NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 110 of 2020

[Arising out of Order dated 05.06.2020 passed by the National Company Law Tribunal, Bengaluru Bench, Bengaluru in IA No. 170 of 2020 in C.P. No.110/BB/2019]

IN THE MATTER OF:

Brookefield Technologies Pvt. Ltd.
Represented by
Director, Mr. Pawan Kumar Jain
Regd. Office E-1381
AECS Layout, ITPL Road, Brookefields
Bangalore – 560037.

Mr. Pawan Kumar Jain
S/o Chhagan Lal Jain,
8024, Tower 8,
Prestige Shanti Niketan, Whitefield
Bangalore – 560048. **...Appellants**

Versus

Mrs. Shylaja Iyer
W/o Mr. Ravindra Iyer,
No. 721/11, 41st Cross,
3rd Block, Rajajinagar,
Bangalore – 560048.

Mrs. Bhavana Jain
W/o Mr. Pawan Kumar Jain,
8024, Tower 8,
Prestige Shanti Niketan, Whitefield
Bangalore – 560048.

Mr. Chhagan Lal Jain
S/o Late Sri Heera Lal Jain,
E-1381, AECS Layout,
ITPL Road, Brookefields,
Bangalore – 560037.

Mr. Parag Jain
E-1381, AECS Layout,
ITPL Road, Brookefields,
Bangalore – 560037. **...Respondents**

Present:

For Appellant: **Mr. Dhyan Chinnappa, Sr. Advocate**
Ms. Gawry Cootaiah, Ms. Arunima Kedia, Advocates

For Respondent: **Ms. Aanchal Basur, Mr. Dhananjay Joshi, Advocates for Respondents No.1**

For Respondent Nos. 2 to 4 – Notice Delivered-no appearance

J U D G M E N T

Venugopal M. J

Prelude

The Appellants have filed the present Company Appeal being 'aggrieved' with the impugned order 05.06.2020 in IA No. 170 of 2020 in C.P. No. 110/BB/2020 passed by the 'National Company Law Tribunal', Bengaluru Bench, Bengaluru which had allowed the application waiving the requisite conditions, as mentioned in Section 244(1) of the Companies Act, 2013 to maintain the main Company petition.

2. The 'National Company Law Tribunal', Bengaluru Bench, Bengaluru while passing the impugned order dated 05.06.2020 at paragraph 10 and 11 had observed the following: -

> *"10. It is not in dispute that the Applicant/Petitioner is still having 09% of the total share capital, after original shareholding was unjustifiable reduced from 45%, by virtue of rights issue, which is under challenge in the main Company Petition. While considering an Application filed seeking to waive the requisite conditions, U/s 244(1) of the Companies Act, 2013, the broad issues to be considered are whether the Petitioner has made out prima facie case in the main case or it is filed on mere baseless or frivolous grounds or on assumptions/presumptions, in order to abuse the judicial process. As stated supra, the main Company Petition is filed by the Petitioner by questioning*

various acts of oppression and mismanagement, which are found to be prima facie meritorious so as to consider those allegations at the time of final hearing of the Case, after waiving the requisite condition as sought for. A meritorious/disputed litigation cannot be thrown at threshold without looking into merits of litigation cannot be thrown at threshold without looking into merits of the case by the Tribunal/Court by depriving aggrieved party remediless. The contention of the Respondent that Civil Court has already decided the issues and thus the present Application and main Company Petition are not maintainable, are baseless on facts and on law, as detailed supra. Moreover, the Civil Court has decided only in respect of the alleged acceptance of resignation, and Civil Court do not have any jurisdiction to decide the acts of oppression and

mismanagement of the Companies Act, 2013."

"11. The above facts and circumstance of the case clearly established that the Applicant/Petitioner has made out a prima facie case to entertain the main Company Petition for its final adjudication. Moreover, it is a settled position of law that a meritorious litigation cannot be thrown at threshold without examining the merits of the case. It is not in dispute that the Applicant is admittedly, a shareholder of the Company by holding 09% of its total shares. Therefore, the Applicant/Petitioner is entitled for waiver as prescribed, U/s 244(1) of the Companies Act, as prayed for."

and opined that the First Respondent / Applicant / Petitioner had made out a *prima facie* case to entertain the main Company petition for its final adjudication, further proceeded to mention that it is a settled position of

law that a meritorious litigation cannot be thrown at threshold without examining the merits of the case and stated that it is not in dispute that the First Respondent / Applicant / Petitioner was admittedly a shareholder of the Company by holding 09% of its total shares and, therefore, she is entitled for waiver as prescribed, Under Section 244(1) of the Companies Act as prayed for and ultimately allowed the IA No. 170 of 2020 in C.P. No. 110/BB/2020 by waiving the requisite conditions, as prescribed Under Section 244(1) of the Companies Act to maintain the main Company petition and resultantly admitted the Company Petition and granted ten days' time to the Appellants/Respondents to file their replies to the main Company Petition and posted the case for final hearing on 18.06.2020.

