

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 25 of 2018

[Arising out of Order dated 13th October, 2017 passed by the National Company Law Tribunal, Ahmedabad in C.P. No. 16/241/NCLT/AHM/2017]

IN THE MATTER OF:

Smt. Smruti Shreyans Shah

Gujarat Samachar Bhavan,
Khanpur,
Ahmedabad.

...Appellant

Vs

1. The Lok Prakashan Limited.

Gujarat Samachar Bhavan,
Khanpur,
Ahmedabad.

2. Shri Bahubali Shantilal Shah,

Residing at 15 Nandi Hills,
Satellite Road,
Ahmedabad.

3. Shri Shreyans Shantilal Shah,

Gujarat Samachar Bhavan,
Khanpur,
Ahmedabad.

4. Shri Shrenik Arvindbhai Shah,

Ahmedabad, Gujarat,
India.

**5. Smt. Usha M. Mazumdar
alias Smt. Mukti Ellsbridge,**

Ahmedabad.

6. AASPAS Multimedia Ltd.,

607, 6th Sakar,
Nr. Gandhigram Railway Station,
Ashram Road,
Ahmedabad – 380009.

....Respondents

Present:

For Appellant: Dr. Abhishek Manu Singhvi, Sr. Advocate with Mr. Krishnendu Dutta, Mr. Jayant Mehta, Ms. Niharica Khanna, Ms. Madhavi Khanna, Ms. Rajshri, Ms. Anushree Kapadia and Ms. Drishti Harpalani, Advocates.

For Respondents: Dr. U. K. Chaudhary, Sr. Advocate with Mr. Pavan S. Godiawala, Mr. Mahesh Agarwal, Mr. Rajeev Kumar, Mr. Sumit Malhotra, Ms. Natasha D. Shah, Advocates for R-2.

Ms. Garima Bajaj, Advocate for R-3.

With

Company Appeal (AT) No. 32 of 2018

[Arising out of Order dated 13th October, 2017 passed by the National Company Law Tribunal, Ahmedabad in I. A. No. 275 of 2017 in C.P. No. 16/241/NCLT/AHM/2017]

IN THE MATTER OF:

Smt. Smruti Shreyans Shah

Gujarat Samachar Bhavan,
Khanpur,
Ahmedabad.

...Appellant

Vs

1. The Lok Prakashan Limited.

Gujarat Samachar Bhavan,
Khanpur,
Ahmedabad.

2. Shri Bahubali Shantilal Shah,

Residing at 15 Nandi Hills,
Satellite Road,
Ahmedabad.

3. Shri Shreyans Shantilal Shah,

Gujarat Samachar Bhavan,
Khanpur,
Ahmedabad.

4. Shri Shrenik Arvindbhai Shah,

Ahmedabad, Gujarat,
India.

5. Smt. Usha M. Mazumdar

alias Smt. Mukti Ellsbridge,
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For Appellant: Dr. Abhishek Manu Singhvi, Sr. Advocate with Mr. Krishnendu Dutta, Mr. Jayant Mehta, Ms. Niharica Khanna, Ms. Madhavi Khanna, Ms. Rajshri, Ms. Anushree Kapadia and Ms. Drishti Harpalani, Advocates.

For Respondents: Dr. U. K. Chaudhary, Sr. Advocate with Mr. Pavan S. Godiawala, Mr. Mahesh Agarwal, Mr. Rajeev Kumar, Mr. Sumit Malhotra, Ms. Natasha D. Shah, Advocates for R-2.

Ms. Garima Bajaj, Advocate for R-3.

J U D G M E N T

BANSI LAL BHAT, J.

This batch of two appeals has been preferred by 'Smt. Smruti Shreyans Shah' – Appellant [Respondent No. 2 in C. P. No. 16/241/NCLT /AHM/2017 pending disposal before National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (hereinafter referred to as the 'Tribunal')] against order delivered by the Tribunal in the aforesaid Company Petition on 13th October, 2017 by virtue whereof the Company Petition preferred by Respondent No. 2 herein - 'Shri Bahubali Shantilal Shah' ('Petitioner' in the Company Petition) under Section 241 of the Companies Act, 2013 (hereinafter referred to as the 'Act') alleging certain acts of oppression and mismanagement came to be admitted with further directions passed in the Company Petition and I. A. No. 275 of 2017 to appoint an Independent Director on the Board of Directors of Respondent No. 1 - 'The Lok Prakashan Ltd.' (hereinafter referred to as the 'Company') to act as Chairman of the Board of Directors with casting vote. The Tribunal adjourned the matter for naming the Independent Director and fixing his remuneration after hearing both the parties.

2. It is abundantly clear that the Company Petition as also the I.A. have not been finally disposed off and are still pending consideration before the Tribunal.

3. Before advertng to the grounds of appeals arising out of common order impugned in both appeals between the same set of parties, a peep into the factual matrix germane to the controversy involved at the bottom of the subject matter of these appeals is inevitable. Respondent No. 2 herein holds 22.79% of equity shareholding in the 1st Respondent Company incorporated under Companies Act, 2013 and engaged in the business of publishing daily Gujarati Newspaper under the name and style of 'Gujarat Samachar' which is stated to be having a very wide circulation. The Appellant and the Respondent No. 2 are the Managing Directors of the Company whereas Respondent No. 3 is the Managing Editor, Printer and Publisher of the Newspaper since 1969. Respondent No. 6 is a Company promoted by the Appellant and Respondent No. 3 (the couple). Respondent No. 1 is not a shareholder of Respondent No. 6. Respondent No. 2 is not a Director Shareholder in Respondent No. 6. Respondents No. 4 and 5 are Independent Directors of the Board of the Company. Respondents No. 2 and 3 are brothers engaged in running the Company for the last five decades. Previously, Shri Shantilal Shah was the Chairman of the Company and he was the sole signatory to the Bank Account of the Company. The Company is running successfully and generating profits despite various issues arising during the course of business which, according to Respondent No. 2, constituted acts of oppression and mismanagement though the same is contested by the Appellant by claiming that such issues were the operational issues raised from time to time and continued to linger on due to apathetic attitude of Respondent No. 2. However, it is the admitted case

of parties that the publication of Newspaper is going on and the Company is productive.

