NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) No. 213 of 2017

IN THE MATTER OF:
Archer Power System Pvt. Ltd.
403 L Pantheon road, Egmore,
Chennai

Now at
No.29, Dr. Radhakrishnan Road,
Mylapore,
Chennai represented by its
Director Rohit Rabindernatbh. **Appellant**

Vs

1. Cascade Energy Pvt. Ltd.
   203 Hougang Street,
   No.03-73, Singapore 530203

2. Zynergy Solar Projects and Services Private Limited
   403 L Pantheon Road, Egmore, Cheenai

   Now at
   3rd Floor, Block a, Bannari Amman Towers,
   No.29, Dr. Radhakrishnan Road,
   Mylapore,
   Chennai

3. Rohit Rabindranath
   S/o Late Mr. Rabindranath,
   Road No.26, Poes Garden
   Gopalapuram
   Chennai 600086

4. Greatshine Holdings Private Limited
   403 L Pantheon Road, Egmore, Cheenai

   Now at
   3rd Floor, Block a, Bannari Amman Towers,
   No.29, Dr. Radhakrishnan Road,
   Mylapore,
   Chennai

5. Alectrona Energy Private Limited
   403 L Pantheon Road, Egmore, Cheenai

Now at
3rd Floor, Block a, Bannari Amman Towers,
No.29, Dr. Radhakrishnan Road,
Mylapore,
Chennai **...Respondents**

Present:
Mr. Rana Mukherjee, Sr. Advocate, Mr. Goutham Shivshankar, Mr Shantanu Singh Advocates for appellant.
Mr Brijender Chahar, Sr. Advocate, Mr. N Saravanan, Ms Arunima Singh, Mr. Shivam Tandon, Advocates for R1.

With

Company Appeal (AT) No. 296 of 2017

IN THE MATTER OF:

Archer Power System Pvt. Ltd.
No.29, Dr. Radhakrishnan Road,
Mylapore,
Chennai represented by its
Director Rohit Rabindernatbh. **...Appellant**

Vs

1. Cascade Energy Pvt. Ltd.
   203 Hougang Street,
   No.03-73, Singapore 530203

2. Zynergy Solar Projects and Services Private Limited
   3rd Floor, Block a, Bannari Amman Towers,
   No.29, Dr. Radhakrishnan Road,
   Mylapore,
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   Mylapore,
   Chennai **...Respondents**

J U D G M E N T
(23rd July, 2020)

Mr. BALVINDER SINGH, MEMBER (TECHNICAL)

1. These two Appeals i.e. Company Appeal (AT) No. 213 and 296 of 2017 have been preferred by the Appellant under Section 421 against the Respondents challenging two impugned orders dated 14.06.2017 and 18.07.2017 in C.P. No. 19 of 2017 passed by the National Company Law Tribunal, Chennai Bench ('for short Bench'). These Appeals were heard together and disposed of by this common judgment.
2. The brief facts of the case are that Zynergy Solar Projects and Services (hereinafter referred as Respondent No. 2 or R-2 in short) have Appellant as 49% shareholder and Cascade Energy Pvt. Ltd. (hereinafter referred as Respondent No. 1 or R-1 in short) as 51% shareholder as per the shareholding Agreement signed between them. The Appellant is a company registered under companies Act, 1956 engaged in the business of purchase, sale, supply and distribution of power. R-2 Company was promoted by Mr. Rohit Rabindranath (hereinafter referred as Respondent No. 3 or R-3 in short) and also the Managing Director of R-2 Company. The Appellant is a shareholder of R-2, initially holding 49% and claiming to hold 51.1% shares which is contested and is part of the subject matter of the Company Appeal (AT) No. 296 of 2017. R-2 ventured into solar power generation in 2010 and required additional funds to expand its business. In 2015 R-3 entered into a Strategic Investment Agreement with Kohli Ventures. Pursuant to the Agreement Rs. 30 Crores was invested into R-2 Company by Kohli

Ventures from various sources, and shares were allotted to the nominee company of Kohli ventures, one Cascade Energy Private Limited i.e R-1 Company.

