Convergytics Solutions Private ... vs Randhir Hebbar on 22 June, 2021

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT)(CH) No. 15 of 2021
Under section 421 of the Companies Act, 2013

(Arising out of Interim Order dated 10.03.2021 passed in C.P. No. 219/BB/2020 passed by the National Company Law Tribunal, Bengaluru Bench)

In the matter of:
1. Convergytics Solutions Private Limited
A Company incorporated under
the Companies Act, 1956,
And having its registered office at:
#5/1, Gulmohur Enclave Road,
Kundalahalli Gate, Marathalli Post,
Bengaluru- 560037
CIN: U72300KA2013PTC069084. ...Appellant No. 1

2. Sanjeev Mishra
S/o Pramod Mishra
Aged about 44 years Residing at K-805
Brigade Metropolis, GarudacharPalya,
Mahadevapura, Bengaluru- 560048. ...Appellant No. 2

3. Santosh Vithal Rao Atre
Son of V K Atre
Aged about 40 years,
Residing at No. 49, 10th Cross,
West of Chord Road, 2nd Stage, Bengaluru- 560086.
Through Power of Attorney Mr. Sanjeev Mishra ...Appellant No. 3

V.

1. Randhir Hebbar
Son of ASN Hebbar
Aged about 41 years,
Residing at Anantha Krupa,
No. 33, 16th C Main, 4th Block,
Koramangala, Bengaluru- 560034. ...Respondent No. 1

2. Baghyashri Hebbar
Wife of Randhir Hebbar
Aged about 37 years,
Residing at Anantha Krupa,
No. 33, 16th C Main, 4th Block,

Koramangala, Bengaluru- 560034. ...Respondent No. 2

3. Convergytics LLC
A company incorporated under the laws of Texas,
United States of America,
And having its registered office
At: 4512 Legacy Drive (Suite 100)
Plano, Texas- 75024.
And also at:
1001, 4th Avenue,
Suite 3200, Seattle,
Washington- 98154
United States of America. ...Respondent No. 3

4. Convergytics INC
A company registered under the laws of Ontario
And Having its registered office at:
Robert Speck Parkway (15th Floor) Mississauga,
Ontario- L4Z1S1.
And also at:
130, Adelaide Street,
Suite 701, Toronto, Ontario- M5H2K4,
Canada. ...Respondent No. 4

Present:
For Appellant : Mr.T.K. Bhaskar, Advocate
For Ms.Deepika Murali, Advocate
For Respondent No.1 & 2: Mr.P.H. Arvind Pandian, Sr. Counsel
For Mr.S. Sri Ranga, Advocate

JUDGMENT

(VIRTUAL MODE) Company Appeal (AT)(CH) No.15 of 2021 Page | 2 Preface:

1. The Appellants/Respondents No.1 to 3have filed the 'instant Company Appeal' (AT)(CH) No.15 of 2021, being aggrieved against the Order dated 10.03.2021 in C.P. No.219/DB/2020 passed by the National Company Law Tribunal, Bengaluru Bench.

2. The National Company Law Tribunal, Bangaluru Bench while passing the 'Impugned Order' in C.P.No.219/BB/2020 filed by the Respondents No.1 and 2/Petitioners on 10.03.2021 at Paragraph No.6 had observed the following:

"The Present Company Petition has been filed on 07.12.2020, after duly serving a copy on the other side, and the same was listed for admission on 04.01.2021, and on that day also the Tribunal ordered notice to the Respondents. Subsequently, the case was listed on 01.02.2021 and the same was admitted and posted for consideration of the interim reliefs on 15.02.2021. On 15.02.2021 again the case was adjourned to today. The Respondent without filing reply to the main Company Petition as well as interim reliefs, has filed an Application U/s.8 of the Arbitration and Conciliation Act,

> 1996 to refer the matter to the Arbitration. However, the said I.A. is not listed today as there are office objections on I.A. We are of the prima facie view that the services of the Petitioner No.1 was terminated without following due process of Law and the Petitioners being minority share are to be given proper opportunity before taking impugned action. Therefore, it is just and proper to suspend the impugned termination letter dated 25.11.2020, and pending finalization of the case, in the interest of justice and equity."

Company Appeal (AT)(CH) No.15 of 2021 Page | 3 and resultantly, suspended the Impugned Termination Letter dated 25.11.2020, ordered restoration of the Status quo as on 24.11.2020, and directed the consequential payment of remuneration to the Respondents No.1 and 2 (Petitioners) until further orders.

Appellants' Contentions:-

> 3. The Learned Counsel for the Appellants submits that the 'Impugned Order of the 'Tribunal' dated 10.03.2021 in C.P.No.219/2020 in suspending the Termination Letter dated 25.11.2020 in and by which the First Appellant/Company had terminated the employment of the First Respondent and restoration of status quo as on 24.11.2020 was ordered etc. is an illegal one, because of the fact that the said order is in the character of a 'Mandatory Injunction' and as such, the same suffers from 'non-application of mind'.
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> 4. Advancing his arguments, the Learned Counsel for the Appellants' contends that the 'Impugned Order is a non-speaking one and also in violation of the principles of natural justice, as per Section 424 of the Companies Act, 2013.
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> 5. It is represented on behalf of the 'Appellants' that the 'Impugned Order' passed by the 'Tribunal' tantamount to granting the main reliefs sought for and hence, the same is to be set aside. Moreover, the argument is advanced on behalf of the 'Appellants' that the validity of an order is to be judged by the reasons mentioned in it and cannot be supplemented by fresh reasons. Added further, it is the stand of the Appellants that 'Employment Agreement' is not to Company Appeal (AT)(CH) No.15 of 2021 Page | 4 be specifically enforced and that apart, a 'stay' on the termination of 'Employment Agreement' cannot be granted.
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> 6. The Learned Counsel for the Appellants' points out that the First Respondent/First Petitioner was an employee of the First Appellant's Company, as per 'Employment Agreement' dated 02.07.2013 and that, an 'Employment Contract' being for a 'personal service' and requirements stand supervision, cannot be specifically enforced in the 'eye of law'. Moreover, Clause 9 of the 'Employment Agreement' dated 02.07.2013 clearly mentions that the Agreement is terminable at will and cannot be specifically enforced as per Section 14(d) of the Specific Relief Act, 1963.

7. The Learned Counsel for the Appellants comes out with the plea that an 'employment' is not a 'Shareholder Rights', and hence removal from the employment cannot be projected as an act of "Oppression". Also, that the 'Tribunal' cannot substitute the decision of the Board in this regard. Besides this, the contention advanced on behalf of the Appellants is that the 'Tribunal' should have decided the Applications filed under Section 8 of the Arbitration and Conciliation Act, 1996 at the first instance. As a matter of fact, two Applications were filed by the Appellants in February 2021 and the Respondents No.1 and 2/Petitioners had filed objections on 08.03.2021.

8. The Learned Counsel for the Appellants takes stand that the First Respondent/First Petitioner had already invoked the Arbitration Clause and filed Company Appeal (AT)(CH) No.15 of 2021 Page | 5 an Application under Section 9 of the Arbitration and Conciliation Act, 1996 and in fact, the Respondents No.1 and 2/Petitioners has repeatedly sought to rely on the 'Joint Venture Agreement' both in the Petition and their 'Statement of Objections' to the I.A.No.130 of 2021 filed before this 'Tribunal'.

9. On behalf of the Appellants, it is brought to the notice of this 'Tribunal' that the reliefs claimed under Section 9 of the Arbitration and Conciliation Act, 1996 in the I.A.No.130 of 2021 are similar to the prayers sought for in this Petition and that, the said Application was 'dismissed as withdrawn' on 30.01.2021 and therefore, the Respondents No.1 and 2/Petitioners are indulging in 'Forum Shopping'.

10.The categorical plea of the Appellants is that the 'Tribunal' should have considered the 'Applications' seeking reference to 'Arbitration' which were filed early to the First Statement on the substance of 'dispute', before considering any interim or final reliefs claimed. Continuing further, it is the submission of the Learned Counsel for the Appellants that the First Respondent/First Petitioner is not a member of the First Appellant/Company and cannot maintain a Petition under Section 241, 242 of the Companies Act, 2013.

11.Expatiating his submissions, the Learned Counsel for the Appellants projects an argument that only a 'Member' as per Section 2(55) of the Companies Act, 2013, fulfilling the requirements under Section 244 of the Companies Act, 2013 can maintain Petition under Section 241 of the Act.

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12.The Learned Counsel for the Appellants contends that 'Tribunal' should have decided firstly, whether the First Respondent/First Petitioner is a Member of the First Appellant/Company and only then an Interim or Final Reliefs be considered by it. The other argument advanced on behalf of the Appellants is that the Claim of the Second Respondent/Second Petitioner that she was holding the shares of the First Appellant/Company, on behalf of the First Respondent/First Petitioner

cannot be considered as per Section 89 of the Companies Act, which speaks of "declaration in respect of beneficial interest in any share."

13.The Learned Counsel for the Appellants submits that the First Respondent/First Petitioner is defaming the Appellants in the eyes of employees, general public, and is publishing the internal matters of the First Appellant/First Respondent's conduct and that the First Respondent/First Petitioner is trying to set his own house of fire for not getting what he perceives as legitimately due to him, does not deserves to continue as part of the Company either as an Employee of a Director and therefore not entitled to obtain any relief.

I. Appellants' Decisions:

> (a) The Learned Counsel for the Appellants cites the decision of Hon'ble Supreme Court in J.M. Housing Limited and Ors. V. Surender Kumar Gupta and Ors. 2020 SCC Online NCLAT 825 wherein at Paragraphs 63 and 64 it is observed as under:-
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> 63. "When an order has adverse consequences, the Competent Authority/Court of Law/Tribunal before passing the order must provide an adequate opportunity of hearing to the concerned person(s). If reasons are given in an order then, when the matter is taken up before a higher forum, there will be an opportunity to examine the concerned order in regard to the manner and quality of exercise undertaken at the time of passing it. A reasoned order will have an appearance of justice.

An unreasoned order will not be of any assistance to the affected person(s)and that the absence of reasons in an order will make it susceptible to challenge before an Appellate Forum.

64. If reasons are assigned in an order then it will point out fairness in decision making and also that the affected person(s) will come to know as to why the said order was passed. In this connection, this Tribunal pertinently points out that Section 424 of the Companies Act says that the 'Tribunal' and the 'Appellate Tribunal' shall be guided by the principles of 'Natural Justice'. In fact, the Tribunal can regulate its own procedure."

(b) The Learned Counsel for the Appellants refers to the decision of Hon'ble Supreme Court in Special Director v. Mohd. Ghulam Ghouse, reported in (2004) 3 SCC at page 443 wherein at Para 6 it is observed as under:

> "In the instant case, the High Court has not indicated any reason while giving interim protection. Though, while passing interim orders, it is not proper to elaborately deal with the merits, it is certainly desirable and proper for the High Court to indicate the reasons which have weighed with it in granting such an extraordinary relief in the form of interim protection. This, admittedly, has not been done in the case at hand."

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(c) The Learned Counsel for the Appellants relies on the decision in Ruby General Hospital Limited v. Sarkar Soumitra and Company, reported in MANU/WB/0456/2013; wherein at Paragraph 6 it is observed as under:

> "Perusing the impugned order dated 24th January, 2013 it is evident that the first Appellate Court granted ad interim order of injunction as it found that there was strong prima facie case which the Trial Court had declined to grant as the cause of action arose on 24 th September, 2012. On a reading of the said impugned order it appears that no specific reason has been given in its support. Rather a general observation has been made that it has been granted as there "is a strong prima facie case"

which was "on perusal of the injunction application and the documents annexed". That evidently there was non-application of mind is palpable as while passing the impugned order "schedule of the property" was referred to which the plaint does not contain. Though the Supreme Court in Morgan Stanley Mutual Fund (supra) had held that "Asa principle, ex parte injunction could be granted only under exceptional circumstances" (paragraph 19) and had enumerated certain factors in which such injunction can be granted, in the instant case, however, no cogent reason, far from any specific reason, has been recorded while passing the order of injunction. In this context it is appropriate to refer to the judgment in Secretary and Curator, Victoria Memorial Hall (supra) wherein it has been held that "Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher/forum" (paragraph 32). Though the Apex Court in Shiv Kumar Chadha (supra) had held that "When the statute itself requires reasons to be recorded, the Courts cannot ignore that requirement by saying that if reasons recorded, it may amount to Company Appeal (AT)(CH) No.15 of 2021 Page | 9 expressing an opinion in favour of the plaintiff before hearing the defendant" (paragraph 33) and though in Supratik Ghosh (supra) it has been held that "A bare reading of Rule 3 shows that the Court shall in all cases before granting an injunction, direct notice of the application for the same to be given to the opposite Party. But one exception has been made to this Rule. The exception is where it appears to the Court that the object of granting the injunction would be defeated by the delay, the Court may propose to grant an injunction without giving notice of the application to the opposite party and in such event the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay" (paragraph 13), yet in spite of the settled principles of law, the First Appellate Court chose not to give any cogent reason in support of the ad interim order passed. The principles of law laid down in paragraph 6 of the judgment in Estralla Rubber (supra) cited on behalf of the respondent furthers the case of the petitioner since if the order under challenge is sustained it would cause grave injustice as it is against the settled principles of law with regard to proviso to Order 39 Rule 3 of the Code. The judgment of NEPC Micon Ltd. (supra) is not applicable to the instant case in hand as therein the Division Bench of the High Court was considering an order passed by a learned Single Judge of the High Court in the light of the unconditional power of the High Court on its Original Side under Chapter XX Rule 3 of the Original Side Rules."

(d) The Learned Counsel for the Appellants points out the decision of Hon'ble Supreme Court in Secretary and Curator, Victoria Memorial Hall v Howrah Ganatantrik Nagrik Samity and others reported in (2010) 3 Supreme Company Appeal (AT)(CH) No.15 of 2021 Page | 10 Court Cases at Page 732 at Special Page 744 wherein from paragraph 40 to 43 it is observed as under:

> "It is a settled legal proposition that not only an administrative but also a judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of justice-delivery system, to make known that there had been proper and due application of mind to the issue before the court and also as an essential requisite of the principles of natural justice. "The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind." (Vide State of Orissa v. Dhaniram Luhar and State of Rajasthan v. Sohan Lal) Para 41. "Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. (Vide Raj Kishore Jha v. State of Bihar((2003) 11 SCC 519), SCC p. 527, para 19; Vishnu Dev Sharma v. State of U.P.((2008) 3 SCC 172); SAIL v. STO((2008) 9 SCC 407), State of Uttaranchal v. Sunil Kumar Singh Negi((2008) 11 SCC 205):, U.P SRTC v. Jagdish Prasad Gupta((2009) 12 SCC 609), Ram Phal v. State of Haryana((2009) 3 SCC 258), Mohd. Yusuf v. Faij Mohammad((2009)3 SCC
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> 513) and State of H.P v. Sada Ram((2009)4 SCC 422).

42. Thus, it is evident that the recording of reasons is a principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as to why his application has been rejected.

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43. Indisputably, the High Court did not assign valid and good reasons for rejecting the recommendation made by the Expert Committee for allowing the construction in question in its judgment and order dated 28.09.2007 nor the reasons have been recorded in the impugned judgment dated 21.8.2009 rejecting the application for modifications of the earlier order. Thus, in view of the above, the orders, so far as this particular issue is concerned, remain unsustainable".

(e) The Learned Counsel for the Appellants refers is made to the decision of Hon'ble Supreme Court Sant Lal Gupta v. Modern Coop. Group Housing Society Ltd., (2010) 13 SCC 336 at page 337 wherein at Paragraph 27 it is observed as under:

> "Not only administrative but also judicial orders must be supported by reasons recorded. While deciding an issue, the court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the court to record reasons while disposing of the case. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is the principle of natural justice and every judicial order must be supported by reasons recorded in writing."

(f) The Learned Counsel for the Appellants in the decision in Kishorsinh Ratansinh Jadeja v. Maruti Corpn., reported in (2009) 11 Supreme Court Cases at Page 229 at Special Page 237-238 wherein at paragraph 33-36, it is observed as under:

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> 33. "As will be apparent from the order itself, the same was passed in great haste without even giving the owners of the lands an opportunity of contesting the application. In fact, the application was disposed of by a cryptic order which does not even contain any reason for passing the same.

The Division Bench has merely indicated that to avoid further complications and multiplicity of litigation, the order was being passed not to raise constructions on the disputed lands, without even taking into consideration the several transferees who were to be adversely affected by such an order. Even the appellant herein and Respondents 2 to 7 were not given an opportunity of filing any affidavit to counter the statements and allegations made in the application for injunction.

