

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeal (AT) No.16 of 2018

[Arising out of Order dated 01.12.2017 passed by National Company Law Tribunal, New Delhi Bench in Company Petition No.219 (ND) of 2017]

IN THE MATTER OF:

1. Deepak Beri
S/o Shri S.K. Beri
E, 539, Greater Kailash –II,
New Delhi – 110048
2. Karan Beri
S/o Shri Deepak Beri
E, 539, Greater Kailash –II,
New Delhi – 110048
3. Nandita Beri
D/o Shri Deepak Beri
E, 539, Greater Kailash –II,
New Delhi – 110048
4. Rekha Beri
W/o Shri Deepak Beri
E, 539, Greater Kailash –II,
New Delhi – 110048

...Appellants
(Original Petitioners)

Versus

1. D B Engineering Private Limited
81, Jor Bagh, New Delhi – 110 003
2. Atul Beri
S/o Shri S.K. Beri
81, Jor Bagh, New Delhi – 110 003
3. S.K. Beri
81, Jor Bagh, New Delhi – 110 003
4. Ramesh Beri
W/o Shri S.K. Beri
81, Jor Bagh, New Delhi – 110 003

5. Banaras Marbles and Granites Limited
A-119, Okhla Industrial Area, Phase – II,
New Delhi – 110 020

...Respondents
(Original Respondents)

Present: Shri K. Datta and Shri Shantanu Parashar, Advocates for the Appellants

Shri Arun Kathpalia, Senior Advocate with Shri Jayant K. Mehta, Shri Rahul Kukreja and Shri Raghavendra Bajaj, Advocates for Respondent Nos.1, 2 and 5

Ms. Priya Kumar, Shri Adhish Srivastava and Shri Sujit Kr. Singh, Advocates for Respondent Nos.3 and 4

J U D G E M E N T

A.I.S. Cheema, J. :

1. The Appellants (original Petitioners) filed Company Petition No.219(ND)/2017 before the National Company Law Tribunal (in short, “NCLT”), New Delhi on 24.08.2017. The Company Petition has been filed complaining of oppression and mismanagement in Respondent No.1 Company, on the part of Respondents 2 to 4. The Appellants 2 to 4 are part of the family of Appellant No.1 - Deepak Beri (hereafter referred as “Appellant”). The Appellant group has 30.60% shareholding in the Respondent No.1 Company - D B Engineering Private Limited which was incorporated on 31.12.1986. Respondent No.2 – Atul Beri, who is brother of the Appellant, has 30.60 % shareholding. Respondent No.3 – S.K. Beri is (the father of Appellant and Respondent No.2) having 33.22% shareholding while Respondent No.4 – Ms. Ramesh is wife of S.K. Beri and has 5.50% shareholding. It appears that Respondent Nos. 2 and 4 have been Directors of Respondent No.1 Company (hereafter referred as

“Company”) since 1986 and the Appellant became Director in 2002 while his father – Respondent No.3 – S.K. Beri became Director on 21.02.2015.

2. It appears that Respondent No.5 - Banaras Marbles and Granites Limited, incorporated in 1992 was acquired in September, 2014 and the Appellant and Respondents 2 and 3 became Directors in the said Company.

3. The Appellant claims that he set up “D B Engineering Private Limited” and “Atlas Knives” as Limited Liabilities Partnership (LLP).

4. According to the Appellants, somewhere in 2014 disputes arose between the Appellant and Respondent No.2 with regard to business, business assets and family properties, jointly owned and controlled by them which includes the Respondent Company. The other entities jointly owned and controlled by the parties are S.K. Beri and Brothers (SKB), D.B. Engineering Company (DBC) and Banaras Marbles and Granites Limited (Banaras). According to Appellants, there were discussions regarding dividing the business and assets. To sort out differences between the brothers, Respondent No.3 – S.K. Beri, the father was taken as Director on 21.02.2015 in the Company but the same did not help. On 20th January, 2016, the Appellant and Respondent No.2 entered into agreement to refer disputes to Arbitration (Annexure A2 – Page 79). They agreed on Mr. Manoj Nagrath, a CA to be the Arbitrator. Thereafter on 17th February, 2016, after detailed negotiations, it is claimed that the Appellant and Respondents 2

