for the purposes of fulfilling the role of the IBBI under the IBC. Thus, the delegate has not been vested with unfettered power and the standard prescribed in *State of Tamil Nadu* v. *K. Shyam Sunder*, AIR 2011 SC 3470 is satisfied. Besides, the conferment of the power to charge a fee and the charging of such fee by using the annual remuneration as a measure does not amount to delegation of an essential legislative function as per the ratio in *Avinder Singh* v. *State of Punjab*, AIR 1979 SC 321. Therefore, it cannot be said that there is excessive delegation to the IBBI.

15 In fine, the writ petition fails and is dismissed. Consequently, the connected miscellaneous petition is closed. No costs.

[2020] 222 Comp Cas 14 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — MUMBAI BENCH]

RAJIV GARG

v.

SITI CABLE NETWORK LTD.

SMT. SUCHITRA KANUPARTHI *(Judicial Member)* and
V. NALLASENAPATHY *(Technical Member)*

June 17, 2020.

HF ▸ Respondent

REGISTER OF MEMBERS—RECTIFICATION OF REGISTER—LIMITATION—VALIDITY OF TRANSFER DEED CHALLENGED AFTER LAPSE OF TEN YEARS—BARRED BY LIMITATION—COMPANIES ACT, 2013, S. 59.

On an appeal filed under section 59 of the Companies Act, 2013, to order the respondent-company to rectify the register of members by deleting the

transfer entry dated March 31, 2007 recording the transfer of 1,66,550 equity shares from the appellant to J and to reinstate the name of the appellant as the owner of the 1,66,550 equity shares :

Held, *dismissing the appeal, that the company had recorded the transfer of shares on the basis of the share transfer deed lodged with it in the year 2006. The validity of the transfer was questioned at a belated stage after the lapse of ten years. Any action to enforce the rights or revoke the transfer of shares by a deed of transfer ought to have been brought within three years in terms of the Limitation Act, 1963. The petition challenging the validity of transfer deed dated December 22, 2006 was filed on February 10, 2016 ten years after the date of execution and registration of the transfer deed and ratification of the transfer by the investor grievance committee on March 31, 2007. The appellant had chosen to enquire into the matter only in the year 2015 and had lost his rights of challenging the transfer deed on account of delay and laches. The appellant had not impleaded J, who was a necessary party, in view of the fact that the shares which were allotted and transferred to him were being questioned, as a respondent to the appeal, and had thus failed to question the title of the third party who had bought the shares under a valid share transfer deed.*

MANNALAL KHETAN *v.* KEDAR NATH KHETAN [1977] 47 Comp Cas 185 (SC) (paras 28, 29) *referred to.*

T. C. A. No. 15/58, 59 of 2016.

Ashish Kamat along with *Ms. Keya Raval* instructed by *Dhru and Co.*, for the appellant.

Gautam Ankhad along with *Ms. Rima Desai* instructed by *Parinam Law Associates*, for the respondent.

ORDER

The order of the Bench was delivered by

SMT. SUCHITRA KANUPARTHI ***(Judicial Member)***.—This is an appeal 1
filed under section 59 of the Companies Act, 2013, by the appellant, Rajiv Garg against the respondent, Siti Cable Network Ltd., seeking relief that :

(a) This hon'ble Bench be pleased to order the respondent to rectify the register of members by deleting the transfer entry dated March 31, 2007 recording the transfer of 1,66,550 equity shares of the respondent from the appellant to Jayneer and to reinstate the name of the appellant as the owner of the said 1,66,550 equity shares.

(b) That this hon'ble Bench be pleased to direct the respondent to return to the appellant the share certificate pertaining to the said 1,66,550 equity shares.

2 The petitioner submits that he is a shareholder and member of the respondent holding 1,66,650 equity shares of Rs. 1 each in the capital of the respondent. The appellant, as a subscriber at the time of incorporation of the respondent, subscribed to and was allotted 16,655 equity shares of Rs. 10 each which were subsequently split into 1,66,550 equity shares of Rs. 1 each. The appellant also acquired an additional 100 equity shares of Rs. 1. The appellant thereby holds 1,66,650 equity shares of Rs. 1 each. The appellant is aged 60 years and is a citizen of India.

Facts regarding allotment of 1,66,550 equity shares

3 The respondent was incorporated on March 24, 2006 as Wire and Wireless India Ltd. Subsequently, the respondent changed its name from "Wire and Wireless India Ltd." to "Siti Cable Network Ltd." on or around 2012-13. The respondent was incorporated in the course of a corporate restructuring exercise undertaken by Zee Networks Ltd., whereby cable business run by different entities within the Essel/Zee group of companies were to be consolidated within one corporate entity, being the respondent.

4 The appellant was one of the original subscribers to the respondent at incorporation and as such was allotted 16,655 equity shares of Rs. 10 each, which, at the time of incorporation constituted about 33.133 per cent. of the total issued, subscribed and paid-up equity share capital.

5 The shareholding pattern of the respondent as on the date of its incorporation is given below :

Sl. No.	*Names of the shareholders*	*No. of equity shares*	*%*
1.	Shri Rajiv Garg	16,655	33.313
2.	Shri Himanshu Mody	16,655	33.313
3.	Shri Sanjay Agarwal	16,650	33.32
4.	Shri M. Lakshminarayanan	10	0.02
	Total	50,000	100

As can be seen from the above table, the appellant (one of the subscribers of the respondent) held 33.133 per cent. of the issued, subscribed and paid-up equity share capital of the respondent. The petitioner paid the amount of Rs. 1,66,550 as subscription money vide Cheque No. 201001 dated March 24, 2006 drawn on HDFC Bank, Sandoz I-House, Worli

Branch. The said amount has been debited to the appellant's account on March 29, 2006.

6 The respondent is a group/associate company of the Essel group of companies, as stated earlier. At the relevant time, the appellant was employed with Essel Corporate Resources P. Ltd., as its CEO-corporate. Considering the appellant's internal relationship within the Essel group, the share certificates in respect of the said 16,550 equity shares subscribed and allotted to the appellant were retained with the respondent.

7 Through an e-mail dated December 21, 2006 one Mr. Laxminarayan, the company secretary of Zee Telefilms Ltd. (now Zee Entertainment Enterprises Ltd.) and the advisor generally to the Essel group and Mr. Subhash Chandra, asked the appellant and other original subscribers of the respondent to transfer the shares respectively subscribed by them to the "investment companies of the Zee group" at par. A copy of the e-mail dated December 21, 2006 in that regard is annexed hereto and marked as exhibit B.

8 The appellant responded through his e-mail dated December 21, 2006 whereby he refused to transfer his 16,550 equity shares in the respondent at par as required by the said Mr. Laxminarayan. The copy of the said e-mail dated December 21, 2006 is annexed hereto and marked exhibit C.

9 As the appellant was not unwilling to accept the arbitrary direction of Mr. Laxminarayan, Mr. Subhash Chandra vide his letter dated May 7, 2007 requested the appellant to sell his 1,66,550 equity shares in the respondent at a computed higher price mentioned therein. A copy of the said letter dated May 7, 2007 is annexed hereto and marked as exhibit D. This was also not accepted by the appellant. It is pertinent to note that at or about the same time as Mr. Laxminarayan's or Mr. Subhash Chandra's letter referred above, the share price of the respondent was greater than Rs. 70, making the holding of the appellant valued at about Rs. 1.2 crores.

10 The appellant has, at no time, indicated his acceptance of any offer of any party for transfer of his 16,655 equity shares in the respondent and has not, at any time, signed any transfer form or any other form as required by statute, which would allow the respondent to transfer the appellant's 16,655 equity shares to any third party.

11 The appellant employment with the respondent was terminated on January 31, 2007. After cessation of employment with the respondent, the appellant moved to US and worked there till October 20, 2011.

12 The appellant, at no time prior to September, 2015 as set out below, had any information or knowledge about the impugned transfer of his 16,550

equity shares of Rs. 10 each (converted to 1,66,550 equity shares of Rs. 1 each) in favour of any third party.

Facts regarding partial and incomplete inspection

13 As a member of the respondent, the appellant is given the right to inspect all the statutory records maintained by the respondent at its registered office. However, when the appellant sought to exercise his statutory right of inspection, the respondent vide letter dated August 31, 2015 delayed such inspection using various excuses and, in any case, gave only a partial inspection on August 28, 2015 as the office was preparing to shift. On August 31, 2015 the appellant was informed that the records were not available for inspection and that inspection will be provided at Share Pro Services India Ltd.'s office at 13AB, Samhita Warehousing Complex, Second Floor, Sakinaka Telephone Exchange Range, Andheri (East), Mumbai. The appellant followed up with the respondent Secretarial Department for seeking inspection of records.

14 On September 11, 2015 Mr. Anil Dalvi of Share Pro confirmed that inspection of records of the respondent would be provided to the appellant on September 18, 2015 but no records were provided even on inspection on September 18, 2015 and partial records were allowed to be inspected. The appellant during the course of inspection obtained copies of the following entries :

(a) Computer record and a printout of a page bearing Folio No. 000001 in the name of the appellant.

(b) Computer record and a printout of a page bearing Folio No. 062063 stated to be in the name of Jayneer Capital P. Ltd. ("Jayneer") recording the alleged transfer of 1,66,550 equity shares in its favour from the name of the appellant and the subsequent dematerialisation of these shares.

Other than the aforesaid two computer printouts, no other statutory records were made available to the appellant for inspection, in spite of repeated requests for the same.

Facts regarding the illegal transfer of 1,66,550 equity shares

15 The appellant was shocked to see records that reflected 1,66,550 equity shares which were purportedly and allegedly transferred by the respondent to Jayneer as on March 31, 2007. The appellant has not transferred the said shares to the said Jayneer or to anyone else nor has he received any consideration for such alleged transfer. The said transfer is fraudulent and illegal and not binding on the appellant.

The appellant stated that he has not executed the transfer deeds in favour of Jayneer, and as such, the transfer is ex facie illegal and without sufficient cause. The transfer has taken place on March 31, 2007 but whereas a letter from Mr. Subhas Chandra on May 7, 2007 indicates that the appellant continued to hold the shares in his name. **16**

Reply on behalf of the respondent

On March 24, 2006 the respondent was incorporated and the minimum subscribed capital as per applicable provisions of the Companies Act, 1956 are as follows : **17**

Name of the subscriber	*Designation with Essel group at the time of subscription*	*No. of equity shares of Rs. 10 each subscribed*
Rajiv Garg	CEO-Corporate Strategy and Finance-Essel Corporate	16,655
Himanshu Mody	Executive Vice President-Zee Telefilms Ltd.	16,655
Sanjay Agarwal	Sr. VP Finance-Zee Telefilms Ltd.	16,650
M. Lakshminarayanan	Sr. VP and Company Secretary-Zee Telefilms Ltd.	10
Pushpal Sanghavi	Sr. Manager Secretarial-Zee Telefilms Ltd.	10
Shailesh Dholakia	Sr. Manager Secretarial-Zee Telefilms Ltd.	10
Vinod Desai	Executive Secretarial-Zee Telefilms Ltd.	10
Total		50,000

The face value of equity shares were sub-divided from Rs. 10 to Rs. 1.

The name of the respondent was changed to Siti Cable on September 5, 2012. The appellant and the subscriber to the memorandum of association of the respondent were employees of Essel Group entities. The share transfer deed records the transfer of shareholding by the appellant to Jayneer for a consideration of Rs. 1,66,550. The share transfer was ratified and approved by the share transfer and investor grievance committee by its resolution dated March 31, 2007. The respondent relies upon the copy of the share transfer register certified by M/s. Share Pro Services P. Ltd., the Registrar and share transfer agent of the company. **18**

However, in breach of understanding as well as the terms of employment, the appellant sought to claim market value of the equity shares earlier held by him in the respondent. This claim was not acceded by the promoters of Essel group. The appellant's employment was terminated, with effect from January 31, 2007 and he ceased to be a shareholder by virtue of transfer in favour of Jayneer Capital P. Ltd. The shares are currently in dematerialised form and are not in control of the respondent. **19**

20 The shares were transferred to Jayneer Capital P. Ltd., way back in December, 2006. The appellant had knowledge of the said transfer and had no objection about the transfer. The appellant sought details of the transfer on August 31, 2015 for the first time. Nothing prevented the appellant to seek inspection of records for a period of eight years and more particularly as a respondent is a listed company who files its shareholding pattern with stock exchanges on quarterly basis in accordance with the listing agreement/listing regulation.

21 In 2009, the respondent issued letter of offer for the issuance of 236,767,351 equity shares of Rs. 1 each at a price of Rs. 19 per share on the rights' basis in the ratio of 109 rights for every 100 equity shares held by the equity shareholder. The letter of offer was made available on online portal of SEBI, Stock Exchanges and the respondent sent offers to all registered shareholders and as a listed company the respondent sent his annual report to all its shareholders.

22 There is no explanation of delay of more than eight years in the present appeal and hence, the appeal is barred by limitation. The appellant has slept over his rights for a period of eight years and failed to justify inordinate delay in approaching the Tribunal.

23 The respondent claim that there was acquiescence on the part of the appellant to raise any objection regarding the transfer of share to Jayneer for a period of eight years. The respondent further claimed that the present appeal suffers from suppressio veri, suggestio falsi and has deliberately suppressed the material information pertaining to corporate structuring.

24 The respondent also claimed that the inspection was provided to the appellant from the records available with the Registrar and share transfer agent of the company.

Rejoinder of the appellant

25 The appellant denied the transfer of shares and execution of transfer deed to Jayneer Capital P. Ltd., in the year 2006 and claimed that the purported transfer deed is forged and did not know the witness who signed the transfer deed. The transfer deed being fabricated sought to be examined by the handwriting expert, the appellant further denied the ratification of transfer vide resolution dated March 31, 2007.

26 The appellant confirmed that he had moved to US to take up employment till the year October, 2011 and had no intimation of fraudulent action of transfer and vide letter dated August 31, 2015 he sought inspection of records from the respondent. Therefore, he denied that the application is barred by limitation.

Sur-rejoinder of the respondent

The respondent denied all the allegations made in the rejoinder and **27** stated that all documents are available with the Registrar of Companies and Ministry of Corporate Affairs website. The respondent submitted that since the appellant had weak case on merits, as afterthought he is trying to claim that the transfer deed dated December 22, 2006 is fabricated to mislead the hon'ble Tribunal.

Citations relied on by the appellant

The hon'ble Supreme Court has in the case of *Mannalal Khetan* v. *Kedar* **28** *Nath Khetan* [1977] 47 Comp Cas 185 (SC) ; [1977] 2 SCC 424 held that, "the provisions of section 108 of the Companies Act, 1956 (section 56 of the Companies Act, 2013) are mandatory in nature and transfer in violation thereof is illegal and void". Once an act is void, no rights can be claimed under such void transaction by Jayneer or any of the other third parties. The court would not validate or act on such illegal and void transfer based on an unstamped transfer deed.

In *Mannalal Khetan* v. *Kedar Nath Khetan* [1977] 47 Comp Cas 185 **29** (SC) ; [1977] 2 SCC 424, transfer of shares on the basis of unstamped transfer deed was held to be illegal, non-operational and the court directed rectification of register of members and restore name of the original shareholders.

Findings

On going through the pleadings filed by respective parties and upon **30** hearing arguments, we are of the view that this appeal is barred by limitation. Section 59 of the Companies Act, 2013 talks about rectification of register of members and the same is extracted below :

> "If the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register, is, without sufficient cause, omitted therefrom, or if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be a member, the person aggrieved, or any member of the company, or the company may appeal in such form as may be prescribed, to the Tribunal, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register."

Section 59 prescribes that if the name of any person is without sufficient cause entered in the register of members of the company or after having

been registered in the register is without sufficient cause omitted, therefrom, the person aggrieved may appeal to the Tribunal against such order.

31 The company has recorded the transfer of shares on the basis of the share transfer deed lodged with them in the year 2006. The validity of such transfer is being questioned at a belated stage after the lapse of ten years.

32 Any action which ought to have been brought about to enforce the rights or revoke the transfer of shares by a deed of transfer within three years as per the Limitation Act, in the instance case, the action of challenging the validity of transfer deed dated December 22, 2006 was chosen to be filed on February 10, 2016 after a lapse of ten years from the date of execution and registration of the said transfer deed and ratification of the said transfer by investor grievance committee on March 31, 2007. The appellant has chosen to enquire into the matter only in the year 2015 and has lost his rights of challenging the transfer deed on account of delay and laches. The appellant has not impleaded Jayneer Capital P. Ltd., as a respondent to the present appeal who is a necessary party in view of the fact that the shares which were allotted and transferred to him are being questioned and has thus failed to question the title of third party who has bought shares under a valid share transfer deed.

33 The company being a listed company, having dematerialised shares cannot access to the transfer of shares. The shares of the public company are traded at the stock exchange and evidently the shares are held by Jayneer Capital P. Ltd., from the year 2006.

34 In view of the above discussion this appeal is dismissed.

[2020] 222 Comp Cas 22 (Delhi)

[IN THE DELHI HIGH COURT]

RESERVE BANK OF INDIA

v.

JVG FINANCE LTD.

JAYANT NATH J.

August 7, 2020.

HF ▸ Respondent

WINDING UP—FRAUDULENT TRANSACTION—DIRECTION OF HIGH COURT TO SEEK PERMISSION BEFORE CREATING ANY SALE OR ALIENATION—APPLICATION BY PURCHASER OF LAND FOR PERMISSION TO COMPLETE REGISTRATION—FAILURE BY APPLICANT TO PLACE ON RECORD

documents to show its capacity to purchase property and that property was its asset—Serious Fraud Investigation Office and committee appointed by court finding that transaction not bona fide—Application to set aside report of committee to be dismissed—Companies Act, 1956.

The applicant purchased certain lands from companies of the JVG group during the period from May, 2002 to July, 2002 through S who was the authorised signatory. On September 3, 2002 the High Court directed that prior to effecting any sale, alienation, transfer or creation of any third party interest in any assets of the JVG group of companies, permission of the court should be obtained. The applicant filed an application for grant of permission to the applicant-company to complete the process of registration of sale deeds. On July 22, 2004 the court while dealing with this application and other applications appointed a one-man committee for verifying the claims of various applicants and directed the applicant to appear and put its claim before the committee. The committee, inter alia, observed that the sale consideration paid by the applicant was below the market price and recorded that the claim of the applicant on the evidence did not appear to be sound. On an application to set aside or not to accept the recommendation made by the committee and grant permission to the applicant to complete the process of registration contending that the committee had failed to comply with the principles of natural justice inasmuch as the applicant was not given copies of documents on the basis of which it had concluded undervaluation :

Held, *dismissing the application, that the applicant had failed to place on record its balance sheets and income-tax records which would show that it had the wherewithal to purchase this property and also that the balance-sheets reflected this property as its asset. The committee report, however, concluded that material evidence had not been produced and that the transaction was not genuine and bona fide. The report doubted that any consideration was paid. The Serious Fraud Investigation Office in its report concluded that the resolution authorising S to make the agreement to sell and general power of attorney on behalf of the five stated companies of the JVG group were fabricated. The conclusions of the committee were to be accepted. Further, in 2002 when the alleged transaction took place, the JVG group of companies was a sinking ship. The flagship company of the group had already been ordered to be provisionally wound up by order dated June 5, 1998. It could only be concluded that this transaction was carried out only to whisk away valuable assets of the JVG group of companies which at that time were likely to go under winding up proceedings.*

Cases referred to :

Aron Salomon *v.* A. Salomon and Co. Ltd. [1897] AC 22 (HL) (para 22)

Asha M. Jain *v.* Canara Bank [2001] 94 DLT 841 (para 33)

Bakshi (M. R.) (Col.) *v.* Fintra Systems Ltd. [2008] 151 DLT 1 (para 35)

BHEL *v.* State of U. P. [2003] 6 SCC 528 (para 31)

Dharanendrah (K. T.) *v.* Regional Transport Authority [1987] AIR 1987 SC 1324 (para 35)

Gopal Krishnaji Ketkar *v.* Mohd. Haji Latif [1968] AIR 1968 SC 1413 (para 31)

Hiralal *v.* Badkulal [1953] AIR 1953 SC 225 (para 31)

Khatri Hotels P. Ltd. *v.* Union of India [2011] 9 SCC 126 (para 31)

Morris *v.* Banque Arabe et Internationale d'investissement SA (No. 2) [2001] 1 BCLC 263 (para 36)

Murugesam Pillai *v.* Manickavasaka Pandara [1917] AIR 1917 PC 6 (para 31)

Mussauddin Ahmed *v.* State of Assam [2009] 14 SCC 541 (para 31)

Raghavamma (A.) *v.* Chenchamma (A.) [1964] AIR 1964 SC 136 (para 31)

Suraj Lamp and Industries P. Ltd. *v.* State of Haryana [2012] 169 Comp Cas 133 (SC) (para 33)

Union of India *v.* Ibrahim Uddin [2012] 8 SCC 148 (para 31)

Union of India *v.* Mahadeolal Prabhu Dayal [1965] AIR 1965 SC 1755 (para 31)

Company Petition No. 265 of 1998.

Ms. Swati Setia for the petitioner.

Kunal Sharma for the official liquidator.

Dheeraj Gupta, Ms. Sanam Siddiqui and *Ms. Diksha Arora* with *Ms. Aneeta Sharma,* Authorised Representative of the JVG Group.

Giriraj Subramanium and *Simarpal Singh Sawhney,* for the applicant.

JUDGMENT

JAYANT NATH J.—*C. A. No. 547 of 2011*

1 This application is filed by the applicant-M/s. Tirupati Cylinders Ltd., seeking the following reliefs :

> "(a) issue appropriate direction or order to the effect to set aside or not to accept the recommendation made by the learned Mr. G. P.

Thareja-the Presiding Officer of the one man committee constituted by this hon'ble court in its XIIIth Report, dated February 5, 2007 in regard with the claim made by the present applicant in C. A. No. 1171 of 2003 in Company Petition No. 265 of 1998 in the interest of justice ;

(b) grant permission to the applicant-company to complete the process of registration/execution of the sale deeds of the land mentioned in the annexure A2 in terms and conditions as mentioned in the said agreements annexed with the annexure A3 (colly) by modifying/clarifying the said order dated February 3, 2002 passed by this hon'ble court in the present case and also issue appropriate further direction to the appropriate authority not to put any restriction in the process of registration/execution of sale deeds of the properties as mentioned in annexure A2 ; or

(c) refer this case to the newly constituted J. P. Aggarwal Committee to examine the claim of the applicant-company by providing all necessary documents, particularly exhibits 1 to 17 (as referred by the then Thareja Committee) to the applicant-company ;"

The case of the applicant-M/s. Tirupati Cylinders Ltd., is that the applicant purchased certain lands in question from the companies of the JVG Group through Shri V. K. Sharma who was the authorised signatory. The applicant claims to have purchased these lands from JVG Hotels Ltd., JVG Housing Finance Ltd., JVG Foods Ltd., JVG Farm Fresh Ltd., and JVG Steels India Ltd. These lands are located in District and Tehsil Gurgaon, Haryana and located at Village Sindhrawali or Village Bhorakhurd. Full details of the description of the lands and the consideration paid are spelt out in annexure A2 of the application. All the seller companies belong to the JVG group of companies which comprise of large number of such companies. It is claimed that a number of these companies have gone into liquidation but at the time of purchase of the land, the companies noted above were not under liquidation. 2

All these purchases were made during the period from May, 2002 to July, 2002. The entire consideration for the alleged purchase of the lands has been paid in cash allegedly to Mr. V. K. Sharma, the ex-director of the JVG group of companies. Power of attorney and agreement to sell were executed and duly registered with the appropriate authorities during the aforesaid period itself. Registered irrevocable general power of attorneys were executed in favour of the director of the applicant-company, namely, Shri Dinesh Goyal. It was also agreed in the registered agreement to sell that the applicant-company can register sale deeds in its own name or in favour of any of its nominee or any other person or firm, etc. It is claimed

that the physical possession of the property is also with the applicant-company.

3 On September 3, 2002 this court directed that prior to effecting any sale, alienation, transfer or creation of any third party interest in any assets of the JVG group of companies, permission of this court should be obtained.

4 It is the contention of the applicant that the properties in question were purchased from May, 2002 to July, 2002. All the documents were duly registered with the appropriate authorities. The entire sale consideration had been duly paid and the applicant had taken possession of the land concerned. Hence, it is stated that there is no violation of the interim order dated September 3, 2002 passed by this court. The said order, it is pleaded, does not apply to further sale, alienation and transfer by the applicant. It is further pleaded that in terms of the agreement to sell, it was compulsory for the purchaser company, namely, the applicant to execute the sale deeds with regard to the properties purchased by December 20, 2003 or December 30, 2003 failing which the agreement to sell was to stand cancelled and the advance money was to get forfeited.