4. Before coming to grips with the issues raised in these appeals, it is apt to notice the findings recorded by the Tribunal for admission of the Company Petition and passing of interim directions in terms of the impugned order. A cursory look at the impugned order lays bare that the Tribunal has decided the issue of limitation after referring to the respective contentions of the parties.

5. The Tribunal proceeded to admit the Company Petition by making the following observations:-

“22. In view of the above findings, petitioner is eligible to file this petition and the petition is within time. In view of the findings as there are certain alleged acts of oppression and mismanagement, though denied by the respondents, the application deserves to be admitted. The correctness or otherwise of acts of oppression and mismanagement can only be decided after the full-fledged hearing. Without admitting the petition, this Tribunal cannot go into the merits of the case. There plea of delay and laches as such cannot be taken into consideration at this stage unless a full-fledged hearing takes place as it involves several questions of fact.

23. *In view of the aforesaid discussion, the petition is admitted.”*

6. A bare look at para 24 of the impugned order would bring it to fore that at the hearing learned counsel for Respondent No. 2 herein restricted the prayer for interim relief to only one viz. appointment of Independent Directors on the Board of Directors of the Company pending final disposal of the Company Petition to ensure that statutory and contractual liabilities and day to day expenses are met with. It was contended before the Tribunal that there was a deadlock in the management of the Company in as much as the two Independent Directors, one appointed by the Respondent No. 2 herein and the other appointed by the Appellant were respectively supporting their mentors, thereby creating a split situation where both sides were equally divided. However, the Appellant appears to have disputed the factum of existence of a deadlock by projecting that the Company was an ongoing entity producing Newspaper Daily despite Respondent No. 2 herein having disputes with the Appellant and Respondent No. 3. The Tribunal observed that the Appellant had not objected to the increase in strength of Board by inducting Independent Professional Directors. It further observed that no proper Board Meeting was held in year 2016. Thus, the Tribunal came to a finding that there was a deadlock in the management of the Company with Directors being in equal strength in both groups. It noticed letter dated 5th October, 2017 written by the Appellant to all Directors proposing a meeting of the Board on 14th October, 2017 and appointment of Hon'ble Justice

Shri P. B. Majumdar (Retd.) as Chairman to oversee the proceedings of the meeting. Though, Respondent No. 2 did not object to the convening of the meeting but maintained that it was not permissible to take an outside person as Chairman without being a member of the Board. The Tribunal drew its conclusions of deadlock in the management of Company from the stand taken by the Appellant in her reply as also from the fact that the Directors of both groups were equal in strength. The Tribunal noticed the fact that Respondents No. 2 and 3 are brothers and despite availing a fairly long opportunity they failed to arrive at a settlement. Observing that the Board Members were equally divided in two groups, even holding a Board Meeting to adopt a resolution was not possible. It was of the further view that in such circumstances even appointment of an Observer would not help in smooth conduct of the Board Meeting and any meaningful outcome. The Tribunal referred to the letter dated 5th October, 2017 written by the Appellant wherein she stated that she had no objection in increasing the strength of the Board by inducting Independent Professional Directors. This was besides the fact that she proposed the name of Hon'ble Justice Shri P. B. Majumdar (Retd.) to be Chairman to oversee the proceedings of the Board Meeting. The Tribunal relied upon Article 182 of the Articles of Association of the Company to find that an outsider cannot act as Chairman of the Board unless he is appointed as a Director. Thus, it ruled out such appointment, moreso as the same was not going to break the deadlock. Since in the view of the Tribunal, the Company had to comply with the statutory requirements, contractual obligations, compliances, operational

issues and to attend the day to day business like purchase of news print and payment of salary etc., the Tribunal deemed it necessary to appoint Independent Director on the Board of the Company to act as Chairman of the meeting of Board of Directors with casting vote. The Tribunal accordingly admitted the petition and directed appointment of an Independent Director. The matter was adjourned to enable the parties to name the Independent Director and fixing his remuneration.

7. Before proceeding further to note the submissions made at the Bar, we deem it appropriate to refer to a development that occurred after passing of the common impugned order. Appellant (Original Respondent No. 2) filed I.A. No.06 of 2018 in the Company Petition No.16 of 2017 pending consideration before the Tribunal seeking recall or suitable amendment of the impugned order by rectification of certain mistakes pointed out in the I.A. Same was dismissed by the Tribunal vide order dated 12th December, 2018 on the ground that the relevant order had already been assailed in appeal and the observations made therein were conscious observations based on pleadings of the parties and submissions put forth by their learned counsel. It was also observed in the order of dismissal that the statement of fact as regards what transpired at the hearing and recorded in the judgment being conclusive of the facts so stated, it was not permissible to contradict the same by affidavit or other evidence. Appeal preferred against the same by the Appellant herein being Company Appeal (AT) No. 26 of 2019 came to

be decided by this Appellate Tribunal in terms of order dated 25th January, 2019 which reads as under:-

“O R D E R

25.01.2019: *When we pointed out that appeal against the original order dated 13th October, 2017 is pending consideration in an appeal Company Appeal (AT) No. 25 and 32 of 2018, learned counsel appearing on behalf of the Appellant submitted that they have raised the question that their consent has been wrongly recorded in the order dated 13th October, 2017. This apart certain statements have been wrongly attributed to him in the said order dated 13th October, 2017, which were also brought to the notice of the Tribunal, which passed order dated 12th December, 2018.*

2. When we pointed out that all these questions can also be raised in the pending appeal, learned counsel for the Appellant prayed for permission to raise the issues in the pending appeal, which were raised before the Tribunal by filing application under sub-section (2) of Section 420 of the Companies Act, 2013.

3. We allow the Appellant to raise those issues in the pending appeal, without expressing any opinion with

regard to the appeal, which will be considered by this Appellate Tribunal uninfluenced by the impugned order dated 12th December, 2018 passed by the Tribunal in I.A. No. 6 of 2018 in C.P. No. 16/241/NCLT/AHM/2017. The appeal stands disposed of with aforesaid liberty.”

