NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No. 237 of 2017

[Arising out of Order dated 15th June, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in C.P. No. 15/241-241/NCLT/ AHM/2017 with IA 68, 69, 70, 71 and 72/2017 and IA 92, 93/2017]

IN THE MATTER OF :

M/s. Power Finance Corporation Limited,
(through Manoj Sharma and P.K. Sinha)
Urjanidhi,
1, Barakhamba Lane,
Connaught Place,
New Delhi – 110001. **... APPELLANT**
[Original Petitioner]

- Versus -

1. **M/s. Shree Maheshwar Hydel Power Corporation Limited**
   Abhayanchal Parisar,
   Post Mandaleshwar,
   Mandaleshwar – 451221.
   Madhya Pradesh.

2. **Mr. Shambhukumr S. Kasliwal,**
   Padam 1, Flat 17,
   4-B, Peddar Road,
   Mumbai – 400026.

3. **Mr. Mukul S. Kasliwal,**
   Padam 1, Flat 17,
   4-B, Peddar Road,
   Mumbai – 400026.

4. **Mr. Vikas S. Kasliwal,**
   Padam 1, Flat 17,
   4-B, Peddar Road,
   Mumbai – 400026.

5. **Mr. Abhay Kumar Kasliwal (deceased)**
   Padam 1, Flat 17,
   4-B, Peddar Road,
   Mumbai – 400026.

6. Mr. Warij A. Kasliwal,
Flat No. 3, 4-B,
G. Deshmukh Marg,
Mumbai – 400026.

7. M/s. S. Kumar Nationwide Limited,
(Formerly S. Kumar Synfab Limited)
"Awadh", Avadhesh Parisar,
Shree Ram Mills Premises,
G.K. Marg, Worli,
Mumbai – 400018.

8. M/s. Entegra Limited,
S. Kumars House,
Plot No. 60, Street No. 14,
MIDC (PHASE – II),
ANDHERI (EAST),
Mumbai – 400002.

9. M/s. MW Infra Developers Private Limited,
99, Niranjan, Marine Drive,
Mumbai – 400002.

10. Shri Ramkrishnan N,
S/o Shri Goptal Krishnan N,
A-2, Third Floor, Atur Pak,
Sion-TromBay Road,
Chembur, Mumbai,
Maharashtra – 400071.

... RESPONDENTS
(Original Respondents Nos. 1 to 10)

Present: **Dr. U.K. Chaudhary, Senior Advocate and Shri Amarendra Sharan, Senior Advocate with Ms. Manisha Chaudhary, Shri Karan Malhotra, Shri Himanshu Vij, Shri Sanchit Guru, Ms. Aprajita Mukherjee, Advocates for the Appellant.**

Shri Sarthak Guru, Advocate for Respondent No. 1.

Shri Ritin Rai with Ms. Kritika Bhardwaj and Shri Aabhas Kshetarpal, Advocates for Respondent No.3.

Shri Abhishek Puri and Shri Yasharth Misra, Shri V. Siddharth and Ms. Surbhi Gupta, Advocates for Respondents Nos. 2, 3, 4, 6, 7, 9 and 10.

Shri Ankur Sood, Shri Uday Bedi and Ms. Romila Mandal, Advocates for Respondent No. 8.

J U D G E M E N T

A.I.S. Cheema, J :

This appeal has been filed by the Appellant – Power Finance Corporation Limited (a Government of India Undertaking) against the impugned Judgment & Order dated 15th June, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (hereinafter referred to as 'NCLT') in C.P. No. 15/241-242/NCLT/AHM/2017. By the impugned judgement, the NCLT dismissed the Company Petition filed by the Appellant (hereinafter referred to as "Petitioner"), and accordingly disposed off IAs pending.

Case of Petitioner

2. The Company Petition as filed before the NCLT and the case which was put up in short are as follows :-

A. Respondent No. 1 Company (hereinafter referred to as "Company") was incorporated and was to deal in generating, developing etc. energy including electricity and other types of power like gas, coal etc. Its authorized Share capital is Rs. 2500 Crores and Paid-up capital is Rs.565,379,0000/-. The Petitioner is a Government of India Enterprise under the Ministry of Power, New Delhi. It is holding 13,18,46,779 equity shares of Rs. 10/- each in the Respondent Company representing 23.32% of Issued and Paid-up Share Capital.

Respondents Nos. 2 to 5 are Promoter Directors of the Respondent Company. Respondent Nos. 2 to 6 are Personal Guarantors of the Respondent Company and Respondents Nos. 7 to 9 are Corporate Guarantors. Respondent No. 10 was one of the Executive Directors and Company Secretary of the Respondent Company at the concerned point of time.

B. Maheshwar Dam was planned as part of the Narmada Valley Development Project in 1978 and in 1989, Madhya Pradesh State Electricity Board (MPSEB) was assigned the responsibility to build the same. In 1993, the Project was allotted to Respondent No. 8 - M/s. Entegra Limited (earlier known as – M/s. S.K.G Power Ventures Pvt. Ltd.) which floated Respondent No. 1 Company to implement the Project. It was required to set-up a Power Project having capacity of 400 M.V. In December, 1996, the estimated cost of the Project was Rs.1,565 Crores. The Petitioner claimed that the Respondents were in full control and management of the Company but could not complete the Project even in 13 years due to gross mismanagement of the Company. The Project cost went up. Respondents failed to bring in necessary equity. Petitioner and other public sector companies from time to time funded the project. On the request of the Respondent Company, the Petitioner provided term loan of Rs. 100 Crores and foreign currency loan of US$ 34 Million. M.P. Government accorded

stand-by guarantee to the extent of Rs. 4000 Million to improve marketability of bonds issue. The Petitioner gave details as to how the Respondent Company required funds and the Petitioner and other lenders invested in the Project.

NCLT in the impugned Order has recorded in detail the developments as to how the lenders brought money to the Respondent Company. The Petitioner claimed that although the Respondent Company had promised to infuse Rs. 430 Crores of equity but it could infuse only Rs.100 Crores and the Respondent Company had defaulted in servicing of the debts. Due to the loans raised by the Respondent Company and inability to pay-off, the Company was declared as Non-Performing Assets (NPA) in the books of accounts of the Petitioner on 31st March, 2012. As there were problems in the Respondent Company, the Government of Madhya Pradesh appointed a High Level Committee. Committee in Report dated 2nd May, 2015, made certain suggestions. The Impugned Order has referred to the suggestions as under :

"Scenario – I Implementation by the present promoter 90 days' time allowed till 2nd August, 2015. Existing promoter will have to arrange additional equity of Rs. 600 crores as well as debt of Rs. 1100 crores at concessional rates to achieve the M.P. Power Management Company Limited stipulated tariff of Rs.5.32 per unit.

Scenario - II Government companies having majority equity project with management control project could be taken over by NHPC/NHDC and petitioner company would be amenable to infusing equity or additional debt as well as lowering of interest rate for existing debt and with commensurate support from lenders, tariff could be reduced to Rs. 5.32 per unit which is acceptable to M.P. Power Management Company Limited.

Scenario – III Cancellation of PPA

If the scenario I & II above do not fructify, the last option will be that M.P. Power Management Company Limited cancels the existing Power Purchase Agreement, Government of Madhya Pradesh and M.P. Power Management Company Limited would be burdened on account of Govt. MP counter guarantee deed of Rs. 400 crores issued to petitioner company. This is apart from Rs. 102.48 crore which has already been paid by M.P. Power Management Company Limited to petitioner company."

C. According to the Petitioner, the Promoters were given 90 days' time to submit a firm and binding proposal regarding arrangement of additional equity of Rs. 600 Crores and the debt of Rs. 1100 Crores at concessional rate and to ensure that the tariff would not be more than Rs. 5.32 per unit. The Promoters of the Respondent Company were unable to infuse necessary cash equity and raise loan to complete the Project and Scenario-I failed. The lenders initiated recovery proceedings with issue of loan recall notice dated 5th January, 2016.

D. According to the Petitioner, the Petitioner in such circumstances converted the subordinate debt into equity. Respondents Nos. 3 and 8 did not clear the default and because of it, notice dated 19th May, 2016 was issued to invoke pledge. Conversion notice dated 18th December, 2015 and revised notice dated 27th May, 2016 were issued. Subsequently, on 1st June, 2016, there was transfer of pro-rata shares in favour of the Petitioner and other lenders who have invoked the rights and new shares were issued to them converting such debt into equity. The Petitioner claimed that the lenders took over majority equity of Respondent Company and started revival work on the Project with the support of lenders. The Petitioner gave details before the NCLT of the revival works. According to the Petitioner, Respondent No. 3, however, resorted to filing false and misleading complaints to Registrar of Companies (ROC) because of which the Respondent Company was

marked as "management disputes". The inquiry was initiated by the ROC. Respondents Nos. 3 and 8 and Respondent No. 10 did not transfer documents of the Respondent Company to the Petitioner.

Alleged Oppression and Mismanagement

E. In short, the Petitioner made following allegations against the Respondents :-

(i) Siphoning of funds and financial mismanagement in relation to servicing of debentures issued to IDBI Trusteeship Services Ltd. There was diversion of funds of Rs. 2.30 Crores in March, 2013;

(ii) There was default in repayment of inter corporate deposit of Madhya Pradesh State Industrial Development Corporation Ltd. and cheques issued to them were dishonoured between 2009 and 2013;

(iii) There was illegal transfer/adjustment of funds of Rs. 5.28 Crores to Respondent No. 8- M/s. Entegra Ltd. in 2010;

(iv) There was mismanagement. Project Insurance lapsed in 2014; in 2010-11, Respondent No. 8 refused to convert the Optionally Fully Convertible Debentures (OFCD) into equity shares;

(v) There was persistent default in payment of principal and interest amount for debentures to the extent of Rs. 400 Crores issued by the Respondent Company to MPPMC in 2013 and 2014;

(vi) Respondent No. 10 when he ceased to be Company Secretary failed to hand over statutory records;

(vii) Respondents failed to deposit T.D.S. deducted to Income Tax Authorities;

(viii) Respondents failed to infuse equity.

F. In sanction letter dated 2nd March, 2005 issued by the Petitioner for revaluation of loan, it was proposed that there should be nominee Director of the Petitioner in the Company and Articles of Association of Respondent No. 1 Company need to be modified. The Respondent Company availed credit facilities for the Project without raising any objection and after amendment to Articles of Association, Mr. G.S. Patra, Nominee Director of the Petitioner and nominee directors of other lenders were taken on Board of the Respondent Company.

Prayers in Company Petition

G. In the Company Petition, the Petitioner made following prayers :

"A) Declare that the Respondent No. 2 to 6 and Respondent No. 10 have indulged in serious and grave acts of financial mis-management and siphoning of funds and other illegal and fraudulent acts;

B) Direct the Respondent No. 2 to 6 and Respondent No. 10 to restore the funds of the Respondent No. 1 Company,

which would be ascertained/calculated after the trial of the present petition;

C) declare Respondent No. 2 to 6 and 10 have indulged in serious acts of fraud under Section 447 of the Companies Act, 2013 and consequently order for prosecution;

D) Declare that condonation/grant immunity against the violation of various provisions of the Companies Act, 1956/2013 in relation to Shri Gauri Shankar Patra and our earlier nominee Director of the Petitioner on the Board of Respondent No. 1 Company;

E) Direct the Registrar of Companies, Gwalior not to launch any prosecution against Shri Gauri Shankar Patra, and our earlier nominee Directors of Respondent No. 1 Company against possible prosecution to be launched by the Registrar of Companies, Gwalior or any other Government and/or prosecuting authorities.

