Cads Software India Pvt. Ltd. & Anr vs K. K. Jagdish & Ors on 7 May, 2019

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NATIONAL COMPALY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL (AT) NO.320 OF 2018

(ARISING OUT OF IMPUNGED JUDGEMENT DATED 19.07.2018 PASSED BY NATIONAL COMPANY LAW TRIBUNAL, CHENNAI BENCH, CHENNAI IN COMPANY PETITION NO.8 OF 2017)

IN THE MATTER OF:	BEFORE NCLT	BEFORE NCLAT
1. CADS Software India Pvt Ltd, Type 11/5, Dr. VSI Estate, Rajiv Gandhi Salai, Tiruvanmiyur, Chennai-600041	1st Respondent	1st Appellant
2. Robins J.J.Wellington, S/o Mr. Wellington Gananiah No.27, 7th Cross Street, Padmavathy Nagar, Selaiyur, Chennai-600073	6th Respondent	2nd Appellant
Versus		
1. Mr. K.K. Jagadish, No.7, Defence Officers Colony, Ekkattuthangal, Guindy, Opposite Military Hospital Bus Stop, Chennai 600032.	1st Petitioner	1st Respondent
2. Nayagam Jeyakaran Jesupatham, No.35, Honeypots Road, Mayford Gu22 9Qw Working, 229, England	2nd Respondent	2nd Respondent
3. Ian Lelie Chamber Breamar Merley Park Road Ashington BH213DD, Winborne, 96041 England.	3rd Respondent	3rd Respondent
4. Jonathan Walter Pursall Fryeet		

Lindfield, 64, Queens Road BH 19

Swanae, 19.
England 4th Respondent 4th Respondent

5. Richard Martin Pearce
30 Ellesfield Drive,
West Parley BH22 8QW
Ferndown, 92173
England. 5th Respondent 5th Respondent

6. Computer Design Service Ltd,
(a company incorporated under the
Laws of England)
Arrowsmith Court,
10 Station Approach,
Broadstone
Dorset, BH18 8AX 7th Respondent 6th Respondent

7. Krishnamoorthy Meyyanathan
Practicing Company Secretary,
No.2 Shanti villa
Bharathi Nagar 3rd Street
T. Nagar
Chennai 600017 8th Respondent 7th Respondent

Present: Mr. VV Shivakumar, Mr.CA Sinha and Ms Sonali Khanna, Advocates for appellants.
Mr Rana Mukherjee, Sr. Advocate, Mr. Balaji and Ms Sreoshi Chatterjee, Advocates for Respondent No.1.
Mr. Aaditya Vijay Kumar and Mr Lila M Baruah, Advocates for Respondent No.2 to 7.

JUDGEMENT

MR. BALVINDER SINGH, MEMBER (TECHNICAL) The present appeal has been preferred under Section 421 of the Companies Act, 2013 against the order dated 19.7.2018 of the NCLT, Chennai in Company Petition No.8 of 2017. The Company Petition was partly allowed.

2. The brief facts of the case are that 1st appellant was incorporated on 19.3.1996 by 1st and 2nd respondent. 1st appellant is a subsidiary of 6th Respondent. 6th Respondent is a company based in UK which holds 51% shares in the company. 39% shares of the 1st appellant are held by 2nd Respondent. 1st Company Appeal (AT) No.320 of 2018 respondent holds only 10% of the equity shares of 1st appellant. 3rd to 5th respondent and 2nd appellant are nominee directors of 6th respondent. 7th respondent is a practising company secretary. 1st respondent was removed as Director of the 1st appellant pursuant to the Management losing confidence in him at the EGM on

7.8.2015 which resulted in 1st respondent to file company petition before the NCLT, Chennai for relief against oppression and mismanagement under Sections 241 and 242 of the Companies Act, 2013. The 1st respondent alleged five acts of oppression while alleging three acts of mismanagement. The appellants pleaded that the Company Petition is filed with the ulterior motive of extracting Rs.10 crores from the Company. The main contentions of the 1st respondent, in brief, are as follows:

a) That the R7 (R6 herein) company, registered under law of England engaged in the business of software development and software sales decided to venture into India and approached R2 who was its customer.