and 3 arrived at Memorandum of Understanding (Annexure A3 – Page 81). On 14th March, 2016, Respondent No.3 and the Arbitrator – Manoj Nagrath had meeting and document (Annexure A4 –Page 90) titled as “Regarding settlement between Deepak & Atul Beri” was executed and signed by them. Later, on 30th April, 2016, it is stated that Deed of Arrangement (Annexure A5 – Page 93) was executed for final division of business and assets between the parties which was signed by the Appellant and Respondents 2 and 3.

5. It appears that the Arbitrator passed Award on 2nd August, 2016 (filed with Diary No.5321), directing division of business and assets of the family businesses, including the Respondent Company.

6. The Appellant claims that after the award was passed, he filed OMP(I) 326/2016 (Annexure A6 – Page 101) under Section 9 of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”, in short), against Respondent No.2 – Atul Beri seeking to restrain him from acting in derogation of the Memorandum of Understanding, Deed of Arrangement and the Award. Inter alia, the Appellant claimed in the OMP (I) 326 of 2016 that Respondent – Atul Beri should provide the Appellant access to books of accounts, ERP System, bank accounts, stock registers and access to manufacturing Unit No.64 at Noida. In the OMP, he also prayed for appointment of a receiver to take charge of the books of accounts, operations of bank accounts, stock registers, etc. belonging to Respondent

Company D B Engineering Pvt. Ltd. as well as other entities of the family and has sought further reliefs as appearing in the prayer clauses.

7. It appears from record that the Respondent Nos.3 and 4 then filed OMP 382 of 2016 under Section 34 of the Arbitration Act and Respondent No.2 filed 396 of 2016 under Section 34 of the Arbitration Act raising grievances leading to the Hon'ble High Court of Delhi at New Delhi passing Orders on 19th August, 2016 copy of which has been filed at Annexure A-7 (Page 129). According to the Appellant by such Order dated 19th August, 2016, the Hon'ble High Court recorded statement of Respondent No.3 that the parties were bound by the MOU and Deed of Arrangement. According to the Appellants, Respondent No.2 instead of abiding by the terms of the Award, filed OMP 396 of 2016, a petition under Section 34 of the Arbitration Act, 2016. The OMP 382 of 2016 filed by the Respondent Nos.3 and 4 was also filed subsequently. According to the Appellant, there was breach of Order dated 19th August, 2016 passed by the High Court as Respondent No.2 opened another bank account having CBCA/1/209 in the name of Respondent Company on 05.11.2016 with Corporation Bank, Village Kasna Pergana, Dankor, Greater Noida without any authority or Board Resolution and without letting the Appellant know. The Appellants claimed Rs.3,04,48,547/- have been siphoned by opening such account and transferring the money to the personal accounts of Respondent No.2 and his children.

8. The Appellant further claims that in view of such illegal acts of Respondent No.2, the Appellant No.1 filed IA 13 of 2017 in OMP 326 of 2016 (Page 177) as Respondent had opened new account in the name of Company. It is stated that the Hon'ble High Court took serious note of the conduct of Respondent and, with other directions passed Orders appointing Court Commissioner assisted by Chartered Accountant to inspect the premises of various entities of the Company and, inter alia, list of stocks, machines, raw material, scrap, etc. lying at the premises. It is the case of the Appellant that when the Court Commissioner and Chartered Accountant were carrying out inspections, Respondent No.2 moved machinery and stocks from Unit which was not yet inspected, to unit which was already inspected. Because of such conduct of Respondent No.2, Appellant filed another Application - I.A. No.3226 of 2017 in OMP 326 of 2016 because of which the Hon'ble High Court issued Orders dated 14th March, 2017 directing the Court Commissioner to re-inspect the premises and file Supplementary Report. The Appellant has filed copy of the Report submitted by Court Commissioner on 15.05.2017 at Page – 203 and the Report regarding revisit as at Page – 228.