F) Direct the Respondent No. 2 to 6 and 10 to restore to the Respondent No. 1 Company all Statutory Records, Books of Accounts, Ledger, Cash Book, all ancillary and incidental Registers, Invoices, Vouchers, Records, Documents and other assets of the Respondent No. 1 Company;

G) Direct the Registrar of Companies, Gwalior to lift the order "management dispute" to enable the Respondent No. 1 Company to file various returns/documents as are required to be filed under the various provisions of Companies Act, 2013;

H) Direct the Income-tax Authorities not to launch prosecution under the Income-Tax Act, 1961;

I) Direct the Authorities under the Industrial & Labour Laws not to launch prosecution under the relevant laws against the nominee Directors of the Petitioner Company who were on the Board of Directors of the Respondent No. 1 to secure and protect interests of the Public Funds;

J) Declare that the lenders including the Petitioner along with other lenders namely Rural Electriciation Corporation (REC), Housing and Urban Development Corporation (HUDCO), Edelweiss Asset Reconstruction Company Limited (EARC), IFCI Limited, Dena Bank Ltd., and National Insurance Company Limited (NIC) have acquired the management control of the Respondent No. 1 Company w.e.f. 01.06.2016;

K) Declare that the Petitioners along with other and/or in combination with each other are not Holding Company or Associate Company or Joint Venture Company or Co-

promoters of the Respondent No. 1 Company prior to 01.06.2016;

L) Direct the authorities of Ministry of Corporate Affairs not to launch any prosecution either under the Companies Act, 1956/2013 or any other law against the petitioner, nor its nominee director on the Board of Respondent No. 1 and/or other lenders/equity shareholders who are public financial institutions;"

3. Thus, Prayers A, C, D, J and K related to declaration while Prayer B claimed restoration of funds. The Prayer F related to claim of Petitioner for restoration of the statutory records. Rest of the prayers were mainly for seeking protection from various authorities.

Case of Respondent No. 1

4. In NCLT, Respondent No. 1 Company filed reply and claimed that one Mr. Nirbhay Goel had been appointed Company Secretary on 1st January, 2016. It was claimed that in the Board Meeting dated 1st January, 2016, the request of lenders was considered and approved invoking the pledge of shares due to which shareholding of Respondent No. 8 – M/s. Entegra Limited in Respondent No. 1 Company reduced from 58% to 12.28%. The Petitioner being lead lender had decided to invoke the pledge. M/s. Entegra Limited thus ceased to hold the status of the holding company. This Respondent gave particulars as to the numbers of shares held by the Petitioner as well as other

lenders. It was stated that the sub-debt was converted into equity from 1st June, 2016 for an amount of Rs. 66.10 Crores. This led to increase in the Paid-up capital of the Respondent Company. The Form submitted on this count with the ROC did not get approved due to the Respondent Company having been marked as 'Under management dispute'. The Company issued notice to the past management and Respondent No. 10 for records but the same were not available. This Respondent claimed that lenders used to disburse the funds to the Respondent Company on regular intervals. The records are kept in safe custody of the Company Secretary of the previous management but he did not hand over records of the Company.

Case of Respondent No. 2

5. Before NCLT, Respondent No. 2 claimed that he had no role in decision-making process. Due to market conditions, the project required re-finance and Respondent Company entered into discussion with the Petitioner, Government of Madhya Pradesh and Government of India to re-finance to revive the Project. Later on, the Petitioner agreed to re-finance the Project subject to modification of Articles of Association to the extent that the Petitioner would have complete autonomy in decision-making and appointment of Directors of the Respondent Company. Respondent No. 8 was given rights to nominate only one single Director on the Board. The Articles of Association were amended in 2005 and since then, the Petitioner had been managing the Respondent Company. According to this Respondent, the

Petitioner is solely responsible for the affairs of the Company, and petition is filed with malicious intention to cover-up its own mistakes.

Case of Respondents Nos. 3, 4, 6 to 9

6. Respondent No. 5 was dead before the NCLT decided the matter. The other Respondents Nos. 3, 4, 6 to 9 disputed the claims made by the Petitioner. According to these Respondents, the shareholding claimed by the Petitioner and its supporters is based on illegal invocation of the pledged shares. They claimed that the shareholding of the Petitioner is zero. The Petitioner supported by other Public Sector Companies has filed this petition to scuttle the investigation taken up by ROC in the wrongdoings of the Petitioner with respect to the affairs of the Respondent Company. These Respondents claimed that the alleged acts of 'oppression and management' are in relation to the period when the Petitioner itself was in actual control of the affairs of the Respondent Company. The Petition has been filed belatedly and was not *bonafide*. These Respondents claimed that they had made complaints regarding illegal and wrongful manners in which the Petitioner was conducting the affairs of Respondent Company. According to them, in 2005, it is the Petitioner who took over control of the Respondent Company by appointing managing Committee of its own. They got the Articles of Association of the Respondent Company altered which amendments gave additional powers to the Petitioner. Because of this, Respondent Company was transformed from 'Promoter Managed Company' to 'Lenders' Managed Company'. The day-to-day affairs of the Company were taken over by the

Petitioner. The Petitioner appointed on the Board of Respondent Company persons as Chairman, Managing Director, Finance Director and Nominee Directors of its choice. The only right which remained with these Respondents was to appoint a single Non-Executive Director as Promoter Director. Thus, according to them, even if any acts of 'oppression and mismanagement' are to be attributed, they are to be attributed to the officers of the Petitioner.

These Respondents claimed that in 2010, the Company was in a position to commission three turbines but the Petitioner blocked the commissioning by diverting the entire funds of the Respondent Company to lenders, thereby causing loss of revenue to the Respondent Company. These Respondents claimed that the Petitioner neither funded nor allowed other investors to invest in the Company and the Company was declared as 'NPA'. It is claimed that the Government of Madhya Pradesh formed a High Power Committee to find solutions for the Project for which Ajay Nath Committee was formed and it made recommendations. The Petitioner was not willing to accept the suggestions and subordinate loan was forced upon the Company by the Petitioner under threat and coercion. The subordinate loan was thus void and illegal. The Petitioner has been in management control for 12 years during which only Respondent No. 3 was on the Board and he was also a Non-Executive Director and had no executive authority and powers. According to these Respondents, detailed investigation is necessary with regard to the working of the Company. Respondents Nos. 3 to 8 had reported

to the ROC who conducted inquiry under Section 206(4) of the Companies Act, 2013 ("New Act" in short). Vide letter dated 30th May, 2016, the ROC asked the Respondent Company to furnish explanations on various discrepancies found in the management. The Petitioner apprehending punitive actions tried to suppress the report and the Petition was filed to block and avoid ROC report from becoming public and block action being taken against wrongdoings.

According to these Respondents, 9 out of 12 Directors on the Board were selected by the Petitioner. There was even letter from the Ministry of Power to Ministry of Finance on 10th August, 2006 confirming transfer of absolute management control to the Petitioner. The Petitioner under extra constitutional authority had appointed "Maheshwar Committee" which acted as a Shadow Board of the Respondent Company. They had conflict of interests with Respondent Company but had zero accountability. They were responsible for diversion of Project funds from TRA Bank account which was under control of lenders. The ROC has already examined role played by this Shadow Board with regard to Respondent Company.

7. Respondent No. 4 further claimed before the NCLT that he was not involved with the affairs of the Respondent Company since 2005. Respondent No. 7 claimed that the Corporate Guarantee of Respondent No.7 as claimed by the Petitioner was not legal or subsisting. The High Court of Bombay had in Company Petition No. 511 of 2014, on 1st July, 2016 ordered

winding-up of the Respondent Company but Respondent No.7 filed appeal against the said order and there is stay. Respondent No. 7 had on 5th April, 2007 asked the Petitioner to release Corporate Guarantee given by him to the lenders.

Case of Respondent No. 10

8. It appears that Respondent No. 10, the Executive Director and Company Secretary had considering the approach of Petitioner resigned vide letter dated 26th August, 2015 and Board vide Meeting dated 17th December, 2015 accepted it w.e.f. 31st December, 2015. He claimed before the NCLT that 'Maheshwar Committee' created by the Petitioner was Shadow Supervisory Board of Respondent Company. Since 2005, the lenders dominated the Board of Directors of the Respondent Company. The Petitioner illegally convened Board Meeting dated 1st June, 2016. The Petitioner diverted Project Funds to itself and to fellow lenders. The Petitioner illegally got shares transferred. According to him, Respondent No. 3 was non-Executive Director without any power since 2005. The Petitioner has suppressed documents which disclosed that the management control was with the Petitioner. The lenders and Government of Madhya Pradesh and the public at large invested Rs. 2,000 Crores in the project out of which 40% was diverted back to the Petitioner and lenders. Respondent No. 10 gave particulars as to how there were documents showing that the actual management control was with the Petitioner since 2005. He claimed that the Petitioner diverted the funds available to the lenders. The financial adviser

of the lenders appointed by the Petitioner had audited the Bank Accounts and directly reported to the Petitioner. No case of siphoning was stated by the Petitioner but it has made allegations of siphoning without any evidence. According to Respondent No.10, a sum of Rs. 5.28 Crores appropriated by TRI Bank without the approval of the Petitioner - Power Financial Corporation Limited cannot be deemed to be illegal siphoning by the Respondents. In answer to claim of Petitioner that Respondent No. 10 had unauthorizedly sold scrap, Respondent No. 10 defended his action claiming that there was strike of the site employees and security personnel working in the Project. There was notice of disconnection, regular theft of materials and non-extension of insurance cover. The Labour Commissioner had intervened. Salary and wages etc. had not been paid for 7-12 months which had led to the strike. In such circumstances, Committee of four personnel had been finalized and approved competitive quotes with security deposit received and the scrap was sold. The Special Audit did not find any objection with this and it was discussed in the Board Meeting also.

9. Respondent No. 10 claimed that there was extraordinary General Body Meeting dated 17th June, 2010 which resolved issue of shares at par in the event of failure to repay subordinate loan keeping in mind Clause 1.2 of Subordinate Loan Agreement. But on the very next day, on 18th June, 2010, the Petitioner issued letter amending the terms of Subordinate Loan Agreement to the detriment of the Respondent Company and to advantage of

the Petitioner. By such amendment, the Petitioner ensured that the Petitioner would have right to debit the outstanding dues against the subordinate loan.