b) That R2 approached his distant relative, the petitioner (1st respondent herein) and requested to join and manage the affairs of the Company.

c) That the Financial Collaboration Agreement (FCA) was entered into by the petitioner (1st respondent herein) 2nd and 7th respondent (6th respondent herein) with regard to the incorporation of the new company as proposed by them.

d) That the R1 company (1st appellant herein) was incorporated in the year 1996 and 10%, 39% and 51% shares of the R1 company (1st appellant) are held by the petitioner (1st respondent herein) R2 and R7 (R6 herein) respectively.

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e) That the petitioner (1st respondent) is the Managing Director, R2 is the Executive Chairman of the company.

f) That the petitioner (1st Respondent) was promised allotment of 25% of the shares of the company, but was allotted only 10% and that his request for allotment of 15% was never heeded to.

g) That the Respondents used to visit to India once in a year that too at the time of AGM and the Petitioner (1st respondent) was managing the affairs of the company solely and Petitioner's (1st respondent) tireless contribution since 1996 was huge in making the company a successful enterprise.

h) That the petitioner (1st respondent) during the year 2011 learnt that the company was violating the transfer pricing norms since incorporation and R2 accepted the violation by his email dated 13.11.2011 and this act of R2 was protested by the petitioner (1st respondent).

i) That the petitioner (1st respondent) came to know that R2 had made huge cash withdrawals from the accounts of the company for his own purpose during the year 2015.

j) That the R2 incorporated M/s Waterman Consulting Engineers India Pvt Ltd and also another company M/s Consulting Structural Engineers India Pvt Ltd in the year 2014, In order to augment

income for the company he purchased two cars and leased the said cars to the R1 company (1st appellant). The cost of the cars would be Rs.18 to Rs.19 lakhs, whereas the company paid Rs.39.73 lakhs towards lease, when question, Respondent 2 declined this issue.

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k) That R2 in connivance of R3 to 6 (R3 to R5 and 2nd appellant herein) conspires, made false allegations against the petitioner (1st respondent) resulting in appointment of KPMG (auditor firm) to review the operations of the company that pointed out certain violations regarding direct tax, labour law, indirect tax and transfer pricing, for which, Respondent 2 was mainly responsible.

l) That R2 to R6 (R2 to R5 and 2nd appellant herein) pressurized the petitioner (1st respondent) to resign from the post of Managing Director and the Petitioner (1st respondent) had also decided to exit from the post of Managing Director on a compensation ofRs.10 crores from the company. However, the Respondents offered meagre amount.

m) That on receipt of report of KPMG (audit form) the holding company and the other Respondents issued a special notice dated 15.5.2015 under Section 169 of the Companies Act, 2013 for removal of the Petitioner (1st Respondent) from the office of Managing Director by making false allegations. Prior to this, a notice was given on 8.5.2015 for holding a Board Meeting on 15.5.2015 to discuss the position of the Petitioner (1st respondent) as the Managing Director. The special notice to discuss convening of an EGM on 15.6.2015 by the holding company contemplates only removal of the Petitioner (1st respondent) from the office of the Managing Director.

n) That to consider the special notice dated 15.5.2015, the company should have convened another Board Meeting after giving notice as contemplated under Section 173 Clause 3 of the Act, 2013. But in the special notice issued by the shareholders of the company it is mentioned that an EGM Company Appeal (AT) No.320 of 2018 would be convened on 7.8.2015 which indicates that the whole episode has been instigated by R2. Therefore, EGM convened on 7.8.2015 was without prior notice and the said EGM was illegal.