5 Hence, the applicant filed C. A. No. 1171 of 2003 for grant of permission to the applicant-company to complete the process of registration/execution of sale deeds. On July 22, 2004 this court while dealing with this application and other applications appointed a one man committee of Shri G. P. Thareja, Retd. Additional District Judge, Delhi for verifying the claims of various applicants. The Thareja Committee thereafter submitted its report being the VIIIth Report dated January 16, 2006. In the report, it noted the submission of the representative of Tirupati Cylinders Ltd., that it had moved this court for withdrawal of the petition moved by them and further stated that he has nothing further to say in the matter. The Committee further recorded that the claim of Tirupati Cylinders Ltd., as per evidence so far collected does not appear to be sound. However as stated, it noted that the said Tirupati Cylinders Ltd., the applicant sought to withdraw.

6 On March 10, 2006 this court disposed of C. A. No. 1171 of 2003 with the direction again to the applicant-company to appear and put its claim before the G. P. Thareja Committee, the one man committee constituted by this court.

7 It is pleaded that before the Thareja Committee, the applicant filed all the relevant documents to prove its title. The applicant also filed two certificates, i. e., a certificate dated May 1, 2006 issued by State Bank of Bikaner and Jaipur, Muzaffar Nagar (U. P.) stating that the applicant-company had withdrawn an amount of Rs. 9 lakhs on May 17, 2002 and an amount of Rs. 7.50 lakhs on May 20, 2002. Another certificate was filed of

PNB, Preet Vihar dated May 4, 2006 wherein it was stated that the applicant-company had withdrawn a total of Rs. 36 lakhs by various cheques during the period from May 17, 2002 to May 23, 2002. Hence, proof of cash in hand to pay the stated consideration of about Rs. 45 lakhs is said to have been shown.

8 It is stated that the Thareja Committee never gave/served a copy of its order on the applicant. The applicant thereafter filed C. A. Nos. 72 and 73 of 2011 wherein after hearing the parties, this court directed the counsel for the official liquidator to supply a copy of the report/recommendations of the Thareja Committee dated February 5, 2007. That is how, it is claimed that the applicant got a copy of the report of the Thareja Committee with regard to the claim of the applicant-company. This report was received allegedly on February 7, 2011 by the applicant.

9 A perusal of the said report of the Thareja Committee dated February 7, 2007 shows that the claim of the applicant-company-Tirupati Cylinders Ltd., has been rejected. Hence, the present application challenging the findings of the Thareja Committee.

10 The official liquidator has filed its reply. The official liquidator in its reply has pointed out that the applicant is not entitled to any permission as sought for. The property in Gurgaon was purchased from the funds of JVG Finance Ltd. (in liquidation) and the properties of the company in liquidation have to be taken control of by the official liquidator in the interest of bona fide depositors/creditors. It is also pointed out that SFIO has also conducted an enquiry which also dealt with the Gurgaon land of the company-JVG Finance Ltd. In the SFIO report dated February 11, 2010 it is established that Shri V. K. Sharma, ex-CMD of the JVG group of companies (in liquidation) in connivance with relatives and associates had purchased land worth Rs. 22.80 crores in the name of various JVG group of companies using the funds of JVG Finance Ltd. The SFIO report further states that Shri V. K. Sharma further sold the land of these companies to parties/companies at Rs. 2 lakhs per acre and made joint GPA and agreement to sell in favour of Shri Dinesh Goyal and his company-Tirupati Cylinders Ltd. SFIO found the resolution authorising Shri V. K. Sharma to make agreement to sell and GPA on behalf of five JVG group of companies as fabricated. It is claimed in the reply that SFIO has made it clear that Shri V. K. Sharma along with other directors of JVG Hotels Industries Ltd., JVG Steels India Ltd., JVG Publications Ltd., and JVG Industries Ltd., had made forged documents to facilitate the entire fraud by siphoning off funds of JVG Finance Ltd. It is also stated that this court has in its order dated November 27, 2010 noted the submission of Shri V. K. Sharma that he

does not have any objection to the sale of the properties in question inasmuch as they belong to JVG Finance Ltd., though they may have been purchased in the names of different companies like JVG Housing Finance Ltd., JVG Farm Fresh Ltd., JVG Hotels Ltd., JVG Steels India Ltd., JVG Foods Ltd., etc.

It is further stated that the copies of the resolution of JVG Housing Finance Ltd., JVG Farm Fresh Ltd., JVG Steels India Ltd., JVG Foods Ltd., and JVG Hotels Ltd., adduced in the application reflect the registered office and head office on the date of the resolution, i. e., May, 2002 at 1, Ashoka Park, Main, New Rohtak Road, New Delhi and B-22, Ansal Chambers-I, Bhikaji Cama Place, New Delhi. It is pleaded that the official liquidator in the month of June, 1998 had taken possession of the property at New Rohtak Road and Ansal Chambers much before passing of the said resolution. The resolutions are hence forged.

11 A reply has also been filed by Shri V. K. Sharma, ex-chairman of JVG group of companies. In the said reply, it is stated that all the properties of the JVG group of companies have been purchased from the finances/funds of JVG Finance Ltd. (in liquidation). It is denied that the applicant-company had paid any consideration to Shri V. K. Sharma or that any land had been sold to the applicant-Tirupati Cylinders Ltd. It is admitted that Shri V. K. Sharma had issued power of attorneys and agreement to sell in favour of Shri Dinesh Goyal, the director of Tirupati Cylinders Ltd., to safeguard the properties of JVG Companies at Gurgaon as Shri Dinesh Goyal was a very close friend/neighbour of Shri V. K. Sharma at Kurushetra. Shri Dinesh Goyal told Shri V. K. Sharma that unless, he had some rights/documents in his favour he could not protect the valuable land of JVG from illegal encroachers/trespassers. The power of attorney and agreement to sell were given to Shri Dinesh Goyal as the land in Gurgaon was not properly demarcated and also the possession of the said land was not taken over by the official liquidator till 2002. In order to protect the land from the villagers and encroachers who were cultivating the said land, the said step was taken. It is further pleaded that Shri V. K. Sharma was facing a lot of litigation and he could not take steps to defend the land and hence, the need to issue the necessary agreement to sell and power of attorney. It is further stated that the land was purchased at a much higher rate than the consideration alleged to have been paid by the applicant-company. It is further stated that till date, the land in Gurgaon has not been properly demarcated. Further, it is stated that the applicant despite several opportunities had failed to produce original statement of accounts/cash books/vouchers/etc., before the Thareja Committee. The applicant only produced

two certificates from the bankers which were not sufficient to convince the Thareja Committee.

One Mr. Anil Aery on behalf of the applicant has also filed an additional affidavit dated February 13, 2012 and stated that in some earlier proceedings before this court in C. C. P. No. 20 of 2002, the ex-chairman-Shri V. K. Sharma had filed a reply/affidavit dated December, 2002 where he had accepted all the documents which are being relied upon by the applicant and validated the purchase of land at Gurgaon by the applicant-company. **12**

A perusal of C. A. No. 547 of 2011 shows that various reasons are given by the applicant as to why the findings of the Thareja Committee should be set aside. The following salient submissions have been raised in the application : **13**

(i) The Thareja Committee has made conclusions about the sale consideration paid by the applicant being below market price on the basis of certain exhibits, i. e., exhibits X-1 to X-27. It is claimed that these were never shown or supplied to the applicant-company. Hence, the report has been passed contrary to the principles of natural justice.

(ii) It is claimed that the Thareja Committee went on the basis of evidence of one Shri Sushil Kumar Gupta who allegedly helped the JVG group of companies to buy the land in question. The applicant was never informed about the investigation or examination of the aforesaid Shri Sushil Kumar Gupta with respect to the applicant's claim. No opportunity was also granted to the applicant-company to cross-examine Shri Sushil Kumar Gupta. Hence, it is claimed that the procedure adopted was one sided.

(iii) At no point, did the Thareja Committee summon Shri V. K. Sharma, ex-managing director of JVG group of companies. The Committee never asked Shri V. K. Sharma as to whether he had received money/consideration from the applicant-company.

(iv) It is further stated that in spite of producing two certificates dated May 1, 2006 and May 4, 2006 issued by the concerned branch managers of the banks with regard to withdrawal of money paid by the applicant to Shri V. K. Sharma, the said branch managers were never summoned for recording of their evidence. Hence, it is claimed that the entire enquiry report is illegal and void.

(v) It is further stated that the transaction by the applicant was a bona fide transaction. On the date of the transaction, some other companies of the JVG group were under liquidation but not the five companies from whom the applicant had purchased the property.

14 I have heard learned counsel for the applicant, learned counsel for the official liquidator and learned counsel for the ex-directors.

15 Learned counsel for the applicant has reiterated the contentions as raised in the above grounds. It is reiterated that exhibits X-1 to X-27 were not shown to the applicant. It is also stated that no records were summoned from the office of the Sub-Registrar on the issue of actual valuation of the property in question. It is reiterated that Shri Sushil Kumar Gupta was never cross-examined. It is reiterated that the agreements to sell were duly signed and registered by Shri V. K. Sharma. Reliance is also placed on the SFIO report where the statement of Shri V. K. Sharma is also noted.

16 I may note that the applicant has also filed written submissions. In the written submissions the following pleas have been raised :

(i) The Thareja Committee failed to comply with the principles of natural justice inasmuch as the applicant was not given copies of documents exhibits X-1 to X-27 and was not able to rebut the said documents. Based on these documents, the Committee came to a conclusion that the transaction in question which is the subject-matter of the present application was grossly undervalued.

(ii) It is pleaded that had the applicant been confronted with these documents, the applicant would have informed the Committee that the records supplied by JVG detailing the price paid by it for lands in Gurgaon area cannot be relied upon.

(iii) It is further pleaded that if the above noted facts were brought to the notice of the applicant, the applicant would have summoned the concerned Sub-Registrar or Tehsildar who would have deposed before the Committee as to the actual and correct value of the properties. Such evidence would have helped the Committee to come to a correct conclusion regarding the market price.

(iv) It is further submitted that the applicant had submitted 6 examples of registered sale deeds for the same village which show that the prevailing rates in 1996 were many times lower than what was alleged by Shri V. K. Sharma.

(v) It is further pleaded that the Committee never directed Shri V. K. Sharma to appear and testify. It is pleaded that had Shri V. K. Sharma entered the witness box, he could have been examined by the Committee and confronted with the transaction.

(vi) It is further pleaded that the Committee examined Shri Sushil Kumar Gupta and came to a conclusion regarding the undervaluation of the property. No opportunity was given to the applicant to cross-examine Shri Sushil Kumar Gupta.

(vii) It is further pleaded that the applicant had submitted a copy of its cash book at the relevant time which demonstrates that cash money was paid by the applicant to the JVG group as consideration for executing agreement to sell and GPA. It is pleaded that these facts have been ignored by the Committee.

(viii) It is further pleaded that the Committee never communicated to the applicant that the certificates from the bankers which have been supplied showing withdrawal of money were unworthy of credence. Had such a view been placed before the applicant, the applicant would have taken remedial measures. It is pleaded that the stand of the Committee was misplaced as the statement of the branch managers was in conformity with the Bankers' Books Evidence Act, 1891.

(ix) It is further pleaded that the conclusion of the Committee that the receipts, all of whom have the number "001", are fictitious was never put to the applicant. Had any such issue been posed to the applicant, the applicant would have summoned the signatory of the receipts for his testimony.

(x) It is stressed that in various proceedings including in an application dated February 22, 2012 Shri V. K. Sharma has acknowledged the execution of the agreement to sell as well as GPA.

Learned counsel for the official liquidator and the ex-directors have also reiterated their submissions as noted above. **17**

Written submissions have also been received from Shri Mayur Shah, advocate for the investors. It is pointed out that it was the applicant who in 2006 had refused to continue with further investigation and withdrawn its application. Now, after lapse of 5 years, it cannot claim violation of principles of natural justice in 2011 for a report that was submitted in 2007. **18**

I may first look at the VIIIth Report of the Thareja Committee dated January 16, 2006. The conclusions of the Report read as follows : **19**

> "From the above the following position emerges.
>
> (i) That the land which has been purchased in Gurgaon in the name of various companies as noted above has been purchased from the funds of JVG Finance Ltd. (under liquidation).
>
> (ii) The claim of M/s. Tirupati Cylinders as per evidence so far collected does not appear to be sound. As such they as stated before the Committee wants to withdraw.
>
> (iii) It is recommended that the official liquidator should take control of the lands at Gurgaon immediately including the land which the applicant had claimed to have been purchased by it through Sh. V. K. Sharma, ex-managing director of JVG Group of Companies."

20 Hence, as per the VIIIth Thareja Committee Report, the land which was purchased in the name of various companies has been purchased from the funds of JVG Finance Ltd. The claim of Tirupati Cylinders Ltd.-the applicant was rejected.

21 As noted above, the applicant was again referred back to the Thareja Committee vide order dated March 10, 2006 of this court whereafter the Committee passed the XIIIth Report dated February 7, 2007. I may now look at the XIIIth Report of the Thareja Committee and its conclusions. Certain observations of the Thareja Committee are quite revealing. The observations are as follows :

(i) The Committee notes that Shri Dinesh Goyal's statement was recorded. He could not tell about the accounts and in fact, he deposed that the position of the account will be explained by the accountant. He did not bring the original documents which were executed in lieu of the payments made. He also could not tell what amount was paid in respect of each particular transaction.

In his statement made on October 28, 2005 Mr. Dinesh Goyal admits that the land is not divided and was purchased in a combined Khewat. The properties were also in the joint names of the alleged sellers. He also admits that the land is not in the names of the applicant-company. He also admits that he has not brought the original documents which were got executed from Shri V. K. Sharma on behalf of different companies or the original Khewat.

(ii) The Report looks at the agreement with JVG Hotel Ltd. It is pointed out that the said property was purchased in the name of JVG Hotels Ltd., for a consideration of Rs. 29.55 lakhs. The consideration said to have been paid by the claimant for the property to JVG Hotel Ltd., is Rs. 8,10,000. Hence, the report notes that the land purchased in 1996 for Rs. 29.55 lakhs was agreed to be sold in 2002 for a consideration of Rs. 8,10,000. The land is situated adjacent to National Highway 24 going towards Jaipur from Gurgaon and the land prices would have shot up. The report concludes that clearly, the transaction is not bona fide.

(iii) The Committee also records that the receipt of alleged consideration paid to JVG Hotels Ltd., which was produced on record bears number "001". The applicant also produced receipts of other companies which also bear the number "001". The report concludes that there cannot be receipts bearing the same number, i. e., "001" in the case of purchase of land from JVG Hotels Ltd., JVG Farm Fresh Ltd., JVG Housing Finance Ltd., JVG Foods Ltd., and JVG Steels India Ltd.

22 The Committee concluded as follows :

"I have found as herein before noted especially in the matter of land transactions of JVG Hotels that the land which has been purchased for a high value in the year 1996 cannot be sold at a meagre value in the year 2002 particularly when the land is situated adjacent to NH-24 on the Road, going from Gurgaon to Jaipur. In fact land during the period escalated 10 times. The observation made show that the land has been agreed to sold at less than one-fourth and one-fifth of value at which it was purchased. I have already held that the transaction are against the guidelines of the RBI and in fact fraudulent one. Even the original documents of title deed have not been procured while parting with the meagre amount. Even the meagre amount was also not paid by cheque as it is required by the Income-tax Laws. Yet, I consider the submissions which have been made by Shri A. K. Ganguly, advocate, in the matter.

The submission of Shri A. K. Ganguly that the companies in whose name the land existed were not under liquidation and the land have been purchased bona fide and that the claimant had come to know by letter dated November 19, 1998 written by the official liquidator that the land in question was not included in the letter. On the face of the observation made by me herein above the submission of Shri Ganguly has no merit. A purchaser of the land is not only to inspect the revenue record to see if the land subsist in the name of the company from whom the claimants is purchasing but also for what value the land was acquired by such company. If the land was agreed to be sold at a meagre consideration, what was the reason for the same. It cannot be denied that the land has been agreed to be purchased at the meagre value. In absence of any reason in the agreement to sell, I find that submissions of Shri Ganguly cannot be accepted.

It is submitted by Shri Ganguly that the claimant had agreed to purchase the land during May, 2002 to July, 2002. The claimant had to obtain the permission on account of the order dated September 3, 2002. There was no directions that the land of the companies which are not in liquidation cannot be sold. Further, Shri Ganguly submitted that the claimant should not be penalized and victimized for the wrong misconduct committed by Shri V. K. Sharma, ex-chairman of the companies under liquidation. When confronted with the order of the court dated September 3, 2002 that the court has noted the complaints about the sale of the land and made observation regarding piercing the corporate veil. Shri Ganguly submitted that such an inquiry is beyond the jurisdiction of the Committee. He placed

reliance upon ILR 1979 (2) Ker 102, *Aron Salomon* v. *A. Salomon and Co. Ltd.* [1897] AC 22 (HL) and insisted that companies which entered into transaction are not the agent of the companies under liquidation. They are separate entitles. Their act cannot be questioned.

The submission of Shri Ganguly on the face of the findings herein above that for the purchase of the land the money of M/s. JVG Finance under liquidation was used cannot be accepted. Furthermore this committee vide its order dated February 16, 2005 as already reproduced earlier also asked the claimant to produce all the accounts books of the claimant pertaining to the year 2002. The accounts were not produced. The claimant were also asked to produce evidence that the claimant had actually parted with the money in favour of the companies selling the land and they were the bona fide purchaser. In spite of repeated asking no such evidence has been produced. Instead only two certificates one from State Bank of Bikaner and Jaipur dated May 1, 2006 and another from Punjab National Bank dated May 4, 2006 has been produced. The certificate only depict that certain amount of money was withdrawn from the bank account of the claimant. Such certificate is no certificate in the eye of law. It cannot be given any importance. Law gives importance to the statement of account of the bank provided such statement of account is issued under the Bankers' Books Evidence Act. Furthermore how such withdrawals where utilized can be told by the accounts books of the claimant which have not been produced. Even the bank managers have not been produced in the witness box to depose about the genuineness of certificates brought by the claimant. Under the circumstances no value can be attached to certificate produced by the claimant. No importance can be given to the deposition of Shri Dinesh who has been examined on behalf of claimant. The material evidence both oral as well as documentary has not been produced by the claimant since the claimant knew that the transaction claimed by the claimant are not genuine and bona fide as such the benefits of the judgments cited by Shri Ganguly is not available to the claimant.

In view of the reasons stated above I find that there is no merit in the prayer of the claimant. The claimant is not entitled to the permission sought for. The property situated at Gurgaon noted hereinabove and various other properties which are also there having been purchased from the funds of M/s. JVG Finance Ltd., as disclosed in exhibited in exhibits X-1 to X-17 are the properties of companies under liquidation to be taken into control by the official liquidator in

the interest of the bona fide depositor/creditors of the companies under liquidation.

Recommendation for the disposal of the application is made to the hon'ble court, that the prayer of the claimant has no merit and cannot be granted. Report with respect to Application No. 1171 of 2003 is submitted to the hon'ble court for directions/orders accordingly. On the application and also for directions to the official liquidator."

23 The Thareja Committee hence concludes that an amount of Rs. 22.80 crores from which the lands in Tehsil Gurgaon, Nuh, Tavru and Tizara were purchased was provided from the accounts of JVG Finance Ltd. and was transferred from the account of JVG Finance Ltd., to the account of Sh. Sushil Kumar Gupta. A total of Rs. 22.80 crores was transferred. Properties were purchased in the name of various companies of JVG Group. The report comes to the conclusion that the land was purchased by Sh. Sushil Kumar Gupta in the name of various JVG Group of Companies at a value less than the value shown by him in documents exhibits X-1 to X-17 (the applicant however states that there are 27 exhibits, i. e., exhibits X-1 to E-27). It is further stated in the report that Mr. Anil Karanwal, advocate was called upon to produce evidence that they had actually parted with money in favour of different companies and they are the bona fide purchasers of the land. No satisfactory evidence was adduced. The case of the applicant was rejected.

24 Another important report which has gone in detail of the stated transaction is the SFIO (Serious Fraud Investigation Office) Report. I may also look at some of the relevant portions of the SFIO Report which read as follows :

"4.1.5 One Shri Dinesh Goyal s/o. Shri Gian Chand Goel, r/o D-14, Preet Vihar, Delhi appeared before the inspectors on July 21, 2008 and submitted relevant details/documents (annexure 22) to Investigation. On scrutiny of these details/documents it is noticed that Shri Vijay Kumar Sharma, CMD of JVG group has further sold the land of these companies to parties/companies at Rs. 2 lakhs per acre. Shri Vijay Kumar Sharma, as managing director of the said companies, has made general power of attorney and agreement to sell in favour of Shri Dinesh Goyal and his company, M/s. Tirupati Cylinders P. Ltd. The details of said land submitted by Shri Dinesh Goyal are as under :

Sl. No.	*Name of company*	*Area of land Kanal*	*Marla*	*Date of agreement*	*Amount received as advance (Rs.)*	*Name of villages of Distt. Gurgaon*
1.	JVG Foods Ltd.	32	15	23-5-2002	8,18,750	Sidhrawali
		11	14	10-6-2002	1,80,000	Bohra Khurd
2.	JVG Housing Finance Ltd.	47	02	23-5-2002	11,77,500	Sidhrawali
		17	18	23-5-2002	4,47,500	Bohra Khurd
		4	6	23-5-2002	1,07,500	-Do-
3.	JVG Farm Fresh Ltd.	29	5	23-5-2002	7,31,250	Sidhrawali
		08	0	10-6-2008	2,00,000	Bohra Khurd
4.	JVG Hotels Ltd.	32	8	23-5-2002	8,10,000	Sidhrawali
5.	JVG Steels India Ltd.		15	23-5-2002	18,750	Sidhrawali
				Total	44,91,250	

4.1.6 Shri Dinesh Goyal filed an application on behalf of the company M/s. Tirupati Cylinders P. Ltd., under rule 9 of the Companies (Court) Rules, 1959, in the matter of *RBI* v. *JVG Finance Ltd.* Company Petition No. 265 of 1998. It is pertinent to mentioned here that the Delhi High Court passed an order on September 3, 2002 (annexure 23) to the effect that 'prior to effecting any further sale, alienation, transfer of creation of any third party interest in any assets of the JVG group of companies, permission of this court should be obtained'. However, all the deals were made before the said date of these orders.

4.1.7 Investigation further revealed that Shri Dinesh Goyal has also made sale deed on behalf of M/s. JVG Foods Ltd., M/s. JVG Petrochemicals Ltd., M/s. JVG Housing Finance Ltd., M/s. JVG Hotels Ltd., M/s. JVG Steels Ltd., M/s. JVG Overseas Ltd. and M/s. JVG Farm Fresh Ltd. He made these sale deeds in favour of Defence Services Investors Forum, without any consideration. In this connection a contempt petition has been filed by investors of JVG group in the Delhi High Court.

4.1.8 The documents/details submitted by Shri Dinesh Goyal have been examined. It is noticed that resolution authorising Shri Vijay Kumar Sharma to make agreement to sell and GPA on behalf of aforesaid five companies, was found to be fabricated. As per minute books submitted by some of these companies, it is seen that the date mentioned in the resolution is false as on the said date there was no meeting held as per concerned company's records. A copy of such minutes recorded before and after the said dates is placed at annexure 24 . . .

4.1.21 Shri Vijay Kumar Sharma, ex-CMD of the aforesaid companies appeared before the inspectors on October 5, 2009 and in reply to question Nos. 222 to 228, he categorically admitted that the funds for the purchase of above land were given by JVGFL. He could not give any cogent reasons for the purchase of land in the names of other JVG group companies by using the funds of JVGFL and simply stated that there must have been some resolution in this regard. On being further asked about land worth Rs. 16.29 crores (which was registered in the name of 13 JVG group companies), out of which land registered in the names of 5 JVG group companies (mentioned in paragraph 4.1.5 above) was sold, he categorically admitted that a deal was made between these companies and M/s. Tirupati Cylinders Ltd. (represented by Shri Dinesh Goyal) but the same could not be completed due to stay granted by hon'ble Delhi Court. A copy of the relevant extracts of his statement dated October 5, 2009 is placed at (annexure 26).

4.1.22 In the instant case, Shri Vijay Kumar Sharma, being chairman and managing director of JVGFL was duly bound as its director/ trustee of company's property and its agent to protect the interests of JVGFL and its various stakeholders, i. e., shareholders/depositors and creditors. Shri Sharma instead of protecting the interests of JVGFL and its stakeholders has in fact, indulged in siphoning off the company.s money in connivance with Smt. Namrata Krishan. He has fabricated false documents with the help of Smt. Namarta Krishan on behalf of other JVG group companies for sale of land of these companies. He has also kept whole consideration with himself. JVGFL had collected these funds from innocent public."