10. Respondent No. 10 claimed that he had not been paid salary for 30 months and by letter dated 26th May, 2015, he had pointed out deficiencies in functioning of the Company. Seeing the approach of the Petitioner, he tendered resignation on 26th August, 2015. The Board on 29th September, 2015 asked him to continue till alternative arrangement is made. Later on, on 17th December, 2015, the Board accepted his resignation with effect from 31st December, 2015 without any reference to settlement of dues and without naming any official to whom the charge of the functions and records could be handed over. No officer was nominated to take charge. Respondent No. 10 filed form for cessation to ROC on 11th January, 2016 and stopped attending office. According to him, the Records were there where they had been for last 25 years. They were maintained in Mumbai Office and were in safe custody of employees. He also complained to the ROC regarding lack of governance in the Respondent Company.

Points before NCLT

11. In NCLT, the parties completed their pleadings and were heard. NCLT framed following points for determination :

"1) Whether the statements made in the sur-rejoinders filed by the respondents can be taken into consideration?

2) Whether this Tribunal is entitled to decide the dispute raised by the respondents on the shareholding of PFC and its supporters ?

3) Whether the invocation of the shares pledged by the respondent no.8 is valid or not?

4) Whether shares were transferred to Petitioner according to provisions of Companies Act, 2013?

5) Whether the conversion of Sub-debt into equity is valid or not?

6) Whether petitioner and his supporters are entitled to agitate about the alleged acts of oppression and mismanagement that took place prior to 01.06.2016 on the ground that they are not members of First Respondent Company prior to 01.06.2016?

7) Whether the petition is barred by limitation or not?

8) Whether there is any delay or latches on the part of the petitioner in approaching this Tribunal?

9) Whether the management and affairs of the First Respondent Company have been controlled by PFC from 2005 onwards or not?

10) Whether the failure to infuse equity and repayment of loan amounts to petitioner and other financial institutions, amounts to acts of oppression or mismanagement?

11) Whether the respondents siphoned the moneys of the First Respondent Company?

12) What are the reasons for the delay in the commissioning of generation of power in the project Maheshwar Dam?

14) Whether the parties can have access to report of ROC Gwalior?

14) Non joinder of parties - Prayers E, G, H, I, L.

15) Whether petitioner is entitled for relief (C) prayed in the petition?

16) Whether petition is bona fide one or not?

17) Row over records of 1st Respondent Company.

18) Whether petitioner is entitled for any reliefs in this petition?"

12. NCLT has then exhaustively discussed the rival cases put up by both sides and with reference to the above points recorded findings at Page 108 of the impugned judgment and order in paragraph 154 as under :

Findings by NCLT

"154. In view of the above discussion, the following are the findings arrived by this Tribunal

(1) There is no valid invocation of pledge of shares and transfer of shares do not take place as per law.

(2) Petitioner and his supporters are not entitled to agitate about the alleged acts of oppression and mismanagement that took place prior to 01.06.2016.

(3) Effective control of management of the first respondent company was with PFC and other lenders.

(4) This petition is barred by limitation and petitioner is disentitled for reliefs on grounds of delay and latches.

(5) Failure to repay debts etc. and failure to infuse equity do not amount to acts of oppression and mismanagement.

(6) Allegation of siphoning of funds is vague and there is no material to substantiate the same.

(7) Parties are entitled for copies of ROC report from the office of ROC, Gwalior.

(8) Petitioner is not entitled for reliefs C, D, E, F, G, H, I specifically.

(9) Petition is not a Bona fide petition.

(10) Row over records is raised as a pretext."

13. After recording such findings, learned NCLT considered as to what steps could be taken with regard to the Project and interest of lenders and promoters. Keeping in view Section 242 (2) of the New Act, the NCLT was of the view that workable solution would require consent of all the stakeholders. It expressed that the stakeholders should evolve a scheme with consent of all including promoters so that the Project could be completed. In the ultimate, the NCLT went on to dismiss the petition. Various I.As pending were also disposed of.

14. The Original Petitioner, aggrieved by the impugned judgment & order has filed this appeal, raising various grounds.

Arguments of Appellant – Petitioner

15. We have heard learned counsel for both sides. Learned counsel for the Appellant-Petitioner made submissions which could be stated in brief as under :-

(a) According to the Appellant-Petitioner, there was no pending litigation filed by the Respondent's with respect to the title of the shares claimed by the Petitioner. Respondent No. 1 did not deny shareholding of the

Appellant-Petitioner. According to the learned counsel, it was not necessary for the NCLT to determine whether the Appellant had established clear title to the shares and mode of acquisition. The Appellant-Petitioner had clearly disclosed in the petition that it was holding 13,18,46,779 equity shares of Rs. 10/- each amounting to 23.32% shareholding of the Respondent Company. Thus, the requirement of Section 244 of the Act was satisfied. The Appellant-Petitioner had even produced share certificates which were held in the Respondent Company. The Respondent Company had acknowledged the current shareholding of the Appellant-Petitioner and the transfer of shares and allotment. The shareholding of the appellant was not challenged in any judicial forum till the Respondents came up with their reply in the Petition.

(b) It has been argued by the learned counsel that in the High Level Committee Respondent No. 3 never objected to the report of the Committee which envisaged that the Government Companies including the Appellant-Petitioner having majority equity in the Project would have management control under Scenario-II and thereby consented to the dilution of their shareholding. By letter dated 12th January, 2017 (Pages 876 – 882 of Volume -V of the appeal), the Appellant-Petitioner had confirmed acquisition of 51% shares of Respondent No. 1 by the lenders including the Appellant-Petitioner and stated that the Appellant

agreed to advance additional loan subject to the condition that the lenders/government companies will hold majority equity which was accepted and ratified by Respondent No.1 in Board Meeting held on 2nd February, 2017. Respondent No. 3 was present in that meeting and voted in favour of the Resolution which approved availing of additional loan, along with stipulated conditions. According to the learned counsel, Respondent No. 3 had thus acquiesced to the Appellant acquiring shares of Respondent Company and thus now cannot raise objections.

(c) Learned NCLT committed error because there was no requirement of endorsement on the "Memo of Transfer" in the Share Certificate No. 47 as it was "new share certificate" issued to the Appellant-Petitioner on allotment of shares, pursuant to the conversion of subordinate loan into equity. The argument is that NCLT took hyper-technical approach while determining title of the shares of the Petitioner although there was evidence that on the date of filing of the Petition, the Appellant was member and the acquisition of shares had been consented to and acquiesced and that the Respondents had not filed petition challenging the petitioner.

(d) It is argued that the other lenders who also invoked conversion of the loan into equity are not parties and they could not be condemned unheard.

(e) It has been argued by the learned counsel for the Appellant-Petitioner that the NCLT committed error while dealing with Point No. 5 relating to conversion of debentures into equity. It is stated that reasoning with reference to subsequently introduced Clause 1.4 in the Subordinate Loan Agreement by way of letter dated 18th June, 2010 was wrong. Argument is that Clause 1.4 stating conversion rights was clearly a part of Subordinate Loan Agreement as can be seen from the document at Page 553 of Volume -III of the appeal. Thus, it is stated that there was wrong factual finding. With reference to the observations of the NCLT relating to letter dated 18th June, 2010 issued by the Petitioner it is claimed that the letter actually stated that prior to the disbursement of the subordinate loan, the Respondent No. 1- Company shall submit the Shareholders resolution of the General Meeting held on 17th June, 2010.

(f) Learned counsel further submitted that NCLT erred in accepting the plea of Respondents that the Extraordinary General Body Meeting had been held on 17th June, 2010 without giving 21 days clear notice as the Respondents were in the management of the company and they were responsible for the compliances and cannot take benefit of their own wrong. It is argued that the Respondents had convened a meeting and passed the necessary resolutions which were not recalled and they have acquiesced to the same.

(g) Learned counsel for the Appellant-Petitioner claimed that the Petitioner had only one nominee Director on the Board of Respondent No.1 Company. The said Director cannot be treated as 'Interested Director' under Section 184(2) of the Act as has been done by the NCLT. A Director can be said to be interested if the concerned matter relates to another Company where the Director is holding more than 2% of shareholding. Nominee of the Appellant on the Board of Respondent Company cannot be held to be 'Interested Director'. The decision to convert subordinate loan into equity and transfer of shares was taken by the Board of Directors, including nominee Directors, collectively in the interest of Respondent Company as per Scenario–II and Respondent No. 3 had not raised any objection.

(h) Learned counsel found fault with the judgement & order of NCLT where it found that the past and concluded acts could not be challenged in a petition under Section 241 of the Act as the new amended Section uses the words 'have been' in addition to 'are being carried on' within the scope of oppression and mismanagement.

(i) The Petitioner has submitted that there was deed of pledge dated 30th November, 2006 executed in favour of the Appellant and Respondent No.8 had pledged shares held by it in the Respondent Company for the benefit of lenders. Respondent No. 8 had deposited the original share

certificates with the Appellant along with the share transfer forms duly filled by Respondent No. 8. It was transaction in the nature of mortgage of shares. Power of Attorney was executed by Respondent No. 8 to constitute, appoint and enable the Appellant as its attorney to execute and do all acts and to complete, when required, the transfer of pledged shares in its name. Petitioner was entitled to register shares in its name and the transfer of shares was procedural aspect. The Market value of the shares of Respondent was determined by SBI Capital Markets Limited at the time of notice of invocation dated 19th May, 2016 which was Nil. Token amount of Re.1/- was mentioned and it was not objected and shares were transferred. According to the learned counsel, the NCLT wrongly held that in spite the notice of 30 days, in 15 days itself the transfer was effected. According to the counsel, NCLT failed to appreciate that transfer of shares was prerogative of Respondent Company and it was for the Company to transfer the shares within the maximum time of 30 days, which was done on 1st June, 2016. The transfer thus could not be invalidated, it is argued.

(j) It is stated that Section 176 of the Contract Act, 1872 does not apply as it was not sale of shares but transfer of shares by the pledgee. It is further argued that the Appellant became Member of the Company w.e.f. 1st June, 2016 and has challenged the acts of oppression and mismanagement under the provision of Section 241 as the words “have

been" are added in the section. Learned counsel further tried to show that Respondent No. 3 was part of the Board throughout and it cannot be said that the management of the Respondent Company was with the Petitioner and other lenders as claimed by the Respondents and as has been found by the NCLT. According to him, the amendment of resolution accepting amendments to the Articles of Association was passed by the Respondent No. 8. Only because the Petitioner proposed names for the appointments would not mean that the Petitioner was in control. The Maheshwar Committee was internal committee of the Petitioner for internal processing of matters relating to loan account pertaining to Respondent Company and it had no bearing on the control and management of the Respondent Company. Due to mismanagement by the Respondents, the Project was stalled. The Petitioner and other lenders tried to revive implementing the Project but the Respondents created management dispute. The NCLT erred in holding that the petition was time-barred relying on the Limitation Act. The Petitioner acquired rights only on 1st June, 2016 and this was overlooked.