3. Assailing the correctness, validity and legality of the impugned order in IA No. 170 of 2020 in C.P. No. 110/BB/2020 dated 05.06.2020 passed by the National Company Law Tribunal, Bengaluru Bench, Bengaluru, the Learned Counsel for the Appellants submits that the Tribunal had failed to appreciate that the First Respondent / Applicant / Petitioner had failed to make out a *prima facie* case for 'waiver' of statutory requirements as per Section 241 r/w Section 244 of the Companies Act, 2013.

Appellants Submissions

4. The Learned Counsel for the Appellants contends that the resignation of the First Respondent / Applicant / Petitioner from her post as 'Director' was completely voluntary as held by the Civil Court and that

the dilution of the First Respondent's shareholding in the Appellant Company was a consequence of her unequivocable refusal to avail of the rights offer made by the Appellant Company. Therefore, the impugned events are the result of First Respondent's own actions and hence, there is no allegation of oppression and mismanagement of the affairs of the Appellant Company made out by the First Respondent / Applicant / Petitioner in the petition.

5. The Learned Counsel for the Appellants comes out with a plea that the First Respondent / Petitioner had filed the application claiming 'waiver' on the very same grounds that form the basis of the long standing civil dispute between the parties, which in turn presently had attained finality through a judgement of the civil court.

6. It is represented on behalf of the Appellants that there are no exceptional circumstances for 'waiver' that are made out or even pleaded and the application suffers from this fatal infirmity. Added further, there is no scope for invoking a 'waiver' enabling the First Respondent to proceed with the petition when she herself had refused to subscribe to the 'Rights Issue' and that the civil court had already held that the Board meeting at which such 'Rights Offer' was decided to be made was legally convened.

7. The Learned Counsel for the Appellants projects an argument that without fulfilling the conditions mentioned in Section 241 or Section 244 of the Companies Act, 2013 and in the judgement in '**Cyrus Investments**

Pvt. Ltd. & Anr.' V. 'Tata Sons Ltd. & Ors.' reported in (2017) SCC online 'NCLAT' 261 cannot claim any remedies under the said provisions.

8. The Learned Counsel for the Appellants takes a plea that the Hon'ble Civil Court had considered the case of the First Respondent and found that she had no right to the notice of subsequent Board Meetings and that the resolutions passed at subsequent Board Meetings are legal and valid. Apart from this, it was found that the First Respondent had opted not to subscribe for additional shares offered by the Company through 'Rights Issue', even though the offer was made to her. In short, the First Respondent cannot seek to once again assail the legality of the actions of the Company under the garb of a petition alleging oppression and / or mismanagement. Moreover, the First Respondent is attempting to reagitate the very same dispute, on the same facts and grounds that were previously agitated in a suit O.S. NO. 3554 OF 2016 filed by her before the Civil Court viz. her case that she was illegally removed as a Director of the Company by a meeting of the Board of Directors dated 13.04.2016 and that the shareholding of the First Respondent was illegally reduced owing to the 'Rights Issue' undertaken by the Company on 25.04.2016 were looked into by a competent Court.

9. The Learned Counsel for the Appellants points out that the issue of legality of the 'Rights Issue' which the First Respondent has specifically disputed, her case that she was illegally removed as Director of the Company in the Board Meeting of the Directors dated 13.04.2016 and her

shareholding was reduced illegally were raised before the Civil Court and in view of the findings rendered by it, in its judgement such allegations which are sought to be raised again are completely frivolous for the purposes of a fresh action alleging oppression and mismanagement. Under the garb of separate 'Cause of Action' the First Respondent is seeking to reagitate the same issues arising from the same transaction, same set of facts and grounds.

10. According to the Learned Counsel for the Appellants that the 'Doctrine of Issue of Estoppel' applies to the facts of the present case especially when a particular issue forming necessary ingredient in a 'Cause of Action' was litigated and determined and in subsequent proceedings between the same parties involving a different 'Cause of Action' to which the same issue is relevant one of the parties seeks to reopen the issue and the plea of 'Estoppel' bars such relitigation.

