M/S Ram Bahadur Thakur & Ors vs Sh. Manish M. Sharma & Ors on 16 December, 2016

Author: Ramesh Kumar Datta

Bench: Ramesh Kumar Datta

IN THE HIGH COURT OF JUDICATURE AT PATNA

Company Appeal (SJ) No.3 of 2010

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1. M/S Ram Bahadur Thakur Ltd. Jitwarpur Kothi, P.O. Twarpur Distt. Samastipur, Bihar though its Director Shri Sailesh Mohan Sharma
2. Shri Sailesh Mohan Sharma, S/o Late Chaturbhuj Sharma, Forbes Bungalow, Veli Road, Kochi-682 001, Kerala
3. Shri Manoj Mohan Sharma, S/o :ate Chaturbhuj Sharma, 25th Floor, Samudramahal, Dr. Annie Besant Road, Worli, Mumbai 400 018

.... Respondent-Appellants

Versus

1. Sh. Manish M. Sharma A-10, Maharani Bagh Ring Road, New Delhi - 110065
2. Sh. Kanishk K. Sharma A-10, Maharani Bagh, Ring Road, New Delhi - 110065

.... Petitioner- Respondents

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Appearance :
For the Appellants : Mr. V.Giri, Senior Advocate
Mr. Raghunath Basant, Advocate
Mr. Dronacharya, Advocate

For the Respondents :
Mr.Dhruv Mehta, Sr. Advocate
Mr. Sanjeev Kumar, Advocate
Mr. Sri Ram Kim, Advocate
Mr. Ashish Wad, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

CAV JUDGMENT

Date: 16-12-2016

Heard learned counsels for the parties.

The appeal has been filed under Section 10F of the Companies Act, 1956 against the order dated 29.11.2010 passed by the Company Law Board, Principal Bench in Company Application No. 136 of 2009 filed in Company Petition No. 56 of 1996. By the said

order the Company Law Board (CLB) while disposing of the Company Application directed the appellants herein (respondents in the application), inter alia, to pay the compensation amount of Rs. 15,84,

49,410.38 to the petitioners (respondents herein) within 60 days of the receipt of the order.

The facts leading to the present matter may be considered in some detail. Appellant No. 1 Ram Bahadur Thakur Limited (hereinafter referred to as „RBT) was incorporated as a company with its registered office in Bihar on 19.09.1974 by both the appellant side family (the CBS Group) as also the respondents side family (MMS Group) holding approximately 50% share each. After its incorporation and until his death in 1992, Shri Madan Mohan Sharma, the grand father of the two respondents was Chairman and Managing Director of the Company. During 1975-1976 negotiations were initiated between the Company and M/s. Travancore Tea Estates Company Ltd.(TTE) for purchase of 9 Tea Estates. It is not in dispute that the father of the two respondents, namely, Shri B.M. Sharma who was residing in London at that time and continues to do so, was involved in the negotiations, actively according to the appellants and only to a limited extent according to the respondents. While the negotiations were going on, ceiling proceedings under the Kerala Land Reforms Act, 1963 (hereinafter referred to as the „KLR Act), which had the notified date as 1.1.1970, for the purpose of prohibition from holding land in excess of ceiling area, even prior to the negotiations

were initiated against TTE. The TTE filed a statement before the Taluk

Land Board on 14.4.1970 containing declaration as to excess land and therafter under the provisions of the KLR Act on 30.1.1972 a report was prepared by the Assistant Collector, Devikulam indicating the excess land held by TTE.

On 9.2.1976 an agreement for sale was entered into between TTE and RBT with respect to 9 Tea Estates belonging to TTE. On 26.2.1976 a draft statement was issued by the Taluk Land Board (TLB) with respect to the excess land held by TTE against which objection was filed by TTE on 23.6.1976. On 17.9.1976 TTE executed a Sale Deed in favour of the appellant No. 1 with regard to 9 Tea Estates which contained a clear recital that the assets are being handed over free from all liens, charges and encumbrances save as expressly disclosed to RBT. The schedule to the sale deed contained all the survey numbers and the area which also included the excess land under the KLR Act. Immediately after the sale deed on 9.10.1976 the TLB submitted report regarding the excess land held by TTE and thereafter on 13.11.1976 the TLB passed an order declaring 1444.36 acres of land held by TTE to be in excess of the ceiling provided under the KLR Act and directed TTE to surrender the said excess land. Certain excess land, 360.46 hectares, was surrendered to the TLB on 30.10.1984 for which the declaration was filed by one Mr. P.P.Machiah, Senior Group Manager of RBT about whom it is admitted that he subsequently

joined the MMS group. The annual report and the balance sheet for the year ending 31.12.1985 also mentioned the fact that the company had to surrender 1016.21 acres of land to the Government of Kerala.

On the death of Shri Madan Mohan Sharma in 1992 Shri Chaturbhuj Sharma, father of the appellant Nos. 2 and 3, took over as the Chairman and Managing Director of RBT whereas Shri B.M. Sharma and respondent No. 1 Manish Mohan Sharma were also made Directors of RBT. The dispute having arisen relating to the management and control of the Company, the respondent No. 1 filed Company Petition (CP) No. 56 of 1996 (from which the present matter also arises) before the CLB, Principal Bench, New Delhi under Sections 397 and 398 of the Companies Act alleging oppression and mismanagement by the CBS Group seeking, inter alia, removal of the CBS group from the management of the company and to put MMS group in management and control of the same. By order dated 9.1.1997 of the CLB the then Board of Directors of RBT was dissolved and a fresh Board was constituted with Justice A.N.Verma (retired) as the Chairman and two Directors each from the MMS Group and CBS group. The CLB directed the parties to make efforts for arriving at an amicable settlement.

On 2.3.1998 the CLB passed an order that the affairs of RBT shall be jointly managed by the CBS Group and MMS group.

Thereafter, a notice was received from the Kerala Land Ceiling authorities by RBT on 25.4.1998 regarding surrender of excess land. After taking advice from its lawyers, RBT sent a letter on 12.5.1998 to the Tahsildar stating that excess land has already been surrendered and therefore, there was no need for a fresh survey. It is the stand of the CBS group that these communications took place when affairs of RBT were being jointly managed by both the Groups and everyone was fully aware of these communications.

Pursuant to the order of the CLB dated 2.3.1998 a Joint Management Agreement (JMA) dated 1.6.1998 was entered into between the CBS Group and MMS group under which 5 estates were to be managed by MMS group and 4 estates were to be managed by the CBS group which was to come into effect from 1.6.1998 and was approved by the Board of Directors in its meeting dated 29.6.1998. As per the JMA, MMS Group was to pay 55% of the office expenses of RBT in Kochi whereas CBS Group was to pay the remaining 45%. The communications, in the meantime continued between the parties for arriving at a family arrangement so as to divide the assets and liabilities of the two Groups and the company in order to end the dispute between them. On 28.4.1999 a draft Memorandum of Family Arrangement (MOFA) along with a transfer deed (TD) was prepared under which as per the TD, RBT was to sell 5 estates to MMS group on their paying

Rs. 7.23 crores towards their share of the liabilities of RBT subject to certain conditions mentioned in the TD. By order dated 19.8.1999 the CLB passed a consent order on the basis of the said MOFA and TD after making the following observations in para 4, relevant part of para-5 and paras 7 and 8 which are quoted below:

> "4. During the course of 1998, discussions were held between the parties with Shri Justice Varma playing a crucial role and with the benefit of his advice and guidance both sides were soon able to reach a verbal family settlement agreement to settle their overall disputes and their verbal family settlement agreement has now been reduced in writing, for the purposes of record, in the form of a Memorandum of Family Arrangement which is annexed hereto as Appendix „A . The differences between the two sides on the details of the terms of settlement in respect of the Respondent No. 1 Company however continued to be a hurdle that proved difficult to overcome. Despite the best efforts of Shri Justice Varma, over a period of some 12 months, agreement between the two sides in respect of the respondent No. 1 Company could not be reached and it was noted in the minutes of the meeting of the Interim Board of Directors, held on 12.4.99

, that fundamental differences still existed between the two groups.

5. The matter was heard by us over various sittings Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 in the past five months (19.4.99 to 21.4.99, 28.4.99, 6,5,99, 24.5.99, 2.6.99, 21.6.99, 28.7.99 and 9.8.99). From the very outset we have been of the opinion that not only would an amicable settlement be in the interests of both groups, who are after all family members closely related to each other, but it would also be in the best interests of the company, it s workers, business associates and creditors as well as other Companies where they are common shareholders. We do not at this time propose to adjudicate on the merits of any allegations made during the course of the proceedings. In the course of the above mentioned hearings we asked both sides to explain to us the reasons why an amicable settlement could not be reached and what were the areas of differences. After hearing counsel for both sides we also gave one Director representing each group the opportunity to explain the issues to us. After hearing them, we found that a settlement could be reached since, in our view, the differences though substantial were not insurmountable. We expressed our firm opinion that the only way which the disputes could be put an end to was the division of assets and liabilities of the company between the two groups. It is our opinion, in order to achieve a fair and equitable settlement, five tea estates together with certain other assets should vest in the petitioner group. Accordingly, we directed the parties to identify the tea estates to be given to

the petitioners group and also details of sharing of the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 assets and liabilities of the company. We also directed to put in writing necessary terms and conditions of the division of the properties of the company as suggested by us. Accordingly, they have identified the tea estates and other assets to be given to the petitioners group and have also quantified the share of the liabilities of the company to be paid by the petitioners group which comes to Rs. 7,24,67,708.90 (Rupees seven crores twenty four lacs sixty seven thousand seven hundred and eight and paise ninety only). The detailed terms on which this settlement is to be elected is more fully set out in the form of a "Transfer Document Relating to the assets of Ram Bahadur Thakur Ltd." which is attached hereto and marked as Appendix "B" and forms an integral part of this Order. ..... .