8. Pursuant to the aforestated order further affidavit has been filed by the Appellant in Company Appeal (AT) No. 32 of 2018. Respondents have filed rejoinder thereto. Before advertng to the same, if required, it would be appropriate to refer to the grounds of Company Appeal (AT) No. 25 of 2018 and Company Appeal (AT) No. 32 of 2018 on which common order dated 13th October, 2017 culminating in admission of Company Petition and appointment of an independent Director on the Board of Directors of the Company is impugned.

9. The impugned order is assailed on the ground that Respondent No. 2 herein (Petitioner in the Company Appeal) failed to make out a prima facie case establishing acts of oppression and mismanagement before the Tribunal. It is urged that the alleged acts of oppression/mismanagement are nothing but ‘operational issues’ arising in day to day management of the Company. It is further urged that the Company Petition is barred by limitation. It is also urged that the Tribunal has wrongly attributed it to Appellant that she had no objection in increasing the strength of the Board by inducting Independent Professional Directors. It is urged that the Tribunal has failed to notice that the allegations in the Company Petition

merely related to operational issues and the Tribunal has drawn an erroneous conclusion in regard to existence of deadlock from such allegations. It is also urged that the Tribunal failed to notice that the Appellant had made attempts to convene a Board Meeting to ensure statutory compliances and in this regard sought consent of Respondent No. 2 to accord consent to the appointment of Hon'ble Justice Shri P. B. Majumdar (Retd.) to be Chairman to oversee the proceeding of the Board Meeting. However, the same was opposed by Respondent No. 2. It is further urged that the Tribunal has wrongly attributed consent to appointment of Independent Director to Appellant. It is further urged that the Tribunal was not justified in coming to conclusion that the appointment of independent Director was necessary for smooth functioning of the affairs of the Company when the Company was a going concern earning profit.

10. Respondent No. 2, in its reply affidavit, while reiterating grounds raised in the Company Petition qua allegations of oppression and mismanagement stated that the Appellant was estopped from denying the factum of seeking time by joint consensus with the Appellant to name the Independent Director. Reference in this regard is made to orders dated 13th October, 2017, 2nd November, 2017, 23rd November, 2017 and 18th December, 2017. It is stated that a case is made out by Respondent No. 2 herein before the Tribunal justifying appointment of an Independent Director to ensure compliance of statutory and contractual obligations.

11. Respondent No. 5 – ‘Smt. Usha H. Majumdar’, alias ‘Smt. Mukti’ in her reply affidavit denied the allegation of having been appointed either by Respondent No. 2 or by the Appellant. She further stated that she was appointed as an Independent Director on 31st December, 2015. She further stated that she had not authorized Respondent No. 2 to make any admission on her behalf. It is further stated that she had taken a similar stand before the Tribunal.

12. Dr. Abhishek Manu Singhvi, learned senior counsel for the Appellant firstly submits that the Tribunal has completely ignored the core issue which triggered the proceedings under Section 241-242 of the Act. It is submitted that the Respondent No. 2 entered into a compromise with the supplier of news print in the Civil Suit filed by Respondent No. 2 against the supplier without authorization of the Board of Directors of the Company. It is submitted that the Company Petition triggering the proceedings at the instance of Respondent No. 2 has been filed when the Appellant raised serious questions about his motive, conduct and financial prudence as the settlement was prejudicial to the Company. It is contended that Respondent No. 2 has self-engineered disputes and created artificial deadlock though it was his conduct which was prejudicial to the Company.

Secondly, it is argued that incorrect concessions have been attributed to Appellant in impugned order. Reference is made to para 25 and 28 of the impugned order in this regard. It is contended that there is no basis for findings recorded in the aforesaid paras of the impugned order in the record

before the Tribunal on 13th October, 2017 and none of the parties made any such submissions. It is submitted that the aforementioned findings are factually incorrect in as much as the Appellant in her letter dated 5th October, 2017 nowhere mentioned that she had no objection in increasing the strength of the Board by inducting Independent Professional Directors. It is submitted that the Appellant only stated that in view of the pending proceedings before the Tribunal, a Chairman was proposed for overseeing the proceedings of the proposed Board Meeting. However, there was no concession on part of the Appellant for appointment of an Independent Director.

Thirdly, it is contended that the pleadings of Appellant have been read/ misread out of context in the impugned order. It is submitted that references made to a 2010 Board Resolution containing recommendations for strengthening of the Board by approaching expert/reputed professionals for their consent to be inducted into the Board of Directors cannot be read to attribute any concession on the part of the Appellant and cannot be taken as consent for appointment of an Independent Director to act as Chairman with the casting vote being contrary to Article 182 of the Articles of Association.

Fourthly, it is submitted that the impugned order is factually incorrect and without reference to any evidence. It is pointed out that Respondents No. 4 and 5 were both appointed at the 74th Annual General Meeting (AGM) of the Company. There was no material before the Tribunal to presume that

Respondents No. 4 and 5 were appointed by any of the parties, more so, as they were Independent Directors who could not be appointed by any Director individually. Deadlock arising out of such appointment has neither been pleaded nor demonstrated by Respondent No. 2 in the Company Petition.

Fifthly, it is contended that Respondent No. 2 had failed to make out a case for grant of interim relief. It is submitted that there is no allegation of bias against the independent Directors and no instance of deadlock in the pleadings of Respondent No. 2. It is further submitted that there is no finding of oppression or mismanagement in the impugned order based on any material on record of the case. It is submitted that the impugned order is purely based on “no objection” of Appellant based on misreading of her reply and on wrongly recorded concessions of the parties that were never made with regard to purported deadlock. It is further submitted that material facts have been suppressed and false averments made in regard to status of Appellant as Managing Director and status of Respondent No. 3 as Managing Editor. It is further submitted that the impugned order travels beyond the scope of pleadings and does not bear any nexus with the grounds pleaded or with the record before the Tribunal. It is pointed out that no Independent Director could be appointed with a casting vote in contravention to Articles of Association.

