NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.293 of 2017

[Arising out of Order dated 21.04.2017 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in T.P. No.80/2016 in C.P. No.71/2014]

IN THE MATTER OF:

Shri Surjeet Singh
B-7, Vinay Nagar, Road No.1
P.O. Agrico, Jamshedpur – 831009 ...Appellant

Versus

1. Prowess International Pvt. Ltd.
   A-18, 6th Phase, Adityapur Industrial Area
   Gamaria, Jamshedpur – 832108
   Jharkhand, India

2. Mr. Prakash Kumar
   Plot No.136, Road No.10,
   Aditya Garden, Adityapur,
   Jamshedpur – 831013

3. Ms. Usha Rani Jha
   H-7, Nishant Vihar, Adityapur,
   Jamshedpur – 831013

4. Mr. Manoj Kumar Jha
   Sagar Gorai House,
   Near Tata Workers Union High School,
   Bhatia Basti, Main Road,
   P.O. & P.S. Kadma,
   Jamshedpur – 831005

...Respondents

For Appellant: **Shri Abhay K, Das, Advocate**
Shri A.K. Dubey, PCS

For Respondents: **Shri Akhilesh Kumar Shrivastava, Advocate**
Ms. Suhita Mukhopadhyay, PCS

J U D G E M E N T

A.I.S. Cheema, J. :

1. The Appellant - Surjeet Singh – Original Petitioner has filed this Appeal against the Impugned Judgement and Order passed in TP 80/2016 in CP 71/2014. The Company Petition was filed complaining oppression and mismanagement on the part of Respondents 2 to 4 in Company Respondent No.1 – Prowess International Pvt. Ltd. The Company Petition has been rejected by the National Company Law Tribunal, Kolkata Bench, Kolkata ('NCLT', in short) vide Judgement and Order dated 21st April, 2017.

2. It has been argued for the Appellant and the Appellant claims that the Respondent No.1 Company (hereafter referred as 'Company') was incorporated on 7th March, 2005. The Appellant and Respondent Nos.2 (Prakash Kumar) and 4 (Manoj Kumar Jha) were the founding members, promoters and first Directors having equal shareholding in the Respondent No.1 Company. The authorized share capital of the Company was Rs.1 crore (10,00,000 equity shares of Rs.10/- each) and paid up capital was Rs.3 Lakhs (30,000 equity shares of Rs.10/- each). The authorized capital at the time of filing of the Company Petition (i.e. 13.05.2014) was Rs.2 Crores and paid up capital was Rs.1.4 Crores.

2.1 At the time of filing of the Company Petition, the Appellant and Respondent No.2 held 333400 equity shares each and Respondent No.4 held 333200 equity shares. "Prowess International Engineers and Consultants", a partnership firm held rest of the 4,00,000 equity shares in

which the Appellant, Respondent No.2 and Respondent No.4 are equal partners. According to the Appellant, he and Respondent No.2 were employees of M/s. Usha Martin Ltd. and engaged in mechanical maintenance and allied functions. They decided to float their own venture and were introduced to Respondent No.4 by one Rajesh Jha who is husband of Respondent No.3. The Appellant, Respondent Nos.2 and 4 incorporated the Company in 2005. The Company functioned well from 2005 till March, 2013 and starting from scratch reached to turnover of Rs.80 Crores. Respondent No.3 - Usha Rani Jha was appointed Director on 05.03.2013 but she did not possess any shareholding in the Respondent Company. Respondent No.4 resigned as Director on 29.03.2013.

2.2 The Petitioner claimed that he did not know that Respondent Nos.2 and 3 were working in a design to take over the Company by grabbing all administrative and financial powers to oust the Petitioner – Appellant from the management. For no reason, Respondent No.2 was appointed as CEO in spite of protest from Appellant, on 16.07.2013. The Respondents started claiming that the Appellant was interfering in functional areas of other Respondents. The Appellant filed Company Petition which gives details regarding continuous oppressive acts, humiliating attitude and non-cooperative behaviour mainly of Respondents 2 and 3 (hereafter referred as – 'Respondents'). Because of such behaviour of Respondents 2 and 3, the Appellant expressed his