3. R-1 is a Singapore based Investment Company. R-1 entered into a Shareholder Agreement dated 27.07.2015 with R-2 Company. R-1 holds 67,46,998 equity shares of Rs. 10/- each, in R-2 constituting 51% of the Equity Share Capital in R-2. R-1 submits that on noticing certain acts and omissions of the Appellant and the violation of the provisions of law by R-3, it filled Company Petition 19 of 2017 before NCLT, Chennai Bench against the Appellant for Oppression and Mismanagement. The Appellant instead of filling counter affidavit filed Company Application I.A. No. 112/2017 in C.P. No. 19 of 2017 challenging the issue of maintainability to be decided as a preliminary issue.
4. After hearing both the parties NCLT, Chennai Bench passed an interim order on 14.06.2017 directing as follows:

> "4. In view of the above, we proceed to consider the prayer of the petitioner for grant of interim relief contained under sub para (f) of Para II of the Petition. Counsels for the Respondents have vehemently opposed the grant of interim relief. **However, considering the facts and circumstances involved in the case, as detailed in the petition, we are inclined to grant interim relief as prayed and appoint Mr S. Santhanakrishnan as Chartered Accountant and Mr R Sridharan as Company Secretary, whose names have been recommended by the Petitioner and direct them to undertake forensic audit of the state of affairs of the company including accounts-cum-banking and statutory compliance including Sales Tax, Excise, Customs, FEMA, Companies Act, GATT and other laws applicable and statutory records of R1 company including the Income and Expenditure of Respondent No. 1. The audit report shall be submitted to this Bench within four weeks from the date, the copy of the order is received.** The

Chartered Accountant and the Company Secretary shall also report on the aspects of the corporate governance and compliance of effecting contractual commitments of R1 and its shareholders. The report shall be submitted in a sealed cover to this Branch. The petitioner and Respondents are directed to cooperate with the Chartered Accountant and Company Secretary by making available the accounts, books and other records as may be required by the Chartered Accountant and the Company Secretary. Regarding the payment of remuneration to the Chartered Accountant and the Company Secretary, both are at liberty to fix their remuneration s per the practice in vogue. The payment of remuneration to them shall be borne by the Petitioner and Respondents equally. Accordingly, the relief as prayed is granted to the petitioner.

5. It is also on record that an application has been filed by the Counsel for R2. The Petitioner is directed to file the counter within two weeks and thereafter within ten days the Counsel for the Respondent may file rejoinder, if any. Matter is posted for arguments on the application. Put up on 13.7.2017 at 10.30 a.m."

5. Aggrieved by the same the Appellant approached NCLAT through this Company Appeal (AT) 213 of 2017. NCLAT set aside the order passed by the NCLT, Chennai and remanded back to the NCLT, Chennai by passing an Order on 14.07.2017 as under:

"5. It is informed by the parties that the Appellants have filed the original Company petition under Section 241 of the Companies Act, 2013 alleging 'oppression and mismanagement' by Respondents. The Respondents have also filed a cross petition under Section 241 alleging 'oppression and mismanagement' on the part of the Appellants. Both the matters are pending and no affidavit or reply has been filed, as the Appellants have raised the question of maintainability of the petition filed by Respondents

under Section 241 of the Companies Act, 2013. The original petitions were filed in April 2017 and though approximately three months have passed but the petitions have not been taken up for consideration on merit for one or other objections raised by the parties. The Petitions preferred by the parties are required to be disposed of by the Tribunal within three months as per sub-Section (1) of Section 422 of the Companies Act, 2013. But because of interim applications preferred by one or other parties, the Tribunal could not take up the main matter (s). We are of the view that the question of maintainability was not required to be decided as preliminary issue which can be decided along with main petition. It could have been taken up during the final hearing of the main Company Petition as the cases are required to be disposed of preferably within 90 days.