16. At the time of this appeal, the Appellant-Petitioner without seeking prior leave to file documents which had not been filed before the NCLT, filed the documents. The Respondents objected claiming that the NCLT had mentioned regarding certain documents not being filed which were material documents relating to the issues which had been raised before the NCLT and

thus the documents could not be simply and quietly filed with this appeal. Learned counsel for the Appellant however claimed that the prayer for leave of this Tribunal is not necessary as there was no provision in National Company Law Appellate Tribunal Rules, 2016 (hereinafter referred to as 'NCLAT Rules') which bars filing of new documents. It is claimed that Respondents had in sur-rejoinder in NCLT filed documents and further opportunity was not given to the Petitioner in the NCLT and so they could directly file documents here. Thus, according to the learned counsel for the Appellant-Petitioner, the impugned judgement & order cannot be upheld and it should be held that the Respondents mismanaged the Company and also the Petitioner was entitled to reliefs as sought in the Company Petition.

Arguments of Respondents Nos. 2, 4, 6, 8 and 10

17. Against this, Respondents Nos. 2, 4, 6, 8 and 10 have argued that Annexures -A/2 to A/5, A/7 to A/18 and A/21 filed with the appeal did not form part of the record before NCLT and should be struck-off. It is stated that the Appellant-Petitioner did not state in the appeal that new documents are being produced by it nor the Appellant identified the new documents. The reasonings of the Appellant that NCLT did not give opportunity to produce these documents in response to sur-rejoinder filed by the Respondents is liable to be rejected as the Appellant has not shown that any effort was made to seek permission from NCLT to place the documents on record and that such permission was declined. The conduct of the Appellant in not

identifying and stating the new documents which are produced is unfair. The NCLT drew adverse inference against the Appellant on account of the documents not being produced. Rule 22 of the NCLAT Rules relied on does not give permission to produce new documents. NCLAT has power to regulate its own procedure and the Appellant cannot simply produce new documents. The Appellant in NCLAT suppressed facts of having control over Respondent No. 1 since 2005 as appearing from series of documents and bringing about the amendment to Articles of Association and documents. According to these Respondents, the Appellant in the rejoinder dated 14th April, 2017 in NCLT had admitted that the acts of 'oppression and mismanagement' took place before the Appellant allegedly became shareholder. The NCLT found that the Appellant could not complain of 'oppression and mismanagement' which was of prior to 1st June, 2016. Thus the Appellant could not maintain petition on the basis of such earlier alleged acts. The Appellant cannot challenge acts pertaining to earlier period keeping in view of the provisions of Section 241 of the Act. Even if the word "have been" is to be considered, it cannot be applied to concluded acts of past and the words refer to actions of recent past that have a direct connection with the present time. According to these Respondents, even otherwise the acts alleged relate to time when the Appellant-Petitioner was in actual control and thus the Appellant-Petitioner cannot be heard making grievance. The petition was rightly dismissed for delay and latches. The Petitioner claimed reliefs against various Government Authorities seeking that they should not take

action against the Appellant-Petitioner. Those Authorities were not made party and thus the Petition suffered from non-joinder of the necessary parties. The reliefs claimed were not maintainable. The NCLT correctly held that failure to bring in equity cannot be equated to fraud or 'oppression and mismanagement'. These Respondents referred to various documents, which show that the Appellant was in actual control since 2005. The management vested with the Petitioner and there was no control of Respondent No. 3. The Respondent No. 1 Company was managed by the Petitioner through directions of the Maheshwar Committee consisting of senior officials of the Petitioner. The Directors appointed by the lenders were acting in the interest of the lenders and not the Company.

Arguments of Respondent No. 3

18. For Respondent No. 3 also similar arguments have been made. According to this Respondent, the contention of the Appellant-Petitioner that the NCLT could not have gone into the question as to how the Appellant became shareholder has no substance because when the Respondents disputed the rights of the Petitioner, NCLT was bound to look into the question as to how the Petitioner claimed to be the Member or shareholder. It was not necessary for the Respondents to file separate petitions and they rightly raised dispute in the Company Petition and the same has been correctly decided by the NCLT. It is claimed that separate proceedings for rectification of Register have been filed before the NCLT to remove the name of the Petitioner from Register of shareholders. This Respondent has also

claimed that the Petitioner did not produce necessary documents before the NCLT like (i) Pledge Deed dated 30th November, 2006, (ii) Common Loan Agreement dated 29th September, 2006; (iii) Notice Invoking Pledge dated 19th May, 2016; (iv) Subordinate Loan Agreement dated 29th September, 2006; (v) Notice of Invocation of Subordinate debt dated 27th May, 2016; (vi) Share Transfer Certificates; and (vii) Minutes of Board Meeting dated 1st June, 2016. This defendant claimed that the documents were not produced in spite of the opportunities and so NCLT rightly drew adverse inference against the Petitioner. The documents could not have been produced in Appeal without specific application seeking permission to bring documents on record. It is argued that the Minutes dated 1st June, 2016 show that the decision regarding conversion of the subordinate loan to equity shares and the approving of transfer of pledged shares was taken based on positive and affirmative votes of the Directors nominated by the lenders. Out of the Directors, 4 nominated Directors were not only nominated to the Board by the lenders but they were also employees of the lenders' institution, in whose favour the transfers/conversions were made. The counsel submitted that the NCLT rightly held that such Directors were "Interested Directors" under Section 2(49) of the Act and their participation rendered their resolution invalid. It is argued that under Section 176 of Indian Contract Act, 1872 pledgee could not acquire ownership to pledged articles and benefit of sale has been negated by the action of the lenders unilaterally transferring the shares to themselves valuing the same at Re. 1/-. The value of the

outstanding debt was reduced to Re.1/- which clearly shows *malafides* of the lenders. Thus, this Respondent is supporting the judgment & order of NCLT. It is stated that the pledge invoked without awaiting 30 days' period mentioned in the notice and was bad in law. It is further submitted that the Power of Attorney attached with the pledge deed only contemplated transfer of shares pledged for the purpose of future sale and the Petitioner was placing wrong reliance on the same to justify the act of invoking the pledge. The requisite transfer of shares forms – 4 and 5 were also not submitted by the Appellant. It is argued that the conversion of the subordinate loan was illegal and a result of fraud. Subsequent to the grant of loan, Rs. 76 Crores were diverted to the Petitioner and Rs. 111 Crores were diverted to the other lenders which was completely against the interest of the Respondent Company. The High interest loan was used to pay-off, prior low interest loan. Thus, the Respondent wants the appeal to be dismissed.

Arguments of Respondent No. 9

19. Respondent No. 9 also argued on the same lines as other Respondents. This Respondent has also referred to documents showing that the actual control was shifted from promoters to lenders since 2005. Counsel referred to amendments carried out in the Articles of Association which show as to how the control was diverted to the lenders. It is argued that Respondent No.2 had stepped down as Chairman on 10th February, 2005. One P.V. Narsimhan (Ex. CMD of Petitioner) was appointed as Chairman of

Respondent No. 1 Company at the instructions of Petitioner. The Managing Director and Director (Finance) were also appointed by the Petitioner. On 2nd March, 2005, the Appellant had issued letter setting out terms and conditions for loan which included that these posts would be controlled by the lenders and that they would be doing periodic review of transactions and the fund will flow through "Trust and Retention Account" (TRA). The Respondent has given further details to show the full control of the Petitioner since 2005. Thus the Respondent No. 9 wants the appeal to be dismissed.

20. Having heard counsel for both sides, we now proceed to analyse the material relating to disputes raised. In the arguments one thing is clear and there appears to be no dispute regarding the fact that since 1993 when the Project was allotted to Respondent No. 8 the project delayed *inter-alia* due to financial difficulties. The Promoters thus had to resort to lenders.

Whether the management and affairs of Respondent No. 1 Company has been in control of the Petitioner since 2005 ?

The NCLT considered the aspect of the Petitioner having control over Respondent Company since 2005 in Point No. 9 and came to the conclusion (in Para 130 of its judgement) that the effective control of the Respondent Company was with the lenders including the Petitioner. It found that no doubt, Respondent No. 3 was on the Board of Directors but he had no say in the affairs of the Company and the majority of Directors were following dictates of the lenders.

21. It appears to us that this is an important aspect of this matter which needs to be dealt with first. The findings as regards this point for determination would reflect on the other points which are being raised. In the records, we find that there is sufficient documentary evidence available in this regard. We are referring to some of the documents on this count :-

A. Learned counsel for the Respondents argued and pointed out Board Meeting Resolution dated 10th February, 2005 (Volume-XIII, Page 2598) to point out that Respondent No. 2 had resigned as Chairman of the Board with effect from 10th February, 2005.

By the same Resolution, Mr. P.V. Narasimhan was appointed Chairman. It is mentioned in the resolution that *"Mr. Narsimhan's name has been suggested for appointment as the Chairman by PFC"* (i.e. Petitioner).

B. With the Reply filed by the Respondents Nos. 3, 6, 8 and 9, they have annexed a copy of letter dated 2nd March, 2005 from the Petitioner sent to the Director of the Respondent. It is with reference to subject of - "*The Revalidation of sanction ……. for achieving financial closure….". With refere*nce to the subject, the Petitioner informed the Respondent Company that it was agreeable to revalidate the earlier sanction of Respondents' term loan and guarantee for Optionally Fully Convertible Debentures ('OFCD') to achieve financial closure under terms and conditions already conveyed and subject to following additional terms

and conditions. The Petitioner then proceeded to lay down terms and conditions of which Terms 10, 11 and 20 read as under :-

> *"10. PFC, in consultation with other lenders, will approve appointment of Chairman, Managing Director and Director (Finance) on the Board of SMHPCL."*
>
> *"11. Lender's nominee Directors shall be allowed to exercise full management control for the smooth implementation of the project till the entire debt is repaid. Mechanism for such control will be finalized after discussion with other Lenders."*
>
> *"20. Lender's Auditors would be involved in periodic review of various commercial transactions including TRA transactions."*

Thus the Petitioner laid down the condition that the Petitioner and other lenders would be the persons who would appoint Chairman, Managing Director and Director (Finance) of Respondent Company and they should have full management control.

C. Then, there is letter dated 18th April, 2005 (Reply Volume – 1 Page 160) where a reference was made to above letter dated 2nd March, 2005 and

Petitioner *inter-alia* recorded that :- "The following milestones would need to be achieved prior to commencement of disbursements by the lenders :-

"xxx xxx

4. *Board Resolution of SMHPCL in a form acceptable to PFC; empowering the Management Team consisting of the Chairman, Managing Director and Director (Finance) nominated by PFC on behalf of lenders to take all operating decisions for implementation of the project.*

xxx xxx

6. *Flow of Rs. 370 million into the TRA for payment of PFC dues."*

Thus, Petitioner wanted the Board not only to resolve regarding empowering the Managing Team which it would nominate, but also as to the "form acceptable" to Petitioner, in which the resolution of the Board should be couched. Thus it was dictating terms. Petitioner also wanted to ensure flow back of funds to itself.

D. Then there are Minutes of Board Meeting of Respondent Company dated 28th June, 2005 presided over by above P.V. Narsimhan. Resolution 8 (Reply Volume –XIII at Pages 2606 - 2610) of the Minutes reads as under :

"8. <u>Defining powers of Management Team</u>

Chairman explained that to comply with the sanction letter of PFC, it is necessary for the Board to delegate Operational Decision making and implementation powers related to construction of the Project to a Committee of the Board called 'Management Team' after discussions the following Resolution was passed :

"RESOLVED THAT pursuant to clause 10, 11 of the Revalidation of sanction letter No. 03:02-SMHPCL:05 dated 02.03.2005 received from PFC a committee of the Board of Directors styled "Management Team" comprising of the Chairman, Vice Chairman, Managing Director, Director Finance, Nominated Director of PFC be and is hereby authorized to be formed with immediate effect".

