

Yamini Bipinchandra Shah & Ors vs Trimbak Estates Pvt Ltd & Ors on 24 June, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) No. 250 of 2018

IN THE MATTER OF:

1. Yamini Bipinchandra Shah
2. Mr. Bhavik Bipinchandra Shah
3. Mr. Arpit Bipinchandra Shah.

All adults, of Mumbai, Indian Inhabitants
Having address at 401, Silver Heights, TPS III,
51st Road, Opp. Kent Tower Borivali (W),
Mumbai-400 092.

....Appellants

Vs

1. Trimbak Estate Pvt. Ltd. a private Limited Company, Incorporated under the companies Act, 1956 having its registered office at 103, Camy House Dhuswadi, Dr. Cawasji Hormasji Lane, Marine Lines, Mumbai-400 002.
2. Mr. Kamalkumar Shankarlal Bhageria, an adult, of Mumbai having address at 702-A, Aakansha Tower, Kalyan Complex, yari road, Versova, Andheri (West), Mumbai-400 061.
3. Mr. Rajendra Kumar Natwarlal Parmanandka an adult, of Mumbai, having address of 104, Camy House, Dhuswadi, Dr. Cawasji Hormasji Lane, Marine Lines, Mumbai-400 002.
4. Mrs. Sushila Rajendra Parmanandka an adult, of Mumbai, having address at 104, Camy House, Dhuswadi, Dr. Cawasji Hormasji Lane, Marine Lines, Mumbai-400 002.
5. Mrs. Maina Devi Hamirwasia an adult, of Mumbai, having address at 104, Camy House, Dhuswadi, Dr. Cawasji Hormasji Lane, Marine Lines, Mumbai-400 002.

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6. Mr. Shankarlal Bhageria, an adult, of Mumbai having address at 702-A, Aakansha Tower, Kalyan Complex, yari road, Versova, Andheri (West), Mumbai-400 061.
7. Mr. Ramswaroop Agarwal, an adult, of Mumbai

- having address at 702-A,
Aakansha Tower, Kalyan Complex, yari road,
Versova, Andheri (West), Mumbai-400 061.
8. Mrs. Alka Kamal Bhageria. an adult, of Mumbai
having address at 702-A, Aakansha Tower,
Kalyan Complex, yari road, Versova, Andheri
(West), Mumbai-400 061.
 9. Mrs. Aarti Suresh Gupta, having address at A-
5/504, Devdar CHS, Lokudyan, Sangliwadi
Road, Near Bali Bazar, Kalyan West, Thane-
421301.
 10. Mr. Aditya Parmanandka, Having address at
Flat No. 201, A Wing Bldg No. L-3, Ostwal
empire, boisar - 401 501
 11. Mr. Amit Parmanandka, having address at
Flat No. 201, A Wing Bldg No. L-3, Ostwal
empire, boisar - 401 501
 12. Smt. Anandi Devi Bagaria, having address at B-
501, Gokul Plaza, Thakur Complex, Kandivali
(E) Mumbai 400 101
 13. Ms. Ashrat Kanchwala, having address at
156/158, Lucky House, 2nd Floor, Flat No. 10,
E.R. Road, Bhendi Bazar, Mumbai-400 003.
 14. Bhagirathi Synthetics Pvt. Ltd., having address
at 122, Trinity Bldg, A.P. Market, S.S. Gaikwad
Road, Dhobi Talao, Mumbai-400 002.
 15. Mr. Bulesh Bhageria, having address at Emp-
03/401, Thakur village kandiwali (E), Mumbai
400101.
 16. Ms. Chanda Suresh gupta, having address at A-
5/504, Devdar CHS, Lokudyan, Sanglewadi
Road, Near Bali Bazar, Kalyan West, Thane-
421301.

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17. Growell Tradelines Pvt. Ltd., having address at
202, Sona Chamber, 507/509, J.S.S Road,
Mumbai- 400 002.
18. Harmony Traders Pvt. Ltd. having address at
122, Trinity Bldg, A.P. Market, S.S. Gaikwad
Road, Dhobi Talao, Mumbai 400 002.
19. Hi-Tech Corporate Service Ltd., having address
at 104, Camy House, Dhuswadi Dr. Cawasji
Hormasji lane, Marine lines, Mumbai - 400 002.
20. Hi-Tech Management Consultants Pvt. Ltd.
having address at 103, Camy House, Dhuswadi
Dr. Cawasji Hormasji Lane, Marine Lines,

Mumbai 400 002.