11. The Learned Counsel for the Appellants submits that the First Respondent in her 'Appeal Memorandum' before the Hon'ble High Court of Karnataka had assailed the Civil Court's order by specifically urging the same contentions.

12. It is the categorical stand of the Appellants that the present C.P. No. 110/2019 was filed before the Tribunal on 04.04.2019, nearly three years from the date of removal of the First Respondent from the 'Board of Directors' of the First Appellant / Company on 13.04.2016 and the 'Rights Issue' notified to the First Respondent / Petitioner through letter dated

25.04.2016 and as such the Company Petition suffers from severe delay and latches and is liable to be dismissed in limine.

13. The Learned Counsel for the Appellants submits that the First Respondent / Petitioner having failed before the Civil Court had approached the Tribunal to espouse her grievances and her conduct is nothing but an attempt at *'forum shopping'* and cannot be sustained on any score.

Appellants' Citations

14. The Learned Counsel for the Appellants cites the decision of this Tribunal in the matter of '**Cyrus Investments Pvt. Ltd. & Anr.' V. 'Tata Sons Ltd. & Ors.' reported in (2017) SCC online 'NCLAT' 261** wherein at paragraph 148 and 151 it is observed as under:-

> *"148. Now there is a clear departure from earlier provision i.e. sub-section (4) of Section 399 whereunder the Central Government was empowered to permit the ineligible member(s) to file an application for 'oppression and mismanagement' by its executive power. Under proviso to sub-section (1) of Section 244 now the Tribunal is required to decide the question*

whether application merits 'waiver' of all or any of the requirements as specified in clauses (a) and (b) of sub-section (1) of Section 244 to enable such member(s) to file application under Section 241. Such order of 'waiver' being judicial in nature, cannot be passed by Tribunal, in a capricious or arbitrary manner and can be passed only by a speaking and reasoned order after notice to the (proposed) respondent(s). The basic principle of justice delivery system is that a court or a Tribunal while passing an order is not only required to give good reason based on record/ evidence but also required to show that after being satisfied itself the Court/ Tribunal has passed such order. To form an opinion as to whether the application merits waiver, the Tribunal is not only

required to form its opinion objectively, but also required to satisfy itself on the basis of pleadings/evidence on record as to whether the proposed application under Section 241 merits consideration.

151. Normally, the following factors are required to be noticed by the Tribunal before forming its opinion as to whether the application merits 'waiver' of all or one or other requirement as specified in clauses (a) and (b) of sub-section (1) Section 244: - (i) Whether the applicants are member(s) of the company in question? If the answer is in negative i.e. the applicant(s) are not member(s), the application is to be rejected outright. Otherwise, the Tribunal will look into the next factor. (ii) Whether (proposed) application

under Section 241 pertains to 'oppression and mismanagement'? If the Tribunal on perusal of proposed application under Section 241 forms opinion that the application does not relate to 'oppression and mismanagement' of the company or its members and/or is frivolous, it will reject the application for 'waiver'. Otherwise, the Tribunal will proceed to notice the other factors. (iii) Whether similar allegation of 'oppression and mismanagement', was earlier made by any other member and stand decided and concluded? 79 (iv) Whether there is an exceptional circumstance made out to grant 'waiver', so as to enable members to file application under Section 241 etc.?"

15. The Learned Counsel for the Appellants relies on the decision of **Hon'ble Supreme Court in 'Sangramsingh P. Gaekwad and Others' V. 'Shanta Devi**

P. Gaekwad (Dead) Through LRS and Others' reported in (2005) 11 Supreme Court Cases at p. 314 at spl p. 361 wherein at paragraph 119 and 120 it is observed as under: -

> *"119. It is interesting to note that respondent no. 1 in her rejoinder categorically stated that everybody received the circular letter and even Appellant I did not apply for the shares pursuant thereto but the same had not been replied to."*
>
> *120. In the aforementioned situation, in our considered opinion, she cannot now be permitted to turn around and contend that there was no requirement to raise any funds or there was no valid reason to increase the capital of GIC by issues of shares."*

16. The Learned Counsel for the Appellants refers to the decision of **Hon'ble Supreme Court in 'Ishwar Dutt' V. 'Land Acquisition Collector and Another'**

reported in (2005) 7 Supreme Court Cases at P. 190 at spl. P. 199 to 201 wherein at paragraph 24-28 it is observed as under:-

> *"24*. (Ed.... Para 24 corrected vide official corrigendum No. F.3/Ed.B.J./90/2005 dated 15.05.2005). Yet again in Arnold v. National Westminster Bank Plc. (1991) 3 All ER 41 : (1991) 2 WLR 1177 the House of Lords noticed the distinction between cause of action estoppel and issue estoppel: (All ER pp. 46 C-E and 47 C-D)*
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> *"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been litigated between the same parties or their privies and having involved the same subject-matter. In such a case, the bar is absolute in relation to all points*

decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgement. The discovery of new factual matter which could not have been found by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened. ….. Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue."