"FURTHER RESOLVED THAT the Management Team be vested with all powers needed for managing the day to day affairs of the Company other than those that are specifically required to be discharged by the Board of Directors or Shareholders as per the provisions of

Memorandum & Articles of Association and requirements of Companies Act, 1956".

Thus the Board lead by Chairperson installed by it, let a "Management Team" be made as per dictates of Petitioner for managing the day to day affairs of the Company.

It is stated that Respondent No. 3 was the Vice-Chairman. The Petitioner has been trying to show that Respondent No.3 was continued on the Board. The Minutes show, apart from Chairperson, Narsimhan and Respondent No. 3 others as "Mr. M.I. Gupta – Managing Director, Mr. S. Singhal – IFCI Nominee, Smt. Malini Bansal– IDBI, Nominee, Shri Ashok Gupta – PFC Nominee, Shri V.K. Jain – Invitee". It is apparent from the above as to how outnumbered Respondent No. 3 was with so many other Directors being representatives of the lenders. – This document shows that not only the Board of Directors was taken over but also the Management was taken over by Petitioner with other lenders, through what was called "Management Team".

E. Petitioner by this time, having taken a grip, the records show Amendatory and Restated Agreement dated 16th September, 2005 (Reply Volume – I, Page 141) and later Supplementary Agreement dated 25th November, 2005 (Reply Volume – I, Page 135), being passed.

It has been argued by Respondent No. 9 with reference to these documents that by these documents, it was ensured that the Director (Finance) would be one recommended by the Petitioner and the lenders and the Management Team would also be nominated and appointed by them. The Trust and Retention Account (T.R.A.) was also to be opened in consultation with the lenders before financial closure for receiving all Equity, Project Loans etc. It is argued that the Supplementary Agreement executed ensured that for the release of Rs. 10 Crore to be made on immediate basis, the Respondent Company will to the satisfaction of the Petitioner amend the Articles of Association to empower Management Team of the lenders to exercise effective management control till the entire debt is serviced and repaid. The movement of funds was also regulated and controlled. By these documents, the borrower Company (i.e. Respondent No. 1) agreed to give effect to the instructions/directions of lenders in regard to the management of the affairs of the Respondent Company.

We find after going through these documents and hearing the submissions that there is substance in what Respondents are saying regarding the shifting of the management control.

F. Then there is letter dated 8th November, 2005 (Appeal Volume-III, Page 509) from the Petitioner to the Managing Director of the Respondent

Company, which was written with reference to disbursement to restart the work on the Project. It is mentioned :-

"The proposal has been considered and keeping in view the need to restart the Project work immediately, Power Finance Corporation is in-principle agreeable to disburse Rs. 30 crore (under the existing loan agreement) for restart of the Project work in the following manner :

a. Pending approval of construction budget, Rs. 10 crore disbursement on immediate basis. For the release of this initial disbursement, the Company shall, to the satisfaction of PFC

- *confirm that the working office at Indore has started functioning and also agree that MD and Dir (F) would now start functioning from Indore.*
- *execute necessary documents with PFC*
- *amend the Articles of Association by adopting suitable resolutions in the SMHPCL Board and EGM, to <u>empower the Management Team of the lenders to exercise effective management control till the entire debt is serviced and repaid.</u>*

b. Before any further disbursement by PFC, the Company shall, to the satisfaction of the major lenders:

- *submit the Construction Budget, duly approved by the LE and detailed time bound Action Plan for financial closure.*
- *transfer the money available in the Special Trust Account of the TRA.*
- *ensure that REC and HUDCO agree to disburse Rs. 20 crore each to be released pro-rata with PFC's disbursement (taking into account PFC's initial disbursement of Rs. 10 crore).*
- *appoint merchant bankers for the bonds issue and equity issue.*
- *take measures to strengthen the Project team.*

All the funds will flow into the TRA and release in (b) above will be made as per the construction budget to be approved by the LE and accepted by the major lenders."

(Emphasis supplied)

Thus, in spite of earlier agreement, dated 16.09.2005, the restart of the project was being held back by not releasing funds and pushing for Amendment of Articles of Association to empower the Management Team of the lenders to exercise management control till the entire debt is serviced and repaid. Thus development and completion of the project was not the main object. Management control was targeted to ensure flow back of funds.

G. Then if the Articles of Association of the Respondent Company are perused (Volume – VII, Page 1270), it can be seen that the material amendments were brought about in E.G.M. in the Articles of Association on 25th November, 2005. In Paragraph 105 of the Articles of Association, under the head- "DIRECTORS", the substituted clause in the Extraordinary General Meeting held on 25th November, 2005, read as under. :-

> **#(d) The Board shall consist of four permanent (non-retiring Nominees of Lenders; three Directors liable to retire by rotation – one each to be nominated by the Government of Madhya Pradesh, the Promoter Group and Power Infrastructure India (all retiring by rotation); at least Two Independent Directors to be appointed under Section 149 of the Act not liable for retirement by rotation; One woman Director liable to retirement, if not an independent Director; One Chairman, One Managing Director and One Whole-time Director and Two Non-Executive Directors."*

Paragraphs 108 and 109 substituted on 25th November, 2005 read as under :-

> *"*108 Subject to Article 105(c), in accordance with section 260 of the Act, the Board may appoint Additional Directors. Provided that the appointment of additional directors will require approval/consent of majority of the lenders and PFC.*
>
> *109. Subject to Article 105(c), the casual vacancies among the directors may be filled up by the Board as per section 262 of the Act. Provided further that such casual vacancies can be filled up only with the consent of PFC and majority of lenders."*

It is apparent that the Petitioner ensured that the compliance of the provisions of the Companies Act, 1956 (old Act) would be subject to what Petitioner will 'consent'. Petitioner thus confirmed its position in the Respondent No. 1 Company.

H. The Petitioner wrote letter dated 24th April, 2006 to SBI Capital Markets Limited (Reply – Page 162) mentioning :

"PFC on behalf of the Lenders took the initiative in mid 2004 to revive the project with a new management set in place by the Lenders. This includes the induction of

entirely new management team, comprising Chairman, MD and D(F) identified by FIs. The Promoter was also asked to amend the Articles of the Company to facilitate effective management control by the FIs. With the changes carried out in November, 2005, the Board has been fully re-structured as follows :-

* *Chairman, MD and D(F) nominated by the FIs.*
* *4 nominee Directors of Lenders.*
* *1 nominee Directors of GoMP.*
* *1 nominee Director of the Promoter*
* *3 Independent Directors."*

It is apparent that Promoters were "asked to amend" the Articles of Association to facilitate management control by the Financial Institutions. It is not that the Promoters "agreed". The language shows more a dictate on the part of Petitioner.

I. Even the Joint Secretary to the Government of India, Ministry of Power stood updated with the developments and he wrote letter dated 10th August, 2006 to the Joint Secretary, Ministry of Finance (Reply – Page 164) mentioning :

"I may also inform that the management control of the project has since been taken over by the lenders and appropriate changes to effect this have been made in the

Memorandum and Articles of Association of SMHPCL. In the process, PFC has been assigned the role of lead FI, with the approval of all the lending institutions."

J. The Minutes of the Meeting of the Board of Directors held on 5th December, 2006 (Appeal Volume-XIII, Page 2690) recorded :

"The Chairman informed that he had himself written to the Chairman & Managing Director of Power Finance Corporation Ltd. on the subject. He also mentioned that the Articles of Association does not preclude appointment of Vice-Chairman for the Company. The Chairman emphasized that such a position to Shri Mukul Kasliwal is in the overall interest of the Company as his services are still being used extensively and will be used for some more time in tackling sensitive and serious issues with the Central/State Governments. The Chairman also confirmed that Shri Kasliwal will not hold any executive position."

20. It is clear that the position of Mukul Kasliwal - Respondent No. 3 who was being kept on the Board as Vice-Chairman was apparently not one contemplated under the Articles of Association and his presence was continued so that issues with the Central and State Governments, could be tackled.

21. It has been recorded that Respondent No. 3 will not hold any executive positon. Not only Respondent No. 3 was outnumbered on the Board but also stripped-off executive position. It appears that the Petitioner and Lenders got Articles of Association further amended by changes in Paragraph 134 (Appeal Volume-VII, Page 1301) to provide that if and when the Chairman is not there, the Directors present would choose "one of Directors nominated by lenders" to be the Chairman of the meeting. Thus Respondent No. 3, Vice-Chairman could not be Chairman even if the regular Chairman was unable to attend the Board Meeting.

22. The above are some of the documents which are on record. In fact, there appear to be much more and other documents also which show that clear, effective and actual control of Respondent Company has been taken over by representatives of the Petitioner and other lenders since 2005. Although the learned counsel for the Appellant-Petitioner is arguing that earlier Promoter Director-Respondent No. 3 was part of the Board, looking to the above documents, there is substance in the submissions of the learned counsel for the Respondents that presence of Respondent No. 3 was only titular and the Company was actually managed by the Petitioner and other lenders. With so many representatives of the Petitioner and lenders on the Board and Chairman itself of the choice of Petitioner, opposition of Respondent No. 3 on the Board of Directors was clearly of no consequence. It is undisputed that the Respondents who had earlier taken up the Project

and incorporated Respondent No. 1 Company were struggling with the Project and the finance was major issue.

The main grievance against the Respondents is that they were not able to raise necessary equity required to complete and put into effect the Project. However, their effort to raise equity appears to have attracted Petitioner and other lenders. In the circumstances, looking to the above documents, it is seen that lenders led by the Petitioner while lending money to the Respondent Company slowly and gradually took over the actual management of the Company as well as the finances on the plea that they would get the Project completed and implemented. In this, we are not absolving Respondent Promoters of Respondent No.1 also, as they had a responsibility and a duty to perform. Promoter – Respondents appear to have simply surrendered to the demands of Petitioner and other lenders when it was their responsibility to manage the Company as per the Companies Act. The incomplete project had public interest and pubic money involved taken through Banks. The Project was taken up from State Government with benefit of public in view.

23. Before the NCLT, Point No. 2 raised was whether it could decide the dispute raised by the respondents relating to shareholding of the Petitioner and other lenders. The respondents raised dispute that the pledge had not been validly invoked by the Petitioner and the other dispute was that there was no valid conversion of debt. The Petitioner claimed in the petition that it was holding 23.32% shares in the paid-up share capital of the Company. The

NCLT, in order to consider the right claimed by the Petitioner to maintain the Petition went into the defence raised that the pledge was not validly invoked and also went into the defence that the conversion of sub-debt into equity was not valid. We do not find that the NCLT erred when it looked into these aspects. Whether the Petitioner makes out right to maintain petition under Section 241 - 242 of the Act can be looked into.