Hence, the SFIO report notes that the documents/details submitted by **25**
Shri Dinesh Goyal have been examined. It also concludes that the resolution authorising Shri V. K. Sharma to make agreement to sell and GPA on behalf of the aforesaid five companies of the JVG group is fabricated. The date mentioned in the resolution is wrong as on the said date, no meetings were held as per the company record.

SFIO records the statement of Shri V. K. Sharma that a deal was made with Tirupati Cylinder Ltd., but the same could not be completed. However, the report concludes that Shri V. K. Sharma being a director was duty bound to protect the interest of JVG Finance Ltd., and its stake holders. Instead, he had indulged in siphoning off funds of the company and fabricated false documents. The report concludes that Shri V. K. Sharma instead of protecting the interest of JVG Finance Ltd., has indulged in

siphoning of company's money in connivance with Smt. Namarta Krishan. It also concludes that Shri Sharma has fabricated documents. It also concludes that Shri V. K. Sharma has indulged in fraudulent conduct of business in the manner as brought about earlier and is personally responsible without limitation of liability for the debts and liabilities of JVG Finance Ltd., in terms of section 542 of the Act.

26 Another aspect which is relevant here is the stand taken by the official liquidator, namely, that the resolutions authorising Shri V. K. Sharma to sell the aforesaid properties of the five companies in question which are part of the JVG group reflect the registered office and the head office on the date of the resolution, i. e., May, 2002 as 1, Ashoka Park, Main, New Rohtak Road, New Delhi and B-22, Ansal Chambers-I, Bhikaji Cama Place, New Delhi. It has been pointed out by the official liquidator in its reply, that in June, 1998 the official liquidator has taken possession of these two properties. Hence, the question of passing resolutions on the letter heads reflecting the said offices as the registered office and head office obviously raises grave suspicion on the genuineness of the resolution.

27 What follows is that both the reports, namely, the Thareja Committee Report and the SFIO Report have rejected the claim of the applicant. It is not in dispute that the agreement to sell and power of attorneys were executed. The Thareja Committee report however concludes that material evidence has not been produced and that the transaction is not genuine and bona fide. The report gravely doubts that any consideration was paid. SFIO in its report concludes that the resolution authorising Shri V. K. Sharma to make the agreement to sell and GPA on behalf of the five stated companies of the JVG group are fabricated. The conclusion is unequivocal that Shri V. K. Sharma had no authority to execute the said documents and to receive any consideration for and on behalf of the said companies in cash. The report unequivocally concludes that Shri V. K. Sharma has indulged in fraudulent conduct and has siphoned off the company's money. Based on these two reports, it is quite clear that the transaction which is claimed by the applicant-company cannot be accepted.

28 The applicant has taken strong objections to the aforesaid findings of the Thareja Committee. According to them, the procedure followed by the Thareja Committee was illegal and contrary to the principles of natural justice. The Committee came to a conclusion that the property in question has been sold to the applicant at throw away rates without giving an opportunity to the applicant to summon the revenue authorities or to even cross-examine Shri V. K. Sharma or Shri Sushil Kumar Gupta. It is also pleaded

that exhibits X-1 to X-27 on the basis of which the value of the property has been ascertained by the Committee were not provided to the applicant.

On the SFIO report, learned counsel for the applicant had strenuously urged that the report accepts the fact that Shri V. K. Sharma has made the GPAs and agreement to sell in favour of the applicant and that the applicant has also paid consideration to Shri V. K. Sharma. It is pleaded that these conclusions show that the stand of the applicant has been accepted by SFIO.

29 The argument raised by learned counsel for the applicant regarding the SFIO report supporting the case of the applicant is entirely misplaced. The report in paragraph 4.1.8 clearly spells out that the resolution authorising Shri V. K. Sharma to make the agreement to sell and GPA on behalf of the aforesaid five companies is fabricated. It also concludes that Shri V. K. Sharma has fabricated false documents on behalf of JVG group of companies for sale of the land and that he has collected the whole consideration for himself. The funds for purchase of the land on behalf of these companies belong to JVG Finance Ltd., which was generated from innocent public as investments.

Two things stand out as per the report of SFIO. Firstly, Shri V. K. Sharma was never authorised to effect this transaction on behalf of the five companies. Secondly, he has acted in a fraudulent manner and has sought to siphon off the funds of JVG Finance Ltd., by indulging in these transactions. In my opinion, these observations and conclusions of SFIO do not in any manner support the claim of the applicant.

30 Regarding the objections taken to the Thareja Committee report by the applicant, in my opinion, the objections are misplaced. As noted above, there is no dispute that the agreement to sell and power of attorney were duly executed and registered. The issue is as to whether the consideration was actually paid given the fact that it is claimed to have been paid in cash. The Thareja Committee report concludes that the relevant documents, namely, the cash book, ledger, etc., have not been placed on record and concludes that the transaction lacks bona fide. In my opinion, this conclusion is supported by so many other surrounding facts and circumstances which render the objections raised by the applicant to the Thareja Committee Report completely irrelevant and without merits.

31 Apart from the conclusions drawn against the applicant by the Thareja Committee and SFIO, there are so many other aspects and circumstances which are apparent on the face of the record which raises grave doubts about the bona fide of the transaction. The following aspects/facts clearly stand out :

(a) The first aspect is that the applicant claims that the property was purchased around 2002. It is further claimed that the applicant has physical possession of the property. This is despite the fact that there is unrebutted evidence on record that there is no proper demarcation of the land. Even assuming that the applicant was in possession of the land in question for the last 18 years, there would have been surely some utilization of the land. There would be enough evidence with the applicant to demonstrate their possession on the land, namely, as to whether they are carrying out any farming on the land or they are using it for some commercial purpose or that they have rented out the property. The entire application and the submissions of learned counsel for the applicant are completely silent about the same. There is no attempt to demonstrate that the applicant at any stage exercised any rights as a title owner for the property in question for the last 18 years/as a person in physical possession of the property. In the last hearing, it was urged that the land is being used for agriculture purpose. However, nothing to support this plea has been placed on record. Any such user of the property as claimed would have generated income for the applicant-company. Such income would be reflected in its books of account/balance-sheets/income-tax records. None of these documents has been produced to show the manner in which the property is being utilized/ is generating income for the company.

(b) I also cannot help noticing the conduct of the applicant. The applicant has failed to place on record the income-tax records and balance sheets of the company. If such a purchase of properties had been made, surely the applicant-company would have shown them in their balance sheets and filed appropriate returns with the Income-tax Department. The balance-sheets and relevant income-tax record of the applicant would have shown that this land has been shown as an asset of the company.

(ii) During the hearing a question was posed to learned counsel for the applicant as to whether the company Tirupati Cylinders Ltd., has shown purchase of this property in the income-tax records. Learned counsel for the applicant submitted that he does not have any instructions in this regard. Learned counsel was then asked as to whether the applicant-company is using the land in question in any manner whatsoever. Learned counsel replied that perhaps they were using the land. This court further put a question as to whether the applicant-company is receiving any rent from the land or any profit or revenue from the land. Learned counsel for the applicant replied that he does not know about the same.

(iii) The absence of these documents raises grave doubts on the bona fide of the transaction.

(iv) In the above context reference may be had to the judgment of the Supreme Court in the case of *Union of India* v. *Ibrahim Uddin* [2012] 8 SCC 148. The Supreme Court in the said case held as follows (page 161) :

> "12. Generally, it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the court may draw adverse inference under section 114 Illustration (g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. (Vide *Murugesam Pillai* v. *Manickavasaka Pandara*, AIR 1917 PC 6, *Hiralal* v. *Badkulal*, AIR 1953 SC 225, *A. Raghavamma* v. *A. Chenchamma*, AIR 1964 SC 136, *Union of India* v. *Mahadeolal Prabhu Dayal*, AIR 1965 SC 1755, *Gopal Krishnaji Ketkar* v. *Mohd. Haji Latif*, AIR 1968 SC 1413, *BHEL* v. *State of U. P.* [2003] 6 SCC 528, *Mussauddin Ahmed* v. *State of Assam* [2009] 14 SCC 541 and *Khatri Hotels P. Ltd.* v. *Union of India* [2011] 9 SCC 126) . . .
>
> 24. Thus, in view of the above, the law on the issue can be summarised to the effect that the issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The court cannot lose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents, etc., as is required under Order 11 of the CPC. Conduct and diligence of the other party is also of paramount importance. Presumption of adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and the other side failed to comply with the court's order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary."

(v) Clearly, in the facts of this case, it is the averment of the applicant that it has bona fidely purchased the property from the JVG group of companies in question in 2002. The burden of proof was on the applicant who

has made the factual averment. Withholding and non-production of facts and documents which would have demonstrated that the applicant has purchased the property and has been dealing with the property since 2002 as an owner/title holder of the property, clearly permits the court to draw an adverse inference against the applicant. The best evidence has been hidden/suppressed by the applicant. This aspect negatives the legality and validity of the contentions raised by the applicant.

(c) That apart, what stands out is that large consideration is sought to be paid for sale of the property entirely in cash. This, itself, raises a suspicion about the bona fide and genuineness of the transaction. There is no reason to have paid the entire consideration of about Rs. 45 lakhs in cash as is claimed.

(d) It is also an admitted fact that the original title documents of the land that were executed in favour of the five companies who are allegedly the sellers of the land to the applicant, were not taken into possession by the applicant when the alleged sale was made. It is a standard practice that when a sale is made all title documents in favour of the seller are handed over to the purchaser. This is a prudent practice as it ensures that the title documents are not misused. On the contrary, as per the ex-management, the original sale deeds were lying with Shri V. K. Sharma and have been filed by him in this court. This absence of possession of the original documents of title of the five companies from whom the land was bought with the applicant itself raises doubt on the bona fide of the sale transaction.

(e) The SFIO report also notes the conduct of Shri Dinesh Goyal, the alleged person-in-charge of the applicant-company-Tirupati Cylinders Ltd. In paragraph 4.1.7, SFIO notes that the said Shri Dinesh Goyal has made sale deeds on behalf of JVG Foods Ltd., JVG Petrochemicals Ltd., JVG Housing Finance Ltd., etc., in favour of Defence Services Investors Forum without any consideration. It is manifest from these observations that Shri Dinesh Goyal was a familiar figure with the JVG group of companies and was involved in some of the transactions relating to JVG group of companies/functioning of the said group. He is not a bona fide third party dealing with the JVG group/the five companies in question for a bona fide sale of the properties.

(f) I also cannot help noticing the manner in which the applicant-company has been lingering along with its so-called claim to the title of the property. On July 22, 2004 this court had referred the matter to the Thareja Committee to give its recommendations on the claim raised by the applicant-company. On November 24, 2005 before the Thareja Committee, a statement was made on behalf of the applicant that they do not wish to

pursue the matter and sought withdrawal of the petition. Subsequently, on a request made by the applicant-company, on March 10, 2006 this court permitted the applicant to approach the Thareja Committee to substantiate its claim again. The Thareja Committee gave its XIIIth Report dealing with the claim of the applicant on February 5, 2007. It was in 2011 that the applicant, four years after the report had been given sought to move the court claiming that it had not received a copy of the report of the Thareja Committee dated February 5, 2007. It is clear that the applicant have permitted the matter to linger on and have not pursued the matter/the alleged claim in a diligent manner.

The aforesaid facts clearly show that the best evidence that the applicant had to prove its case has been hidden from the court. The applicant has failed to place on record its balance sheets and income-tax records which would show that it had the wherewithal to purchase this property and also that the balance-sheets reflect this property as its asset. **32**

No details are given as to how the property is being utilized by the applicant. It is a valuable piece of land situated on a main road. No details are forthcoming.

I also cannot help noticing the judgment of the Supreme Court in the case of *Suraj Lamp and Industries P. Ltd.* v. *State of Haryana* [2012] 169 Comp Cas 133 (SC) ; [2012] 1 SCC 656 wherein the court has frowned on POA/GPA transactions. The court held as follows (page 144 of 169 Comp Cas) : **33**

> "Therefore, an SA/GPA/will transaction does not convey any title nor creates any interest in an immovable property. The observations by the Delhi High Court in *Asha M. Jain* v. *Canara Bank* [2001] 94 DLT 841, that the 'concept of power of attorney sales has been recognised as a mode of transaction' when dealing with transactions by way of SA/GPA/will are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPA/will transactions are some kind of a recognised or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognise or accept SA/GPA/will transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law."

In this context, reference may be had to section 542 of the Companies Act, 1956 which reads as follows : **34**

> "542. *Liability for fraudulent conduct of business.*—(1) If in the course of the winding up of a company, it appears that any business of the company has been carried on, with intent to defraud creditors

of the company or any other persons or for any fraudulent purpose, the court, on the application of the official liquidator, or the liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

On the hearing of an application under this sub-section, the official liquidator or the liquidator, as the case may be, may himself give evidence or call witnesses.

(2)(a) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.

(b) In particular, the court may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf.

(c) The court may, from time to time, make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.

(d) For the purpose of this sub-section, the expression 'assignee' includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both.

(4) This section shall apply, notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made."

A Co-ordinate Bench of this court in the case of *Col. M. R. Bakshi* v. **35**
Fintra Systems Ltd. [2008] 151 DLT 1 while dealing with section 542 of the Companies Act, 1956 held as follows :

> "10. Having considered the respective submissions I am, as at present advised, inclined to agree with the submissions of Mr. Rajiv Shakdher, senior advocate the learned amicus curiae. Keeping in view the purpose for which section 542 has been enacted, and the fact that timely action is of the essence, not only to prevent the presentation of a fiat accompli by the fraudulent directors of the company, but also to provide relief to the victims of the fraud, it seems that the establishment of the fraudulent conduct for attracting the provision of section 542 of the Companies Act does not require the same standard of proof as in a criminal trial and the rigours of the law of evidence as apply to a criminal trial would not apply to establish the commission of fraudulent acts and omissions by the directors and managers of a company. It has also to be kept in mind that by its very nature, fraud is not easy to establish. This is even more so, when the fraudulent conduct is undertaken by the directors of a company, sitting in their own office, with a view to defraud the creditors/investors who, though the victim of the fraud, are not involved in the transactions which constitute such conduct, and may have no personal knowledge of the same. In *K. T. Dharanendrah* v. *Regional Transport Authority*, AIR 1987 SC 1324, the Supreme Court, while dealing with a case under the Customs Act, 1962 observed that 'An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest'."

Reference may also be had to the works of the learned author "A. **36**
Ramaiya, *Guide to the Companies Act* (17th edition, 2010)" where while dealing with section 542 of the Act, it is stated as follows :

> "A personal can be held liable for fraudulent trading, if he assisted in the commission of the fraud. It is not necessary that he should be actively involved in the management of the company. The court said that as a matter of ordinary language the section was not restricted to those who performed a managerial role. Moreover, the legislative

history of the provision pointed towards a wider interpretation, extending not only to a person who carried on business or assisted in the carrying on of the liquidated company's business but also to a person who had participated in the fraudulent acts of the company *Morris* v. *Banque Arabe et Internationale d'investissement SA (No. 2)* [2001] 1 BCLC 263."

37 In my opinion, in view of the above stated facts and legal position, the transaction as alleged by the applicant is not a bona fide act. I concur with the conclusions of the Thareja Committee. Further, in 2002 when the alleged transaction took place, the JVG group of companies was a sinking ship. The flagship company of the group, namely, JVG Finance Ltd., had already been ordered to be provisionally wound up by order dated June 5, 1998. One cannot help coming to the conclusion that this transaction was carried out only to whisk away valuable assets of the JVG group of companies which at that time were likely to go under winding up proceedings.

38 Clearly, the present application has no merit. The application is dismissed.

[2020] 222 Comp Cas 46 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL— NEW DELHI]

ARCHER POWER SYSTEM P. LTD.

v.

CASCADE ENERGY P. LTD. AND OTHERS

JARAT KUMAR JAIN J. ***(Judicial Member)***,
BALVINDER SINGH and
DR. ASHOK KUMAR MISHRA ***(Technical Members)***

July 23, 2020.

HF ▸ Respondent

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—MAINTAINABILITY—PETITIONER SHOWN AS NOMINEE IN SHAREHOLDING AGREEMENT BUT HOLDING SHARES IN ITS OWN NAME AND HAVING SEPARATE LEGAL ENTITY—ELIGIBILITY TO BE RECKONED AS ON DATE OF PETITION—PETITION MAINTAINABLE—COMPANIES ACT, 2013, S. 241.

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—POWERS OF TRIBUNAL—QUESTION OF MAINTAINABILITY NEED NOT TO BE DECIDED AS PRELIMINARY ISSUE, CAN BE DECIDED ALONG WITH MAIN PETITION—

INTERIM ORDERS TO MAINTAIN STATUS QUO AND IMPOSITION OF FORENSIC AUDIT—TRIBUNAL HAS POWER TO MAKE INTERIM ORDERS WHICH IT THINK FIT FOR REGULATING CONDUCT OF COMPANY'S AFFAIRS—NATIONAL COMPANY LAW TRIBUNAL RULES, 2016, r. 11.

The appellants filed a petition under section 241 of the Companies Act, 2013, alleging oppression and mismanagement by the respondents. The respondents also filed a cross petition under section 241 alleging oppression and mismanagement on the part of the appellants. The appellants raised the question of maintainability of the petition filed by the respondents under section 241 of the Act. The Tribunal appointed a chartered accountant and directed a forensic audit of the state of affairs of the company including accounts-cum-banking of the company. The Appellate Tribunal set aside this order and observed that the petitions preferred by the parties were required to be disposed of by the Tribunal within three months as per sub-section (1) of section 422 of the Act but because of interim applications preferred by one or other parties, the Tribunal could not take up the main matters. The Appellate Tribunal therefore held that the question of maintainability was not required to be decided as preliminary issue and could be decided along with main petition. The Supreme Court set aside this order and remanded the matter for a fresh consideration by the Tribunal. The Tribunal directed the respondents to maintain status quo with regard to the composition of the board of directors, the shareholding and the articles of association of the company as on April 27, 2017 the date of the petition. On appeal :

Held, *(i) that the shareholder agreement was entered between the appellant, respondent No. 1 and respondent No. 2. The shares were held by respondent No. 1 in its own name. Even if respondent No. 1 was a nominee of K in terms of the shareholding agreement, having a separate legal entity, respondent No. 1 could hold shares in its own name. There was nothing on record to show that any action was initiated or any competent authority had decided the question of beneficial interest in the company. Thus no such rights could be taken away from respondent No. 1 in respect of such shares. Since respondent No. 1 was registered as a shareholder as on the date of the petition and no competent court had passed any order affecting its rights as on the date of petition the eligibility of respondent No. 1 to file a petition was to be reckoned on the date of the petition. Therefore, the petition was maintainable per se on the date of petition.*

(ii) That the question of maintainability need not to be decided as preliminary issue and could be decided with main petition. The Tribunal under rule 11 of the National Company Law Tribunal Rules, 2016, had inherent

powers to pass such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal. Therefore, the orders passed by the Tribunal were not questionable on the grounds contended by the appellant. The maintainability was a mixed question of facts and law and conducting a forensic audit could produce important facts that may be required by the Tribunal in order to decide the preliminary issue. The Tribunal had the power to pass interim orders as it thought fit for regulating the conduct of the company's affairs. Imposition of forensic audit and calling for the report of forensic audit before the Tribunal was a measure to help the Tribunal appreciate the issue on the basis of an independent report so as to ensure that the case was processed with due regard to the rights and obligations of the contesting parties and would be in the interest of justice. Similarly the status quo as ordered was only with a view to regulate the conduct of the company's affairs during the pendency of the case so that no contesting party took advantage during the period detrimental to the other party. The order for restoration of status quo as on April 27, 2017 (date of petition) as directed by the Tribunal as long as the matter was under consideration could not be found faulted with.

Order of the National Company Law Tribunal affirmed.

CYRUS INVESTMENT P. LTD. *v.* TATA SONS LTD. [2017] 203 Comp Cas 14 (NCLAT) (para 16) *referred to*.

Company Appeal (AT) Nos. 213 with 296 of 2017.

Rana Mukherjee, Senior Advocate with *Goutham Shivshankar*, *Shantanu Singh*, for the appellant in Company Appeal (AT) No. 213 of 2017.

Brijender Chahar, Senior Advocate with *N. Saravanan*, *Ms. Arunima Singh* and *Shivam Tandon*, for respondent No. 1 in Company Appeal (AT) No. 213 of 2017.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

1 BALVINDER SINGH ***(Technical Member)***.—These two appeals, i. e., Company Appeal (AT) Nos. 213 and 296 of 2017 have been preferred by the appellant under section 421 against the respondents challenging two impugned orders dated June 14, 2017 and July 18, 2017 in C. P. No. 19 of 2017 passed by the National Company Law Tribunal, Chennai Bench ("for short Bench"). These appeals were heard together and disposed of by this common judgment.

The brief facts of the case are that Zynergy Solar Projects and Services 2
(hereinafter referred as respondent No. 2 or respondent No. 2 in short) have the appellant as 49 per cent. shareholder and Cascade Energy P. Ltd. (hereinafter referred as respondent No. 1 or respondent No. 1 in short) as 51 per cent. shareholder as per the shareholding agreement signed between them. The appellant is a company registered under the Companies Act, 1956 engaged in the business of purchase, sale, supply and distribution of power. Respondent No. 2-company was promoted by Mr. Rohit Rabindranath (hereinafter referred as respondent No. 3 or respondent No. 3 in short) and also the managing director of respondent No. 2-company. The appellant is a shareholder of respondent No. 2, initially holding 49 per cent. and claiming to hold 51.1 per cent. shares which is contested and is part of the subject matter of the Company Appeal (AT) No. 296 of 2017. Respondent No. 2 ventured into solar power generation in 2010 and required additional funds to expand its business. In 2015 respondent No. 3 entered into a Strategic Investment Agreement with Kohli Ventures. Pursuant to the agreement Rs. 30 crores was invested into respondent No. 2-company by Kohli Ventures from various sources, and shares were allotted to the nominee company of Kohli Ventures, one Cascade Energy P. Ltd., i. e., respondent No. 1-company.

Respondent No. 1 is a Singapore based investment company. Respond- 3
ent No. 1 entered into a shareholder agreement dated July 27, 2015 with respondent No. 2-company. Respondent No. 1 holds 67,46,998 equity shares of Rs. 10 each, in respondent No. 2 constituting 51 per cent. of the equity share capital in respondent No. 2. Respondent No. 1 submits that on noticing certain acts and omissions of the appellant and the violation of the provisions of law by respondent No. 3, it filled Company Petition No. 19 of 2017 before the National Company Law Tribunal, Chennai Bench against the appellant for oppression and mismanagement. The appellant instead of filling counter affidavit filed company application I. A. No. 112 of 2017 in C. P. No. 19 of 2017 challenging the issue of maintainability to be decided as a preliminary issue.

After hearing both the parties the National Company Law Tribunal, 4
Chennai Bench passed an interim order on June 14, 2017 directing as follows :

> "4. In view of the above, we proceed to consider the prayer of the petitioner for grant of interim relief contained under sub-paragraph (f) of paragraph II of the petition. Counsels for the respondents have vehemently opposed the grant of interim relief. However, considering the facts and circumstances involved in the case, as detailed in the

petition, we are inclined to grant interim relief as prayed and appoint Mr. S. Santhanakrishnan as chartered accountant and Mr. R. Sridharan as company secretary, whose names have been recommended by the petitioner and direct them to undertake forensic audit of the state of affairs of the company including accounts-cum-banking and statutory compliance including Sales Tax, Excise, Customs, FEMA, Companies Act, GATT and other laws applicable and statutory records of respondent No. 1-company including the income and expenditure of respondent No. 1. The audit report shall be submitted to this Bench within four weeks from the date, the copy of the order is received. The chartered accountant and the company secretary shall also report on the aspects of the corporate governance and compliance of effecting contractual commitments of respondent No. 1 and its shareholders. The report shall be submitted in a sealed cover to this Branch. The petitioner and respondents are directed to co-operate with the chartered accountant and company secretary by making available the accounts, books and other records as may be required by the chartered accountant and the company secretary. Regarding the payment of remuneration to the chartered accountant and the company secretary, both are at liberty to fix their remuneration as per the practice in vogue. The payment of remuneration to them shall be borne by the petitioner and respondents equally. Accordingly, the relief as prayed is granted to the petitioner.

5. It is also on record that an application has been filed by counsel for respondent No. 2. The petitioner is directed to file the counter within two weeks and thereafter within ten days counsel for the respondent may file rejoinder, if any. Matter is posted for arguments on the application. Put up on July 13, 2017 at 10.30 a.m."