9. The Appellant claims that the Respondents are guilty of acts of oppression and mismanagement like under-invoicing of goods; shifting Company properties and destroying other Units of the Company; not holding Board Meetings and other Statutory compliances; selling scrap without invoices/records; outsourcing business of the Company to the

detriment of the Company; Hampering transparency and other acts as mentioned by him in the Company Petition, because of which Appellants claimed they were required to file petition when such acts became evident from the Report dated 15th May, 2017 filed by the Court Commissioner. Thus, the Company Petition was filed. The Appellants claim that the Respondents claimed before the NCLT that the Appellants were forum shopping. The NCLT has entertained the Company Petition but declined to grant Interim Orders. NCLT has directed Respondents to file Reply in the Company Petition. The present Appeal has been filed by the Appellants being aggrieved by the NCLT not passing any Interim Orders.

10. We have heard counsel for both sides.

11. Counsel for the Appellants has submitted that as per the Impugned Order, NCLT admitted the Company Petition and issued Notice and, that part, of the Order has become final. It is argued that the present appeal is limited to the issue of NCLT refusing to grant Interim Orders of Protection to the Appellants. The argument is that the Interim Orders which were pressed by the Appellants but denied by the NCLT were as follows:-

- 1) Interim Protection seeking directions for grant of status quo in relation to assets, management and shareholding, and
- 2) Inspection of books of accounts and statutory records of the Company.

The argument of the Counsel is that the NCLT wrongly refused Interim Orders observing that the affairs of the Company were *custodia legis* of the Hon'ble High Court and that if NCLT would pass any orders in relation to the assets and books of account, the same may lead to a conflict of orders. It has been argued that NCLT was not right in refusing Interim Orders only because Section 9 and Section 34 proceedings under the Arbitration Act were pending in High Court. The learned counsel for Appellants claimed that the NCLT had jurisdiction to pass the Interim Orders as mentioned above. According to the learned counsel, Respondent No.2 was involved in acts of under-invoicing of goods, illegal removal of assets and machines of the Company among other acts of siphoning. Thus, according to the learned counsel, orders of status quo on assets and the Board of Directors of the Company and status quo with regard to the shareholding should have been passed. According to the counsel, the Appellants have rights to inspect books of accounts and other Statutory records. Thus, according to the counsel, prima facie, case has been made out for grant of Interim Reliefs. The Appellants have argued that the observations of the Court Commissioner and Chartered Accountant recorded in their 2 Reports dated 15th may, 2017, prima facie, establish that the Respondents are involved in the acts of oppression and mismanagement. The argument is that it could not be said that the affairs of the Company are *custodia legis* of the High Court as High Court has not appointed any receiver as such and the affairs of the Company are still

being managed by the Respondent No.2. It is argued that the broader dispute pending adjudication before the High Court will have no effect on the proceedings which are before NCTL, even if some of the reliefs are similar or overlapping. The issues directly and substantially arising for consideration in NCLT and in the High Court are different, it is claimed.

12. The learned counsel for the Appellants further submitted that after passing of the Impugned Order, the Appellants have further filed applications in NCLT making other further grievances but NCLT is not passing any orders even in those applications. It has been submitted that NCLT has exclusive jurisdiction with regard to matters arising under the Companies Act and only on apprehension, NCLT is not passing orders of Interim Reliefs. The learned counsel concluded his arguments claiming that he was basically seeking status quo on the assets, shareholding and was also seeking inspection of the accounts which the Appellants are entitled.