Here also the bar is complete to re-litigation but its operation can be thwarted under certain circumstances. The house then finally observed ….(All ER p.50 C-E).

"But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice have greater force in cause of action estoppel, the subject matter of the two proceedings being identical then they do in issue estoppel, where the subject matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it

hopeless, or argue it faintly without any real hope of success".

25. In Gulabchand Chhotalal Parikh v. State of Bombay (AIR 1965 Supreme Court page 1153) the Constitution Bench held that the principle of res judicata is also applicable to the subsequent suits where the same issues between the same parties had been decided in an earlier proceeding under Article 226 of the Constitution.

26. It is trite that the principle of res judicata is also applicable to the writ proceedings (See H.P. Road Transport Corpn. V. Balwant Singh- 1993 Supp (1) SCC 552).

27. In Bhanu Kumar Jain v. Archana Kumar(2005) 1 SCC 787 it was held: (SCC p. 796, paras 18-19)

"18. It is now well settled that principles of res judicata apply in different stages of the same proceedings. (See Satyadhyan Ghosal v. Deorajin Debi(1960) 3 SCR 590: and Prahlad Singh v. Col.Sukhdev Singh (1987) 1 SCC 727.

19. In Y.B.Patil(in Y.B.Patil 1976) 4 SCC 66 (SCC) p. 68, para 4.

'4…….It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final it would be binding at the subsequent stage of that proceeding."

It was further observed. (SCC p. 798, paras 31-32).

"31. In a case of this nature, however, the doctrine of 'issue estoppel' as also 'cause of action estoppel' may arise. In Thoday (Thoday v. Thoday (1964) 1 All ER 341) (Lord Diplock held:(All ER p. 352B-D)

……"cause of action estoppel", is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e. judgement was given on it, it is said to be merged in the judgment…If it was determined not t exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam.'

The said dicta was followed in Barber v. Stffordshire Country Council. (1996) 2 ALL er 748(CA). A cause of action estoppel arises where in two different proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided, save and except allegation of fraud and collusion. (See C. (A minor) v. Hackney London Borough Council (1996) ALL er 973). (See The Doctrine of Res Judicata, 2nd Edn. By Spencer Bower and Turner, p.149).

28. In this view of the matter, the High Court, in our opinion, had no jurisdiction to go into the aforementioned question."

17. The Learned Counsel for the Appellants points out the decision of the

Hon'ble Supreme Court in 'Hope Plantations Ltd.' v. 'Taluk Lan Board Peermade and Anr.' reported in (1999) 5 SCC p. 590 at spl. p. 607, 608 and 611 wherein at paragraph 26 and 31 it is observed as under:-

> *"26. The principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgement and are stopped from questioning it.*

They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action" estoppel and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determines. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to an issue

estoppel. It operates in any subsequent proceedings in the same suit in which the issue has been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 CPC contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."

"31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various

courts on this subject. As noted above, the plea of res judicata, though technical is based on public policy in order to put an end to litigation. It is however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier, if in the meanwhile law is changed or has been interpreted differently by IR forum. But that situation does not exist here. Principles of constructive res judicata

apply with full force. It is the subsequent stage of the same proceedings. If we refer to Order XLVII of the Code (Explanation to Rule 1) review is not permissible on the ground.

"that the decision on a question of law on which the judgement of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgement."

First Respondent's Contentions

18. The Learned Counsel for the First Respondent contends that the Tribunal, took note of the main objection that the First Respondent / Petitioner filed a civil suit challenging the removal as a Director from the First Appellant / Company and was, therefore, purportedly barred from seeking relief from oppression and mismanagement, interalia on the ground of fraudulent reduction of the First Respondent shareholding in the First

Appellant / Company and accordingly framed specific issues to consider that objection. Moreover, the Tribunal in the impugned order mentioned the reasoning for allowing the application of the First Respondent/Petitioner by noting that she had 45% shareholding in the First Appellant / Company for several years and that one of the acts of the oppression and mismanagement that the First Respondent / Petitioner was seeking relief was the fraudulent reduction of her shareholding to 09%.