21. Kamal Bhageria HUF, having address at 103, Camy House, Dhuswadi Dr. Cawasji Hormasji Lane, Marine Lines, Mumbai 400 002.
22. Mrs. Kavita jain, having address at B-401, Kent enclave Haridas Nagar, Borivali (W), Mumbai- 400 092.
23. Mr. Kishore Jain, Having address at B-401, Kent enclave Haridas Nagar, Borivali (W), Mumbai- 400 092.
24. Mr. Narendra Bhageria, having address at 01-A Wing, Nirmal park Bldg No. 3, S.V. Road, Bhayander (E), Mumbai 401 105.
25. Mrs. Manisha Bhageria, having address at 01-A Wing, Nirmal park Bldg No. 3, S.V. Road, Bhayander (E), Mumbai 401 105.
26. Nishi Consultant Pvt. Ltd. having address at 202, Sona Chamber, 507/509 J.S.S. Road, Mumbai - 400 002.
27. Mrs. Parul Hamirwasla, having address at E- 701, Vasant Smurit, 90ft, Road, Thakur complex, Kandiwali(E), Mumbai 400 001.
28. Ms. Neha Suresh Gupta, having address at A- 5/504, Devdar CHS, Lokudyan Sanglewadi Road, Near Bail Bazar, Kalyan (W), Thane- 421 301.

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29. Narottam Bagaria HUF, having address at B- 501, Gokul Plaza, Thakur Complex, Kandivali (E) Mumbai 400 101
30. Ms. Neha bhageria, having address at 702-A, Aakanksha Tower Panchmarg, off Yari Road, Versova Andheri (W) Mumbai- 400061
31. Mr. Narottam Bagaria, Having address at B-501, Gokul Plaza, Thakur Complex, Kandivali (E), Mumbai-400101
32. Mrs. Veenu Bhageria, Having address at Emp- 03/401, Thakur Complex, Kandivali (E), Mumbai-400101
33. Sapphire Capitals Pvt. Ltd., having address at 103, Camy House, Dhuswadi Dr. Cawasji Hormasji Lane, Marine Lines, Mumbai 400 002.
34. Ms. Shabina Kanchwala, Having address at 156/158 Lucky House, 2nd Floor, Flat No. 10 E.R. Road, Bhendi Bazar, Mumbai-400003.
35. Sushil Bhageria HUF, Having Address at 122,

Trinity Bldg., A.P. Market, S.S. Gaikwad Raod,
Dhobi Talao, Mumbai-400002.

36. Smt. Santra Devi Parmanandka, having address at Flat No. 201, A Wing Bldg No. L-3, Ostwal Empire, Boisar - 401 501
37. Progressive Securities Pvt. Ltd., having address at 103, Camy House, Dhuswadi Dr. Cawasji Hormasji Lane, Marine Lines, Mumbai 400 002.
38. Mr. Vijay Kumar Bagaria, Having address at B-501, Gokul Plaza, Thakur Complex, Kandivali (E), Mumbai-400101
39. Mr. Sushil Kumar Bhageria, Having Address at 122, Trinity Bldg., A.P. Market, S.S. Gaikwad Raod, Dhobi Talao, Mumbai-400002.
40. Mr. Ramavtar Hamirwasia, Having Address at E-701, Vasant Smruti, 90 ft. Road, Thakur Complex, Kandiwali (E) Mumbai- 400101
41. Mr. Vikas Agarwal, Having Address at Emp-03/401, Thakur Village Kandiwali (E) , Mumbai-