5 Aggrieved by the same the appellant approached the National Company Law Appellate Tribunal through this Company Appeal (AT) No. 213 of 2017. The National Company Law Appellate Tribunal set aside the order passed by the National Company Law Tribunal, Chennai and remanded back to the National Company Law Tribunal, Chennai by passing an order on July 14, 2017 as under :

"5. It is informed by the parties that the appellants have filed the original company petition under section 241 of the Companies Act, 2013 alleging 'oppression and mismanagement' by the respondents. The respondents have also filed a cross petition under section 241 alleging 'oppression and mismanagement' on the part of the appellants. Both the matters are pending and no affidavit or reply has been

filed, as the appellants have raised the question of maintainability of the petition filed by the respondents under section 241 of the Companies Act, 2013. The original petitions were filed in April, 2017 and though approximately three months have passed but the petitions have not been taken up for consideration on merit for one or other objections raised by the parties. The petitions preferred by the parties are required to be disposed of by the Tribunal within three months as per sub-section (1) of section 422 of the Companies Act, 2013. But because of interim applications preferred by one or other parties, the Tribunal could not take up the main matter(s). We are of the view that the question of maintainability was not required to be decided as preliminary issue which can be decided along with main petition. It could have been taken up during the final hearing of the main company petition as the cases are required to be disposed of preferably within 90 days.

6. For the reasons aforesaid, we set aside the impugned order passed by the Tribunal in Company Petition No. 19 of 2017 and direct the parties to file their respective reply affidavit in concerned petitions within one week, rejoinder, if any, be filed within a week thereafter. In case one or other party fail to file reply affidavits in their respective petitions and or rejoinder, the Tribunal will proceed with the matter without granting further time to the parties while deciding the question of maintainability at the time of final hearing of the case. The parties should co-operate with the Tribunal and it is expected that the Tribunal will decide the case at an early date, preferably within 30 days.

7. The appeal stands disposed of with aforesaid observation and directions. No costs."

Further, aggrieved by the order passed by this Tribunal, respondent **6** No. 1 moved to the hon'ble Supreme Court by way of Civil Appeal No. 9388 of 2017. Further, the hon'ble Supreme Court set aside the order passed by this Tribunal, i. e., the National Company Law Appellate Tribunal and remanded back the matter for a fresh consideration on August 10, 2017 stating as follows :

"When we are remanding the matter to the National Company Law Appellate Tribunal, the main proceeding before the National Company Law Tribunal shall remain stayed till the National Company Law Appellate Tribunal decides with regard to the justifiability of the interim order. The National Company Law Appellate Tribunal may be well advised to deal with the issue of maintainability of the

original proceedings or that comes within the sweep of prima facie case for entertaining this prayer for interim relief."

7 The National Company Law Tribunal, Chennai Bench in consideration of I. A. No. 110 of 2017 filed in the same Company Petition No. 19 of 2017 has directed the respondents under the company petition to maintain the status quo and passed the following order on July 18, 2017 :

"7. It is also on record that the petition came to be filed on April 7, 2017 and, if the shareholding composition of the management as it existed on April 27, 2017 is not protected. The balance of convenience existing in favour of the petitioner may get disturbed and there is an apprehension of causing irreparable loss to the petitioner that cannot be compensated by way of monetary consideration. In the light of the above discussion, we are inclined to grant the relief as contained under paragraph (vi)(1) of I. A. No. 110 of 2017 and order as follows :

We direct the respondents to maintain status quo with regard to the board composition, shareholdings and articles of association of the first respondent-company as it existed on April 27, 2017.

8. In relation to the application for maintainability of the petition that has been filed by respondent No. 2, counter has been filed by the other side. The opposite party is directed to file rejoinder. The matter is posted for arguments on the maintainability of the company petition. Put up on April 27, 2018 at 10.30 a.m."

8 The above order was challenged before the National Company Law Appellate Tribunal through this Company Appeal (AT) No. 296 of 2017. Both the appeals, i. e., 213 and 296 have been taken up together as there is a common question of law.

9 Counsel for the appellant submitted that after some time had passed since the said investments, respondent No. 2 received a letter from the Reserve Bank of India (hereinafter "RBI") through which respondent No. 2 came to understand that the four agreements entered into between the parties, viz., (i) Strategic Investment Agreement dated July 27, 2015 (ii) Shareholders agreement dated July 27, 2015 (iii) OFCD subscription agreement dated August 11, 2015 are prima facie null and void as the same are in contravention of paragraph 4 of the Master Circular dated July 1, 2015 issued by RBI, since all the four agreements contain "target clauses" providing for "assured return" to the investor based on the profitability and sales even if target are not met by respondent No. 2. Such "target clauses" providing assured return are prohibited under the said circular of RBI.

It is further submitted that KEB Hana Bank, the banker to respondent No. 2-company wrote to respondent No. 3 in February and March, 2017, stating the KYC reports relating to the company's 51 per cent. shareholder, viz., Kohli Ventures (holding through the first respondent) are negative and not satisfactory. The bank stated that the financial assistance granted to respondent No. 2-company would be recalled in case the due diligence report with respect to the 51 per cent. shareholder, i. e., the first respondent is negative. 10

It is further stated on behalf of the appellant that respondent No. 3 conducted a detailed due diligence in order to find out the real status of Kohli Ventures and Kohli. The appellant through said exercise came to understand that Kohli was involved in several criminal cases, which remain pending in US against him, and he also been convicted and sentenced by United States District Court, Central District California. All these facts had been suppressed by Kohli and respondent No. 1 from respondent No. 3-company which has led to significant economic and reputational loss to the appellant. 11

It is further stated that on March 16, 2017 and subsequently on March 23, 2017 the KEB Hana Bank issued letters stating that the KYC of Kohli/ Kohli Ventures is not satisfactory and that in the event that the investor continues to be a shareholder in respondent No. 2-company, it will be constrained to recall the loan (ECB) of 4 million USD that it had advanced. It is pertinent to note that the appellant has secured, from its shareholders, property worth more than 100 crores INR in relation to the loans. Any recall of loans due to the KYC of the respondent would have crippling consequences for the appellant and would essentially sound the death knell for the appellant as well as the business life of respondent No. 3. 12

It is also submitted that respondent No. 1 and Kohli Ventures have failed to disclose several material facts with respect to their background, and specifically that of their promoter, i. e., Kohli. Therefore the said respondent has wilfully misrepresented and has consequently violated the provisions of the Indian Contract Act, 1872. Due to these illegal acts of respondent No. 1, the appellant has been forced to run from pillar to seek remedy. Aggrieved by the blatant violation of the Foreign Exchange Management Act, 1999 ("FEMA") and the failed KYC due to fraudulent misrepresentation by respondent No. 1 and its agents, the appellant filed a company petition alleging oppression and mismanagement and seeking rectification of register of members on March 16, 2017 (C. P. No. 13 of 2017) before the National Company Law Tribunal, Chennai Bench. 13

14 It is submitted that subsequently, respondent No. 1 also filed a company petition by way of counter blast, being C. P. No. 19 of 2017 before the National Company Law Tribunal, Chennai Bench, in April, 2017. This being the situation, on May 19, 2017 the Income-tax Department issues a show-cause notice and attached the shares held by respondent No. 1-company in respondent No. 2-company, as per section 24 of the Prohibition of Benami Property Transaction Act, 2016. Although respondent No. 1 is shown as a member in the register of members of respondent No. 2-company, the investment was in fact funded by Kohli through Kohli Ventures Ltd., and Cascade Global Ltd., Hong Kong. Therefore, in the eyes of the Initiation Officer (Income-tax Department), this was a clear case of Benami Transaction wherein the shares are held by one person but the beneficial owner is someone else.

15 The appellant contended that the core issue that arises for consideration in the appeal is whether the National Company Law Tribunal can/should pass an interim order in a petition under section 241/242 of the Companies Act, 2013 before deciding on the question of maintainability as raised by the appellant herein (respondent No. 1 before the National Company Law Tribunal).

16 It is further submitted that the challenge was on the ground that under section 89(8) of the Companies Act, 2013, a serious question of maintainability of the company petition filled by respondent No. 1 had arisen and ought to be decided first before any interim order was granted by the National Company Law Tribunal. In failing to take this approach and by granting interim relief prior to deciding the maintainability application, the hon'ble National Company Law Tribunal has wrongly prejudged the issue contrary to the provisions of law and the order of the hon'ble Supreme Court and National Company Law Appellate Tribunal. The hon'ble Supreme Court has held that all issues whether preliminary or otherwise should be decided together so as to rule out the possibility of any litigation at the interlocutory stage. The National Company Law Appellate Tribunal in the case of *Cyrus Investment P. Ltd.* v. *Tata Sons Ltd.* [2017] 203 Comp Cas 14 (NCLAT), relying on the said decision of the Supreme Court fixed the company petition for hearing on the question of maintainability should be decided first. It further held that (page 30) : "It will be open to the appellants to file a petition for amendment and may argue on the question of removal of the eleventh respondent, if he is removed by the decision of the extraordinary general meeting during the pendency of the company petition".

It is further stated by counsel of the appellant that any order arising out **17**
of company petition/application filed by respondent No. 1 could have been decided only after it has been established that respondent No. 1 can maintain the petition under section 244 read with section 89(8) of the Companies Act, 2013. Therefore the said impugned orders of the hon'ble National Company Law Appellate Tribunal are not only erroneous and illegal, but the said illegality also goes to the root of the matter, since the National Company Law Tribunal has failed to properly consider whether respondent No. 1 was even entitled to maintain C. P. No. 19 of 2017 filed by it, and further whether it could have exercised its rights as a shareholder on the date of filing the petition under section 241 despite the failure to make declarations under section 89. Therefore respondent No. 1 is disqualified from exercising any rights of shareholder under section 89(8) of the Companies Act, 2013 and for that reason cannot maintain C. P. No. 19 of 2017.

It is further contended by the appellant that as per section 242(4) an **18**
interim order could be passed only for the purpose of regulating the conduct of the company's affairs that too upon such terms and conditions which are just and equitable. Neither does the impugned order contemplate regulating the company's affairs nor does it state the reason for passing such a drastic order. For the very reason, the order of the National Company Law Tribunal is liable to be set aside as perverse, erroneous and without jurisdiction.

It is further argued on behalf of the appellant that as far as the **19**
impugned order dated June 14, 2017 directing forensic audit is concerned, similar prayer is sought for as one of the final reliefs also. The said final relief is sought for under section 213 of the Act. It is a settled position of law that interim relief shall only be incidental or ancillary to the main relief as final prayer and the final prayer cannot be granted at the interim stage.

It is further stated that impugned order dated July 18, 2017 restoring sta- **20**
tus quo ante is an order in the nature of an interim mandatory injunction which has to satisfy the necessary ingredients as enunciated by the Supreme Court. The same has not been satisfied which is evident from the counter filed by respondent No. 1 before the ICC, arbitration on September 29, 2017 and the relief sought is against respondent No. 2 as well, in which respondent No. 1 is a shareholder. The prayer are for return of the investment and the damages. When respondent No. 1 has made the very same allegation before the ICC as it has in C. P. No. 19 of 2017 and where it has sought for prayers against respondent No. 2-company, respondent No. 1 cannot approbate and reprobate as it has submitted before ICC that its

relief is by way of damages and hence cannot maintain this petition on that ground also.

21 Lastly, counsel for the appellant contended that rule 11 of the National Company Law Tribunal Rules, 2016 provides for the inherent power. It states that "Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal". This Tribunal has held that inherent powers could not be exercised when there are specific provisions governing the said Act/procedures. As C. P. No. 19 of 2017 filed by the respondent is specifically filed under section 213 among others, it is erroneous to grant such a relief at the interim stage that too exercising the inherent powers of the Tribunal. In the present case the National Company Law Tribunal ought to have granted the order directing forensic audit only after satisfying itself with the criteria mentioned in the section 213 and that too only at the final stage.

22 Respondent No. 1 filed their reply and rebutted in brief. It is submitted on behalf of respondent No. 1 that as per law laid by the hon'ble apex court, administrative orders passed by courts or judicial orders that do not affect the rights or liabilities of a party are not appealable. In the instant case, the impugned order merely directs a forensic order of the records of respondent No. 2 as the National Company Law Tribunal deemed it fit and necessary to determine the status of the affairs of the said company before progressing in the matter. The obligation to maintain proper records and to subject them to annual audit is a statutory obligation of the said company. Hence the impugned order does not impose a new obligation upon respondent No. 2-company. The impugned order does not in any way impose any obligation or curtails the right/liberty of the appellant, who is nothing more than a mere 49 per cent. shareholder. The appellant cannot in any way be a "person aggrieved" for the purpose of section 421 and the impugned order cannot possibly cause prejudice or give rise to a grievance to the appellant. The impugned order is innocuous. Consequently, as per the law laid by the hon'ble Supreme Court, such an order is not appealable, especially at the hands of the appellant. On this ground alone the instant appeal ought to be dismissed.

23 It is further stated by counsel of respondent No. 1 that the impugned order is not arbitrary, perverse or capricious. The said impugned order is not passed frivolously but after hearing the parties in details for four hearings. After being fully convinced about the facts warranting such audit, the

National Company Law Tribunal has passed the impugned order. Hence the same is not liable to be set aside.

Counsel for respondent No. 1 further submitted that National Company **24**
Law Tribunal has the inherent power under rule 11 of the National Company Law Tribunal Rules, 2016 "to make such orders as may be necessary to meet the ends of justice". Hence the National Company Law Tribunal had the power and authority to make the impugned order having found that it was essential to meet the ends of justice in the instant case.

It is further argued that impugned order is in aide of the power and **25**
jurisdiction of the Tribunal to regulate the affairs of the company, i. e., respondent No. 2. The National Company Law Tribunal, Chennai deemed it fit and necessary to determine the status of the affairs of the said company before progressing in the matter and hence directed a forensic audit of its records and affairs. Further, it may be noted that the Tribunal has the power to order a statutory investigation into the affairs of a company under section 213 of the Companies Act, 2013, which is a power that can be exercised suo motu and is a far wider power than to merely order an audit by an independent person. It is submitted that the availability of wider power in an authority would always encompasses the jurisdiction to make a narrower order.

It is also submitted on behalf of respondent No. 1-company that C. P. **26**
No. 19 of 2017 contains clear pleadings as regards misfeasance, siphoning of funds, breach of trust and a failure to maintain proper books of account. Thus the provisions of sections 337 to 341 have been made applicable to the petition under section 241, by virtue of section 246 of the Act. Furthermore, respondent No. 1 is a 51 per cent. shareholder in respondent No. 2-company and in such circumstances the National Company Law Tribunal, Chennai would certainly have the jurisdiction and power to order an audit especially when such an audit is sought by a majority shareholder who is not in management.

It is further submitted that though it monitored the transactions, the **27**
said Kohli Venture P. Ltd., is not the beneficial owner of the investment made by respondent No. 1-company. The investment is made by respondent No. 1 in respondent No. 2-company in its own name and for its own absolute benefit. Respondent No. 1 is the registered owner and the beneficial owner of its shares held in the company. The said Kohli Ventures P. Ltd., does not hold any right, title or interest in the said shares. Even the company secretary of respondent No. 2-company issued certificates confirming that all applicable laws and regulations were complied with while

making the investment. The entire investment in equity and debentures is fully reported to RBI as required by applicable regulations.

28 It is further submitted on behalf of respondent No. 1 that after receiving the investment, respondent No. 2-company and respondent No. 3 excluded respondent No. 1's nominee directors from the activities and affairs of the company. Despite persistent efforts by respondent No. 1 and its representatives, the appellant and respondent No. 3 did not divulge any information about the affairs and business operations of the company to respondent No. 1. Realising that things were amiss respondent No. 1 enquired with statutory authorities and discovered that respondent No. 2 company :

(a) Had not filled its financial statements for the year 2015-16 and 2016-17.

(b) Had not finalised its balance-sheet for 2015-16 and 2016-17.

(c) Had advanced huge loans to its subsidiaries, i. e., respondent No. 4 and respondent No. 5 without the approval and consent of respondent No. 1's nominee directors.

(d) Advanced to subsidiaries and related party's was in violation of the "reserved matters" identified in the shareholders agreement and hence was a breech thereof.

(e) The loans/guarantees were advanced in breach of the fiduciary duty owed by the directors to the company moreso because respondent No. 2 was suffering huge losses at the time when the loans/guarantees were advanced to subsidiaries. The advances are also violative of various provisions of the Companies Act, 2013.

(f) There was sufficient indication that the funds of respondent No. 2 was being diverted to the other entities that are directly in the control of respondent No. 3. These entities are mere name lenders and means by which respondent No. 3 was parking/siphoning the funds invested by this respondent in the company.

(g) Several business contracts/orders that were being placed on the company were being diverted by respondent No. 3 to other companies/ entities where he had also diverted monies. Hence it was obvious that having received respondent No. 1's investment in the company, respondent No. 3 was diverting money and the business to other entities in his sole control thereby siphoning the funds of the company.

(h) Respondent No. 2 and respondent No. 3 also appeared to have wrongly represented to the RBI as if respondent No. 1 seeking some assured return for disinvestment when this is patently false. Respondent

No. 1 is not even seeking an exit at this point in time, as would be evident from the final reliefs sought in C. P. No. 19 of 2017. It may also be noted that the conversion of either type of debentures into any form of the shares would not in any way amount to an "exit" from respondent No. 2-company.

29 It is further submitted that in C. P. No. 19 of 2017 the Tribunal noted that no counter had been filed, despite the earlier direction to do so, and hence adjourned the case to June 14, 2017. Simultaneously in C. P. No. 13 of 2017 based on the appellant's specific argument that the respondents were unfairly not divulging information about the affairs of the said company to respondent No. 1 herein, the learned Tribunal directed the respondents to "supply required information" to the appellants herein in C. P. No. 13 of 2017. The Tribunal also restrained the appellant from making any related party transactions. Further the Tribunal also directed the appellant and respondent No. 2-company to maintain status quo on the said date.

30 It is also submitted by respondent No. 1 that despite the aforesaid order the appellant did not supply the requisite information to respondent No. 1 and instead filed a false and frivolous "complaint" purportedly dated May 17, 2017 to the Deputy Commissioner Income-Taxes, to the effect that this respondent is a Benamidar of Kohli Ventures P. Ltd. Based on the complaint of respondent No. 3, the said Income-tax Officer absurdly and without jurisdiction passed an order dated May 19, 2017 under the Benami Transaction (Prohibition) Amendment Act, 2016 directing the Registrar of Companies, Chennai to attach the shares of respondent No. 1 in respondent No. 2-company, without prior notice to respondent No. 1. On issuance of this order, the appellant filed an application C. A. No. 112 of 2017 in C. P. No. 19 of 2017 seeking summary dismissal of C. P. No. 19 of 2017 on the premise that the shares have been attached and therefore no right in respect of the same can be exercised by respondent No. 1.

31 It is argued on behalf of respondent No. 1 that while the said attachment was mala fide and illegal it is also respectfully submitted that mere attachment does not divest the shareholder of ownership or his rights under the shares, only the right to transfer any rights therein is curtailed. Therefore, the presumption of the appellant that merely because the shares were provisionally attached the same may be treated as non-existent is wholly fanciful and self serving.

32 It is further contended on the behalf of respondent No. 1 that the timing of the IT attachment order and simultaneously application filed by the appellant exposes the fact that the appellant and respondent No. 3 had

engineered the issuance of the said bogus order divulging any information about the company as directed by the National Company Law Tribunal by its order dated April 27, 2017 in C. P. No. 13 of 2017. It is relevant to note that the said attachment has been stayed by the hon'ble High Court in W. P. No. 14625 of 2017. In fact the entire proceedings purported to have been initiated under the Benami Act have been stayed. The said order is still in force.

33 It is further submitted by respondent No. 1 that despite the order directing status quo on April 27, 2017 the said company conducted alleged board meeting in June 7, 2017 and June 9, 2017 and an alleged extraordinary general meeting on June 8, 2017 in the absence of respondent No. 1 and even without notice to respondent No. 1 or its nominee directors, as required under law. By virtue of the resolutions passed at the alleged board meetings and extraordinary general meeting, respondent No. 3 effectively removed respondent No. 1 from respondent No. 2-company. Further respondent No. 3 had allotted shares to himself and the appellant in breach of the order of the National Company Law Tribunal dated April 27, 2017 in C. P. No. 13 of 2017.

34 It is further submitted that the allegations against Kohli Ventures and Tej Kohli are entirely based on arbitrary internet research that is grossly baseless, unsubstantiated and the appellant is put to strict proof of the same. Further, the same is entirely irrelevant to the facts of the case and to the investment of respondent No. 1 in the said respondent No. 2-company.

35 It is further contended on behalf of respondent No. 1 that the assertion challenging respondent No. 1's shareholding under section 89(8) of the Companies Act, 2013 is entirely misconceived. It is respectfully submitted that the said provision is not even attracted in the present facts as the respondent herein is both the registered and the beneficial owner of the subject shares and hence the obligation in section 89(1) and the prohibition contained under section 89(8) of the Act is not even applicable here. Further none of the documents submitted by the appellant demonstrate that the said Tej Kohli or Kohli Ventures is a beneficial owner of the subject shares. Hence the burden of proof cannot be shifted upon the respondent to disprove that which has merely been asserted but not substantiated by any material whatsoever.

36 It is also submitted on behalf of respondent No. 1 that the allegation that the application challenging maintainability and the application seeking status quo ante were listed on July 13, 2017 but the Tribunal only ordered the application for maintainability is erroneous. As is apparent from the

records respondent No. 1 had filed a counter in C. A. No. 112 of 2017 and hence on their specific request, the appellant had been permitted by the Tribunal to file a rejoinder. This direction was in fact specifically sought by the appellant. In fact the appellant has also filed a rejoinder in C. A. No. 112 of 2017 thereafter. Further the application for status quo namely C. A. No. 110 of 2017 was argued by both sides. There is nothing on record to demonstrate that the appellant objected to the said application being argued on the said and factually no such objection was raised. On the other hand the appellant took its chance by arguing the application C. A. No. 110 of 2017 in C. P. No. 19 of 2017 and when orders have now been passed against it, the appellant is now raising the ground that the said application ought not to have been taken up. Nevertheless, it is respectfully submitted that by merely filling an application challenging maintainability of a proceeding and not pursuing it for several months, cannot be a ruse to stymie another party's recourse to law. Hence this allegation of the appellant is clearly misconceived.

We have heard learned counsel for the parties and perused the record. **37**

The first issue raised by learned counsel for the appellant is that **38** respondent No. 1 failed to make a declaration under section 89(1) and (2) of the Companies Act, 2013 read with rule 9 of the Companies (Management and Administration) Rules, 2014 which mandates that a declaration is to be filed by the registered owner and by the beneficial owner with the company in Form Nos. MGT-4 and MGT-5 respectively and the company in turn will have to file MGT-6 with the Registrar of Companies along with the prescribed fees. Further under section 89(8) of the Act, the beneficial owner and any person claiming through him cannot exercise any rights in respect of the shares held. We are not satisfied with the allegations of the appellant as the shareholder agreement was entered between the appellant, respondent No. 1 and respondent No. 2-company. The shares were held by respondent No. 1 in its own name, even if respondent No. 1 is a nominee of Kohli Ventures as per the shareholding agreement, but having a separate legal entity respondent No. 1 can hold shares in its own name. There is nothing on record that any action was initiated or any competent authority have decided the question of beneficial interest in the company. Thus no such rights could be taken away from respondent No. 1 in respect of such shares. As respondent No. 1 is registered as a shareholder as on the date of petition and no competent court has passed any order affecting its rights as on the date of petition eligibility of respondent No. 1 to file a petition is to be reckoned on the date of the petition. Therefore, the petition is maintainable per se on the date of petition.

39 The other issue raised by the appellant is that the National Company Law Tribunal, Chennai has erroneously passed the impugned order dated July 18, 2017 directing the status quo ante and the impugned order dated June 14, 2017 directing forensic audit before deciding the issue of maintainability. We heard the contentions of the parties and we are of the view that the question of maintainability need not to be decided as preliminary issue which can be decided along with main petition. Thus the National Company Law Tribunal under rule 11 of the National Company Law Tribunal Rules, 2016 has the inherent powers to pass such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal. Therefore, the orders passed by the National Company Law Tribunal are not questionable on the grounds contended by the appellant. Also, we are of the opinion that maintainability is a mixed question of facts and law and conducting a forensic audit could produce the important facts that may be required by the National Company Law Tribunal in order to decide the preliminary issue.