o) That during the Board Meeting held on 15.5.2015, the Petitioner (1st respondent) had objected to consider the special notice dated 15.5.2015 as the original notice dated 8.5.2015 of the Board Meeting had a different Agenda. In the minutes of the Board Meeting dated 15.5.2015, Respondent 2 and Respondent 5 have falsely recorded that the Petitioner (1st respondent) has been sought to be removed from the office of the Managing Director. It is also mentioned in the notice dated 15.5.2015 issued for EGM to be convened on 7.8.2015 for removing the Petitioner (1st respondent) from the office of the Managing Director. The R2 also filed a Form MGT 14 on 17.8.2015 with ROC wherein at Column 1 mentioned that the Petitioner (1st respondent) was removed from the office of the Managing Director and not from the office of the Director.

p) That the Petitioner (1st respondent) could not attend EGM held on 7.8.2015 in time as he got stuck in a traffic jam. The petitioner's (1st respondent) request through SMS to postpone the meeting was recorded in the minutes of EGM held on 7.8.2015.

q) That the said meeting was commenced at 11.30 A.M. and ended at 11.30 A.M. and ended at 11.33 a.m. and according to Clause 1 of Section V of FCA, the presence of the petitioner (1st respondent herein) is must to form a quorum. Since he was not present in the said EGM the same is illege, non est and void. Subsequently, R2 has filed a DIR 12 qwith ROC falsely recording that the Petitioner (1st respondent herein) was removed from Company Appeal (AT) No.320 of 2018 the office of the Managing Director and Director. The company has also issued a Public Notice in the newspaper "The Hindu" on 9.8.2015 which caused great prejudice to the reputation of the Petitioner (1st respondent herein). After removal of the petitioner the company has convened AGMs on 19.10.2015 and on 13.10.2016 wherein company has increased its capital from Rs.25 lakhs to Rs.35 lakhs and also amended the Articles of Association. As per the FCA, the presence of the Petitioner (1st respondent) is a must for shareholders meeting and since the petitioner did not attend the meeting, the AGMs convened on 19.10.2015 and 13.10.2016 illegal and null and void.

r) That the Petitioner (1st respondent) was removed from the office of the Managing Director and Director on 7.8.2015 and they have not paid the terminal benefits to the Petitioner (1st respondent) till date.

3. Respondent filed their reply and rebutted in brief as under:-

> a) That the 1st respondent did not invest in the shareholding of the company and 10% shareholding which he holds is not sweat equity and it was gifted by R2.
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> b) That the Petitioner (1st respondent) has prayed for an award of damages to the tune of Rs.10 crores from the Respondent but the petitioner (1st respondent) was always willing to resign and leave the company and he has written many letters and sent emails to this effect. Petitioner was offered a generous package of two years salary, two company cars and gratuity. As the gross salary of the petitioner for the year 2013-14 was Rs.33.79 lakhs and on the basis of the offer of Respondent the exit package would be around Company Appeal (AT) No.320 of 2018 Rs.1 crore only. The demand for Rs.10 crores was rejected by the Respondents.
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> c) That the company is not a party to the FCA and it is not binding on the company and not obliged to amend its Articles of Association in accordance with the FCA and the said act cannot be termed as "an act of oppression".

The petitioner accepted the non-amendment of AOA and worked for 20 years and he is estopped from saying that it is an act of oppression.

d) That the Audit Report shows that the petitioner (1st respondent) has not complied to the statutory provisions such as Income Tax, Wealth Tax, ESI, Gratuity Act, Bonus Act, Service Tax Act.

e) The item 1 of the minutes of the Board Meeting held on 15.5.2015 relates to the Petitioner (1st respondent) position as Managing Director and his participation in the said meeting is recorded properly. The other directors exercised their right under Clause 108 of the AOA to revoke the

petitioner's appointment as Managing Director. The removal of the petitioner from the office of the Director has to be decided in an EGM. There is nothing in the minutes of the meeting to show that it has been falsified as claimed by the Petitioner. The minutes are the evidence as per the provisions of Section 118 (7) and (8) of the Act.

f) That R2 and R3, the other directors, have filed a counter denying the allegations of the falsification of the minutes made by the Petitioner.

g) That the petitioner was not appointed as Managing Director of the company for life time and his appointment does not specify any term of office and, therefore, he cannot claim any contractual or statutory right to remain in the office of the Managing Director.