6. For the reasons aforesaid, we set aside the impugned order passed by Tribunal in Company Petition No. 19 of 2017 and direct the parties to file their respective reply affidavit in concerned petitions within one week, rejoinder, if any, be filed within a week thereafter. In case one or other party fail to file reply affidavits in their respective petitions and or rejoinder, the Tribunal will proceed with the matter without granting further time to the parties while deciding the question of maintainability at the time of final hearing of the case. The parties should cooperate with the Tribunal and it is expected that the Tribunal will decide the case at an early date, preferably within 30 days.

7. The appeal stands disposed of with aforesaid observation and directions. No cost.”

6. Further, aggrieved by the order passed by this tribunal, R-1 moved to Hon’ble Supreme Court by way of Civil Appeal 9388 of 2017. Further, the Hon’ble Supreme Court set aside the order passed by this Tribunal i.e. NCLAT and remanded back the matter for a fresh consideration on 10.08.2017 stating as follows:

> "When we are remanding the matter to the NCLAT, the main proceeding before the NCLT shall remain stayed till the NCLAT decides with regard to the justifiability of the interim order. The NCLAT may be well advised to deal with the issue of maintainability of the original proceedings or that comes within the sweep of prima facie case for entertaining this prayer for interim relief. "

7. NCLT, Chennai Bench in consideration of I.A. 110 of 2017 filled in the same Company Petition No. 19 of 2017 has directed the respondents under the company petition to maintain the status quo and passed the following order on 18.07.2017:

> "7. It is also on record that the petition came to be filed on 07.04.2017 and, if the shareholding composition of the management as it existed on 27.04.2017 is not protected. The balance of convenience existing in favour of the petitioner may get disturbed and there is an apprehension of causing irreparable loss to the petitioner that cannot ve compensated by way of monetary consideration. In the light of the above discussion, we are inclined to grant the relief as contained under para vi(1) of the I.A. No. 110 of 2017 and order as follows:-
>
> > We direct the Respondents to maintain status quo with regard to the Board Composition, shareholdings and Articles of Association of the 1st Respondent Company as it existed on 27.04.2017.
>
> 8. In relation to the application for maintainability of the petition that has been filed by R2, counter has been filed by the other side. The opposite party is directed to file rejoinder. The matter is posted for arguments on the maintainability of the Company Petition. Put up on 27.04.2018 at 10:30 A.M."

8. The above order was challenged before the NCLAT through this Company Appeal (AT) 296 of 2017. Both the Appeals i.e. 213 and 296 have been taken up together as there is a common question of law.

9. Counsel for the Appellant submitted that after some time had passed since the said investments, R-2 received a letter from the Reserve Bank of India (hereinafter "RBI") through which R-2 came to understand that the four agreements entered into between the parties viz., (i) Strategic Investment Agreement dated 27/07/2015 (ii) Shareholders Agreement dated 27/07/2015 (iii) OFCD Subscription Agreement dated 11/08/2015, are prima facie null and void as the same are in contravention of paragraph 4 pf the Master Circular dated 01/07/2015 issued by RBI, since all the four agreements contain 'target clauses' providing for 'assured return' to the investor based on the profitability and sales even if target are not met by R-2. Such 'target clauses' providing assured return are prohibited under the said circular of RBI.

10. It is further submitted that KEB Hana Bank, the banker to the R-2 Company wrote to R-3 in February and March 2017, stating the KYC reports relating to the Company's 51% shareholder viz., Kohli ventures (holding through the 1st Respondent) are negative and not satisfactory. The bank stated that the financial assistance granted to the R-2 Company would be recalled in case the due diligence report with respect to the 51% shareholder i.e., the 1st respondent is negative.

11. It is further stated on behalf of the Appellant that R-3 conducted a detailed due diligence in order to find out the real status of Kohli Ventures and Kohli. The Appellant through said exercise came to understand that Kohli was involved in several criminal cases, which remain pending in US against him, and he also been convicted and sentenced by United States District Court, Central District California. All these facts had been suppressed by Kohli and R-1 from R-3 Company which has led to significant economic and reputational loss to the Appellant.