13. Against this, the learned counsel for the Respondent Nos.3 and 4 submitted that the Appellant has filed applications before the Hon'ble High Court praying for reliefs which are similar to the ones which are made before the Tribunal. The Hon'ble High Court in the OMP 326 of 2016 filed by the Appellant is already seeking compliances from parties and the High Court was looking into the disputes raised with regard to the Respondent Company and other businesses which are part of the Award. The argument is that the present Company Petition has been filed on the basis of what

has been found by the Court Commissioners in their Reports dated 15th May, 2017 and those Reports are yet to be dealt with and accepted by the Hon'ble High Court. It has been argued by the learned counsel that as per the Arbitration Agreement (Annexure A-2), it was necessary to seek views of Respondent No.3 but according to the counsel, this was not done and the dispute on this count was already raised in OMP 382 of 2016 filed by these Respondents.

14. It has been argued on behalf of the Respondents 1, 2 and 5 that the NCLT has recorded reasons why it was not passing Interim Orders. The reasons are not perverse and so interference in appeal is not called for. It has been argued that the OMP 382 of 2016 and 396 of 2016 filed by the Respondents under Section 34 were already heard by the Hon'ble High Court and Judgements in those matters were reserved which were due to be passed on 31st May, 2018, same day when the argument was being made in this Appellate Tribunal. The OMP 326 of 2016 filed by the Appellant, however, was still pending. The learned counsel referred to the IAs filed by the Appellant in OMP 326 of 2016 and the prayers made therein to submit that if those prayers are read along with the prayers made in the Company Petition, there was an overlap and when the Appellant had already moved the High Court for reliefs, the NCLT rightly refrained from interfering. It has been argued that the MOU (Annexure A-3) and Deed of Arrangement (Annexure A-5) themselves seek change in the Board with reference to the Respondent Company and other business entities of the

parties and thus seeking status quo with regard to the Board and assets is in conflict. If the Award is maintained and implemented as well as if the Hon'ble High Court considers the various prayers made by the Appellant, it should not happen that the Orders passed by the NLCT should stand in the way. It is argued that for filing the Company Petition, the Appellants have lifted portions from the Reports of Court Commissioner to support the Company Petition. That Report itself is yet to be dealt with and accepted by the Hon'ble High Court and acting on such averments, it would not be appropriate that NCLT issues Interim Orders. The argument is that the NCLT thus rightly refrained and thus this Appellate Tribunal also may refrain from passing Interim Orders.

15. At the time of arguments which were being completed on 31st May, 2018, in Reply, the counsel for Appellant accepted that on that date itself, the Hon'ble High Court was set to pass Judgement in the OMP 382 of 2016 and 396 of 2016 vide which the Respondents had raised objections to the Award under Section 34 of the Arbitration Act. However, the OMP 326 of 2016 filed by the Appellants under Section 9 of the Arbitration Act along with other IAs filed in that OMP were still pending and yet to come up for decision. In Reply, the learned counsel for the Appellants submitted that the reliefs Appellant was seeking in his OMP under Section 9 and what he was seeking in the Company Petition were different as the causes for them were different. He argued that in the proceeding under Section 9 of the Arbitration Act, the Appellant had brought to the Notice of Hon'ble High

Court that the Respondents were not acting as per the MOU (Annexure A-3).

16. Before discussing the arguments, it would be appropriate to make reference to the prayers made in this Appeal as well as to look into the prayers made and disputes which have been raised before the Hon'ble High Court and keep in view, the directions and orders already passed. We juxtapose these aspects for a better appreciation.

16A. Prayers (i) to (v) in this Appeal read as under:

- “(i) Set aside a part of the Impugned Order dated 01.12.2017 to the extent it denies interim orders to the Appellants (para 14 & 15 of the Impugned Order);
- (ii) Pass appropriate order and/or directions restraining the Respondents from appointing any Director(s) on the Board of Directors of the Respondent No.1 Company;
- (iii) Pass appropriate order and/or directions restraining Respondents from altering/changing the shareholding pattern of the Respondent No.1 Company;
- (iv) Pass appropriate order and/or directions directing status quo to be maintained with respect to fixed assets and other properties, both movable and immovable, of the Company;
- (v) Pass appropriate order and/or directions directing the Respondents to grant access to the Appellants to the accounts and accounting software of the Company *inter-alia* by providing to the Appellants the current password to the accounting software of the Company;”

We recall here submissions for Appellants noted supra in para – 11, to note above underlined portions.