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h) That the majority shareholders have every right to remove the Director. Section 169 of the Act, 2013 and Clause 85C of the Articles of Association, empower the shareholders to remove the Petitioner from the office of the Director. There is a typographical error in the EGM explanatory statement and in EGM notice where the "Managing Director has been wrongly typed instead of "Director". The company is not a quasi partnership and it is not a family company, therefore, the removal of the Petitioner as Managing Director and Director cannot be considered as an "act of oppression".

i) That the transfer of shares from R2 to the Petitioner is a contract between them and it cannot be an act of oppression in the affairs of the company.

k) That the Petitioner has not proved any violation in transfer pricing regulations. The company has appointed M/s Ernest & Young to advise the company on transfer pricing in the year 2007 and subsequently in the year 2015 (KPMG) was appointed to report on non-compliance including transfer pricing. The KPMG did not find any non-compliance of transfer pricing and only found non-compliance of direct tax, indirect tax, corporate and labour laws. The e-mail dated 14.11.2011 of R2 refers to remittances from UK to India and Sales Tax on such remittances and it also refers to bring the company's transfer policy in line with the other customers. The Petitioner having known of the violations has chosen to keep quiet from the year 2011 till filing of the Petition.

l) That the Petition is the joint signatory for the company's bank account from the year 1996 and R2 cannot withdraw any cash without signing on cheques by the Petitioner. If the allegations of cash withdrawal is accepted as true, then the Petitioner is also equally liable for such cash withdrawals. Company Appeal (AT) No.320 of 2018 The auditors appointed by R2 certified that the cash was used for legitimate business expenditure. Taking cars on lease is a business decision and involves monthly out flow spread over a longer period and the lease rent can be fully claimed an expenditure under the Income Tax Act. Therefore, the lease agreement cannot be termed as an act of mis-management.

m) That Section 202(3) of the Act, 2013 provides for a cap of three years compensation. Therefore, the compensation can never be Rs.10 crores. Further, the company is not a wholly owned subsidiary of R7 and R7 holds only 51% of the share capital. The R7 company is in existence for over 40 years long before the incorporation of the company. Therefore, it is false to state that the entire turnover of R7 is contributed by the activities of the company and the software business of R7 in India is insignificant to the sales of R7.

4. After hearing the parties the NCLT passed the impugned order. The relevant portion of the order is as under:-

> "8. In view of the above discussions relating to the first issue, the Board Meetings and shareholders Meeting in the company were not held without quorum. Further, the respondents themselves admitted that there is a typographical error in the notice as well as in the minutes of the EGM. It is a fact that the Agenda of the Board Meeting do not disclose the intention of other directors/shareholders with regard to the removal of the Petitioner from the post of Director also.
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> Further to the above, we are of the opinion that the removal of the Petitioner from the post of office of the Director has not been done in consonance with the provisions of the Companies Act and, Company Appeal (AT) No.320 of 2018 therefore, it is held that the removal of the Petitioner as a Director is not valid.
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> 9.No doubt, the Petitioner was the Managing Director right from the incorporation of the company i.e. 1996 and he was removed only in the year 2015. There is no fixed term for continuation as Managing Director. The R2 was residing at England and dealing with the operations of the company. The submissions of the Petitioner in this regard are not disputed by the Respondents. The Respondents removed the Petitioner from the Office of the Managing Director, showing the reason "loss of confidence" on him. According to the Respondents words used to mean "revoke such appointment" gives the Board of Directors the power to remove the Petitioner. Revocation of appointment is synonymous with removal. In such cases, it is not necessary to find the Petitioner "guilty of fraud or gross negligence"

(Para 15 at Page 4 and 5 of the written submissions of the Respondents). The above submissions indicate that the Respondents have the ultimate power to remove the Managing Director even if the condition of the removal as mentioned in the articles did not arise. The lack of confidence is the contingency for removal of the Managing Director, even according to the said Clause of AOA. The action of removal of the Petitioner from the post of Managing Director by the majority shareholders cannot be questioned. Hence, his removal from the office of the Managing Director would remain valid.