12. It is further stated that on 16-03-2017 and subsequently on 23-03-2017 the KEB Hana Bank issued letters stating that the KYC of Kohli/Kohli Ventures is not satisfactory and that in the event that the Investor continues to be a shareholder in R-2 Company, it will be

constrained to recall the loan (ECB) of 4 Million USD that it had advanced. It is pertinent to note that the Appellant has secured, from its shareholders, property worth more than 100 Crores INR in relation to the loans. Any recall of loans due to the KYC of the Respondent would have crippling consequences for the Appellant and would essentially sound the death knell for the Appellant as well as the business life of R-3.

13. It is also submitted that R-1 and Kohli ventures have failed to disclose several material facts with respect to their background, and specifically that of their promoter, i.e. Kohli. Therefore the said Respondent has willfully misrepresented and has consequently violated the provisions of the Indian Contract Act, 1872. Due to these illegal acts of R-1, the Appellant has been forced to run from pillar to seek remedy. Aggrieved by the blatant violation of the Foreign Exchange Management Act, 1999 ("FEMA") and the failed KYC due to fraudulent misrepresentation by R-1 and its agents, the Appellant filled a Company Petition alleging oppression and mismanagement and seeking rectification of Register of Members on 16-03-2017 (C.P. No. 13 of 2017) before the NCLT, Chennai Bench.

14. It is submitted that subsequently, R-1 also filled a company petition by way of counter blast, being C.P. No. 19 of 2017 before the NCLT, Chennai Bench, in April 2017. This being the situation, on 19-05-2017 the Income Tax Department issues a show cause notice and attached the shares held by the R-1 Company in R-2 Company, as per section 24 of Prohibition of Benami Property Transection Act, 2016. Although the R-1 is shown as a member in the Register of Members of R-2 Company, the investment was in fact funded by Kohli through Kohli Ventures Limited and Cascade Global Limited, Hong Kong. Therefore, in the eyes of the Initiation Officer (Income Tax Department), this was a clear case of Benami Transection wherein the shares are held by one person but the beneficial owner is someone else.

15. The Appellant contended that the core issue that arises for consideration in the appeal is whether the NCLT can/should pass an

interim order in a petition under Section 241/242 of the Companies Act, 2013 before deciding on the question of maintainability as raised by the Appellant herein (Respondent No. 1 before the NCLT).

16. It is further submitted that the challenge was on the ground that under section 89(8) of the Companies Act, 2013, a serious question of maintainability of the Company Petition filled by R-1 had arisen and ought to be decided first before any interim order was granted by the NCLT. In failing to take this approach and by granting interim relief prior to deciding the maintainability application, the Hon'ble NCLT has wrongly prejudged the issue contrary to the provisions of law and the order of Hon'ble Supreme court and NCLAT. The Hon'ble Supreme court has held that all issues whether preliminary or otherwise should be decided together so as to rule out the possibility of any litigation at the interlocutory stage. The NCLAT in the case **Cyrus Investment Pvt. Ltd & Ors. Vs. Tata Sons Ltd.**, relying on the said decision of the Supreme Court fixed the Company Petition for hearing on the question of maintainability should be decided first. It further held that "It will be open to the Appellants to file a petition for amendment and may argue on the question of removal of 11th Respondent, if he is removed by the decision of the EGM during the pendency of the Company Petition."

17. It is further stated by the Counsel of Appellant that any order arising out of Company Petition/application filed by R-1 could have been decided only after it has been established that R-1 can maintain the petition under Section 244 read with Section 89(8) of the Companies Act, 2013. Therefore the said Impugned Orders of Hon'ble NCLAT are not only erroneous and illegal, but the said illegality also goes to the root of the matter, since the NCLT has failed to properly consider whether R-1 was even entitled to maintain C.P. No. 19 of 2017 filed by it, and further whether it could have exercised its rights as a shareholder on the date of filing the petition under Section 241 despite the failure to make declarations under Section 89. Therefore R-1 is disqualified from exercising any rights of shareholder under section

89(8) of the Companies Act, 2013 and for that reason cannot maintain CP No. 19 of 2017.

