

Smiti Golyan & Ors vs Nulon India Ltd. & Ors on 25 March, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.222 of 2018

[Arising out of Order dated 04.07.2018 passed by National Company Law Tribunal, Principal Bench in C.P. No. 27(ND) of 2015]

IN THE MATTER OF:	Before NCLT	Before NCLAT
1. Smiti Golyan (previously residing at): N-15, Third Floor, Panchsheel Park, New Delhi - 110017 (Presently residing at): B-22, 2nd Floor, Pomposh Enclave, New Delhi - 110048	Original Respondent No.2 (OR2)	Appellant No.1
2. Krishan Kumar Golyan (Director), (previously residing at): N-15, Third Floor, Panchsheel Park, New Delhi - 110017 (Presently residing at): B-22, 2nd Floor, Pomposh Enclave, New Delhi - 110048	OR3	Appellant No.2

Versus

1. Nulon India Limited Nulon House, Ishwar Nagar, 10th Milestone, Mathura Road, Delhi - 110065	OR1	Respondent No.1
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2. Yash Golyan 34, Western Avenue,	Original Petitioner No.1 (OP1)	Respondent No.2
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Sainik Farm
(Earlier Known as
171-A, Sainik Farm),
New Delhi - 110062

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|---|-----|-----------------|
| 3. Mahabir Prasad
Golyan
34, Western Avenue,
Sainik Farm
(Earlier Known as
171-A, Sainik Farm),
New Delhi - 110062 | OP2 | Respondent No.3 |
| 4. Shakuntala Devi
Golyan,
34, Western Avenue,
Sainik Farm
(Earlier Known as
171-A, Sainik Farm),
New Delhi - 110062 | OP3 | Respondent No.4 |
| 5. Pushpendra Bansal
Prop. Pushpendra
Bansal & Co.,
Chartered Accountants
138, Block IV,
Ganga Shopping
Complex,
Sector - 29, Noida
(U.P.) - 201301 | OR4 | Respondent No.5 |
| 6. Sanjay Kumar
Company Secretaries,
4/64, Shalimar Park,
Shahdra,
Delhi - 110019 | OR5 | Respondent No.6 |
| 7. Registrar of
Companies
4th Floor, IFCI Tower, | OR6 | Respondent No.7 |

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Nehru Place,
New Delhi - 110019

8. Regional Director
Ministry of Corporate
Affairs,
PDIL Bhavan,
Sector - 2, Noida,
Uttar Pradesh

OR7

Respondent No.8

For Appellants:

Dr. U.K. Chaudhary, Sr. Advocate with Ms. Ranjana Roy Gawai, Ms. Vasudha Sen, Shri Vivek Kumar and Shri Himanshu Viz, Advocates

For Respondents:

Shri Virender Ganda, Sr. Advocate with Shri Sarwar Raja, Ms. Shelly Khanna, Mohd. Waseem Akram, Mr. Takrim Ahsan Khan and Shri Chandreyee Maitra, Advocates (Respondents 2 to 4)

JUDGEMENT

(25th March, 2019) A.I.S. Cheema, J. :

1. This Appeal has been filed by original Respondents - 2 and 3 against Impugned Judgement dated 04.07.2018 passed by the National Company Law Tribunal, Principal Bench ('NCLT', in short) in Company Petition 27(ND) of 2015. The Appellants claim to be shareholders as well as Directors in Nulon India Limited (hereafter referred as - 'Company') -

arrayed as original Respondent No.1 (OR1) in the Company Petition. It is stated that the Company was incorporated on 08.05.1987. It appears that the first Directors were Respondent No.3 - Mahabir Prasad Golyan (original Petitioner No.2) and the Appellant No.2 - Krishan Kumar Golyan (original Respondent No.3 - OR3) and one L.K. Bajoria, said L.K. Bajoria resigned Company Appeal (AT) No.222 of 2018 as Director on 27.07.1995. It is stated that the Appellant No.1 - Smiti Golyan (Original Respondent No.2 - OR2) was then inducted as Director.

2. We will refer to the parties in the manner in which they have been arrayed before NCLT and as reflected in the Impugned Order, which referred to the Amended Petition. It seems that earlier only OP1 - Yash Golyan filed Petition and then by amendment, his grandfather and grandmother appear to have been added as Petitioners with him. OR2 and 3 are admittedly parents of OP1 - Yash Golyan. OP2 and 3 are parents of OR3 Krishan Kumar Golyan.