7. We accordingly direct, pursuant to the powers vested in us under Section 402 of the Companies Act, 1956 that;

(a) both parties fill up and complete Schedules 1,4,7,8,11 and 12 in the Transfer Document Relating to the Assets of Ram Bahadur Thakur Ltd. (which are currently blank/incomplete), by mutual agreement and following the completion of the said Schedules the parties shall forthwith execute the Transfer Document Relating to the Assets of Ram Bahadur Thakur Ltd. ;

(b) both parties fill up and complete Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 Schedules 1,4 (part B), 5,6,7,8 and 9 in the Memorandum of Family Arrangement (which are currently blank/incomplete), by mutual agreement and following the completion of the said Schedules the parties shall forthwith execute the Memorandum of Family Arrangement. And both parties shall take all necessary steps to implement the settlement contemplated under the said document which must be completed by 30th September, 1999.

The Memorandum of Family Arrangement and the Transfer Document Relating to the Assets of Ram Bahadur Thakur Ltd. set out the entire agreement the parties and there are no understandings and/or arrangements other than expressly stated in these documents.

(8) Time shall be of the essence in effecting the settlement if either party fails to perform it s obligations undertaken pursuant to the Memorandum of Family Arrangement or the Transfer Document Relating to the Assets of Ram Bahadur Thakur Ltd., within the time specified therein, the aggrieved party shall be at liberty to approach us for appropriate orders/directions and for expediting the final disposal of the Petition and the various interim Applications. After the completion of all the transactions both sides shall appear before us for the final disposal of the Petition and the various Interim Applications. In the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 event of any further difficulties in the implementation of this Order the parties shall be at liberty to apply to us for implementation of this Order."

The origin of the present dispute arises from the form in which the division of Assets and Liabilities were made. Para 3.6 of the MOFA stated that it will take into its fold and include the Transfer Document Relating to the Assets of RBT executed as per the directions of the CLB annexed therein and marked as Schedule 5 which is in implementation of it and forms an integral part of the MOFA.

The Transfer Document, on the other hand, was in the form of a Sale Deed in which the appellant No. 1 was the vendor the purchasers being the Travancore Tea Estates Pvt. Ltd. (not to be confused with TTE) and Madan Mohan Sharma and Sons Pvt. Ltd., both the companies belonging to the MMS Group, and it was provided in the TD that the vendor as beneficial owner shall convey to the Purchasers and the purchasers shall purchase the Assets with effect from the date of completion 5 of the Tea Estates fully under the management of the MMS group in the assets to be transferred by the RBT to the Purchaser Company. During the interregnum the affairs of the company were to be managed by the two groups as per the Joint Management Agreement. The dispute in the present matter arises from the description of the 5 sale estates which were contained in Schedule 9 of Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 the TD and the share in the Tea Estates which were managed by the MMS group but the area indicated in Schedule-9 was the same as in the sale deed of 1976 of TTE to RBT, without excluding therefrom the lands surrendered to the Kerala Government under the KLR Act. Schedule 10 of the TD contained warrantees which provided that the facts set out in the document, recitals and schedules to the agreement were true and accurate in all respect and each of the representatives undertook that the documents provided to the purchaser shall be complete, genuine, fully valid and fully effective in achieving its purpose and further that the assets were free from all liens, charges and encumbrances save as expressly disclosed to the other party. Clause 13.6 of the TD provided that if at any time any term or provision in the document shall be held to be illegal, invalid or unenforceable in whole or part under any rule of law or enactment such term or provision or part shall to that extent be deemed not to form part of that document but the enforceability of the remainder of the document shall not be affected.

As contemplated by the TD, on 17.1.2000 the CBS Group issued a notice to the MMS Group that the CBS Group has complied with their obligations under the TD. The same was contested by the MMS Group by filing an application before the CLB on 7.2.2000. Thereafter the CBS Group filed an application on 5.7.2000 Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 for recalling the orders of the CLB in CP No. 56 of 1996 including the order dated 19.8.1999. On 22.12.2000 the CLB dismissed both the applications. An appeal against the same was dismissed by this Court by order dated 14.2.2003. The MMS Group thereafter filed SLP before the Supreme Court which was allowed by order dated 21.3.2006 directing the CLB to execute the order dated 19.8.1999 with the following observations as reported in (2006) 4 SCC 416 in paras 25 to 28, 31 to 33, the relevant part of para 35 and para 38 :-

> "25. The order dated 19.08.1999 was in fact a preliminary decree. Final disposal of the matter or the final decree would be after full implementation of the terms of the MOFA and Transfer Document.
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> The interim orders passed relating to joint management were therefore directed to continued until such time.

26. Significantly, the Company Law Board in the order dated 19.08.1999 had itself recorded that if there was any difficulty in the implementation of the order "the parties shall be at liberty to apply to us for implementation of this order". Yet when the application was made for such implementation, the Company Law Board did not abide by its own Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 direction.

27. Since the Company Law Board when it deals with an application u/s. 643A sits as an executing court it is subject to all the limitations to which a Court executing a decree is subject. It is well settled that an executing court cannot go behind the decree, unless the decree sought to be executed is a nullity for a lack of inherent jurisdiction. A decree is without jurisdiction if the court passing the decree usurps a jurisdiction which it did not have and which could not be waived by the parties. The last two decisions have also held that the lack of jurisdiction must be patent on the face of the decree in order to enable the executing court to come to the conclusion that the decree is a nullity.

28. Furthermore, the order dated 19.08.1999 was a consent order. Its terms and conditions were contained in the MOFA and the Transfer Document which expressly formed an integral part of the order itself. A consent decree has been held to be a contract with the imprimatur of the court superadded. It is something more than a mere Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 contract and has the elements of both a command and a contract. As was said by the Privy Council as early as 1929,"The only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands until and unless it is discharged on an appeal.

31. The effort of the executing court must be to see that the parties are given the fruits of the decree. The mandate is reinforced when it is a consent decree and doubly reinforced when the consent decree is a family settlement. Clauses 3.1 and 3.6 of the MOFA make it clear that the agreements were arrived at between the parties to resolve finally long pending disputes between the family members relating to jointly owned assets. The clauses read as follows:-

"For the sake of resolving the disputes of the Sharma Family and the companies owned by them and to regain the harmony, peace, love and affection amongst the two groups and for Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 the welfare and prosperity of the Sharma Family and the companies owned by them; The Memorandum of Family Arrangement will also take into its fold and include the Transfer Document Relating to the Assets of Ram Bahadur Thakur Ltd. (RBTL), executed as per the directions of the CLB, Annexed hereto and marked as Schedule 5. The above mentioned Transfer Document Relating to the Assets of Ram Bahadur Thakur Ltd. is in implementation of and forms an integral part of this Memorandum

of Family Arrangement."

32. It has been repeatedly emphasized in several decisions that family settlements are governed by a special equity and are to be enforced if honestly made. This would be so "even if the terms may have been agreed to on the basis of an error of the parties or originate in a mistake or ignorance of fact as to what the rights of the parties actually are, or of the points on which their rights actually depend". This is because the object of an arrangement is to protect Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 the family from long drawn out litigation, and to bring about harmony and goodwill in the family.

The courts lean heavily in favour of family arrangements and, "matters which would be fatal to the validity of similar transaction between strangers are not objections to the binding effect of family arrangements". This view has been reiterated recently in Amteshwar Anand V/s Virendra Mohan Singh & Ors.

33. In our opinion both the Company Law Board and the High Court erred in refusing to execute the order dated 19.08.1999 u/s 643A of the Companies Act. They have thereby failed to exercise the jurisdiction with which they were vested. The failure is heightened given the nature of the order which they were bound to execute. They have erroneously proceeded upon principles applicable to contracts alone and have ignored the fact that the agreement between the parties had culminated in a consent order of the Company Law Board. The plea of the respondents that this Court should not interfere in the matter under Art. 136 by reason of Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 any alleged misconduct on the part of the appellants in managing the 5 estates is unacceptable. The appellant s alleged lack of efficiency in running of the five tea estates is not a material consideration for deciding whether the order dated 19.08.1999 should be enforced.

35. …….. The Company Law Board and the High Court have proceeded on the basis that the only dispute between the parties was as to the interpretation of Cl. 4.1.1.11. Elaborate arguments have however been addressed to us on the merits of the four contentions noted by us earlier by both the parties. We were initially of the view that the dispute should be resolved by us finally. However, on a reconsideration, we deem it fit to remand this issues for determination by the Company Law Board if it is satisfied that the issues could be said to have been fairly raised by the parties before it. We make it clear that whatever interpretation may be put by the Company Law Board on the clauses of the MOFA and Transfer Document, the Board must implement the clauses as interpreted.

Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016

38. We note that the MOFA and Transfer Document were the outcome of the commendable and determined efforts on the part of the Company Law Board to bring to an end disputes between the parties in a manner which would have been in the interest of the respondent no. 1 given the impasse between the two blocks of shareholders and saved the parties a lot of unnecessary harassment, expenditure and acrimony. We also sought to bring an end to the dispute by proposing measures which might be acceptable to both. However, such resolution does not appear to be possible. Therefore it must be left to the Company Law Board to execute its order dated 19.08.1999 in

accordance with the settled principles of law and in terms of the opinion expressed by us in this judgment. The impugned decisions of the Company Law Board and the High Court are for the reasons earlier stated set aside. The appeals are allowed and the matter remanded to the Company Law Board for completing the implementation of the order dated 19.08.1999 by executing the same."

Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 Various disputes even thereafter continued to be raised by the parties against each other on different issues regarding the implementation of the MOFA and TD. Finally, on 19.3.2009 the respondents filed an interim application being I.A. No. 136/2009 in CA No. 645/2008 alleging that on the facts and documents coming to the knowledge recently that the RBT as per its own submissions had agreed to surrender lands from survey numbers located in the Sale Estates i.e., the estates to be transferred to the petitioners alone covering an extent of 1366.72 acres but withheld material facts not only from the petitioners but also from the CLB and are guilty of fraudulent misrepresentation which action is not only in breach of the warranties from the time the MOFA and TD were signed, but are also in breach of Clause 9.5 of the TD by failing to notify the petitioners about the inaccuracies in the warranties. Accordingly, the provision of Clause 9.6 of the TD was sought to be invoked to rectify the breach of the warranties so as to entitle MMS Group to receive the loss suffered due to shortfall of the area of land a sum equivalent to 100% of all or any losses incurred by the petitioner as a result of any misrepresentation or breach of the warranties. It was further stated therein that the similar Estates in the area are conservatively valued at Rs. 1,20,000/- per acre.

In the course of arguments before the CLB, however, the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 appellants stated that an area of 716.80 acres has already been surrendered and further 206.12 acres is to be surrendered, i.e., total 922.92 acres shortfall is there in the Sale Estates. The appellants herein also resisted the claim of compensation stating that they are not liable under the terms of the TD. The CLB held that the intention of the parties is to be ascertained by the Executing Court only from the decree and where the decree is clear, no further evidence can be adduced to come to a conclusion that is contrary to the express provision of the decree and that is liable to render inoperative provisions of the decree and that it was bound to execute the consent order in terms of the direction of the Supreme Court dated 21.3.2006 and the respondents plea not to enforce the terms of the Warranty and in particular clause 9.6.1.1 is the prayer to render the warranty provisions of the TD inoperative and to rewrite Schedule 9 of the TD which cannot be entertained by the Executing Court.

The CLB further did not accept the contention of the appellants regarding the involvement and knowledge of Mr. B.M. Sharma in respect of the negotiation and purchase of the Estates from TTE holding that in terms of Schedule 2 of the TD Mr. B.M. Sharma was never a part of the MMS group and thus the respondents are attempting to make inference in direct opposition to the settled decree. It further held that the sale deed of TTE Company to RBT does not Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 have any qualifications/caveats with regard to KLR Act proceedings or any surrendered area and there is no evidence to show that TTE made any disclosure to Mr. B.M. Sharma about any possible surrender of land. Moreover, when the area to be surrendered was determined by the Taluk Land Board (TLB) after the sale deed, it would be

impossible for TTE to make any disclosure of details of the land surrendered. The CLB further held that the mention in the Annual Report of 1984 of RBT regarding the reduced area cannot be treated as evidence of universal knowledge of KLR surrender proceedings. It further held that in terms of Clause 9.8 of the TD, which provides that it shall not be a defence to any claim under the Warranties that the Purchaser or any member of the MMS Group ought to have known about the matter which is the subject of the claim, any alleged knowledge on the part of the petitioners cannot provide a defence against the claim. With regard to the severability Clause 13.6 of the TD, it was held that the question is not if the land is beneficially owned by the Company, rather the appellants falsely warranted and that any such warranty was clearly a fraudulent misrepresentation which was beyond doubt. Therefore, the MMS Group was found entitled to be compensated for the loss as a result of misrepresentation as provided in the TD. It further held that even if it was presumed that the transfer was never valid in view of the provisions of KLR Act still the appellants were in violation of the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 warranties and, in any case, they have knowingly misrepresented the facts by falsely claiming that the land was beneficially owned by the Company and not subject to any rights to acquire and the provisions of Clause 9.6.11 have to be enforced.

The CLB also rejected the contention of the respondents regarding division of assets/liabilities being on 55%/45% basis between the petitioners and the appellants as an attempt to prevent enforcement of the terms of Clause 9.6.11 stating that there was no provision of any such 55/45 division in its order dated 19.8.1999 or in the MOFA and TD that form integral part of the same and, therefore, the terms of the TD had to be implemented as they were.

With regard to the valuation of the land also the CLB disagreed with the stand of the appellants that the same would be valued only at Rs. 10,000/- per acre and further held that 716.80 acres should be valued at Rs. 1,50,353.49 per acre and remaining 206.12 acres at Rs. 2,45,961.25 per acre.

The CLB also made several remarks on the conduct of the appellants herein and ultimately by its impugned order dated 29.11.2010 directed the appellants to pay the compensation as stated above within 60 days.

Learned counsel for the appellants has raised several propositions in support of the appeal. It is firstly submitted that the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 MOFA and TD should be read conjointly as part of the division of the assets and liabilities of the family and not as a sale of the properties of the company. To support the said submission, it is submitted that both the groups had almost equal share holding of the assets mentioned in the schedule to the TD and MOFA belonging to the RBT. Further, the document is in fact a settlement of dispute among members of the family, all of whom had a right towards the asset of the company and the MMS Group had equal right upon the properties and assets of RBT, including the five tea estates sought to be given to the share of MMS Group under the TD and it is not a case where the right is acquired over the said estates by virtue of MOFA and TD. Thus irrespective of the form of the agreement between the parties, what is contemplated is a division of assets and liabilities and not a sale in any real sense as there is no transfer of any property or asset in favour of a 3rd party.

The next submission of learned counsel for the appellant is that inclusion of the surrendered lands under the KLR Act in Schedule-9 of the TD is a common mistake by both the Groups and in such circumstances the agreement itself would be rendered void and unenforceable by virtue of Section 20 of the Contract Act, in so far as it relates to the surplus land under the KLR Act. It is submitted that Schedule-9 of the TD verbatim reproduces the survey numbers and acreage as mentioned in the sale deed of TTE to RBT. This itself goes Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 to show that it could not be a case of fraudulent misrepresentation by one of the co-owners of the company to the other co-owners. It is submitted that the excess area of 1444 acres were distributed among all the nine estates whereas the division of assets estatewise is to one or the other of the groups. Hence, in the course of negotiation and settlement it did not occur to either of the parties to remove from the five sale estates survey numbers of the properties which had been taken over by the State as excess lands but non-deletion of those areas was a clear mistake committed by both the sides which is a common mistake under the purview of Section 20 of the Contract Act.

It is further contended that neither 923 acres surplus land falling within the sale estates allotted to the MMS group nor the balance 522 acres of excess land surrendered from the share of the CBS Group were available to be divided and thus their mere inclusion in the TD can only be a mutual mistake of the parties as there was no contemplation in the two documents for transfer of any land that had already vested in the State and for the said reasons the agreement to that extent would be void ab nitio.

In support of the aforesaid proposition learned counsel for the appellants relies upon a decision of the Supreme Court in the case of Tarsem Singh Vs. Sukhbinder Singh: (1998) 3 SCC 471 in paras 21,22 and 24 of which it has been held as follows:

> Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016
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> 21. This section provides that an agreement would be void if both the parties to the agreement were under a mistake as to a matter of fact essential to the agreement. The mistake has to be mutual and in order that the agreement be treated as void, both the parties must be shown to be suffering from mistake of fact. Unilateral mistake is outside the scope of this section.
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> 22. The other requirement is that the mistake, apart from being mutual, should be in respect of a matter which is essential to the agreement.
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> 24. "Bigha" and "kanal" are different units of measurement. In the northern part of the country, the land is measured in some States either in terms of "bighas" or in terms of "kanals". Both convey different impressions regarding area of the land. The finding of the lower appellate court is to the effect that the parties were not ad idem with respect to the unit of measurement. While the defendant intended to sell it in terms of "kanals", the plaintiff intended to purchase it in terms of "bighas". Therefore, the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 dispute

> was not with regard to the unit of measurement only. Since these units relate to the area of the land, it was really a dispute with regard to the area of the land which was the subject-matter of agreement for sale, or, to put it differently, how much area of the land was agreed to be sold, was in dispute between the parties and it was with regard to the area of the land that the parties were suffering from a mutual mistake. The area of the land was as much essential to the agreement as the price which, incidentally, was to be calculated on the basis of the area. The contention of the learned counsel that the "mistake" with which the parties were suffering did not relate to a matter essential to the agreement cannot be accepted."

In this regard learned counsel also places reliance on other decisions in the case of Sheikh Brothers Ltd. Vs. Arnold Julius Ochsner: (1957) AC 136; Bibee Solomon Vs. Abdool Azeez: ILR 1881 Bombay 68; EC Eyre Walker Vs. Henry Earnest Meaney: AIR 1947 Allahabad 332; Ananda Chandra Das Vs. Kali Das Bepari: 51 Indian Cases 955; Nursing Dass Kothari Vs. Chuttoo Lall Misser: AIR 1923 Calcutta 641; Mt. Rani Kunwar Vs. Mahbub Baksh: AIR 1930 Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 Allahabad 252; and the Orissa State Electricity Board Vs. M/s. Indian Metals & Ferro Alloys Ltd. : AIR 1991 Orissa 59.

The next submission of learned counsel for the appellants is that the MMS Group had actual knowledge of the fact that proceedings had been initiated against RBT under the KLR Act and that lands had been declared as excess which was not available for division among the two Groups and, therefore, the non-deletion of the revenue survey nos. with respect to such lands from the sale estate in Schedule 9 was clearly on account of common mistake by both the Groups for which the MMS Group cannot derive any advantage over the CBS Group. This proposition, in fact, is in many ways the sheet anchor of the case of the appellants for which a large number of evidence already on the record were cited before this Court and in addition strength was also sought to be derived from the documents brought on the record by way of an interlocutory application, with the permission of the Court, regarding the sale made by MMS Group in the year 2001.