36. It is well established, that while passing an interim order of injunction under Order 39 Rule 1 and 2 CPC, the court is required to consider three basic principles, namely

(i) prima facie case;

(ii) balance of convenience and inconvenience; and

(iii)irreparable loss and injury.

None of the said principles have been considered by the High Court while passing the second and third interim orders dated 22-4-2008 and 7-5-2008 nor has the High Court, taken into account, the long silence on the part of Respondent 1 Corporation in filing a suit after 19 years."

(g) The Learned Counsel for the Appellants in the decision of Hon'ble Supreme Court State Bank of Patiala v. Vinesh Kumar Bhasin reported in (2010) 4 Supreme Court Cases at Page 368 at Special

page 375 wherein at paragraph 22

- 23 it is observed as under:

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> 22."Mandatory interim orders are issued in exceptional cases, only where failure to do so will lead to an irreversible or irretrievable situation. In service matters relating to retirement, there is no such need to issue exparte mandatory directions. When the writ petition disclosed that the respondent was retired after thirty years of service in accordance with the Bank's regulations, there was no question of any irreparable injury or urgency.
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> 23. On the facts and circumstances, we are of the view that the High Court while directing notice on the writ petition filed by the respondent for implementation of the interim direction of the Chief Commissioner for Persons with Disabilities ought not to have issued an exparte order which virtually amounts to allowing the writ petition without hearing the Bank.

The appropriate course would have been to give an opportunity to the Bank to explain its stand, particularly because the Court itself felt a doubt about the jurisdiction of the Chief Commissioner and its own jurisdiction. The Chief Commissioner issued the order at New Delhi. The respondent was working at Dehradun and was retired from service at Dehradun. Apparently, no part of cause of action arose in the State of Uttar Pradesh. Be that as it may. We therefore hold that the order dated 12-1-2007 is unsustainable."

(h) In the decision of Hon'ble Supreme Court Dorab Cawasji Warden v. Coomi Sorab Warden and Ors., (1990) 2 Supreme Court Cases at Page 117 at Special Page 126-127 wherein at Paragraph 16-17 it is observed as under:

> "The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken Company Appeal (AT)(CH) No.15 of 2021 Page | 14 from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guideline. Generally stated these guidelines are:
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> (1) The plaintiff has a strong case of trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the second judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

(i) In the decision of Hon'ble Supreme Court in Mohinder Singh Gill and anr. v. Chief Election Commr., New Delhi and ors. (1978) 1 SCC at Page 405 at Special Page 417 wherein at Paragraph 8 it is observed as under:

"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning Company Appeal (AT)(CH) No.15 of 2021 Page | 15 may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose. J. in Gordhandas Bhanji:

Public orders, publicly made. In exercise of a statutory authority cannot be construed in the light of explanation subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older."

II APPELLANTS' CITATIONS:

15. In the decision of Hon'ble Supreme Court in SDU Travels Private Limited v. Vipin Sharma reported in (2017) SCC Online Del 8177 wherein at paragraphs 9 to 11 it is observed as under:

Para 3. "There is no dispute that the contract between the parties is a contract of private employment i.e. a contract is not a contract of public employment i.e. a contract of the respondent/plaintiff offering any services to an entity which is a State under Article 12 of the Constitution of India. With respect to private contracts of personal service it is settled law that contracts of personal service are not enforceable.

> This conclusion is derived from a reading of Section 14 of the Specific Relief Act, 1963. Once there cannot be a decree for specific performance of a contract of personal service no injunction can be granted which has the effect of continuing the personal service vide Section 41(e) of the Specific Relief Act. Therefore, in contracts of personal service which fall under the realm of private contracts and not public contracts, even if there is a breach of contract the maximum entitlement of an employee is for damages i.e not for specific performance of continuation of the contract of service.
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> Para 9. "It is also important to note that Courts do not grant injunctions to direct continuation of a contract which by its terms is determinable vide Sections 14(1)(c) and 41(e) of the Specific Relief Act. For this additional reason also the court below could not have passed the impugned order granting injunction of continuation of Company Appeal (AT)(CH) No.15 of 2021 Page | 16 services inasmuch as by Clause 5 the contract of services was determinable by a three months notice.
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> Para 10. Clearly, therefore, the trial court has committed a complete illegality, to say the least, in allowing the interim injunction application under Order XXXIX Rule 1 and 2 CPC filed by the respondent/plaintiff by staying the termination of services and which has the effect of continuation of service of the respondent/plaintiff in a private contact and against the categorical ratios of the judgment of the Supreme Court in S.S. Shetty (Supra) and further the ratio of the judgment of this Court in the case of L.M. Khosla (supra) and Sections 14(1)(c) and 41(e) of the Specific Relief Act.

Para 11. Also, the court below has committed a complete illegality in grating the final relief of the suit by way of an interim order, that too by continuing a private contract of personal service, although, the issue of alleged illegal termination pleaded by the respondent/plaintiff was strongly contested by the appellant/defendant in terms of the provisions of the service contract itself as also the ratio of the judgments of the Supreme court as also this Court. In such a case the court below should not have granted the final relief prayed in the suit by way of the impugned interim order."

16.In the decision of Hon'ble Supreme Court in L.M. Kholsa v. Thai Airways, 2012 SCC online Del. at Page 4019 wherein at paragraph 8 it is among other things observed as under:

> 8. ..... , the following-conclusions in law emerge: -
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> (i) "A contract of private employment is not similar to the public employment and in such private employment there is no scope of applicability of the principles of administrative law/public law.
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> (ii) A contract of employment which provides termination of services by one month's notice, then, at best the employee will only be entitled to one month's pay in terms of the employment contract. An employee is not entitled to any relief of continuation in services or pay with consequential benefit for alleged remaining period of services till

the date of his superannuation.

(ii) As per the provision of Section 14(1)(c) of the Specific Relief Act, 1963, a contract which is determinable in nature cannot be specifically enforced. Since the service contract in the present case is determinable by one month's notice there does not arise the question of giving of any reliefs which tantamount to enforcement of a determinable contract. As per Section 14(1)(6), a contract of personal service cannot be enforced when the employer is not the Government or "State" as per Article 12 of the Constitution of India.

Company Appeal (AT)(CH) No.15 of 2021 Page | 17 Plaintiff has in fact received one month's pay and therefore his claim will stand satisfied in, law and he is not entitled to any reliefs as prayed for in prayer clauses in the suit."

17.In the decision of Hon'ble Supreme Court in GE Capital Transportation Financial Services Ltd. v. Tarun reported in (2012) SCC Online Delhi at Page 1684 wherein at paragraphs 10 to 13 it is observed as under:

Para 10. "Whatever be the language of the prayer clauses of the plaint, and whatever be the ground of cause of action pleaded, the sum and substance of the cause of action in the plaint is for re-employment and continuation of employment with service benefits till the age of 60 years. In effect, therefore there is sought specific performance of the contractual services and which is impermissible in law. I may note that the contracts of personal service are only enforceable where the employer is a Government company or an arm of the State as per Article 12 of the Constitution of India. AS per Section 14 (1)(6) of the Specific Relief Act, 1963, a contract for personal service cannot be enforced.

Para 11. In fact, the subject suit was also barred by Section 14(1)(c) of the Specific Relief Act, 1963 which provides that the contract which is in its nature determinable, cannot be specifically enforced. I have referred to the fact that the contract was determinable by a one month's notice as per clause 7 of the terms and conditions of the letter dated 21.4.1998 and therefore the contract which was determinable by one month's notice cannot be specifically enforced. What cannot be done directly cannot be done indirectly i.e. if there cannot be specific performance of the contract, there cannot be declaration and injunction to continue such a service contract. Section 41(e) of the Specific Relief Act, 1963 provides that injunction will not be granted to prevent breach of the contract, performance of which could not be specifically enforced.

Para 12. Therefore, looking at the matter from the point of view of the contract of personal service not being enforceable under Section 14(1)(b) of the Specific Relief Act, 1963, the contract being determinable in nature and hence cannot be enforced as per Section 14(1)(c) of the Specific Relief Act, 1963 or that injunction could not be

granted to prevent breach of a contract which cannot be specifically enforced, the suit was clearly barred and not maintainable. The judgment of the trial Court does not refer to the binding provisions of Sections 14(1)(b), (c) and 41(e) of the Specific Relief Act, 1963. To complete the discussion on this aspect, I would once again refer to the recent judgment of the Supreme Court in the case of Binny Ltd. (supra) and which specifically provides that in private contracts i.e. in Company Appeal (AT)(CH) No.15 of 2021 Page | 18 strict contractual matters, there does not arise the issue of applicability of Administrative Law principles.

Para 13. I have already stated above that even presuming there was breach of contract, at best reasonable damages can be granted and once there is a clause for termination of services by one month's notice, it can only be one month's notice which can be treated as reasonable damages inasmuch as parties understood the period for obtaining of an alternative employment as a one month's notice period-vide SS shetty's case (supra)."

18.In the decision of Hon'ble Supreme Court in Nandganj Sihori Sugar Rae Bareli & anr. v. reported in (1991) 3 SCC 54 at special page 59 & 60 wherein at paragraph 10 it is observed as under:

Para 10. "A Contract of employment against cannot ordinarily be enforced by or an employer. The remedy is to sue for damages. (See Section 14 read with Section 41 of the Specific Relief Act; see Indian Contract and Specific Relief Acts by Pollock and Mulla, 10th edn., page 983). The grant of specific performance is purely discretionary and must be refused when not warranted by the ends of justice. Such relief can be granted only on Sound legal principles. In the absence of any statutory requirement, Courts do not ordinarily force an employer to recruit or retain in service an employee not required by the employer. There are, of course, certain exceptions to this rule, such as in the case of a public servant dismissed from service in Contravention of Article 311 of the Constitution; reinstatement of a dismissed worker under the Industrial Law, a statutory body acting in breach of statutory obligations, and the like. (S.R. Tiwari v. District Board, Agra(AIR 1964 SC 1680: (1964)3 SCR 55): Executive Committee of U.P. State Warehousing Corporation v. C.K Tyagi((1969) 2 SCC 838) (1970) 2 SCR 250: Executive Committee of Vaish Degree College, Shamli v. Lakshmi Narain (1976) 2 SCC 58) : (1976) SCC (L & S), 176, see Halsbury's Laws of England, 4th edn., Volume 44, paragraphs 405 to 420."

19.In the decision of Hon'ble Supreme Court in Executive Committee of Vaish Degree College, Shamli & ors. v. Lakshmi Narain & ors reported in 1976 (2) SCC 58 at Special Page 59 at paragraph 18 it is held as under:

"A contract of personal service cannot ordinarily be specifically enforced and a court Normally would not give a declaration that the contract the employee, even subsists and be after having been removed from service can be deemed to in service against the will and consent of the employer. This rule, however, is subject to three well

> recognised exceptions -- (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India: (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law and (ii) Company Appeal (AT)(CH) No.15 of 2021 Page | 19 where a statutory body acts in and being in breach or violation of the mandatory provisions of the statute." (Para 18)

20.In the decision of Hon'ble High Court of Himachal Pradesh in Rohit Kumar V Tata Tele Services reported in MANU/HP/0605/2017 at paragraph 14 to 21 and 24, it is observed as under:

> 14. "Obviously, therefore, there cannot be a decree for performance of the contract and even if there is a breach of contract, the maximum entitlement of an employee would be for damages.
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> 15. In S.S. Shetty v. Bharat Nidhi Ltd., MANU/SC/0080/1957: AIR 1958 SC 12, the Hon'ble Supreme Court held that in case of illegal termination of employee by a private employer, at best the employee is entitled to the salary for the notice period.
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> 16. In Binny Ltd. v. V. Sadasivan MANU/SC/0470/2005 (2005) 6 SCC 657, the Hon'ble Supreme Court held that public policy principles or administrative law principles do not apply to private employment. Employment in private sector is governed by the terms and conditions of the employment.
>
> 17. Therefore, what cannot be done directly cannot be permitted to be done indirectly i.e. if there cannot be any specific performance of the contract, obviously, there cannot be a declaration and injunction to continue such a service contract.
>
> 18. As to contract of personal service involving the relationship of master or servant, Halsbury lays down "A judgment for specific performance of a contract for personal work or services is not pronounced, either at the suit of the employer or the employee. The Court does not seek to compel persons against their will to maintain continuous personal and confidential relations. The aforesaid para was quoted with approval by the Hon'ble Supreme Court in Nandganj Sihori Sugar v.

Badi Nath Dixit, MANU/SC/0350/1991 AIR 1991 SC 1525 at page 1528. However, this rule is not absolute and subject to well known exceptions.

19. A contract of employment cannot ordinarily be enforced by or against an employer. The remedy is to sue for damages. (Refer: Vaish Degree College v. Lakshmi Narain, MANU/SC/0052/1979: AIR 1976 SC888)

20. When the relationship is one of master and servant, a suit for declaration that an employee is still in service, the employment having been terminated is hit by Section 14(1)(b) of the Specific Relief Act and is not tenable. (Refer: 5.R. Tiwari v.

Company Appeal (AT)(CH) No.15 of 2021 Page | 20 District Board, Agra MANU/SC/0223/1963: AIR 1964 SC 1680 and Executive Committee U.P. State v. Chandra Kiran Tyagi, MANU/Sc/0499/1969 AIR 1970 SC 1244).

21. Thus, it can be taken to be well settled that a contract of private employment is not similar to the public appointment and in such private employment there is no Scope of applicability of public policy principles or administrative law principles.

24. In view of the above principle, the suit filed by the plaintiff was clearly misconceived apart from being not maintainable for want of jurisdiction, but on account of reliefs sought therein. The substantial question of law is answered against the plaintiff."

21.In the decision of Hon'ble Supreme Court in Sirsi Municipality by its President V Cecila Kom Francis Tellis reported in (1973) 1 SCC 409 at special page 413 wherein at paragraph 15 to 18, it is observed as under:

> 15. "The cases of dismissal of a servant fall under three broad heads. The first head relates to relationship of master and servant governed purely by contract of employment.

Any breach of contract in such a case is enforced by a suit for wrongful dismissal and damages. Just as a contract of employment is not capable of specific performance similarly breach of contract of employment is not capable of finding a declaratory judgment of subsistence of employment. A declaration of unlawful termination and restoration to service in such a case of contract of employment would be indirectly an instance of specific performance of contract for personal services. Such a declaration is not permissible under the Law of Specific Relief Act.

16. The second type of cases of master and servant arises under Industrial law. Under that branch of law a servant who is wrongfully dismissed may be reinstated. This is a special provision under Industrial law. This relief is a departure from the reliefs available under the Indian Contract Act and the Specific Relief Act which do not provide for reinstatement of a servant.

17. The third category of cases of master and servant arises in regard to the servant in the employment of the State or of other public or local authorities or bodies created under statute.

18. Termination or dismissal of what is described as a pure contract of master and servant is not declared to be a nullity however wrongful or illegal it may be. The reason is that dismissal in breach of contract is remedied by damages. It the case of servant of the State or of local authorities or statutory by bodies, courts have declared in appropriate cases the dismissal to be invalid if the dismissal is contrary to rules of natural justice or if the dismissal is in violation of the provisions of the statute. Apart from the intervention of Company Appeal (AT)(CH) No.15 of 2021 Page | 21 statute there would not be a declaration of nullity in the case of termination or dismissal of a servant of the State or of other local authorities or statutory bodies."

22.In the decision of the Hon'ble Supreme Court in Pearlite Liners (P) Ltd V Manorama Sirsi reported in (2004) 3 SCC 172 special page 175 & 176 at paragraph 7 & 8, it is observed as under:

> 7. "Learned counsel for the appellant argued that the prayers in the suit Seek reinstatement of the plaintiff as an employee of the defendant Company which really amounts to specific performance of a contract of personal service which is specifically barred under the provisions of the Specific Relief Act. Il is a well-settled principle of law that a contract of personal service cannot be specifically enforced and a court will not give a declaration that the contract subsists and the employee continues to be in service against the will and consent of the employer. This general rule of law is subject to three well-recognised exceptions: (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the industrial law;

and (iii) where a statutory body acts in breach of violation of the mandatory provisions of the statute. (Per Executive Committee of Vaish Degree College v. Lakshmi Narain.) (1976) 2 SCC 58)

8. The present case does not fall in any of the three exceptions. It is neither a case of public employment so as to attract Article 311 of the Constitution of India nor is a case under the Industrial Disputes Act. The defendant is not a statutory body. There is no statute governing her service conditions. The present is a case of private employment which normally would be governed by the terms of the contract between the parties. Since there is no written contract between the parties, the dispute cannot be resolved with reference to any terms and conditions governing the relationship between the parties. The plaintiff has neither pleaded nor has there been any effort on her part to show that the impugned transfer order was in violation of any term of her employment. In the absence of a term prohibiting transfer of the employee, prima facie, the transfer order cannot be called in question. The plaintiff has not complied with the transfer order as she never reported for work at the place where she was transferred. As a matter of fact, she also stopped attending the office from where she was transferred. Non- compliance with the transfer order by the plaintiff amounts to refusal to obey the orders passed by superiors for which the employer can reasonably be expected to take appropriate action against the employee concerned. Even though it is a case of private employment, the management proposed to hold an enquiry against the delinquent officer, that is, the plaintiff. In case of such insubordination, termination of service would be a possibility. Such a decision purely rests within the discretion of the management. An injunction against a transfer order or against holding a departmental enquiry in the facts of the present case would clearly amount to imposing an employee on an employer, or to enforcement of a contract of personal service, which is not permissible under the law. An Company Appeal (AT)(CH) No.15 of 2021 Page | 22 employer cannot be forced to take an employee with whom relations have reached a point of complete loss of faith between the two".