displeasure and asked for valuation of assets of the Company and payment of his shares on that basis. By a Board Resolution dated 2nd January, 2014, M/s. Vani Consultants Pvt. Ltd. (Statutory Auditor of the Company) was appointed as Valuer of the assets and liabilities of the Respondent Company. Since incorporation, the Petitioner and Respondent No.2 only had been the authorized signatories of the Company and there was no difficulty for 9 years. However, with intention to grab financial control, in spite of protest of the Appellant, Respondents 2 and 3 made Respondent No.3 also authorised banks signatory on 18th February, 2014 with further provision that any of the two Directors would be able to sign. This was with intention to side line the Appellant. The Appellant sent e-mail on 19th February, 2014 objecting to the changes made in signatory considering the on-going disputes in the Board and pending valuation. When the Petitioner –Appellant insisted on participation in the affairs of the Company, Respondent No.2 put up proposal for removal of the Appellant from the Directorship and Respondent No.3 sent letter dated 23rd April, 2014 asking for reply of the Appellant. Because of this, the Appellant was forced to file the Company Petition on 06.05.2014 and on 13.05.2014, the Company Law Board was convinced of prima facie case and passed Orders as under:-

> "3. After considering the above submissions of the Ld. Counsel of the petitioner, I am of the considered opinion that a prima facie case has been made out against the interest of the petitioner and consequently, ad interim order is hereby passed by way of maintenance of status quo regarding shareholding pattern of the company and composition of the board

> of directors of the company. This ad interim order shall be effective until next date of hearing."

2.3 Thus, the Appellant claims that the Respondents were directed to maintain status quo regarding shareholding as well as the composition of the Board of Directors. It is not claimed by either side that during pendency of Company Petition, there was any change in these Orders.

2.4 The Appellant claims that in spite of Company Petition being pending, Respondents continued with their oppressive acts and passed Board Resolution dated 07.07.2014 withdrawing duties, functions and authorities, which had been earlier delegated to the Appellant as Director and the powers were taken up by Respondent No.2 – Prakash Kumar. The official mobile number of the Appellant was deactivated and his corporate e-mail was got blocked and he was stopped from coming to the Company Office. The Appellant filed CA 780/2014 before CLB seeking restoration of his functional responsibilities. He also pointed out that his salary as Director had been stopped since August, 2014. In response, Respondents claimed before CLB that there was financial crunch and thus remunerations were not being paid. According to the Appellant, this was not true, if the returns were perused which showed that the Respondents 2 and 3 were taking huge amounts as remuneration and not declaring any dividends.

2.5 Appellant claims that he came to know subsequently during the pendency of the Company Petition that in spite of the CLB Order directing

maintenance of shareholding pattern, the Respondents were claiming that Respondent No.4 had transferred his 333200 equity shares in favour of Respondent No.3 who was basically a non-member or an outsider. He raised the issue by filing CA 781/2014 on 27.08.2014. In reply, the Respondents failed to produce any document/Notice or Board Meeting to show how the transfer was recorded in favour of Respondent No.3. According to the Appellant, to tide over the CLB direction dated 13th May, 2014, the Respondents claimed the transfer of shares from Respondent No.4 to Respondent No.3 as in the date of 20th March, 2014 and the Respondent No.1 Company recorded the transfer on record as on 25th March, 2014. The Appellant claims that for such acts, no documents were shown and the share transfer form available rather shows fabrication. The Appellant is pointing out another Company Petition 104/2014 relating to M/s. Ranchi Metal and Ispat Pvt. Ltd. where also the present Petitioner - Appellant and Respondents 2 and 3 are parties and how in that matter Respondents 2 and 3 have been found to be in the wrong.

2.6 Referring to such record, it has been submitted by learned counsel for the Appellant that the Respondents have acted in an oppressive manner with the Appellant even before and after filing of the Company Petition and even when the Valuation Report was submitted by the Valuer on 31.03.2014, the Respondents 2 and 3 did not place it before the Board and have simply avoided the same. According to him, the Respondents should have been held to have acted in an oppressive manner and on the basis of

the Valuation Report, the Appellant was entitled to exit. According to him, when the relations between the two groups are such that they cannot function together, NCLT could not have simply rejected the Company Petition without giving a way forward.

3. Against this, the learned counsel for the Respondents referred to the prayers in Company Petition to claim that there was no prayer making grievance regarding transfer of shares from Respondent No.4 to Respondent No.3. It is claimed that the Appellant had set up another Company by the name, "Enteco" and had diverted corporate opportunity of Respondent Company and thus his conduct was not proper as Director and thus Respondents 2 and 3 were justified in the steps taken by them. He referred to the Reply filed in CLB (Annexure A-4 – Page 277, para – 37) to submit that the Respondents had pointed out to CLB that the Appellant – Petitioner had visited the clients of the Company to divert business of the Company to M/s**.** Enteco Engineers Pvt. Ltd. The Counsel claimed that Respondent No.2 had objected to the Appellant visiting Rourkela at place of one of the Company's client where Mr. Ajay Shukla, the other Director of M/s. Enteco was present with him. The Respondents had sent e-mail regarding this to the Appellant but he tried to evade by saying that it was co-incidence. Respondents claimed that because of such conduct, the Petitioner was given Notice to remove him from the post of Director. It is further claimed by Respondents that when Appellant offered to quit, the Board called for a Report from the Auditors. It is claimed that when the