It is firstly urged that even in the order of the TLB dated 13.11.1976 reference had been clearly made to the ceiling return filed by the TTE and associated proceedings prior to the sale deed executed by TTE in favour of RBT. In the order dated 15.12.1976, the TLB also reflected the acceptance of the opinion given by TTE. Thereafter the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 actual surrender of land to an extent of 360.46 hectares equivalent to 1016.21 acres was effected by one P.P. Machiah on 30.10.1984 who was subsequently re-employed by MMS Group in the course of Board meeting of the RBT dated 29.6.1998 to assist in the operation of the estate that was handed over to the MMS Group, which request was made by Mr. B.M. Sharma. The annual report of the Company for the year ending on 31.12.1985 clearly shows a surrender of 1016.21 acres.

Reference is also made to the letter dated 5.10.1994 written by Mr. B.M.Sharma of MMS Group to Mr. S.M. Sharma of CBS Group in which he categorically stated that he had analysed the accounts of the Company since 1977 to 1993 including Schedules G and H which were part of the balance sheets, which clearly shows that the factum of surrender of 1016 acres of land mentioned in the annual report dated 31.12.1985 could not have been missed by him.

Reference is also made to the agreement dated 13.8.2001 between respondent Manish Mohan Sharma and one Panchami Vasudevan in which a portion of the Sale Estates was agreed to be sold and in one of the boundaries of the said land, the land surrendered to the Government was shown as land surrendered to the Government, which shows that a palpably false case was made by MMS Group before the CLB that they had no knowledge about surrender till the year 2009. This is the document which was permitted Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 to be filed by this Court in view of its relevance by order dated 28.9.2012.

The active role of Mr. B.M. Sharma in the negotiation and at every other stage including drafting of TD and MOFA have also been relied upon by the appellants to show that he had a major role to play in negotiating the clauses of the sale deed of TTE to RBT. In support of the same learned counsel relies upon an affidavit dated 5.1.1997 of James Nigel Arden, Eighth Lord Norton, who was Director of TTE when the sale took place, in which he had stated that major role was played by Mr. B.M. Sharma in negotiating the clauses of Sale Deed between TTE and RBT which was held mostly in London between the Directors of TTE including himself and Mr. M.M.Sharma and Mr. B.M. Sharma of the RBT. It is clearly stated therein that the major part of the clause details of the contract was negotiated between B.M. Sharma and himself over a period that initially was thought would be weeks but in fact turned into months.

It is further urged that Shri Madan Mohan Sharma, father of Shri B.M. Sharma and grand father of Manish Mohan Sharma, was actually in effective control of the affairs of the company till November, 1991 which is admitted by the respondents. It is further asserted that active involvement of Mr. B.M. Sharma on behalf of the MMS Group and moreover in the negotiations leading up to the final Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 MOFA and TD showed that it was he who was active on behalf of the MMS Group. It is further alleged that it is Mr. B.M. Sharma who had handed over the draft TD & MOFA to Shri S.M. Sharma on 28.4.1999 in which Schedule 9 had been duly filled up with all the survey numbers, including the survey numbers that had vested in the State as excess lands.

It is contended by learned counsel that under the Joint Management Agreement (JMA) the 5 estates which ultimately became the Sale Estates came to be exclusively managed by the MMS Group with effect from 1.6.1998, during the course of which a report was also prepared in consultation with Mr. Manish Mohan Sharma by the Tea Board showing the details of the actual extent of the lands comprised within the Sale Estates.

Reliance has also been made on the payment of basic land tax for the five estates of the MMS Group, which is payable on the actual land available with the assessee, on 12.1.1999 before the MOFA and TD were finalized.

Reference is also made to the attachment made by the Provident Fund Department with regard to the 9 estates from time to time indicating the correct area of the land in question.

It is also the submission of learned counsel for the appellants that if the MOFA and TD are construed as providing for Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 transfer

of land which is already vested in the Government by the provisions of KLR Act, it would involve transferring the lands vested in the State making the agreement unlawful under Section 23 of the Contract Act which agreement would be void and unenforceable. It is stated that under Sections 84 and 86 of the KLR Act read with Sections 5 and 7 of the Kerala Land Conservancy Act, it is an offence and infraction of law to possess Government land. It is thus argued that if the TD is read as involving transfer of Government land and the transferee to be put in possession thereof, the object of the said agreement would become unlawful and the agreement would become void under Section 23 of the Contract Act. In this regard learned counsel cites the decision of the Supreme Court in the case of Mannalal Khetan & Ors. Vs. Kedar Nath Khetan & Ors.: (1977) 2 SCC 424.

It is contended by learned counsel for the appellants that in the case between the parties which is reported in (2006) 4 SCC 416 it was held by the Apex Court that the order dated 19.8.1999 of the CLB which has adopted the MOFA and TD, is treated as akin to consent decree and under Section 634 A of the Companies Act, the CLB functions as an executing Court having powers to enforce its own decrees. It was held by the Apex Court that if the CLB found that the decree or any of its terms called for interpretation, it was within its jurisdiction to interpret that particular term and to execute the decree on Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 the basis of such interpretation and if the decree was ambiguous, it was the duty of the executing court to construe the decree. It is thus, submitted that when the clause of the agreement providing for transfer of land along with the warranty clause with regard to non-fulfillment of the said clause relating to transfer is called in question, then the contention regarding the validity and enforceability of the clause is a matter which was required to be adjudicated by the executing Court, namely, the CLB in the present matter. Reliance in this regard is placed upon the decisions of the Supreme Court and various High Courts in the cases of Lakshmanaswami Naidu Vs. Rangamma: ILR 26 Madras 31; Raja of Vizianagaram Vs. Dantivada Chelliah: ILR 26 Madras 84; Katwari Vs. Sita Ram Tewari: AIR 1921 Allahabad 118; Uchi Lal Misser Vs. Raghunandan Tewari: AIR 1934 Patna 666 (Full Bench); Jai Narain Ram Lundia Vs. Kedar Nath Khetan: AIR 1956 Supreme Court 359; Mohan Ram Vs. T.L. Sundararamier: AIR 1960 Madras 377 (Full Bench); Bhavan Vaja & Ors. Vs. Solanki Hanuji Khodaji Mansang: AIR 1972 Supreme Court 1371; Vidya Sagar Vs. Sudesh Kumari: (1976) 1 SCC 115; Chandan Mall Vs. Abdul Gani: AIR 1976 Gauhati 54; and Dhurandhar Prasad Singh Vs. Jai Prakash University & Ors: (2001) 6 SCC 534.

Reliance is also placed upon Clause 13.6 of the TD by learned counsel for the appellants to submit that the function of the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 CLB in the present matter is not merely that of an execution Court per se. It also partakes the characteristic of a Court of the first instance, so far as it relates to the adjudication of the disputes between the parties emanating and arising from implementation of the agreement and relatable to resolution of disputes arising under the agreement, since the said clause provides for severability of any term or provision which may be held to be illegal and unenforceable in whole or part so as to not affect the enforceability of the remainder of the document. It is submitted that in view of the declaration by the Supreme Court the CLB is the proper forum to adjudicate upon such matters.

Carrying the argument on the basis of Clause 13.6 of the TD further, learned counsel submits that the validity of the provision regarding the transfer of land already vested in the State Government

will not render the entire agreement null and void but only that part, since it is not the case of either of the parties that the entire agreement is vitiated for any valid reason.

It is urged by learned counsel for the appellants that the respondents had knowledge about the actual state of affairs with regard to the lands vested under the KLR Act and, therefore, the warranty clause in the agreement relating to division of the estates of the company, even assuming the same to be transfer of assets of the company, cannot be invoked by them to claim any injury. It is Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 submitted that the defects known to the purchasers cannot form the basis of a claim for compensation, whatever be the nature of warranty pleaded in that regard. In support of the same, learned counsel relies upon a decision of the Supreme Court of Minnesota (USA) in Mccormick & Ors. Vs. Kelly, in which it has been held as follows:-

> "It has always been held that a general warranty should not be considered as applying to or giving a cause of action for defects known to the parties at the time of making the warranty, and both the weight of authorities and reason authorize this proposition, viz; that for representations in the terms or form of a warranty of personal property no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain.
>
> In the nature of things one cannot rely upon the truth of that which he knows to be untrue, and to a purchaser fully knowing the fact in respect of the property, misrepresentation cannot have been an inducement or consideration to the making of the purchase, and hence could have been no part of the contract."

Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 It is also the contention of learned counsel for the appellants that the warranty clause contained in Schedule-X of the TD is not a standalone clause but will have to be treated part of the clause relating to transfer of the land and where the agreement in so far as it relates to transfer of excess land is invalid and unenforceable or null and void either by virtue of Section 23 of the Contract Act or by reason of Section 20 thereof then the warranty clause alone cannot survive such invalidity. It is urged that the warranty clause is akin to clause of forfeiture or penalty and will sink with the agreement if the latter is found to be unenforceable and invalid, for which reliance is placed on the decision of the Supreme Court in Tarsem Singh s case (supra).

It is further submitted by learned counsel that where an agreement is found to be invalid even the execution Court will have the equitable jurisdiction to relieve the parties of forfeiture or penal clauses. In support of the same learned counsel relies upon a decision of a learned single Judge of Mysore High Court in the case of Abdul Ghanisab Vs. Alampalli Nanjunda Shetty: AIR 1962 Mysore 9, in para- 6 of which it has been held as follows:

> " I am not disposed to agree with the view taken by the lower appellate Court in this case. The principle applicable to cases like the present one is that if a creditor agrees to reduce the amount of his claim on Patna High Court COMP. APP.(SJ) No.3 of 2010

> dt.16-12-2016 certain conditions but the agreement provides that, on the failure of the debtor to fulfill any of those conditions, the original claim shall revive, it is clear that the revival of the original claim is not in the nature of a penalty. But, if, on the contrary, a debtor agrees to pay a sum of money over and above his original liability, he is entitled to be relieved against what undoubtedly has to be regarded as a penalty. The same principle applies to a consent decree made by a Court."