40 The other issue raised by the appellant that whether the impugned interim order dated June 14, 2017 passed by the Tribunal is in consonance with sub-section (4) of section 242 of the Companies Act, 2013, as quoted below :

> "*Powers of Tribunal*.—(1) If, on any application made under section 241, the Tribunal is of the opinion—
>
> (a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company ; and
>
> (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up,
>
> the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.
>
> (2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—
>
> (a) the regulation of conduct of affairs of the company in future ;
>
> (b) the purchase of shares or interests of any members of the company by other members thereof or by the company ;
>
> (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital ;

(d) restrictions on the transfer or allotment of the shares of the company ;

(e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case ;

(f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e) :

Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned ;

(g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference ;

(h) removal of the managing director, manager or any of the directors or the company ;

(i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims ;

(j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h) ;

(k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct ;

(l) imposition of costs as may be deemed fit by the Tribunal ;

(m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

(3) A certified copy of the order of the Tribunal under sub-section (1) shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.

(4) The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the

conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable."

41 From the bare perusal of the impugned order we are of the view that the Tribunal have the power to make interim orders which it think fit for regulating the conduct of the company's affairs. There are allegations of siphoning of funds, breach of agreements and failure to maintain proper books of account thus it was required on the part of the Tribunal to conduct a forensic audit by an independent auditor in order to proceed further with the petition. We are of the opinion that imposition of forensic audit and calling for the report of forensic audit before the Tribunal is a measure to help the Tribunal to appreciate the issue on the basis of an independent report so as to ensure that the case is processed with due regard to rights and obligations of contesting parties would be in the interest of justice. Similarly the status quo as made is only with a view to regulate the conduct of the company's affairs during the pendency of the case so that no contesting party takes an advantage during the period detrimental to the other party. The status quo restored as on April 27, 2017 (date of petition) as directed by the National Company Law Tribunal, Chennai till the matter is under consideration cannot be found faulted with.

42 We find no merit to interfere in the impugned orders dated June 14, 2017 and July 18, 2017 passed by National Company Law Tribunal, Chennai in C. P. No. 19 of 2017.

43 The appeals stand disposed of with aforesaid observation and directions. No costs.

[2020] 222 Comp Cas 64 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL— NEW DELHI]

1. MTS LOGISTICS P. LTD.

(Company Appeal (AT) No. 402 of 2018)

2. PARVESH KUMAR JAIN

(Company Appeal (AT) No. 407 of 2018)

v.

BRIJESH UPPAL AND ANOTHER

JARAT KUMAR JAIN J. ***(Judicial Member)*** and
BALVINDER SINGH ***(Technical Member)***

July 21, 2020.

HF ▸ Appellant/Respondent

Oppression and mismanagement—Petition for relief—Revenue earned from operation of truck not accounted for—Tribunal awarding compensation without any evidence—Compensation awarded by Tribunal modified—Companies Act, 2013, ss. 241, 242.

Penalty—Related party transaction—Respondent entering into agreement with consent of petitioner—Not guilty under section 188—Companies Act, 2013, s. 188.

A petition was filed under sections 241 and 242 of the Companies Act, 2013 against TL, P and MTS for an order directing P to deposit all the revenue that he had earned since August 20, 2016 till date into the account of TL, render true accounts of the transactions after August 20, 2016 and give possession of the five trucks to TL and the petitioner. The Tribunal found that on behalf of TL P had entered into an agreement with MTS. As per the agreement five trucks of TL were handed over for the exclusive use of MTS in which P was the beneficiary, and P had not been able to produce any resolution which authorized him to enter into a business arrangement on behalf of TL. The Tribunal further found that mismanagement of the business was writ large and there was no cogent explanation why sufficient income was not generated to meet the business expenses and payment of monthly instalments to the bank. The Tribunal also found that P had categorically admitted that the trucks were used for the business of MTS. But the revenue generated from the business operation were not paid to TL. Therefore, P and MTS were jointly and severally liable to compensate Rs. 20 lakhs to the petitioner. The Tribunal also directed the Registrar of Companies to initiate action against P for deliberate violation for the statutory provisions of section 188 of the Act. On appeals :

Held, *(i) that both companies had close business relations and P was a director in both companies. Hence, it could not be said that the Tribunal had no jurisdiction to award damages against the MTS. Therefore the Tribunal held that P and MTS were jointly and severally liable to pay compensation to the petitioner.*

(ii) That in the petition there was no allegation that P had entered into hiring agreement with MTS without the authority of TL. Hence the finding of the Tribunal that P had entered into the agreement without a resolution of TL and without consent of the petitioner was erroneous. Therefore, he was not guilty under section 188 of the Act. The direction of the Tribunal for initiation of action against P was to be quashed.

(iii) That P had not accounted for the earnings of the trucks from August 20, 2016 to January 5, 2017. However, the Tribunal without any

evidence on record had awarded damages to the petitioner to the tune of Rs. 20 lakhs for not accounting for the use of revenue generated from the five trucks of TL. The petitioner had not produced any voucher for the amount of Rs. 3,71,500 and had not established how the advance amount of Rs. 2 lakhs received under agreement from MTS was adjusted. The capital of Rs. 5 lakhs invested by the petitioner in four and half months would earn Rs. 2.25 lakhs. Hence, the petitioner was entitled to capital of Rs. 5 lakhs plus Rs. 2.25 lakhs, total Rs. 7.25 lakhs which was just and proper compensation. That should be paid by P and MTS jointly and severally.

Order of the National Company Law Tribunal modified.

SURESH KUMAR SANGHI *v.* SUPREME MOTORS LTD. [1983] 54 Comp Cas 235 (Delhi) (para 13) *and* SANGRAMSINH P. GAEKWAD *v.* SHANTADEVI. P. GAEKWAD [2005] 123 Comp Cas 566 (SC) (para 13) *referred to.*

Company Appeal (AT) Nos. 402 with 407 of 2018.

Nittin Mittal, for the appellant in Company Appeal (AT) No. 402 of 2018 and for respondent No. 2 in Company Appeal (AT) No. 407 of 2018.

P. Nagesh and *Harshal Kumar* for respondent No. 5 in Company Appeal (AT) No. 402 of 2018 and for the appellant in Company Appeal (AT) No. 407 of 2018.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

1 JARAT KUMAR JAIN J. ***(Judicial Member)***.—The appellant-M/s. MTS Logistics P. Ltd., and appellant-Parvesh Kumar Jain filed Company Appeal (AT) No. 402 of 2018 and Company Appeal (AT) No. 407 of 2018 respectively, against the impugned order dated August 31, 2018 passed by National Company Law Tribunal, New Delhi Bench (in brief the Tribunal) both the appeals are heard together and disposed of by this common judgment.

2 Brief facts of these appeals are that on May 1, 2016 the appellant-Parvesh Kumar Jain and respondent No. 1-Brijesh Uppal have incorporated a company named as Tryambakam Logistics P. Ltd. (in short TL Company) under the Companies Act, 2013 having its registered office at L-126A, Street No. 5, Mahipalpur Extension, New Delhi. The company was incorporated to carry on the business of transportation. The appellant-Parvesh and respondent-Brijesh being shareholder/director of the company each one contributed Rs. 5 lakhs towards the paid-up share capital. The appellant-MTS Logistics P. Ltd., company (in short "MTS Company") was

incorporated under the Companies Act, 1956 on March 16, 2011 having its registered office at L-126A, G. F. Street, No. 5, Mahipalpur Extension, New Delhi. The MTS Company is also engaged in the logistics business and the same was incorporated with its promotor/directors Viresh Kumar Jain and Dinesh Kumar Jain and subsequently, the appellant-Parvesh Kumar Jain was inducted as director in the MTS Company on or about October 15, 2012. Respondent No. 1-TL Company started its business with purchase of five trucks worth Rs. 63 lakhs and had also spend huge amount on building the body of those trucks. The company has taken a huge amount of loan from the bank to buy those trucks.

The TL Company started its operations and trucks started running for **3** MTS Company. That initially for few days the MTS Company made regular payments and the business was running smooth till August 15, 2016. Thereafter, the appellant-Parvesh started raising problems. He was unhappy with the drivers engaged by Brijesh. Therefore, he replaced them. This was done with a specific and oblique purpose to ensure that the drivers would not report to Brijesh. So that Brijesh should not know where the trucks were plying. First month potential income of the business was generated but in subsequent months the revenue declined sharply. It was alleged that the trucks of TL Company have been used for the business of MTS Company without remittance to the TL Company which has resulted in causing financial loss to the TL Company and Brijesh.

The affairs of the TL Company were totally in control of Parvesh and he **4** mismanaged the TL Company. After August 20, 2016 he did not deposit the business proceeds in the bank account of the TL Company. Lack of funds resulted in defaults in payment of EMIs towards financial assistance availed from bank. The trucks were finally surrendered to the banks by Parvesh and sold without consulting Brijesh, and no resolution was passed by TL Company in this regard. This unilateral action of Parvesh caused a huge loss to the TL Company. It is also alleged that TL Company earned huge revenue till August 20, 2016 but all its revenue was siphoned off by Parvesh. Therefore, the TL Company was not able to pay the monthly EMIs of the loans. The mala fide intention of the Parvesh and his fraudulent acts has resulted into huge loss to the TL Company and its shareholder Brijesh. On these allegations Brijesh filed a company petition under sections 241 and 242 of the Companies Act, 2013 against the TL Company, Parvesh and MTS Company claiming following reliefs :

> "(a) To order Parvesh to deposit all the revenue that he has earned since August 20, 2016 till date into the account of the TL Company.

(b) To order Parvesh to render the true accounts of the transactions after August 20, 2016.

(c) To give the possession of the all the five trucks to the TL Company and Brijesh.

(d) To order Parvesh not to use the trucks for benefit of his own company, i. e., MTS Logistics P. Ltd.

(e) Impose huge costs on Parvesh for misappropriating the funds of the TL Company and causing huge loss to the TL Company and Brijesh.

(f) Pass order to Parvesh for removing Logo of MTS Company from the trucks of the TL Company.

(g) Pass order to give Brijesh his due amount of dividend received from Parvesh.

(h) Remove Parvesh as the director of the TL Company.

(i) Pass order to impose huge cost on Parvesh.

(j) Any other order the Tribunal thinks fit and proper under the circumstances of the case."

5 In reply, Parvesh denied all the allegations and stated that the petition is filed as a counter blast to the civil suit for perpetual, mandatory injunction and for rendition of accounts filed by Parvesh against Brijesh and the same is pending in the Court of Civil Judge, Saket Court, New Delhi. The petition under sections 241 and 242 of the Companies Act, 2013 is not maintainable as there is no act of oppression or mismanagement of Parvesh had been shown in the petition and the petition is mala fide. It is also stated that the petition is liable to be dismissed as infructuous as already the relief so claimed in the petition does not survive. The trucks through which revenue to be generated has already been taken over by the financier, i. e., ICICI Bank and has been auctioned. Brijesh concealed the material facts from this Tribunal. The five trucks were purchased after getting financed from ICICI Bank on the personal guarantee of MTS Company and its director Viresh Kumar Jain. The trucks so purchased were converted into closed body containers for which expenses were made from the account of Parvesh and the advance of Rs. 2 lakhs, so taken from MTS Company against the vehicle hiring agreement with TL Company. Parvesh made counter allegations that Brijesh handled the operation of the company and has mismanaged by paying to drivers without submitting any account and therefore, Brijesh is liable to account for a sum of Rs. 3,71,500 withdrawn from the bank on the ground of disbursing salary and expenses of the drivers. In the absence of any vouchers produced, the said amount withdrawn

could not be reconciled and hence, it amounted to illegal withdrawals. Parvesh alleged that illegal and unjustified withdrawals led to shortage of funds in the bank account therefore EMIs could not be paid to the bank. It is stated that it was due to noncooperation of Brijesh that the business came to a complete halt. The bank therefore, exercised its lien under the loan agreement and repossessed the hypothecated trucks and auctioned them.

6 The learned Tribunal after hearing the parties found that on behalf of TL Company Parvesh entered into an agreement with MTS Company. As per the agreement five trucks of TL Company were handed over for the exclusive use of MTS Company in which Parvesh was the beneficiary. Parvesh has however, not been able to produce any resolution which authorized him to enter into a business arrangement on behalf of TL Company. He has also failed to provide details of the accounts before the Tribunal. The Tribunal found that mismanagement of the business is at large and there is no cogent explanation why sufficient income was not generated to meet the business expenses and payment of EMIs to the bank. The Tribunal found that Parvesh categorically admitted that the trucks were used for the business of MTS Company. But the revenue generated from the business operation were not paid to the TL Company. Therefore, Parvesh and MTS Company are jointly and severally liable to compensate Rs. 20 lakhs to Brijesh. The Tribunal also directed the Registrar of Companies to initiate action against Parvesh for the deliberate violation for the statutory provisions of section 188 of the Companies Act, 2013. Being aggrieved with this order MTS Company and Parvesh have filed these appeals.

7 Learned counsel for the appellant-MTS Company submitted that the respondent-Brijesh had never claimed any relief against the appellant MTS Company however, without any basis the MTS Company has been held liable to pay damages to the tune of Rs. 20 lakhs to Brijesh. Such order is affecting the rights of shareholders of the MTS Company and before passing such an order against the company no show-cause notice has been served by the learned Tribunal. Even otherwise the Tribunal had no jurisdiction to inflict any damages against the alien company while deciding the inter se dispute between two directors of a TL Company. There is no evidence against the MTS Company. It is also submitted that the impugned order is harsh and against the natural justice.

8 Learned counsel for the appellant-Parvesh submitted that the learned Tribunal had ignored the fact that TL Company had accepted Rs. 2 lakhs as an advance from MTS Company for entering into vehicle hiring agreement. The Tribunal erroneously came to a conclusion that Parvesh hold 80 per cent.

equity and his brother hold 20 per cent. equity in the MTS Company. In support, there is no material on record before the Tribunal hence, such finding is based on surmises and conjectures. Therefore, liable to be set aside.

9 Learned counsel for the appellant-Parvesh submitted that learned Tribunal in the impugned order held that the leasing of the trucks to MTS Company was without proper authorization and resolution passed by the TL Company, such finding is illegal. The appellant-Parvesh categorically asserted that the minute book is in possession and custody of Brijesh which contains all resolution so passed with regard to the business. The entering into vehicle hiring agreement with MTS Company by TL Company was within the knowledge of Brijesh. Therefore, he never objected.

10 Learned counsel for the appellant-Parvesh submitted that Tribunal had ignored the bank statements filed by the appellant-Parvesh which shows the entire transactions of the TL Company during the entire period of its operation. The Tribunal while passing the impugned order had ignored that Parvesh and Brijesh were managing the affairs of the TL Company. Therefore, they both are equally responsible.

11 It is further submitted that Tribunal had failed to consider that the involvement of Parvesh in a grave criminal case by Brijesh owing to business dispute and due to non-assistance of Brijesh, the company could not generate sufficient income to meet the business expenses and to pay EMIs of the bank.

12 Learned counsel for the appellant-Parvesh submitted that learned Tribunal had observed that Brijesh is seeking compensation of Rs. 50 lakhs but the same is not founded on any cogent and calculable evidence and on the other hand, learned Tribunal awarded the compensation of Rs. 20 lakhs without any evidence. The Tribunal while awarding compensation Rs. 20 lakhs to Brijesh had ignored that Brijesh invested only Rs. 5 lakhs and kept Rs. 3.71 lakhs unaccounted funds of the company. It is further submitted by learned counsel for the appellant that in case the TL Company or that the MTS Company could earn profits from hiring of the said trucks then Parvesh would never allowed the trucks to be repossessed by the financier due to non-payment of EMIs. Parvesh is put to more loss than Brijesh as Parvesh had invested complete capital Rs. 10 lakhs. Hence, such an order is a non-speaking order and is liable to be set aside.

13 Learned counsel for the appellant-Parvesh submitted that negligence or inefficiency do not amount to mismanagement or oppression under sections 397 and 398 of the Companies Act, 1956. For this purpose he cited the judgment of the hon'ble Delhi High Court in the case of *Suresh Kumar Sanghi* v. *Supreme Motors Ltd.* [1981] SCC Online Delhi 199 ; [1983] 54

Comp Cas 235 (Delhi). Learned counsel for the appellant Parvesh also submits that the burden to prove oppression or mismanagement is upon the petitioner (Brijesh). For this purpose, he cited the judgment of the hon'ble Supreme Court in the case of *Sangramsinh P. Gaekwad* v. *Shantadevi. P. Gaekwad* [2005] 123 Comp Cas 566 (SC) ; [2005] 11 SCC 314. He submits that in such a situation, Brijesh has failed to make out a case of oppression or mismanagement against Parvesh. Therefore, the impugned order be set aside.

14 Learned counsel for the respondent-Brijesh supports the impugned order and submitted that the learned Tribunal has rightly, held that Parvesh was in charge of the operation of hiring trucks. However, he has not explained as to why earnings not deposited in the bank account of TL Company and the trucks were not hired to the other parties when sufficient business could not be generated through MTS Company. The TL Company's business was in control of Parvesh and he has without sharing the details and without maintaining record, conveniently pocketed the money. Thus, the appellant-Parvesh cheated and defrauded Brijesh. It is also submitted that Parvesh has deliberately not produced statement of accounts before the Tribunal. There is no substance in these appeals. Therefore, the appeals are liable to be dismissed.

15 Learned counsel for the respondent submitted that the appellants have not raised any question of law arising out of the impugned order and the appeals are based on factual matrix, disputed facts and issues arising out of those disputed facts. These issues have been judicially tested determined and adjudicated by the Tribunal by way of a self-speaking and a reasoned judgment. Hence, the appeals are devoid of merit and thus, liable to be dismissed.

16 After hearing learned counsel for the parties we have perused the record.

17 In the appeal of MTS Company the contention of the appellant is that before passing an order against the company, no show-cause notice has been served and the Tribunal had no jurisdiction to inflict any damages against the alien company, while deciding the inter se dispute between two directors of a TL Company.

18 It is seen that the MTS Company was respondent No. 3 before the Tribunal. However, it choose not to file reply of the petition. Therefore, it cannot be said that before passing of the order against the MTS Company, no opportunity of hearing was given by the Tribunal.

19 Now, we have considered, whether the Tribunal had jurisdiction to inflict damages against the MTS Company. It is admitted fact that Parvesh

is a director in the MTS Company since October 15, 2012 and he is also a promotor director of TL Company since incorporation of the TL Company, i. e., May 1, 2016. Parvesh being a director entered into a vehicle hiring agreement with MTS Company on June 25, 2016. As per this agreement all five trucks of TL Company were under the exclusive hiring contract with MTS Company and the same were run by them till their possession was taken over by the financier, ICICI Bank Ltd., on January 5, 2017. Under the said agreement Rs. 2 lakhs as an advance has been paid to TL Company (see paragraph 13 of reply of petition filed by Parvesh before the National Company Law Tribunal).

20 The appellant-Parvesh and TL Company as co-borrower purchased five trucks after getting them financed from ICICI Bank on the personal guarantee of MTS Company and its director Viresh Kumar Jain (see paragraph 4(b) of reply of petition filed by Parvesh before the National Company Law Tribunal).

21 With the above facts, it is clear that both the companies have close business relations and appellant Parvesh is a director in both the companies. Hence, it cannot be said that the Tribunal had no jurisdiction to inflict any damages against the MTS Company. Therefore the Tribunal held that Parvesh and MTS Company are jointly and severally liable to pay compensation to Brijesh.

22 Thus, we find no substance in the objection raised in Company Appeal (AT) No. 402 of 2018.

23 Now we have examined the finding of the Tribunal that Parvesh, without consent of Brijesh and without any resolution of the TL Company, entered into hiring agreement with MTS Company.

24 We have considered arguments of the parties, it is true that on June 25, 2016 Parvesh being a director of the TL Company entered into vehicle hiring and transportation agreement with MTS Company. Parvesh in his affidavit dated November 23, 2017 affirmed that TL Company authorized him for entering into agreement with MTS Company and such minute book of the company is in possession of Brijesh. Brijsh has not controvert this fact. On September 12, 2016 Brijesh sent a notice to Parvesh. Paragraphs 10, 11 and 12 of the notice are reproduced as under :

> "10. That contrary to my suggestion of running the trucks with Om Logistic P. Co., a renowned company in logistic solutions you insisted on running the trucks for your own company, i. e., MTS Logistic.
>
> 11. That the trucks started running for your own company from your Mahipalpur office to your Pune office it is irrelevant to mention

that you have offices at both Mahipal Pur, Delhi and Pune, Maharashtra.

12. That initially for few days your company namely MTS Logistics paid regular payments and the business was running smooth however soon you started raising one problem or the other."

25 With the above statement it is clear that Parvesh entered into hiring agreement with the consent of Brijesh and under the authority of the TL Company. It is pertinent to note that in the petition there is no allegation that Parvesh entered into hiring agreement with the MTS Company without the authority of the TL Company. Hence the finding of the Tribunal that Parvesh entered into above referred agreement without resolution of TL Company and without consent of Brijesh is erroneous.

26 It is alleged in the petition that all five trucks were in possession of the MTS Company and Pravesh has not given any statement of account since August 20, 2016 onwards. It is also alleged that without the consent of Brijesh, Parvesh has surrendered all five trucks to ICICI Bank.

27 Parvesh in reply to the petition specifically admitted that the trucks were under exclusive hiring contract with MTS Company and the same were run by them till their possession was taken over by the financier, ICICI Bank on January 5, 2017. Parvesh stated that the earnings of the trucks have already been deposited in the bank account of TL Company.

28 We have considered the submissions. The TL Company was incorporated on May 1, 2016. The company has purchased five trucks between June 17, 2016 to June 30, 2016 after getting financed from, ICICI Bank. Vehicle hiring agreement was executed between TL Company and MTS Company on June 25, 2016. The operation of the TL Company commenced on July 8, 2016 onwards and as per the vehicle hiring agreement trucks were operated under the vehicle hiring agreement with MTS Company. The business of the company ran smoothly for one month, i. e., up to August 15, 2016. Thereafter, differences started between Brijesh and Parvesh. On September 12, 2016 Brijesh served a notice to Parvesh and in the notice it is alleged that Brijesh misappropriate the funds by not showing the true accounts since August 20, 2016 and perhaps he has been keeping the entire earnings of trucks himself. Parvesh stated that the earnings of the trucks have been deposited in the bank account however he has not filed any bank statement since August 20, 2016 to January 7, 2017. Therefore the learned Tribunal has rightly held that Parvesh has not account for the earnings for the above referred period. Parvesh has not produced any evidence that the trucks were surrendered to ICICI Bank with the consent of Brijesh. Hence the findings of the Tribunal is correct.

29 The learned Tribunal directed Parvesh and MTS Company to compensate Rs. 20 lakhs jointly and severally to Brijesh. This finding is seriously challenged in these appeals.

30 We have considered the submission of the parties. The learned Tribunal in paragraph 8 of the impugned order held that in the petition, Brijesh claimed on average basis Rs. 50 lakhs for 5 months. Such a prayer is unsustainable as it is not found on cogent and calculable evidence. Thereafter, the learned Tribunal without any evidence on record awarded damages to Brijesh to the tune of Rs. 20 lakhs for not accounting for the use of revenue generated from the five trucks of TL Company.

31 We are of the view that while awarding the compensation of Rs. 20 lakhs the Tribunal has not taken into consideration following circumstances :

(i) Admittedly Parvesh deposited the revenue earned since July 8, 2016 to August 15, 2016 in the bank account of the TL Company. However, Brijesh has not produced such statement. If that statement has been produced, then on that basis average earnings for the period of August 20, 2016 to January 5, 2017 can be calculated.

(ii) Under the hiring agreement, the MTS Company has given Rs. 2 lakhs as advance to the TL Company.

(iii) There is a counter allegation of Parvesh that Brijesh has withdrawn Rs. 3,71,500 from the bank account of TL Company however Brijesh has not produced any voucher or accounts for this amount.

(iv) In case the MTS Company could earn profit from hiring of the said trucks then Parvesh had never allowed the trucks to be repossessed by the bank due to non-payment of EMIs.

(v) Brijesh invested Rs. 5 lakhs, the business commenced since July 8, 2016. Parvesh has not account for the earnings of trucks from August 20, 2016 to January 5, 2017, i. e., for about four and half months. In such a short span the capital of Rs. 5 lakhs will multiply four times, i. e., Rs. 20 lakhs does not seems to be feasible.

32 We are of the view that it is proved that Parvesh has not account for the earnings of the trucks from August 20, 2016 to January 5, 2017. However, learned Tribunal without considering the above referred circumstances ordered Parvesh and MTS Company to pay Rs. 20 lakhs is not justifiable.