19. It is represented on behalf of the First Respondent that the Tribunal, in the impugned order had proceeded to observe that the Civil Courts have no jurisdiction over matters of oppression and mismanagement and that the First Respondent's civil suit in OS No. 3554 of 2016 was restricted only to the issue of challenging her removal from the Board of Directors of the First Appellant / Company.

20. Added further, it is the plea of the First Respondent that neither the Civil Suit in OS No. 3554 of 2016 nor the pending Appeal, RFA No. 394 of 2019, filed by the First Respondent as an Appellant prevents the Tribunal from adjudicating upon the First Respondent / Petitioner's application under Sections 241 and 242 of the Companies Act seeking reliefs from oppression and mismanagement. Therefore, it is the stand of the First Respondent that the IA No. 170 of 2020 filed in C.P. No. 110/BB/2019 filed before the National Company Law Tribunal, Bengaluru Bench, Bengaluru is neither a baseless nor a frivolous one and in fact, the First Respondent has no alternate remedy as it is only the National Company Law Tribunal in law,

has the power to investigate and adjudicate in cases of oppression and mismanagement.

First Respondent's Decisions

21. The Learned Counsel for the First Respondent cites the decision of this Tribunal in the matter of '**Cyrus Investments Pvt. Ltd. & Anr.' V. 'Tata Sons Ltd. & Ors.' reported in (2017) SCC online 'NCLAT' 261** wherein at paragraphs 65 to 67, 169 and 170 it is observed as under:-

> *"65. Bare perusal of Section 244 makes it clear that in this case the company having a share capital, only following categories of Member can apply :-*
>
> *(i) Minimum one hundred members of the company or one-tenth of the total number of its member, whichever is less and*
>
> *(ii) Any member or members(jointly) holding not less than one-*

tenth of the 'issued share capital' of the company.

66. It is also obvious on a bare reading of sections 241 and 244 of the 2013 Act, that while clause (a) and (b) of sub-section (1) of section 241 deal with the ***subject matter*** *of the grievances which can be raised in a petition, section 244(1) deals with* ***locus/eligibility*** *of the member who can raise such grievances. The subject matter of the complaint bears no connection with the eligibility of the member applying to the Tribunal except that a member seeking to make a grievance of the subject matter contained in section 241 is required to first satisfy the eligibility of section 244 of the 2013 Act.*

67. This explains why, after stating the nature of complaint in clauses (a) and (b) of sub-section (1) of section 241, it is immediately provided that "provided such member has a right to apply under section 244…" Equally section 244 reciprocates by stating that the "following members…shall have the right to apply section 241, namely." Viewed in this light, there is perfect reciprocal harmony between section 241 and section 244 of the 2013 Act.

169. In so far as (proposed) petition under section 241 is concerned, the plain reading of the same will show that the allegations relate to 'oppression and mismanagement'; it cannot be

stated to be a frivolous application. We find that some of the allegations as made by the appellants and highlighted by the learned counsel for the 11th respondent as noticed in the preceding paragraphs, are of recent year, 2016. We are not expressing any opinion with regard to merit of such allegation, but have only notice the allegations.

170. Taking into consideration the aforesaid facts and exceptional circumstances of the case as apparent from the plain reading of the (proposed) application and as some of them relate to 'oppression and mismanagement', qua 1st respondent company and its member(s), we are of the view

that the appellants have made out a case for 'Waiver' to enable them to apply under section 241."

22. The Learned Counsel for the First Respondent refers to the decision in **'Photon Infotech Pvt. Ltd. & Others' V. 'Medici Holdings Ltd. and Ors.' reported in 2018 SCC online 'NCLAT' 632** wherein at paragraph 16, 18 and 19 it is observed as under:-

"16. Going through the application which was filed for waiver by the Respondent no.1 we find that the application pertains to 'oppression and mismanagement'. We keep in view the pleadings of alleged oppression and mismanagement. There is no dispute that the original applicant/ respondent no.1 is member of the company. It cannot be said that the application is frivolous. It is not a case that similar allegations of 'oppression and mismanagement' were earlier made and stood

decided or concluded (please see Para 146 of the judgment in the matter of Cyrus Investments). It has already been held in Para 150 of the judgment in the matter of Cyrus Investments that Civil Court has no jurisdiction to entertain any suit or proceeding in respect of alleged acts of 'oppression and mismanagement' if it is preferred by any member of the company. When any member of the company complains of 'oppression and mismanagement' in the company, in view of the Companies Act, the issue has to be decided by NCLT.