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400101

42. Mr. Ramesh Hamirwasia, , Having Address at E-701, Vasant Smruti, 90 ft. Road, Thakur Complex, Kandiwali (E) Mumbai- 400101
43. Mr. Suresh Kumar Gupta, having address at A-5/504, Devdar CHS, Lokudyan Sanglewadi Road, Near Bail Bazar, Kalyan (W), Thane-421301
44. Ms. Pooja Bhageria, Having address at B-501, Gokul Plaza, Thakur Complex, Kandivali (E), Mumbai-400101
45. Mrs. Rajni Bhageria, Having Address at 122, Trinity Bldg., A.P. Market, S.S. Gaikwad Raod, Dhobi Talao, Mumbai-400002.
46. Mr. Yash Bhageria, Having Address at 1604/A Green Park, Raheja Vihar, Kulupwadi Road, Borivali (E) Mumbai-400061.
47. Mrs. Santosh Devi Bhageria, Having Address at 01-A Wing, Nirmal Park Bldg. No. 3 S.V. Road, Bhayander (E), Mumbai 401105.
48. Mrs. Shakuntalla Devi Gupta, having address at A-5/504, Devdar CHS, Lokudyan Sanglewadi Road, Near Bail Bazar, Kalyan (W), Thane-421301
49. Mrs. Shashi Bhageria, Having address at B-501, Gokul Plaza, Thakur Complex, Kandivali (E)

Mumbai-400101.

50. Mr. Ankur Bhageria, having address at 702,
Aakansha Tower, Kalyan Complex, yari road,
Andheri (West), Mumbai-400 061.

....Respondents

Present:

For Appellant : Mr. Anirwan with Mr. Varun Singh, Mr.Gaurav Nair, Ms
Pranati Bhatnagar, Advocates.

For Respondent: Mr Rakesh Kumar with Mr. Aashish Khattar, Mr.Ankit
Sharma, Advocates.

J U D G M E N T

Company Appeal (AT) No. 250 of 2018 [24.06.2020] JARAT KUMAR JAIN, J.

The Appellants being legal heirs of founder shareholder Late Mr. Bipin Chandra Shah filed this Appeal against the order dated 26.03.2018 passed by National Company Law Tribunal, Mumbai Bench (In short Tribunal). Whereby, allowed the Application (CA No. 314/2013) filed Respondents and dismissed the Company Petition CP NO. 108/2013 as not maintainable.

2. Brief facts of this Appeal are that M/s Trimbak Estates Pvt. Ltd. (In brief Target Company) was incorporated on 30.08.1995 having authorized share capital of Rs. 1 Lakhs divided into 10,000/- equity shares @ Rs. 10/- each. The founder shareholders and directors namely Late Mr. Bipin Chandra and Kamal Kumar Bhageria, subscribed 100 equity shares each @ Rs. 10 per share and paid up share capital was 2,000/-. During the year 2002-03. Late Mr. Bipin Chandra suffered recurrence of Cordic Problems. He was advised complete bad rest and was not to allow to attend the Office. In absence of Late Mr. Bipin Chandra, the affairs of the Target Company, where being controlled by the Kamal Kumar Bhageria alone. Late Mr. Bipin Chandra could not recover from illness and died on 15.02.2004 living behind his legal heirs namely Yamini (Wife), Mr. Bhavik (Son) and Arpit (Son) Appellants herein. Bhavik vide letter dated 11.03.2006 requested Kamal Kumar Bhageria to transfer the shares hold by his father in the Target Company in the joint names of legal heirs. It was shocking and surprising to know that the shares hold by Late Mr. Bipin Company Appeal (AT) No. 250 of 2018 Chandra in the Target Company held disappeared from the Registrar of shareholders maintained by the Target Company. The inspection carried out during the August to September 2006, revealed that mismanagement and oppression have been carried out behind the back of Late Mr. Bipin Chandra. Kamal Kumar Bhageria being the master mind, indulge into the acts of mismanagement and oppression. The Target Company on 11.12.2002 without authorization of board meeting allotted 9,800 equity shares @ of Rs. 10 each in favour of Rajendra K.N. Permanandka 4900 and Sushila Rajendra Permanandka 4900. Thus, the percentage of shareholding of Late Mr. Bipin Chandra brought down from 50% to 1 % of total share capital. Subsequently, during Financial year 2005-06 the paid up capital increased from 10,000 equity shares to 85,000 equity shares @ Rs. 10 Each. Thus, the shareholding of the Appellants (legal heir of Late Mr. Bipin Chandra) is brought down from 50% to 0.12 % of the total paid up capital. In the Financial year 2011-12 paid up capital again increased from 85,000 shares @ Rs. 10 each to 95,800 shares @ Rs. 10 each. Thus, the shareholding of the Appellants is further brought down from 50% to

0.10%.