23.In the decision of Hon'ble Supreme Court in Executive Committee UP Warehousing Corporation V Chandra Kiran Tyagi reported in (1969) 2 SCC 838 at special page 848 and 850 wherein at paragraph 20 & 23, it is observed as under:

20. "From a review of the English decisions, referred to above, the position emerges as follows: The law relating to master and servant is clear. A Contract for personal service will not be enforced by an order for specific performance nor will it be open for a servant to refuse to accept the repudiation of a contract of service by his master and say that the contract has never been terminated. The remedy of the employee is a claim for damages for wrongful dismissal or for breach of contract. This is the normal rule and that was applied in Barber's case (supra) and Francis case (supra). But, when a statutory status is given to an employee and there has been a violation of the provisions of the statute while terminating the services of such an employee, the latter will be eligible to get the relief of a declaration that the order is null and void and that he continues to be in service, as it will not then be a mere case of a master terminating the services of a servant. position in Vine's case (supra).

23. From the two decisions of this Court, referred to above, the position in law is that no declaration to enforce a contract of personal service will be normally granted. But there are certain well-recognized exceptions to this rule and they are: To grant such a declaration in appropriate cases regarding (1) a public servant, who has been dismissed from service in contravention of Article 311; (2) reinstatement of a dismissed worker under Industrial Law by Labour or Industrial Tribunals; (3) a statutory body when it has acted in breach of a mandatory obligation, imposed by statute."

III APPELLANTS' CASE LAWS:

24.In the decision of Hon'ble Supreme Court in Percept D' mark India (P) Ltd V Zaheer Khan and another reported in (2006) 4 SCC 227 at special page 247 and 248 wherein at paragraph 64, it is observed as under:

64 "Assuming without admitting that the negative covenant in clause 31(b) is not void and is enforceable, it was nevertheless inappropriate, if not impermissible, for the Single Judge to grant an injunction to enforce it at the interim stage, for the following reasons:

(i) Firstly, grant of this injunction resulted in compelling specific performance of a contract of personal, confidential and fiduciary service, which is barred by clauses (b) Company Appeal (AT)(CH) No.15 of 2021 Page | 23 and (d) of Section 14(1) of the Specific Relief Act, 1963.

(ii) Secondly, it is not only barred by clause (a) of Section 14(1) of the Specific Relief Act, but this Court has consistently held that there shall be no specific performance of contracts for personal services.

(iii) Thirdly, this amounted to granting the whole or entire relief which may be claimed at the conclusion of trial, which is impermissible. (Bank of Maharashtra v.

> Race Shipping & Transport Co. (P) Ltd. (SCC paras 10-12).
>
> (iv) Fourthly, the Single Judge's order completely overlooked the principles of balance of convenience and irreparable injury. Whereas Percept (the appellant) could be fully compensated in monetary terms if they finally succeeded at the trial, Respondent 1 could never be compensated for being forced to enter into a contract with a party he did not desire to deal with, if the trial results in rejection of Percept's claim.

(Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan ((2002) 5 SCC 760)

(v) The principles which govern injunctive reliefs in such cases of contracts of a personal or fiduciary nature, such as management and agency contracts for sportsmen or performing artistes, are excellently summarised in a judgment of the Chancery Division in Page One Records Lid. v. Britton((1968) 1WLR 157). In this case it was held that, although the appellant had established a prima facie case of breach of contract entitling them to damages, it did not follow that entire of them were entitled to the injunction sought; that the totality of the obligation between the parties gave rise to the fiduciary relationship and the injunction would not be granted, first, because the performance of the duties imposed on the appellant could not be enforced at the instance of the defendants and, second, because enforcements of the negative covenants would be tantamount to ordering specific performance of this contract of personal services by the appellant on pain of the group remaining idle and it would be wrong to put pressure on the defendants to continue to employ in the fiduciary capacity of a manager and agent a someone in whom he had lost confidence".

25.In the decision of Hon'ble Supreme Court in Indian Oil Corporation V Amristsar Gas Service and Others reported (1991) 1 SCC 533 at special Page 542 wherein at paragraph 12 & 13, it is observed as under:

> 12. "The arbitrator recorded finding on Issue No. 1 that termination of distributorship by the appellant-Corporation was not validly made under clause 27.

Thereafter, he proceeded to record the finding on Issue No. 2 relating to grant of relief and held that the plaintiff-respondent 1 was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of d distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The Company Appeal (AT)(CH) No.15 of 2021 Page | 24 reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the agreement and, therefore, the plaintiff- respondent 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under:

> "This award will, however, not fetter the right of the defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises."

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-Section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinable'. In the present case, it is not necessary to refer to the other clauses of subSection (1) of Section 14, which also may be attracted in the present case since clause

(c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant- Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases. The grant of this relief in the award cannot, therefore, be sustained.

13. Another relief granted in the award is the price of 224 cylinders and 384 regulators taken away by the appellant-Corporation from the C plaintiff-respondent 1. These articles did not belong to the plaintiff respondent 1 and were the property of the appellant-Corporation and, therefore, the direction to pay its price to the plaintiff-respondent 1 also discloses an error of law apparent on the face of the award. The appellant-Corporation has also been directed in the award to return the amounts of two bank drafts of Rs 15,580.83 each dated March 8, 1983 d and March 11, 1983 on the ground that no supplies were made to the plaintiff-respondent 1 against these amounts. This direction is based on a finding of fact which cannot be gone into and, therefore, the same cannot be interfered with."

26.In the decision of Hon'ble Supreme Court in Her Highness Maharani Shantidevi P Gaikwad V Savjibhai Haribhai Patel and others (2001) 5 SCC 101 at special page 130 wherein at paragraph 56 to 58, it is observed as under:

> Company Appeal (AT)(CH) No.15 of 2021 Page | 25 Para 56. ....."it is clear that this Court did not accept the contention that the clause in the insurance policy which gave absolute right to the Insurance Company was void and had to be ignored. The termination as per the term in the insurance policy was upheld. Under general law of contracts any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract. The acceptance of the argument regarding invalidity of contract on the ground that it gives absolute power to the parties to terminate the agreement would also amount to interfering with the rights of the parties to freely enter into the contracts. A contract cannot be held to be void only on this ground. Such a broad proposition of law that a term in a contract

> giving absolute right to the parties to cancel the contract is itself enough to void it cannot be accepted.
>
> 57. In view of the above discussion, we find force in the contention that the agreement in question was terminable before delivery of possession; it was so determined and to the agreement clause (c) of Section 14(1) of the 1963 applies.

Therefore, agreement cannot be Specific Relief Act, specifically enforced.

Para 58. It was further contended by Mr Nariman that the agreement is not specifically enforceable also in view of clause (d) of sub-Section (1) of Section 14 of the Specific Relief Act, 1963. This provision provides that a contract the performance of which involves the performance of a continuous duty which the court cannot supervise, is not specifically enforceable. There is considerable force in the submission of the learned counsel. Even the High Court had substantially proceeded on the basis that the implementation of the Scheme may require supervision but held that it can be supervised by the Competent authority. Having regard to the nature of the Scheme and the facts and circumstances of the case, to our mind it is clear that the performance of the contract involves continuous supervision which is not possible for the Court. After repeal, such continuous supervision cannot be directed to be undertaken by the competent authority as such an authority is now non-existent."

27.In the decision of Hon'ble Supreme Court in Kohinoor Specialty Foods India Private Limited V Kohinoor Foods Limited and others reported in (2016) SCC Online Del 1371 wherein at paragraph 59, it is observed as under:

> Para 59. "Thus, I am clear in my mind that the operation after termination of agreement cannot be stayed which would be wholly contrary to the provisions of the Specific Relief Act, 1963. Even if the termination of the agreement was found to be illegal and unlawful, in case of terminable contract, the only relief which could have been granted is damages/compensation for the period of notice as provided in the contract. The terms of contract, under these circumstances, as per the respondents in their defence, which are relied upon, cannot be enforceable under Section 14(1)(a) of the Specific Relief Act, 1963. Besides the above, no injunction can be granted in view of Section 41 (e) of the said Act as the contract between the parties is determinable and Company Appeal (AT)(CH) No.15 of 2021 Page | 26 already terminated. Whether such termination is valid or not has to be gone into and decided only in the arbitral proceedings. The question as to whether the contract is specifically determinable and consequently, the same cannot be specifically enforced, is a question that would arise for consideration before the arbitral tribunal. Then at this stage, it is not proper to decide the said issue as the termination of the contract against the respondents cannot revived'.
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> IV APPELLANTS' DECISIONS:

28. (A) In the decision of Hon'ble Supreme Court in Tata Consultancy Services Limited V Vyrus Investments Pvt Limited and others reported in (2021) SCC Online 272 wherein at paragraph 111 to 121, it is observed as under:

> 111. "In fact the real reason why the complainant companies thought fit, quite tactfully, not to press for the Reinstatement of CPM is that the mere termination of Directorship cannot be projected as something that would trigger the just and equitable clause for winding in this up or to grant relief under Sections 241 and 242. A useful reference can be made in the regard to the decision of this Court in Hanuman Prasad Bagri v. Bagress Cereals Pvt. Ltd.2.
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> 112. Tt must be remembered: (i) that a provision for inclusion of a representative of small shareholders in the Board of Directors, is of a recent origin under Section 15L of the Companies Act, 2013 and it is applicable only to a listed company; (I) that Tata sons is not a listed Company; (iii) that the Articles of Association of Tata sons, to which the complainant companies, CPM and his father had subscribed, do not provide for or any representation; (iv) that despite there being no statutory or contractual obligation, Tata Sons inducted CPM's father as a director on the board in the year 1980 and continued him for a period of almost 25 years; (v) that CPM himself was inducted, again without reference to any statutory or contractual obligation, as a Director on the Board in August, 2006; and (vi) that within 6 years of such induction, CPM was identified as a successor to RNT and was appointed as Executive Deputy Chairman and elevated to the position of Executive Chairman
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> 113. It is an irony that the very same person who represents shareholders owning just 18.37% of the total paid up share capital and yet identified as the successor to the empire, has chosen to accuse the very same Board, of conduct, oppressive and unfairly prejudicial to the interests of the minorities. In support of such allegation, the complainant companies have pointed out certain business decisions taken during the period of more than 10 years immediately preceding the date of removal of CPM. That failed business decisions and the removal of a person from Directorship can never be projected as acts oppressive or prejudicial to the interests of the minorities, is too well settled. In fact it may be concede today by Tata sons that one important decision that the Board took on 16.03.2012 certainly turned out to be a wrong decision of a life time.

114. Therefore, the fact that the removal of CPM was only from the Executive Chairmanship and not the Directorship of the company as on the date of filing of the petition and the fact that in law, even the removal from Directorship can never be held to be an oppressive or prejudicial conduct, was sufficient to throw the petition under Section 241 out, especially since NCLAT chose not to interfere with the findings of fact on certain business decisions.

115. The subsequent conduct on the part of CPM in leaking his mail dated 25-10- 2016 to the Press and sending replies to the Income Tax Authorities enclosing 4 box even from the files, even while continuing as a Director, justified his removal even from the Directorship of Tata Sons and other group companies. A person who tries to set his own house on fire for not getting what he perceives as legitimately due to him, does not deserve to continue as part of any decision making body (not just the Board of a Company). It IS perhaps this realisation that made the complainant companies give up their original prayer. for restraining the company from removing CPM and singing a different tune seeking proportionate representation on the Board.

116. For assailing the decision to remove CPM from the Chairmanship of Tata Sons, it is contended (i) that Tata Group performed exceedingly well under his stewardship (ii) that the Nomination and Remuneration Committee for the Financial Year 2015-16 endorsed his performance and even recommended a pay hike and performance linked bonus; and (iii) that the Board unanimously approved these recommendations on 29.6.2016 just four months before his unceremonious removal.

117. First of all, the above contention is in direct conflict with the entire foundation on which the whole case of the complainant companies was erected. If CPM and the members of the Nomination and Remuneration Committee as well as the entire Board were on the same page till 29.6.2016 that the company was doing well under the stewardship of CPM, then there can be no allegation that the company's affairs were Conducted in a manner oppressive or prejudicial to the interest of anyone, namely the company or the minority, at least until 29.6.2016. On the contrary if the company's affairs have been conducted in a manner oppressive or prejudicial, even before 29.6.2016, the other members of the Board and CPM could not have formed themselves into a mutual admiration society to laud CPM's performance and CPM acknowledging that the company was doing well when he was in the driver's seat.

118. An important aspect to be noticed is that in a petition under Section 241, the Tribunal cannot ask the question whether the removal of a Director was legally valid and/or justified or not. The question to be asked is whether such a removal tantamount to a conduct oppressive or prejudicial to some members. Even in cases where the Tribunal finds that the removal of a Director was not in accordance with law before or was not justified on facts, the Tribunal cannot grant a relief under Section 242 unless the removal was oppressive or prejudicial.

119. There may be cases where the removal of a Director might have been carried out perfectly in accordance with law and yet may be part of a larger design to oppress or prejudice the interests of some members. It is only in such cases that the Tribunal can grant a relief under Section 242. The Company Tribunal is not a labour Court or an administrative Tribunal to focus entirely on the manner of removal of a person from Directorship. Therefore, the accolades received by CPM from the Nomination and Remuneration Committee or the Board of Directors on 29.6.2016, cannot advance his case.

120. A contention was raised that CPM's removal was a premeditated act, carried out at the behest of Tata Trusts and RNT and that the removal was not only contrary to Article 118, but also contrary to Article 105(a) read with the second proviso to Section 179(1) and Article 122(b).

121. As we have pointed out above, the validity of and justification for the removal of a person can never be the primary focus of a Tribunal under Section 242 unless the same is in furtherance of a conduct oppressive or prejudicial to some of the members. In fact the post of Executive Chairman is not statutorily recognised or regulated, though the post of a Director is. At the cost of repetition it should be pointed out that CPM as removed only from the post of (or designation as) Executive Chairman and not from the post of Director till the Company Petition was filed. But CPM himself invited trouble, by declaring an all out war, which led to his removal from Directorship."

(B) In the decision of Hon'ble Supreme Court in Raghunath Swarup Mathur and others V Har Swarup Mathur and others (1969) SCC Online ALL 292 wherein at paragraph 21 it is observed as under:

> 21 "As regards the claims of petitioner No. 1, as a former employee of the company, the petitioners only disclosed, in the petition, that the company had filed writ petitions against the orders of a labour court reinstating the petitioner, which were dismissed. But, other facts, that petitioner No. 1 had to subsequently retire, having attained the age of superannuation, that there was an arbitration award on the dispute arising on this question and on the claim for gratuity, and that a writ petition directed against that award was dismissed by this court, were revealed by the opposite parties.

The claims of petitioner No. 1, made in his capacity as a former employee only, who had worked as an engineer of the company, for an order of reinstatement and payment of gratuity to him, are not only shown to be concluded by previous orders in other proceedings but are utterly misplaced in proceedings under sections 397 and 398 of the Act which are only open to a member as a shareholder of the company. Such claims have nothing to do with claims for relief against any unfair or unjustifiable agreements which may have to be set aside or modified, under Section 402(d) and (e) of the Act, as necessary consequences of orders under sections 397 and 398 of the Act".

Company Appeal (AT)(CH) No.15 of 2021 Page | 29 V APPELLANTS' CITATIONS:

> i. In the decision of Hon'ble Supreme Court in Sundaram Finance and another v. T. Thangam reported in (2015)14 SCC Online wherein at Page 444 and 445 it is observed and held as under:
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> "In the present case, the respondent had filed a suit against the appellant. Duly complying with the procedure under Section 8 of the Arbitration Act, 1996 the appellant filed an application bringing to the notice of the trial court that in view of the agreement for arbitration between the parties regarding resolution of the disputes, the court did not have jurisdiction to try the case and the parties were to be

directed to the process of arbitration in terms of the agreement. Once an application in due compliance with Section 8 of the Arbitration Act, 1996 is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance with the procedure under the special statute. The general law should yield to the special law -- generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.