Auditors were appointed, the Appellants sent letter to the Bank because of which function of the account in Bank became a problem. The Valuation Report was received giving valuation as on 31st March, 2014. The counsel submitted that Respondents were accepting the Report but in July, 2014, when they calculated their turnover, they found that it was going down because of the Appellant spoiling the name of the Company and the Company was going into loss. The Respondents are also referring to the disputes between the parties relating to Ranchi Metals, where Appellant is in the management, to put the blame on the Appellant that in that matter even the Appellant has not complied with the Orders passed by NCLT.

3.1 Respondents claim that the remuneration Respondents 2 and 3 were taking was similar to what they had been taking since 2010-2011 along with Appellant. It is claimed that in 2014-2015 and 2015-2016, the profits reduced and as the executive jobs of the Appellant were withdrawn, he was not entitled to the remuneration. It is argued that as the Appellant was acting against the Company, EOGM was called which is part of the system of the Company and the same cannot be said to be oppressive. It is claimed that the Petitioner – Appellant failed to prove any act of oppression on the part of Respondents. It is argued that the Appellant started disputes because of which the Company suffered losses and unless the losses are settled, payments cannot be made to the Appellant.

4. The learned Counsel for the Appellant countered the submissions of Respondents and claimed that the Appellant had contributed to the

growth of the Company and even the personal property of his children has been burdened with charge and the Appellant could not have been treated in the manner in which he is being treated. It is argued that when relations came to a deadlock, the Appellant himself offered to quit and Respondents agreed to valuation but subsequently, created problems depriving the Appellant of participation in the Company affairs and in spite of his investments and efforts in the Company, he is neither getting salary nor dividends and has been simply left out. It is claimed that the Company – Enteco was established by the Appellant on 4th December, 2013 but he had resigned from it on 15th March, 2014 while Respondents established another Company - ELINA on 10th December, 2013 and are still continuing with that Company but keep grumbling against him.

5. We have gone through the record and the Impugned Order which has been passed by NCLT and we have heard counsel for both sides. We are first taking up the disputes raised by the Appellant with regard to Respondents not paying him the remuneration of Director since August, 2014. In this regard, we have already reproduced the operative part of CLB Order dated 13th May, 2014 which had directed maintaining of status quo regarding shareholding pattern of the Company and composition of Board of Directors of the Company. It is not the case of any of these parties that this interim Order did not continue to operate during the pendency of the Company Petition. Thus, when there was a direction to maintain the composition of the Board of Directors and admittedly when this Order was

passed, the Appellant was a Director in the Company to whom certain functional areas had been allotted as can be seen from the Minutes of the Board of Directors dated 16th July, 2013, one would expect that the functional areas would not be disturbed when status quo orders regarding Director had been passed. In the present matter, admittedly the Respondents, after such Orders of CLB dated 13th May, 2014 withdrew the functional areas of the Appellant on 7th July, 2013 and then stopped paying him any remuneration since August, 2014. Initially, when the Appellant raised these concerns and the matter came up before CLB, the Respondents came up with an excuse of financial difficulties. The Order of CLB dated 16.09.2014 reads as under:-

> "Ld. Counsel for the petitioner has referred to C.A. No.780 of 2014 and has requested that as per reliefs claimed in such application, the respondents may be directed to pay the outstanding salaries and other perquisites to the petitioner as existing Director. Further it has been submitted that the facility of car given to the petitioner for office use has been withdrawn and the same may be restored back by the respondents. It is also indicated that as per Board meeting dated 7th July, 2014 the authorities of Mr. Surjeet Singh (Petitioner) in respect of functional areas of work have been withdrawn and vested with Mr. Prakash Kumar with immediate effect. No reasons have been specified towards withdrawal of such functional authorities of the petitioner.
>
> Ld. Counsel of the respondents has submitted that the salaries and other perquisites of the existing directors have not been withdrawn. However because of financial difficulties the outstanding dues have not been paid. The same shall be released after availability of funds. As regards the other points raised in the application, the same will be addressed on the returnable date of hearing after the pleadings are complete. He has also

requested that the application filed by respondents being CA No.509 of 2014 should also be heard on the next date of hearing along with the other applications.