3. It is also alleged that the number of Members/ Shareholders have been increased from 2 to 50 in systematic manner. New Shareholders/Members are family Members of Kamal Kumar Bhageria. They have made shareholders with the sole motive to bring down the shareholding of Late Mr. Bipin Chandra Shah from its original $\frac{1}{2}$ to $\frac{1}{50}$ th of total numbers.

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4. The Appellants alleged that aforesaid mismanagement and oppression is ex-facie illegal on the face of it and is in contravention of the Articles of Association. On these allegations the Appellants being legal heir of founder shareholder Late Mr. Bipin Chandra Shah filed Company Petition under Sections 397, 398, 402, 406 and 407 of Companies Act, 1956 and Section 59 of the Companies Act, 2013 before the Company Law Board in Mumbai Bench, against the Respondents in September, 2013. On 04.10.2016 Company Petition transferred to Tribunal Mumbai Bench.

5. During the pendency of the Petition the Respondents herein filed an Application (CA No. 314 of 2013) for dismissal of Company Petition in limine, on the ground that the Appellants do not qualify/fulfilled the criteria under Section 399 of the Companies Act, 1956. It is also stated that the Appellants have also filed suit in City Civil Court Mumbai, being short causes suit No. 942 of 2007 on 23.02.2007 against the Respondent Nos. 1 to 4 herein as a remedy against the oppressive conduct and sought various reliefs, however, the suit was dismissed for default on 25.04.2007. it is also stated that the Appellants have filed Petition (CP No. 16 of 2011) against the Respondents on the ground of oppression and mismanagement, Company Law Board vide order dated 14.03.2012 dismissed the Petition holding that the Petition is not maintainable. For the same cause of action, the Present Petition is filed after a delay of nine years.

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6. The Appellants opposed the Application on various grounds including that maintainability under Section 399 of the Companies Act, 1956 should be considered the crucial date when the shareholding of the Appellants was diluted and reduced from 50% to 1% and subsequently, shareholding is brought down to 0.12% and 0.1% of the total paid up capital.

7. After hearing the Learned Counsel for the parties Tribunal by the impugned order held that do not find any deficiency in allotment of shares by the Company to other Respondents. The Appellants do not hold the minimum threshold limit as prescribed under Section 399 of the Companies Act, 1956 i.e. either $\frac{1}{10}$ th of the paid up equity share capital or $\frac{1}{10}$ th of the total number of Members of the Company. The Appellants in past had suffered adverse orders from City Civil Court Mumbai, in short cases suit No. 942/2007 decided on 25.04.2007. and also in the Company Law Board in CA No. 51 of 2011 in CP No. 16 of 2011 on 12.03.2012. The Appellants have again filed this Petition for the same cause of action and that too after a delay of 9 years. Thus allowed the Application (CA No. 314 of 2013) filed by Respondents and in consequence dismissed the CP No. 108 of 2013. Being aggrieved with this order the Appellants have filed this Appeal.

8. Learned Counsel for the Appellants submitted that Learned Tribunal erroneously, ascertain the eligibility under Section 399 of the Companies Act, 1956 on the date of filing of the Company Petition. The Tribunal ought to have ascertain the eligibility on the date of oppression and mismanagement in Company Appeal (AT) No. 250 of 2018 diluting the shareholding and Membership of the Appellants below 1/10th of the total Shareholding or Membership in the Company. For this principal Learned Counsel for the Appellants cited the Judgments of this Appellate Tribunal in the case of Anup Kumar Agarwal & Anr. Vs. Crystal Thermotech Ltd. and Ors. (Company Appeal (At) NO. 17 of 2016) decided on 24.01.2017 and M/s Ranchi Metal Ispat Pvt. Ltd. Vs. Surjit Singh (Company Appeal (AT) No. 31 of 2016) decided on 20.02.2017.

9. Learned Counsel for the Appellants contended that six instances of oppression and mismanagement by the Respondents as stated in the Petition are as under: -

(i) On 11.12.2002 the Respondent No. 2 without any notice or board meeting allotted 9,800/- shares to Respondent No. 3 and 4.

(ii) On 10.02.2004 the Respondent No.2 had appointed his wife Respondent NO. 8 as Director of the Company.