Sixthly, it is submitted that the impugned order does not deal with the issue of maintainability raised by the Appellant and the issue of limitation

has been decided without any reference to the record. It is contended that the issues of limitation and maintainability being mixed questions of law and fact could not have been decided at an interim stage and that too without referring to pleadings and evidence.

Seventhly, it is submitted that the alleged non-convening of Board Meetings and AGMs/ Deadlock are self-engineered by Respondent No. 2, who himself avoided attending the meeting called for by way of Appellants letter dated 5th October, 2017. It is submitted that even during the pendency of proceedings Respondent No. 2 rendered it difficult to call for meetings by making false allegations against anyone attempting to carryout compliances for the Company. It is pointed out that even in absence of Respondent No. 2 in Board Meeting dated 25th July, 2018 and 75th and 76th AGMs of the Company, no resolutions were passed to the prejudice of Respondent No. 2, who has challenged the same only to create an artificial deadlock. It is further pointed out that Respondent No. 2 himself being the Managing Director has not taken any steps for calling any meeting and has not attended meetings despite notice.

Eighthly, it is submitted that the net profits of the Company for the years 2014-15 to 2017-18 have doubled as indicated in the chart handed over during the course of arguments and there are no reasons for interfering with the operations of the Company. Merely because the impugned order does not create prejudice is no ground to uphold the same.

Ninthly, it is submitted that the very substratum of the impugned order doesn't exist today in view of subsequent developments which are required to be noticed. It is pointed out that presently there are three Directors – Appellant (MD), Respondent No. 2 (MD) and Respondent No. 5 (Independent Director). Respondent No. 4 (Independent Director) has resigned retrospectively w.e.f. 30th December, 2016. Therefore, apprehension of deadlock does not survive.

Tenthly, it is submitted that the concessions recorded in the impugned order are not inconsequential as same form basis for a presumed deadlock. It is pointed out that the Appellant or her Advocate were not present before the Tribunal on 2nd November, 2017 and 23rd November, 2017 as has also been recorded in the orders passed on such dates. On 15th December, 2017, the Appellant had affirmed the I.A. seeking rectification of the impugned order. It is pointed out that the Company Master Data available with the ROC clearly shows that there are three Directors currently on the Board of Directors of the Company. It is further pointed out that the contention of Respondent No. 2 that the Appellant and Respondent No. 3 put the Company in the grinding halt by misusing position as joint signatory is untenable as Respondent No. 2 had signed cheques jointly with Respondent No. 3 on 17th June, 2019 on behalf of Company, while the hearing was going on before this Appellate Tribunal. It is contented that the inferences drawn by the Tribunal are erroneous as the Appellant never gave her consent for appointment of Independent Director to act as Chairman

with a casting vote. The letter from Appellant only proposed a Chairman, being a retired High Court Judge, to oversee the proceedings so as not to cause any prejudice to the pending litigation and also to carry out the statutory compliances for the Company.

13. Per contra Dr. U. K. Chaudhary, learned senior counsel representing Respondent No. 2 (Original Petitioner) submits that the appeals preferred by the Appellant deserve to be dismissed as the Appellant expressly gave consent for appointment of Independent Director in her affidavit dated 8th October, 2017 filed in the Company Petition. It is further submitted that the appeals are not maintainable also on the ground that the Appellant herself on 5th October, 2017 issued Board Notice for statutory compliances and proposed convening a meeting of the Board on Saturday, 14th October, 2017 and proposed name of Hon'ble Justice Shri P. B. Majumdar (Retd.) to be appointed as Chairman to oversee the proceedings of the meeting. Respondent No. 2 opposed appointment of outside person as Chairman. It is submitted that if there was no deadlock then why the Appellant herself proposed the name of an outside person. It is further submitted that the Tribunal directed appointment of outside Independent Director keeping in view facts and circumstances and conduct of Appellant and her allies and not on the basis of alleged concession as claimed. It is further submitted that the Appellant herself made statement before the Tribunal seeking adjournment with consensus for naming Independent Director as borne out by the order dated 18th December, 2017 which followed the impugned order.

It is submitted that the Appellant consciously made submission subsequently about naming an Independent Director and for implementing the order but withheld such orders while filing the appeals. It is submitted that the rectification application was an afterthought. It is submitted that Respondent No. 2 had specifically alleged in the Company Petition that the Board Meetings of 2016 were disrupted and allegations were made against one Practicing Company Secretary by the Appellant. It is submitted that the Appellant did not approve the Board Meetings as held in 2016. It is submitted that the Appellant, by her conduct, put the Company in hardship and the fact remains that till the passing of impugned order there were no Board Meetings and Shareholders Meetings. It is pointed out that few notices were issued by the Appellant and meetings held only to dilute the effect of the impugned order. Appellant and their ally – Respondent No. 5 conducted illegal Board Meeting of 25th July, 2018 which was held without quorum as two Independent Directors i.e. Respondent No. 4 and 5 had ceased to be Directors and on strength of such Board Meeting two AGMs held on same day, which have been challenged by way of I.A. 313/2018. As regards deadlock/ gridlock, it is submitted that though the Company is financially healthy but it shall face penalties and prosecution for statutory non-compliances. The last figure reflected is of financial year 2014-15 which shows that there are no statutory compliances. Therefore, reference to financial result would not lead to the conclusion that there is no deadlock. It is further submitted that the Company Petition is not a counter blast to allegations of siphoning by the Respondent No. 2 against the

Appellant as contended by the Appellant. The impugned order has been passed for regulating the affairs of the Company and it is in the interest of the Company that Independent Directors be appointed to control Promoters. Lastly, it is submitted that the Board comprises legally of two Directors i.e. the Appellant and Respondent No. 2 in the public limited company and the impugned order which is in the interest of the Company's affairs needs to be implemented.