Reliance is also placed upon a Division Bench judgment of the Calcutta High Court in the case of Bishwanath Kundu Vs. Subala Dassi: AIR 1962 Calcutta 272, in the relevant part of para-11 and para 12 of which it has been held as follows:

> "11. On the main question, however, namely, that the stipulation for payment of double the amount in case of default for three consecutive months was a stipulation by way of penalty and that, although the same forms part of a decree of Court, as the said term was really incorporated under a compromise, it cannot be regarded except as part of a compromise decree, so as to be subject to relief even in the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 executing court, Mr. Sen s client ought to succeed. The appellant, therefore, would be entitled to relief in respect of the same as part of a contract, providing for penalty, even though the said contract has been incorporated in a decree of Court. This indeed, is clear from the series of decisions, starting from Surendra Nath V. Secretary of State, 24 Cal WN 545.....
>
> 12. In the present case, the term of double payment was, undoubtedly, a term of penalty. The appellant, therefore, would be entitled to relief under Section 74 of the Indian Contract Act. The respondent, however, even under that section, would be entitled to reasonable compensation even in the absence of proof of special damage."

Support is also sought in this regard from the two decisions, namely, Deepchand Mini Vs. Ticamchand Mini: AIR 1974 Calcutta 222 and Shyam Sundar Padhi Vs. Indramoni Das: AIR 1951 Orissa 46 which lay down the similar propositions.

Lastly, it is submitted by learned counsel for the appellants that even assuming without admitting that the warranty clause is enforceable in spite of the invalidity affecting the TD with Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 regard to excess lands already vested in the State, the compensation that MMS Group is entitled to cannot be 100% of the market value of the lands as if what was contemplated in the agreement was a transfer by the owner of the property to a person who had no pre-existing right over the same, whereas in the present matter the MOFA and TD provided for division of assets, and compensation, if any, should be determined on the basis that RBT can divide amongst its shareholders only such of the assets that were available to it, on the date of the MOFA and TD.

The stand of learned counsel for the respondents, on the other hand is that several new points have been raised by the appellants in the appeal which has not been urged before the CLB. It is submitted that no submissions had been made earlier relying upon Section 20 of the Indian Contract Act, 1872.

Further, it is alleged that no submission had been made over warranty clause and penal clause and the execution court to relieve a party from said penal clauses and no such plea has been taken even in the memo of appeal.

It is urged that it is settled law that an executing Court cannot go behind the decree. Reliance is also made to the circumstances leading up to the passing of the consent decree dated 19.8.1999 by the CLB to show that, contrary to the appellants assertions, the TD forms integral part of the consent decree and was Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 arrived at after 14 months intensive negotiations between the parties assisted by their counsels and with the active involvement of the CLB which had clearly applied its mind while passing the consent decree and thus the comprehensive special warranties clause contained in the TD which did not exist in the initial draft forms, came to be the basis of the agreement between the parties. In the said circumstances, it is alleged that the appellants cannot be permitted now to escape their obligations by rewriting or rendering nugatory large parts of the warranties and Schedules of the TD.

It is submitted that the argument of the appellants based on the provisions of the KLR Act is clearly misconceived as the direction issued by the CLB does not contravene the provisions of the KLR Act since there is no direction to transfer the land which has vested in the State, rather compensation has been allowed to the respondents upon failure of the appellants to adhere to the representations made by them in the TD. In fact, it is asserted by learned counsel that till the date of transfer by TTE to RBT on 17.9.1976 there was no determination of surplus lands under the KLR Act by the TLB which was made on 13.11.1976 and thereafter on 15.12.1976 the option was given to the company with respect to the land to be surrendered and thus, it is submitted that no such relief was sought by the respondents seeking to enforce transfer of land by Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 appellants which had been surrendered or required to be surrendered under the provisions of the KLR Act rather only the compensation for loss suffered due to misrepresentation with regard to the surrender of the land comprised in the 5 Tea Estates having been made as mentioned in Schedule-9 of the TD. It is submitted that consideration for the respondents in signing the transfer document were the warranties given by the vendor relating to the subject-matter of the TD and thus the failure of the appellants to transfer the entire land mentioned in Schedule-9 of the TD has rightly been held by the CLB as entitling the respondents to compensation for such loss.

It is submitted that what was before the CLB was not the contract but a consent decree and to such a decree there can be no applicability of the provisions of Section 20 of the Indian Contract Act. Moreover, it is submitted that Section 20 applies only in a case where both the parties are under a mistake as to a matter of fact essential to the agreement whereas the contention of the appellants is that both the parties were fully aware of the surrender of the land to the State Government and there would consequently be no mistake in the minds of both the parties as to the facts of the case. Thus, while Section 20 assumes ignorance, the appellants are pleading knowledge with respect to surrender of lands under the KLR Act. It is submitted by learned counsel for the respondents that the same is clearly Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 misconceived.

It is urged that Mr. B.M. Sharma who was resident of U.K. was involved in the initial negotiation which took place in London whereas the conveyance deed was signed by C.B.Sharma on behalf of

the RBT and there is no reference to the KLR proceedings in the Sale Deed dated 17.9.1976. Moreover, Mr. B.M. Sharma was never a shareholder of RBT and only became Director in 1992 after 15 years of the conveyance. He is also not part of MMS Group as defined in the TD and has been separately defined therein. Therefore, any alleged knowledge of B.M. Sharma is wholly irrelevant.

It is argued that the appellants are, in any event, barred from taking such pleas in view of the terms of Transfer Document as per Clauses 9.8, 13.3 and 13.5 and even the consent order dated 19.8.1999 records that there is no understanding and/or arrangements other than those expressly stated in the TD.

With regard to the knowledge of Mr. M.M.Sharma, it is submitted that since he had passed away in 1992 and is not part of the MMS Group, his knowledge cannot be attributed to the MMS Group. With regard to Shri Manish Mohan Sharma it is stated that in January, 1992 he was only 20 years old and soon thereafter from the year 1992- 94 the disputes started. It is stated that even from the order dated 2.3.1998 passed by the CLB, it is evident that the respondents were not Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 involved in day to day management.

With regard to Joint Management Agreement, it is stated that it only dealt with the administration and work allocation between the two groups in compliance with the CLB order dated 2.3.1998 and the decision regarding transfer of assets of RBT to the respondents was not even started when JMA was put into effect from 1.6.1998 and even the TD provides that the records are to be given to MMS Group which is evident from Clause 2.1.26 read with Clause 7.3.11.

The respondents have also sought to brush aside the agreement for sale dated 13.8.2001 by Shri Manish Mohan Sharma, in which reference was made to waste land surrendered to the Government forming the boundary, which according to them cannot lead to inference that 922 acres of land surrendered from the respondents side was not available to be transferred to the respondents nor is the report of the Tea Board of any consequence as no action was taken pursuant to the same by the Government and the respondents have never accepted the report.

With regard to the letter of Mr. B.M. Sharma regarding perusal of the balance sheet from 1977 to 1996, it is stated that the same had been done by his London office and cannot lead to inference of his having also looked at the statement relating to land surrendered Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 in the annual report of 1985.

The respondents have also sought to draw the attention of the Court to a large number of documents from the year 1990-91 to June, 1999, immediately preceding the date of signing of the transfer documents including the annual report of RBT in the year 1991, the valuation report of the company s estates of the year 1994-95, due diligence review report of the company carried out by KPMG, copy of various mortgage documents, the letters exchanged between the parties to show that the entire extent of land was available with RBT as per the said documents and no explanation has been given by the appellants as to how the aforesaid document reflect the entire acreage. It is thus submitted that even factually the respondents had no knowledge about the KLR proceedings. It is further submitted that the agreement does not require the appellants to do an act which is

impossible rather Clause 9 dealing with warranties clearly stipulated that in the event of any misrepresentation or non-fulfillment of any of the representations contained in or any breach of any of the warranties then the CBS Group and the vendor shall be liable to pay to the purchasers or the MMS Group, as the case may be, a sum equal to 100% of all and any losses, damages or expenses suffered by the purchasers or any member of the MMS Group.

The respondents have also controverted the stand of the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 appellants with regard to the division of assets in the ratio of 55:45 submitting that there is no such reference in the TD which only refers to the estates which has to be transferred to the respondents and not to those which are to be retained by the company.

It is also submitted that factually also the lands which had been surrendered or have to be surrendered from the respondents estate is 922 acres whereas from the appellants estate it is only 522 acres and if the said area is reduced from the respective total lands, the balance with MMS Group comes to 4169.36 acres as opposed to 3651.59 acres with the CBS Group, the ratio thus becomes 53.33% vis- a-vis 46.6% and therefore it is not correct for the appellants to say that the ratio would be maintained.

With regard to the warranties, it is submitted that they are special warranties in view of the background history of the disputes and litigations between the parties and in fact, consideration for the respondents in signing the MOFA and TD. It is submitted that the judgments relied upon by the respondents to submit that executing Court has power to rely upon the penal clauses are not tenable and seek to rely upon decisions of the Apex Court in the case of Deepa Bhargava and another Vs. Mahesh Bhargav and others: (2009) 2 SCC 294, in para 11 of which it has been held as follows:

> "11. Even assuming that the term stipulating Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 payment of interest in the event the entire amount was not paid within a period of 6 months is penal in nature, the executing court was bound by the terms of the decree....."

The respondents also rely upon a decision of the Apex Court in the case of Haryana Vidyut Prasaran Nigam Limited and another Vs. Gulshan Lal and Ors.: 2009(13) SCC 354, in para-22 of which it is observed as follows:

> "22. We are not oblivious of the fact that the respondents legally would not have been entitled to the reliefs prayed for by them. However, as a decree has been passed, we do not intend to go behind the same. The Executing Court shall, it goes without saying, execute the decree strictly in terms thereof."

It is also submitted by learned counsel that the decision of the Supreme Court of Minnesota in Mccormick & Ors. Vs. Kelly case (supra) is also not applicable as that was not a case relating to execution proceedings of a decree which had attained finality but one where a contract was being sought to be enforced.