18. No doubt in the impugned order NCLT, reading the proviso below section 244 as it is, discussed whether prima facie case is made out and observed that the respondents had not shown certain factors, but we are

ignoring those observations in view of judgment in the matter of Cyrus. However we on our analysis of the matter find that it is a fit case for grant of waiver.

19. In reply to arguments of the Ld. Counsel for respondent no.1 (original appellant) it is argued by Appellants (see brief written submissions on behalf of the appellants filed on 19.03.2018) that appellant no.5 is not a shareholder of the 1st appellant company, nor is it involved in its management; and that appellant no.5 is only the transferee under a Business Transfer Agreement signed by the 1st appellant company; and that " It is a bona fide third party purchaser of the 1st appellant's assets at a fail value". We find that when it is shown that substratum itself of

the company has been transferred, it is an exception circumstance, and waiver as sought should be granted."

Assessment

23. It is the categorical stand of the Appellants is that the first Respondent / Petitioner, is an erstwhile director of the first Appellant / Company and that she resigned as a Director of the company on 05.04.2016, citing health reasons and extensive travel plans and as per section 168(2) of the Companies Act, 2013 ceased to be a director of the first Appellant / Company with immediate effect. Later, the first Appellant / Company held a meeting of the Board of Directors of the Company on 13.04.2016 and passed a 'Resolution' formally accepting the resignation of the First Respondent / Petitioner/plaintiff.

24. It is projected on the side of the Appellants that the First Appellant / Company in accordance with Section 168 of the Companies Act, 2013 and Rule 15 of the Companies (Appointment and Qualification of Directors) Rules, 2014 filed the requisite DIR-12 Form, intimating the 'Registrar of Companies' of the resignation of the first Respondent on 13.04.2016 after the board meeting. Later, the first Respondent and the first Appellant / Company exchanged several mails, where the first Respondent expressed without demur that her resignation was without coercion and was out of her own free will.

25. It is the version of the Appellants that to expand business, the second Appellant and other Directors of the first Appellant / Company made a decision to raise 'Further Capital' from shareholders by making a 'Rights Issue' and that the first Appellant / Company as per Section 62 of the Companies Act r/w Rule 13 of the Companies (Share Capital and Debenture) Rules, 2013 proposed a 'Rights Issue' on 25.04.2016. Apart from that, the 'Letter of Offer' was dispatched to all the shareholders, including the First Respondent / plaintiff, who received the same on 26.04.2016 but she unequivocally refused to subscribe to the additional shares. Indeed, the 'offer' remained open for 18 days and that the first Respondent had not availed the opportunity to subscribe to the additional shares offered on rights basis. The Second Appellant had subscribed to the additional shares offered to him by the First Appellant / Company and consequently the First Respondent's 'Share Capital' in the Company came down to 9% as a natural consequence.

26. It comes to be known that the First Respondent / Petitioner as plaintiff had filed the suit in OS No. 3554 of 2016 on the file of the Learned 39th Additional City Civil Judge Court, Bengaluru City against the Appellants / defendants and sought the following reliefs:-

> "*a. DECLARE that the notice dated 12/4/2016 calling for a meeting of the Board of Directors of the 1st Defendant*

on 13/4/2016 is illegal, void ab initio and contrary to the Articles of Association of the 1st Defendant and also in violation of Section 173 of the Companies Act, 2013;

b. DECLARE that the resolutions passed and the decisions made in the meeting of the Board of Directors held on 13/4/2016 and all actions taken pursuant thereto are illegal, void ab initio and not binding on the plaintiff and the 1st Defendant;

c. DECLARE that the plaintiff continues to be a Director of the 1st Defendant;

d. RESTRAIN, by grant of a Permanent Injunction, the 1st Defendant, 2nd Defendant or anybody claiming through or

under them, from interfering with Plaintiff's right as a Director of the 1st Defendant;

e. GRANT any such other relief/s in the interest of justice and equity."

27. It is averred by the First Respondent / plaintiff at paragraph 11 of the plaint in OS No. 3554 of 2016 on the file of the **Learned 39th Additional City Civil Judge, Bangalore City** that on 07.08.2013 she and the Second Defendant (Second Respondent) that they jointly purchased a commercial property measuring 4340 sq. ft. at White Field and that they contributed equally from their personal funds for the purchase of the said property.

28. Continuing further, the First Respondent / plaintiff at paragraph 12 of the plaint in the above suit had mentioned that in 2013 the First Defendant (the First Appellant Company) required a working capital for the business and hence, availed a term loan of Rs. 1.85 crore from '***Karur Vysya Bank', Jayanagar, Bengaluru,*** that the loan was sanctioned to the First Defendant (the First Appellant Company) and that the First Respondent / plaintiff and the Second Respondent / Second Defendant had pledged their aforesaid White Field Property as collateral security against the repayment of the said loan.