(iii) On 30.09.2004 the name of Mr. Bipin Chandra Shah was removed from the list of shareholders.

(iv) On 19.05.2006 the Respondent No. 2 deliberately, gave false statement that no share stood in the name of Mr. Bipin Chandra Shah.

(v) The Authorized Share Capital increased from 1 lakh to 9.58 lakhs and number of Shareholders increased to six.

(vi) On 15.03.2012, 10,800 shares allotted to Respondent No. 8 to

50.

10. Learned Counsel for the Appellants further submitted that without any notice or board meeting illegally the shares were allotted and authorized share capital was increased. In this Case, the question of maintainability is mixed question of fact and law, as the Petition was filed on the ground that the Company Appeal (AT) No. 250 of 2018 shareholding of the Appellants has been brought down below 1/10th of the total shareholding of the Company by oppression and mismanagement. Therefore, the Tribunal was required to decide the question of maintainability at the time of final hearing of the Petition.

11. Learned Counsel for the Appellants submitted that the Counsel for the Respondents has not argued anything what so ever, in establishing that the Membership of the Appellants on the date of Oppression and Mismanagement was less than 1/10th of the total Members of the Company.

12. Learned Counsel for the Appellants further submitted that Learned Tribunal without giving any reasoning held that there was no deficiency in allotment of shares to Respondent No. 8 to 50. Therefore, impugned order is a non-speaking order and is liable to be set aside and the case may be remanded back to the Tribunal for deciding the case on merit.

13. Learned Counsel for the Appellants also submitted that the Learned Counsel for the Respondents have restricted their arguments on the question of limitation, whereas the Tribunal has not decided the issue of limitation and has not given a finding that the Petition is barred by limitation. Otherwise, also the issue of limitation is a mixed question of law and fact. Therefore, the issue of limitation ought to be decided by the Tribunal at final stage. So far as, the question of limitation is concerned the shares were allotted in favour of Appellants on 08.05.2013. Therefore, the right to sue accrued only on Company Appeal (AT) No. 250 of 2018 08.05.2013. then, the Company Petition was filed in September, 2013. Thus, it is within Limitation.

14. Learned Counsel for the Appellants contended that the Tribunal has wrongly, observed that the Appellants were suffered adverse order in Company Petition No. 16 of 2011. Actually, this Petition was dismissed with liberty to file fresh Petition after obtaining succession certificate of the deceased Mr. Bipin Chandra Shah. When the shares were allotted to the Appellants then they have filed this Company Petition. The acts of Oppression and Mismanagement continued even after the disposal of earlier Company Petition filed by the Appellants. Thus, the cause of action is continuing cause of action. The Civil Suit of the Appellant was dismissed for non-appearance of the parties. Hence, the Appellants may bring afresh suit, therefore, the order 2 Rule 2 CPC has no application in this Case.

15. Learned Counsel for the Respondents submitted that Mr. Bipin Chandra died on 15.02.2004 after about two years the Appellants have for the first time, on 11.03.2006 applied for transferring the shares in their name. On 29.05.2006 Respondent No. 2 had categorically denied with respect to the Appellant's father having shareholding in the Company. Thus the cause of action had accrued at that time, in favour of Appellants. The Limitation started in the year 2006, whereas, the Company Petition was filed in September, 2013. As per Section 433 of the Companies Act, 2013. The Company Petition can be Company Appeal (AT) No. 250 of 2018 filed within three years from accrual of the cause of action. Thus, the Tribunal has rightly, dismissed the Company Petition on the ground of maintainability.

16. Learned Counsel for the Respondents contended that issue of limitation can be considered as a preliminary issue in the Petition under Section 397 and 398 of the Companies Act, 1956 if it is not a mixed question of law and fact as held by Hon'ble Madras High Court in the case, of Saroj Goenka and Ors. Vs. Nariman Point Building Services and Trading Pvt. Ltd. and Ors. reported in MANU/TN/0072/1993.

17. It is also submitted that this Appellate Tribunal in the case of Ganesh Jaiswal and Ors. Vs. Tourist Inn Pvt. Ltd. and Ors. in Company Appeal (AT) No. 18 of 2019 held that the period of limitation is three years from the date, when the right to apply accrues unless there is a continuous cause of action. The right to apply will have to be construed as having it accrued when the first violation of the right accrues and it discovered.