Moreover, it is submitted that it is not a case of general warranties but special warranties which were given in the wake of Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 serious disputes and differences between the parties resolved by lengthy, detailed and difficult negotiations which ultimately culminated in the form of MOFA and TD.

Reference is also made by learned counsel on various paragraphs of the Supreme Court judgment in the inter party decision reported in (2006) 4 SCC 416 wherein it was held that the order dated 19.8.1999 was not an interim order, the issues resolved cannot be reopened or re-argued and further that the CLB while dealing with an application under Section 634-A sits as an Executing Court and subject to all the limitations to which a Court executing a decree is subject and cannot go behind the decree unless the decree is a nullity for a lack of inherent jurisdiction which would happen if the Court passing the decree usurps a jurisdiction which it did not have and which could not be waived by the parties.

Reference is also made to the observations in the said judgment that family settlement is governed by special equity and is to be enforced if honestly made and this would be so even if the terms may have been agreed to on the basis of an error of the parties or originate in a mistake or ignorance of fact as to what the rights of the parties actually are. It was further observed therein that the CLB and the High Court had erroneously proceeded on principles applicable to contracts alone and have ignored the fact that the agreement between Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 the parties had culminated in a consent order of the CLB.

It is further submitted that reliance upon decisions of this Court and other High Courts with regard to the proposition that Executing Court can decline to execute a decree if it is contrary to law is of no avail since the order passed by the CLB is on account of failure or non-fulfillment of obligations on the part of the appellants in view of Clause 9 of the TD.

It is also submitted that acceptance of the plea of knowledge of surrender would amount to rewriting the terms of the consent decree with regard to the definition of sale estates and Schedules 9 and 10 of the MOFA and Clauses 9.8 and 13.5 of the TD.

It is submitted that a consent decree of Court can only be modified by consent of parties and judgment by consent is an as effective estoppel between the parties as a judgment where court exercises its mind on a contested case. The decree on the basis of compromise is something more than a contract. Reliance for the said proposition is made to the decisions in the cases of Govind Waman Vs. Murlidhar Shrinivas & Ors.: AIR1953 Bombay 412; C.F.Angadi Vs. Y.S. Hirannayya: (1972) 1 SCC 191; Sailendra Narayan Bhanja Deo Vs. State of Orissa: AIR 1956 SC 346; Katikara Chintamani Dora Vs. Guntreddj Annamanaj 4: (1974) 1 SCC 567; and the inter party decision of the Apex Court of the year 2006.

Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 It is also submitted by learned counsel that in an appeal under Section 10F of the Companies Act the jurisdiction is limited to question of law alone and not a pure question of fact and the plea of alleged knowledge of the MMS Group with respect to KLR proceedings is a pure question of fact and in the absence of any

perversity in the finding recorded by CLB, the same cannot be gone into in an appeal under Section 10F. Reference is also made in this regard to the decision of the Karnataka High Court in the case of Reserve Bank of India Vs. Kirloskar Investments and Finance Ltd.:

(2001) 107 Comp. Cases 63.

I have considered the submissions of learned counsels for the parties and perused the voluminous records placed before this Court. At the outset it would be appropriate to deal with the submission of learned counsel for the respondents that the present appeal being under Section 10F of the Companies Act, is maintainable only on the question of law and, therefore, the finding of fact rendered by the CLB with regard to the MMS Group having no knowledge of surrender of excess land prior to 1998-99 cannot be agitated before this Court and in the absence of any plea or any allegation of perversity in the finding recorded by the CLB. The proposition that an appeal under Section 10F is only on a question of law can hardly be challenged by any one. But to state that the findings regarding MMS Group having no knowledge Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 of the surrender of excess land prior to 1998-99 being a finding of fact and not open to re-agitation before this Court because of the absence of plea of perversity, does not appear to be made out on a broad consideration of the grounds taken in the memo of appeal. The principal thrust of the memo of appeal is assailment of the said finding of fact with regard to the lack of awareness of the MMS Group regarding the surrender or required to be surrendered surplus land which has been sought to be done not only by challenging the finding regarding misrepresentation by the appellants but also with regard to the finding that Mr. B.M. Sharma has never been part of MMS Group. The findings have been assailed in an appeal which relates only to question of law. It is evident that such proposition can be supported only on the ground of perversity and not otherwise. Thus, it cannot be said that the appellants are excluded from assailing the said findings. Right from the stage before the CLB in the written statement as also before this Court the submission of the appellants has been that the MMS Group had actual knowledge of surrender of land much before 1998-99 and that Mr. B.M. Sharma was at all stages involved right from the inception when the sale of the Tea Estates was negotiated with TTE. In the said background the contention of learned counsel for the respondents that it is not open to the appellants to urge the said ground tantamounts to saying that the appellants have no right to argue their Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 appeal under Section 10F of the Companies Act. The said objection of learned counsel for the respondents is, accordingly, rejected.

At the outset it would be important to remember what the Supreme Court had stated by its order dated 21.3.2006 in the case between the present parties. First of all, it was held that the order dated 19.8.1999 of the CLB was in fact a preliminary decree and the final disposal of the matter or the final decree would be after full implementation of the terms of the MOFA & TD. It was also pointed out that the CLB itself had recorded that if there was any difficulty in the implementation of the order, the parties shall be at liberty to apply to it for implementation of the said order dated 19.8.1999 and it was further made clear that the CLB, while dealing with an application under Section 634A, sits as an executing Court and subject to all the limitations of such a Court. It was also observed that if the Board found that the decree or any of its terms called for interpretation, it was within its jurisdiction to interpret that particular term and to execute the decree on the basis of such interpretation; and

further that if a decree is ambiguous, it is the duty of the executing court to construe the decree and the decree must be executed as interpreted.

The Supreme Court also pointed out that Clauses 3.1 and 3.6 of the MOFA make it clear that the agreements were arrived at between the parties to resolve finally long pending disputes between Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 the family members relating to jointly owned assets. It also emphasized that family settlements are governed by a special equity and must be enforced if honestly made and that even if the terms may have been agreed to on the basis of an error of the parties or originate in a mistake or ignorance of fact as to what the rights of the parties actually are, or of the points on which their rights actually depend, since the object of an arrangement is to protect the family from long drawn out litigation and matters which would be fatal to the validity of similar transactions between strangers may not be objections to the binding effect of family arrangements. It had also taken note of the fact that the MOFA and TD were the outcome of the commendable and determined efforts on the part of the Company Law Board to bring to an end disputes between the parties in a manner which would have been in the interest of the two blocks of shareholders and saved the parties of a lot of unnecessary harassment, expenditure and acrimony. It was with the said observations that the matter was remanded to the CLB for implementing the order dated 19.8.1999 by executing the same. Thus, the order dated 19.8.1999 is to be considered as a contract with the imprimatur of the Court superadded and the MOFA & TD from an integral part of the order itself.

In the said circumstances, when the IA No. 136 of 2009 was filed in the said matter, the CLB ought to have kept in mind the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 fact that it was not merely an agreement between the parties rather by protracted negotiations for quite some time, in which process the CLB itself played an active role by suggesting that the five estates which had been given under the Joint Management Agreement dated 1.6.1998 to the MMS Group may be handed over to them as part of the family arrangement and the no less important role played by the Board Chairman Justice A.N.Verma appointed by the CLB in the matter for bringing the parties together.

In the said backdrop when the matter was first of all raised before the CLB ten years after the consent decree dated 19.8.1999 passed by it, it ought to have examined the matter keeping in view all the aforesaid factual positions and not decided the same on mere technicality. The Company itself had taken over the Tea estates of TTE as long back as in the year 1976. It is evident from the materials on the record that Mr. B.M. Sharma being resident of London at the relevant time had played not only an initial role but the most important role along with his father Mr. Madan Mohan Sharma in the course of negotiations to bring about the sale of TTE as is evident from the affidavit filed by one of the then Directors of TTE which is on the record. Even otherwise, it would be in the normal course of things to presume that a person in London would have played a substantial role in the matter of such a sale, particularly keeping in view the fact the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 conditions prevailing in 1975-76 when there were a lot of controls and permissions to be obtained from the Government as is evident even from the affidavit of the said Director of TTE that the negotiations were protracted much beyond the time in contemplation of the parties. Once this basic fact is accepted then it has to be presumed that the question of ceiling

proceedings under the KLR Act, which had already been initiated against the TTE as far back as in the year 1970 itself and with respect to which it had also filed return and the matter was then under the consideration of the TLB, would have necessarily come up for discussions between the parties. The agreement for sale entered into between TTE and RBT without specifically referring to such proceedings had, in fact, provided for the lands being sold subject to right and title as were in existence. Even the sale deed dated 17.9.1976 clearly stated that the assets were being handed over free from all liens, charges and encumbrances save as expressly disclosed to RBT; the last part would clearly mean reference to the pending ceiling proceedings. Thus, to rely upon the technicality that there is no specific mention of the proceedings under the KLR Act in the Sale Deed and thus there would be no knowledge about the same to Mr. B.M. Sharma would be a hyper technicality and not borne out by the common course of conduct of human beings that too astute businessmen, in the matter of such a substantial purchase of property like the 9 tea estates, Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 specially when the final order in ceiling proceedings was passed within two months of the said sale deed holding 1444 acres of land to be surrendered to the TLB followed by further actions immediately thereafter. The same goes to show that at the very least Mr. B.M. Sharma was fully aware of the said matter having been involved in the purchase of the 9 Tea Estates from TTE.

Moreover, since the proceedings under the KLR Act resulted in final order immediately after the purchase of the company by RBT, it would be an important matter known to all the members of the family interested in the company considering the fact that they are hard-headed urban, even NRI, businessmen. The ceiling proceedings have continued over a period of time and there was actual surrender of substantial area of land in 1984, and it is difficult to believe that such things would have happened in a surreptitious manner and known only to one of the family groups which was not even in control of the management of the company at that time. It has thus be assumed that all members of the family who mattered, including Mr. B.M. Sharma, were aware about these basic facts.