16B. The Hon'ble High Court passed common Order dated 19.08.2016 in OMP 382 of 2016 and OMP 326 of 2016 (Annexure A-7 - Page 129). The Order shows in Para - 4 (Page 131) that present Respondent No.3 reconfirmed before the High Court that in terms of the MOU (Annexure A-3) his stand remains the same and the terms and conditions of the MOU and the Arrangement Deed (Annexure A-5) are binding upon the parties and he had no objection if the movable and immovable assets be divided accordingly as per settlement arrived at between the parties. It appears that he expressed before the Hon'ble High Court that none of the parties should be allowed to misuse any terms and the process of division of the assets should be completed in peaceful and smooth manner. The Hon'ble High Court referred to the Affidavit of present Appellant and Respondent No.2 in Paragraphs 5 and 6 of the Judgement and observed:-

“5.Mr. Atul Beri has stated in his affidavit that the list of payments due that has been submitted by him pertains only to D.B. Engineering Pvt. Ltd. and the employees listed therein are working for D.B. Engineering Pvt. Ltd. only and for no other entity.

6. On the similar lines, the affidavit has been filed by Mr. Deepak Beri who has also confirmed that the salary amount due to the employees and other statutory requirements shall be cleared only and for no other entity. Without prejudice to their respective contentions, all parties at this stage are also agreeable that the cheques may be signed by at least two parties, i.e. the father and one of the sons and no amount by way of cheques at present shall be issued with regard to overdue supplier payment. The Banks concerned to act accordingly.”

It was further observed:-

“They admit that some steps have already been taken in this regard but there are some formalities and disputes are yet to be resolved between them in view of demerger of the assets of Companies owned by Mr. Deepak Beri and Mr. Atul Beri as per the settlements and Award rendered.”

In Para – 7 of the said Order dated 19th August, 2016, Hon’ble High Court directed:-

“7.As agreed, Mr. M.N. Dudeja, Advocate (Mobile No.9811321220) is appointed as Court Commissioner for the purpose of releasing the wages of employees and other statutory liabilities as well as to overview the entire situation. The Court Commissioner would see that none of the parties will misuse any term of the settlement and divert any amount to third entity owned by any party. As agreed, Mr. Surinder Kumar Beri and Mr. Deepak Beri or Mr. Atul Beri will sign all the requisite cheques with regard to the charges of the employees and other statutory liabilities due. Parties shall also file the full details about the issuance of cheques along with list of documents before the next date.”

It was then directed in concluding part of para – 7:-

“As desired by both parties, an order for appointment of an Observer/Mediator would also be passed on the next date for remaining compliance of division of assets of the Companies/Firms as per settlement.”

16C. The Appellant appears to have then filed IA 13 of 2017 in OMP 326 of 2016 (Page – 177), inter alia, making prayers (Page – 188) that the Hon’ble High Court should appoint Receiver to take charge of all the assets including factory premises, books of accounts, operations of the bank accounts, plant and machinery, etc. as well as domain names belonging to

D B Engineering Pvt. Ltd. (Respondent No.1 Company) and other business entities of the parties. He also sought forensic audit of the books of accounts of Respondent Company and other Companies to identify siphoning of funds. He also sought restraint on the Respondents from operating the account CBCA/1/209 and CBCA/1/211 maintained with Corporate Bank, Kasna Branch, Greater Noida which was contrary to the Award and Orders passed by the High Court and restrain the Respondents from opening any new Bank Account in the name of Respondent No.1 Company and other business entities, as mentioned in the prayer.