After consideration of the above submissions of the rival parties, it is hereby directed that the rejoinder affidavits in respect of C.A. No.780, 781 and 509 of 2014 shall be filed within one week hereof. Since the Ld. Counsel of respondents has already mentioned that the outstanding dues of all the existing directors shall be paid on availability of funds, no further action lies as of now.

List the case of hearing of all applications along with CP on 17th November, 2014 at 10.30 A.M.

Interim order dated 13.05.2014 passed by this Bench

shall continue until next date of hearing."

5.1 Later on, when the matter came up on 22nd December, 2014, the CLB Order reads as under:-

"In CA No.509/2014, the Respondents Advocate submitted that rejoinder has been filed and copy thereof served to the Petitioner Advocate. With this, pleadings are complete.

2. In CA No.780/2014 and CA No.781/2014 the Petitioner Advocate submitted that rejoinder has been filed and copy thereof served to the Respondents Advocate. With this, pleadings are complete in both the CAs.

3. The Respondents Advocate submitted that he has filed an affidavit on 25-11-2014 mentioning therein that the Respondent Company has not paid any remuneration since August 2014 due to financial crunch of the Respondent Company. The said affidavit does not disclose the status of payment of Directors' salary as per direction given on 18-11-2014. After hearing the submissions/arguments of the Petitioner

> Advocate as well as Respondents Advocate, the Respondents Advocate is directed to file affidavit within 10 days by mentioning the status of payment of remuneration to the Petitioner.
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> 4. List the matter for hearing on 13-1-2015 at 10-30 A.M.
>
> 5. Ad interim order dated 13-5-2014 passed by this Bench shall continue until next date of hearing."

5.2 Thus, although on these dates before the CLB, financial crunch was being claimed by the Counsel for Respondents, when CLB directed to file Affidavit regarding status of payment of remuneration to the Appellant, Respondents filed Supplementary Affidavit branding the Petitioner as having come without clean hands and to have misled the Bench and alleged diversion of business; stealing of corporate opportunity and taking ex-parte Order dated 13th May, 2014 by (allegedly) misleading the Bench; and that the Petitioner was diverting business and that the Company had no alternative but to pass Board Resolution dated 07.07.2014 divesting the Appellant of executive powers and thus the Petitioner was not entitled to receive any remuneration as non-executive Director. This can be seen from one of the paragraphs of Impugned Order. We are unable to refer the paragraph number as Impugned Order has not put numbers to paragraphs (we hope and wish it would, as everybody does).

5.3 Although the NCLT notes these factors, it simply accepted what the Respondents were claiming. If the CLB had ordered that status quo regarding composition of the Board of Directors should be maintained, it

could not mean that the Appellant-Petitioner may be kept as a Director in name. If the status quo at the time of passing of the Order was that the Appellant was a functional Director getting remunerations, the Respondents could not have on their own, on the basis of facts which were pending disputes before NCLT, taken a decision on their own to firstly withdraw the functions of the Appellant then also stop paying remunerations to the Appellant. Nothing stopped the Respondents from moving CLB/NCLT for getting the Order modified. Without seeking modification in the Order, such attitude of the Respondents 2 and 3 in converting the status quo order into a paper Order could not have been justified and NCLT did not take note of these factors properly. These factors show that the Respondents 2 and 3 have acted in an oppressive manner.

5.4 The Counsel for Appellant has rightly pointed out the Directors Report (Annexure A-8 – Page 450) which is submitted with the 10th Annual Report of the Company together with audited statements of accounts for the year ending 31st March, 2015 where it is reflected that in March, 2014, the profit of the company was Rs.117.96 Lakhs and the Report claimed that by the end of 31st March, 2015 it had become Rs.12.43 Lakhs. The counsel for Appellant pointed out from the extract of Annual Report Form MGT – 9 (Paper Book Page – 461) that the Respondent No.2 had taken salary of Rs.35,66,400/- and Respondent No.3 had picked up salary of Rs.32,80,635/- and yet another amount was shown as spent in the column of "Other Non-Executive Directors" of Rs.14,96,000/-. The