The next stage in the affairs of the company was when Shri Madan Mohan Sharma was succeeded by his cousin of the CBS Group as Chairman and Managing Director of the Company in the year 1992 at which stage Mr. B.M. Sharma along with respondent Manish Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 Mohan Sharma were both made Directors of the Company. Sometime thereafter disputes between the two branches of the family started and quitely assumed virulent position so as to lead to the MMS branch to approach the CLB under Sections 397 and 398 of the Companies Act regarding oppression and mismanagement by the CBS Group. Mr. B.M. Sharma, although not a shareholder of the company, but being the head of his branch of the family after the death of his father and considering that his family members, including his wife and children, were holding nearly half the shares of the company had been playing a most active role, whether he was looking into the balance sheet and annual reports of the company and sending reports and complaints in this regard to the other Directors regarding the state of affairs of the Company, which according to him was not being run in a proper manner. Again at this stage it would be difficult to presume that any person with such high stake in the company through his family members would be unaware while examining, or getting the accounts examined as has been sought to be argued by learned counsel for the respondents, regarding the factum of surrender of lands made in the year

1984, duly reiterated in the Company s Annual Report of 1985. As stated earlier, even without such report it is unbelievable that the respondents would remain blissfully unaware of such matter regarding acquisition in ceiling proceedings of 1523 acres of land of the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 company, which is almost 10% of its total land. The Court can also take judicial notice of the fact that when there is acrimony and bitterness in the matter of running the business then both sides would be more aware of all dealings and affairs in relation to the company, particularly with respect to assets and liability than in a case where the company would be running with a sense of trust by both sides. Thus, it is difficult to accept that during the long years the company was in operation, only one of the two Branches, namely the CBS Group, was aware with regard to surrender of the land under the KLR Act and the other Branch, namely the MMS Group was ignorant of the same.

After that there was re-constitution of the Board of Directors of the RBT by order of the CLB on 9.1.1997 and the entry of Justice A.N.Verma as Chairman of the RBT and two Directors each from the two Groups, with further directions to the parties by the CLB to reach an amicable settlement. This was followed by the order dated 2.3.1998 directing that the affairs of the RBT shall be jointly managed by the two Groups. This was further followed by the Joint Management Agreement dated 1.6.1998 approved in the Board meeting dated 9.6.1998. In between the said period also letters had been received from the Taluk Surveyor which had been responded to by the company after obtaining advice of the lawyers of the RBT clearly stating that the land was surrendered long ago and the action of the Taluk Surveyor Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 was uncalled for. Since RBT was not being managed by the CBS Group alone at the relevant time rather was under the management team headed by Justice A.N.Verma, it would be difficult to assume that the other Group could have been totally kept out of the loop for sending such replies, that too without any rhyme or reason for the same as it cannot be argued that any benefit could have accrued to the CBS Group in keeping the other Group in ignorance about the surrender of lands made under the KLR Act. Then there is the fact of Mr. P.P.Machaiya being re-employed by the Board of Directors of RBT at the request of Mr. B.M. Sharma for MMS Group, who had signed the declaration dated 30.1.1984 by which a large portion of the land was surrendered.

From 1.6.1998 under the Joint Management Agreement, five tea estates were given to the management of MMS Group although it has been sought to be argued on behalf of the MMS Group that certain administrative work alone was handed over to it, which does not appear to be acceptable as otherwise there would be no sense in stating that five estates were to be managed by the MMS Group under the JMA. The said plea appears to be completely false. While under the joint management the land tax was also paid by MMS Group by receipt dated 4.3.1999 on the basis of actual acreage.

The above stand of the MMS Group has also to be considered in the light of the statement made in the I.A. No. 136/2009 Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 that for the first time they became aware of the land being surrendered with regard to five estates under the KLR Act in 2009 which, on the basis of the evidence brought on the record with regard to the agreement for sale dated 13.8.2001 executed by respondent M.M. Sharma by which the lands agreed to be sold showed that one of the boundaries thereof was land surrendered to the Government

appears to be a false assertion and in this regard the explanation sought to be given by the respondents appears to be completely unacceptable and further goes to show that a false stand was taken in the I.A. that the MMS Group had no knowledge about the surrender of land prior to 2009.

The next issue which has serious bearing in the present matter relates to the position of Mr. B.M. Sharma and whether his knowledge can be attributed as knowledge of the MMS Group. As pointed out earlier the MMS Group is nothing but the family members of Mr. B.M. Sharma and he had throughout acted on its behalf even during the course of negotiations with the CBS Group for arriving at the family arrangement. It is Mr. B.M. Sharma who had played the lead role on behalf of the MMS Group, which aspect of the matter has been completely overlooked by the CLB in the impugned order dated 29.11.2010 relying upon the technicality of the description of the MMS Group, which does not include his name and the fact that he has been Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 separately defined in Clause 2.1.4 of the TD. This Court is surprised at the hyper-technicality invoked by the CLB in the impugned order to hold that he was never part of MMS Group. Moreover, merely because the final order of Taluk Land Board was passed on 13.11.1976 it has been held by the CLB that it would be impossible for Mr. BM Sharma to know details of the land surrendered in 1975. The issue is not as to which particular area had been surrendered before the sale deed but the fact that the area of land to be surrendered was almost 10% of the total sale area and was going to be surplus immediately after the sale deed which fact could not have been unknown to Mr. B.M. Sharma who was the key negotiator in London on behalf of the Company.

It has also to be remembered that Mr. B.M. Sharma has not only signed the TD on behalf of the respondents of the MMS Group but he continued to file various petitions, affidavits, etc. on behalf of the said Group including the Interim Application No. 136 of 2009 as power of Attorney holder on behalf of Mr. Manish Mohan Sharma out of which the present appeal arises. Thus to assert that the knowledge of Mr. B.M. Sharma is not the knowledge of the MMS Group would be a travesty of fact and the finding to the contrary by the CLB has to be construed as perverse.

Much has been said about the fact that several annual reports and other documents from 1991 onwards had continued Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 showing area of land of 9 tea estates as they were in the original sale deed and thus the respondents would have no knowledge about surrender of land made earlier. The same does not appear to be acceptable for the reason that those reports merely show the usual carelessness and negligence in such matters which has continued right till the mentioning of the schedule of the TD as no one took care to remove the survey numbers from the original areas of the sale deed and certainly does not lead to any conclusion that this gave any wrong impression to the respondents. It can only show that no one really bothered to check about such details even when all such reports were being filed or even when the Schedule of the TD was being prepared. The same cannot in any way show that this was the prevailing state of affairs as known to everyone because it would be unusual for any one to closely look at each of the revenue survey numbers in such annual reports and nothing would really turn upon it. It is unusual to argue that such reports were noticed but the actual statement regarding surrender made in the year 1985 in the Annual Report of more than 1000 acres of land remained unnoticed which appears to be unbelievable.

More than anything else the respondents cannot show as to how during the long period from 1976 till 1999 when the sale of the tea estates was made till the MOFA and TD were signed, one group alone of the two owning the company remained unaware about Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 surrender of lands under the KLR Act and only the other group had remained aware and it thus played fraud and misrepresentation, which stand of the respondents has been curiously enough believed by the CLB also.

As rightly emphasized by learned counsel for the appellants it was not a case of sale by RBT and CBS Groups of part of the company to a 3rd party and stranger to the family, rather it was a division of the family assets in the form of a sale by the Transfer Deed; nonetheless the said transfer is a part of the Memorandum of Family Arrangement in order to equitably divide the assets by the two Groups in the said Company.

This Court is thus of the view that the finding of the CLB regarding the lack of knowledge of MMS Group about the land surrendered and to be surrendered by the company under the KLR Act is not borne out by and is contrary to the facts and materials on the record and is therefore perverse, and in this regard it has to be held that the MMS Group equally with the CBS Group was aware that a huge chunk of land, i.e., 1523 acres had been surrendered and were to be surrendered by the company under the provisions of the KLR Act.

Once the aforesaid issue of knowledge of the MMS Group with regard to the surrender of land is accepted then the next question which arises would be as to how there can be finding of Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 fraudulent misrepresentation on behalf of the CBS Group to the MMS Group as has been held by the CLB in its impugned order. A fraudulent misrepresentation is only possible if the party making such representation is aware of certain facts whereas the other party to whom misrepresentation is made is not aware of the same. Since the materials on the record lead to the unequivocal conclusion that both the Groups were equally aware about the fact of surrender, it cannot be said that there was any fraudulent misrepresentation about the area of land. This would also be clear from the fact that what was being divided were the assets of RBT belonging to the two Groups, even if it was ultimately given the shape of a Transfer Document by RBT to the MMS Group. Further it is stated in the order dated 19.08.1999 of the CLB that even the suggestion, that the five estates already under the management of the MMS Group under the Joint Management Agreement should be given to the said group as its share on division, had been made by the CLB, and thus it could not be said that deliberately an attempt was made to hand over those very tea estates which had suffered maximum amount of lands being surrendered. As a matter of fact, the issue of area comprising the said estates does not appear to have been expressly brought out in the course of negotiation of more than 14 months by any of the parties and both sides were simply talking in terms of five tea estates regarding which it was Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 evidently known to the parties managing them under the Joint Management Agreement that the five tea estates comprised approximately 55% of the over all 9 tea estates and accordingly, the JMA provided for 55% cost of the expenditure of Kochi office to be borne by the MMS Group and remaining 45% to be borne by the CBS Group.