10.As per the FCA also, as seen in the pattern of shareholding of the company, only 10% was fixed and decided to be allotted to the Company Appeal (AT) No.320 of 2018 Petitioner. There is no evidence that the Petitioner is entitled to get 15% of the shares from R2. Therefore, the claim of the

Petitioner for 25% of the shares in the company should fail and this issue is answered in negative to the petitioner.

11.As regards claim for damages, it is the respondent's contention that the Petitioner it not entitled to claim any exemplary damages and his exit package would come around Rs.1 crore including his terminal benefits. The Respondents have quantified that the petitioner's salary for the year 2013-14 was Rs.33.79 lacs. The contention of the Petitioner is that he is entitled to get a package fo Rs.10 crores, besides the value of the shares in the company. The Petitioner has worked as a Managing Director right from the incorporation i.e. 1996 and continued till 2015 without any break. The Respondents at one stage felt that it is proper to fix Rs.1 crore towards the exit package. There is no denial by the Respondents in relation to the submission of the Petitioner about the growth of the company and its income from his tenure as a Managing Director and a documentary proof is also filed by the Petitioner in this regard. In terms of Section 202(3) of the Companies Act, upon removal, the Managing Director of a company would be entitled to receive remuneration which he would have earned if had been in office for the remainder of his term or for three years, whichever is shorter. Accordingly, we deem it fit to order a compensation of Rs.105 lakhs (calculated at the rate of Rs.35 lakhs p.a. for three years) together with interest @ 10% from the date of removal of the petitioner from Company Appeal (AT) No.320 of 2018 the office of Managing Director, plus other benefits as already offered, till the date of payment to the Petitioner by the R1 company/other respondents.

12. Since the petitioner has expressed his intention to exit from the Company, which has been agreed to by the Respondents, the Respondents shall purchase the shares of the Petitioner at mutually agreed rates by both the parties.

The present company petition is disposed of on the above terms. No order as to costs."

5. Being aggrieved by the impugned order dated 19.7.2018 the appellants (Original 1st and 6th Respondent) have preferred this appeal. The appellants have stated that the 1st respondent was not legally entitled to any compensation for the loss of office as Managing Director in the absence of any breach by the 1st appellant and in the absence of any fixed period of appointment as Managing Director.

6. The appellants stated that the removal of the 1st respondent as Director of the company is valid. The appellants stated that they have done substantial compliance with Section 169 of Companies Act, 2013.

7. The appellants stated that the NCLT has grossly erred in holding that Financial Collaboration Agreement was entered into before the incorporation of the Company. The appellants stated that the finding is ex facie contrary to the documents filed before the NCLT. The appellants stated that the documents show that the said agreement was entered on 7.11.1996 nearly 8 months after the incorporation of the Company.

8. The appellants stated that the NCLT had no jurisdiction to pass orders under Section 242 of the Act in absence of any oppression or mismanagement. Company Appeal (AT) No.320 of 2018

9. That appellants stated that the NCLT was not correct in directing the purchase of the shares of 1st respondent at a mutually agreed rate.

10. Reply has been filed by Respondent No.1. 1st respondent has stated that the appeal should have been filed by the 1st appellant represented by any of the Respondents No.2,3,4 and 5 as the allegations were against these respondents and these respondents cannot afford to remain as proforma respondents and for this reason alone the appeal is liable to be dismissed.

11. 1st respondent stated that the appellants have not challenged the findings of the NCLT Chennai as recorded in para 11 of the impugned order dated 19.7.2018. The said findings are as under:

> "There is no denial by the Respondents in relation to the submission of the Petitioner about the growth of the company and its income from his tenure as a Managing Director and a documentary proof is also filed by the Petitioner in this regard."