INVOCATION OF SHARES PLEDGED

24. This aspect was dealt with by the NCLT in Point No. 3 framed by it. NCLT found that the respondents were not raising the dispute that Respondent No. 8 had pledged shares to the Petitioner. The dispute raised was that the pledge however had not been validly invoked. NCLT noticed that the Petitioner in the petition or rejoinder had not chosen to specify as to the manner in which it had acquired the shareholding. The Petitioner had not even filed the share certificates of the Share Transfer Endorsement Forms along with petition. The copies of the share certificates with Transfer Endorsement only were filed along with the rejoinder which was filed on 17th April, 2017, which was four months after filing of the petition. It noted that the sheet attached to the share certificates styled as "Memorandum of Transfer of Shares" mentioned overleaf was blank without any endorsement. In the NCLT, the Pledge Deed dated 30th November, 2006 had not been filed (The same has now been filed in this appeal without prior leave in Volume-IV at Page 575). NCLT also found that the Petitioner had claimed in the petition

that notice of invocation of pledge was issued on 19th May, 2016 but even this had not been filed in NCLT (But now it has been filed in the appeal without leave with Volume –V at Page 848). NCLT discussed that the Petitioner had claimed in the petition that with the notice invoking pledge reasonable notice of 30 days had been given before invoking the Share Pledge Deed. NCLT, however, found that before the period of 30 days could lapse, the Petitioner had got the shares transferred on 1st June, 2016.

25. The learned Tribunal referred to provisions of Section 176 of the Indian Contract Act, 1872 and discussed the law on the subject to observe that under Section 176 of the Indian Contract Act, notwithstanding anything contained in the contract or pledge, Section 176 will prevail and in case of default, the pledgee can sell the goods pledged and retain receivables as collateral security but could not acquire ownership of the goods pledged to itself. NCLT observed that although the Petitioner claimed acquisition of shares by invoking pledge, it had not placed on record the deed of pledge as well as the notice invoking pledge. NCLT also observed that when notice given was of 30 days, if the shares had been got transferred in 15 days itself, the invocation of the pledge was not valid. The NCLT found that (1) the invocation of pledge of shares had not been done validly; and (2) even if it was to be said that invocation was validly done, the transfer of shares was not according to the provision of Section 56 of New Act.

Additional Evidence filed in Appeal without leave

26. In the course of present appeal, the Appellant-Petitioner filed documents which were not filed before NCLT, without taking leave of this Tribunal. Both the parties however have argued relating to these documents. We are not impressed by the argument of the learned counsel for the Appellant-Petitioner that National Company Law Tribunal Rules do not bar filing of new document(s). An appeal filed against an impugned order can be found fault with only on the basis of the grounds raised material which was brought before the Tribunal below. It is unfair to simply slip in the documents while filing the appeal without disclosing that they are new documents which had not been filed before the Tribunal below and without giving explanation as to why they were/could not be filed in the Tribunal below, and without taking leave of the Appellate Tribunal. The argument that the parties can simply file any document they want, deserves to be discarded as the appeal would be required to be decided on the basis of what was right or wrong in the impugned judgement. If there are documents which were not filed in Tribunal below but which are necessary to adjudicate on the issue, it would be necessary to point out the fact and give reasons why they were not filed earlier and seek leave of the Appellate Tribunal. Under Section 424 of the New Act, the procedure laid down in the Code of Civil Procedure, 1908 is not applicable and the Tribunal is guided by principles of natural justice. Subject to other provisions of the Act, or of the Insolvency and Bankruptcy Code,

2016 and of any Rules made thereunder, this Tribunal has power to regulate its own procedure.

This Tribunal has power to regulate its own procedure, as such, we find that in the Company Appeals (AT) to come up before us, the parties cannot be permitted to raise additional grounds which were not raised in the Tribunal below or file additional evidence/documents in appeal, which were not part of the record of the Tribunal below, unless an I.A. is filed for leave giving reasons as to why the new grounds were not raised earlier and/or why the said documents could not be filed when the matter was in the Tribunal below.

We regulate the procedure of Company Appeals under the Companies Acts, that are to come up before us directing that parties shall not be entitled to raise additional grounds which were not raised in the Tribunal below and/or produce additional evidence/documents without prior leave, by way of I.A. explaining why the same were not raised and/or brought or filed before the Tribunal below. Registry may seek directions of Hon'ble Chairperson, and if permitted, parties may be asked to file Declaration at the time of filing pleadings that no additional grounds which were not raised in the Tribunal below and/or no additional evidence/documents which were not part of record of NCLT/Tribunal below have been raised/filed.

27. Although we have recorded the above finding, in the present matter as both the sides have extensively argued even with regard to additional

documents which were not before the NCLT, we are proceeding to consider these documents in the interest of justice as looking to the facts of this litigation, we find that it would not be in public interest to remand this matter. Remand would endlessly delay the matter and looking to the Project of dam which is stuck, it is necessary in the interest of justice and public interest that finality is reached in this Company Petition, which was filed making allegation of 'oppression and mismanagement'.

28. The copy of notice dated 19.05.2016 invoking rights over the shares pledged has been filed in this appeal by the Petitioner-Appellant (Volume-V Page 848). It referred to the Deed of Pledge dated 30th January, 2006 (Volume –IV at Page 575). It referred to Addendum dated 16th November, 2010 and the Deed of Pledge dated 14th January, 2011 for 29,17,20,330 fully paid-up equity shares held by Respondent No. 8, the pledgor. The notice was addressed to Respondent No. 8 and Respondent No. 1. The Notice refers to multiple documents and in Paras 19 and 20 claims Pledgor has agreed to constitute Petitioner as its attorney and authorized it to act on its behalf and even without Notice to Pledgor they could complete and register the transfer of shares. Para 21 of the Notice reads as under :

> *"21. In view of the above and defaults committed by the Borrower, the Lenders have decided to initiate the Enforcement Action in terms of the Amended and Restated Inter-Creditor Agreement dated*

22.06.2010 (the "ICA") including recalling of Loans and Enforcement of Securities. Hence, the lenders mentioned in Annexure A have directed PFC (acting as Lenders' and Security Agent) to exercise their rights under the Share Pledge Deed. Therefore, we, under the instructions of PFC, for and on behalf of such lenders, do hereby call upon and put the Borrower and the Pledgor on notice to transfer the Pledged Shares to the lenders mentioned in Annexure A in terms of the Share Pledge Deed read with Section 108 of the Companies Act 1956 and/Section 56 of the Companies Act, 2013 along with the Rule 11 of the Share Capital and Debentures Rules, 2014 within a period of 30 days of the receipt of this notice in the ratios provided in the Annexure B. For the purpose of adjustment of consideration payable towards transfer of Pledged Shares, a fair market value of the pledged share was determined in accordance with prevailing market practices and fair value of equity shares of the Company was determined as Nil. Notwithstanding the fair market value determined, each lender is willing to pay a token amount of Re.1

towards total consideration for shares to be transferred to each one of them. Photocopies of the duly signed Share Transfer Forms are annexed herewith. You are requested to call for the Board meeting for giving effect to this notice and depute an authorised officer for taking necessary steps to split the share certificates and transfer the shares in accordance with the number of shares mentioned in Annexure B to the respective lenders and issue fresh share certificates against the original share certifications, to be submitted to the said authorised officer as and when directed. We shall appreciate your earliest action in this regard."

Thus, the Petitioner called upon the Pledgor to transfer pledged shares within 30 days as can be seen from portion emphasised.

29. Interestingly, Paragraph 22 records that this action was being taken without prejudice to the rights of the Petitioner and other lenders in relation to the amounts due and payable by the Company under the Loan Agreements.

Then there is Board Meeting dated 1st June, 2016 (Volume-V Page 865). This meeting had two persons acting as 'Chairman' for different items and then there were Director (Finance) and nominee Directors of the investors.

The Promoter Director, Mukul Kasliwal, was not present. The Minutes show that he had sent an e-mail giving his views on various agenda items and wanted the same to be recorded verbatim in the Minutes. The Board did not record the same. Apparently, he was opposing. Shri Rajiv Dak, Alternate Director to nominee of Strategic Investor also opposed the proposals taken up in this meeting. The Minutes show that these Chairmen and the Directors were aware that the Registrar of Companies (ROC) has on 29th April, 2016 flagged the company as 'Management Dispute' and had even issued notice seeking various clarifications/documents/records. The Board of Directors proceeded in Item No. 134.11 to consider the notice sent by the Petitioner for transfer of shares and splitting of share certificates. The Board had a difficulty which is recorded as under :

> *"ITEM No. 134.11 TO CONSIDER AND TAKE NOTE NOTICE RECEIVED FROM PFC FOR TRANSFER OF SHARES AND SPLITTING OF SHARE CERTIFICATES.*
>
> *xxx xxx xxx*
>
> *The Board noted that the share transfer forms had been executed by the pledger under the applicable provisions of Companies Act, 1956 and the rules made thereunder. The PFC nominee produced these original share transfer forms, original share certificates and the original communications of the pledger submitting the share transfer forms and share certificates in original to the*

pledgee. The Board further noted that with the Companies Act, 2013 having been notified the share transfer forms has undergone change, however provisions of section 56 of Companies Act, 2013 empowers the Board to approve the share transfers in cases where the instrument of transfer has been lost or instrument of transfer has not been delivered within the prescribed period."

30. Thus it was noticed that the share transfer forms had undergone change and Section 56 of the New Act was a matter of consideration. It was not a case of loss or that instrument of transfer had not been delivered within the prescribed period. Still, the Board of Directors continued to record that they were satisfied of the genuineness of transfer of shares which was sought in favour of the lenders. They went on to approve the proposal as detailed in the agenda. The Board appears to have approved share transfer in the name of transferees and enter their names in the Register of Members. Equity shares were also split and transferred in the name of various transferees. The Board appears to have taken decision to issue "New Share Certificates to the transferees after split and transfer" and another resolution was passed to get the fresh share certificates printed.

31. It is clear that the notice issued by the Petitioner, which claimed the fair market value of the shares to be 'Nil' and proposed to offer towards total consideration for shares to be transferred Re. 1/- and called upon Pledgor to transfer the Pledged Shares within a period of 30 days did not even wait for the period given in the notice to be over and got the shares issued to itself and other lenders.