14. Heard learned counsel for the parties at length and perused the record. The two appeals preferred by the Appellant, who figured as Respondent No. 2 in the Company Petition pending consideration before the Tribunal, arise out of common order passed by the Tribunal on 13th October, 2017. The Appellant assails the impugned order on various grounds noticed in the pleadings of the parties and arguments addressed on their behalf. The issues raised in these appeals relate to maintainability of the Company Petition and grant of interim relief. It appears that maintainability of the Company Petition in the context of eligibility of Respondent No. 2 (Petitioner) to file petition under Section 241-242 of the Act is not in controversy. The Appellant, however, has vociferously challenged finding as regards limitation at the very threshold stage. It is the settled position of law that limitation is a mixed question of law and fact. Reference in this regard may profitably be made to the judgment of Hon'ble Apex Court rendered on 11th July, 2006 in Civil Appeal No. 4766 of 2001 titled '**Ramesh B Desai & Ors. Vs. Bipin Vadilal Mehta & Ors.**' reported in (2006) 5 SCC 638 (para 19). It is not in

dispute that in regard to matters falling within the purview of Section 241-242 of the Companies Act, 2013, the Limitation Act does not specifically provide for a period of limitation. In terms of Article 137, which is applicable to matters for which no period of limitation is specifically provided, the period of limitation is three years from the date when the right to apply accrues. Unless there is a continuing cause of action, the right to apply will have to be construed as having accrued when the first violation of right occurs or is discovered. Successive violation of right will not give rise to a fresh cause of action. This being the proposition of law well settled and enunciated through a plethora of judgments, the Tribunal had to determine, with reference to material brought on record by the parties that the Company Petition was filed within the prescribed period of three years from the date when the first violation of right occurred or was discovered unless the Tribunal would find from such evidence that it was a case of continuing cause of action. In both eventualities the Tribunal was required to record its reasons for arriving at such finding which would necessarily depend on appreciation and evaluation of the material having evidentiary value. Any finding which is not informed of the reasons and does not rest upon appreciation of the relevant material/ evidence on record cannot be supported, more so, when it is neither expedient nor practicable to record such finding at the very threshold stage of proceedings on account of the issue of limitation being a mixed question of law and fact. The Tribunal recorded its finding on the limitation in para 20 of the impugned order which reads as under:-

“20. In the case on hand most of the acts of oppression and mismanagement are continuing one. The alleged act of desorting Board Meetings and some other acts are well within three years. Therefore, the petition is not barred by limitation.”

On a bare look at the impugned order it is manifestly clear that most of the allegations of oppression and mismanagement emanating from Respondent No. 2 were denied by the Appellant and other Respondents in their reply before the Tribunal and the Tribunal was conscious that it had to consider whether the acts of oppression alleged are continuing one or concluded one and if they are concluded, whether they are within the prescribed period of limitation. Still the Tribunal proceeded to return the finding on the issue of limitation in para 20 of the impugned order extracted hereinabove without referring to the relevant facts and evidence in support thereof to arrive at the finding that most of the acts of oppression and mismanagement were continuing one. As indicated hereinabove, if some acts of oppression or mismanagement do not form part of a series so as to give rise to a continuing cause of action, right to apply would accrue from the date when the first violation of right occurred or was discovered. The Tribunal appears to have given short shrift to the matter by making a general observation that most of the acts of oppression and mismanagement are continuing one. This observation is not based on consideration of material. Admittedly, it is also not based on any admission on the part of

Appellant. Since the matter was still at the very threshold stage and the issue of limitation involving mixed questions of law and fact was required to be examined in the light of relevant material/ evidence let in by the parties during inquiry of the Company Petition, the Tribunal ought not to have indulged in this exercise at the very initial stage. The observation in para 20 of the impugned order does not have the trappings of a judicial finding and cannot be supported. The Tribunal would have done well by not going through this exercise at the very initial stage by treating the issue of limitation as a preliminary issue. The course adopted was neither desirable nor called for. However, this legal infirmity would not affect the admission of the Company Petition when the eligibility of Respondent No. 2 to file the Company Petition under Section 241-242 of the Act was neither disputed before the Tribunal nor assailed before this Appellate Tribunal in appeal. The appeal had otherwise also to be admitted without dealing with the issue of limitation at the threshold stage as the questions requiring probe during inquiry in the Company Petition and having a semblance of fairness could not be decided on merit at that stage.

15. Now coming to the issue of grant of interim relief, be it noticed that Section 241 of the Act dealing with grant of relief in cases of oppression and mismanagement provides that any member of a company, eligible in terms of Section 244 of the Act, may apply before the Tribunal for an order under Chapter XIV dealing with prevention of oppression and mismanagement. Such member's complaint must be in regard to the affairs of the Company

that have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company or that any material change has taken place in the management or control of the company and because of such change it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members. Section 241(2) of the Act enables the Central Government also to apply to the Tribunal for an order under Chapter XIV of the Act, if in its opinion the affairs of the Company are being conducted in a manner prejudicial to public interest. Section 242 of the Act dealing with the powers of the Tribunal empowers it to pass such order as it thinks fit if, based on application filed under Section 241 it is of opinion that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member(s) or prejudicial to public interest or in any manner prejudicial to the interests of the company and on just and equitable ground winding up order would be justified but such winding up would unfairly prejudice such member(s). Sub-section (2) of Section 242 deals with the nature of substantive relief that can be granted though same is only illustrative and not exhaustive. Section 242(4) of the Act provides for interim relief which the Tribunal may grant for regulating the conduct of the company's affairs. Such interim relief can be granted by virtue of an order passed on the application of any party to the proceeding and such order can be subjected to terms and conditions which appear to the Tribunal to be just and equitable. On a plain reading of these provisions, it is abundantly clear

that pending consideration of application by a member or member(s) of a Company alleging oppression or mismanagement, the Tribunal is vested with wide discretion to make any interim order on the application of any party to the proceedings, which it thinks fit for regulating the conduct of company's affairs. Such interim order can be subjected to terms and conditions which appear to the Tribunal to be just and equitable. The nature of interim order would depend upon the nature of complaint alleging oppression or mismanagement and the relief claimed therein. A member alleging that the affairs of the company have been or are being conducted in a manner prejudicial or oppressive to him or any other member or prejudicial to the interests of the company must come up with specific allegations of oppression and mismanagement and demonstrate that the affairs of the company have been or are being run in a manner which jeopardizes his interests or interests of other members or the interests of the company. Passing of interim order necessarily correlates to regulating the conduct of company's affairs. It is therefore imperative that the member complaining of oppression or mismanagement makes out a prima facie case warranting grant of relief in the nature of an interim order. The making of an interim order by the Tribunal across the ambit of Section 242 (4) postulates a situation where the affairs of the company have not been or are not being conducted in accordance with the provisions of law and the Articles of Association. For carving out a prima facie case, the member alleging oppression and mismanagement has to demonstrate that he has raised fair questions in the Company Petition which require probe. Fairness

of questions depends on the nature of allegations which, if proved, would entitle the member complaining of oppression and mismanagement to final relief in terms of provisions of Section 242.