Counsel pointed out that to the Appellant "0" had been paid while the Respondents took away these amounts and Directors Report showed that no dividend had been declared. According to Advocate for Appellant, such diversion of money to just two of them (Respondents 2 and 3) should be treated as siphoning. It is apparent that no amount was being paid to the one third shareholder of the shares and Respondents 2 and 3 were taking away all the amounts in the name of salary. Counsel pointed out similar factors in the Director's Report for the statement of accounts ending 31st March, 2016 (Page – 465) also. The Counsel for the Appellant referred to Section 309 under the Companies Act, 1956 ('old Act', in short) and Section 197 of the Companies Act, 2013 ('new Act', in short) to show as to how maximum managerial remuneration is to be settled. No doubt as per Sub-Section (9) of Section 309 of the old Act, the provisions regarding remuneration of Directors under the old Act was not applicable to private companies unless it was subsidiary of a public company. But then, it has been argued by the Counsel for Appellant that keeping the yardsticks as found in these provisions and capital of the Respondent Company in view, the remuneration which Respondents 2 and 3 took could not have been more than Rs.1,25,000/- per month but each of them took more than Rs.3 Lakhs per month. It is argued that Respondents 2 and 3 in this manner siphoned off the money to themselves in the name of salaries of Directors by shutting out the Appellant from participating and then not declaring any dividends. We find that the submissions are not without basis. The Respondents have to act in trust and they cannot deprive the Appellant,

one third shareholder in the Company by neither giving him participation nor remuneration nor dividends. Such diverting of profits to salary and not declaring dividends, in the facts of the matter, must be held to be oppressive of Appellant.

6. Now we will deal with the dispute regarding transfer of shares from Respondent No.4 to Respondent No.3.

7. The Company Petition was filed on 13th May, 2014. In the Company Petition (Annexure – A-2), it was claimed by the Appellant in Para – 3.3 that the Respondent No.2 holds 333400 equity shares which is approximately 23.82% of the issued subscribed and paid up share capital of the Company. He further pleaded that the Respondent No.3 does not hold any equity shares in the Company. It was pleaded that Respondent No.3 is Director of the Company while Respondent No.4 holds 333200 equity shares in the Company which is approximately 23.8% of the issued, subscribed and paid up share capital.

7.1 CLB in its Order dated 13th May, 2014 (Annexure –A-3) inter alia noticed these pleadings in para – (iv) and passed orders in para – 3 (which we have reproduced in this Judgement at para – 2.2), and directed maintaining of status quo regarding shareholding pattern. In the Reply filed by Respondents (Annexure – A-4) which was sworn in by the Respondent No.3 for herself and Respondent No.2, there was no specific denial of these pleadings with regard to the pattern of shareholding. In

fact, the Reply started giving para-wise Replies only from para – 6 of the Petition in the Reply para – 6. The Appeal claims [para – 7(m)] that during pendency of the Petition, Respondents filed Annual Return dated 29.09.2014 on 25.10.2014 showing transfer of shares from Respondent No.4 in favour of Respondent No.3 who was non-member/stranger/outsider. Appellant claims that these were acts of oppression. According to him, Respondents 2 and 3 systematically tried to side line the Appellant and in order to take over complete management of the Company, he was systematically excluded from participation in the activities of the Company. The learned counsel for the Appellant has pointed out the Share Transfer Form, which is relied on by the Respondents and copy of which is at Page – 426 of the Appeal. The learned counsel referred to Sub-Section (1A) of Section 108 of the Companies Act, 1956 (old Act, in short) which reads as under:-

> "108. [(1A) Every instrument of transfer of shares shall be in such form as may be prescribed, and—
>
> (a) every such form shall, before it is signed by or on behalf of the transferor and before any entry is made therein, be presented to the prescribed authority, being a person already in the service of the Government, who shall stamp or otherwise endorse thereon the date on which it is so presented, and
>
> (b) every instrument of transfer in the prescribed form with the date of such presentation stamped or otherwise endorsed thereon shall, after it is executed by or on behalf of the transferor and the transferee and completed in all other respects, be delivered to the company,—

(i) in the case of shares dealt in or quoted on a recognised stock exchange, at any time before the date on which the register of members is closed, in accordance with law, for the first time after the date of the presentation of the prescribed form to the prescribed authority under clause (a) or within [twelve months] from the date of such presentation, whichever is later;

(ii) in any other case, within two months from the date of such presentation.]"

7.2 It is argued that from the above provision, it is clear that the Share Transfer Form cannot be signed and no entries can be made in it before it is presented to the prescribed authority. As per this provision, the Form has to be presented before signing or making entries, before the prescribed authority and after it is presented and the authority stamps the same and puts its date, thereafter it has to be duly executed and delivered to the Company within 12 months from the date of such presentation which was done before the prescribed authority. The learned counsel argued and it does appear from reading of the Share Transfer Form that the Share Transfer Form was stamped and dated by the Registrar of Companies on 06.11.2014. The transfer in the Form from Respondent No.4 in favour of Respondent No.3, however, is dated 20th March, 2014 and the Form is shown as approved by the Company on 25.03.2014. This is surprising. The learned Counsel for the Appellant submitted that the document also purports to have an attestation from Notary in the date of 20.03.2014. The

learned Counsel for the Appellant – original Petitioner states that the Form was forged and the transfer was recorded in a back date of 25th March, 2014 to tide over the CLB Order dated 13th May, 2014. We find that the submission of the learned Counsel for the Appellant cannot be said to be without basis. If Section 108(1)(a) is kept in view, the Registrar of Companies will not stamp and date the Share Transfer Form if it has already been executed. Looking to the dates as mentioned above, there is substance in the argument that after getting the Share Transfer Form stamped from the Registrar of Companies, it was got filled up in back date.