18. It is further contended by the Appellant that as per Section 242 (4) an interim order could be passed only for the purpose of regulating the conduct of the Company's affairs that too upon such terms and conditions which are just and equitable. Neither does the impugned order contemplate regulating the company's affairs nor does it state the reason for passing such a drastic order. For the very reason, the order of NCLT is liable to be set aside as perverse, erroneous and without jurisdiction.

19. It is further argued on behalf of the Appellant that as far as the impugned order dated 14-06-2017 directing forensic audit is concerned, similar prayer is sought for as one of the final reliefs also. The said final relief is sought for under section 213 of the Act. It is a settled position of law that interim relief shall only be incidental or ancillary to the main relief as final prayer and the final prayer cannot be granted at the interim stage.

20. It is further stated that impugned order dated 18-07-2017 restoring status quo ante is an order in the nature of an interim mandatory injunction which has to satisfy the necessary ingredients as enunciated by the Supreme Court. The same has not been satisfied which is evident from the counter filed by R-1 before the ICC, Arbitration on 29-09-2017 and the relief sought is against R-2 as well, in which R-1 is a shareholder. The prayer are for return of the investment and the damages. When R-1 has made the very same allegation before the ICC as it has in CP 19 of 2017 and where it has sought for prayers against R-2 Company, R-1 cannot approbate and reprobate as it has submitted before ICC that its relief is by way of damages and hence cannot maintain this petition on that ground also.

21. Lastly, the Counsel for the Appellant contended that Rule 11 of the NCLT Rules, 2016 provides for the Inherent Power. It states that "Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders or give such

directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal." This Tribunal has held that inherent powers could not be exercised when there are specific provisions governing the said act/procedures. As C.P. No. 19 of 2017 filed by the Respondent is specifically filed under section 213 among others, it is erroneous to grant such a relief at the interim stage that too exercising the inherent powers of the Tribunal. In the present case the NCLT ought to have granted the order directing forensic audit only after satisfying itself with the criteria mentioned in the Section 213 and that too only at the final stage.

22. Respondent No.1 filed their reply and rebutted in brief. It is submitted on behalf of R-1 that as per law laid by Hon'ble Apex Court, administrative orders passed by courts or judicial orders that do not affect the rights or liabilities of a party are not appealable. In the instant case, the impugned order merely directs a forensic order of the records of R-2 as NCLT deemed it fit and necessary to determine the status of the affairs of the said Company before progressing in the matter. The obligation to maintain proper records and to subject them to annual audit is a statutory obligation of the said Company. Hence the impugned order does not impose a new obligation upon R-2 Company. The impugned order does not in any way impose any obligation or curtails the right/liberty of the Appellant, who is nothing more than a mere 49% shareholder. The Appellant cannot in any way be a "person aggrieved" for the purpose of Section 421 and the impugned order cannot possibly cause prejudice or give rise to a grievance to the Appellant. The impugned order is innocuous. Consequently, as per the law laid by the Hon'ble Supreme Court, such an order is not appealable, especially at the hands of the Appellant. On this ground alone the instant appeal ought to be dismissed.

23. It is further stated by the Counsel of R-1 that the impugned order is not arbitrary, perverse or capricious. The said impugned order is not

passed frivolously but after hearing the parties in details for 4 hearings. After being fully convinced about the facts warranting such audit, the NCLT has passed the impugned order. Hence the same is not liable to be set aside.

24. The Counsel for R-1 further submitted that NCLT has the inherent power under Rule 11 of the National Company Law Tribunal rules 2016 "to make such orders as may be necessary to meet the ends of justice." Hence the NCLT had the power and authority to make the impugned order having found that it was essential to meet the ends of justice in the instant case.

25. It is further argued that impugned order is in aide of the power and jurisdiction of the Tribunal to regulate the affairs of the Company i.e. R-2. The NCLT, Chennai deemed it fit and necessary to determine the status of the affairs of the said Company before progressing in the matter and hence directed a forensic audit of its records and affairs. Further, it may be noted that the Tribunal has the power to order a statutory investigation into the affairs of a company under section 213 of Companies Act, 2013, which is a power that can be exercised suo moto and is a far wider power than to merely order an audit by an independent person. It is submitted that the availability of wider power in an authority would always encompasses the jurisdiction to make a narrower order.