12. 1st respondent stated that the appellants in para 7(3) of the appeal stated that 2nd respondent gifted the consideration for shares to the 1st respondent which is a modification of the counters filed by the appellants and Respondent No.2 to 6. 1st respondent further stated that before NCLT Chennai, the appellant stated that 2nd respondent gifted the shares to 1st respondent. The appellant stated that it is the contradictory statement.

13. 1st respondent stated that 2nd to 6th respondent cannot remain proforma respondents as the acts of oppression and mismanagement were attributed to them and the Hon'ble NCLT Chennai in the impugned order vide para 11 has made it clear that payments shall have to be made by the appellants and respondents jointly and severally.

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14. 1st respondent stated that he is one of the subscribers to the memorandum and articles of association alongwith Respondent No.2 and he was the first director of the company since incorporation until illegally and oppressively removed in the EGM held on 7.8.2015.

15. 1st respondent stated that the appellant company is a private limited company and the directors are not liable to retire by rotation. The directors can continue until they resign or removed from the office of director in a manner known to law. 1st respondent further stated that the appellant company is a private limited company simpliciter and Section 317 of the Companies Act, 1956 prescribed that a managing director of public limited company and a private limited company which is a subsidiary of a public limited company cannot be appointed for a term exceed 5 years at a time. 1st respondent stated that the averment that he was not appointed for any specific term categorically proves that he is not subject to re-election and Section 317 of the Act is not applicable to this 1st appellant company. 1st respondent stated that Section 196 (2) of the Act only prescribed that even in

a private limited company simpliciter that a managing director cannot be appointed for a term exceeding 5 years at a time. It is further stated that the 1st appellant company did not pass any resolution restricting the period of appoint on or after 1.4.2014.

16. 1st respondent stated that mere "lack of confidence" cannot be a ground to revoke or remove the 1st respondent from the office of director. It is further stated that 1st respondent was not removed from the office of Managing Director in the Board Meeting held on 15.5.2015 and the meeting was concluded abruptly without taking any decision.

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17. 1st respondent stated that the appellant and other respondent illegally removed him from the office of managing director only in the EGM held on 7.8.2015 as he was not present in the said EGM and his presence was must in terms of Clause 1 of Section V of FCA. 1st respondent stated that the appellant and other respondent were bent upon removing the 1st respondent from the office of managing director by foisting false charges on him and for that purpose appointed M/s KPMG an audit firm to find out lapses on the part of 1st respondent. 1st respondent further stated that the appellant and other respondents have produced only draft report of the KPMG and not fair and final report of KPMG before the NCLT Chennai.

18. 1st respondent stated that he has filed the petition to address the injustice caused to him. 1st respondent further stated that it has only 10% of the paid up capital, therefore, there was no other way than to ask the damages of Rs.10 crores against the illegal and oppressive removal of the 1st respondent from the office of managing director.

19. 1st respondent prayed that the appeal filed by the appellants may be dismissed.

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

21. Learned counsel for the appellant argued that petition was filed by 1st respondent on the issue of oppression and mismanagement. NCLT has given no finding on this issue. Therefore, the NCLT should not have passed the order under Section 242 of the Companies Act, 2013.

22. Learned counsel for the 1st Respondent argued that the holding company (CADS, UK) was under the clutches of 2nd respondent, never allowed 1st appellant to realise its real revenue and real profit and thereby persistently violated the Company Appeal (AT) No.320 of 2018 Transfer Pricing Policies and norms and kept the intrinsic value of shares of 1st appellant at a very low. Learned counsel further argued that the 2nd respondent withdrew huge cash from 1st appellant for the purpose of construction of his house and also for renovation and modification of his house. Learned counsel further argued that the 2nd respondent bought a car in his own company's name and leased out to 1st appellant at Rs.1,23,360/- per month, thereby totalling Rs.39.73 lakhs for three years whereas the cost of the car was Rs.18-19 lakhs. Learned counsel argued that in such a way the 1st appellant's funds were siphoned off. The lease rent was signed by 2nd Respondent. Learned counsel argued that these are oppression and mismanagement and taking note of all the above the National

Company Law Tribunal held that the removal of the 1st respondent from directorship is illegal and directed the 1st appellant to grant compensation for removal from the post of Managing Director under Section 202 of Companies Act, 2013.