3. According to the Appellants, OP2 - Mahabir Prasad Golyan decided that shares held in Company and several individuals should be transferred to an individual and accordingly shares were shown in the name of OP1 - Yash Golyan, when he became major. The Appellants claim that the shares were shown in his name without consideration. Appellants claim that OP1 was in USA on 31.03.2012

when the shares were transferred in his name. Appellants claim that as parents, they spent huge money on the education of OP1. The Appellants are also claiming that initially they helped the OP1 in setting up Master Franchisee of Simply Fondue Restaurant in India, but OP1 did not take business seriously and there were losses and the same was shut down in March, 2014. Appellants claim that as OP1 incurred huge expenses, as a feeling of guilt and remorse, he thought it fair to gift his shares held by him in two Companies - Nulon India Ltd. (OR1) and Nulon Global Limited to his mother - Appellant No.1 in January, 2014 for Company Appeal (AT) No.222 of 2018 the upcoming silver anniversary celebration of his parents in February, 2014 in Koh Samui, Thailand. The Appellants claim that gift deed dated 23.01.2014 was prepared by Appellant No.2 - Krishan Kumar Golyan (OR2) which was duly signed by the OP1 - Yash Golyan. Along with the gift deed, OP1 transferred original 19 share certificates to Appellant No.2 - Krishan Kumar Golyan (see Appeal para - 7 b ix) and thus, the gift of shares stood complete on 23rd January, 2014 and there was enforceable contract between the Appellant No.1 - Smiti Golyan and OP1 - Yash Golyan. Again, the Appellants also claim that the gifted shares along with transfer deed were handed over by the OP1 to his mother - Smiti Golyan on 23.01.2014 (see Appeal para - 7 b x), which she lodged with the Company in the end of January, 2014, and the shares were transferred in favour of the Appellant No.1 - Smiti Golyan by following due procedure as per Articles of Association and the Companies Act. Thereafter, the original share certificates were transferred in the name of Smiti Golyan.

4. Appellants further claimed and it is also argued that the accounts for Financial Year 2013 - 2014 were approved in AGM for the Company held on 30.09.2014. Compliance certificate was prepared by the Company Secretary - Sanjay Kumar on 8th September, 2014 which is mentioned in the Director's Report, which made it clear that some shares were transferred during the financial year. According to the Appellants, the approved balance sheets along with compliance certificate and audit report was filed by the Company on 27.10.2014 before Registrar of Companies Company Appeal (AT) No.222 of 2018 and Annual Return was filed on 25th November, 2014. Subsequently, a mistake was detected as transfer of aforesaid shares was not reflected in the Annual Return and the rectification letter dated 4th December, 2014 along with list of shareholders duly signed by OP2 - Mahabir Prasad Golyan and the Appellant No.1, was filed on 6th December, 2014 with the Registrar of Companies. Revised Annual Return was accepted by ROC. The Appellants claim that the original Petitioners were aware of all this. The Appellant No.2 shifted from jointly owned and possessed family bungalow in February, 2015 due to family reasons. It is also claimed that when the financial year was approaching on 31.03.2015, Accountant carried the complete ROC file containing all share transfer deeds, original minutes register and miscellaneous accounts to CA on the evening of 25.03.2015 on his motorcycle but the bundle containing the documents was lost somewhere on the way and police complaint was filed in Police Station, New Friends Colony on 26.03.2015. The Appellants - original Respondents 2 and 3 also claim that there were strained relations in the family but according to them, OP2 - Mahabir Prasad Golyan raised objection on illogical grounds. They also referred to an incident dated 26.03.2015 where it is alleged that the OP1 assaulted his mother and after police complaint was filed, the Appellants agreed to let it go by a warning. The Appellants claim that because the OP1 denied the rights of the Appellants with regard to the share transfer, Civil Suit was filed before Civil Judge at Saket in Delhi claiming declaration of the shares in dispute. The Appellants filed application before NCLT to stay the proceeding, but it was directed on Company Appeal (AT) No.222 of 2018 12.04.2016 that it would be taken up with the petition but

while disposing the Company Petition, the same was ignored.

5. The Appellants claimed that while disposing the Company Petition, NCLT wrongly entered into the issue of ownerships and title to the disputed 4,66,600 shares.

6. The Counsel for the Appellants has argued before us on the above lines and it is stated by him that while deciding the Company Petition, NCLT could not have gone into the title of the shares. It is submitted by him that even if NCLT could go into the compliance under Section 108 of the Companies Act, 1956 ('old Act', in short), the NCLT could not have gone into the question whether there was valid transfer by way of gift deed. According to the Counsel, without evidence being led, NCLT could not have decided title. He relied on the case of "Life Insurance Corporation of India vs. Escorts Limited and Ors." reported in (1986) 1 SCC 264 where Hon'ble Supreme Court inter alia discussed Judgement in the matter of "Vasudev Ramchandra Shelat versus Pranlal Jayanand Thakar and Others" reported in (1974) 2 SCC 323 to canvass his point that rights constituting "property" in shares is different from "the title to get on the register". It is claimed that suit for declaration of ownership of the 4,66,600 shares in terms of the gift deed dated 23.01.2014 is pending in Saket District Court and according to him, the observations of the NCLT in the Impugned Order would make that suit infructuous. It is argued that NCLT could not have doubted the veracity of the signatures of the gift deed. The Company Appeal (AT) No.222 of 2018 jurisdiction of the NCLT under the Companies Act was limited to seeing validity of registration of transfer of shares and not to adjudicate on the ownership of the disputed shares.