(Paras 3 and 13) "Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of Section 8 of the Arbitration Act, 1996 moves the court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, 1996 it is obligatory for the court to refer the parties too arbitration in terms of the agreement."

(Paras 8 and 10) ii. In the decision of Hon'ble Supreme Court in R.K. Roja v. reported in (2016) 14 SCC Online wherein at Page 275 at Special Page 276 and 277 at paragraphs 5 it is observed as under:

Para 5. "Once an application is filed under Order 7 Rule 11 CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (election petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement. In case the application is rejected, the defendant is entitled to file his written statement thereafter (see Saleem Bhai v. State of Maharashtra2). But once an application for rejection is filed, the court has to dispose of the same before proceeding Company Appeal (AT)(CH) No.15 of 2021 Page | 30 with the trial court. To quote the relevant portion from para 20 of Sopan Sukhdeo Sable case:

(2004) 3 SCC 137 PP 148-149) (does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word ""shall" is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant."

iii. In the decision of Hon'ble Supreme Court in Everest Holding Ltd. v. Shyam Kumar Srivatsava reported in (2008) 16 SCC Online wherein at Page 774 at Special Pages 781, 783 and 784 wherein at paragraphs 22, 25 and27 it is observed as under:

> Para 22. "Therefore, the present enquiry, which is entrusted to me in the present case, under the provisions of Section 11(6) of the Act would revolve around the aforesaid aspects which are dealt with in the aforesaid decision. There is no dispute raised by the respondents that this Court has no jurisdiction to decide the issues raised in the petition. There is also a valid arbitration agreement. Clause 14.3 of the JVA requires that if there is any dispute between the parties in respect of the matters relating the JVA, the same is required to be adjudicated upon and decided through the process of arbitration and the decision of the arbitrator shall be final and binding upon the parties. The aforesaid clause is neither disputed nor questioned before me.
>
> Para 25. In the light of the aforesaid factual and legal position, I am of the considered opinion that there is a valid arbitration agreement between the parties as contained in the JVA, which the parties are required to adhere to and are bound by the same. In other words, if there is any dispute between the parties to the agreement arising out of or in relation to the subject- matter of the said JVA, all such disputes and differences have to be adjudicated upon and decided through the process of arbitration by appointing a mutually agreed arbitrator.
>
> Para 27. It is true that the arbitrator would have no power to order for winding up of the company as such power is conferred on and vested with a court as envisaged under the Companies Act in view of the decision of this Court in Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. But in terms of the arbitration agreement, the arbitrator can always find out and adjudicate as to whether or not a company is functional and if it was not functional, in that event he could always find out the nature and status of its assets and can also issue direction and pass orders regarding dues and liabilities and also for taking recourse to appropriate remedy."

iv. In the decision of Hon'ble Supreme Court in Naveen KDR v. Chennai Power Generation Ltd. And ors. reported in (1998) SCC Online CLB 24 wherein at paragraph 13 it is observed as under:

> Para 13. "Having held that the matter before us is covered by arbitration, the next issue for consideration is whether we are bound to refer the parties to arbitration in terms of section Company Appeal (AT)(CH) No.15 of 2021 Page | 31 45 of the Arbitration and Conciliation Act of 1996. The stand taken by the petitioners to advance their arguments that we should not refer the matter to arbitration is two fold. One is that as a specially constituted tribunal with wide powers to grant various reliefs to put an end to the acts complained of, to come before which, a statutory right has been conferred on shareholders, the CLB cannot abdicate its jurisdiction and confer the same on a private forum.

The other ground is that a private forum namely in this case, the arbitrator, cannot grant the reliefs as sought for by the petitioners which can only be granted by us by virtue of the provisions of section 402 of the Companies Act. Mr. Singh relied on a number of cases, which we have already indicated earlier, to state that, matters under section 397/398 cannot be matters for arbitration. In all these cases, the issue that arose was whether a proceeding under section397/398 or proceedings for winding up could be stayed on account of either an agreement between the shareholders for referring the disputes to arbitration or by virtue of the provisions of the articles of association to that effect. It is well known that, to stay or not to stay the proceedings under section 34 of the Arbitration Act, when a plea of arbitration is taken, was solely within the discretion of the court before which such a plea was taken. While in the cases cited by Shri Singh, the courts had refused to exercise their discretion to stay the proceedings, in the cases cited by Shri Sarkar, the courts exercised the discretion to stay the proceedings. However, after the coming into force of Arbitration and Conciliation Act, 1996, the legal position has changed, more particularly with reference to foreign arbitration.* Now it is mandatory, by virtue of section 45 of this Act, that a judicial body will have to refer the parties to arbitration once it is seized of an action in respect of which the parties have made an agreement for arbitration to which the convention in the First Schedule to the Act applies. (Foreign Arbitration.) The ingredients of this section are: a judicial authority should be seized of an action in the matter of which the parties have made an agreement for arbitration; one of the parties should make a request for referring the parties to arbitration and that the judicial body does not find that the said agreement is null and void, inoperative or incapable of being performed. The CLB is a judicial authority and this fact is not controverted. It has been seized of a matter in which, as elaborated earlier, there is an agreement between the parties for arbitration. The petitioners did not advance any arguments to convince us that the agreement is null and void, inoperative or incapable of being performed. They have only taken a stand, in reply to the application, that, referring the matter to arbitration would be expensive, time consuming and would require transfer of documents from India to London for production as evidence. This stand, according to us, would not make the agreement inoperative or incapable of being performed. Thus, all the ingredients of section 45 of the Arbitration and Conciliation Act, 1996, are present. Once it is so, we feel that there is no further scope for us to take into consideration the arguments of Shri Singh about the statutory rights of the shareholders to move the CLB, and that a specially constituted Tribunal cannot abdicate its jurisdiction, etc. We have to do what the law mandates us to do. Section 45 requires us to refer the parties to arbitration and we have no discretion in this matter."

v. In the decision of Hon'ble Supreme Court in Parasramka Holdings Pvt. Ltd.

v. reported in (2018) SCC Online Del 6573 wherein at paragraph 29 it is observed as under:

> Para 29. In the opinion of this Court, an arbitration agreement is a contract by which the parties agree to settle certain disputes by way of arbitration rather than by to proceedings in Company Appeal (AT)(CH) No.15 of 2021 Page | 32 Court. It is akin to an exclusive jurisdiction clause and contains a negative obligation not to commence substantive proceedings in any other forum. [See: AES Ust-Kamenogorsk v. Ust-Kamenogorsk JSC [2013] UKSC 35 at [21]-[28].

Para 30. Where the Court action is commenced in breach of an arbitration agreement the other party may apply to stay the Court action, unless it is content to forego its right to have the dispute referred to arbitration and choose instead to defend the action before the Court. However, the other party must apply without delay to the Court for a stay of the proceedings brought in breach of the agreement to arbitrate.

Para 34. Keeping in view the aforesaid judgments as well as the judgment in Eastern Medikt (supra) and judgments of the learned Single Judge and Division Bench of this Court in Sharad P. Jagtiani (supra), this Court is of the view that the party invoking the arbitration clause does not have to file a formal application seeking a specific prayer for reference of the dispute to arbitration as long as it raises an objection in the written statement that the present suit is not maintainable in view of the arbitration clause in the agreement.

VI APPELLANTS' CASE LAWS:

30.

(a) In the decision of Hon'ble Supreme Court in Gulabrai Kalidas Naik and Ors v. Lakshmidas Lallubhai Patel and ors. reported in (1975) SCC Online Guj 27 wherein at paragraphs 12, 15, 17, it is observed as under:

Para 12. "Now, if the petitioner's title to the membership is in dispute, and he has to seek relief under section 155 for getting his name placed on the register of members to clothe himself with the rights of a member, it would be improper, till that dispute is decided, to permit such a person to maintain a petition under sections 397 and 398. If the petitioners' petition under section 155 fails, obviously, they cannot maintain a petition under sections 397 and 398, because they are not members. Now, it may be that, in a given case, the petitioners invoking court's jurisdiction under sections 397 and 398 are in a position to show that even though their names are not to be found in the register of members of the company, yet they have such an indisputable and unchallengeable title to the membership of the company that court may entertain a petition at their instance. But, in the facts of this case, the petitioners themselves admit that they themselves signed blank transfer forms pursuant to a certain understanding with the respondent No. 4 and that respondent Nos. 1, 2, 3 and 8 by a subterfuge have taken their shares from respondent No. 4. It is true that the share certificates are with the petitioners and their associates. But the fact remains that as the record stands today the shares of the petitioners and their associates were transferred from their names to the name of respondent No. 4 and respondent No. 4, in turn, transferred the shares through his constituted attorneys to respondent Nos. and 8. Now, the petitioners will have to satisfy the court that they have not lost their membership, despite the fact that their shares have been transferred to the name of respondent No. 4 in the first instance, and then to the names of respondents Nos. 3 and 8. That question is yet to be decided. It would be, therefore, Company Appeal

(AT)(CH) No.15 of 2021 Page | 33 premature at this stage to admit the petition under sections 397 and 398 at the instance of such petitioners."

Para 15. "In this connection Mr. G.N. Shah referred to Mahendra Kumar Jain v. Federal Chemical Works Ltd., [1965] 35 Comp Cas 651 (All). A petition under section 155 for rectification of register was not entertained on the ground that there were several disputed questions of fact, requiring determination, and that the remedy under section 155 being of a summary nature, it could not be invoked and the petitioner should pursue his remedy in a civil court. The contention is premature because after the admission of the petition in the case before the Allahabad High Court, the respondents appeared and raised serious questions and the issues were framed and then the court came to the conclusion that the disputed questions of fact cannot be tried in a Summary procedure in an application for rectification of the membership register under section 155. The contesting respondents in the case before me have still not filed their affidavit and we do not know what contentions they propose to raise. Therefore, this contention cannot be entertained at this stage. Another case relied upon was Ved Prakash v. Iron Traders (Private) Ltd., [1961] 31 Comp Cas 122 (Punj). In this case, the right of the petitioners to file a petition under sections 397 and 398 was questioned on the ground that the petitioners or some of them were not members of the company. Petition was dismissed because it was found as a fact that the petitioners' application for rectification of register was already dismissed by the learned district judge and the petitioners had not filed a suit to establish their title to the shares in question. Obviously, if the petition for rectification of register was rejected, those whose names were not to be found in the register could not be said to be members of the company and, therefore, they could not maintain a petition under sections would not lie."

Para 17. Now, one can conceivably envisage a case where there may not be a serious dispute as to the title of the petitioners to the shares of which he claims ownership and yet his name may not be found in the register of members and incidentally he is required to seek rectification of the register, he would be perfectly justified in filing a composite petition under sections 155, 397 and 398. It is not that in all cases such a composite petition is not maintainable but it would be for the court to decide whether the petition should be rejected on the ground that it is a composite petition unworthy of examination, or to admit the petition in part leaving open the question of admission of the remainder of the petition to a later date.

Para 20. Considering all the aspects of the matter, at this stage, the petition so far as it seeks reliefs under section 155 should be admitted and the consideration of the petition for the purpose of admission for reliefs under sections 397 and 398 should be deferred to a later date and the petition to that extent need not be dismissed. The allegations made are grave and serious and if the petitioners are qualified to maintain the petition, it would be necessary for the court to examine these allegations.

Para 21. Accordingly, I direct that the petition should be admitted for the relief under section 155 and notice be issued to the respondents. Parties would be at liberty to move at a later stage for consideration whether the circumstances have come into existence which necessitate examining the question of admission or otherwise of petition for the reliefs under sections 397 and 398. Order accordingly."

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(b) In the decision of Hon'ble Supreme Court in Chaterjee Petrochem (India) Private Limited v. Petro Chemicals Ltd. & others reported in (2011) SCC Online at page 466 wherein at page 467 and 469, it is observed as under:

"The common refrain running through various decisions of the Supreme Court is that in order to succeed in an action under Sections 397 and 398 of the Companies Act, the complainant has to prove that the affairs of the Company were being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members. However, the law has not defined as to what would amount to "oppressive" for the purposes of Section 397 and it is for the courts to decide on the facts of each case as to whether such oppression exists which would call for action under Section 397. The conduct of the majority shareholders should not only be oppressive to the minority, but must also be burdensome and operating harshly up to the date of the petition.

(Paras 133 and 134) Shanti Prasad Jain v. Kalinga Tubes Lid., AIR 1965 SC 1535: (1965) 2 SCR 720, reiterated In order to pass orders under Section 397 of the Companies Act, 1956, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of Section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder.

(Paras 139 and 140) Shanti Prasad Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535 (1965) 2 SCR 720, reiterated and applied Unwise, inefficient or careless conduct of a Director cannot give rise to claim for relief under Section 397 of the Act. For relief under that section, the applicant would have to prove that the conduct of the majority

of the shareholders lacked probity and was unfair so as to cause prejudice to the applicant in exercising his legal and proprietary rights as a shareholder. That, in fact, is the golden thread of the various decisions in relation to petitions under Sections 397, 398 and 402 of the above Act.

(Para 141) Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd., (1981)3 SCC 333, reiterated and applied According to case law, the language of Section 397 suggests that the oppressive manner in which the Company's affairs were being conducted could not b be confined to one isolated incident, but that such acts would have to be continuous as to be part of a concerted action to cause prejudice to the minority shareholders whose interests are prejudiced thereby.

Company Appeal (AT)(CH) No.15 of 2021 Page | 35 (Para 142) Despite the concessions given and/or afforded to C Group it had failed to take advantage of the same and a subsequent agreement dated 8-3-2002, had to be entered into for recording the fact that in terms of the agreement dated 12-1-2002, 155,099,998 equity shares of WBIDC had been transferred/delivered to CP(I)PL on the same day.

(Para 131) The promise extended by WBIDC and the GoWB to C Group to provide at least 60% of the shares held by WBIDC to C Group so as to give C Group the majority shareholding in the Company, as was indicated in the agreements dated 12-1-2002, 8-3-2002 and 14-1-2005, did not ultimately materialise and on the other hand, C Group was reduced to a minority on account of the C Group's d decision not to participate in the rights issue, and, thereafter, by transfer of 150 million shares by WBIDC in favour of IOC.

(Para 145) Although, C Group has complained of the manner in which it had been reduced to a minority in the Company, it is also obvious that when the Company was in dire need of funds and C Group also promised to provide a part of the same, it did not do so and instead of bringing in equity, it obtained a loan from HSBC through M Group, which only increased the debt equity ratio of the Company. Furthermore, while promising to infuse sufficient equity in addition to the amounts that would have been brought in by way of subscription to the rights issue, C Group imposed various preconditions in order to do so, which ultimately led the GoWB and WBIDC to terminate the agreement to transfer sufficient number of shares to C Group to enable it to have complete control over the management of the Company and also to retain its private character. It was at a stage when there was a threat to the supply of naphtha, which was the main ingredient used by HPL for its manufacturing process, that it was finally agreed to induct IOC into the Company as a member by transferring 150 million shares to it.

(Para 146) Moreover, it was on C's initiative that it had been decided to induct IOC as a member of the Company at meetings of the Directors which were chaired by C himself. If C Group had stood by its commitment to bring in equity and had

subscribed to the rights issue, which was a decision taken by the Company to infuse equity in the running of the Company, it would neither have been reduced to a minority nor would it perhaps have been necessary to induct IOC as a portfolio investor with the possibility of the same being converted into a strategic investment.

(Para 147) The failure of WBIDC and the GoWB to register the 155 million shares transferred to CP(I)PL could not, strictly speaking, be taken to be failure on the part of the Company, but it was the failure of one of the parties to a private arrangement to abide by its commitments. The remedy in such a case was not under Section 397 of the Companies Act. Although it has been (Para 148) Although it has been contended that even if no acts of oppression made had been out against the Company, it would still be open to the Company Judge to grant suitable relief under Section 402 of the Act, the facts of the present case do not merit such a course of action to be taken as the alleged breach of the agreements involved herein was really in the nature of a breach between two and members of the Company not the Company itself. It was not on account of any act on the part of the Company that the shares transferred to CP(I)PL were not Company Appeal (AT)(CH) No.15 of 2021 Page | 36 registered in the name of C Group. There was, therefore, no occasion for the CLB to make any order either under Section 397 or Section 402 of the said Act.