23. We have heard the parties on this issue. We have seen the notice of Board Meeting dated 8th May, 2015 (Page 195) in which one of the item is to discuss the position of Mr. K.K. Jagadish as Managing Director of the Company on 15.5.2015. We have also seen the copy of Special Notice dated 15.5.2015 (Page 198) by which it is proposed that a Meeting will be held on 7th August, 2015 to removed 1st respondent as Managing Director. We have also seen the minutes of the meeting of the Board of Directors held on 15.5.2015 (Page 201 to 203) in which it was resolved that 1st respondent be and is hereby removed from the Directorship and Office of Managing Director of the company with effect from the date of approval of this resolution by the shareholders. We have already observed that in the notice there was an agenda for removal of 1st respondent as Managing Director and not Company Appeal (AT) No.320 of 2018 director. Therefore, the NCLT in exercise of its powers under Section 242 of the Act has rightly set aside the decision of the company to remove 1st respondent as director of the company.

24. Learned counsel for the appellant argued that the NCLT committed an error of fact in holding that the FCA was pre-incorporation and binding on the 1st appellant even though it was entered eight months after the incorporation and 1st appellant was neither a party nor signatory to it. Learned counsel further argued that the Articles of Association had not been amended as required under Section 5(3) of the Act. Learned counsel stressed that it is settled law that an external contract to which the company is not a party cannot be binding on the company without the same being incorporated into its Articles of Association. Learned counsel has cited the judgement of Chatterjee Petroleum (India) Pvt Ltd Vs Haldia Petrochemicals Ltd & Ors. Reported in (2011) 10 SCC 466 and VB Rangaraj Vs VB Gopalakrishnan & Ors reported in (1992) I SCC 160 and S.P. Jain Vs Kalinga Tubes Ltd reported in AIR 1965 SC 1535.

25. Learned counsel for the 1st respondent argued that the Financial Collaboration Agreement (FCA) was entered between 1st Respondent, 2nd Respondent and 6th Respondent to hold 10%, 39% and 51% of the paid-up share capital respectively. Learned counsel for the 1st respondent argued that the said FCA was signed on 14.11.1996 subsequent to incorporation, though fed into computer system of 1st respondent even before incorporation. Learned counsel for the 1st respondent argued that it is failure of appellants not to amend the Articles of Association in line with FCA to incorporate the terms mutually agreed upon in the FCA by 1st Respondent, 2nd Respondent and 6th Respondent. Company Appeal (AT) No.320 of 2018

26. We have heard the learned counsel for parties on this issue. As per FCA, only 10% shares were fixed for 1st respondent and accordingly he has been allotted the requisites shares. There is no evidence brought on record that 1st respondent is to get additional 15% shares from 2nd respondent either through FCA or any other documents. Therefore, we are in agreement with the conclusion drawn by the NCLT on this count.

27. Learned counsel for the appellant argued that despite upholding the removal as a Managing Director based on submissions made by the appellants, the NCLT erred in awarding compensation to 1st respondent in the absence of finding of any breach of statute or any contractual liability. Learned counsel for the appellant argued that provisions of Section 202(1) of the Act regarding compensation for loss of office are not attracted in the instant case as Section 202(2)(f) provides that no compensation shall be paid if removal is due to gross mismanagement of the company. Such gross mismanagement leading to loss of confidence was the reason for removal of the 1st Respondent as Director and Managing Director.

27. Learned counsel for the 1st respondent argued that the various instances of oppression and mismanagement and has been cited by him. Learned counsel for the 1st respondent further argued that taking note all the instances of oppression and mismanagement, the NCLT has held that the removal of 1st respondent from directorship is illegal and directed 1st appellant to grant compensation for removal from the post of Managing Director under Section 202 of the Companies Act, 2013.