7. Judgement in the matter of "Vasudev Ramchandra Shelat" (supra) has been discussed by the Hon'ble Supreme Court in the matter of "LIC" (supra). In para - 80 of the Judgement in the matter of "LIC", Hon'ble Supreme Court discussed how in the Judgement in the matter of "Vasudev Ramchandra Shelat" two statements of law were reconciled. It was observed:-

"The two statements of law were reconciled by the court and its was stated, "the transferee under a gift of shares, cannot function as a shareholder recognised by Company Law until his name is formally brought upon the register of a company and he obtains a share certificate as already indicated above. Indeed, there may be restrictions on transfers of shares either by gift or by sale in the articles of association". It was pointed out that, "a transfer of 'property' rights in shares, recognised by the Transfer of Property Act, may be antecedent to the actual vesting of all or the full rights of ownership of shares and exercise of the rights of shareholders in accordance with the provisions of the Company law," and that while transfer of property in general was not the subject matter of the companies Act, it deals with "transfers of shares only because they give certain rights to the legally recognised shareholders and imposes some obligations upon them with regard to the companies in which they hold shares. A share certificate not merely entitles the shareholder whose name is found on it to interest on the sharehold but also to participate in certain proceedings relating to the company concerned."

Company Appeal (AT) No.222 of 2018 7.1 Hon'ble Supreme Court discussed other Judgements also and observed in para - 84 as under:-

"84. On an overall view of the several statutory provisions and judicial precedents to which we have referred we find that a shareholder has an undoubted interest in a company, an interest which is represented by his shareholding. Share is movable property, with all the attributes of such property. The rights of a shareholder are (i) to elect directors and thus to participate in the management through them; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the company in the shape of dividends; (iv) to apply to the court for relief in the case of oppression; (v) to apply to the court for relief in the case of mismanagement;

(vi) to apply to the court for winding up of the company; and (vii) to share in the surplus on winding up. A share is transferable but while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term, with all the rights of a shareholder, only when the transfer is registered in the company's register. A transfer effective between transferor and the transferee is not effective as against the company and persons without notice of the transfer until the transfer is registered in the company's register. Indeed until the transfer is registered in the books of the company, the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares."

7.2 We are keeping in view the above law as laid down by the Hon'ble the Supreme Court relied on by the Appellants. However, in the present matter, the dispute relates to the basic question itself whether the shares were transferred in the first place, and whether the Respondents could rightly claim that all due procedure under the Companies Act was followed for omitting the name of OP1 and entering the name of OR2 in the register Company Appeal (AT) No.222 of 2018 of members. Thus, it is necessary to analyse the facts of the present matter and the evidence to arrive at a decision.

8. Before discussing the facts and the evidence, it would be appropriate to also refer to Judgement in the matter of "Ammonia Supplies Corporation (P) Ltd. Versus Modern Plastic Containers Pvt. Ltd. and Others" (1998) 7 SCC 105. That was a matter where Hon'ble Supreme Court was dealing with Sections 155 (the predecessor of Section

111) and 466 of the Companies Act, 1956. With reference to rectification, it was observed by the Hon'ble Supreme Court in that matter in paragraphs

- 27 and 28 of the Judgement as under:-

"27. In other words, in order to qualify for rectification, every procedure as prescribed under the Companies Act before recording the name in the Register of the

company has to be stated to have been complied with by the applicant -- at least that part as required by the Act -- and assertion of what has not been complied with under the Act and Rules by the person or authority of the respondent-Company before the applicant to claim for the rectification of such register. The Court has to examine on the facts of each case whether an application is for rectification or something else. So field or peripheral jurisdiction of the court under it would be what comes under rectification, not projected claims under the garb of rectification. So far exercising of power for rectification within its field there could be no doubt the court as referred under Section 155 read with Section 2(11) and Section 10, it is the Company Court alone which has exclusive jurisdiction. Similarly, under Section 446 the "court" refers to the Company Judge which has exclusive jurisdiction to decide matters what is covered under it by itself. But this does not mean by interpreting such "court"

having exclusive jurisdiction to include within it what is not covered under it, merely because it is cloaked under the nomenclature rectification does not mean Company Appeal (AT) No.222 of 2018 the court cannot see the substance after removing the cloak."

"28. Question for scrutiny before us is the peripheral field within which the court could exercise its jurisdiction for rectification. As aforesaid, the very word "rectification" connotes something what ought to have been done but by error not done and what ought not to have been done was done requiring correction. Rectification in other words is the failure on the part of the company to comply with the directions under the Act. To show this error the burden is on the applicant, and to this extent any matter or dispute between persons raised in such court it may generally decide any matter which is necessary or expedient to decide in connection with the rectification."

In that matter, the Hon'ble Supreme Court had sent back the matter to the Hon'ble High Court to exercise its discretion under Section 446(2) to get the matter adjudicated by the Court (Company Judge) itself, instead of sending back the same to Civil Court.