16D. The Hon'ble High Court had taken up before it the OMP 382 of 2016 and 396 of 2016 as well as OMP 326 of 2016 on 3rd January, 2017. Hon'ble High Court on that day passed Orders in IA 13 of 2017 referred above which Order is at Annexure A-10 (Page 163). The Hon'ble High Court referred to the background of the matter and also made reference to the earlier Orders passed by the High Court on 19th August, 2016 (Annexure A-7) and after reproducing portions of the Order observed in para – 9 as under:-

“9. On 15th December, 2016, in relation to urgent statutory payments to be made, certain directions were issued by the Court. The Court also required the parties to place on record before it the various steps required to be taken to implement the complete separation between the parties in terms of the MoU and the DoA. The Court observed that it would on the next date consider appointing an Escrow Agent, who would be accountable to the Court to implement the steps suggested by the parties.”

[Emphasis Supplied]

In Paragraphs – 11 and 12, it has been observed:-

“11. The Court expected that the parties would have moved forward towards implementing their respective suggestions for separation of the units in terms of the MoU and DoA. Instead, in what can be only termed unfortunate, certain developments appear to have been taken place without prior permission of the Court and without the knowledge of the Applicant, Mr. Deepak Beri, as set out in the present application, I.A. No.13 of 2017.

12. It is stated that during the pendency of the present proceeding, a new bank account, CBCA/1/209, in the name of DBEPL was opened by Mr. Atul Beri with the Corporation Bank, Village Kasna Pergana Dankor, Greater Noida. The statement of the said bank account has been enclosed as Annexure A-2. The address of DBEPL as given therein is at B-1, Sector – 68, Noida Gautam Buddh Nagar, Uttar Pradesh which happens to be address of one of the units of DBEPL which is under the control of Mr. Atul Beri. The first entry in the statement of account is on 7th November, 2016 and the last entry is 30th December, 2016. It reveals a credit balance of Rs.12,41,076.”

Referring to the account opened, the Hon’ble High Court observed in para – 16 as under:-

“16. The Court is surprised that such a step has been taken when the Court is still seized of the matters and several orders have been passed, as noticed hereinbefore, towards effectuating the division of the units among the parties. It is indeed disconcerting that a separate bank account could have been opened in the name of DBEPL without the participation and consent of Mr. Deepak Beri. At this stage, the Court is not aware if Mr. Surinder Kumar Beri and Mrs. Ramesh Beri consented to the opening of such an account of DBEPL by Mr. Atul Beri. This *prima facie* appears to be a brazen attempt by Mr. Atul Beri to overreach the Court and present it with a *fait accompli*.”

[Emphasis supplied]

After such observations, the Hon'ble High Court gave certain directions so as to freeze the Account CBCA/1/209 which had been opened as well as CBCA/1/211, the Branch Manager was directed to remain present before the Hon'ble High Court along with statements of the Accounts. The Hon'ble High Court then proceeded to appoint, H.P. Sharma, a former District and Session Judge as Court Commissioner and also appointed Mr. Arun Kishore, Chartered Accountant to assist the Court Commissioner and gave certain directions including direction to visit the Unit of Respondent No.1 Company as well as other business entities of the parties and, inter alia, inspect the records, prepare inventories, etc. The detailed directions can be seen in the Order at Para – 17.

16E. The Appellant appears to have then filed IA 3226 of 2017 in OMP 326 of 2017 (read – 2016) (Annexure A-11 Page – 191) raising grievances against Respondent No.2 that he had shifted certain stocks from uninspected Unit to Unit which was already inspected by the Court Commissioners. In view of such application, the Hon'ble High Court on 14.03.2017 directed (see page - 199) the Local Commissioners (Court Commissioners) to revisit the premises in question and file Supplementary Report.

16F. The Court Commissioners have filed Report (Page – 204) dated 15.05.2017 in view of the Orders of Hon'ble High Court dated 03.01.2017 and Report of revisit (Page – 228) and re-inspection in view of Orders of the Hon'ble High Court dated 14.03.2017.