33 Brijesh has not produced any voucher for the amount Rs. 3,71,500 and has not satisfied how the advance amount of Rs. 2 lakhs received under agreement from MTS Company was adjusted. For the sake of arguments we presume that Brijesh has accounted for above amount. Apart from this

we have assumed the earnings for four and half months on the capital of Rs. 5 lakhs to be 10 per cent. per month of the amount invested, i. e., which comes to Rs. 2.25 lakhs. After having been considered the abovementioned facts and circumstances we are of the view that the capital of Rs. 5 lakhs in four and half months would earn Rs. 2.25 lakhs. Hence, Brijesh is entitled for capital Rs. 5 lakhs plus Rs. 2.25 lakhs total Rs. 7.25 lakhs which is just and proper compensation. It shall be paid by Parvesh and MTS Company jointly and severally within a month from today and in default, they have to pay interest on Rs. 7.25 lakhs at the rate of 8 per cent. per annum from the date of the order of the National Company Law Tribunal till realization.

As we discussed above, Parvesh entered into an agreement with the 34
consent of Brijesh therefore, he is not guilty under section 188 of the Companies Act, 2013. Hence, the direction of the Tribunal for initiation of action against Parvesh is quashed.

With the aforesaid the appeals are allowed with the above modification. No costs.

[2020] 222 Comp Cas 75 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — AHMEDABAD BENCH]

SEAL FOR LIFE INDIA P. LTD., *In re*

PROJ SEALANT INDIA P. LTD., *In re*

MADAN B. GOSAVI *(Judicial Member)* and
VIRENDRA KUMAR GUPTA *(Technical Member)*

July 1, 2020.

HF ▸ Applicant

SCHEME OF ARRANGEMENT—MEETINGS—MEETINGS OF EQUITY SHAREHOLDERS OF TRANSFEROR COMPANY AND TRANSFEREE COMPANY AND SOLE UNSECURED CREDITOR OF TRANSFEREE COMPANY TO BE DISPENSED WITH BASED ON CONSENT LETTERS GIVEN—MEETING OF UNSECURED CREDITORS OF TRANSFEROR COMPANY, TO BE CONVENED—DIRECTIONS GIVEN—COMPANIES ACT, 2013, SS. 230, 231, 232.

On a joint application filed by two applicant-companies under sections 230 to 232 of the Companies Act, 2013 :

Held, *(i) that meetings of the equity shareholders of the transferor company and the transferee company were to be dispensed with, in light of the consent letters on affidavit, placed on record.*

(ii) That meetings of the secured creditors of both the applicant-companies were not necessary as there were no secured creditors of these companies.

(iii) That the meeting of the sole unsecured creditor of the transferee company was to be dispensed with in light of the consent letter on affidavit being placed on record.

(iv) That a meeting of the unsecured creditors of the transferor company, was to be convened and held at the registered office of the transferor company. [Directions given].

C. A. (CAA) No. 41/230-232/NCLT/AHM/2020.

Mrs. Swati Soparkar for the applicant.

ORDER

The order of the Bench was delivered by

1 MADAN B. GOSAVI ***(Judicial Member)***.—This joint application is filed by two applicant-companies under sections 230 to 232 and other applicable provisions of the Companies Act, 2013. The proposed scheme involves merger by absorption of Seal for Life India P. Ltd. (the applicant transferor company) with PROJs Sealant India P. Ltd. (the applicant transferee company).

2 The registered office of both the applicant-companies are situated in Vadodara in the State of Gujarat, and hence both the applicant-companies are under the jurisdiction of the National Company Law Tribunal, Bench at Ahmedabad.

3 Both the companies are empowered by their respective memorandum of associations to enter into scheme of merger. Copies of memorandum of association of both the companies are placed on record. The audited financial statements of the applicant transferor company as at July 22, 2019 and the unaudited provisional financial statements of both the companies as on December 31, 2019 are placed on record.

4 It has been submitted that both the companies are part of the same management group and more particularly, the transferor company is a subsidiary of the transferee company. It is envisaged that the proposed scheme of merger would, inter alia, result into the following benefits :

—legal integration of the businesses, reduction of shareholding layers and direct control of assets of the transferor company by the transferee company ;

—combined resources to maximize synergies, reduce costs, and enable a focused management ;

—consolidation of businesses under a single entity and achieve simplified corporate structure ;

—reducing managerial overlaps, enable cost saving and effective utilization of valuable resources which will enhance the management focus thereby leading to higher operational efficiency ;

It is envisaged that the said scheme shall be beneficial to all stakeholders. Copies of board resolutions of both the companies are placed on record as annexures F1 and F2.

A copy of the valuation report for the proposed exchange ratio of shares to be issued by the transferee company obtained from M/s. BDO Valuation Advisory LLP, is placed on record as annexure E. Copy of the scheme of merger is placed on record as annexure G. **5**

It is stated in the application that there are no proceedings or investigations pending against the applicant-companies under sections 210-217, 219, 220, 223 to 227 of the Companies Act, 2013 and/or under sections 235 to 251 of the Companies Act, 1956. There are no winding up petitions pending against the applicant companies. The statutory auditors of the transferee company have provided the certificate confirming the proposed accounting treatment being in conformity with the applicable accounting standard. The said certificate is placed on record as annexure H. **6**

The following are the reliefs prayed by the applicant-companies : **7**

(a) That meetings of the equity shareholders of both the applicant-companies be dispensed with ;

(b) That there being no secured creditors of both the applicant-companies, their meetings are not necessary ;

(c) That meeting of the unsecured creditors of SFL, the applicant transferor company be directed to be convened to obtain the approval to the scheme and necessary directions for convening and conducting the said meeting be issued ;

(d) That meeting of sole unsecured creditor of PROJS, the applicant transferee company be dispensed with ;

(e) That necessary directions be issued to the applicant-companies for the service of notices to the concerned statutory authorities.

8 We heard the submissions of learned counsel Mrs. Swati Soparkar for the applicant-companies.

8.1 It has been submitted that both the applicant-companies are private limited companies and have only two equity shareholders respectively. All the equity shareholders of both the applicant-companies have given their written consent on affidavits approving the proposed scheme. The same are placed on record respectively as annexures I-1 and I-2. Certificates from the chartered accountant confirming the list of shareholders and further confirming the receipt of the consent letters is placed on record as annexure J. In view of the same, it is prayed that meeting of the equity shareholders of the said applicant-companies be dispensed with.

8.2 It has been further submitted that as per the books of both the applicant-companies as on December 31, 2019 there are no secured creditors as confirmed by the C. A. certificate. Hence, it is prayed that meeting of secured creditors of both the applicant-companies are not necessary.

8.3 It has been further submitted that the applicant transferor company had about 34 unsecured creditors having the total value of debt at Rs. 14.18 crores as on December 31, 2019. The details for the same are provided in form of the summary statement certified by the chartered accountant and placed on record as annexure M. It is prayed that a meeting of the unsecured creditors be convened to obtain their approval to the proposed scheme.

8.4 The applicant transferee company has only one unsecured creditor. The sole unsecured creditor of the applicant transferee has given the approval to the scheme in form of the consent letter on affidavit and the same has been placed on record along with certificate from chartered accountant as annexure L. In view of the same, it is prayed that meeting of the sole unsecured creditor of the applicant transferee company be dispensed with.

9 Having perused the entire material on record, this Tribunal passes the following order :

(i) Meetings of the equity shareholders of Seal for Life India P. Ltd., the applicant transferor company and PROJS Sealant India P. Ltd., the applicant transferee company are hereby dispensed with, in light of the consent letters on affidavit, placed on record.

(ii) Meetings of the secured creditors of both the applicant-companies are not necessary as there are no secured creditors of these companies, as confirmed vide the C. A. certificates.

(iii) Meeting of the sole unsecured creditor of PROJS, the applicant transferee company is dispensed with in light of the consent letter on affidavit being placed on record.

(iv) A meeting of the unsecured creditors of SFL, the applicant transferor company, shall be convened and held at the registered office of the transferor company at 17, GIDC Estate Manjusar Taluka, Savli District, Vadodara-391 775, in the State of Gujarat, on Monday, August 17, 2020 at 11.30 a.m. ; for the purpose of considering and, if thought fit, approving the proposed scheme of merger, with or without modifications.

(v) At the said meetings of unsecured creditors of the said applicant transferor company, voting shall be carried out through ballot/polling paper at the venue of the meeting.

(vi) At least one month before the date of the meeting, a notice in Form No. CAA-2 convening the said meeting indicating the day, the date, the place and the time as aforesaid, together with a copy of the scheme of merger by absorption, copy of the explanatory statement required to be sent under section 102 of the Act, read with sections 230 and 232 of the Act and rule 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and the prescribed form of proxy shall be sent to each of the unsecured creditors of Seal for Life India P. Ltd., the applicant transferor company ; at their respective or last known addresses either by registered post/speed post or by courier or by e-mail. The notice shall be sent to all the unsecured creditors of the applicant transferor company, as per the records of the company as on the date of the order.

(vii) At least one month before the date of meetings, an advertisement about convening the said meeting, indicating the day, the date, the place and the time as aforesaid, shall be published once in English daily *Indian Express* Vadodara edition and Gujarati translation thereof in Gujarati daily *Sandesh*, Vadodara edition. The publication shall also indicate that the statement required to be furnished pursuant to section 102 of the Act, read with sections 230 and 232 of the Act and the prescribed proxy can be obtained free of charge at the registered office of the applicant-company or at the office of the advocate, i. e., Mrs. Swati Saurabh Soparkar, 301, Shivalik-10, Opp. SBI Zonal Office, S. M. Road, Ambavadi, Ahmedabad-380 015 in accordance with second proviso to sub-section (3) of section 230 and rule 7 of the Companies (CAA) Rules, 2016.

(viii) Mr. Satyanarain Samdani, an independent practicing company secretary (F. C. S. No. 3677), and failing him, Mr. Suresh Kumar Kabra, an independent practicing company secretary (A. C. S. No. 9711), shall be the chairman of the said meeting of the unsecured creditors of SFL, the

applicant transferor company to be held on August 17, 2020 and in respect of any adjournment or adjournments thereof.

(ix) Ms. Gunjan Shah, practicing company secretary, having the registration number A. C. S. No. 33883, shall act as the scrutiniser for the said meeting.

(x) The chairman appointed for the aforesaid meeting shall issue advertisements and send out notices of the said meeting referred to above. The chairman is free to avail the services of the applicant-company or any agency for carrying out the aforesaid directions. The chairman of the meetings shall have all powers under the articles of association of the applicant-company and also under applicable rules, including for deciding any procedural questions, that may arise at the meeting or adjournment(s) thereof proposed at the said meeting, amendment(s) to the aforesaid scheme or resolution, if any, proposed at the aforesaid meeting by any person(s) ; and to ascertain decision of the meetings through a poll, i. e., by polling paper/ballot.

(xi) The quorum for the meeting of the said meeting of unsecured creditors shall be 10 (ten) unsecured creditors, present in person or by authorized representative or by proxy.

(xii) Voting by proxy/authorized representative is permitted provided that the proxy in the prescribed form/authorization duly signed by the person entitled to attend and vote at the aforesaid meetings, is filed with the applicant-company at the registered office not later than 48 hours before the said meetings.

(xiii) The number and value of the vote of each unsecured creditor of the applicant transferor company, shall be in accordance with the entries in the books of account of the said applicant-company ; and where the entries in the records are disputed, the chairman of the meeting shall determine the value for the purposes of the meeting.

(xiv) The chairman shall file an affidavit not less than 7 (seven) days before the date fixed for the holding of the meetings and to report to this Tribunal that the directions regarding issuance of notices and advertisement of the meetings have been duly complied with as per rule 12 of the Companies (CAA) Rules, 2016.

(xv) It is further ordered that the chairman shall report to this Tribunal on the result of the said meeting in Form No. CAA-4, verified by his affidavit, as per rule 14 of the Companies (CAA) Rules, 2016 within 20 (twenty) days of the conclusion of the meetings.

In compliance of sub-section (5) of section 230 of the Act and rule 8 of **10** the Companies (CAA) Rules, the applicant-companies shall send a notice of meeting in Form No. CAA-3 with a copy of the scheme of arrangement, the explanatory statement and the disclosures mentioned under rule 6 (to the extent applicable) to :

(a) the Central Government through the Regional Director, North Western Region ;

(b) the Registrar of Companies, Gujarat ;

(c) the Income-tax Authorities ;

(d) the Reserve Bank of India ; and

(e) the official liquidator, only for the applicant transferor company stating that representations, if any, to be made by them shall be made within a period of 30 (thirty) days from the date of receipt of such notice, failing which it will be deemed that they have no objection to make on the proposed scheme of arrangement. The said notices shall be sent forthwith after the notice for the meetings are sent to the concerned unsecured creditors of the applicant transferee company, either by registered post or by speed post or by courier or by hand delivery at the offices of the authorities as required by sub-rule (2) of rule 8 of the Companies (CAA) Rules, 2016. The aforesaid authorities, who desire to make any representation under sub-section (5) of section 230 shall send the same to this Tribunal with a copy of the same to be supplied to the applicant-companies within a period of 30 (thirty) days from the date of such service.

C. A. (CAA) No. 41 of 2020 is allowed and stands disposed of accordingly.

[2020] 222 Comp Cas 81 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — KOCHI BENCH]

DOHA BROKERAGE AND FINANCIAL SERVICES LTD.

v.

REGISTRAR OF COMPANIES, KERALA

ASHOK KUMAR BORAH *(Judicial Member)* and
VEERA BRAHMA RAO AREKAPUDI *(Technical Member)*

June 16, 2020.

HF ▸ Respondent

PENALTY—ALLOTMENT OF EQUITY SHARES TO SUBSIDIARY COMPANY—ALLOTMENT IN VIOLATION OF PROVISIONS—PENALTY TO BE IMPOSED—COMPANIES ACT, 1956, ss. 42(1), 621A.

The applicant-company violated the provisions of section 42(1) of the Companies Act, 1956 by allotting 1,00,000 equity shares to its subsidiary company. On a petition filed under section 621A of the Act :

Held, *that the allotment of 1,00,000 equity shares made to its subsidiary company was hit by section 42(1) of the Act. Therefore, each officer in default as member of the board of directors was subjected to a fine of Rs. 5,000 that too as a deterrent for not repeating the default in future.*

C. P. No. 13/KOB/2020.

Jayan (K.), Practising Company Secretary, for the petitioner.

No appearance for the respondent.

ORDER

1 The Doha Brokerage and Financial Services Ltd. (previously known as Select Securities Ltd.), (hereinafter called the applicant/applicant-company) having CIN : U67120KL1992PLC006711 filed petition under section 621A of the Companies Act, 1956 (section 441 of the Companies Act, 2013). This petition was filed before the Registrar of Companies, Kochi (hereinafter referred to as the Registrar of Companies) and the same has been forwarded to this Tribunal along with the Registrar of Companies report. The learned Registrar of Companies has informed that, this application was filed because the company has violated the provisions of section 42(1) of the Companies Act, 1956 (section 19 of the Companies Act, 2013) (hereinafter referred to as Act) by allotting 1,00,000 equity shares to its subsidiary company DBFS Derivatives and Commodities Ltd.

2 It is further stated that the company has made allotment of shares to its subsidiary company DBFS Derivatives and Commodities Ltd., on April 21, 2007 in violation of the provisions of section 42(1) of the Companies Act, 1956. The company has noticed the violation during the proceedings of an appeal against an order of the Company Law Board in which company was the respondent, at the hon'ble High Court of Kerala. Subsequently the hon'ble High Court of Kerala, in appeal vide order dated March 11, 2019 observed that 1,00,000 shares allotted by the company to its subsidiary company is hit by section 42(1) of the Act, 1956.

3 According to the provisions of section 42 of the Companies Act 1956 :

> "42. *Membership of holding company.*—(1) Except in the cases mentioned in this section, a body corporate cannot be a member of a company which is its holding company and any allotment or transfer of shares in a company to its subsidiary shall be void.
>
> (2) Nothing in this section shall apply—

(a) where the subsidiary is concerned as the legal representative of a deceased member of the holding company ; or

(b) where the subsidiary is concerned as trustee, unless the holding company or a subsidiary thereof is beneficially interested under the trust and is not so interested only by way of security for the purposes of a transaction entered into by it in the ordinary course of a business which includes the lending of money.

(3) This section shall not prevent a subsidiary from continuing to be a member of its holding company if it was a member thereof either at the commencement of this Act or before becoming a subsidiary of the holding company, but, except in the cases referred to in sub-section (2), the subsidiary shall have no right to vote at meetings of the holding company or of any class of members thereof.

(4) Subject to sub-section (2), sub-sections (1) and (3) shall apply in relation to a nominee for a body corporate which is a subsidiary, as if references in the said sub- sections (1) and (3) to such a body corporate included references to a nominee for it.

(5) In relation to a holding company which is either a company limited by guarantee or an unlimited company, the reference in this section to shares shall, whether or not the company has a share capital, be construed as including a reference to the interest of its members as such, whatever the form of that interest."

Submissions by the petitioners/alleged defaulters

Learned counsel for the petitioner-company stated that the petitioner- 4
company is mainly doing the business (1) To carry on the business of investors, brokers, traders, underwriters and otherwise dealers in stocks, shares, debentures, securities and bonds, and (2) To engage in the business of rendering corporate advisory service and manage portfolio of securities.

It is further stated that the petitioner issued and allotted 1,00,000 fully 5
paid equity shares of Rs. 10 each aggregating to Rs. 10,00,000 at a premium of Rs. 30 per share, to its subsidiary company DBFS Derivatives and Commodities Ltd. (previously known as Select Derivatives and Commodities (India) Ltd.). Certified copies of the special resolution passed under section 81(1A) of the Companies Act, 1956 at the extraordinary general meeting of the members of the company held on December 11, 2006 and board resolution dated April 21, 2007 for allotment of shares, list of allottees, return of allotment filed with the Registrar of Companies in Form 2 and its receipt are annexed with the petition specifying that on the date of the

abovementioned allotment, the company's shareholding in the above subsidiary was 99.96 per cent.

6 Counsel further stated on November 15, 2007 that the minority shareholders of the company have filed a petition before the hon'ble Company Law Board, Chennai Bench under sections 111A, 397 and 398 of the Companies Act, 1956 vide C. P. No. 103 of 2007 and the said matter was disposed of in favour of the petitioner. Subsequently, the petitioners in C. P. No. 103 of 2007 filed an appeal before the hon'ble High Court of Kerala and the appeal was dismissed by the hon'ble High Court observing that 100,000 shares allotted by the company on April 21, 2007 to its subsidiary company, DBFS Derivatives and Commodities Ltd., was hit by section 42(1) of the Companies Act, 1956.

7 Counsel for the petitioner submitted that the board of directors of the petitioner-company has disclosed the observation of the hon'ble High Court of Kerala on violation of the provisions of section 42(1) of the Act in the directors report for the financial year ended on March 31, 2019 under the head "share capital". the petitioner also submitted that the violation was due to oversight and unintentional and it did not cause any loss or damage to any shareholders or any other parties. The petitioner also submitted that the subsidiary company is not holding any shares in its share capital. Therefore, the present petition is filed by the petitioner to compound the violation of section 42(1) of the Companies Act, 1956.

Findings :

8 The Bench has gone through the pleadings on record and the submissions made by learned counsel for the petitioner herein and accordingly came to the conclusion that the petitioners/defaulters herein had violated the provisions of section 42(1) of the Act. For such violation the punishment is provided under section 629A of the Companies Act, 1956 :

> "629A. *Penalty where no specific penalty is provided elsewhere in the Act*.—If a company or any other person contravenes any provision of this Act for which no punishment is provided elsewhere in this Act or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, the company and every officer of the company who is in default or such other person shall be punishable with fine which may extend to five thousand rupees, and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which the contravention continues."

On examination of the circumstances as discussed above, it can be seen 9
that the allotment of 1,00,000 equity shares made to its subsidiary company DBFS Derivatives and Commodities Ltd., on April 21, 2007 is hit by section 42(1) of the Companies Act, 1956. Therefore, by each officer in default as members of the board of directors is subjected to a fine of Rs. 5,000 (rupees five thousand only), that too as a deterrent for not repeating the impugned default in future. The imposed remittance shall be made by the petitioner in favour of "Pay and Accounts Officer, Ministry of Corporate Affairs, Chennai" within three weeks from the date of receipt of this order.

This compounding application bearing C. P. No. 13/KOB/2020 is, there- 10
fore, disposed of on the terms directed above. Needless to mention, the offence shall stand compounded subject to the remittance of the compounding fee imposed. A compliance report therefore, shall be filed before this Tribunal within four weeks from the date of this order. Call this matter on July 20, 2020 for compliance report. Thereafter the learned Registrar of Companies shall take consequential action in the matter.

Ordered accordingly and C. P. No. 13/KOB/2020 stands disposed of. 11

[2020] 222 Comp Cas 85 (Mad)

[IN THE MADRAS HIGH COURT]

CHIRANJEEVI RATHNAM AND OTHERS

v.

RAMESH AND ANOTHER

DR. G. JAYACHANDRAN J.

July 19, 2017.

HF ▸ Petitioner

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—CIVIL COURT—SUIT TO DECLARE APPOINTMENT OF DIRECTORS ILLEGAL AND VOID—NOT MAINTAINABLE IN CIVIL COURT—PROPER REMEDY IS UNDER SECTION 242 OF ACT—COMPANIES ACT, 2013, SS. 242, 430.

MEMBER—MEANING OF—INCLUDES NOT ONLY MEMBER OF COMPANY IN STRICT SENSE BUT ALSO PERSON WHO BEARS CHARACTER OF MEMBER OR HAS SUBSTANTIAL INTEREST IN INTERNAL AFFAIRS OF COMPANY—COMPANIES ACT, 2013, S. 241.

INTERPRETATION OF STATUTES—DOCTRINE OF READING DOWN—APPLICATION.

The right to approach the Tribunal is given to the members of a company, because no one else can have a cause of action or complaint against the internal management of the company. Whether the extraordinary general body meeting called for by the company was legal or whether or not its directors were elected following the mandate of the procedure contemplated in the statute or the bye laws of the company are all matters of concern only to members of the company and not to outsiders or non-members.

The word "member" employed in section 241 of the Companies Act, 2013, cannot be given a restricted meaning. If a restricted meaning is given, it may lead to abuse of the process law. Hence, it is essential to apply the doctrine of reading down to make the provisions under Chapter XVI of the Act purposeful. The golden rule of statutory construction is that the words and phrases or sentences should be interpreted according to the intent of the Legislature that passed the Act. Sections 241 and 242 should be read together. If the words of the statute raises doubt, it is inevitable to call in aid the ground and cause of making the statute and the mischiefs which the Act intends to redress. Under the Companies Act, 2013, the intention of the Legislature is to vest the power of adjudication of matters referred to in section 242 in the Tribunal.

On applying the doctrine of reading down, an internal aid to construction of the word in a statute to give reasonable meaning, so as to give the supposed purpose the word "member" referred in section 241 of the Act, should not be read in isolation or given a strict meaning. The word should be read down along with section 242 of the Act. Therefore, the phrase "member of the company" in section 241 means and includes not only members of the company in the strict sense but, also persons who "bear the character of a member" or "have substantial interest in the internal affairs of the company".

A suit for declaring the appointment of defendants Nos. 2 to 8 as directors of the first defendant-company illegal and void was filed. Defendants Nos. 2, 3, 4, 6 and 7 filed an application under Order 7, rule 11 of the Code of Civil Procedure, 1908 to reject the plaint on the ground that the civil court's jurisdiction was ousted under section 430 of the Companies Act, 2013. The trial court dismissed the application holding that section 430 of the Act did not completely bar the jurisdiction of civil courts in respect of matters relating to companies, but only in respect of matters which the Tribunal was empowered to determine by or under the Companies Act or any other law for time being in force. Hence, a duty was cast upon the petitioner to establish that there was a specific provision in the Companies Act to deal with the issues raised in the suit and that the plaintiffs were not members of the company and hence, could

not approach the Tribunal in a case of oppression and mismanagement. On a revision petition :

Held, *allowing the petition, that if the plaintiffs claimed status as non-members, they had no locus standi to interfere with the affairs of the internal management of a private limited company. If they claimed status as directors of the company, they carried all trappings or characteristics of a member of the company. So, to protect the interests of the company, the remedy for them was under section 242 of the Companies Act, 2013. Either way the civil court had no jurisdiction to entertain the subject-matter of the suit. In the light of section 430 of the Companies Act, 2013 and the alternate redressal forums being adequately provided under the Act, the plaint was not maintainable.*

ARIVANDANDAM (T.) *v.* SATYAPAL (T. V.) [1977] AIR 1977 SC 2421 *and* RAO (V. M.) *v.* RAJESWARI RAMAKRISHNAN [1987] 61 Comp Cas 20 (Mad) *relied on.*

Cases referred to :

Arivandandam (T.) *v.* Satyapal (T. V.) [1977] AIR 1977 SC 2421 (para 27)

Dhulabhai *v.* State of Madhya Pradesh [1968] 22 STC 416 (SC) (paras 11, 14)

K. S. Venkataraman and Co. P. Ltd. *v.* State of Madras [1966] 60 ITR 112 (SC) ; [1966] 17 STC 418 (SC) (para 14)

Nahar Industrial Enterprises Ltd. *v.* Hong Kong and Shanghai Banking Corporation [2009] 8 SCC 646 (para 12)

Premier Automobiles Ltd. *v.* Kamlakar Shantaram [1975] AIR 1975 SC 2238 (para 14)

Raja Ram Kumar Bhargava *v.* Union of India [1988] 171 ITR 254 (SC) (para 14)

Rao (V. M.) *v.* Rajeswari Ramakrishnan [1987] 61 Comp Cas 20 (Mad) (para 27)

Robust Hotels P. Ltd. *v.* EIH Ltd. [2017] 1 SCC 622 (para 12)

Secretary of State *v.* Mask and Co. [1940] AIR 1940 PC 105 (para 14)

Swamy Atmananda *v.* Sri Ramakrishna Tapovanam [2005] 10 SCC 51 (para 12)

C. R. P. (PD) (MD) No. 870 of 2017 and C. M. P. (PD) (MD) No. 3846 of 2017.

G. Prabhu Rajadurai for the petitioners.

Yasothvarathan, Senior Counsel and *V. R. Shanmuganathan* for the respondents.