26. It is also submitted on behalf of R-1 Company that C.P. 19 of 2017 contains clear pleadings as regards misfeasance, siphoning of funds, breach of trust and a failure to maintain proper books of accounts. Thus the provisions of section 337 to 341 have been made applicable to the petition under section 241, by virtue of section 246 of the Act. Furthermore, R-1 is a 51% shareholder in R-2 Company and in such circumstances the NCLT, Chennai would certainly have the jurisdiction and power to order an audit especially when such an audit is sought by a majority shareholder who is not in management.

27. It is further submitted that though it monitored the transections, the said Kohli Venture (P) Ltd. is not the beneficial owner of the investment made by R-1 Company. The investment is made by R-1 in the R-2 Company in its own name and for its own absolute benefit. The Respondent No. 1 is the registered owner and the beneficial owner of its shares held in the company. The said Kohli Ventures (P) Ltd does not hold any right, title or interest in the said shares. Even the Company Secretary of R-2 Company issued certificates confirming that all applicable laws and regulations were complied with while making the investment. The entire investment in equity and debentures is fully reported to RBI as required by applicable regulations.

28. It is further submitted on behalf of R-1 that after receiving the investment, R-2 Company and R-3 excluded R-1's nominee directors from the activities and affairs of the company. Despite persistent efforts by R-1 and its representatives, the Appellant and R-3 did not divulge any information about the affairs and business operations of the Company to R-1. Realising that things were amiss R-1 enquired with statutory authorities and discovered that the R-2 Company :-

a) Had not filled its financial statements for the year 2015-16 and 2016-17.

b) Had not finalised its balance sheet for 2015-16 and 2016-17.

c) Had advanced huge loans to its subsidiaries i.e. R-4 and R-5 without the approval and consent of R-1 's nominee directors.

d) Advanced to subsidiaries and related party's was in violation of the "Reserved matters" identified in the Shareholders Agreement and hence was a breech thereof.

e) The loans/guarantees were advanced in breach of the fiduciary duty owed by the directors to the company more-so because R-2 was suffering huge losses at the time when the loans/guarantees were advanced to subsidiaries. The advances are also violative of various provisions of the Companies Act, 2013.

f) There was sufficient indication that the funds of R-2 was being diverted to the other entities that are directly in the control of R-3. These entities are mere name lenders and means by which R-3 was parking/siphoning the funds invested by this Respondent in the Company.

g) Several business contracts/orders that were being placed on the company were being diverted by R-3 to other Companies/entities where he had also diverted monies. Hence it was obvious that having received R-1's investment in the Company, R-3 was diverting money and the business to other entities in his sole control thereby siphoning the funds of the Company.

h) R-2 and R-3 also appeared to have wrongly represented to the RBI as if R-1 seeking some assured return for disinvestment when this is patently false. R-1 is not even seeking an exit at this point in time, as would be evident from the final reliefs sought in C.P. 19 of 2017. It may also be noted that the conversion of either type of debentures into any form of the shares would not in any way amount to an "exit" from R-2 Company.

29. It is further submitted that in C.P. No. 19 of 2017 the Tribunal noted that no counter had been filed, despite the earlier direction to do so, and hence adjourned the case to 14/06/2017. Simultaneously in CP No. 13 of 2017 based on the Appellant's specific argument that the Respondents were unfairly not divulging information about the affairs of the said company to R-1 herein, the Learned Tribunal directed the Respondents to "supply required information" to the Appellants herein in CP No. 13 of 2017. Tribunal also restrained the Appellant from making any related party transections. Further the Tribunal also directed the Appellant and R-2 Company to maintain status quo on the said date.