16. In the instant case, the Company - 'The Lok Prakashan Limited' is admittedly a closely held Company and it cannot be disputed that directoral complaints would be entertainable within the ambit of oppression and mismanagement. Admittedly, Respondent No. 2 herein (Petitioner in the Company Petition) was holding 22.79% of equity shareholding in the Company. He alleged in the Company Petition that the Appellant and Respondent No. 3 were managing Respondent No. 6 (AASPAS Multimedia Ltd.) as Executive Directors. Allegedly, various resources of the Company came to be transferred and utilized by Respondent No. 6 and the TV Channel 'GSTV' capitalized on goodwill and reputation of 'Gujarat Samachar' Newspaper published by the Company without any disclosure of interest by the Appellant and Respondent No. 3 creating a wrong impression in the mind of the public that the Channel was a part of the Company. It was further alleged that the Company was prevented from raising invoices as regards advertisements issued by Respondent No. 6 published in Newspaper 'Gujarat Samachar' of the Company. Respondent No. 2 herein also alleged in the Company Petition that the Respondent No. 3 has usurped the powers of Editor without declaration though he was only a publisher also being one of the signing authority. It was further alleged that the Appellant and Respondent No. 3 created impediments in conducting of

Board Meetings/ Annual General Meetings. Besides, the Board Meeting on 10th June, 2016 was not allowed to do business as per agenda. Respondent No. 2 alleged harassment at the hands of Appellant, who wrote letter dated 3rd September, 2016 making some allegations targeting Respondent No. 2 herein and disrupting the affairs of management. It was further alleged that after the demise of Shri Shantilal Shah, Appellant and Respondent No. 3 created many impediments in smooth functioning of the Company, no legal appointment of Editor was made and one Mrs. Illa Parikh employee of 'Gujarat Samachar' was being paid salary though her services were utilized by Respondent No. 6. It was further alleged that Respondent No. 3 was reluctant to sign the cheques and letter of credit. It was alleged that the Appellant had addressed letter dated 13th January, 2017 to Respondent No. 2 herein in order to defame him and to hide the irregularities committed by her. It was further alleged that the Appellant and Respondent No. 3 deposited demonetized old currency notes of the value of Rs.6 Lakhs received from Vadodara in HDFC Bank, Ahmedabad without knowledge of Respondent No. 2 herein though he was the Managing Director of the Company. Further attempts at deposit of demonetized Currency Notes worth Rs.32 Lakhs with Rajkot Branch of HDFC Bank did not materialize as the Respondent No. 2 herein refused to sign letter of deposit. It was further alleged that Respondent No. 3 although not in management, through the Appellant, who is his wife, is illegally functioning on the post of Editor. The couple is alleged to have supplied inferior quality gifts under the gifts scheme thereby undermining the reputation of the Company. Further acts

of oppression and mismanagement are alleged in the form of the couple not handling the legal matters of the Company properly, uploading and registering the form appointing Respondent No. 2 as Managing Director and certifying the forms by stranger Practicing Company Secretary.

Appellant and Respondent No. 3 disputed the veracity and correctness of such allegations of Respondent No. 2 and gave their own versions of the events blaming the Respondent No. 2 herein for non-compliance of the statutory compliances.

17. The Tribunal, as stated hereinabove, decided to pass interim directions as a corollary to the admission of the Company Petition by making certain observations. Appellant is aggrieved of the same and it has been vociferously contended on her behalf that the observations in the impugned order suffer from various errors which render the findings erroneous. Reference has already been made to the errors pointed out by Dr. Abhishek Manu Singhvi, learned senior counsel for the Appellant in the submissions made at the Bar and noticed hereinabove.

18. According to Appellant, the affairs of the Company were running smoothly and all was well with the Company until Respondent No. 2, who had filed a Civil Suit against one of the suppliers of the Newsprint of the Company, entered into a compromise with the supplier without any authorization of or intimation to the Board of Directors of the Company. This is projected as the core issue triggering the proceedings and stated to

have been ignored by the Tribunal. To ascertain whether the Company Petition was filed on account of such objection raised by the Appellant reference to record is inevitable. In this regard reliance is placed on email dated 13th December, 2016 from Respondent No. 2 to Respondent No. 3 (at page no. 305 of the Paper Book) requesting him to sign cheques and L/C papers regarding case matter of 'Fibro' and 'HDFC Bank'. Reply thereto (at page 359 of the Paper Book) indicates that Respondent No. 3 took serious exception to the consent terms agreed upon by Respondent No. 2 with the supplier terming the same as being extremely prejudicial to the Company as the consent terms enjoined upon the Company to place orders for additional 15,000 metric tons of New print in future with 'Fibro' even when such material was available at more competitive prices from other suppliers. Respondent No. 3 also alleged that he as also the Appellant had been kept in dark about the settlement and the settlement was foisted on them exposing the interests of Company to peril. Appellant, in her letter dated 13th January, 2017 (page 287 of the Paper Book) also responded to email dated 13th December, 2016 emanating from Respondent No. 2 in the same tone and tenor reiterating the stand taken by Respondent No. 3. What transpires from this communication between the parties is that there was lack of confidence between Respondent No. 2 herein on one hand and the Appellant and Respondent No. 3 (the couple) on the other side and the same related to the affairs of the Company. While it is true that mere lack of confidence would not amount to oppression of a member, acts of omission or commission bearing nexus with such lack of confidence may have an

adverse impact on the affairs of the Company and its ongoing operations moreso when the Company is a productive one like in the instant case, publishing a daily newspaper, claiming to be of repute and having wide circulation. Lack of confidence between the two warring factions may any time snowball into a major conflict culminating in the publication of newspaper coming to a grinding halt and such aggravated form of lack of confidence would seriously jeopardize the interests of the Company besides imperiling the rights and interests of the affected member. It is in this context that a prima facie case qua deadlock has to be appreciated.