This is also the admitted position as per the arguments of learned counsel for the respondents that even after excluding the surrendered estates the share of MMS Group would be to the tune of 53.33 percent vis-à-vis 46.6% share of the CBS Group. This is broadly the proportion in which expenditure was sought to be shared of the Kochi office in terms of the JMA dated 1.6.1998. Thus the finding regarding fraud and misrepresentation by the CLB in the aforesaid circumstances appears to be completely uncalled for and contrary to the materials on the record and its own previous order dated 19.08.1999 and, therefore, perverse.

The aforesaid two findings would broadly take care of what has been decided by the CLB in the impugned order rendering it fit to be set aside. However since several other propositions have been raised by learned counsels, I may briefly deal with them.

So far as the submission of learned counsel that the MOFA and TD have to be read conjointly as part of the scheme for division of the assets and liability of RBT and not a sale, there can Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 hardly be any doubt that the said proposition reflects the correct state of affairs, shorn of the technicality that has been brought about in the form of Transfer Document to effect the division of the property of the Company which aspect has also been noted by the Supreme Court in its order dated 21.3.2006 in the inter party case.

So far as the submission of learned counsel based upon Section 20 of the Contract Act is concerned, the same does not appear to be acceptable as Section 20 speaks about both the parties to the agreement being mistaken as to a matter of fact essential to the agreement, which makes the agreement void. It does not appear that the parties in the present matter were mistaken as to a matter of fact essential to agreement rather it was division of Tea Estates in the ratio of 5:4 between the two Groups and since it was in the form of Transfer Document, hence the sale of those five estates to the MMS Group, without referring to 4 Tea Estates to be retained by the CBS Group. The description of the lands in Schedule 9 to the TD is really a case of negligence on the part of the parties to correctly refer to the area which remained within the 5 Tea Estates by not excluding from the area what had been surrendered or were required to be surrendered under the KLR Act.

From the course of dealing of the parties as has been discussed above, it is evident that there could be no intention of the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 parties to include surrendered lands in the Transfer Documents and it is on account of sheer negligence in preparing the documents that the areas surrendered and to be surrendered had not been excluded therein. As pointed out earlier the sale was not really in relation to the actual area of land rather the sale was of the 5 Tea Estates and there was merely careless misdescription of the actual position of the land comprised in the 5 Tea Estates which has occurred in the Transfer Document. Section 20 of the Contract Act talks of a mistake as to a matter of fact essential to an agreement and where there is such mistake, the agreement would be void. If the submission of learned counsel for the appellants regarding application of Section 20 is accepted then mere presence of the severability clause 13.6 would not save the agreement and the entire agreement would have to be struck down as void under the law and not voidable in which latter situation alone such a clause can operate. It is not the case of either of the parties that the entire agreement is void. What is involved herein is really a question of interpreting the agreement as the parties intended it to be, which has to be seen not only from the

Clause of the TD which would have been seen in quite a different light had it been a case of sale by the company to a third party stranger and not as in the present matter where both the parties were in full knowledge of the affairs and proceeded to enter into the agreement. Thus there was no mistake as a Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 matter of fact, essential to agreement; rather it is negligence in incorporating the correct areas. In view of the fact that those areas have been surrendered or were required to be surrendered by operation of law to the State Government under the KLR Act, there can be no question of those areas being shown in the Tea Estates and at least in the eyes of the parties they had entered into the agreement and were entitled only to the Tea Estates as then remaining and not any land which had been surrendered to the Government. Thus, Section 20 of the Contract Act can have no application in the present matter. For the said reasons the arguments based upon Section 20 of the Contract Act will also have to be held as not valid in the facts and circumstances of the case.

For the same reason, the argument that the operation of Sections 20 and 23 of the Contract Act is available to be urged before the Execution Court like the CLB would also lose its relevance, on the findings recorded above.

So far as the submission of the appellants upon clause 13.6 of the TD is concerned, as has already been held by the Apex Court in the 2006 judgment in the dispute between the parties and it is also the view of this Court that the CLB had the powers to adjudicate on the enforceability of the clauses of the TD; and while doing so it had to take into consideration the entire history of the dispute between the Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 parties including the fact of joint management and negotiations under the aegis of the CLB and it ought not to have decided the issue on mere technicalities.

So far as the submission that the invalidity of the TD would affect only the transfer of land already vested in the State by virtue of KLR Act and not the entire agreement as a void one on account of Clause 13.6 of the TD, the same has to be accepted as parties themselves had provided that if at any time any term or provision of the document shall be held to be illegal, invalid or unenforceable in whole or in part under any rule of law or enactment, such term or provision or part shall to that extent be deemed not to form part of the document but the enforceability of the remainder of the document shall not be affected. It is the view of this Court that there can be no agreement between the parties to the family arrangement to transfer any land which did not belong to the company and had vested in the State much prior to that date almost at the time when the Tea estates vested in the company and thus that part of the TD cannot be enforced but the same will not make the entire document invalid.

This Court is also in agreement with the observations made in the decision of the Supreme Court of Minnesota in Mccormick case (supra) in which it was held that a party cannot rely upon the truth of that which he knows to be untrue and once the purchaser has full Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 knowledge in respect of the property, misrepresentation cannot be said to be an inducement or consideration to the making of the purchase and hence could not have been part of the contract in the present matter.

Further in this case there is no real purchaser, although the division of assets of the family has been expressed in the form of Transfer Document and it is the property of the company held in almost equal shares by the two Groups which has been sought to be divided between them.

For the same reasons, the warranty with regard to the said lands cannot have any application to the lands which as held earlier, were known to the parties to have been surrendered or were required to be surrendered to the State Government under the KLR Act, and it cannot cover that part of the agreement. In this regard the reasonable view of the matter, considering the insistence by the MMS Group during the course of negotiations for the existence of warranty clause, would be that which they had knowledge with regard to the area of land, about which they were already aware as held earlier, but the fact that since 1992 the CBS Group had been in control and management of the Company, therefore the MMS Group may not be aware of the various actions that may have been taken by the CBS group during that period of nearly 5-6 years with respect to various amounts and assets of the company including any mortgage or charge Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 or some such transfer or any such action on their part which would have any adverse effect on the right and title over the 5 Tea Estates which had come to them. It is to be presumed that it was for such purposes that the CBS Group was required under the warranty clause to compensate the MMS Group with 100% compensation for the loss to be incurred by them on account of any such actions that they may have taken during that interregnum with regard to the assets and properties in question. Such warranty was certainly not in the contemplation of the parties with regard to the area of land, because had that been so then at the very least when Manish Mohan Sharma had entered into the agreement for sale with a private person in the year 2001 and was fully aware about the surrender of land to the State Government in the boundary of the land for which he had entered into the agreement for sale, such a plea would have been taken in 2001 itself and not come nearly 10 years after the MOFA and TD were executed.

On the question of power of the Execution Court exercising its equitable jurisdiction with regard to forfeiture or penal clauses, it cannot be said that such power does not exist in the Execution Court in an appropriate case. However, the said issue is not arising in the present matter in view of the fact that it has already been held that there is no misrepresentation on the part of the appellants, and there could not have been any, as the respondents were fully aware of Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 the state of affairs in respect of the land.

Lastly, it is the stand of the appellants that even if it is admitted that warranty clause is enforceable, the compensation could not be 100% of the market value of the lands as it was a division of assets between the two groups. However, I have already held that in the given facts and circumstances the warranty clause per se would not be enforceable. Moreover, this Court finds that the respondents having themselves in their application claimed compensation at the rate of Rs. 1.20 lac per acre, there could have been no justification for the CLB to have further enhanced the said amount.

This Court is further not in agreement with the submission of learned counsel for the respondents that acceptance of the plea of knowledge would amount to re-writing the terms of the consent decree. The said proposition completely overlooks the fact that the consent decree was with respect to the division of the assets of the family in the Tea Estates of the company, RBT and the order of the

CLB itself depends upon the ground of fraud and misrepresentation, whereas it has been found that there was no fraud and misrepresentation.

In the said circumstances, it is the duty of the court to see that the decree is enforced in the form and manner in which it was actually intended to by the parties and ensure that any error or omission Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 inadvertently which has crept in the compromise of the parties, is dealt in an equitable manner. In this regard, this Court would consider the repeated plea of the appellants themselves both before the CLB and this Court that the division of estates was meant in the ratio of 55:45 %. It is not in dispute that after the transfer of 923 acres from the share of the MMS Group and 522 acres from the share of the appellants, the MMS Group has been admittedly left with balance of 4169.36 acres whereas the appellant CBS Group with 3651.59 acres which makes the ratio 53.33% for MMS Group vis a vis 46.6% with the CBS Group. Thus the greater loss has been occasioned in the said matter to the MMS Group.

In view of the strong stand by the appellants throughout before the CLB and before this Court that division of estates was meant to be in the ratio of 55:45, this Court is of the view that considering the fact that the division of family assets had been agreed to by the CBS Group to be in the form of Transfer Document, the appellants should on the basis of their own stand be directed to monetarily compensate the respondents so that the respondents may be restored to the position of 55% of the total remaining area of the acreage legally belonging to the nine Tea Estates. It would thus be fair and equitable on the part of the appellants to compensate the respondents by paying them the equivalent of the shortfall they would have obtained if 55% of the Tea Estates had gone to them as compared to what they have now. Patna High Court COMP. APP.(SJ) No.3 of 2010 dt.16-12-2016 However, the compensation for the same cannot exceed what had been claimed by the respondents in their interlocutory application, i.e., at the rate of Rs. 1.20 lacs per acre. The CLB (or its successor under the new Act) is directed to calculate the loss caused to the respondents on account of their share of the total acreage remaining after the acquisition under the KLR Act having come down from 55 to 53.33 % and for the said area alone the respondents shall be given compensation at the rate which they have claimed.

The impugned order dated 29.11.2010 is, accordingly, set aside to the extent indicated above and the appeal is partly allowed with the aforesaid observations and directions.

(Ramesh Kumar Datta, J) S.Pandey/-

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