30. It is also submitted by R-1 that despite the aforesaid order the Appellant did not supply the requisite information to R-1 and instead

filed a false and frivolous "complaint" purportedly dated 17/05/2017 to the Deputy Commissioner Income Taxes, to the effect that this Respondent is a Benamidar of Kohli Ventures (P) Ltd. Based on the complaint of R-3, the said IT Officer absurdly and without jurisdiction passed an order dated 19/05/2017 under the Benami Transection (Prohibition) Amendment Act 2016 directing the Registrar of Companies, Chennai to attach the shares of R-1 in R-2 Company, without prior notice to R-1. On Issuance of this order, the Appellant filed an application CA No. 112 of 2017 in CP No. 19 of 2017 seeking summary dismissal of CP 19 of 2017 on the premise that the shares have been attached and therefore no right in respect of the same can be exercised by R-1.

31. It is argued on behalf of R-1 that while the said attachment was malafide and illegal it is also respectfully submitted that mere attachment does not divest the shareholder of ownership or his rights under the shares, only the right to transfer any rights therein is curtailed. Therefore, the presumption of the Appellant that merely because the shares were provisionally attached the same may be treated as non-existent is wholly fanciful and self serving.

32. It is further contended on the behalf of R-1 that the timing of the IT attachment order and simultaneously application filed by the Appellant exposes the fact that the Appellant and R-3 had engineered the issuance of the said bogus order divulging any information about the Company as directed by NCLT by its order dated 27/04/2017 in CP 13 of 2017. It is relevant to note that the said attachment has been stayed by the Hon'ble High Court in WP 14625 of 2017. In fact the entire proceedings purported to have been initiated under the Benami Act have been stayed. The said order is still in force.

33. It is further submitted by R-1 that despite the order directing status quo on 27/04/2017, the said Company conducted alleged Board Meeting in 07/06/2017 and 09/06/2017 and an alleged EGM on 08/06/2017 in the absence of R-1 and even without notice to R-1 or its

Nominee Directors, as required under law. By virtue of the Resolutions passed at the alleged Board Meetings and EGM, R-3 effectively removed R-1 from the R-2 Company. Further R-3 had allotted shares to himself and the Appellant in breach of the Order of the NCLT dated 27/04/2017 in CP 13 of 2017.

34. It is further submitted that the allegations against Kohli Ventures and Tej Kohli are entirely based on arbitrary internet research that is grossly baseless, unsubstantiated and the Appellant is put to strict proof of the same. Further, the same is entirely irrelevant to the facts of the case and to the investment of R-1 in the said R-2 Company.

35. It is further contended on behalf of R-1 that the assertion challenging R-1's shareholding under section 89(8) of the Companies Act, 2013 is entirely misconceived. It is respectfully submitted that the said provision is not even attracted in the present facts as the Respondent herein is both the registered and the beneficial owner of the subject shares and hence the obligation in 89(1) and the prohibition contained u/s 89(8) of the Act is not even applicable here. Further none of the documents submitted by the Appellant demonstrate that the said Tej Kohli or Kohli Ventures is a beneficial owner of the subject shares. Hence the burden of proof cannot be shifted upon the Respondent to disprove that which has merely been asserted but not substantiated by any material whatsoever.

36. It is also submitted on behalf of R-1 that the allegation that the application challenging maintainability and the application seeking status quo ante were listed on 13/07/2017 but the Tribunal only ordered the application for maintainability is erroneous. As is apparent from the records R-1 had filed a counter in CA 112 of 2017 and hence on their specific request, the Appellant had been permitted by the Tribunal to file a rejoinder. This direction was in fact specifically sought by the Appellant. In fact the Appellant has also filed a rejoinder in CA 112 of 2017 thereafter. Further the application for status quo namely CA 110 of 2017 was argued by both sides. There is nothing on record

to demonstrate that the Appellant objected to the said application being argued on the said and factually no such objection was raised. On the other hand the Appellant took its chance by arguing the application CA 110 of 2017 in CP 19 of 2017 and when orders have now been passed against it, the Appellant is now raising the ground that the said application ought not to have been taken up. Nevertheless, it is respectfully submitted that by merely filling an application challenging maintainability of a proceeding and not pursuing it for several months, cannot be a ruse to stymie another party's recourse to law. Hence this allegation of the Appellant is clearly misconceived.