16G. During the pendency of this Appeal, the Hon'ble High Court of Delhi at New Delhi has pronounced Judgement in OMP 382/2016 and OMP 396/2016 filed by Respondents 2 to 4 vide which they had raised objections under Section 34 of the Arbitration Act. The Hon'ble High Court dealt with the objections of these Respondents with regard to the Award passed. The Hon'ble High Court dealt with the above MOU dated 17.02.2016 (Annexure A-3); settlement between present Respondent No.3 and the Arbitrator – Manoj Nagrath dated 14.03.2016 (Annexure A-4); and Deed of Arrangement dated 30.04.2016 (Annexure A-5), and referred to these documents as Annexures A, B and C, respectively. Hon'ble High Court referred to the Award and in Para – 10, took note of some of the salient directions which are given by the Arbitrator. In Para – 32, the Judgement records:-

“Hence, the award to the extent that it gives directions *de hors* the agreement between the parties, namely, Annexure A, B and C to the Award are illegal and being severable, is set aside.”

16H. In para 34, the Hon'ble High Court has recorded that “The Award to the extent it is passed based on Annexure A, B and C is upheld.”

17. Perusal of above para – 16 and the documents referred, makes it clear that the Hon'ble High Court, in the context of the Award is dealing with not merely the present Respondent Company but also other entities of the parties and is, inter alia, seized with questions of division of assets,

movable and immovable. The Appellant himself has in the IA 13/2017 in OMP 326/2016 sought appointment of Receiver to take charge of the assets including factory premises, books of accounts, operations of the Bank Accounts, plant and machinery, etc. He has also sought forensic audit of the books of accounts of Respondent Company and other companies to identify siphoning of funds. It can be seen from the observations of the Orders of the Hon'ble High Court referred to in above para – 16D that it has called upon the parties to place on record various steps required to be taken to implement the complete separation between the parties in terms of the MOU and DOA. It can also be seen that the Hon'ble High Court has observed that the Court is still seized of the matters and several orders have been passed towards effectuating the division of the units among the parties. The Hon'ble High Court appointed Court Commissioner and Chartered Accountant to visit the business entity and inspect the records, prepare inventories, etc. It is apparent from the above para – 16G that the Award to the extent it has been passed based on Annexures A, B and C has been upheld. Mutually executed Annexures – A, B and C which have culminated into Award deal with division of the Respondent Company and other entities. When this is so, the prayers of the Appellants as referred to in para - 16A on the counts of seeking to restrain the Respondents from appointing any Directors on the Board of Respondent No.1 Company or restraining them from altering/changing shareholding pattern of Respondent No.1 Company and seeking status quo with regard to fixed assets and other properties, from NCLT are

uncalled for. The request that access to accounts may be given is also not necessary looking to the steps that are being taken in the Hon'ble High Court. The Appellant himself has sought many of these reliefs from the Hon'ble High Court in his OMP 326/2016. Taking overall conspectus of the matter, we find that the NCLT did not commit error when it did not pass any Interim Orders on such counts noted above which were being pressed by the Appellants.

18. Section 430 of the Companies Act, 2013 reads as under:-

“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 Tribunal.”

There is no dispute that in a petition like the present one, the question of oppression and mismanagement would be matters which are required to be exclusively dealt with and decided by the NCLT. Section 242 which deals with powers of the Tribunal in the matters of applications under Section 241 relating to oppression and mismanagement, provides in Sub-Section (4) as follows:-

“The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.”

19. For Interim Orders, it would be necessary in the application to spell out a prima facie case which requires interference of the Tribunal without which interference, it has to be shown that the Applicant/Petitioner would suffer irreparable injury and that balance of convenience lies in the fact that Interim Orders should be passed. If the present matter is perused and the reliefs as sought by the Appellants – Petitioners are seen, when it appears from the record that on the basis of documents executed between the parties an Arbitration Award has been passed and the Hon’ble High Court has while dealing with the OMPs filed by the parties passed different orders, it does not appear that the Appellants are able to show prima facie case, as regards the counts on which prayers referred above, were made before NCLT.