9. Against what is argued by the Appellants, the present Respondents 2 to 4 (OP1 to 3) have filed Reply and it has been argued that the NCLT has duly decided the matter and the Appellants are trying to create confusion regarding rectification of Register of members and the title of shares. According to the original Petitioners, the NCLT has rightly and justifiably set aside the illegal and fraudulent transfer of shares which were effected by the Appellants (OR2 and 3) only because they were in the management of the Company and so could do it. According to the Counsel for original Petitioners, OP1 noticed somewhere in February, 2015 that his share certificates were missing and approached the Company for duplicate Company Appeal (AT) No.222 of 2018 shares and official - Mr. Ajay Sharma of the Company had informed that duplicate shares will be issued on compliances. The OP1 executed necessary documents for issue of duplicate shares but then noticed revised Annual Return being filed which fraudulently showed transfer of shares. OP1 never signed any transfer deed in respect of 4,66,600 shares in favour of Appellant No.1 - Smiti Golyan. The impugned transfer of shares has been effected contrary to provisions of Section 108 of the old Act.

According to the original Petitioners, initially, the Appellants took the stand that transfer of shares were effected in proper manner as per normal process and family arrangement and subsequently, claimed loss of bundle containing attested documents being lost on motorcycle in Noida. The alleged complaint to Police dated 26.03.2015 was never followed up. It is stated, that the Appellants also relied on several affidavits to claim that OP1 had gifted his shares, which Affidavits appear to be fabricated. Although it was claimed that Board Meeting was held by Video Conferencing, no evidence was produced in terms of General Circular No.28/2011 issued by Ministry of Corporate Affairs on 20.05.2011. The Respondents - original Petitioners claimed that when the proceedings were pending in NCLT, suddenly so called gift deed surfaced in Civil Suit purporting to have been executed on 23.01.2014. The NCLT rightly considered the said gift deed and did not rely on it. The Civil Suit has been filed during pendency of the proceedings before NCLT to mislead and misguide NCLT. There was no compliance of provisions of Section 108 of the old Act which correspond to Section 56 of the new Companies Act of Company Appeal (AT) No.222 of 2018 2013. The Appellants - husband and wife transferred the shares to themselves. The shares were transferred in the name of Appellant No.1 in connivance with the Appellant No.2 and Respondents 5 and 6 to take control of the whole Company so as to oust the Respondents - original Petitioners. It has been argued that in NCLT, the Appellants were asked to produce the share transfer documents on several occasions, but they failed to produce a single document to show the transfer of shares as per law. The alleged gift deed is in the handwriting of Appellant No.2 - Krishan Kumar Golyan. According to the Respondents, it is a fabricated and forged document and NCLT rightly held that the same could not be recorded as an expression of free-will to gift 4,66,600 shares. The Respondents claimed that OP1 never signed or executed any such gift deed in respect of his shares. There is nothing to show as to who paid the share transfer stamp duty and who was the vendor. There is no record shown of alleged Board Meeting held on 14.02.2014 which was the date when according to the Appellants, the transfer of shares was recorded in the Company. According to the Respondents - original Petitioners, there is nothing to show that the notice was issued to OP2 - Mahabir Prasad Golyan who was the other Director. The original Petitioners claimed that the Appellants have been taking contrary stands on the alleged transfer of shares. The original Petitioners claim that the Appeal should be rejected.

10. We have gone through the material placed before us and the Impugned Judgement. The fact that 4,66,600 shares initially stood in the Company Appeal (AT) No.222 of 2018 name of OP1 - Yash Golyan, is not in dispute. It is not in dispute that after the alleged AGM held on 30.09.2014, when the balance sheet along with compliance certificate and audit report was filed with ROC on 27.10.2014 also, the name of OP1 reflected as shareholder of these shares. Of course, the Appellants claimed that this happened by mistake and they filed rectification letter dated 4th December, 2014. The Appellants claimed that they had rectified the Annual Return because of mistake and wanted to refer to Page - 236 of the Appeal to say that the list of shareholders as on 31.03.2014 had the other signature of OP2 - Mahabir Prasad Golyan.

11. When we have perused the said Page - 236, we find while the signature of Appellant No.2 - Krishan Kumar Golyan can be read, the other signature is not at all legible. The Counsel for Respondents - original Petitioners has argued that they disputed this document and the signature because it is an odd document in the Returns filed where everywhere else, the Appellants were

signing. If the Appellants want to read Page - 236 of the Appeal in their favour, the original Petitioners are pointing out Page - 182 of the Appeal, which is also list of shareholders as on 31.03.2014 and where name of the OP1 reflected and the document had signatures of the Appellants. We are not impressed by the Appellants referring to the photocopy at Page - 236 of the Appeal to accept the argument of the Appellants that OP2 has signed this document, and so it should be read against OP1. There is substance in the argument of Counsel for original Petitioners that this document (Page - 236) is odd in Annual Return where Company Appeal (AT) No.222 of 2018 all other pages were signed by Appellants. Apart from this, the record shows that initially OP1 alone had filed the Company Petition before his grandparents joined the Amended Petition. The rights of the OP1 would stand independently, even from his grandfather - OP2 - Mahabir Prasad Golyan.

12. Thus, the fact remains that till the disputes started, the name of the OP1 was reflected in the records of the Company as shareholder of 4,66,600 shares.