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

38. The first issue raised by the learned counsel for the appellant is that R-1 failed to make a declaration under section 89 (1) and (2) of the Companies Act, 2013 read with Rule 9 of Companies (Management and Administration) Rules, 2014 which mandates that a declaration is to be filed by the registered owner and by the beneficial owner with the company in Form MGT 4 and MGT 5 respectively and the Company in turn will have to file MGT 6 with ROC along with the prescribed fees. Further under Section 89(8) of the Act, the beneficial owner and any person claiming through him cannot exercise any rights in respect of the shares held. We are not satisfied with the allegations of the Appellant as the Shareholder Agreement was entered between the Appellant, R-1 and R-2 Company. The shares were held by R-1 in its own name, even if R-1 is a nominee of Kohli ventures as per the Shareholding Agreement, but having a separate legal entity R-1 can hold shares in its own name. There is nothing on record that any action was initiated or any competent authority have decided the question of beneficial interest in the company. Thus no such rights could be taken away from R-1 in respect of such shares. As R-1 is registered as a shareholder as on the date of petition and no competent court has passed any order affecting its rights as on the date of petition eligibility

of R-1 to file a petition is to be reckoned on the date of the petition. Therefore, the petition is maintainable per se on the date of petition.

39. The other issue raised by the appellant is that the NCLT, Chennai has erroneously passed the Impugned Order dated 18-07-2017 directing the Status Quo Ante and the impugned order dated 14-06-2017 directing forensic audit before deciding the issue of maintainability. We heard the contentions of the parties and we are of the view that the question of maintainability need not to be decided as preliminary issue which can be decided along with main petition. Thus the NCLT under Rule 11 of National Company Law Tribunal Rules, 2016 has the inherent powers to pass such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal. Therefore, the orders passed by NCLT are not questionable on the grounds contended by the Appellant. Also, we are of the opinion that maintainability is a mixed question of facts and law and conducting a forensic audit could produce the important facts that may be required by the NCLT in order to decide the preliminary issue.

40. The Other issue raised by the Appellant that whether the impugned interim order dated 14th June 2017 passed by the Tribunal is in consonance with sub-section (4) of Section 242 of the Companies Act, 2013, as quoted below:-

> ***"Powers of Tribunal*** *- (1)If, on any application made under Section 241, the Tribunal is of the opinion-*
>
> *(a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company;and*
>
> *(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up,*

the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

(2)Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—

> *(a) the regulation of conduct of affairs of the company in future;*
> *(b) the purchase of shares or interests of any members of the company by other members thereof or by the company;*
> *(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;*
> *(d) restrictions on the transfer or allotment of the shares of the company;*
>
> *(e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;*
>
> *(f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e);*
>
> *Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;*
> *(g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;*

(h) removal of the managing director, manager or any of the directors or the company;
(i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;
(j)the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h)
(k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;
(l) imposition of costs as may be deemed fit by the Tribunal;
(m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

(3) A certified copy of the order of the Tribunal under sub-section (1) shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.

(4) 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."

41. From the bare perusal of the impugned order we are of the view that the Tribunal have the power to make interim orders which it think fit for regulating the conduct of the company's affairs. There are allegations of siphoning of funds, breach of agreements and failure to maintain proper books of accounts thus it was required on the part of the Tribunal to conduct a forensic audit by an independent auditor in order to proceed further with the petition. We are of the opinion that imposition of forensic audit and calling for the report of Forensic Audit

before the Tribunal is a measure to help the Tribunal to appreciate the issue on the basis of an independent report so as to ensure that the case is processed with due regard to rights and obligations of contesting parties would be in the interest of justice. Similarly the status quo as made is only with a view to regulate the conduct of the company's affairs during the pendency of the case so that no contesting party takes an advantage during the period detrimental to the other party. The status quo restored as on 27.4.2017 (date of petition) as directed by the NCLT Chennai till the matter is under consideration cannot be found faulted with.

42. We find no merit to interfere in the impugned orders dated 14.07.2017 and 18.07.2017 passed by National Company Law Tribunal, Chennai in C.P. No. 19/2017.

43. The appeals stand disposed of with aforesaid observation and directions. No cost.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

New Delhi

Bm