(Paras 149 and 150) Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd (1981) 3 SCC 333, distinguished on facts If the CLB had given a finding that the acts of oppression had not been established, it would still be in a position to pass appropriate orders under Section 402 of the Act. That, however, is not the case in the present appeals."

(Para 150)

(c) In the decision of Hon'ble Supreme Court in Church of South India, Diocese of North, C.S.I. Diocese Office, Shormur, Kerala State, Rep. by Rt. Rev. Dr.K.P. Kuruvila, Bishop, CSI Diocese of North Kerala and Anr. v. Always Settlement, having its regd. Office at UC College PO, Aluva, Ernakulam District Kerala State and Ors. reported in (2016) SCC Online Ker 13829 wherein at paragraph 6, 9 and 14, it is observed as under:

Para 6. "The Company Law Board, after considering the rival contentions, found that, as clearly provided under Section 399 of the Act, only the members of a company shall have the right to apply under Sections 397 and 398 of the Act. Strangers cannot institute proceedings against a company claiming public interest and hence the Company Petition was found to be unsustainable for want of locus standi. Also found that all indications available would show that the power of attorney holder of the petitioners is virtually the petitioner. It was further found that the petitioners, not being members of the Association, cannot raise any Complaint based on oppression and mismanagement. Notwithstanding these findings entered, the Company Law Board made some observations and issued some directions in the matter of the

Association and finally dismissed the Company Petition. Aggrieved by the order passed by the Company Law Board, the petitioners have approached this Court by way of filing this Company Appeal raising various contentions. A counter affidavit has been filed by the third respondent for himself and for respondents 1, 2, 4 to 9, 16 and 18. The appellants have filed a reply affidavit also. The contesting respondents, inter alia, raised a contention that the Company Petition as well as the Company Appeal are not maintainable in view of the mandatory provisions contained in the Act.

Para 9. As per this definition, the subscribers of the Memorandum of Association of a company shall be deemed to have agreed to become members of the company and, on the registration of the company, their names shall be entered as members in its register of members. Ext. A2 is a copy of the Memorandum of Association of the Settlement. It can be seen from this document that 21 persons are the subscribers of the Memorandum of Association of the Settlement. The petitioners in the Company Petition are not among these subscribers of the Memorandum of Association. These 21 subscribers of the Memorandum of Association should be deemed to have agreed to become members of the company. Their names should be entered as members of the company, on its registration, in the register of members. The register of members of the Settlement is not among the records. Since the names of the petitioners are not among the names of the subscribers of the Memorandum of Association, Company Appeal (AT)(CH) No.15 of 2021 Page | 37 the petitioners will not acquire the status of members even if these 21 persons are treated to be members of the Settlement. Therefore, Subsection 1 of Section 41 of the Act defining a member will not come to the rescue of the petitioners.

Para 14. For the foregoing reasons, the Company Petition filed by the petitioners/appellants is liable to be dismissed as not maintainable and, in turn, the Company Appeal is also liable to be dismissed. The Company Law Board, even though found that the petitioners had no locus standi and hence the Company Petition was not maintainable, made certain observations and issued certain directions. Since the Company Petition was found to be not maintainable, such observations and directions were unnecessary. Therefore, we vacate such observations and directions."

(d) In the decision of Hon'ble Supreme Court in Corona Ltd. v. Parvathy Swaminathan and sons reported in (2007)8 SCC Online at page 559 and 560 wherein at paragraphs 27, 28, 29 and 36 it is held as under:

Para 27. "The fact(s) upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be "jurisdictional fact(s)". If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. Also, a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The

underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not posses. The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a court or tribunal.

(Paras 27 and 28) There is a distinction between "jurisdictional fact" and "adjudicatory fact" which cannot be ignored. An "adjudicatory fact" is a "fact in issue" and can be determined by N court, tribunal or authority on "merits", on the basis of evidence adduced by the parties. It is no doubt true that it is very difficult to distinguish "jurisdictional fact" and "fact in issue" or "adjudicatory fact". Nonetheless the difference between the two cannot be overlooked. Once jurisdictional fact is found to exist, the court or tribunal has power to decide adjudicatory facts or facts in issue."

(Paras 29 and 36)

(e) In the decision of Hon'ble Supreme Court in Scientific Instrument Co. Ltd.

v. Rajendra Prasad Gupta reported in (1998) SCC Online Allahabad at page 884 wherein at paragraphs 7, 8 and 12, it is observed as under:

Para 7. "I have carefully considered the submissions made by the learned counsel for the parties and I have perused the material placed before me. I find that allegations of conspiracy to misuse, fabricate and forge documents have been made on behalf of the appellant. A dispute has been raised whether AMI computers were appointed share transfer agent and were authorised to issue share certificates on behalf of the transfer company. Allegations have been made in the preliminary objection that the persons who have given their consent to the filing of the petition are alleged to be Company Appeal (AT)(CH) No.15 of 2021 Page | 38 holding 50 shares whereas the marketable lot was of 100 shares. Consequently, the lot could not be split up neither were AMI computers authorised to split up shares. Allegations have been made that out of the alleged 4.5 lakhs shares allotted to Sikkim Investment Limited 2.5 lakhs shares were issued as fully paid up and 2 lakhs have been subscribed under the rights issue which are partly paid up although the calls regarding the same have been made by the appellant-company. Similarly, one Fauzia Shiraji, who holds 500 shares which are partly paid up has defaulted in paying the allotment- call money due to the said shares and consequently could not have given a valid consent for instituting the petition. Allegations have been made that the affidavits filed by the contesting parties do not bear the signature of the said persons and there is variance in the signatures contained in the affidavits and the records of the company. It is apparent that complicated questions of law and facts arise even for determining the question of maintainability of the petition under section 399 of the Act. The Board has referred to its decision in the case of Satish Chand Sanwalka v. Tinplate Dealers Association Pvt.

Ltd., [1998] 93 Comp Cas 70; [1998] 2 Comp [ ] 354 (CLB). In the said case also preliminary objection was raised regarding the maintainability of the petition in terms of section 399 of the Act. In that case also the argument was raised that as per section 84 of the Act the share certificate is prima facie evidence of title of a shareholder to the shares indicated therein. Though agreeing with the said contention the Board held as follows (page 75):

"Normally, "Normally, when the maintainability of a petition is questioned in terms of section 399, especially, as a preliminary issue, there should be enough material available before us, without having to go through the pleadings in detail to decide the issue. In the present case, the issues like whether articles have been violated, whether there were calls due and whether the petitioner failed to pay the calls whether notice of forfeiture were issued to the petitioner etc., are complicated questions of law and facts requiring a detailed inquiry.

Para 8. Therefore, we are of the firm view that complicated questions of law and facts cannot be decided at the preliminary argument stage without going through pleadings and hearing. Accordingly, the maintainability of the petition will be decided after hearing or the petition and afterwards, if we hold that the petitioners do not satisfy the requirements or section 399, we shall pass orders only on the maintainability. In case we hold that the petition is maintainable then a comprehensive order will be issued both in terms of maintainability as well as on the merits of the case."

Para 12. After hearing the petition if the Board comes to the conclusion that the petitioner satisfies the requirements of section 399 it shall proceed to pass orders on the maintainability of the petition as well as on other issues which arise out of the facts of the present case. The appellant has not filed a detailed reply to the petition but only raised a preliminary objection. As the matter has got sufficiently delayed it is desirable to direct the appellant to file its reply to the petition under section 397/398 within one month from today along with a certified copy of this order. The Company Law Board will thereafter fix a date for rejoinder by the petitioner and shall proceed with the case in accordance with law and in the light of the observations made above."

Company Appeal (AT)(CH) No.15 of 2021 Page | 39 RESPONDENTS NO. 1 AND 2/PETITIONERS SUBMISSIONS:

31.The Learned Counsel for the Respondents No.1 and 2/Petitioners contends that the Respondents No.1 and 2/Petitioners were oppressed by the acts of majority of shareholders and there were large scale financial irregularities, which were highlighted in the main Company Petition and later developments were also brought to light and pleaded in the applications pending before the 'Tribunal' for consideration. AS a matter of fact, the application was filed seeking 'Forensic Audit'.

32.The Learned Counsel for the Respondents No.1 and 2/Petitioners submits that the Appellants/Respondents convened a Board Meeting on 03.07.2020 to record the transfer of shares from Respondent No.3 and Respondent No.2 in the Company Petition and to appoint the Respondent No.2 as the Chairperson for all future Board Meetings. In fact, the actions of the Appellants/Respondents No.2 and 3 as in violation of Clause 8 of the 'Joint Venture Agreement' which provides the right of first refusal on any sale of shares by the existing shareholders and 'Articles of Association' of the Company and that the First Respondent/First Petitioner lodged his protest and objected to the passing of the Resolutions. Moreover, the protest of the First Petitioner/First Respondent was not recorded by the Appellants in the Minutes of the Meeting. In short, majority of shareholders, by misusing their position in the 'Board' concealed material documents from the Respondents No.1 and 2/Petitioners and Company Appeal (AT)(CH) No.15 of 2021 Page | 40 prevented them from exercising their legal rights under the 'Joint Venture Agreement' and the Provisions of the Act, 2013. Furthermore, the Appellants issued a legal notice making part and unsubstantiated allegations against the Respondents No.1 and 2/Petitioners which were fare from the truth, to compel the First Respondent/First Petitioner to leave the Company. In this connection, it is projected the on the side of the Respondents No.1 and 2/Petitioner that at any rate, it is now admitted that 'transfer of shares from Appellant No.3/Respondent No.3 to Appellant No.2/Respondent No.2 had not took place.

33.It is represented on behalf of the Respondents No.1 and 2/Petitioners that when the First Respondent/First Petitioner refused to exceed the Company, the Appellants/Respondents illegally terminated his alleged employment and effectively prevented him from participating in the affairs of the Company by removing of access to the Company's Assets. Indeed, it is the stand of the Respondents No.1and 2/ Petitioners that the Company had resorted to such an illegal and 'oppressive of terminating the First Respondent/First Petitioner from his position, before the date fixed for inspection of the Company's Records which the Appellants were to somehow exclude the First Respondent/First Petitioner with a view to carry on with running the Company to their benefit, of course unchecked and sequence out the first Respondent/first Petitioner's branch of the family from the Company, at a low valuation.

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34.The real grievance of the Respondents No.1 and 2/Petitioners is that the Appellants/Respondents are continuing their oppressive and illegal acts against them and in fact, the First Respondent/First Petitioner discovered only on access to some of the financial statements pursuant to the orders passed by the 'Tribunal' and that the Appellants/Respondents were clearly indulged in the acts of siphoning of the funds of the Company and mismanaging the finance which is also the reason why an active endeavour was being made to exclude the First Respondent/First Petitioner.

35.The Learned Counsel for the Respondents No.1 and 2/Petitioners submits that the Appellants had terminated the First Respondent/First Petitioner without any 'Notice' and without an opportunity to provide a reply and that the Appellants/Respondents in doing so, not only oppressed the Respondents No.1 and 2/Petitioners, by excluding their branch from the Company's management and also acted in a manner contrary to law to the interest of the Company.

Considering that the future business of the Company is depended on the software developed by the first Respondent/first Petitioner.

36.The Learned Counsel for the Respondents No.1 and 2/Petitioners comes out with a plea that the minutes of the meetings of the first Appellant/first Respondent company including 'Minutes of the Meeting' dated 03.07.2021 did not reflect the actual transactions that had taken place and were tweaked to serve the Appellants/Petitioners interests. Added further, the Appellants No.2 and 3 / Company Appeal (AT)(CH) No.15 of 2021 Page | 42 Respondents No.2 and 3 are indulging in misappropriation of the Company's assets and there acted in enaction of the feudatory duty specified under Section 166 of the Companies Act, 2013.

37.The Learned Counsel for the Respondents No.1 and 2/Petitioners submits that there was serious financial mismanagement of the first Appellant/first Respondent's Company by the 2nd Appellant and 3rd Appellant and that the 2nd Appellant/2nd Respondent and his father, will shown as an employee of the Company have been in total control of the financial transaction of the Company and there was serious financial mismanagement which can be seen from the 'Account Statement' accessed by the Respondents No.1 and 2/Petitioners. Besides this, there were large scale withdrawals of money and transfers made to foreign entities which are arrayed as Respondents No.3 and 4 and that payment was made to the 'Chartered Accountant' and that the overall conduct of the Respondents No.2 and 3 is wrong and harsh qua the minority shareholders of the Company.

38.The Learned Counsel for the Respondents No.1 and 2/Petitioners contends that the 'Impugned Order' of the 'Tribunal' is a result of the exercise of its discretion in an equitable jurisdiction based on the prima facie future of the acts and as such, the question of interference with the 'Impugned Order' would not arise.

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39.In this regard, the contention of the Learned Counsel's for the Respondents No.1 and 2/Petitioners is that a 'Court of Appeal' interferes not when the Judgment under attack is not right but only when it is shown to be wrong. As a matter of fact, the 'Impugned Order' is 'Shareholders Dispute' concerned with the position and functioning of the Respondents No.1 and 2/ Petitioners, who are the Promoters and one of the branches actively involved in the management of the Company. In short, as per Section 242(2)(e) of the Companies Act, 2013, issues arising out of a relationship, in the context of the complaint under Section 242 of the Companies Act, 2013 is wholly within the ambit of the 'National Company Law Tribunal' and further that Section 2(94) of the Act enjoins 'Wholetime Director' includes 'Director' in the 'Wholetime employment' of the Company and besides that, having regard, Section 6 of the Companies Act 2013, the Statutory reliefs available in

the Companies Act, 2013 cannot be overridden by the Provisions of any Contract between the parties. As such, the aspect of referring the 'dispute' to 'Arbitration' does not arise. The other argument projected on behalf of the Respondents No.1 and 2/Petitioners is that the aspect of 'termination' is itself a 'dispute' to be 'adjudicated' by the 'Tribunal' in the pending proceedings, especially when the position of the First Respondent/First Petitioner is link to its active role in the management of the Company representing involvement of this branch of shareholders. Moreover, it is the specific plea of the Respondents No.1 and 2/Petitioners that the First Company Appeal (AT)(CH) No.15 of 2021 Page | 44 Respondent/First Petitioner and Second Appellant and 3rd Appellants/Respondent Nos.2 and 3 are shareholders and 'Directors' of the Company and the 'Letter of Employment' was issued, because it was required for securing 'Visa' to the United States of America.

40.At this juncture, the Learned Counsel for the Respondents No.1 and 2/Petitioners brings it to the notice of this 'Tribunal' that the Company had filed a suit in O.S.No.6131 of 2020 on the file of City Civil Court, Bangalore which is contested on merits. In this connection, the Learned Counsel for the Respondents No.1 and 2/Petitioners takes a stand that the 1st Respondent/1st Petitioner's position in the company is that of a Executive Director i.e. a Director in the employment of the Company discharging the management functions and different names were provided to his position from time to time only keeping in mind the nature of the industries in the Company operates and presently is working with the designation of 'Executive Vice President'. Apart from the above, the Learned Counsel for the Respondents No.1 and 2/Petitioners points out that there is no employment letters issued in this regard which makes it clear that the 1st Respondent/Petitioner has been working and managing the business of the company which is in the nature of a quasi partnership, by virtue of the shareholding in the Company as well as holding the position of a Director. As such, the Appellants stance that the 'Tribunal' has no jurisdiction to entertain the dispute is an incorrect one.

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41.The Learned Counsel for the Respondents No.1 and 2/Petitioners contends that the relief granted by the 'Tribunal' in the 'Impugned Order' is in aid of the final reliefs and the same was exercised in an equitable jurisdiction. In reality, the dispute which is brought before the 'Tribunal' is one of oppression of minority of shareholders' which requires 'Adjudication'. Continuing further, the main Company Petition filed before the 'Tribunal' is a composite petition for rectification of register and as well as to address the grievance relating to oppression and mismanagement. Indeed, there are three individuals holding 1/3 rd share in the company as the 1st Respondent/1st Petitioner was an employee on another entity and the shares were held in the name of 2nd Respondent/2nd Petitioner who is none other than the wife of the 1st Respondent/1st Petitioner. In fact, 'shares' were transferred to the name of the 1st Respondent/1st Petitioner as evidenced by the endorsement found on 18.09.2013 in respect of 'Share Certificates' and the draft MGT-7 circulated by the Chartered Accountant and the entry at Page 173 categorically highlights the fact that the 1 st Respondent/1st Petitioner was always recognised as shareholder of the Company by the Respondent as well, which is fortified by the references in the 'Joint Agreement' dated 24.01.2015.