13. The Appellants have relied on the Judgement of "Life Insurance Corporation" and Judgement in the matter of "Vasudev Ramchandra Shelat" (both referred supra). We have gone through the Judgements. In para - 10 of the Judgement in the matter of Vasudev Ramchandra Shelat, the Hon'ble Supreme Court observed as under:-

"10. In the case before us, the registered document was signed by the donor as "the giver" as well as by the donee as "the acceptor" of the gift, and it is attested by six witnesses. In it, the donor specified and gave particulars of the shares meant to be gifted and undertook to get the name of the donee put on to the registers of the companies concerned. The donor even said that she was, thenceforth, a trustee for the benefit of the donee with regard to the income she may get due to the fact that her name was still entered in the registers of the companies concerned as a shareholder. The donor delivered the registered gift deed together with the share certificates to the donee. We think that, on these facts, the donation of the right to get share certificates made out in the name of the donee became irrevocable by registration as well as by delivery. The donation of such a right, as a form of property, was Company Appeal (AT) No.222 of 2018 shown to be complete so that nothing was left to be done so far as the vesting of such a right in the donee is concerned. The actual transfers in the registers of the companies concerned were to constitute mere enforcements of this right. They were necessary to enable the donee to exercise the rights of the shareholder. The mere fact that such transfers had to be recorded in accordance with the company law did not detract from the completeness of what was donated."

The Hon'ble Supreme Court accepted the argument in that matter that even in the absence of registration of the gift deed, the delivery of the documents mentioned above to the donee with the clear intention to donate, would be enough to confer upon the donee a complete and irrevocable right of the kind indicated above, in what is movable property.

14. We are keeping in view the above distinction as can be seen from the Judgements referred by the learned Counsel for the Appellant. It is stated that Civil Suit is pending for declaration sought by the

Appellant No.1 - Smiti Golyan that she owns the disputed shares as they have been gifted to her.

15. In the present matter, however, when it is an admitted fact that the shares stood in the name of OP1- Yash Golyan and he filed the Company Petition claiming that his shares in the Company had been illegally shown as transferred and the Register of members was required to be rectified, what we are concerned is that when the shares stood in the name of OP1, can the Respondents in the Company Petition (present Company Appeal (AT) No.222 of 2018 Appellants) justify the transfer recorded in the Register of members. When the Appellants, who are managing the Company, filed Returns on 27.10.2014 still showing the name of the OP1 as a shareholder and then filed rectified Returns showing that the OP1 was no more a shareholder, they being in the management would have to show as to how their acts are justified, and burden is on them.

16. Admittedly, the Appellants are the parents of OP1, who held the shares, and the Appellants were earlier living jointly with Original Petitioners - contesting Respondents 2 to 4 and the record shows that due to relations getting strained somewhere in 2015, the Appellants shifted from the bungalow in Sainik Farm. Apparently, access to the shares of OP1 would not be difficult. The Company Petition as initially filed by OP1 claimed that the Appellants shifted somewhere in February, 2015 and he had sent e-mail dated 19.02.2015 claiming loss of shares and asking for duplicates. Copy of the e-mail is at Page - 245. In response, Ajay Sharma from accounts department asked for certain compliances like giving copy of FIR, Affidavit, etc. OP1 complied it is claimed. It appears that there were exchange of e-mails and OP1 kept asking for duplicate shares. Subsequently, Appellant No.2 - Krishan Kumar Golyan sent Reply on 30th March, 2015 attached to his e-mail. Copy of the e-mail is at Page - 262 and the Reply at Page - 263. This date of 30th March, 2015 is material because if the Reply is perused, the initial stand taken by the Appellants - OR2 and 3 was that the shares standing in the name of OP1 had been Company Appeal (AT) No.222 of 2018 transferred "as per normal process". Although subsequently, the Respondents came up with a defence of gift, said to have been made in February, 2014 and even claimed that there was a Board Meeting regarding transfers because of gift on 14.02.2014, there was no reference to any such gift in this letter dated 30th March, 2015. It would be appropriate to reproduce portion of the letter dated 30th March, 2015 which reads as under:-

"We are in receipt of your above referred letter regarding the equity shares of the company transferred to Mrs. Smiti Golyan from your name & have noted the contents there of with utmost surprise.

We would like to inform you that 4,66,600 Equity shares of the company were transferred to Mrs. Smiti Golyan in Financial Year 2013 -14 as per normal process even though the rectification with ROC was filed on later date. Shri M.P. Golyan, Director of the company is fully aware about the transfer of your share from your name to Mrs. Smiti Golyan's name since he had signed the list of shareholder of the company as on 31.03.2014 which was much after the said transfer. It was the usual normal & general practice known to all Directors of the company about the manner of transfer of share from one name of family member to another name of family member as a part of family arrangement & understanding for convenience sake

which practice was adopted for other group companies also to the knowledge of Shri M.P. Golyan. Besides the above you were also fully aware about this normal practice of the family for transfer of shares from one name to another & likewise you were aware of the said transfer of Shares to your mother Mrs Smiti Golyan and hence raising of this issue is mala fide & after thought."