18. Learned Counsel for the Respondents submits that the Appellants being legal heirs had filed the Petition in February, 2011 before the Company Law Board. Therefore, the Appellants cannot contend that since they did not have 100 shares, therefore, they could not file the Petition under Section 397 and 398 of the Companies Act, 1956. Hon'ble Supreme Court in the case, of World Wide Agencies Pvt. Ltd. & Ors. Vs. Margaret T Sore reported in (1990 1 SCC

536) held that even the legal heirs of deceased shareholder can be treated as Company Appeal (AT) No. 250 of 2018 member of Company for the purpose of maintaining Petition under Sections 397 to 398 of the Companies Act 1956.

19. After, hearing Learned Counsel for the parties we have gone through the record.

20. First question for our consideration is that what is the crucial date when the Applicant is required to satisfy the requirements under Section 399 of the Companies Act, 1956, so as to make the requirement of having an aggregate of 1/10th of shares out of total shareholding of the Company, if the Applicant alleges oppression in bringing down his shareholding. This Appellate Tribunal while dealing with this issue in the case of Anup Kumar Agarwal (Supra) held as under: -

"The question of oppression and mismanagement and maintainability in the present case is a mixed question of facts and law. As the petition was filed on the ground that the shareholding of the applicant(s) has been brought down below 1/10 th of the total shareholding of a Company by oppression and mismanagement, Tribunal was required to decide the question of maintainability at the time of final hearing of the Petition. Both the merit and question of maintainability were required to be decided together. On hearing the parties, in case the Tribunal forms opinion that there was no oppression and mismanagement on the date of cause of action as alleged by the applicant then in such case it was open to the Tribunal to dismiss the petition as not maintainable in view of Section 399 of the Companies Act, 1956. "

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21. This Appellate Tribunal has again an occasion to deal with this issue in the case of M/s Ranchi Metal Ispat Pvt. Ltd. (Supra) after referring the decision of Hon'ble Supreme Court this Appellate Tribunal held as under:-

"In Anup Kumar Aggarwal Vs. Crystal Thermotech ltd. & Ors. - [company Appeal (AT) NO. 17 of 2016], this Court considered the crucial date when an applicant is required to satisfy the requirements under Section 399 of the Companies Act, 2013 so as to make the requirement of having an aggregate of 1/10th of share out of the total shareholding of the Company, if the Appellant alleges oppression in bringing down his shareholding. In the said case, this Court noticed the Hon'ble Supreme Court's decision in "Bhagwati Developers Pvt. Ltd." and "Rajahmundry Electric Supply Corporation Ltd." wherein the Apex Court held that the requirement of 1/10th of holding of the total share is to be examined in the light of whether such a number is maintained on the actual date of presentation of the Company petition in the court

(emphasis added). This Court while distinguished the decision of Hon'ble Supreme Court in "Bhagwati Developers Pvt. Ltd."

and "Rajahmundry Electric supply corporation Ltd.," held that the said principle, which was made applicable in the case of winding up, will not be applicable where applicant alleges oppression and mismanagement in bringing down the shareholding below 1/10 th of the total share of the company. This Court further observed that if the principles laid down by Supreme Court in "Bhagwati Developers Pvt. Ltd." and "Rajahmundry Electric Supply Corporation Ltd.," which related to cases of winding up, is made applicable in the case of alleged 'oppression and mismanagement' bringing down the minimum requirement of shareholding, then the applicant(s) will be remediless. This Court thereby held that the crucial date for determination of requirements under Section 399 will be the date the alleged date of Company Appeal (AT) No. 250 of 2018 oppression and mismanagement in bringing down the shareholding below 1/10th of the total shareholding of the Company took place."