28. We have heard the learned counsel for the parties. Section 202 of the Companies Act, 2013 provides as under:-

> "202. Compensation for loss of office of managing or whole-time director or manager.-- (1) A company may make payment to a Company Appeal (AT) No.320 of 2018 managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.
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> (2) No payment shall be made under sub-section (1) in the following cases, namely:--
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> (a) where the director resigns from his office as a result of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation;
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> (b) where the director resigns from his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid;
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> (c) where the office of the director is vacated under sub-section (1) of section 167;
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> (d) where the company is being wound up, whether by an order of the Tribunal or voluntarily, provided the winding up was due to the negligence or default of the director;
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> (e) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs of the

company or any subsidiary company or holding company thereof; and

(f) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

Company Appeal (AT) No.320 of 2018 (3) Any payment made to a managing or whole-time director or manager in pursuance of sub-section (1) shall not exceed the remuneration which he would have earned if he had been in office for the remainder of his term or for three years, whichever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which he ceased to hold office, or where he held the office for a lesser period than three years, during such period Provided that no such payment shall be made to the director in the event of the commencement of the winding up of the company, whether before or at any time within twelve months after, the date on which he ceased to hold office, if the assets of the company on the winding up, after deducting the expenses thereof, are not sufficient to repay to the shareholders the share capital, including the premiums, if any, contributed by them.

(4) Nothing in this section shall be deemed to prohibit the payment to a managing or whole-time director, or manager, of any remuneration for services rendered by him to the company in any other capacity. We have seen that the 1st respondent was functioning as Managing Director of the company since 17.4.1996 and was not appointed for a fixed tenure. 1st respondent was removed from the company. Upon removal as Managing Director, 1st respondent is entitled to compensation for loss of office as per Section 202 of the Companies Act, 2013. Section 202(1) of the Act provides that a company may make payment to a managing director by way of compensation for loss of office, or Company Appeal (AT) No.320 of 2018 as consideration for retirement from office or in connection with such loss or retirement. Section 202(2) of the Act is not applicable in the case of 1st respondent. Section 202(3) of the Act provides that any payment made to a managing director shall not exceed the remuneration which he would have earned if he had been in office for the remainder of his term or for three years whichever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which he ceased to hold office, or where he held the office for a lesser period than three years, during such period. On critical analysis of Section 202 of the Act we observe that the appellant company may make payment of compensation to 1st respondent for loss of office of managing director. We have also observed the Minutes of the Meeting of Board of Directors of 1st appellant held on 15th May, 2015 (Page 203) in which it was resolved to remove 1st respondent from the directorship and Office of Managing Director of the of the Company with effect from the date of approval of this resolution by the shareholders. We observe that in the said Meeting no discussion on payment to 1st respondent was discussed. We also observe Notice dated 15.5.2015 (Page 205) for conducting EGM of 1st appellant on 7.8.2015. We also observe that Minutes of Meeting dated 7.8.2015 at Page 214 that there are no discussions on payment of compensation to 1st respondent on his removal as Managing Director. The arguments advanced by the appellant that 1st respondent was removed due to loss of confidence. We observe that loss of confidence as argued by the appellant does not appear in the Companies Act. We observe that the NCLT has rightly given his findings and arrived at to give compensation of Rs.105 lakhs (calculated at the rate of Rs.35 lakhs p.a. for three years) together with interest @ 10% from the date of removal of the 1st Respondent as

Managing Company Appeal (AT) No.320 of 2018 Director plus other benefits as already offered, till the date of payment by the company/other respondents.

29. In view of the aforegoing observations and directions, we find no merit in the appeal. The appeal is accordingly dismissed. No order as to costs.

(Justice A.I.S. Cheema)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

New Delhi

Dated:07-05-2019

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Company Appeal (AT) No.320 of 2018