17. Thus, if the above contents are seen, the initial stand taken by the Appellants who have been admittedly managing the Company, was that as Company Appeal (AT) No.222 of 2018 per this Reply, "the usual normal & general practice" known to all Directors of the company about the manner of transfer of share from one name of family member to another name of family member as a part of "family arrangement" and "understanding for convenience sake" which "practice" was adopted for other group companies also" was relied on. The letter did not purport to say there were transfer forms executed and shares handed over and in compliance of provisions of the Companies Act, the shares were transferred. The letter was relying on some "usual normal and general practice" etc. and overall reading gives an impression that whenever desired, the names were simply changed.

18. The above letter dated 30th March, 2015 further shows that OP1 had by 30th March, 2015 became serious regarding change in the name of register of members and had also filed FIR seeking search warrant of the office premise. This letter mentioned further:-

"The wrong information in said FIR is that, you were aware that physically no share certificates were in your possession & as such there were no justifications for you to mentioned in the said FIR that original share certificates were lost or misplaced. Even you have not given the number of shares or number of share certificates in the said FIR. Further, you have wrongly mentioned that original share certificates are in possession of Shri Krishan Golyan in the said FIR & with that have claimed search warrant of office premises to retrieve the said shares. Even the date & time of loss as shown in the said FIR as of 19-02-2015 & place of loss are also incorrect. You have not gone through the Disclaimer Clause IV of the said FIR which mentions that "False Report to Police is a punishable offence".

Company Appeal (AT) No.222 of 2018 Thus, in this letter, the Appellant No.2 claimed that OP1 was not in possession of physical share certificates. This is contrary to the subsequent stand taken of gift and shifting stand where it is claimed that in February, 2014, OP1 handed over the share certificates to the Appellant No.2 or stated that the certificates were handed over to Appellant No.1.

19. It would be appropriate to refer to the Reply filed by the Appellants who were contesting Respondents in the Company Petition. In the Reply (copy of which is at Annexure - A4 - Page 309) at Page - 314, these Respondents first referred to how the restaurant business was set up; that there were losses and claimed that the OP1 started feeling guilty and remorse. It is then pleaded:-

"petitioner No.1 thought it fair to gift the shares held by him in the two companies i.e. Nulon India Ltd. and Nulon Global Limited to his mother i.e. respondent no.2 in January 2014 on the upcoming occasion of silver anniversary celebration of his

parents in February 2014 in Koh Samui, Thailand. Petitioner No.1 also informed all family members that said shares were of no use for him as he was not interested in the running and affairs of any of the companies and neither he was Director nor was involved in day to day affairs of Respondent No.1 at any point of time. The gifted shares alongwith transferred deeds were handed over by petitioner No.1 to his mother i.e. respondent No.2 in January 2014 which were lodged by her with respondent No.1 in the end of January 2014 and ultimately were transferred in her favour on 14.02.2014."

The Reply then referred to the OP1 along with other sisters and other relatives celebrating the silver anniversary at Thailand and claimed Company Appeal (AT) No.222 of 2018 that OP1 had informed the gathering about he gifting the shares and that such incident happened on 15th February, 2014. The Reply claimed that notices were sent to all Directors and there was Board Meeting on 14th February, 2014 held by video conferencing and the shares were transferred. With the initial Petition, OP1 had filed the Affidavit of Mahabir Prasad Golyan the other Director, that he had no notice of any such meeting. It remains a fact that although Appellants took a stand of loss of records, no supportive evidence of even video conferencing was brought forth before the NCLT. Our reference to the pleadings in the Reply would show that the initial stand taken by the Appellants was that the gifted shares along with transfer deeds were handed over by OP1 to his mother. In these pleadings, no evidence of existence of any gift deed was mentioned. In fact, even in the Civil Suit 31/2016, filed by the Appellant No.1 before the Civil Judge, Senior Division (copy at Page - 536), similar stand was taken. It was mentioned in para - 5 of Plaint:-

"5. That huge expenses were spent by parents of defendant No.1 on his studies and then further huge expenses were spent in setting up the restaurant for him and further in meeting the losses in running of the restaurant and all these were borne by parents of defendant No.1 and because of feeling of guilt and remorse and on account of huge losses suffered by parents of defendant No.1 which fact was known to defendant No.2 also, the defendant No.1 thought it fair to gift the shares shown in his name in the above said two companies to plaintiff in January, 2014 on the upcoming occasion of silver anniversary celebrations of his parents in February, 2014 in Koh Samui, Thailand. The defendant No.1 informed all family members that said shares were of no use for him as he was not interested in the running and affairs of any of the companies. The gifted shares Company Appeal (AT) No.222 of 2018 alongwith signed transferred deeds were handed over by defendant No.1 to plaintiff in January, 2014 which were lodged by plaintiff with the companies in the end of January, 2014 and ultimately were transferred in favour of the plaintiff on 14.02.2014. At that point of time, there were cordial relations between all the family members and to celebrate the silver anniversary of his parents, defendant No.1 alongwith of his parents, his sister and four sisters of husband of plaintiff alongwith husband, sister and brother of Mrs. Smiti Golyan and few friends had gone to Koh Samui, Thailand for about four nights in February, 2014 and all celebrated the occasions happily and defendant No.1 informed everybody present in the gathering about his gifting of shares to his mother as gift for the occasion which as per his insistence were to be transferred on

14.02.2014 in the name of the plaintiff so that he could proudly and happily announce the same before the gathering on 15.02.2014 i.e. the day of silver anniversary."