32. The Government of Madhya Pradesh was having a second charge on the shares as seen in Deed of Pledge of Shares dated 30.11.2006 but this was fully ignored. The Appellant-Petitioner had got the Articles of Association amended. Article (2) of the Articles of Association was amended (Volume-VII, Page 1270 at 1276) to prescribe that the "pledged shares of S. Kumars" which had been pledged to the Lead Team Loan Lenders shall mean that S. Kumars had given right to vote in any meeting of shareholders also to the Lenders until the entire loan was repaid. Amendment to this effect had been brought in the definition of "Pledged Shares of S. Kumars". Amendment had been brought to Article 89(2) also to provide that voting rights attached to shares pledged shall be exercisable in the pledgor and members name and on behalf of pledgee. How merely because the shares were pledged, right of the members to vote was taken away is surprising. Looking to the Minutes of the Board of Directors dated 1st June, 2016, it is clear that the nominee Director of the Petitioner and other lenders also participated. Additionally, there was

invitee, the General Manager of Petitioner, Mr. P.K. Sinha also present in the meeting. We find that the Directors, apparently all nominees of the lenders, participated in this Board Meeting and ignoring provisions of Section 56 of the New Act went ahead to enforce the Pledge Deed as per desire of Petitioner. We have noted the argument of the learned counsel for the Appellant-Petitioner that only a director having more than two percent interest in some other body corporate could be treated as interested director while dealing with the present Company's affairs with other body corporate. Invoking jurisdiction of Section 241, what is needed to be shown is not only the legality of action but also the fairness of its application. In present set of facts when the Board of Directors consisting of Nominees of Lenders was taking decision in favour of lenders while invoking pledge of shares, a higher level of compliance without undue haste was warranted. The sole Director of Promoters was not there and his views conveyed were not recorded nor considered. Nothing more is required to hold that the Board of Directors (voting in favour) were all representing interests of the Lenders and were protecting interest of the Petitioner and other lenders.

33. Apart from the above, Section 176 of the Indian Contract Act is matter of consideration as it lays down procedure required to be followed by the Pawnee where Pawnor makes default. This Section is not qualified by any wording like "subject to contract to the contrary". Acts of Petitioner

are lacking in fairness and in the present set of facts Petitioner cannot rely on such acts to maintain petition to get relief under Section 241 – 242 of New act.

CONVERSION OF SUB-DEBT INTO EQUITY

34. The NCLT discussed dispute on this count to observe that the subordinate loan agreement in which the sub-debt was created had not been filed. In the absence of the document, it discussed the letter of the Petitioner to Respondent No. 10 that prior to disbursement of subordinate loan, the first Respondent Company shall conduct EGM. NCLT observed that there was no discussion about conversion clauses in the EGM dated 17th June, 2010 and thus was not happy with the letter dated 18th June, 2010. It observed that there was cloud on the conversion of subordinate loan into equity.

Learned counsel for the Appellant-Petitioner submitted that the observation of NCLT that Clause 1.4 was subsequently introduced in the subordinate loan agreement by way of letter dated 18th June, 2010, i.e. one day after EGM dated 17th June, 2010, is wrong as the document shows that clause was there since before. As the subordinate loan agreement itself was not before the Tribunal, which Appellant could have filed but did not, this may have happened but much will not turn on this.

35. In this appeal, the Appellant-Petitioner filed copy of the Notice dated 18th December, 2015 (Volume – V at Page 859- which had not been filed in NCLT). This document was Notice for conversion of loan into equity sent to the Board of Directors. Reference was made to Clause 1.4 of the subordinate loan agreement (Volume-III at Page 550) which prescribed that on the notice of conversion, the borrower (i.e. Respondent No. 1) shall allot and issue requisite number of fully paid-up equity shares at par to the Petitioner and the Petitioner shall accept the same in satisfaction of the principal amounts of the subordinate loan to the extent so converted. By this notice dated 18th December, 2015, the Appellant claimed Principal amount of Rs. 375 Crores with interest was due. It called upon Respondent No. 1 to issue 13,74,20,000 equity shares of Rs. 10/- each against partial conversion of total outstanding subordinate loan. The notice asked Respondent No. 1 to convert outstanding amount of Rs. 137.42 Crores into 13,74,20,000 equity shares and start process for the same. By subsequent notice dated 27th May, 2016 (Volume –V at Page 862), the Petitioner mentioned that the notice was in continuation of the earlier notice of conversion and called upon Respondent No. 1 to issue 6,61,00,000 New equity shares of Rs. 10/- each against partial conversion of the total outstanding loan of Rs. 375 Crores.

36. Both these notices were discussed in the meeting by the Board of Directors of Respondent No. 1 on 1st June, 2016 (Volume –V at Page 865)

and they were taken up as Item No. 134.10. The Board of Directors observed :

> *"ITEM No. 134.10 : TO DELIBERATE ON NOTICE FOR CONVERSION OF LOAN INTO EQUITY*
>
> *The Board noted that the Company had received the letters dated 18th December 2015 and 27th May, 2016 for the Conversion of Power Finance Corporation's sub debt to the extent of Rs. 66.10 Crore into equity shares in terms of relevant provisions of the Sub-Ordinate Loan Agreement where under PFC has the right to convert its Sub-debt into equity shares in part or in full of the outstanding dues under the sub-ordinate loan into fully paid equity shares at par. By exercising its rights, PFC has called upon the company to convert Rs. 66.10 Crore, which is a part of the total subordinate loan of Rs. 375 Crore, into fully paid up 6,61,00,000 equity shares of Rs. 10 each of the company. The said notices and the Sub-Ordinate Loan Agreement were made available in the meeting. Further, in this regard, the Board noted that the shareholders of SMHPCL had also passed a special resolution in the EGM held on 17th June, 2010, which was annexed to the agenda."*

They then permitted partial conversion of sub-debt amounting to Rs.66.10 Crores into 6,61,00,000 equity shares of Rs. 10/- each at par and to allot the same to the Petitioner.

As on 01.06.2016 Section 62 of the new Act would be required to be complied for further issue of share capital. Admittedly, the further issue of shares is not claimed to be in compliance of Sub-Section 1 of Section 62. Sub-Section 3 is in the nature of exception. The same reads as under:

> "(3) Nothing in this section shall apply to the increase of the subscribed capital of a company caused by the exercise of an option as a term attached to the debentures issued or loan raised by the company to convert such debentures or loans into shares in the company.
>
> Provided that the terms of issue of such debentures or loan containing such an option have been approved before the issue of such debentures or the raising of loan by a special resolution passed by the company in general meeting."

(Emphasis supplied)

If the notice (Annexure A12 - page 859) by Appellant is seen, the Appellant referred to the subordinate loan agreement dated 29th September, 2006 Clause 1.4 to invoke conversion of the loan into equity shares. The Appellant claimed that the Company is in default of repayment

of aggregate principal amount of Rs.375/- crores disbursed under the subordinate loan agreement dated 29.09.2006 from time to time and also the interest thereon. The subordinate loan agreement dated 29.09.2006 (Annexure A6) in turn referred to the background that the borrower has sought financial assistance from the Appellant and other Lenders as defined in the common loan agreement dated 29.09.2006. The said common loan agreement (Annexure A5 – page 233) in turn refers to the fact of the loan borrowed and the Appellant having advanced a sum of Rs.100 cores towards the rupee term loan and USD 52.9 million towards the foreign currency loan. It shows the background of the transactions. Now if the resolution of the Board of Directors in item No.134.10 (supra) is seen, the Board of Directors appear to have relied on the EGM dated 17th June, 2010 which was annexed to the agenda to say that EGM had approved the conversion. (Copy of the EGM Resolution is at Annexure A-20 page – 907). Sub-Section 3 of Section 62 referred above in the proviso requires that the "terms of issue" of such loan containing such an option should have been approved "before" raising of loan by a special resolution passed by the Company in General Meeting. Benefit of Sub-Section 3 of Section 62 of the new Act (which was applicable at the time of conversion) cannot be taken for enforcing an Agreement of 2006 for which EGM Resolution was taken in 2010.

37. Apart from above, even this Resolution apparently suffers from what we have observed earlier that the Board of Directors which was constituted had all the participants representing the lenders passed the Resolution in favour of the lenders. To seek equity relief from N.C.L.T. fairness in action would also be required to be shown.

38. Looking to over-all facts of this matter for reasons mentioned, we find that the invoking of the pledge and the invoking of the conversion of debt relied on by the Petitioner to claim that it has shareholding in the Respondent No. 1 Company, which could be relied on to maintain the petition, is seriously under cloud and when legality of such actions is questionable, right to maintain petition under Section 241 of the New Act is not there and the Petitioner could not have filed the petition on the basis of such tainted rights.

39. For a moment, even if it is accepted that the Petitioner has a right to maintain the petition, the question is whether it can make grievances of 'oppression and mismanagement' as have been made in the petition. Learned NCLT referred to the alleged oppressive acts referred to by the Petitioner. In Paragraph 100 of the impugned order, the same were enlisted. NCLT observed that on the dates when alleged acts of oppression took place, the Petitioner was admittedly not a shareholder and thus could not maintain petition under Section 241 of the New Act.

40. Lot of arguments have been made by the counsel for both sides with reference to Clause (a) of Section 242 of the New Act. The relevant portion of that provision is as under :

> ***"242. Powers of Tribunal.—*** *(1) If, on any application made under section 241, the Tribunal is of the opinion—*
>
> *(a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and*
>
> *(b) ..... the Tribunal may, with a view to bring to and end the matters complained of, make such order as it thinks fit."*

41. The arguments of the counsel for the Respondents are that the past and concluded acts could not be made grievance of. The learned counsel for the Petitioner-Appellant, however, submitted that the affairs which "have been" or "are being" conducted in a prejudicial or oppressive manner both can be looked into and thus past affairs can also be considered. We find that "have been" relates to present perfect tense. It relates to action that began some time in the past and is still in progress. Wording "are being" relates to present continuous tense. There is a difference between "have been" and "had been". "Had been" would be past perfect tense indicating acts which were committed in the past and which came to an

end in the past. Apart from this, in view of our earlier finding that since 2005 itself the petitioner has had Board of Directors constituted of its own selected Chairpersons and also its own nominee and nominees of other lenders, except one promoter, as well as the management of the Company itself has had been with Petitioner and other lenders, such Petitioner can clearly not be heard putting blames on others. Thus, the petition would require to be dismissed even on this count.

Amended Articles of Association Restricted Rights of Promoters

42. We have already discussed some of the amendments which were brought about at the behest of the Petitioner and other lenders in the Articles of Association. We have kept in view Section 9 of the Companies Act, 1956 (old Act) and Section 6 of the New Act which give overriding effect to the provisions of these Acts (save as expressly provided in the Acts), notwithstanding "anything to the contrary" in Articles of Association of a company, or agreement executed by the Company. We have gone through the Articles of Association copy of which is filed by the Appellant (Volume VIII at Page 1270. Another copy is in Volume VI - Page 1047). We have already referred as to how the definition was inserted in Article 2 with reference to interpretation of "Pledged Shares of S. Kumars". The effect was that on the shares pledged, the voting right in any meeting of Shareholders itself of the pledgor was taken away. Nothing is shown that

by Agreement or Amendment in Articles of Association such right can be taken away. Relevant portion of Section 106 of the new Act reads as under:

> "(1) Notwithstanding anything contained in this Act, the articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has exercised any right of lien.
>
> (2) A company shall not, except on the grounds specified in sub-section (1), prohibit any member from exercising his voting right on any other ground."