22. Now It is well settled that the question of oppression and mismanagement and maintainability is a mixed question of fact and law and when the Petition is filed alleging that the shareholding of the Applicant has been brought down below 1/10th of the total shareholding of a Company by oppression and mismanagement the Tribunal was required to decide the question of Maintainability at the time of final hearing of the Petition and the crucial date of cause of action is when the alleged shareholding of the Applicant has been brought down below 1/10th of the total shareholding of the Company. In this case the Appellants have alleged that on 11.12.2002 without any notice or board meeting. The Respondent No. 2 allotted shares to Respondent No. 3 and 4 and thereby shareholding of Late Mr. Bipin Chandra brought down from 50% to 1% and subsequently, by increasing paid up capital from time to time the shareholding of Mr. Bipin Chandra brought down 50% to 1% of the total paid up capital and 1/50th of the total membership. In the impugned order Learned Tribunal has considered the question of maintainability on the date of filing of the Petition which is not correct and question of maintainability in the case is a mixed question of fact and law. Therefore, it should have been decided at the time of final hearing of the Petition.

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23. it is interesting fact the Respondents have restricted its arguments on the question of limitation only. It means that the Respondents are not convinced or not in a position to justify the findings of the Tribunal in regard to maintainability of the Petition in view of Section 399 of the Companies Act, 1956.

24. So far as the question of limitation is concerned the Tribunal has not given any findings that the Petition is time barred. But dismissed the Petition on the ground of delay and laches. As the Tribunal has not embarked the issue of limitation, therefore, we restrained ourselves to express any opinion in regard to the arguments advanced by Learned Counsel for the Respondents on the question of limitation. However, we are of the view that as per the allegations in the Petition, it is apparent that in this Petition issue of limitation is a mixed question of fact and law. Therefore, it should have been decided at the time of final hearing i.e. when the Petition is decided on merit. In

this purpose it is useful to refer the Judgment of this Appellate Tribunal in the case of Mr. Ganesh Jaiswal & Ors. (Supra) in which held as under: -

"It is well settled that a plea of limitation is a mixed question of law and fact. Reference in this regard may profitably be made to the Judgment of Hon'ble Apex Court rendered on 11th July, 2006 in Civil Appeal No. 4766 of 2001 titled 'Ramesh B Desai & Ors. Vs. Bipin Vadial Mehta & Ors.' reported in (2005) 5 SCC 638 (para 19). It is not in dispute that in regard to matters falling within the purview of Sections 397-398 of the Companies Act, 1956, the Limitation Act does not specifically provide for a period of limitation. In terms of Company Appeal (AT) No. 250 of 2018 Article 137, which is applicable to matters for which no period of limitation is specifically provided, the period of limitation is three years from the date when the right to apply accrues. Unless there is a continuing cause of action, the right to apply will have to be construed as having accrued when the first violation of right occurs or is discovered. Successive violation of right will not give rise to a fresh cause of action."

25. Learned Tribunal without considering the relief and the orders passed by City Civil Court Mumbai in short cases suit no. 942 of 2007 decided on 25.04.2007 dismissed the Petition on this ground also. As per the Appellants the relief claimed in the suit and in this Company Petition are different, parties are different and the suit has been dismissed in default and the acts of oppression and mismanagement continued even after the dismissal of suit. Therefore, the Learned Tribunal is required to consider the arguments of Appellants and should have given a specific finding on this issue.

26. Learned Counsel for the Appellants also pointed out that a Company Petition No. 16 of 2011 was dismissed on 12.03.2013 with liberty to file the Petition afresh after obtaining Succession Certificate or letter of Administration for the estate of Late Mr. Bipin Chandra. Thus, the earlier Petition was not dismissed on merit. Hence, there is no impediment in maintaining the present Petition.

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27. Learned Tribunal without discussing evidence gave a finding that the Tribunal do not find any deficiency in allotting the shares to Respondent No. 8 to 50.

28. With the aforesaid, we are of the view that the impugned order is a non-speaking order. The question of Oppression, and Mismanagement, Maintainability and Limitation in the present case are mixed question of law and fact. Therefore, the Tribunal was required to decide these questions at the time of final hearing of the Petition.

29. Thus, the impugned order is not sustainable in the law. Hence, it is hereby set aside and the matter is remanded to Tribunal that after hearing both the parties, Petition be decided afresh on merit.

No order as to costs The Registry is directed to send the copy of this Judgment to National Company Law Tribunal, Mumbai Bench and parties are directed to appear before the same Bench on 15.07.2020.

(Justice Jarat Kumar Jain) Member (Judicial) (Mr. Balvinder Singh) Member (Technical) (Dr. Ashok Kumar Mishra) Member (Technical) NEW DELHI SC Company Appeal (AT) No. 250 of 2018