42.The Learned Counsel for the Respondents No.1 and 2/Petitioners contends that there can be no termination without taking over of shares by others and in such took over has to be a fair value, proving beyond the doubt, the Company Appeal (AT)(CH) No.15 of 2021 Page | 46 connection between the shareholding and the role performed in the Company. In fact, the 'Impugned Order' dated 10.03.2021 brings the restoration of 'Status Quo' as on 24.11.2020 and the payment of remuneration is directed as consequences of the same until further orders and the Respondents 1 and 2 cannot take any exception to the reliefs granted.

43.The Learned Counsel for the Respondents No.1 and 2/Petitioners submits that even in respect of the maintainability of the main Company Petition is under challenge, does not take away the powers of the 'Tribunal' to pass an 'Interim Order' and further that an application under Section 8 of the Arbitration and Conciliation Act, 1996 does not affect the maintainability of the main Company Petition and if the Respondents succeed, the dispute only gets referred to 'Arbitration'.

44.The Learned Counsel for the Respondents No.1 and 2/Petitioners points out that the share transfer from Respondent No.3 in favour of the 2 nd Respondent which was the subject matter of Commercial Arbitration Application No.52 of 2020 had not taken place and the proceedings were ended infructuous and hence it was withdrawn.

45. I. RESPONDENTS NO. 1 AND 2 CITATIONS:

> (a) The Learned Counsel for the Respondents No. 1 & 2 cites the decision in Hon'ble Supreme Court in Dollar Company, Madras, reported in (1975) 2SCC at page 730 at special page 732 wherein at paragraph 4 it is among other thing observed that:
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> Company Appeal (AT)(CH) No.15 of 2021 Page | 47 ..... "A court of appeal interferes not when the judgment under attack is not right but only when it is shown to be wrong. These twin principles serve as back drop to our approach to the rival contentions in the case."
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> (b) The Learned Counsel for the Respondents No. 1 & 2 refers the judgment in Re Ra Noble & Sons (Clothing) Ltd., 1983 BCLC 273 at special page 291 wherein at Paragraphs 'e' to 'g' it is observed as under:
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> (e) "I have no doubt that sooner or later a case will emerge in which the particular facts will make it necessary for the court to make a closer examination of the relationship between s 222(f) and $75 than feel is necessary.in the present case.

In this case I have come to a clear view that it has not been established that the affairs of the Company are being or have been conducted in a manner which is unfairly prejudicial to the interests of Anafield, but that it has been established that it is just and equitable that the Company should be wound up.

(f) As to winding up, I find that the Company did embody an association formed on the basis of a personal relationship between Mr Noble and Mr Bailey involving mutual confidence and that there was an implied agreement or an understanding that Anafield through Mr Bailey should participate in all major decisions relating to the Company's affairs. I find that Mr Noble was not guilty of underhand conduct, and I find that Mr Bailey's conduct was, by reason of his notable degree of disinterest and his decision to demand early repayment of the loans, not above reproach. Nevertheless I find that Mr Noble's conduct was the substantial cause of the destruction of the mutual confidence involved in the personal relationship between him and Mr Bailey. I should add that itis clear to me that that mutual confidence has been destroyed and cannot be repaired."

(c) The Learned Counsel for the Respondents No. 1 & 2/Petitioners refers to the decision in Re a Company (1986) BCLC Chanchery Division - Ahoffmann J 18, 21 March 1986 Page 376 pertaining to the interference through 'acts of oppression'.

(c) The Learned Counsel for the Respondents No. 1 & 2 points out the decision of Hon'ble High Court of Karnataka in the decision in M/s.Synchron Machine Tools Pvt. Ltd. v. U.M. Suresh Rao, reported in 1992 SCC Online KAR 256 where in at paragraph 40, it is observed as follows:

> Para 40. "Therefore, if there was an understanding that persons, investing in the shares of the company would be appropriately remunerated by way of salary and perquisites with a right participate in the management of the company, in lieu of or in addition to, the dividends, the interest created by such an understanding has to be held as a component of the proprietary right of the said shareholder while applying equitable considerations."
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> Company Appeal (AT)(CH) No.15 of 2021 Page | 48 The Learned Counsel for the Respondents No. 1 & 2 seeks aid of the decision of the Hon'ble High Court of Karnataka in the decision Ultrafilter Gmbh Vs. Ultrafilter (India) Private Limited and another, reported in 2011 SCC Online KAR 218 wherein at paragraph 8 it is observed as follows:
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> Para "8.(a) It was further contended by the appellant, that the CLB committed an error in applying the principles of partnership to the case on hand. That the CLB was misguided by the nomenclature of the document titled as a 'Shareholders Partnership Agreement'. Only because the partnership agreement has been entered into, it cannot be held that the principles of partnership are applicable to the case on hand.
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> (b) On the other hand, the respondent's Counsel contends that on the very nature of the documentation between the parties and the manner in which the business is being conducted, leads to only one conclusion, that the same is being conducted, on the principles of partnership. That there was a very clear understanding between both of them, that the appellant acts in the nature of the partner by giving his technical knowhow to the Company.

That the material on record clearly establishes the fact that the principles of partnership are applicable to the case on hand.

(c) The CLB held that the Company is nothing but a glorified partnership between the appellant and the respondent. A technical collaboration agreement was entered into between the appellant and the Company on 17th February, 1986 by which the appellant had to provide technical knowhow and assistance to the Company for the manufacture of industrial filters. Therefore, the technical collaboration agreement was the first agreement between the parties.

(d) In the case of Synchron Machine Tools Private Limited v. V.M. Suresh Raos the Supreme Court held as follows:

> A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.
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> X X X X
> X X X X
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> In the case of domestic or family companies, the Courts have applied the dissolution of partnership principle where shareholdings are more or less equal and there is ousting not only form management but from benefits as shareholders. The Learned Company Judge also held that he was unable to hold that the substratum of the company had gone. However, in the appeal, it was reversed and winding-up was ordered. The matter was taken to the Supreme Court. After referring to Ebrahimi's case (1972) 2 All ER 492: (1973) AC 360 and also Yenidje Tobacco Co. Ltd.'s case (1916) 2 Ch 426 (CA) and other cases, the Supreme Court held as follows (at page 104 of 46 Comp Cas):
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> X X X X
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>
> In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership.
>
> (e) In the light of the aforesaid judgment and in the facts of this case it can therefore be held that the has principles been placed of partnership stand attracted to the case on hand.

That to sufficient material has been placed to establish the same.

(f) The relationship between the parties commenced with the 'Technical Collaboration Agreement.' By virtue of this agreement a know how fee of DM Rs. 2,25,000/- was paid to the appellant in return for technical assistance/technical information for the manufacture of industrial filters/fluid processing etc. Thereafter they entered into a 'Shareholders Partnership Agreement' by which the appellant was to subscribe to a 26% share holding. It is therefore apparent that a relationship as partners was born first. It thereafter culminated into a shareholders right by a separate agreement. The understanding, object and the relationship from the inception onwards, was that of a partnership. Furthermore, the shareholders partnership agreement entered into between them evidences the intention of the parties to carry on the business of the Company in the same manner as that of a partnership. The cessation of agreements also adds meaning to the partnership relationship.

(g) Therefore, the Company can be held to be in the guise of a partnership. Even though it is a Company in law, it is still a partnership. The real structure of the Company appears to be that of a partnership. The finding of the CLB in holding that the Company is nothing but a glorified partnership between the parties, is just and proper. Hence, the principles of dissolution of partnership as applied by the CLB, is just and reasonable and we find no ground to interfere with the same."

(d) The Learned Counsel for the Respondents No. 1 & 2 refers the decision of Hon'ble High Court of Madras in the decision R. Ramesh Vs. M S Devi polymers private Limited and other, reported in LNIND 2017 Mad 1639 where in at paragraph 33.3 to 39.8, it is observed as under:

> Para 33.3. The CLB's view that the quasi partnership principle will not be applicable, unless there is equality of shareholding and deadlock in the management, seeks to ignore the economic reality of the unincorporated structure, which prevailed at the relevant point in time. The parties involved, which included the appellant and the respondents herein, even while giving a corporate form to their business relationship chose to divide the shareholding equally amongst themselves. The expectation, therefore, of each branch of the family, inter alia, was (apart from receipt of dividend) that they would continue to hold their presence on the BOD. This expectation of the appellant, to my mind, which was legitimate, was destroyed, when he was removed as the Director of DPPL. To say that this did not cause oppression, as it was only a directorial complaint, loses sight of the fact that the presence on the BOD, with the added right to manage exclusively Unit C was the essence of the relationship, which Company Appeal (AT)(CH) No.15 of 2021 Page | 50 various branches of the family, shared amongst themselves, before it acquired a corporate form.
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> Para 33.4. The CLB's View that only, if, there was deadlock in the management, i.e., there was equality of shareholdings, could the principle of quasi partnership apply, in my view, is flawed. There is no such principle of law that the principle of quasi partnership would apply, only, where, the parties have equal Control, in the absolute sense, over the management of the company. Appellant's family had an equal share of the corporate pie, when, compared with the share of other branches of the family.

> The fact that in the instant case four branches were pitted against one branch did not militate against the principle of quasi partnership.
>
> 34. The principle of quasi partnership gets into the fray in actions filed under Section 397 of the 1956 Act. by virtue of the expression "just and equitable" used in Sub--

Section (2), clause (b) of the very same section. In sum, for an action to be sustainable under Section 397 of the 1956 Act, in which, the principle of quasi partnership is invoked, the aggrieved party would have to demonstrate to the Court: (i) that the affairs of the company were being conducted in a manner prejudicial to the public or, in a manner oppressive to any member or members; and (ii) that to wind up the company would, unfairly, prejudice such member or members, and that, otherwise, the facts obtaining in the matter would justify that the company should be wound up on the ground that it is "just and equitable"

> 34.1. The word "oppressive" would include, in its widest sense, an action, which is "burdensome, harsh and wrongful" and therefore, while, applying this measure to the facts of a particular case, the Court, is required to look at "business realities", and not be constrained by technicalities, or, a "narrow legalistic view", while adjudging, whether or not a given action falls within the ambit and scope of the expression just and equitable". The Supreme Court in Needle Industries (India) Limited and Others Vs. Needle Industries Newey (India) Holding Limited, MANU/SC/0050/1981, adopted the following apposite observations made by the Lord Wilberforce in Ebrahimi V. Westbourne Galleries Limited, [1973]AC 360, while expounding on its understanding of the expression "just and equitable":
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> 48. 'words' just and equitable' are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own; and that there Is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and Obligations inter se which are not necessarily submerged in the company structure:
>
> "The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does. enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another. which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way". (p.379) Company Appeal (AT)(CH) No.15 of 2021 Page | 51 Observing that the description of companies as "quasi- partnerships" or "in substance partnerships" is confusing, though convenient, Lord Wilberforce said:
>
> "company however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."(p380) Finally, it was held that it

> was wrong to confine the application of the just and equitable clause to proved cases of mala fides, because to do so would be to negative the generality of the words. As observed by the learned Law Lord in the same judgment, though in another context:
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> "Illustrations may be used. but general words should remain general and net be reduced to the sum of particular instances." (pp 374-375 34.2. It is important to note that in Ebrahimi's case, wherein, the "just and equitable"

clause was applied, the company against whom action had been filed, was a closely held company, where, one of the Directors was being removed by votes cast by the other two (2) Directors on the Board.

34.3. Furthermore, in this regard, the observations made in paragraph 50 of the Needle Industries (India) Limited case (cited supra), are also required to be noted. The Supreme Court, in nutshell, held that the fact that a company is prosperous and/or makes substantial profits, is not an obstacle to it being wound up, if, it is otherwise, just and equitable to do so.

34.4. This apart, the Supreme Court observed in the very same case that there may be situations, where, a resolution passed against a Director, which may be. otherwise. perfectly, legal, may yet be oppressive. Similarly, it went on to observe that the converse may also be triggered, which is, that a resolution, which is, in contravention of the law could be in the interest of the shareholders and the company.

34.5. This principle was refined, by the Court, with the following observations made in paragraph 54 of the very same judgement:

> "54. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as shareholder"

34.6. Applying the principle adumbrated in the judgement, it cannot be said that in the given case, the quasi partnership principle would not apply, as was suggested by the learned counsel for the respondents.

34.7. Therefore, the observations of the CLB that the provisions of Section 397 and 398 of the 1956 Act would not be applicable in the instant case, as the grievance articulated Company Appeal (AT)(CH) No.15 of 2021 Page | 52 by the appellant are in the nature of directorial complaints, in my view, does not bear in mind the fact that in a small private limited company, such as DPPL, which emerged out of a partnership comprising of members of one family, who, decided to give a corporate structure to their business relationship, only to manage their affairs in a manner which would benefit each member of the family - would, necessarily, give rise to charge of oppression, upon exclusion of a member, who represents a branch of the family, from an assigned managerial role. In the given case, the appellant, stands excluded from a managerial role, after having invested over a

period of 34 years, in a manner of speech, his "blood, toil and sweat" to the growth of DPPL it cannot but, to my mind, be an act of oppression. To entertain any other view, in my opinion, would cause such deep chasm between law and justice that it would defeat the very purpose, for which these provisions are enacted. More often than not a single infraction, which has a continuing impact, as in this case can be more oppressive than a series of acts. This is not, in substance, a case of a single act of oppression, as was sought to be portrayed by the counsel for the respondents.

34.8. Therefore, the removal of the Director in a widely held public limited company may not always compare, with the removal of a Director in a closely held private company, where, as in this case, each branch of the family is expecting to be represented on its BOD. In such cases, removal of a member from the BOD, can amount to oppression and mismanagement, when, it is carried out on made-up and flimsy grounds, as in this case and would, thus, in my opinion, bring the action within the ambit of provisions of Sections 397 and 398 of the 1956 Act.

34.9. In a public limited company, much would depend on the facts obtaining in that case. Say, for example, where, controlling interest is centered in one or more groups, and shares, though, listed on the Stock Exchange, are not freely traded. In such cases, different connotations may arise. The acts of oppression, in my view, will, thus, have to be examined, bearing in mind the totality of circumstances obtaining in a case, without being unduly burdened by the fact that it is a family company, or a private limited company, or even a public limited company. For grant of relief, qua oppression, the principles of quasi partnership are applicable, even to a public limited company. This is clearly borne out from the following observations made in paragraph 238 of the judgment of the Supreme Court in Sangramsinh P.Gaekwad and Others V. Shantadevi P.Gackwad, MANU/SC/0052/2005:

> "238. It is now well-known that principles of quasi- partnership is not foreign to the concept of Companies Act. For the purpose of grant of relief the principles of partnership had been applied even in a public limited company. (See Loch and Another Vs. John Blackwood Ltd, 1924 AC 783, EbrahimiV. Westbourne Galleries Ltd, and Ors, 19722) AlI ER 492"

35. Since, I have come to the conclusion that oppression is made out qua the appellant, the judgment cited by Mr.Venkatavaradan, in the matter of: In cable Net (Andhra) Limited and Others, V. AP Aksh Broadband Limited and Others, 2010 (6) SCC 719 LNIND 2010 SC 480], would not be applicable.

Company Appeal (AT)(CH) No.15 of 2021 Page | 53 35.1. As a matter of fact, in that case, where, the petitioner before the Court, had filed an action for oppression and mismanagement under the 1956 Act, it was pleased that the majority of shareholders had oppressed the petitioners. The CLB had dismissed the petition. The appeal filed in the High Court had resulted in a similar fate.

35.2. The facts disclosed demonstrate that a joint venture company (i.e., respondent No.1) had been set up to undertake a project involving provisioning of broadband network connectivity to all government offices in the State of Andhra Pradesh. Petitioner No.1 before the Supreme Court

formed part of the consortium, which operated under the umbrella of respondent No.1. Furthermore, petitioner No.1 had entered into a shareholders' agreement with respondent No.5, in the said case. Respondent No.5 held, as it appears, majority shares in respondent No.1. For implementing the project, respondent No.1 gave a turnkey contract to respondent No.5, who, as indicated above, was a principal shareholder in respondent No.1.

35.3. It appears, the allegation of the petitioners, was that respondent No.5 breached its obligations under the Contract with respondent No.1, which, required it to supply certain materials to enable the execution of the contract undertaken by the latter.

35.4. It is, in this context, the Supreme Court observed that breach, if any, of the obligations under the contract, would not furnish ingredients necessary for bringing an action under Sections 397 and 398 read with 402 and 403 of the 1956 Act. The Court observed that, at best, it could, give rise to an action for breach of contract under Section 73 of the Contract Act, 1872.

35.5. To my mind, the facts, as obtaining in the said case, are distinguishable from those which obtain in the instant appeal.