[Emphasis Supplied] It appears that subsequently, the Plaint in Civil Suit was rejected under Order - VII, Rule 11 of the Code of Civil Procedure, 1908 on 06.08.2016 as the Plaintiff failed to correct valuation. It appears yet another suit numbered as 698/2017 has been filed sometime in July, 2017 (Annexure - A2 with Diary No.8195) and this time, similar para No.5 as was pleaded in the earlier suit, was repeated but with changes. This time, it was mentioned that:-

"the defendant No.1 thought it fair to gift the shares shown in his name in the above said two companies to plaintiff in January, 2014 on the upcoming occasion of silver anniversary celebrations of his parents in February, 2014 in Koh Samui, Thailand and for that purpose, a gift deed dt. 23.01.2014 was executed which was written by husband of plaintiff Company Appeal (AT) No.222 of 2018 on instructions of defendant No.1 and defendant No.1 signed the same."

.....

"The gifted shares alongwith gift deed dt. 23.01.2014 and signed transfer deeds were handed over by defendant No.1 to plaintiff in January, 2014 which were lodged by plaintiff with the companies in the end of January, 2014 and ultimately were transferred in favour of the plaintiff on 14.02.2014."

[Emphasis Supplied] Thus, somewhere in 2017, the Appellants came up with a stand that not merely the shares were handed over and share transfer forms were executed, but that there also existed what is called "gift deed". Impugned Order of NCLT shows that learned NCLT painstakingly looked into the various aspects and analysed Section 108 of the old Act to see if there were necessary compliances. NCLT found that there was nothing to show that such compliances had been done. NCLT found that the Appellants failed to show instance of any transfer deed by adducing any evidence. NCLT also discussed the said supposed to be "gift deed", as has been reproduced by NCLT in para - 39 of its Judgement. Undisputedly, Appellant No.2 wrote the document. In the various circumstances which exist against the Appellants, this is also the circumstance not explained as to why if OP1 wanted to gift his shares, he did not write the document himself. And why, three signatures? Again, even the affidavits of relatives filed with Application for stay before CLB - Annexure - A-5 (Page 520) to claim that OP1 declared he had gifted shares do not inspire confidence. They are Company Appeal (AT) No.222 of 2018 stereo type and incidentally affidavit of one Rddhima Golyan (Page - 574) purporting to have been sworn on 14.01.2016 has been notarized by Notary whose seal itself has a validity between 24.03.2016 to 23.06.2016. Apparently back dated.

The Appellants have tried to claim that Ajay Sharma was taking the share transfer deeds, original Minutes register and the concerned files to the CA and lost the same on 25th March, 2015, for which FIR was filed on 26th March, 2015. Copy of the document is at Page 391 in the Appeal. The stamp on this document, which appears to be of the Police Station, has a date of 26.03.2015 with time as 2.30

p.m. The Accounts Officer claimed to have carried the ROC file with complete share transfer deeds and other documents and also the minutes of meetings. He claimed that he was carrying the same on his motorcycle to meet the CA and found the whole bundle missing and could not locate the same. He claimed that the bundle slipped away somewhere and he could not locate the same. The letter did not seek for any search and merely informed the SHO that FIR was being lodged "to take on record the same". Now if this FIR is kept in view and we peruse Page - 260 of the Appeal, we have a copy of e-mail from the OP1 - Yash Golyan sent to Ajay Sharma as well as the Appellant No.2 and others, attaching a letter sent by him that he had applied for duplicate share certificates and now was shocked as it came to his attention that his 4,66,600 equity shares have been transferred in the name of Mrs. Smiti Golyan, and informed that he had never sold or transferred his shares to Company Appeal (AT) No.222 of 2018 Smiti Golyan or to anybody else. He called upon the Directors to immediately inform with documentary proof as to how and on what basis/documents his shares had been transferred to Smiti Golyan. He even alleged fraud and conspiracy between the two Appellants. Page - 260 read with that Page - 261 shows that such e-mail was sent by OP1 on 26th March, 2015 at 12.06 p.m. Thus, after such e-mail being sent at 12 O' clock in the afternoon, said Ajay Sharma appears to have lodged short FIR at 2.30 p.m. as at Page 391 claiming that one day earlier itself, he lost all the concerned records. The Appellants thus conveniently took a stand that they are unable to show copy of Board Meeting or share transfer forms. In the circumstances, conduct of Appellants is suspect. We are unable to accept the defence of the Appellants in the Company Petition that OP1 had transferred his shares to the Appellant No.1. The Appellants - original Respondents 2 and 3 first took defence to claim that in alleged normal and general practice of the Company, the shares were transferred; then subsequently they took a defence of handing over of shares with transfer forms to claim that there was gift (without referring to any document); and yet subsequently, took a stand that there was also a gift deed executed. They then conveniently take a stand of loss of records, hiding behind a vague FIR filed when the heat from OP1 increased. With such shifting stands, the contesting Respondents - Appellants failed to convince the learned NCLT and have failed to convince us that OP1 gifted the shares and that due procedures under the Companies Act have been followed regarding change in the Register of members. No document worth the Company Appeal (AT) No.222 of 2018 name showing compliances of the Companies Act effecting change in the Register of Members, has been brought before us and the defence that there was a gift, is also not inspiring confidence. We have looked into the defence claimed that there was gift as the defence was raised by the Appellants themselves in NCLT to consider their defence on that count. We would say that prima facie, the Appellants failed to prove such defence of gift before NCLT and us that the Appellants have justifiable reasons for their action to omit the name of the original Petitioners from the Register of members and to add that of Appellant No.1 - Smiti Golyan.