8. In the Reply filed in Appeal (Diary No.2230), Respondent No.2 in para – 18 (Page – 15) in vague manner stated that Respondent No.3 was made signatory to the bank account of the Company in view of "her equal right with the appellant and the R2 as one-third owner of the R1 Company and also in view of the business needs". It is stated that it is denied that 333200 shares were transferred to Respondent No.3 from Respondent No.4 without following the due process of law. Thus although transfer is admitted, how process of law was followed in not shown. The learned Counsel for the Respondents, however, referred to the prayers in the Company Petition to submit that there were no contentions raised with regard to the transfer of shares from Respondent No.4 to Respondent No.3 and there was no prayer to set aside such transfer. It is also tried to be argued by the Respondents to say that Respondent No.4 is uncle of Respondent No.3 and he transferred all his shares in favour of Respondent

No.3 and thus, there is no dilution of the shareholding of the Appellant and thus, shareholding remains the same with only Respondent No.3 substituting for Respondent No.4 and thus, there is no violation of the Order of the CLB. We find from the above discussion that when the Company Petition was filed, the Appellant pointed out the shareholding pattern which showed the different shares held by him and Respondent No.2 and Respondent No.4. The case brought by the Appellant was that after Respondent No.4 resigned as Director and Respondent No.3 was introduced as Director, Respondent Nos.2 and 3 joined hands against the Appellant to side-line him and were working in sync against him and that such act on the part of Respondents 2 to 4 transferring the shares in favour of Respondent No.3 was clearly a violation of the Orders of CLB. The alleged Board Resolution dated 25th March, 2014 taking on record the transfer of shares by the Company has not been filed by the Respondents. Looking to the Share Transfer Form, which we have discussed above, we do not find that the Respondents acted in good faith and their stand that the shares were transferred on 25th March, 2014 is clearly suspicious. When the matter is before the Tribunal and there is also a specific Order to maintain status quo regarding shareholding, if the Respondents could quietly record the transfer and show the same in back date, we find substance in the submissions made on behalf of the Appellant that the Respondents were acting in sync with each other to oppress him.

9. We find that the Respondents have not been able to satisfy us that the transfers from Respondent No.4 in favour of Respondent No.3 were before the date of CLB Order dated 13th May, 2014 and this being so, it is immaterial whether the Company Petition prayed for setting aside such transfer. When it was in violation of the CLB Order, this being appeal out of the same proceedings, we set aside such transfer of 333200 shares as witnessed from the Share Transfer Form which is filed at Page – 426 of this Appeal.

10. Coming to the case of oppression and mismanagement as was put up by the Appellant in CLB/NCLT, the Petitioner mentioned in the Petition as to how the Company came to be set up and according to him since beginning, he participated in its functioning leading to its growth and profit. He has also pleaded that he arranged for primary finances for such commencement of the Company through his connections with various banks and even mortgaging assets belonging to himself and/or his family members. In response, the Respondents pleaded in their Reply in NCLT (para – 9) that for obtaining bank finance, the assets in the name of the family members of both the Respondent No.2 and the Petitioner were mortgaged equally. Thus, admittedly the Petitioner has contributed to the upcoming of the Company.

10.1 The Company Petition then shows as to how the Appellant – Petitioner and Respondents 2 and 3 decided in 2013 that they would meet daily to discuss the affairs of the Company. According to him, it was

decided that every business proposal would be brought to the notice of all Directors and with consent of all Directors, investments would be made by the other Directors in their personal capacity. The Company Petition annexed drafts and correspondence which were exchanged between the Directors with reference to various meetings. The Appellant pointed out e-mail dated 20.07.2013 as draft Minutes relating to discussion as to how the cheques should be signed and how Respondent No.2 proposed to invest in a company by name "ELINA" which was rejected by the Petitioner but Respondents 2 and 3 went ahead to invest in that Company in their individual capacity. He pointed out e-mail in this regard as Annexure - A6 with the Company Petition. According to the Company Petition, after such incident, Respondents 2 and 3 started creating problems for the Appellant from July, 2013. The Petition pointed out that Respondents 2 and 3 started insisting on inputs for a magazine in English only, when the Appellant had submitted the contents in Hindi. The reading of the Petition along with the e-mails exchanged clearly shows growth of a rift between the Petitioner on one side and Respondents 2 and 3 on the other. The straining of relations becomes apparent from reading of these e-mails which is documentary evidence. The Petition and the e-mails attached show that in spite of resistance from the Appellant, Respondents 2 and 3 introduced Respondent No.3 as the other signatory in the bank and brought about Resolution that the banking transactions could go ahead with signatures of any two Directors. The Appellant – Petitioner claims that this was done to keep him away from the transactions and so that Respondents 2 and 3