Thus except for contingency provided in Sub-Section 1 voting right cannot be denied on any other ground. Even after coming into force of the new Act, how such Articles of Association can continue to exist restricting the right of a member who has pledged his shares to another is not shown. There are yet other Articles which also do not appear to be in consonance with either the Old Companies Act or New Companies Act. We have already reproduced earlier Articles 108 and 109 (Para 21 G) which were made subject to Article 105 and although Section 260 of the Old Act was referred, the benefit of Old Section 260 appears to have been taken away by adding proviso laying down that the appointment of Additional Directors will require approval/consent of majority of the lenders and PFC. With regard

to casual vacancies of the Directors also, the amendment made provisions that it can be filled up "only with the consent of PFC and majority of lenders". If this is so, clearly there was no right and discretion as such left with the promoters and shareholders of the Company to take decision on these counts and even the Board created was to act as per what Petitioner and Lenders desired. Thus the overriding effect of the Act was indirectly taken away. Even in the amendment made to Article 134, it was brought about that all the decisions taken by the Board either at the meeting or by Circular would require the affirmative vote of the meeting / Chairman and majority of Directors appointed by the lenders. Although quoram was specified as of six directors, it was added that the meeting shall require attendance of Chairman and three nominee directors of the lenders.

43. Article 105(d) [Para 21 G – supra] which we have reproduced earlier appears to be in conflict with Section 255 of the Old Companies Act, 1956, which reads as under :

> ***"255. Appointment of directors and proportion of those who are to retire by rotation.—*** *(1) Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two- thirds of the total number of directors of a public company, or of a private company which is a subsidiary of a public company, shall-*

(a) be persons whose period of office is liable to determination by retirement of directors by rotation; and

(b) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(2) The remaining directors in the case of any such company, and the directors generally in the case of a private company which is not a subsidiary of a public company, shall, in default of and subject to any regulations in the articles of the company, also be appointed by the company in general meeting."

44. With such amendments brought about by the Petitioner and other lenders in the Articles of Association of Respondent No. 1 Company, extensive rather exclusive control of the Company went to the Petitioner. The Petitioner and other lenders appear to have asserted and Promoter Respondents and shareholders of the Company conceded to the Amendments most of which appear to be in conflict and not in consonance with the letter as well as spirit of the Old and New Companies Act. Against the principles of 'corporate governance' requiring that the companies shall be brought into existence by the promoters and managed by the promoters and shareholders, here is a rare case where the lenders have taken over

the company since long and now taking benefit of their position in the Board of Directors and the management of the company, it is claimed that the pledge has been redeemed and new shares have been issued converting loan into equity. With such restrictive articles which will not let even fresh equity flow, there appears hardly any scope for the original promoters and shareholders to take charge of the company affairs so as to complete the Project. The Petitioner naturally is interested in such amended Articles of Association and Respondents also do not appear to be enthusiastic to get status quo ante restored in the Articles of Association nor inspire confidence that if we strike down these amendments made on 25.11.2015 (and subsequently) they can take charge and complete the project which attracts public interest. Promoters have not brought to our attention that at any time they opposed, or stood up to the gradual takeover. No opposition worth the name in Board Meetings is shown. Both sides have not brought to our attention the Resolutions which approved these amendments on 25th November, 2005 and thereafter to consider respective roles of parties, although so many other documents have been loaded on Record.

HIGH LEVEL COMMITTEE REPORT

45. In the appeal (Volume –V at Page 798), there is letter dated 2nd May, 2015 submitting report of the High Level Committee constituted by the Government of Madhya Pradesh vide order dated 16th October, 2014. The

said Committee appears to have deliberated with different stakeholders in the matter. Paragraph 14 reads as under :

> *"14. PFC has suggested the putting of an additional condition that equity stake of the present equity holders should be brought down to less than 26%, so that functioning of the project could proceed without interference from them. The promoter has vehemently objected to the suggestion and stated that at least 26% would be reserved for the promoter, while the investor M/s. IIP would separately hold a percentage in proportion to its present shareholding. It is apprehended that the project may get stalled on this account, if there is lack of agreement on this issue between the promoters & other equity holders on one side and PFC, other lenders & NHPC on the other side. In view of the above, it was generally agreed that, while the present equity holders should become minority stakeholders, there should be no insistence to keep their equity holding below 26%."*

46. Thus, the Government of Madhya Pradesh, who is really the owner of the land and allotted the Project, which was being put up, insisted that the equity of the shareholders should not be reduced below 26%. The Appellant-Petitioner, however, has gone ahead and equity stake of Respondent No. 8 in the Respondent No. 1 Company is claimed to have been reduced from 58.4% to 12.29% as the Petitioner and other lenders enforced the Pledge Agreement and also converted loan into shares on the basis of subordinate loan agreement.

47. The learned counsel for the Petitioner-Appellant has argued that Scenario-I which was to be implemented by the Promoter failed and the 90 days' period provided in this report was already over and thus, according to him, Scenario – II is now in motion. However, Para 14 of the report which we have reproduced above, was part of Scenario-II and the Petitioner himself appears to have violated the requirements in Scenario – II.

48. The learned NCLT in the impugned order, *inter-alia*, found that the petition suffers from delay and laches. As discussed, in the present matter, the Appellant and other lenders took over the control of the company since 2005. The grievances being raised in 2017 suffer from delay and laches. The NCLT further found that the petition was not *bonafide.* This finding is correct as the prayers made in the company petition itself show that attributing 'oppression and mismanagement' to the Respondents, what was being tried to be sought were directions to various Government

Authorities to stop them from taking action, without making those authorities party. We have reproduced the prayers made by Petitioner and reading of the same itself shows that the petition is not *bonafide*. It is unthinkable that NCLT could direct these so many authorities not to do their job. Keeping such petition pending and now this appeal pending must have been used for telling the concerned Registrar of Companies, Income Tax Authorities as well as authorities of industrial and labour laws to refrain from actions as the litigation is pending. It is surprising how the Appellant - Petitioner can claim that it should be given declaration of condonation/granting immunity to violations of various provisions of the Companies Act with regard to its employee, Gauri Shankar Patra, and earlier nominee Directors. With R.O.C. after Petitioner and Promoters with enquiry under Section 206 of the New Act, the Appellant's object in filing Petition appears to be to stop and delay action being taken against the Petitioner, its employees and other lenders for the acts committed with regard to Respondent No. 1 Company which in turn had an impact on the Project which the Respondent No. 1 had taken up. No doubt, a person lending money may put conditions to protect its interest but there has to be a limit and it is unthinkable that the lenders took over the Company itself and committed acts attracting actions under the Companies Act and other Acts from which now protection was sought. The NCLT rightly held that the Petitioner had not approached the NCLT with *bonafide* intention.

Where are the Statutory Records?

49. One of the disputes being raised by the present parties is with reference to statutory records required to be maintained under the Companies Act. The Petitioner and other lenders claimed that the records have not been handed over by Respondent No. 10 and the Respondents are claiming that the records are available at the same place in Mumbai, where they were maintained since before. We have referred to the case of Respondent No. 10 in Para 10 supra. Petitioner has not shown that while accepting resignation of Respondent No. 10, directions for handing over detail charge were given to him. Without this, blame is sought to be passed on. Though, both the parties are putting blame on each other, it can be seen that they have been producing documents and resolutions and letters etc. as suits the either side to score legal points in the litigation. When it comes to accounting for actions, there appear excuses why records are not available. The approach of the parties is "hide and show". They are showing only what suits them. This really needs to be investigated, as statutory records which would be required to fix responsibilities cannot be allowed to be suppressed on such excuses. In investigation suitable action needs to be taken against whoever is found suppressing or holding back statutory records from authorities.

50. Parties have made allegations of siphoning and diversion of funds. Specific details have not come forward. How the huge loans taken were

utilized is matter of consideration. One claim is that in 2010 three turbines could have been commissioned but it did not happen as funds were diverted to lenders. Looking to facts, it appears necessary in public interest (as even Banks have put in huge amounts) and Petitioner is also Government of India Enterprise, that forensic audit of accounts should be done. Hundreds of Crores of Rupees are involved and the Project is still incomplete even after 2 Decades and Company is declared Non-Performing. Audit and Investigation should give clear picture. Letter dated 28.04.2016 of Government of M.P., Energy Department (Volume V – Page 883) sent to Petitioner refers to the stopped work on MW Maheshwar HEP since last four years and that since then, there is no maintenance of dam, power house, hydraulic gates etc. Letter records that dewatering of power house has also been stopped and hydraulic spillway gates are not being maintained. The letter adds that, failure of these gates may endanger safety of dam and would affect population at downstream and upstream side. The letter then asked Petitioner to take steps regarding maintenance.

The letter makes evident seriousness of the issue and matter cannot be left to present warring parties. The Central Government and M.P. State Government need to urgently find a way out in public interest, to get the project completed. We are not directing appointment of administrator to avoid further litigation on that basis and looking to the fact that Petitioner, being Government of India Undertaking, who is in control of the Company

it will be easier for Central Government on administrative side to ensure change of guard having proper instructions to ensure that while moving forward the project there is no breach of the Companies Act.

51. The Project appears to have made some progress but remains incomplete. The completion of the Project is necessary in the national interest. It will benefit the farmers in the State of Madhya Pradesh. The Project has been delayed endlessly. The voluminous records put up before us show facts are intertwined with various complications. The learned NCLT has not been able to find workable solution by way of orders/directions except to the extent of all stakeholders. The learned NCLT expressed opinion that all the stakeholders should evolve a scheme which should include promoters so as to help in speedy completion of Project. With such expectations, the NCLT dismissed the petition. We have also deliberated between us as to what is the way-out in the present scenario. The Registrar of Companies, it is stated, has already held inquiry and submitted report under Section 206 of the New Act to the Central Government. We hope and expect Central Government to take early decision and action. No doubt, the Respondents have filed a copy of the Report with Volume – IV at Page 711 but we are not going into the said report as the NCLT did not discuss it although it had the report and Central Government has to still consider it. At least, nothing is brought to our attention that Central Government has taken decision on the Report.

52. Looking to the facts of the present matter and above discussions, we order that the affairs of this Company ought to be investigated under Section 210 of the New Act in public interest. The Central Government should take steps accordingly. Whoever from the promoters, shareholders as well as the Petitioner-Appellant or other lenders, is found to be responsible for acting against Public Interest, needs to be made accountable. Central Government may also as part of investigation direct, at the cost of Company, forensic audit of the Company preferably under supervision of officials of Comptroller and Auditor General of India at least since 2005 if not earlier.

In our view, the Government of Madhya Pradesh and Central Government both need to urgently consider the way forward in public interest to get project completed.

53. We direct accordingly and decline to set aside the dismissal of the Company Petition. We however maintain the dismissal of the Company Petition but for the reasons discussed by us. The appeal is dismissed. No order as to costs.

Contempt Case 10/2017 and other I.As pending shall stand disposed.

54. Registry to note directions recorded in para – 26 (Supra) and take necessary steps. Registry to immediately forward copy of this Judgement to Central Government through Ministry of Corporate Affairs and a copy of the Judgement be sent to Chief Secretary, Government of Madhya Pradesh for information and necessary action.

55. The arguments in this matter took place for long period. Matter is voluminous and we had to ourselves examine so many details. After the arguments were completed, we have remained connected to the matter and were working on it but delay has taken place due to pressure of other matters also. As such, some more time than normal has passed in disposing this matter.

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

[Balvinder Singh]
Member (Technical)

NEW DELHI

12th March, 2018

/ng/nn