JUDGMENT

1 DR. G. JAYACHANDRAN J.—The legal issue for decision before this court is, whether a civil suit to declare the appointment/co-option of some of the defendants/directors of a private limited company as illegal and void ; to grant permanent injunction restraining them from any manner functioning as directors of that company ; further injunction restraining the said company from conducting any extraordinary general body meeting/annual general body is maintainable in a civil court, in the light of section 430 of the Companies Act, 2013 ?

2 M/s. Standard Fireworks P. Ltd., which is the epicentre of the dispute, is a private limited company controlled by three families, namely, Yennarkay Ravindran family (34 per cent. shares), Arunachalam Nadar of Pioneer Group (33 per cent. shares) and Chelladurai Nadar of Bell Group (33 per cent. shares). The 34 per cent. shares in M/s. Standard Fireworks P. Ltd., company held by Yennarkay Ravindran family are with three companies run by that family. Those three companies are M/s. Rajarathnam Matches P. Ltd., M/s. Chiranjeevi Rathnam Matches P. Ltd., and M/s. Selvarathnam Matches P. Ltd. Each of these three companies hold 11.09 per cent, of share in M/s. Standard Fireworks P. Ltd. While so, due to heavy pressure and burden of work, Yennarkay R. Ravindran and Mrs. Thilagavathi/directors of M/s. Rajarathnam Matches P. Ltd., resigned from their directorship in the year 2003 and co-opted the plaintiffs, who are the employees of M/s. Rajarathnam Matches P. Ltd., as the directors of the company.

3 The plaint averment is that, Mr. Yennarkay Selvarathnam/second defendant requested calling for extraordinary general body meeting (EGM), removal of directors, payment of dividend and external audit for the machinery investment. Those requests were considered and declined in the board of directors meeting held on August 31, 2015 for the reasons stated. Since he was not able to succeed with his attempts, he wanted to remove the directors, who are not accepting his demands. To achieve his illegal object, he has decided to capture all these three Match Industries, viz., M/s. Rajarathnam Matches P. Ltd., M/s. Chiranjeevi Rathnam Matches P. Ltd., and M/s. Selvarathnam Matches P. Ltd., held by his family members, which possess 33.27 per cent. of shares in the ninth defendant-company, namely, M/s. Standard Fireworks P. Ltd.

4 In order to hold the 11.09 per cent. of shares in M/s. Standard Fireworks P. Ltd., the second defendant has manipulated the signature of the first plaintiff and had created records as if the fifth defendant-Mrs. Pallavi has been inducted as director of the first defendant-company, namely, M/s. Rajarathnam Matches P. Ltd. The fifth defendant, in turn, has co-opted six

persons as the directors of the first defendant-company. Expressing their apprehension that with manipulated records, if any extraordinary general body meeting/annual general body is called in M/s. Standard Fireworks P. Ltd., either the representative of the second defendant or the proxy, will be selected by board of directors.

Hence, the suit for declaration declaring the appointment/co-option of defendants Nos. 2 to 8 as directors of the first defendant-company (M/s. Rajarathnam Matches P. Ltd.) as illegal and void for violating the mandatory legal procedures and the procedures of the said company. To grant permanent injunction restraining them from any manner functioning as directors of that company and interfere with the functioning of the plaintiffs and further injunction restraining the ninth defendant-company (M/s. Standard Fireworks P. Ltd.) from conducting any extraordinary general body meeting/annual general body meeting. 5

The trial court has taken the plaint on file assigned suit number as O. S. No. 188 of 2016 and has summoned the defendants. On receipt of the suit summons, the revision petitioners herein/defendants Nos. 2, 3, 4, 6 and 7 in the suit in O. S. No. 188 of 2016 have filed an application in I. A. No. 1015 of 2016 under Order 7, rule 11 of the Code of Civil Procedure, 1908 to reject the plaint on the ground that the civil court jurisdiction is ousted under section 430 of the Companies Act, 2013 (in short "the Act"). The averments and relief sought for in the suit are matters, where the National Company Law Tribunal has exclusive jurisdiction and empowered to determine. Hence, even as per section 9 of the Code of Civil Procedure, civil court has no jurisdiction, The trial court not convinced with the said submission dismissed the application in I. A. No. 1015 of 2016 for the following reasons : 6

> "(i) On a bare perusal of this provision, it is clear that section 430 of the Act, does not completely bar the jurisdiction of civil courts in respect of the matter relating to companies. (ii) It is further made clear that the jurisdiction of civil court is barred only in respect of matter, in which, the Tribunal is empowered to determine by (or) under the Companies Act (or) any other law for time being in force. Hence, duty is cast upon the petitioner to establish that there is a specific provision in the Companies Act to deal with the issues raised in this suit. (iii) Apart from that the respondents/plaintiffs are not members of the company and hence, they cannot approach the Tribunal in case of oppression and mismanagement."

The said dismissal order of the trial court in the interlocutory application is under challenge in this revision petition. 7

8 Learned counsel for the revision petitioners submitted that, the new Companies Act, 2013 has consolidated the laws governing the affairs of companies in India. It is a comprehensive legislation, taking note of the courts delay and has constituted National Company Law Tribunal and National Company Law Appellate Tribunal, which are the heirarcial forums for redressal. The Companies Act, 2013 has created rights and liabilities and has provides the Tribunal for determination of such right and liability. The constitutional validity of ouster of civil court jurisdiction and vesting the power with the Tribunal has already been tested before the hon'ble Supreme Court and the court has upheld the constitutional validity of the Act. The reading of the plaint and the remedy sought falls within the purview of the rights determined by the statute. What is sought to be protected is not a common law right. Therefore, the civil court is ousted of its jurisdiction to entertain the plaint. However, the trial court without proper appreciation of the law and fact, has dismissed the interlocutory applications, instead of allowing the same and rejecting the plaint.

9 Per contra, learned senior counsel for the respondents submitted that, the civil court jurisdiction is plenary in nature. Unless the same is ousted expressly (or) by a statute (or) by necessary implication, the civil court has jurisdiction to try all types of cases. Further, section 430 of the Act also does not oust the jurisdiction of the civil court completely. It is restricted to the matters for which, the Tribunal is empowered to determine. The right to approach the Tribunal under section 241 of the Act is conferred to the members of the company and not to non-members. The plaintiffs in the suit being non-members, the doors of the Tribunal are not open to them. The plain reading of section 241 of the Act, clearly indicates, it is a right for the members of the company, who have any complaint regarding the affairs of the company to approach the Tribunal. For a non-member, the civil court jurisdiction is neither ousted expressly nor by necessary implications. A causus ommissus cannot be supplied by the court to oust jurisdiction of the court.

10 The relevant provisions of law and judgments relied by the respective counsel are taken into consideration and they are referred and cited at the appropriate places in the course of the discussion.

11 Primarily, before proceeding further, it will be appropriate to record the law and dictum, which governs the law of "ouster of civil court jurisdiction" in the light of section 9 of the Code of Civil Procedure. The bedrock judgment, on this point is, judgment of the hon'ble Supreme Court rendered in *Dhulabhai* v. *State of Madhya Pradesh* reported in [1968] 22 STC

416 (SC) ; AIR 1969 SC 78, wherein the hon'ble Supreme Court laid down the following principles (page 434 of 22 STC) :

> "(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particulars Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

12 Applying the above principles, several judgments have been rendered by the courts in India. Some of the judgments cited by learned counsel for the respondents are as follows :

(i) [2005] 10 SCC 51 (*Swamy Atmananda* v. *Sri Ramakrishna Tapovanam*).

(ii) [2009] 8 SCC 646 (*Nahar Industrial Enterprises Ltd.* v. *Hong Kong and Shanghai Banking Corporation*).

(iii) [2017] 1 SCC 622 (*Robust Hotels P. Ltd.* v. *EIH Ltd.*).

13 One point, which is made clear, in all the above judgments is that, whether it is section 53A of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 or section 34 of the SARFAESI Act, or any other legislation for that matter, whenever a provision ousting, the civil court jurisdiction (partially or totally) is incorporated in a statute, whether such ouster is complete, either expressly or by necessary implication can be decided on applying the maxim "Ubi jus ibi remedium" (there is no wrong without a remedy).

14 At this juncture, it is also appropriate to cite the following observation made by the hon'ble Supreme Court in *Raja Ram Kumar Bhargava* v. *Union of India* reported in [1988] 171 ITR 254, 261 (SC) ; AIR 1988 SC 752 :

> "The question turns on the scope of the exclusionary clause in the statute. The effect of clauses excluding the civil courts ; jurisdiction are considered in several pronouncements of the Judicial Committee and of this court (see *Secretary of State* v. *Mask and Co.*, AIR 1940 PC 105 ; *K. S. Venkataraman and Co. P. Ltd.* v. *State of Madras* [1966] 60 ITR 112 (SC) ; [1966] 17 STC 418 (SC) ; [1966] 2 SCR 229 ; AIR 1966 SC 1089 ; *Dhulabhai* v. *State of Madhya Pradesh* [1968] 22 STC 416 (SC) ; [1968] 3 SCR 662 ; AIR 1969 SC 78 and *Premier Automobiles Ltd.* v. *Kamlakar Shantaram*, AIR 1975 SC 2238). Generally speaking, the broad guiding considerations are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created uno flatu and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the civil courts jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil courts' jurisdiction, then both the common law and the statutory remedies might become concurrent remedies leaving open an element of election to the persons of inherence. To what extent, and on what areas and under what circumstances and conditions, the civil courts' jurisdiction is preserved even where there is an express clause excluding their jurisdiction, are considered in *Dhulabhai* v. *State of Madhya Pradesh* [1968] 22 STC 416 (SC) ; [1968] 3 SCR 662 ; AIR 1969 SC 78."

15 Therefore, the point for determination is, whether the relief sought is based on the common law right (or) right conferred under any statute ? and whether the said statute oust the jurisdiction of the civil court for redressal of that right by providing alternate redressal mechanism ?

16 The relief sought and cause of action as pleaded are related to the indoor management of a private limited company. The plaintiffs, at one breath, say that they are non-members. If so, they cannot have any locus standi to question the internal affairs of the company. As an individual, if they have any grievance under common law, their right to seek remedy before civil court is not taken away. But, neither the pleadings nor the cause of action disclose any infringement of civil right vested on them as individual. The allegations are all related to the company's management alleging

oppression and coup to take over the management of the company and violation of procedures in convening extraordinary general body meeting (EGM). All these allegations can have relevancy to the plaintiffs only in their status as directors of the first defendant's company and not as individual.

If we read the provisions of the Companies Act, 2013, section 2(34) **17** defines directors as under :

> "2. (34) 'director' means a director appointed to the board of a company."

Any right whatsoever claimed to be vested with the plaintiffs is only as a **18** director of the first defendant-company. Therefore, the right is a statutory right and not a common law right. Section 430 of the Companies Act, 2013, which oust the civil court jurisdiction reads as under :

> "430. *Civil court not to have jurisdiction.*—No civil court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force by the Tribunal or the Appellate Tribunal."

The word employed in section 430 of the Act is matter, which the Tri- **19** bunal or Appellate Tribunal is empowered to determine by or under this Act. Thus, it is "matter" in dispute to be taken into consideration and not the "men" in dispute. Therefore, to decide whether the ouster clause applies or not, one has to unmask the plaintiffs and find out the matter in dispute. Obviously, the matter in dispute is regarding affairs of the company alleged to be conducted prejudicial to the interest of the company, there is a matter which the Tribunal is empowered to determine. The subject matter squarely falls within the ambit of section 242 and 242(2)(c), (h) of the Companies Act, 2013.

Section 242 Powers of Tribunal reads as under : **20**

> "(1) If, on any application made under section 241, the Tribunal is of the opinion—
>
> (a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company, and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up,

the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—

(a) the regulation of conduct of affairs of the company in future ;

(b) the purchase of shares or interests of any members of the company by other members thereof or by the company ;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital ; . . .

(h) removal of the managing director, manager or any of the directors of the company."

21 Thus, in the case in hand, the National Company Law Tribunal alone is empowered to consider complaints of oppression or conduct of the company found to be prejudicial to the interest of the company or to public and redress the same.

22 It is contended by learned senior counsel appearing for the respondents that under section 242 of the Act only application made under section 241 of the Act can be entertained and determined by the Tribunal. Whereas, only member of a company can give complaint under section 241 of the Act. So, the combined reading of sections 241, 242 and 430 of the Act, will clearly indicate for non-members, civil court is the forum available to redress the grievance and not the Tribunal. The said submission is not appealing to this court, in the light of the facts and law referred below.

23 Section 241 of the Companies Act, 2013 reads as under :

"241. *Application to Tribunal for relief in cases of oppression, etc.*—(1) Any member of a company, who complains that—

(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company ; or

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the board of directors, or manager, or in the ownership of the company's

shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members,

may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter."

24 The right to approach the Tribunal is given to the members, because none-else can have any cause of action or complaint against the indoor management of the company. Whether the company calls for extraordinary general body meeting (EGM) is legal (or) whether or not its directors are elected following the mandate of the procedure contemplated in the statute or the bye-laws of the respective company are all matters of concern only to members of the company and not for outsiders/non-members.

25 In the light of the facts and circumstances of this case, this court is of the opinion that the word "member" employed in section 241 of the Act cannot be given a restricted meaning. If restricted meaning is given, it may lead to abuse of the process law, as it is found in this case. Hence, it is essential to apply the doctrine of reading down to make the provisions under Chapter XVI of the Act purposeful. The golden rule of statutory construction is that the words and phrases or sentences should be interpreted according to the intent of the Legislature that passed the Act. Sections 241 and 242 should be read together. If the words of the statutes raises doubt, it is inevitable to call in aid the ground and cause of making the statute and the mischiefs, which the Act intends to redress. Under the new Companies Act, 2013, the intention of the Legislature is to vest the power of adjudication the matters referred in section 242 to the Tribunal.

26 On applying the doctrine of reading down, an internal aid to construe the word in a statute to give reasonable meaning, so as to give the supposed purpose the word "member" referred in section 241 of the Act, should not be read in isolation or in strict meaning. The word should be read down along with section 242 of the Act. Therefore, the phrase "member of the company" in section 241 mean and include person not only member of the company is strict sense but, also person who "bears the character of a member" or "have substantial interest in the internal affairs of the company".

27 In the given context, the following two judgments of the hon'ble Supreme Court are very relevant to refer (i) *T. Arivandandam* v. *T. V. Satyapal* reported in AIR 1977 SC 2421, wherein, paragraph 5 reads as follows (page 2423) :

> "5. The learned Munsif must remember that if on a meaningful—not formal—reading of the plaint it is manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7, rule 11 of the CPC taking care to see that the ground mentioned therein is fulfilled. And, if clear drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10 of the CPC. An activist judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage."

(ii) In *V. M. Rao* v. *Rajeswari Ramakrishnan* reported in [1987] 61 Comp Cas 20 (Mad), division of our High Court was confronted with a case, which is almost similar to the case in hand wherein a winding up petition was filed for oppression and mismanagement of company, which was closely held by family members. In the said case, after considering various judgments arising out of English Law and Indian Law, our court has capsulized the position of law in the following words (page 66) :

> ". . . (1) that the oppression complained of must affect a person in his capacity or character as a member of the company ; harsh or unfair treatment in any other capacity, e. g., as a director or a creditor is outside the purview of the section ; (2) there must be continuous acts constituting oppression up to the date of the petition ; (3) the events have to be considered not in isolation but as a part of a continuous story ; . . ."

28 If the plaintiffs claim status as non-member, the disclosed cause of action in the plaint is illusion and irrelevant for third parties, since they have no locus standi to interfere with the affairs of the indoor-management of a private limited company. If they claim status as directors of the company, they carry all trappings/characters of a member of the company. So, to protect the interest of the company, the remedy for them is under section 242 of the Companies Act, 2013. Either way the civil court has no jurisdiction to entertain the subject-matter of the suit. In the light of section 430 of the Companies Act, 2013 and the alternate redressal forums being adequately provided under the Act, the plaint is not maintainable.

In the result, the civil revision petition is allowed. Fair and decretal order passed by the learned District Munsif, Sivakasi made in I. A. No. 1015 of 2016, dated December 19, 2016 is set aside. The plaint in O. S. No. 188 of 2016 on the file of the District Munsif, Sivakasi, is rejected. No order as to costs. Consequently, connected miscellaneous petition is closed. 29

[2020] 222 Comp Cas 97 (NCLT)

[Before the National Company Law Tribunal — Hyderabad Bench]

ALBERT LAEL AND OTHERS

v.

OPERATION MERCY INDIA FOUNDATION AND OTHERS

K. Anantha Padmanabha Swamy *(Judicial Member)* and
Dr. Binod Kumar Sinha *(Technical Member)*

June 26, 2020.

HF ▸ Respondent

Oppression and mismanagement—Petition for relief—Investigation into affairs of company in progress on direction of Supreme Court—Interference by Tribunal at this stage not required—Petition to be dismissed—Companies Act, 2013, ss. 213, 241.

On a petition filed under sections 213 and 241 of the Companies Act, 2013, inter alia, for an order directing investigation into the affairs of the company under section 213 of the Act :

Held, *dismissing the petition, that at the time of filing the petition the petitioners had not filed any documents in support of their case. The allegations made in the complaint on which a first information report was registered and the allegations made in the petition were the same. The respondents had filed a special leave petition to quash the first information report whereupon the Supreme Court had directed the authorities to expedite the process of investigation in respect of the same allegations which were enumerated in the petition. Pursuant to the directions of the Supreme Court, the investigation in this regard was in progress and no final report or charge sheet had been filed against any of the accused or respondent in this case. In these circumstances, any interference by the Tribunal at this stage by ordering investigation under section 213 of the Act would not only give rise to duplication of investigation proceedings but would disturb the process of proceeding with*

the enquiry and investigation by the concerned authorities, which was to be completed expeditiously in accordance with the directions of the Supreme Court.

ROHTAS INDUSTRIES LTD. *v.* AGARWAL (S. D.) [1969] 39 Comp Cas 781 (SC) (para 4) *referred to.*

I. A. No. 566 of 2019 in C. P. No. 60/241/HDB/2019.

Samuel Nagadesi, Practising Chartered Accountant, for the petitioners.

S. Ravi, Senior Counsel along with *Ms. Sarvani Desiraju* and *G. Sai Prasen* for the respondents.

ORDER

The order of the Bench was delivered by

1 K. ANANTHA PADMANABHA SWAMY ***(Judicial Member)***.—Under consideration is a company petition filed under sections 213 and 241 of the Companies Act, 2013 (hereinafter called as "Act, 2013") alleging various acts of oppression and mismanagement in the affairs, of M/s. Operational Mercy India Foundation (hereinafter called as the "company"), inter alia, seeking following reliefs :

(i) To order investigation into the affairs of the company under section 213 of the Companies Act, 2013 ;

(ii) To grant appropriate reliefs in terms of section 241 of the Companies Act, 2013 ;

(iii) As an interim measure pending the investigation, to suspend the Board and appoint a Commissioner ;

(iv) To freeze all assets of the company pending investigation and resolution of the cases referred to in the petition.

(v) To pass such order as deemed fit in the interest of better working of the company and in the interest of justice.

2 In brief the averments made in the petition are as follows :

(a) That the respondent-company was incorporated in the year 2002 under the provisions of section 25 of the Companies Act, 1956 (hereinafter called "Act, 1956") under the name and style of M/s. Operation Mobilization of India and subsequently the name of the company was changed to M/s. Operation Mercy India Foundation in the year 2006. That the petitioner herein is the founder member of the company herein and also authorized by the other petitioners.

(b) That the main object of the company is to establish adult literacy centers, balwadis, educational institutions, schools and other such institutes to impart education free of cost or at subsidized fee, etc.

(c) That M/s. Operation Mobilization of India was a religious trust incorporated by missionaries of OM International which has operations in 105 countries and the entire operation in those countries are bound by the Joint Ministries Agreement which was registered or filed with International Court of Justice in Canada. The said trust was registered in Mumbai under Bombay Public Trust Act, 1950 in the year 1972, and subsequently the headquarters was moved to Hyderabad in the year 1989.

(d) The initial trustees either voluntarily resigned or were forced to leave the trust, following which the second respondent took over the management of the organization in 1987 and assumed the position of the National Director. Having gained total control of the organization, the second respondent along with few key trustees started incorporating, making, taking over various trusts, societies and organizations such as OM Books India Foundation, OM Books P. Ltd. company, Operation Mercy India Foundations, Mercy Community Development Foundation, Good Shepherd Community society (also known as Good Shepherd Community Church), International Bible Society, All India Christian Council and Day Spring Enterprises of India, etc., under the guise of dividing work.

(e) The second respondent was successful in achieving his nefarious designs by accommodating and rehabilitating his entire family—that is his son, daughter, their spouses, brothers, kith and kin by retaining power over the organization for over 30 long years.

(f) The first petitioner being the CEO of the company, filed a whistle blowing complaint along with the fourth petitioner and pursuant to the complaint, "OM International" had sent a fact finding team to look into the allegations. The team made thorough investigation and reported back to OM International Board, wherein they had found ample evidences of misappropriation of funds, nepotism and intimidation of staff by the second respondent and other office bearers. However, the second respondent threatened the investigation team with dire consequences and succumbing to threats, subsequently OM International has separated OM India from international governance and accountability and the second respondent has appointed his kith and kin to the key positions and taken the entire control including its sister concerns.

(g) That over a number of years, several directors and company officers including the first petitioner were unilaterally removed from office without following due course of law and in contravention of company laws,

Trust and Society Regulations. All the termination letters were issued under the signature of one Mr. A. E. Franks, who is the managing trustee and director of almost all the sister concerns and who is involved in serious Pedophilia, especially with the girls who were/are under his care and authority. A massive protest erupted by the staff and instead of redressing their reasonable and lawful concerns, they have been displaced by issuing termination letters and discharge letters within a span of 72 hours. Some of the expelled staff have also approached the Labour Commissioner.

(h) The second respondent had also appointed his own family members as directors, office bearers and officers in contravention of company law, Trust and Society Regulations by providing exorbitant salaries and allowances to them. The company has paid money for a flat purchased by the son of the second respondent without passing any resolution. The amount paid by the company was paid back to the company by selling a property at Jubilee Hills that too after a case was filed with the Enforcement Directorate.

(i) The second respondent incorporated private limited companies for the purpose of hiding/covering financial irregularities in the guise of bona fide operations. It is also the practice of giving contracts to the friends of second respondent and his family members without inviting competitive quotations or tenders.

(j) The second respondent purchased the Holy Bible books from Bible Society of India for free distribution amongst the new believers, whereas the same was sold to book shops and certain individual and he has embezzled an amount to the tune of Rs. 80 lakhs. OM India raised huge funds in various countries towards tsunami relief, but a significant portion of money to the tune of Rs. 4 to 5 crores were embezzled by the second respondent by creating fake, fabricated and pseudonymous beneficiaries.

(k) One of the properties of the company situated at Jubilee Hills was sold without the permission of the Collector, Hyderabad and significant amount of sale proceeds was received in cash and not accounted in the company books.