could act as per their own desires. The learned Counsel for the Appellant has rightly submitted that the concern of the Appellant against such changing of bank signatories from the Appellant and Respondent No.2 (as was the earlier arrangement) to any 2 of the 3 Directors was justified as the Respondent No.3 did not hold any shares in the Company. The Company Petition read with the e-mails shows Respondent Nos.2 and 3 alleging against the Appellant that he had been behaving badly and the Appellant claiming that Respondents 2 and 3 were colluding against him (Petition para – 6.18). The Company Petition shows the Appellant sending e-mail to Respondent No.2 questioning as to why he was travelling to Muscat for review and execution of a project when an employee of the Company had already gone to Muscat and Respondent No.2 replied on 26.12.2013 (Appeal Page – 208) telling the Appellant that it was not his functional area as Director and why he had written such a "silly" e-mail. Respondent No.2 also told the Appellant in this e-mail that as CEO, he does not need to explain this which is beyond functional area of the Appellant and alleged that the Appellant was maintaining a serious act of indiscipline by not attending the daily meetings. The Company Petition itself mentioned (para – 6.35) that Respondent No.2 sent e-mail dated 08.04.2014 alleging that the Appellant – Petitioner visited clients of Respondent No.1 with a view to divert business to a company incorporated by the Appellant namely, "M/s. Enteco Engineers Pvt. Ltd." The Petitioner also filed copy of that e-mail in the petition itself (Appeal Page – 250) where Respondent No.2 expressed displeasure to Appellant visiting AML Works,

Rourkela on 4 – 5th April, 2014 and claimed that Ajay Shukla – Co-Director in Enteco was also present. Although the Respondent made allegations, the Appellant mentioned in the Company Petition itself in para – 6.36 that he had already resigned from such Enteco Engineers on 15th March, 2014. Although the learned Counsel for the Respondents tried to make much out of such e-mail, taking an overall conspectus of the Company Petition read with the various e-mails which is documentary evidence, what appears to us is that once the relations started straining between the Appellant on one side and Respondents 2 and 3 on the other, they had suspicions of their own against each other and in the absence of specific material showing one or the other party acting against the interest of the Company, it would not be appropriate to give too much of weight to isolated instance of visit to Rourkela which does not necessarily establish acting of a Director against the interest of the Company. On surmises, misconduct cannot be assumed. In fact, if the Respondent Nos.2 and 3 are alleging that the Appellant had promoted Enteco, the Appellant is at least able to show that he resigned from that Company on 15th March, 2014 while Respondents 2 and 3 continue to be investors of another Company – Elina.

10.2 The NCLT appears to have been impressed by the case put up by the Respondents claiming that the Petitioner had participated in a tender of Usha Martin Ltd. for supply of 70 T Ladle on 10.07.2013 and that the Company - Enteco had filed quotation of Rs.54,72,000/-. Before us also, the learned Counsel for Respondents referred to the tender of Enteco, copy

of which is filed with Reply (Diary No.2230 at Page – 87) and what was quoted by the Respondent No.1 Company, copy of which is at Page – 97. It is stated that Respondents had quoted Rs.64,60,000/-. We are not impressed with the submission that the Appellant had misused his connection with Respondent Company. The quotation of Enteco dated 13.03.2014 was of Rs.54,72,000/-. The Appellant has claimed that he resigned from Enteco on 15th March, 2014. The quotation of Enteco cannot be compared with Rs.64,60,000/- quoted by the Respondent No.1 Company in its quotation (Page 97 of Reply) on 10.07.2013. If there was to be insider information, difference in quotes would not be of a couple of Lakhs of rupees.

11. We have gone through the Impugned Order. Going through the reasonings recorded, we do not think that the learned NCLT appreciated the matter in proper perspective. The Petitioner who had himself fairly put up all the e-mails and copies of the Board Resolutions, which Respondents 2 and 3 brought about by way of majority, has been presumed to be in the wrong.