19. The stand taken by Appellant before the Tribunal qua allegations of oppression and mismanagement is that the same are merely “operational issues” which included procurement of newsprint. Serious exception has been taken to the conclusions drawn from the pleadings of Appellant in Company Petition proceedings by the Tribunal when it observed in the impugned order that there are certain operational issues and there was a deadlock in the management of the Company. Challenge on this ground does not appear to be of much substance as it would appear from the discussion made hereinabove that since the issues including procurement of newsprint were of substantial importance having a direct bearing on the publication of the newspaper which admittedly is the lifeline of the Company earning huge revenue, such issues, if continued to drag on, would have serious ramifications affecting the productivity, financial health and sustainability of the Company, more so as the settlement arrived at by

Respondent No. 2 with the Supplier in civil litigation qua supply of newsprint was questioned by the Appellant.

20. Now we shall proceed to consider whether the appointment of any Independent Director was consented to by the Appellant. In this regard reference may be made to affidavit in reply of Appellant filed before the Tribunal which refers to Board of Directors Meeting dated 27th September, 2010. It emerges therefrom that a committee constituted in January, 2009 examined the operational problems faced by the management of the Company and submitted its report containing 26 recommendations which was placed before a meeting of the Board of Directors held on 27th September, 2010. One of the recommendations related to strengthening the Board for which eight names were suggested. Respondent No. 2 and Respondent No. 3 were jointly authorized to approach the said eight persons so as to obtain consent of any three to be appointed on the Board before 31st March, 2011. It appears that the various committees formed in terms of the resolutions passed by the Board of Directors could not function and all recommendations were not implemented. Recommendation to increase the strength of the Board and the resolution in that behalf also could not be enforced. The Appellant further stated in her reply affidavit before the Tribunal that she had no objection to increasing the strength of the Board by inducting Independent Professional Directors (page 459 of the Paper Book). This being the pleadings of Appellant before the Tribunal in specific and unambiguous terms expressing her willingness to increasing the

strength of the Board by inducting Independent Professional Directors, it is futile to contend that the same, read in conjunction with the Board resolution cannot amount to consent for appointment of Independent Director. The objection raised and arguments advanced on this score are overruled. So far as objection regarding appointment of Independent Director to act as Chairman with a casting vote being violative of Articles of Association is concerned, same does not appear to have any substance as the Article 182 of the Articles of Association dealing with 'Appointment of Chairman' explicitly speaks of the Chairman being elected from amongst the Directors without placing an embargo on an Independent Director to be so elected. The Article also provides for a casting vote for the Chairman at the Board Meeting and at the General Meeting. Viewed thus, the objection raised being untenable is overruled.

21. In so far as, appointment of Respondents No. 4 and 5 is concerned, both are stated to have been appointed at the 74th AGM of the Company. Respondent No. 4, in his reply affidavit dated 14th March, 2018 before the Tribunal stated that he was inducted on the Board as a Director of the Company and the Board comprised of Respondent No. 2 and the Appellant who chose Respondent No. 4 and Respondent No. 5 respectively as Independent Directors. He further stated that neither he nor Respondent No. 5 were appointed from the Data Bank and the existing members of the Board would appoint others as Independent Directors. While Respondent No. 5 in her reply affidavit dated 21st January, 2018 refuted the statement of

Respondent No. 4 regarding the manner in which Respondents No. 4 and 5 have been appointed and stated that she was an Independent Director appointed as far back as 31st December, 2015 and had not been appointed either by Respondent No. 2 or by the Appellant. Appellant has filed further affidavit referring to this controversy and stated that though the term of Independent Directors had come to an end on 30th December, 2016, the Company in its 75th AGM held on 29th August, 2018 reappointed Respondents No. 4 and 5 as Independent Directors for a term of three years. This development is a subsequent development. Queer enough is the statement in additional affidavit of Appellant dated 29th January, 2019 that Respondent No. 4 has filed an I.A. before the Tribunal that since his term was only for one year commencing from 30th December, 2015, he ceased to be Independent Director of the Company by operation of law and gave intimation thereof to Registrar of Companies, Gujarat, Ahmedabad. It would therefore, for the purposes of consideration of appeal on the aspect of grant of interim relief, be not out of place to observe that Respondents No. 4 and 5 have been taking stands as suits their mentors which compounds the deadlock. This conclusion is clearly deducible from the contradictory stands taken by Respondents 4 and 5 regarding their mode of appointment. This is apart from controversy interse the dominant characters (Appellant and Respondent No.3 (Couple) on one side and Respondent No.2 on the other side). There being no love lost interse Respondents 4 and 5 on this material aspect, the only inference available is that they are pliable. We refrain from making any further comment on the merits of their respective stand lest

same causes prejudice to either of the parties during inquiry in the Company Petition.