29. As a matter of fact, the First Respondent / plaintiff at paragraph 16 of the plaint in the aforesaid suit had proceeded to mention that she was seriously hurt by the scathing remarks and use of inappropriate language by the Second Respondent / Second Defendant against her and in a fit of anger, and as a knee jerk reaction, she wrote a letter of resignation in her hand, resigning from the post of Director of the First Appellant / Company etc.

30. Indeed, the First Respondent / plaintiff at paragraph 24 of the plaint had among other things observed that the Second Respondent / Second Defendant pushed her into deeper emotional turmoil because of the fraudulent steps taken by him and as a result of an emotional outburst she sent an e.mail on 13.04.2016 that she would like to part ways with the Second Respondent / Second Defendant. Moreover, she asserted that the e.mail was sent while she was in a state of shock and when she was undergoing emotional turmoil.

31. The First Respondent / plaintiff at paragraph 29 of the plaint in the above suit had stated that she is a lawful director of the First Defendant (the First Appellant Company) and she had not tendered a resignation from the post of Director, although she had written such a letter. Also, she had averred that the notice of the meeting of the Board of Directors was illegal and does not comply with the requirements of law and further that the meeting purportedly held on 13.04.2016 was also illegal and void abinitio. As such, the resolution alleged to have been passed and the action of removing her and the appointment of Mrs. Bhawna Jain as Additional Director were all illegal and

not binding on the First Defendant (the First Appellant Company) and the First Respondent / plaintiff. Besides this, she had stated that the meeting purported to have been held on 25.04.2016 was also illegal particularly as she was entitled to participate in the meeting that discussed the approval of the 'Rights Issue'.

32. In paragraph 45 and 46 of the Judgement in OS No. 3554 of 2016 filed by the First Respondent / plaintiff, the **Learned 39th Additional City Civil Judge, Bangalore City** had observed the following:-

> *"45.... In this case also, if at all the plaintiff is aggrieved by the decisions of the Board of Directors, she can very well approach the Company Law Board for her redressal in respect of issuance of the rights issue."*

> *"46.... The plaintiff herself resigned and once the resignation is received by the company, the plaintiff ceases to be a director of a company.*

Apart from this, as per Section 173(3) Proviso (1) of Companies Act, 2013, issuance of emergent notice is permitted. The plaintiff is not at all a director of defendant No. 1 – company as on the date of meeting, i.e., 13.4.2016. Hence, plaintiff cannot challenge the Board of Directors meeting dated 13.4.2016."

and finally held that as on date of the suit, the First Respondent / plaintiff was no more Director of the Company and claiming as Director of the Defendant Company (First Appellant). She had no right / locus standi to file the suit and dismissed the suit without costs.

33. After the dismissal of the suit in OS No. 3554 of 2016 by the trial Court the First Respondent / plaintiff as an Appellant had filed RFA No. 394 of 2019 on the file of 'Hon'ble High Court of Karnataka' and the same is pending.

34. The First Respondent / plaintiff filed C.P. No.110/BB/2019 before the National Company Law Tribunal, Bengaluru Bench, Bengaluru against the

First Appellant / Company and four others (u/s 241 of the Companies Act, 2013 and sought the reliefs of Declarations:-

> *(i) that the affairs of the First Respondent / Company are being conducted by the Respondent Nos. 2,3 and 5 in a manner prejudicial to her and to the interests of the Respondent No. 1 Company itself;*
>
> *(ii) that the issuance of rights shares during 2016-17 by the First Respondent Company was illegal, set it aside and cancel the further shares so issued;*
>
> *(iii)To remove the First Respondent as the Managing Director of the Respondent No. 1 Company;*
>
> *(iv)To recover the undue gains made by the Respondent Nos. 2,3 and 5 during the period*

commencing from 01.04.2016 until the disposal of this petition and retain the same for the benefit of the Respondent No. 1 Company;

(v) To Direct the valuation of the shares of the Respondent No. 1 Company and to provide for the purchase of the petitioner's entire shareholding by the Respondents or for the purchase of the Respondents' entire shareholding by the Petitioner;

(vi) In the alternative to Prayer (e), in the event of the Parties disagreeing with the valuation of the shares or in the event of the respective Parties being unable to or unwilling to purchase /sell the other's entire shareholding in the Respondent No. 1 Company, to WIND UP the Respondent No. 1 Company.