12. The very fact which is admittedly on record and which shows that when the relations strained, the parties did sit down together and on 2nd January, 2014 (Appeal Page – 213). Board Resolution was passed to appoint Valuer of the Company including of tangible and intangible assets and liability and Vani Consultants Private Limited was assigned the job,

shows admitted position between the parties that they did accept between themselves that they could no longer continue together and need to split.

13. The Valuation Report is of July, 2014. According to the Appellant in spite of receiving the Valuation Report, the Respondents did not act upon the same and it was not placed before the Board. Counsel for Appellant submitted that the Appellant accepted this Report but the Respondents are avoiding. Against this, the learned Counsel for Respondents submitted that they were also accepting the Report but when they calculated their turnover which was going down allegedly due to Appellant spoiling the name, they suffered loss and thus did not act on the Report. Admittedly, the Respondents divested the Appellant of all executive powers by Board Resolution dated 07.07.2014. Valuation Report is of the Company as on 31.03.2014. If the profits of the Company have gone down after the Appellant was divested of his responsibilities, the Respondents cannot be heard putting the blame on the Appellant.

14. Learned Counsel for the Appellant relied on the Judgement in the matter of **"M.S.D.C. Radharamanan versus M.S.D. Chandrasekara Raja And Another"** reported in *(2008) 6 SCC 750* to submit that in that matter, the private company was comprising only of 2 shareholders/Directors and acrimony between 2 Directors/shareholders resulted in deadlock in the affairs of the Company. In that matter in the Company Petition, oppression on the part of the other Director was not proved but still Hon'ble Supreme Court accepted that it was not a question merely of interest of the

Petitioner but interest of the shareholders as a whole which was material and even in the absence of proof of oppression on the part of the other Director, direction to the other member to purchase the shares of the Company Petitioner was required to be upheld. Keeping in view this Judgement in the matter of "M.S.D.C. Radharamanan" also, and considering the facts of the present matter, we find that there is substance in the arguments of the Counsel for the Appellant that the learned NCLT could not have simply dismissed the Company Petition.

15. For the reasons discussed above, we find that Respondents 2 and 3 did act oppressively with the Appellant before Company Petition was filed as well as during pendency of the Company Petition and for such acts of theirs there was tacit consent of Respondent No.4 and thus he is also guilty of oppression. We find that winding up of the Company would unfairly prejudice the members of the Company but otherwise the facts justify making a winding up order on the ground that it is just and equitable that the Company should be wound up.

16. Although we are finding Respondent No.2 to 4 guilty of acts of oppression of appellant we are proceeding to give directions that Respondent No.2 and 4 will be given first option to purchase shares of the appellant in view of the fact of the matter where the appellant had opted for quitting the company and valuation report had been called by parties taking decision in Board Resolution. In case Respondent No.2 and 4 fail to purchase the shares of the appellant (for which we are proceeding to

pass directions), the appellant should get benefit of discount in purchase of the shares of Respondent No.2 and 4. This should even the scales of justice considering that Respondents are being found guilty of acts of oppression. This is also because Respondents after having agreed to get valuation done and passing Board Resolution, have sat over the Valuation Report giving some lame excuses.

16. We pass following directions and Orders:-

(A) We set aside the transfer of shares from Respondent No.4 in favour of Respondent No.3.

(B) The Appellant is entitled to function as Director and is entitled to remuneration as Director equal to what has been paid to Respondent No.3 from August, 2014 till his shares are purchased by Respondent Nos.2 and 4 from the funds of the Company.

(C) We remit back the matter to NCLT, Kolkata Bench. NCLT will first give opportunity to the Respondent Nos.2 and 4 to purchase shares of the Appellant of Respondent No.1 company on the basis of Valuation Report (Annexure A-11) (filed in this Appeal with Diary No.2428) within time preferably of 3 months (or as may be specified by NCLT). If the Respondents 2 and 4 fail to purchase the shares of the Appellant in time as may be specified by NCLT, opportunity will be given to the Appellant to buy out, in time to be specified by NCLT, the shares of Respondents 2 and 4 in which contingency he would be entitled to purchase the shares of Respondent

No.2 and 4 on a discount of 5% on the value as specified in the Valuation Report. NCLT may pass any and further suitable Orders deemed fit in the context, and matter.

(D) Parties to appear before NCLT, Kolkata on 19.11.2018.

(E) Respondents 2 and 3 each will pay costs of Appeal Rs.1 Lakh each to Appellant from their own sources.

The Appeal is disposed accordingly.

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

[Balvinder Singh]
Member (Technical)

New Delhi

24th October, 2018

/rs/nn