22. Now we proceed to examine whether there are any errors apparent from the face of the record which renders the impugned order unsustainable. The stand taken by the Appellant that the disputes raised in the Company Petition by Respondent No. 2 are self-engineered and do not constitute oppression or mismanagement would necessitate a probe into such allegations and recording of finding on the basis of material produced and evidence adduced during the inquiry of the Company Petition. This cannot be decided within the narrow scope of an application seeking interim relief. Once Respondent No. 2 was able to demonstrate that the affairs of the Company were not being conducted smoothly, not on account of petty squabbles arising out of day to day working, but due to serious differences on key issues like procurement of newsprint, which is essential for survival of the business of the Company engaged in publishing of a widely circulated Newspaper and also with regard to settlement of dispute with the supplier in civil litigation, the Tribunal would be acting within its province to intervene by passing interim directions to safeguard the interests of the Company and its various stakeholders. It is apt to notice the scheme of legislation engrafted in Sections 241-242 of the Act. While interim directions can be sought pending inquiry in Company Petition as regards allegations of oppression and mismanagement which happened in the past, Section 242(4) of the Act empowers the Tribunal to pass interim directions for regulating

the conduct of the Company's affairs on just and equitable terms and conditions which clearly envisages managing the affairs for the present as also for future, i.e., till the Company Petition is decided. Viewed in this context, the objection raised by the Appellant that in the Company Petition there is no prayer for appointment of an Independent Director to act as Chairman with casting vote and to participate in day to day operations of the Company is without substance. The Tribunal, in absence of appropriate relief being sought, has the power to mould the relief as per the facts and circumstances of the case and ensure that the ends of justice are not defeated. It would be relevant to refer to letter dated 5th October, 2017 written by the Appellant to all Directors proposing a meeting of the Board on 14th October, 2017. She proposed appointment of Hon'ble Justice Shri P. B. Majumdar (Retd.) as Chairman to oversee the proceedings of the meeting (Page 441 of the Paper Book). Though, Respondent No. 2 did not object to the convening of the meeting but maintained that it was not permissible to take an outside person as Chairman without being a member of the Board. This lends credence to the plea of Respondent No. 2 that the affairs of the Company were not being conducted smoothly and, in the least, outside intervention was required to oversee the proceedings of the Board of Directors for managing the affairs of the Company and also to ensure statutory compliances. The fact remains that in regard to convening of Board Meetings, Annual General Meetings and filing of statutory compliances there is a deadlock. Appellant's contention that such deadlock is artificial and self-engineered by Respondent No. 2 cannot be decided at

this stage of the proceedings and within the ambit of application seeking interim directions. The contentions raised on behalf of Appellant in this regard are accordingly repelled.

23. Now coming to the aspect of deadlock in the context of the Board of Directors being equally divided, be it seen that the Company being left with only three Directors pursuant to resignation of Respondent No. 4 retrospectively w.e.f. 30th December, 2016 as contended by learned counsel for Appellants and the same having been rebutted by Respondent No. 2 by disputing the legality of the AGM granting extension to the Independent Directors, constitutes an issue requiring finding at the inquiry in Company Petition. Same cannot be addressed within the ambit of this appeal, which has a limited scope. Even otherwise this aspect is not going to clinch the issue at this stage as the projected deadlock pertains to the management of the affairs of the Company and concerns being shown for its ongoing operations as also complying with the statutory requirements. The deadlock, not being limited to issue of numerical strength of the Directors, would not get diluted on account of one or other Independent Director resigning voluntarily or otherwise. We do not wish to say anything more on this aspect at this stage lest the same prejudices the inquiry.

24. Now coming to the issue of alleged incorrect concessions attributed to Appellant in impugned order, be it seen that para 25 of the impugned order refers to an event at the hearing i.e. during the course of arguments both sides admitted that each Independent Director selected by the Appellant and

the Respondent No. 2 were supporting their mentors and thus the Board was equally divided. This observation refers to something that transpired during the course of hearing before the Tribunal. It cannot be disputed that sanctity is attached to the judicial record and no material in rebuttal thereto can be admitted to disprove the same unless the same is attributed to some human/clerical error or inadvertence. We are aware of the proposition of law that where there is a mixed question of law and fact, a concession made by a lawyer during arguments would not preclude the party from re-agitating the point in appeal. We have already referred to the letter dated 5th October, 2017 emanating from the Appellant in regard to convening of AGM on 14th October, 2017 which clearly speaks of convening of meeting of the Board of Directors to ensure statutory compliances and proposes appointment of Hon'ble Justice Shri P. B. Majumdar (Retd.) as Chairman to oversee the proceedings of the meeting. This letter, ex-facie, does not speak of the two Independent Directors respectively supporting their mentors. However, since we have come to an independent conclusion about existence of a prima facie case as regards deadlock and for existence of grounds justifying interim directions for regulating the affairs of the Company, we do not want to enter the controversy as regards such concessions and errors pointed out on behalf of the Appellant as the same may embarrass the inquiry. So far as the interim orders dated 2nd November, 2017, 23rd November, 2017 and 18th December, 2017 are concerned, same can be interpreted only as attempts at seeking adjournment as a sequel to the

impugned order. Interpreting the same as falling in line with the impugned order would not only be absurd but preposterous too.

25. For the foregoing reasons, we hold that the impugned order in so far as the same dealt with the issue of limitation suffers from legal infirmity and cannot be supported. The Tribunal would be required to arrive at a finding on the issue after inquiry in the Company Petition, the same being a mixed question of law and fact. The impugned order to that extent has to be set aside and appeal partly allowed. However, we have found that the Company Petition was fit for admission and come to an independent conclusion as regards existence of a prima facie case in respect of deadlock entailing consequences like non-holding of AGMs, Board Meetings, General Meetings and non-filing of statutory compliances, warranting passing of appropriate directions in terms of Section 242(4) of the Act for regulating the conduct of the Company's affairs. In the given circumstances, while we do not support induction of an Independent Director for being appointed as a Chairman, we cannot leave the interests of the Company as also of its various stakeholders in jeopardy. Therefore, we propose to modify the interim directions and substitute the same with appointment of a Retired Judge (Judge of Hon'ble Apex Court or Hon'ble Chief Justice or Judge of a High Court) from a panel of three names to be submitted by each of the parties to the Tribunal within three weeks of pronouncement of this Judgment giving the Tribunal liberty to decide the fee of the Hon'ble Judge who would constitute the single member 'Oversight & Supervision Committee' to oversee and supervise the

conduct of the Company's affairs and ensure that the affairs of the Company are conducted and regulated in accordance with law, rules and regulations occupying the field. The Board of Directors of the Company will function under his supervision and no decision shall be taken without his approval. The Tribunal would be expected to seek consent of the Hon'ble Judge for such appointment. We order accordingly.

The appeal is disposed of in the aforesaid terms. Interim direction passed during the pendency of this appeal, if any, shall stand vacated.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

NEW DELHI

5th September, 2019

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