36. Therefore, having regard to the aforesaid discussion, I am inclined to allow the appeal and set aside the impugned order of the CLB dated 28.05.2015. Resultantly, the decision taken at the EOGM convened on 27.06.2009, to remove the appellant as the Director of DPPL and as a consequence thereof, his removal as the Executive Director is held to be bad in law.

37. As a logical corollary, status quo ante, would prevail, as was obtaining prior to the decision taken, qua the appellant, at the EOGM held on 27.06.2009.

38. Accordingly, in terms of what is stated above, the captioned appeal is allowed.

39. While, the appeal has been allowed, the question, which, to my mind, still remains to be answered is, as to whether the contesting parties ought to be forced to continue as part of DPPL, by a judicial fiat, albeit, against their will.

Company Appeal (AT)(CH) No.15 of 2021 Page | 54 39.1. At the moment, the respondents 2 to 10, represent one group, while, the appellant represents the other group. The fact that the appellant has succeeded in the appeal, would be, in the long run, quite clearly, be a pyrrhic victory, as the respondents, would, perhaps, learn the lessons of this litigation and would tackle the very same issue in a manner, which would, perhaps, be closer and in line with the formalistic requirements of law.

39.2. Clearly, my sense of the matter is that, the contesting parties cannot remain together, in what appears to be an unhappy marriage. Therefore, in the larger interest of the contesting parties, I am inclined to direct the Chennai Bench of the National Company Law Tribunal (in short "NCLT"), to value shareholding interest of the appellant in a manner known to law and provide him an exit route from DPPL.

39.3. I may only indicate that this is a methodology, which is not novel, in 39 as much as the Supreme Court in Needle Industries (India) Limited case (cited supra), after holding that the appellant in that case, i.e., the holding company, had not been able to make out a case of oppression, did pass directions to do substantial justice between the parties before it. The measures employed by the Supreme Court are set outinparagraphs175to 185 of the said judgment. The fact that the Court has such powers which enable it to go beyond the ken of Section 402 is emphasised in the following observations of the supreme Court in Sangramsinh P.Gackwad and Others V. Shantadevi P.Gaekwad, MANU/SC/0052/2005:

> 185. The jurisdiction of the Court to grant appropriate relief under Section 397 the Companies Act indisputably is of wide amplitude. It is also beyond any controversy that the court while exercising its discretion is not bound by the terms contained in. Section 402 of the Companies Act if in a particular fact situation, a further relief or reliefs, as the court may seem fit andproper.is warranted. (See Bennet Coleman & Co. Vs. Union of India and Others, MANU/MH/0054/1977 and Syed Mahomed Ali Vs. R. Sundaramurthy and others, MANU/TN/O089/1958.
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> 206. In a given case the Court despite holding that no case of oppression has been made out may grant such relief so as to do substantial justice between the parties.

(emphasis is mine) 39.4. I must indicate that Mr. Venkatavaradan, had opposed such methodology being followed and in Support of his submission, has cited the judgment of the Supreme court in the matter of: Commissioner of Income Tax, V. S.S.Navigation Company Ltd, AIR 1961 SC 1633 [LNIND 1961 SC 159].

39.5. It was submitted by the learned counsel that, since, the issues relating to buy out was not raised before the CLB, it could not be espoused, for the first time, before this Court. It is relevant to note that in that case, the Supreme Court was required to interpret the provisions of Section 66(1) of the Income Tax, 1922. The Court, in that context, was called upon to rule as to what would constitute a question of law arising from the order of the Tribunal. The Court, inter alia, ruled that, when a question of law is neither raised before the Company Appeal (AT)(CH) No.15 of 2021 Page | 55 Tribunal, nor considered, it cannot be a question arising out of its order, notwithstanding the fact that it may arise in the context of findings given in the order.

39.6. It is relevant to note that the nature of jurisdiction, which stood vested upon the High Court under Section 66 of the Income Tax, 1922, is different from the jurisdiction, which is conferred on the CLB under Sections 402 of the 1956 Act. In the given case, the failure to exercise such jurisdiction may give rise to a question of law under Section 10F. That the power of CLB under Section 402 of the 1956 Act is of the widest amplitude, is statutorily exemplified by clause (g) of the very same provision. Clause (g) of Section 402 brings within its sway, all other matters, qua which it is just and equitable for CLB to make a provision.

39.7. As indicated above, the Supreme Court in Needle Industries (India) Limited ease (cited supra), adopted, precisely, the same approach. According to me, the ratio laid down in S.S. Navigation

Company Ltd. case, is not applicable to actions filed under Sections 397 and 398 of the 1956 Act.

39.8. Accordingly, the matter is remanded to the NCLT, as against CLB, as the latter is no longer in existence. (see the observations contained in the judgment of the Division Bench of the Kerala High Court in Ayoli Abdulla V. Meezan Realtors Pvt. Ltd.,)"

> (e) The Learned Counsel for the Respondents No. 1 & 2 cites the judgement of this Tribunal in Brookefield Technologies Pvt. Ltd. & Anr. Vs. Mrs. Shylaja Lyer & Ors, (vide Comp App (AT) No 11/2020 dated 22.12.2020 wherein at paragraph 36 and 37, it is observed as under:
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> Para 36. "To determine whether the petition filed under Section 241 and 242 of the Companies Act, 2013, the Tribunal has to examine only the averments mentioned in the petition. The concept of 'oppression' is larger than the idea of legal rights' and indeed, the term interests' is wider than rights. As a matter of fact, the law does not define an 'oppressive act'. Whether an act is oppressive one or not is fundamentally a question of fact. The law relating to 'oppression' is cemented on the principles of equity and fair play as against the strict compliance of law.
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> 37. A Company is merely an abstract of Law. It cannot be gainsaid that right to complain about 'oppression and mismanagement' lies with the members of a company. No wonder fairness and probity rather than legality are the key factors to be taken into consideration by a Tribunal in case of oppression. What kind of oppression or prejudice or unfairness is caused in a given case will depend on the injury caused to an affected person by the concerned as visualised in Section 241 of the Companies Act, 2013?"

(f) The Learned Counsel for the Respondents No. 1 & 2 refers the decision of Hon'ble High Court Mrs.Saroj Goenka and others Vs. Nariman Point Building Services and Trading Private limited and others, reported in LNIND 1993 MAD 659 No.3 wherein Company Appeal (AT)(CH) No.15 of 2021 Page | 56 at point No. 3, It is observed and finally it is answered that the order under appeal in so far as it restrains CLB from entertaining and considering the interim application is liable to be interfered with;

Point No. 3. "Both the sides made concerted efforts on this point. it is contended on behalf of the appellants that the learned single judge is not at all justified in directing that until the question of maintainability is decided. no other interim application should be taken up for consideration. On the contrary, it is contended on behalf of the respondents that when the question as to the maintainability of the very petition is involved. the petitioners in the company petition are not entitled to seek any interim direction. nor can the Company Law Board consider the interim applications filed by them. We find it very difficult to agree with the contention of learned counsel for the respondents. It is not a case in which it can be held that the Company Law Board has no jurisdiction to entertain the petition under sections 397 and 398 of the Act. No doubt the persons who have invoked the jurisdiction. whether they are entitled to the relief under Section 397 or 398 of

the Act or are entitled to maintain such a petition. are the questions which are required to be decided by the Company Law Board, but this does not take away the jurisdiction. nor does it affect the Jurisdiction of the Company Law Board to pass such interim orders or to entertain such interim applications as are necessary in the interests of the subject-matter of the proceedings and also of the parties. we may point out at this stage itself the object with which interim orders are passed. In Kihoto Hollohan v. Zachilhu, it has been held thus "The purpose of interlocutory orders is to preserve in status quo the rights of the parties, so that the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency. One of the contentions urged was as to the invalidity of the amendment for non-compliance with the proviso to article 368(2) of the Constitution. It has now been unanimously held that paragraph 7 attracted the proviso to, article 368 (2). The interlocutory orders in this case were necessarily justified so that no landslide changes were allowed to occur rendering the proceedings ineffective and infructuous.

No doubt, learned counsel for the respondents has placed reliance on a decision of the High Court of Calcutta in Bengal Luxmi Cotton Mills Ltd., In re, There is no doubt that in that case, it has been held that without deciding the maintainability issue, no interim application need be entertained, nor an interim order need be passed. We find it difficult to agree with the view expressed by the learned single judge of the Calcutta High Court. As pointed out by us, it is not the jurisdiction of the Company Law Board to entertain a petition under sections 397 and 398 of the Act that is under doubt, it is only the capacity or the competency of the petitioners to maintain the petition under sections 397 and 398 of the Act that is in question. As long as the decision or the determination of such a question lies within the jurisdiction of the Company Law Board, it cannot be held that pending determination of such issue, the Company Appeal (AT)(CH) No.15 of 2021 Page | 57 Company Law Board cannot or is not competent to entertain interim applications or pass interim orders, which are necessary for ensuring the final reliefs, which the petitioners may be entitled to get, failing which it may be possible in a given case that the ultimate success in the case may become futile when the very subject-matter of the proceedings may not be available or it may become impossible to realise the fruits of the proceedings. Therefore, as pointed out by the Supreme Court in Kihoto Hollohan v. Zachillhu, the interim orders are passed only to ensure that in the ultimate analysis, to the parties succeeding, relief should be available. Hence, we are of the view that the Company Law Board cannot be restrained from entertaining an interim application or passing an interim order if it is found necessary in the interests of the subject. matter of the proceedings and of the parties. Therefore, we are of the view that the order of the learned single judge in so far as it restrains the Company Law Board from entertaining and considering the interim applications requires to be interfered with. We also make it clear that we should not be understood as having laid down that the Company Law Board should entertain an interim application and pass an interim order. It is open to it to consider any such application that is filed whether the relief sought for requires to be granted in the facts and circumstances of the case as itis a matter for decision by the Board. We should not be taken to have interfered with the discretion which the Company Law Board enjoys in the matter of passing the interim orders. Several decisions were cited at the Bar, namely, Ved Prahash v. Iron Traders, 1960 AIR(Punj) 427; 1961 (31) Cc 122, Raza Textiles Limited v. ITO, Cotton Corporation of India Limited v. United Industrial Bank, and World Wide Agencies Private Limited v. Margaret T. Desor. We have not referred to those decisions as they relate to the merits of the case, with which we are not concerned at this stage.

Accordingly, the points raised for determination are answered as follows:

> Point No. 1.---Answered in the affirmative in the light of the finding recorded on point No. 2.
>
> Point No. 2.--Answered in the affirmative, in the light of the facts and circumstances of the case. pointed out while discussing point No. 2.
>
> Point No. 3.--The order under appeal in so far as it restrains the Company Law Board from entertain and considering the interim applications is liable to be interfered with."
>
> (g) The Learned Counsel for the Respondents No. 1 & 2 quotes the decision in Hon'ble Supreme Court order dated 2.12.2019 in Solitaire Capital India and another Vs. Vipul SEZ Developers Pvt. Ltd. Others in civil Appeal CA(AT) 268 of 2019 wherein at paragraph 7 & 8 it is observed as under.

Company Appeal (AT)(CH) No.15 of 2021 Page | 58 Para 7. "The question arises for consideration as to how the petition under Section 8 of the Arbitration and Conciliation Act, 1996 is maintainable with regard to the Sale Deed or Sale of one or other asset of the Company. However, this issue cannot be decided by this Appellate Tribunal as the matter is pending before the Tribunal. The other question is as to whether the Arbitral Tribunal, which is already deciding the claim of the claimant can decide the question of oppression and mismanagement, if any, caused by a member or members against one or other members or group of members or the Company or such action is prejudicial to the public interest or the interest of the members or company. However, such issue, we are not going to decide in this appeal. It is for the Arbitral Tribunal to determine, if such issue has been raised.

Para 8. In the aforesaid background, the Tribunal rightly held that predominant focus in a Company Petition under Section 241-242 of the Companies Act, 2013 is to safeguard the interest of the Company. However, if a party raises the issue of maintainability of the petition under Section 241-242 by filing a petition under Section 8 of the Arbitration and Conciliation Act, 1996, the Tribunal rightly held that such issue is to be decided but after the pronouncement by the Arbitral Tribunal and in the meantime passed interim direction as it thought fit and proper in the interest of the company. If the Tribunal is required to pass further ad-interim relief order, it may wait till the decision of the Arbitral Tribunal and then decide the main issue of maintainability and then decide on the question of passing further interim order during the pendency of the petition, if it is held to be maintainable."

(h) The Learned Counsel for the Respondents No. 1 & 2 cites the decision dated 09.01.2020 of Hon'ble Supreme Court in Solitaire Capital India and another Vs. Vipul SEZ of Developers Pvt. Ltd. And others in Civil Appeal No.9400/2019 wherein at paragraph 2 to 4 had observed the following and accordingly disposed appeal:

> 2. "The appeal is outcome of an interim order passed by the NCLT which has been dealt with by the NCLAT in the impugned order. As the application under Section 8 of the Arbitration and Conciliation Act, 1996 is pending before the NCLT, we request the NCLT to decide the same finally, as agreed to by the learned counsel for the parties, within a period of ten days.
>
> 3. No further order is required to be passed at this stage. In case any order is passed, it is open to the parties to take steps in accordance with law for redressal of their grievance.
>
> 4. Interim order passed by this Court on 17.12.2019 shall continue to operate for a period of ten days from today."

(i) The Learned Counsel for the Respondents No. 1 & 2 refers the decision in Hon'ble Supreme Court in Vidya Drolia and other Vs Durga Trading Company Appeal (AT)(CH) No.15 of 2021 Page | 59 Corporation, reported in (2021) 2SCC 1 at special page 60 & 61 at paragraph 49 it is observed as under.

Para 49. "Exclusion of actions in rem from arbitration, exposits the intrinsic limits of arbitration as a private dispute resolution mechanism. which is only binding on "the parties" to the arbitration agreement. The courts established by law on the other hand enjoy jurisdiction by default and do not require mutual agreement for conferring jurisdiction. The Arbitral Tribunals not being courts of law or established under the auspices of the Sale cannot act judicially so as to affect those who are not bound by the arbitration clause. Arbitration is unsuitable when it has ergu omnes effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement. Equally arbitration as a decentralised mode of dispute resolution is unsuitable when the subject-matter or a dispute in the factual background, requires collective adjudication before one court or forum. Certain disputes as a class, or sometimes the dispute in the given facts, can be efficiently resolved only through collective litigation proceedings. Contractual and consensual nature of arbitration underpins its ambit and scope. Authority und power being derived from an agreement cannot bind and is non-effective against non-signatories. An arbitration agreement between two or more parties would be limpid and inexpedient in situations when the subject-matter or dispute affects the rights and interests of third parties or without presence of others, an effective and enforceable award is not possible. Prime objective of arbitration to secure just fair and effective resolution of disputes, without unnecessary delay and with least expense. is crippled and mutilated when the rights and labilities of persons who have not consented to arbitration are affected or the collective resolution of the disputes by including non-parties is required. Arbitration agreement as an alternative to public fora should not be enforced when it is futile, ineffective and would be a no result exercise.30 "

> 30. Prof. Stavros Brekoulakis. "On Arbitrability: Persisting Misconceptions and New Areas of Concern" essay in the edited collection. Arbitrability, International and Comparative Perspectives (Kluwer, 2009) pp. 19-15"

(j) The Learned Counsel for the Respondents No. 1 & 2 seeks aid of the judgment of Hon'ble Supreme Court in Indus Biotech Pvt. Ltd. Vs Kotak India Offshore Venture Fund, reported in 2021 SCC Online 268 at paragraph 39 wherein it is observed as under.

Para 39. "A perusal of the arbitration agreement indicates that the arbitration shall be held at Mumbai and be conducted by three arbitrators. For the purpose of appointment KIVF I, KEIT and KIVL are to jointly appoint one arbitrator and the promoters of Indus Biotech Private Limited, to appoint their arbitrator. In the second agreement dated 20.07.2007, 'KMIL' as the Investor is on the other side. In the third agreement dated 20.07.2007, 'KIVEI' as the Investor is on the other side and in the Company Appeal (AT)(CH) No.15 of 2021 Page | 60 fourth agreement dated 09.01.2008 it has the same clause as in the first agreement. The two arbitrators who are thus appointed shall appoint the third arbitrator who shall be the Chairperson. The recital (c) in the different agreements though refers to each of the entity in the Kotak Investment Venture and amount invested in shares is referred to, it is provided therein that the equity shares and preference shares subscribed by KMIL, KIVF I, KEIT and KIVL are hereafter collectively referred to as the 'Financial Investors Shares'. If the said aspect is taken into consideration keeping in view the nature of the issues involved being mainly with regard to the conversion of preference shares into equity shares and the formula to be worked thereunder, such consideration in the present facts can be resolved by the Arbitral Tribunal consisting of same members but separately constituted in respect of each agreement. It will be open for the Arbitral Tribunal to work out the modalities to conduct the proceedings by holding separate proceedings in the agreement providing for international arbitration and by clubbing the domestic disputes. All other issues which have been raised on merits are to be considered by the Arbitral Tribunal and therefore they have not been referred to in this proceedings."