(l) The respondents are having three or four different accounts in India, UK, USA and other countries. The foreign contributions shall be regulated as per the FERA/FEMA rules whereas the respondents taking advantage of Christian minority status, indulging in illegal monetary transactions and embezzling the public funds in crores. In one particular case an UK citizen made a donation to be accounted into Operational Mercy India in Hyderabad was diverted to USA loan amount which was taken for the purpose of purchase of building in Jubilee Hills. This was done in total

violation of the FERA/FEMA rules. The respondents have also diverted funds into their individual names at different cities and it has been specifically brought to the notice of the CID, State of Telangana.

(m) The first petitioner during his tenure as National Director for Good Shepherd Schools (Dalit Education) started new Good Shepherd Schools and the number of schools was enhanced to 103. It was informed to the community that they would have to pay only Rs. 30 per month for one child and for this purpose supporting the cause separate registered charities were started in UK, USA, Canada, Australia and other countries. Besides raising donation, one child was connected to one donor, who will pay $28 to $33 per month. However, the situation is completely changed and the management under the second respondent is forcing school staff to collect admission fee, monthly fee, cost of books and uniform, etc., from parents. The fee received from parents is diverted to Good Shepherd Society which runs Churches.

(n) No board meetings of the company were called for even after repeated requests by the first petitioner. All the decisions are being taken by the second respondent without following any protocol. Before appointing anybody as directors, the second respondent collects pre-signed letters of resignation. If anybody questions the dubious deals, the second respondent immediately used the resignation letter and removed them from the post of the directors. The company has not called for any board meeting for the last five years. The second respondent had also appointed his son, daughter and family members to the highest position in the organizations. In order to pay the allowances and salaries, the second respondent incorporated a private limited company, viz., Kadwell Consultancy which generates fictitious bills and draws funds from the charities.

(o) The company under the management of the second respondent had also contributed funds to political personalities and on several occasions the funds were released on fictitious bills. He had also appointed a former Inspector General of Police to protect himself from any police action or enforcement agencies.

(p) The petitioners after exhausting all available options, brought the matter to the notice of the hon'ble Home Minister of Telangana on December 8, 2015. He has forwarded the complaint to the DGP of Telangana with instructions to take appropriate action. After examination of the complaint, the police authorities have registered a FIR vide Crime No. 22 of 2016, dated September 29, 2016. When the investigation was going on, the respondents approached the hon'ble High Court through a petition in W. P. No. 40742 of 2016 to quash the FIR and stall the investigation. The

hon'ble High Court dismissed the said writ petition vide its order dated April 3, 2017. The respondents who are accused in the FIR approached the Metropolitan Sessions Judge and obtained bail on April 28, 2017. The respondents have also filed a SLP and the hon'ble Supreme Court dismissed the SLP and directed the authorities to conclude the investigation expeditiously.

(q) That an anonymous complaint was also filed before the Enforcement Directorate in which the first petitioner himself impleaded in the said matter. However, the authorities have ignored the representation of the first petitioner and also the staff for obvious reasons. The subsequent representation submitted by the first petitioner on June 9, 2017 is pending before the Enforcement Directorate.

(r) The first petitioner filed a special leave petition in SLP (Crime No. 27899 of 2018 for the suitable relief and cancellation of the bail granted to the respondents and the hon'ble Supreme Court allowed the complainant to approach relevant forums including the High Court. In view of the order of the hon'ble Supreme Court the petitioner filed the CP.

(s) The learned practising chartered accountant for the petitioners while reiterating the above averments submitted that the affairs of the company are being conducted prejudicial to public interest and prayed to allow the petition.

3 Respondents Nos. 1 and 8 filed counter and their averments in brief are as follows :

(a) The company was incorporated on April 8, 2002 under section 25 of the Act, 1956 and the first petitioner does not hold any position in the first respondent-company. The petitioners are also not the directors of the company. The first petitioner has not been authorized by the other petitioners and no such authorization is filed along with the petition.

(b) The first petitioner was suspended from the services of Operation Mobilization India Trust during the year 2010 due to gross misconduct, sexual harassment, wife abuse and breach of other organizational policies. Subsequently during the year 2011 the first petitioner was removed from the directorship of the company and thereafter the first petitioner and his accomplices filed one compliant after another against the respondents.

(c) One Mr. K. Ratnakar, an accomplice of the first petitioner at the instance of the first petitioner filed a complaint under section 190 of the Criminal Procedure Code on July 12, 2012 to register a FIR under section 156(3) of the Criminal Procedure Code against the Operation Mobilization India Trust, third, sixth and eighth respondents and two others under

sections 406, 420 read with 34 and 120B of the Indian Penal Code and under the Prevention of Money-Laundering Act, 2002 before the Magistrate Ranga Reddy District. The said compliant was registered in FIR No. 350 of 2012 on August 24, 2012 and the police authorities have investigated the complaint and filed a final report on October 28, 2013, closing the case for lack of evidences. No protest petition was filed by the said Mr. K. Ratnakar or any other person against the closure of FIR No. 350 of 2012. The said Mr. K. Ratnakar filed one more complaint registered in FIR No. 384 of 2012 on the allegation that the second respondent and others threatened him and forcibly took his resignation on May 3, 2012. After investigation the said FIR was also closed due to lack of evidences.

(d) The first petitioner filed another complaint dated September 29, 2016 before the Additional Director General of Police, CID Telangana State and FIR No. 22 of 2016 was registered. The allegations made in FIR No. 22 of 2016 are similar to the allegations made in FIR No. 350 of 2012 and the allegations made in the present company petition is similar to the allegations made in FIR No. 22 of 2016. A writ petition in W. P. No. 40742 of 2016 was came to be filed by the respondents to quash the FIR No. 22 of 2016 and the same was dismissed by the hon'ble High Court. The SLP challenging such dismissal was also dismissed by the hon'ble Supreme Court on September 12, 2017. The hon'ble Supreme Court directed that the investigation pursuant to the said FIR be concluded expeditiously.

(e) The Enforcement Directorate had filed a counter before the hon'ble Supreme Court in S. L. P. (Crl.) No. 3888 of 2017 wherein it was mentioned that the investigation was carried out by them and no irregularities were found by them with respect to the accused in FIR No. 22 of 2016. The investigation in FIR No. 22 of 2016 is partly completed by the police authorities and no irregularity is found against the accused in the said FIR and also the Trust.

(f) The company has not indulged in or ever found indulging in misappropriation, contravention of the FERA, money laundering, misuse and use of funds to the benefit of members and their families, diverting the funds, ring fencing, use of the companies as conduits to round trip the project donations not to the beneficiaries but to the personal benefit of the second respondent and his family. In cases where donations are received for education of children, a nominal fee is collected from students. The allegations that the money received for Dalit upliftment and emancipation was squandered and removal of 100 staff members are baseless and incorrect.

(g) The company is entirely a different legal entity from Operation Mobilisation of India Trust. The Operation Mobilisation India is a trust and it is governed by the laws of India and not bound by the Joint Ministries Agreement which was registered or filed with the International Court of Justice in Canada.

(h) The initial trustees were not forced to resign and the incorporation of trusts is done as per law. It is not illegal to incorporate trust and companies. The name of the company was mentioned in passing without making allegations thereto. A false FIR was lodged by the petitioner and his accomplices. The CID, Telangana State has not completed the investigation yet. The CID, Telangana State has not found prima facie case of fraud and series of economic offences and the charge sheet on the FIR is yet to be filed. Only some of the respondents filed SLF against the order of the hon'ble High Court and the SLP filed by the petitioner to cancel the bail was also rejected by the hon'ble Supreme Court.

(i) No reasons whatsoever is mentioned to invoke the provisions of sections 213 and 241 of the Act, 2013. Mere incorporation of companies and trusts which was done for legal purposes with good intent is legal action for which a person cannot be penalized. The staff of the said companies and trusts are properly managed and trained. The company conducts its meeting as per the requirement of the Companies Act.

(j) The companies and trusts mentioned by the petitioners are not the holding companies of the respondent-company. The whistle blowing complaint is also incorrect and the allegations are made without any support or evidences. The allegations are not related to the company and the second respondent has not made any threats. The company is a section 25 company and the second to eighth respondents are the directors of the same. Proper audits, filings were made and meetings were held in consonance with the law so that no improper allegations on the working of the first respondent-company could be made against it. With regard to the illegal removal of staff, the company has not received any petition against the retrenchment under the Industrial Disputes Act. The first petitioner was himself accused of indulging in sexual misconduct.

(k) The allegation of oppression and mismanagement and fraudulent conduct of company business, misappropriation of Rs. 80 lakhs, embezzlement of Rs. 4 to 5 crores in Tsunami Relief Fund, embezzlement of Rs. 4 crores by sale of property at Jubilee Hills, diversion of donations of US $400,000 meant for Dalit Education Centers in India through hawala which is contrary to provisions of FCRA/FEMA and public trust acts/laws, diversion of embezzled funds in to private investments in the name of the

members of family, and charging exorbitant fees and accumulating funds in fixed deposits are made with respect to the trust and not with respect to the company. Further said allegations are similar to the allegations made in FIR Nos. 350 of 2012 and 22 of 2016. The petitioners have not been removed illegally from the board and such allegations are made after 14 years. The allegation of charging fees from the students despite getting donations was investigated by the police in FIR No. 92 of 2017 and the said FIR was eventually closed. The company is providing education at much subsidized cost and the same is in the public interest.

(l) No prima facie case was found against the respondents in any of the frivolous criminal complaints filed by the first petitioner and his accomplices. The dismissal of the petition seeking quashing the FIR does not mean that the respondents are convicted. The charge sheet in FIR in 22 of 2016 is not filed so far. The order of the bail was obtained legally and it is confirmed by the hon'ble High Court and Supreme Court.

(m) The Enforcement Directorate conducted a thorough investigation and found no inculpating evidence against the respondents. The present petition is filed in a gross abuse of the process of this Tribunal and the petitioners are trying their best to use the order dated August 17, 2018 of the hon'ble Supreme Court in a way which is prejudicial to respondents Nos. 2 to 8. By the order dated August 17, 2018 the hon'ble Supreme Court dismissed the SLP filed by the first petitioner whereby the order dated December 12, 2017 passed by the High Court confirming the bail granted to the respondents was challenged by the first petitioner. Now the said order is interpreted to say that the hon'ble Supreme Court has granted permission to the petitioners to file the present petition. The said order was made by the hon'ble High Court in FIR No. 22 of 2016 wherein no allegations were made against the company and also it has not been even accused.

(n) The petitioners failed to submit any material evidence on record for the purpose of invoking the provisions of sections 213 and 241 of the Act and moreover the allegations raised which are more than three years old. Therefore, the present petition is barred by limitation.

Learned counsel for the first and eighth respondents while reiterating **4** the above averments submitted that the petitioners have not made any case for invoking the provisions of sections 213 and 241 of the Act, 2013. The allegations made in the present petition are similar to the allegations made in the complaint registered under FIR No. 22 of 2016 which is partly investigated. No charge sheet is filed in the said FIR. He also submitted that filing of present petition is nothing but abuse of process of law.

Therefore, he prayed to dismiss the petition. Learned counsel for the first and eighth respondent relied on [1969] 39 Comp Cas 781 (SC) ; AIR 1969 SC 707 (in the matter of) *Rohtas Industries Ltd* v. *S. D. Agarwal* and (C. P. No. 78 (ND) of 2017 decided on July 20, 2017) decided by the National Company Law Tribunal, Principal Bench, New Delhi, in the matter of *Manmohan Malik* v *Simplot India Foods P. Ltd.*, in support of his submissions.

5 The petitioners filed rejoinder, inter alia, stating as under :

(a) The petition is maintainable within all four corners of law and there is overwhelming evidence supporting the allegations of fraudulent management, of oppression and mismanagement, criminal breach of trust attracting the provisions of the sections 213 and 241 of the Act, 2013 and the offences under sections 409, 420, 477A of the Indian Penal Code and other applicable laws. The denial of the respondents is only self-serving and it is made only for denial.

(b) There is a prima facie case made out by the petitioners and the balance of convenience is towards the maintainability of the petition as the offences alleged were under investigation by the CID of Telangana State.

(c) The oppression is evident on its face where the four members out of seven members concerned in the formation of company by subscribing to the memorandum of association and three out of seven in the other companies are the present petitioner alleging the same. The fraudulent conduct of the management of the company can be visibly seen from the returns filed by the company in compliance with the provisions of the Act. There is no suppression of any material facts by the petitioners. In fact, the respondents are resorting to the same and trying to mislead the Bench with colourable interpretations and fanciful explanations.

(d) The fraudulent conduct of business to defraud the beneficiaries, the oppression and mismanagement being carried out continuously, therefore, the petition is not barred by limitation.

(e) The second respondent unnecessarily interfered with the family affairs of the first petitioner and instigated his wife to rebel against him to settle the scores with him as the first petitioner as chief financial officer discharging his duties as custodian, controllership functions of the funds and property of the charities of the company and questioning the second respondent on the misuse and abuse of the same to the detriment of beneficiaries and diversion of the same to the personal and family benefit.

(f) There is no similarity of the facts mentioned in the complaint filed by Mr. K. Ratnakar and the present company petition. It is held by the

hon'ble Supreme Court that the second FIR is maintainable. Therefore, the report of the Police, Police Station Basheerabad has no relevance whatsoever as the proceedings in the said FIR was held valid and maintainable as per the orders the hon'ble Supreme Court and the investigation is pending.

(g) The company was incorporated in the year 2002 with enhanced vision and objectives. After incorporation, donor funds were flooded on various poverty alleviating activities targeting people below the poverty line (BPL) for promoting education, upliftment and social emancipation. More fascinating activity is emancipation of dalits under "Dalit Freedom Network" now rechristened as "Dignity Freedom Network" in the other parts of the world. Ever since, the flow of funds towards various charity schemes increased in volumes the element of greed and bad faith entered into the leadership, various companies and other layers were created as conduits for misappropriation, misuse, diversion for self, persona, and family benefits was started.

(h) The whistle blowing report clearly establishes financial irregularities, abuse of power, leadership abuse and nepotism. It is a fact that when global leadership wanted to correct the irregularities they were threatened by the second respondent.

(i) The learned practicing chartered accountant while reiterating the averments made in the rejoinder submitted that the petition is maintainable and the petitioners have made prima facie case to invoke the provisions of sections 213 and 241 of the Act, 2013. In view of the same, he prayed to allow the petition.

Heard the submissions of both the sides and perused the records. **6**

It is a fact admitted that the respondent-company was incorporated under the provisions of section 25 of the Companies Act, 1956 and it is carrying on with several religious and charitable operations. The petitioners contended that the second respondent and his family members are in the helm of affairs of the company and they mismanage the affairs of the company and also oppressed the other stake holders since incorporation. It is also contended that they have filed complaints before the CID, Telangana State and it is under investigation. Whereas the respondents contended that the affairs of the company are being conducted in a manner envisaged under the provisions of the Act, 2013 and the filing of present petition is nothing but abuse of process of law. They have also contended that the petitioners failed to submit any material evidence for invoking the provisions of sections 213 and 241 of the Act. **7**

It could be seen from the pleadings that the petitioners have made allegations such as oppression and mismanagement and fraudulent conduct of **8**

company business, misappropriation of Rs. 80 lakhs, embezzlement of Rs. 4 to 5 crores in Tsunami Relief Fund embezzlement of Rs. 4 crores by sale of property at Jubilee Hills diversion of donations of US $400,000 meant for Dalit Education Centres in India through hawala which is contrary to the FERA/FEMA and public trust acts/laws, diversion of embezzled funds into private investments in the name of the members of family, and charging exorbitant fees and accumulating funds in fixed deposits and the same allegations could be seen in the complaint dated September 29, 2016, submitted by the first petitioner on which the FIR No. 22 of 2016 was came to be registered. It is a fact that the respondents filed writ petition in W. P. No. 40742 of 2016, praying to quash the FIR and stall the investigation. The hon'ble High Court dismissed the said writ petition vide its order dated April 3, 2017. It is also a fact on record that the respondents who are accused in the FIR approached the Metropolitan Sessions Judge and obtained bail on April 28, 2017. The respondents have also filed a SLP and the hon'ble Supreme Court dismissed the SLP and directed the authorities to conclude the investigation expeditiously. Even according to the petitioners, the said complaint is under investigation by the CID, Telangana State.

9 The provisions of section 213 of the Act, 2013 empower the Tribunal to order "Investigation into company's affairs in other cases" and these provisions read as follows :

> "The Tribunal may—
>
> (a) on an application made by—
>
> (i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital ; or
>
> (ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital,
>
> and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting in investigation in to the affairs of the company ; or . . ."

10 It is a fact that the petitioners herein are the members of the company and since they satisfy the threshold limit of qualification for filing a petition under sections 213 and 241 of the Act, have filed the present petition. However, whereas the law requires them to show good reasons for seeking investigation "supported by such evidence as may be necessary", they have

relied only on the complaint filed in FIR No. 22 of 2016 which is already pending before the police authorities for investigation. At the time of filing the instant petition the petitioners have not filed any documents in support of their case and allegation/averments made in the company petition. Learned counsel for the respondents rightly pointed out that the petitioners have not filed any documents in support of invoking the provisions of sections 213 and 241 of the Act, 2013. Subsequently, the petitioners have come up with an application bearing I. A. No. 566 of 2019 with a prayer to take on record the additional documents which cannot be considered as the respondents have already filed their counter and vehemently submitted that there are no supporting documents. It is a fact that the allegations made in the complaint on which FIR No. 22 of 2016 was registered and the allegations made in the company petition are one and the same. It is also a fact that the respondents filed SLP to quash the FIR wherein the hon'ble Supreme Court was pleased to direct the authorities to expedite the process of investigation in respect of same allegations which are enumerated in the instant petition. As per the directions of the hon'ble Supreme Court, the investigation in this regard by CID is in progress and no final report/charge sheet has been filed against any of the accused/respondent in this case. In these circumstances, any interference by this Tribunal at this stage by ordering investigation under section 213 of the Act as prayed in the instant company petition will not only be giving rise to duplication of investigation proceedings but will undoubtedly hamper an disturb the process of proceeding with the enquiry and investigation by the concerned authorities, which is to be completed expeditiously as per the directions of the hon'ble Supreme Court. Further, this Tribunal found that the petitioner failed to place any concrete proof in relation to the alleged oppression and mismanagement into the affairs of the company by the respondents. There are no documentary proofs for considering any of the prayers made in the petition. In fact, the petitioners do not seek any specific prayer with regard to the oppression and mismanagement and the prayer (paragraph 2 page 34 of the petition) appears to be very general in nature.

Considering the aforesaid facts and in view of the already pending **11**
investigation in the affairs of the company and against other respondents by the investigation agencies, we are not inclined to pass any orders on the merits of the instant petition and accordingly the petition is dismissed.

Interim order, if any, shall stand vacated and pending applications, if **12**
any, shall also stand closed. No order as to costs.

[2020] 222 Comp Cas 110 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — MUMBAI BENCH]

BEE ATHLETIC P. LTD.

v.

DSK SHIVAJIANS FOOTBALL CLUB P. LTD.

V. K. RAJASEKHAR *(Judicial Member)* and
RAVIKUMAR DURAISAMY *(Technical Member)*

June 10, 2020.

HF ▶ Petitioner

INSOLVENCY RESOLUTION—PETITION BY OPERATIONAL CREDITOR—EXISTENCE OF DEFAULT—PETITION TO BE ADMITTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, s. 9.

On a petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 to initiate the corporate insolvency resolution process against the corporate debtor :

Held, *that there had been no communication in reply from the corporate debtor to the demand notice dated April 27, 2018 in spite of receiving it by speed post. The application made by the operational creditor was complete in all respects as required by law. The corporate debtor was in default of a debt due and payable. The petition was to be admitted, a moratorium was to be declared and an interim resolution professional was to be appointed.*

C. P. (IB) No. 3976/MB/C-IV/2018.

Ms. Priyanka Lokhande instructed by *Singhania and Partners* with *Prashant Mishra*, for the operational creditor.

No representation for the corporate debtor.

ORDER

The order of the Bench was delivered by

1 V. K. RAJASEKHAR ***(Judicial Member)***.—This is a company petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) by Bee Athletic P. Ltd. (operational creditor) (CIN : U18101HR2016PTC058144), a company within the meaning of section 2(20) of the Companies Act, 2013 and represented by its director, Navneet Singh, on the basis of a board resolution dated December 11, 2019 seeking to initiate corporate insolvency resolution process (CIRP) against DSK Shivajians Football Club P. Ltd. (corporate debtor).

2 The corporate debtor is a private company limited by shares and incorporated on December 21, 2012 under the Companies Act, 1956, with the

Registrar of Companies, Maharashtra, Pune. Its CIN is U92190PN2012NPL145795. Its registered office is at S. No. 326/2, Mumbai Bangalore Highway, Bawdhan, Pune-411 021, in the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.

The present petition was filed on October 16, 2018 before this Adjudi- 3
cating Authority on the ground that the corporate debtor failed to make payment of a sum of Rs. 19,01,193 (rupees nineteen lakhs one thousand one hundred and ninety three only) as principal as on March 1, 2017 which is stated to be the date of default, along with interest thereon.

The case of the operational creditor is as follows : 4

(a) In May, 2016 the corporate debtor through its chief executive officer (CEO), Mr. Neel Shah, approached the operational creditor with the intention of purchasing sports merchandise for its club, such as T-shirts, practice jersey, track suits, shorts, travel bags, stockings, etc., personalised with the corporate debtor's logo. The corporate debtor also detailed the specifications and requirements for the aforesaid merchandise and asked the corporate debtor to supply the same (paragraph 2 at page 4 of the petition) ;

(b) Subsequently, the corporate debtor, vide its e-mail dated May 31, 2016 instructed the operational creditor for samples of the merchandise, which was also supplied. The corporate debtor duly approved the same (paragraph 4 at page 5 of the petition) ;

(c) The operational creditor duly communicated the final price for the said merchandise to the corporate debtor vide e-mail dated June 13, 2016 which was accepted by the corporate debtor on the same date. The reply e-mail dated June 13, 2016 contained the total quantity of merchandise to be supplied by the operational creditor along with their types (paragraph 4 at page 5 of the petition) ;

(d) The products so ordered by the corporate debtor were duly supplied by the operational creditor by courier on October 3, 2016, 076 and January 10, 2017 (paragraph 5 at page 5 of the petition) ;

(e) The products were duly accepted by the corporate debtor without raising any dispute in respect of the quantity or quality of the products. No dispute was raised even subsequently till the date of filing of the present petition (paragraph 6 at page 6 of the petition) ;

(f) The following invoices were raised on the corporate debtor :

Sl. No.	*Date*	*Invoice No.*	*Amount in Rs.*
1.	03-10-2016	BEE/16-17/090	14,11,955

2.	07-10-2016	BEE/16-17/091	14,31,748
3.	07-10-2016	BEE/16-17/092	2,10,978
4.	25-10-2016	BEE/16-17/096	2,70,644
5.	25-10-2016	BEE/16-17/097	2,46,047
6.	04-11-2016	BEE/16-17/099	56,823
7.	10-01-2017	BEE/16-17/127	5,56,361
8.	10-01-2017	BEE/16-17/128	32,865
		Total	42,17,421

(paragraph 7 at pages 6 and 7 of the petition) ;

(g) The corporate debtor was always irregular in making payments. Instead of making invoice-wise payments, the corporate debtor would make "on account" payments. Therefore, there was a running account with the corporate debtor (paragraph 8 at page 7 of the petition) ;

(h) As against a total amount of Rs. 42,17,421 the corporate debtor has made a total payment of Rs. 23,16,228, leaving a balance of Rs. 19,01,193 (paragraph 9 at page 7 of the petition) ;

(i) The operational creditor sent several reminders, the last of which was on February 12, 2018 to the corporate debtor requesting for payment. However, the corporate debtor has deliberately avoided making the payment (paragraph 10 at page 7 of the petition).

5 Invoices have been placed on record as exhibit C at pages 49-75 (inclusive of e-mails whereby the invoices were delivered to the corporate debtor). The invoices provide for interest in case of delayed payments, to be charged at the rate of 18 per cent. per annum. Bank statements are attached as exhibit G at pages 116-199. The total debt due and payable to the operational creditor is Rs. 19,01,193 (rupees nineteen lakhs one thousand one hundred and ninety three only) as mentioned at page 108 of the petition, plus interest thereon.

6 The operational creditor had served a demand notice in Form No. 3, dated April 27, 2018 to the corporate debtor (exhibit F, pages 110-115) in terms of section 8 of the Insolvency and Bankruptcy Code. The corporate debtor has not replied to the demand notice. Necessary affidavit of no dispute in terms of section 9(3)(b) of the Insolvency and Bankruptcy Code has been annexed at page 14A.

7 The corporate debtor has neither entered appearance nor filed a reply to the petition.

8 We have heard the arguments of learned counsel for the operational creditor and perused the records.