20. Thus considering the disputes raised in the present matter and the evidence available, keeping in view observations in the matter of "Ammonia Supplies", we have considered the same and find that the learned NCLT rightly decided the matter. We have purposely used the word "prima facie" in the above paragraph analysing the matter on the basis of law as it stood before coming into force of New Act.

21. In para - 31 of the Judgement in the matter of "Ammonia Supplies"

portions of which we have reproduced above, the Hon'ble Supreme Court had observed that there was nothing under the Companies Act expressly barring the jurisdiction of the Civil Court and thus mandated that the "Court" should examine whether prima facie what is said is a complicated question or not. The earlier Section 10 GB of the companies Act, 1956 relating to Civil Court not to have jurisdiction, does not appear to have been enforced but the position has now changed with coming into force of Company Appeal (AT) No.222 of 2018 Companies Act, 2013 and Section 430 of the Act providing that Civil Court would not have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act. Under the new Companies Act - Section 59, it is for the NCLT to consider if the name of any person is "without sufficient cause" entered or omitted from the register of members of a company. Recently in the matter of "Shahi Prakash Khemka (Dead) Through LRs. and Another Versus NEPC Micon (Now called NEPC India Ltd.) and Others" Civil Appeal Nos.1965 - 1966 of 2014 decided on 8th January, 2019 - 2019 SCC OnLine 223, the Hon'ble Supreme Court of India dealt with disputes which were before the Hon'ble Supreme Court relating to exercise of power under Section 111-A of the Companies Act, 1956 (relating to rectification of register on transfer) and noticed above Judgement in the matter of "Ammonia Supplies". It was observed:-

"Learned counsel for the appellants has drawn our attention to the view expressed in Ammonia Supplies Corporation (P) Ltd. vs. Modern Plastic Containers Pvt. Ltd. and Others (1998) 7 SCC 105, to canvass the proposition that while examining the scope of Section 155 (the predecessor to Section 111), a view was taken that the power was fairly wide, but in case of a serious dispute as to title, the matter could be relegated to a civil suit. The submission of the learned counsel is that the subsequent legal developments to the impugned order have a direct effect on the present case as the Companies Act, 2013 has been amended which provides for the power of rectification of the Register under Section 59 of the said Act. Learned counsel has also drawn our attention to Section 430 of the Act, which reads as under:-

Company Appeal (AT) No.222 of 2018 "430. Civil court not to have jurisdiction.-

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate."

The effect of the aforesaid provision is that in matters in respect of which power has been conferred on the NCLT, the jurisdiction of the civil court is completely barred.

It is not in dispute that were a dispute to arise today, the civil suit remedy would be completely barred and the power would be vested with the National Company Law Tribunal (NCLT) under Section 59 of the said Act. We are conscious of the fact that in the present case, the cause of action has arisen at a stage prior to this enactment. However, we are of the view that relegating the parties to civil suit now would not be the appropriate remedy, especially considering the manner in which Section 430 of the Act is widely worded.

We are thus of the opinion that in view of the subsequent developments, the appropriate course of action would be to relegate the appellants to remedy before the NCLT under the Companies Act, 2013."

[Emphasis supplied] It is apparent that now even otherwise, exclusive jurisdiction with regard to Section 59 is of the NCLT. NCLT would now clearly have jurisdiction to deal with rectification and all questions including incidental and peripheral questions raised with regard to rectification for the purpose Company Appeal (AT) No.222 of 2018 of deciding legality of the rectification. What could earlier be looked into to see if prima facie made out can now be considered if proved to justify rectification even if it was to be said to be complicated question. We do not find any error with the Impugned Order. We pass the following Order.

ORDER The Appeal is rejected. Each of the Appellants shall pay costs of Rs.50,000/- to Respondent No.2 - Yash Golyan.

[Justice A.I.S. Cheema] Member (Judicial) [Balvinder Singh] Member (Technical) /rs/nn Company Appeal (AT) No.222 of 2018