(k) The Learned Counsel for the Respondents No. 1 & 2 cites the judgment of Hon'ble Supreme Court in Charanjit Khanna and other Vs. M/s Khanna Paper Mills Ltd., reported in 2011 SCC online Del 1845 wherein at paragraph 11 & 12, it is observed as under.

Para 11. "In my opinion, it cannot be said as a proposition of law that no composite petition under Sections 397, 398 and 111A of the Act is ever maintainable. In fact, in a large number of petitions filed under Sections 397 and/or 398 of the Act, the primary allegation of oppression and mismanagement is that the faction that is in control of the company has either intentionally reduced the rival faction to less than 1/10th of the total number of members of the company or removed the rival faction from the register of members. In Such cases where allegation of oppression and mismanagement is inexplicably intertwined with the issue of maintainability of the petition under Section 399 of the Act, a composite petition has to be held as maintainable. To ask a petitioner to file two separate petitions in such circumstances would also result in unnecessary delay.

Para 12. Moreover, neither Ved Prakash (supra) nor Gulabrai Kalidas Naik (supra) lay down the proposition of law that a composite petition under Section 111A read with Sections 397/398 of the Act is not maintainable in any circumstances. In fact, in the Case of Ved Prakash (supra) the separate petition for rectification of register of members had been dismissed and no suit had been filed prior to filing of petition under Sections 397 and 398 of the Act, even though specific liberty had been granted by the civil Court. The Gujarat High Court in Gulabrai Kalidas Naik (supra) has

held that it is not in all cases that a composite petition under Section 155 (now Section 111) and Sections 397/398 of the Act is not maintainable.)"

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(l) The Learned Counsel for the Respondents No. 1 & 2 refers the decision of the National Company Law Tribunal in Sunil Kumar Pottem and others Vs Sapphire Blossom Rocks Private Limited and others, reported in 2018 SCC Online NCLT 26581 at paragraphs 60 & 61, it is observed as under:

"In fact, it is settled law that a composite Petition is maintainable where the legality of transfer of shares or the legality of allotment of additional shares is raised in the petition.

In view of the above discussion it is held that this composite petition is maintainable."

46 EVALUATION:

The Respondent No.1 and 2/Petitioners in CP No.219/BB/2020 filed under Section 241, 242 and 59 of the Companies Act, 2013 had sought the following reliefs:

i. quashing the termination letter dated 25.11.2020 issued by the 1st Appellant/1st Respondent.

ii. for a declaration that the 'Resolutions' passed in the Board Meeting that took place on 03.07.2020 pointing the 2nd Respondent as permanent Chairman for all future Board Meetings of the Company are illegal, null and void and consequential to set aside the same.

iii. For issuance of direction in rectifying the register of the 1 st Appellant/1st Respondent Company and register the transfer of 3,333 shares bearing distinctive numbers 5001-7001 and 7002-8333 from the 2nd Respondent/2nd Petitioner company to the 1st Respondent/1st Petitioner Company. Also, the Respondents No.1 and 2/Petitioners had sought a relief of declaration that the acts of Appellants No.2 and 3/Respondents No.2 and 3 inter alia, in removing the 1st Respondent/1st Petitioner from the company amounts to oppression of the 1st Respondent/1st Petitioner and mismanagement of the Company and is prejudicial to the interests of the Company, etc. Company Appeal (AT)(CH) No.15 of 2021 Page | 62

47. As an interim relief, the Respondents No.1 and 2/Petitioners had prayed for the relief of stay the letter of termination dated 25.11.2020 issued by the 1 st Appellant/1st Respondent Company and restores the 'status quo' as on 24.11.2020 and also prayed for issuance of directions to the Appellants/Respondents to pay remuneration to the 1st Respondent/1st Petitioner from November

2020, etc.

48. In the instant case, although the Respondents No.1 and 2/ Petitioners 1 and 2 had claimed No.1 to 16 reliefs in the main C.P.No.219/BB/2020 on the file of the National Company Law Tribunal, Bengaluru Bench, as an interim relief, they had claimed 15 reliefs. However, the National Company Law Tribunal in CP No.219/BB/2020 on 10.03.2020 at paragraph 6 had among other things passed the following:-

> "..... We are of the prima facie view that the services of the Petitioner No.1 was terminated without following due process of Law and the Petitioners being minority share are to be given proper opportunity before taking impugned action. Therefore, it is just and proper to suspend the impugned termination letter dated 25.11.2020 and pending finalization of the case, in the interest of justice and equity."

and ultimately, suspended the 'Impugned Termination Letter' dated 25.11.2020 and restored status quo as on 24.11.2020 and consequently, directed the payment of remuneration to the 1st Respondent/1st Petitioner until further orders.

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49. Before the 'Tribunal', the Appellants have not filed Reply/Response/Counter to the main C.P.No.219/BB/2020. The Appellants, before this 'Tribunal' have taken a plea that the 'Impugned Order' dated 10.03.2021 of the 'Tribunal' in C.P.No.219/BB/2020 is non speaking one, besides the same, suffering from nonapplication of mind. In short, it is the version of the Appellants, that there was no discussion in the 'impugned Order' passed by the 'Tribunal' on 10.03.2021, either on the 'Applicable Law', or on 'Balance of convenience' or an 'Irreparable Injury' that may be caused by passing of the said order.

50. The Appellants have also come out with a plea that an 'employment agreement' is not to be specifically enforced and hence, a 'Stay' on the termination of the said 'Agreement' cannot be granted by the 'Tribunal, more so, an 'employment' is not a 'shareholder right' and therefore, removal from employment is not to be termed as "an act of oppression".

51. In so far as the filing of an application under Section 8 of the Arbitration and Conciliation Act, 1996, by the Appellants, to refer the matter to an 'Arbitration' and the said application was not listed on the date of passing of the 'Impugned Order' on 10.03.2021 by the 'Tribunal' because of certain office objections, the Appellants emphatically puts forward a contention that the 'Tribunal' should have decided the application(s) filed under Section 8 of the Arbitration and Conciliation Act, 1996, at the first instance, before considering any interim relief(s) or final relief as the case may be.

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52. It is the stand of the Appellants that even without a 'formal application', 'Tribunal' is required to determine firstly the request made for reference to 'Arbitration' and unfortunately, the 'Tribunal'

had not resorted to this procedure resulting in injustice.

53. Per contra, the Respondents No.1 and 2/Petitioners, have come out with a plea that the Appellants are continuing their oppressive and illegal acts against the Respondents No.1 and 2/Petitioners and even went to the extent of stopping the payment of remuneration to the 1st Respondent/1st Petitioner and in fact, the subject matter of the 'main Company Petition' and also the 'impugned Order' is a 'shareholder's dispute' relating to the position and functioning of the Respondent/Petitioners who are the 'promoters' and one of the branches involved actively, in the management of the Company.

54. According to the Respondents/Petitioners, the 'Tribunal has wide powers to pass an 'interim order' as it thinks fit, for regulating the conduct of 'company's affairs' upon such terms and conditions, as it considers just and equitable, by exercising its power as per Section 242(2) of the Companies Act, 2013. Also that, the 1st Respondent/1st Petitioner was always recognised as the 'shareholder of the company' by the Appellants and this is strengthened by the references made in the 'Joint Venture Agreement dated 24.01.2015', which is relied on by the Appellants' themselves.

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55. The categorical point of view of the Respondents/Petitioners is that the 'termination letter' was issued to the 1st Respondent/1st Petitioner on 25.11.2020 and a detailed Reply/Notice was issued on 26.11.2020 through the Advocate of the 1st Respondent/1st Petitioner which provides a response to all the allegations made by the Appellants and further that the sequence of events clearly demonstrates that the rights of the 1st Petitioner/1st Respondent being 'Member' and 'Director of the Company' was trampled upon by the Appellants, which clearly exhibit their mala fide intentions.

56. In effect, the contention of the Respondents/Petitioners is that the mere filing of an application seeking reference to 'Arbitration' will not oust the 'Tribunal's jurisdiction and even where maintainability of proceedings is assailed, it would not take away the powers of the 'Tribunal' to pass an 'Interim Order'.

57. Dealing with the aspect of the maintainability of main C.P.No.219/BB/2020 on the file of the National Company Law Tribunal, Bengaluru Bench, it is the submission of the Respondents/Petitioners that the main Company Petition is a 'Composite Petition' [projected under Section 241, 242 and 59 of the Companies Act, 2013] and as such, the same is maintainable, when remedy is sought for in connection with the 'Rectification of Register' and for 'Oppression and Mismanagement'.

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58. To be noted, the purpose of Section 241 of the Companies Act, 2013, dealing with matters of 'Oppression and Mismanagement' is to put an end to the said acts by bringing it to an end, in a prompt and speedy manner, rather than permitting the 'parties' and the 'company' to be engaged in a procrastinated litigation.

59. It is to be pointed out that 'Removal of Director' in a surreptitious manner, thereby causing prejudice to the concerned, can be a subject matter of an enquiry in a Petition filed under Section 241 and 242 of the Companies Act, 2013 in the considered opinion of this 'Tribunal'. In this connection, this 'Tribunal' significantly points out that an act which is quite legal in a given case, may be an 'oppressive' one, because it is based on 'unfairness'. It cannot be forgotten that every illegality is not 'ex-facie oppressive', but an illegality of an action may hinge upon its 'oppressiveness'.

60. In respect of an application filed under Section 8 of the Arbitration and Conciliation Act, 1996, the 'Tribunal' is firstly to form an opinion as to whether the 'disputes' which are pending between the parties are within the ambit of the 1996 Act, and the matters which are subject matter of proceedings whether the application(s) under the 1996 Act are covered by an 'Arbitration Agreement' in incidental or ancillary proceedings in suit, etc. It is to be remembered that during the pendency of an application under Section Company Appeal (AT)(CH) No.15 of 2021 Page | 67 8 of the Arbitration and Conciliation Act, 1996, there is no jurisdictional bar upon a 'Tribunal' to pass necessary orders or directions.

61. As regards, the rectification of 'Register of Members', Section 59 of the Companies Act, 2013, entitles a person 'aggrieved' to seek rectification of 'Register of Members', if a default is made or unnecessary delay takes place in entering in the register about the fact of any person becoming or ceased to be a 'member'. Of course, the 'Tribunal's jurisdiction under Section 59 of the Companies Act is of 'summary in character'.

62. Section 89 of the Companies Act, 2013 read with Rule 9(1) of the Rules provides that a person whose name is named in the 'Register of Members' of a Company but who does not hold the 'beneficial interest' in such shares (hereinafter referred to as 'Registered Owner') shall file with the Company a declaration to that effect in Form No.MGT4 in duplicate within a period of 30 days from the date of which his name is named in the 'Register of Members' of such Company.

63. According to Black's Law Dictionary the term of 'Beneficial Owner' is applied to a person who does not have title to the property, but has rights in property, which are normal incident of owning the property.

64. At this juncture, this 'Tribunal' worth recalls and recollects the decision in Wood Preservation Ltd. V. Prior reported in 54 Tax Cases at Page 112, 133, wherein it is held that a beneficial owner is a person who is not the legal Company Appeal (AT)(CH) No.15 of 2021 Page | 68 owner, but has the right to deal with the property as his own and has the right to enjoy the same.

65. It cannot be lost sight of that a 'Tribunal' has an implied obligation to act with 'Fairness'. After an order is passed, the same must be rested on reason. The order/judgment which does not disclose reasons, undoubtedly, will be of little assistance to an 'Appellate Tribunal'. To put it succinctly, a 'speaking order' will at best be a reasonable one, and will have an appearance of justice. More importantly, if an order is not based on reasons, the same is a 'Laconic' one in the 'eye of Law'.

66. Assigning of reasons by a 'Tribunal' in an order will be the 'Heart' and 'Soul' of it, which will facilitate a higher forum to test the benefit or efficacy of the order so passed, as opined by this 'Tribunal'.

67. The Locus standi of the Respondents/Petitioners to file the main Company Petition can be determined by the 'Tribunal' as a 'Preliminary issue' where 'Issues of fact(s)' and 'Questions of Law' arise in a given matter.

68. It is pertinently pointed out that the 'Tribunal' owe a duty to assign/ascribe reasons in an order to be passed/passed by it. Furnishing of reasons introduces clarity, and excludes/reduce the aspect of arbitrariness or minimise the chance of infiltration of personal by us. The necessity of disclosing the reasons, guarantees 'consideration'. To put it lucidly, a 'reasoned order' is a desirable/palatable requirement of a 'Judicial Disposal', in an effective, Company Appeal (AT)(CH) No.15 of 2021 Page | 69 efficacious, unambiguous manner. It cannot be ignored that the principle is that 'justice' should not only be done but also appear to be done.

69. Admittedly, in the Main Company Petition in C.P. No.219/BB/2020 on the file of the National Company Law Tribunal, Bengaluru Bench, the Appellants/Respondents have not filed their 'Reply'. Even the Application(s) filed numbering for referring the matter to an 'Arbitration' was/were not listed because of certain defects (as observed by the 'Tribunal' at the time of passing the 'Impugned Order' on 10.03.2021).

70. Be that as it may, in the light of detailed foregoings, this 'Tribunal' keeping in mind the respective contentions advanced on either side, taking note of the facts and circumstances of the case in an encircling manner, not delving deep into the merits of the controversies/dispute(s) between the parties in the main 'Company Petition' and ongoing through the 'Impugned Order' dated 10.03.2021 in CP/219/BB/2020 on the file of National Company Law Tribunal, Bengaluru Bench to the effect that the 'Termination Order dated 25.11.2021 was suspended and 'restoration of Status Quo' as on 24.11.2020 was ordered and consequently, a direction was issued for payment of remuneration to the 1st Respondent/1st Petitioner until further orders', is of the considered opinion that the same is a 'non speaking and unreasoned one', more so, bereft of qualitative and quantitative details. Hence, this 'Tribunal' is perforced to interfere with the said 'Impugned Order' dated 10.03.20221 in Company Appeal (AT)(CH) No.15 of 2021 Page | 70 CP/219/BB/2020 passed by the National Company Law Tribunal, Bengaluru Bench, to prevent an aberration of justice and to promote substantial cause of justice. Resultantly, the Appeal succeeds.

Result:

> In fine, the 'Instant Company Appeal' (AT)(CH) No.15 of 2021 is allowed No costs. The 'Impugned Order' dated 10.03.2021 in CP/219/BB/2021 on the file of National Company Law Tribunal, Bengaluru Bench is set aside by this 'Tribunal' for the reasons assigned in this 'Appeal'. However, this 'Tribunal' remits back the matter to the National Company Law Tribunal, Bengaluru Bench, to determine afresh on merits about the aspect of interim relief pertaining to the stay of the 'letter of

termination' dated 25.11.2020 and the payment of remuneration to the 1st Respondent/1st Petitioner from November 2020, after providing due opportunities to respective parties, by adhering to the principles of natural justice. Also this 'Tribunal', directs the Appellants/Respondents to file their reply to the main Company Petition No.219/BB/2020 within two weeks from the date of copy of receipt of the 'Judgment' of the present Appeal. Further, the Appellants are directed to rectify the defects found in the Applications filed under Section 8 of the Arbitration and Conciliation Act, 1996, before the 'Tribunal' and to represent the same. On such representation, if the National Company Law Tribunal, Bengaluru Bench finds that they are in order, the said Applications can be numbered and taken up for hearing, in the manner known to Company Appeal (AT)(CH) No.15 of 2021 Page | 71 Law and in accordance with Law, of course, after providing enough opportunities to the parties, to raise their objections/points of view and to dispose of the same in conformity with legal requirement.

Before parting with the case, it is abundantly made quite clear by this 'Tribunal' that all the 'Issues of fact(s)' and 'questions of law' are left open in the main Company Petition in CP/219/BB/2021 on the file of National Company Law Tribunal, Bengaluru Bench and the respective parties are permitted to raise all factual and legal pleas before the 'Tribunal' in the main 'Company Petition' to be dealt with by the 'Tribunal' in an appropriate manner, of course on merits, in a just, fair, in a dispassionate manner and orders be passed uninfluenced and untrammelled with any of the observations made by this 'Tribunal', in the 'instant Company Appeal'.

[Justice Venugopal M] Member (Judicial) [V.P. Singh] Member (Technical) .06.2021 SE Company Appeal (AT)(CH) No.15 of 2021 Page | 72