20. Learned counsel for the Appellants relied on the case of **“Telecommunications Consultants India Ltd. versus TCIL Bellsouth Ltd. and others”** ILR (2006) II Delhi 780 to submit that the scope of the Petition under Section 397 and 398 of the old Act was very wide and in that matter, the Hon’ble High Court had in spite of pendency of Civil Suit and Writ Petition observed that the Company Law Board could not have laid off its hands so as not to pass Interim Orders. We have gone through that Judgement. The Writ Petition related to operation of Bank Accounts. As for the Civil Suit, it would be appropriate to reproduce para – 14 of that Judgement, which is as under:-

“14. The scope and ambit of the petition under Section 397 and 398 of the Act as in the present case is very wide. It is just and equitable remedy to secure justice to parties. In the present matter the civil court has not passed any order in spite of the fact that the interim application has remained pending. The interim application is yet to be heard and decided. The Company Law Board, therefore, should not have adopted “touch me not” approach but gone into the question on merits. The issue before the civil court is extremely attenuated and is related only to right of appointment of Mr. A.K. Jolly as CEO and the conduct of the respondent nos.1 and 2 in appointing Dr. S N Singh as CEO. The larger and broader issue of oppression and mismanagement is not the subject matter of the civil suit. The said civil suit was filed on June/July, 2005. The petition for oppression and mismanagement was filed much later in November, 2005 and the subsequent events after filing of the suit are also subject matter of the petition for oppression and mismanagement. There is no possibility of conflict of orders as the civil court has not decided the interim application and secondly the subject matter of controversy before the civil court is only a minuscule fraction of the entire controversy, which is subject matter before the Company Law Board. Thirdly, the civil court is concerned with the rights of the parties and cannot go into and examine question of oppression and mismanagement which can be gone into and examined by the Company Law Board.”

21. If the above paragraph is kept in view and present facts are seen, there is no comparison. In the present matter apart from the present Company Respondent, the other entities of the parties (who are a family) are also under consideration of the Hon’ble High Court for the purpose of the Award passed under the Arbitration Act. The Hon’ble High Court has already passed several Orders in the matter, as noted above. In the circumstances, the counts on which the Appellants were seeking Interim Orders, if the NCLT did not find it appropriate to pass Orders which may

go in conflict with the steps Hon'ble High Court is taking, we do not think that the NCLT was wrong.

22. Similarly, the other Judgement relied on by the Appellant is in the matter of **“M.S.D. Chandrasekar Raja vs. M/s. Jayabharath Textiles Pvt. Ltd. and M.S.D.C. Radha Ramanan”** reported as MANU/TN/2357/2013. That Judgement and observations of the Hon'ble High Court itself in para - 75 shows that there, the issues directly and substantially arising for consideration before the two separate Forums of Company Law Board and Civil Court could not be said to be the same. We do not find so in the present matter.

23. The Appellant claimed that the Hon'ble High Court of Bombay has in the matter of **“ICICI Ltd. vs. Alpine Industries Ltd.”** 1999(2) Mh.L.J. 683 held that if receiver has not taken charge of the property, it cannot be said that the property is *custodia legis* of the High Court and NCLT could not have held that property is *custodia legis*. According to us, in the present matter, even if the Hon'ble High Court has not appointed a receiver, and in view of the Judgement of ICICI Ltd., it cannot be said that the property is *custodia legis*, still looking to the facts of present matter and the developments which have taken place as by way of litigation as noted earlier, refrain as exercised by NCLT on the counts on which Interim Orders were sought, cannot be faulted with.

24. The parties when they would be acting in response and in compliance to the directions and orders of the Hon'ble High Court in the proceedings pending before the Hon'ble High Court and take steps to comply with the provisions of the Companies Act, would naturally not be required to worry. As the Company Petition is pending, any steps taken by the parties, which are not in consonance with or not by way of compliance of directions of the Hon'ble High Court, which do not comply with the provisions of the Companies Act and Rules, would naturally attract the principles of lis pendens.

25. For the above reasons, we do not find any substance in this Appeal. The Appeal is rejected. No orders as to costs.

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

[Balvinder Singh]
Member (Technical)

New Delhi

8th August, 2018

/rs/nn