(vii) Direct the Respondents to bear and pay the entire costs of this petition and the proceedings to the Petitioner; and

(viii) GRANT such other and further reliefs as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

35. The First Respondent / Petitioner filed IA No. 170 of 2020 in C.P. No.110/BB/2019 before the National Company Law Tribunal, Bengaluru Bench, Bengaluru u/s 244(1) r/w Sections 241 and 242 of the Companies Act, 2013 r/w Rules 11 and 34 of the 'NCLT' Rule, 2016 seeking to waive the compliance of Section 244(1) of the Companies Act. In fact, the First Respondent / Petitioner in IA No. 170 of 2020 had averred at paragraph 11 that 'prior to being illegally reduced to a proportionate shareholding 09% in the Respondent No. 1 Company, the petitioner held 45% of the total share capital of the Respondent No. 1 Company. The illegal reduction of her proportionate shareholding in the Respondent No. 1 Company is one of the several acts of oppression and mismanagement on the part of the Respondent Nos. 2,3 and 5' and she

has a right, u/s 244 of the Companies Act, 2013, to submit this application u/s 241.

36. To determine whether the petition filed under section 241 and 242 of the Companies Act, 2013, the Tribunal has to examine only the averments mentioned in the petition. The concept of 'oppression' is larger than the idea of 'legal rights' and indeed, the term 'interests' is wider than rights. As a matter of fact, the law does not define an 'oppressive act'. Whether an act is oppressive one or not is fundamentally a question of fact. The law relating to 'oppression' is cemented on the principles of equity and fair play as against the strict compliance of law.

37. A Company is merely an abstract of Law. It cannot be gainsaid that right to complain about 'oppression and mismanagement' lies with the members of a company. No wonder fairness and probity rather than legality are the key factors to be taken into consideration by a Tribunal in case of oppression. What kind of oppression or prejudice or unfairness is caused in a given case will depend on the injury caused to an affected person by the concerned as visualised in section 241 of the Companies Act, 2013?

38. Undoubtedly, the burden is on the petitioner to prove oppression or mismanagement and the 'Tribunal' is to consider the entire material on record and to arrive at a final conclusion. The 'Rights Issue' can be

examined by the 'Tribunal' in a petition u/s 241 of the Companies Act, 2013. Also, that, in law the Tribunal is to ascertain when the right to sue / to file an application accrued to the petitioner. There is no impediment for the Tribunal to consider the preliminary objections raised by a party at a later stage of the main proceedings. If maintainability is a triable issue, the acceptance of a petition or rejection of the same has to be decided along with the issues raised, to be heard with the merits of the case in the considered opinion of this Tribunal.

No Time Limit

39. More importantly, although for filing a petition no time limit is specified under Section 241 of the Companies Act relating to 'oppression and mismanagement', the residuary Article 113 of the Limitation Act, 1963 concerning 'when the right to sue accrues' is to be borne in mind.

Jurisdiction of Civil Court

40. Section 430 of the Companies Act, 2013 speaks of 'Civil Court not to have jurisdiction' to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force etc.

41. In so far as the jurisdiction of the civil court is concerned, it is to be pointed out that section 9 of the Civil Procedure Code confers

jurisdiction upon the civil courts to decide all disputes of civil nature unless the same is prohibited under a statute either expressly or by necessary implication. In short, one cannot infer the bar of civil courts' jurisdiction and in this regard a strict interpretation is required in regard to a provision seeking to bar the jurisdiction of a civil code.

42. At this juncture, this Tribunal worth recalls and recollects the decision of **Hon'ble Supreme Court in 'Dhulabhai' V. 'State of Madhya Pradesh' reported in AIR 1969 SC p.78** wherein it is observed that where under the scheme of any particular Act, there is no express exclusion of jurisdiction it becomes necessary to examine the scheme of the Act to find out whether it is necessary to spell out intendment to exclude the jurisdiction of the Civil Court. Such exclusion is not readily to be inferred unless the conditions which are mentioned in the said judgement are satisfied.

43. Moreover, this Tribunal points out that in the decision **'Avanthi Explosives P. Ltd.' V. 'Principal Subordinate Judge, Tirupathi and Anr.' reported in 62 Company Cases p. 301** which dealt with the suit for a declaration that the plaintiff was not disqualified to be a Director Managing Director of the Company in question and that the **Hon'ble High Court of Andhra Pradesh** observed that the civil court has jurisdiction to entertain the 'Suit' and the section 10 only specifies the court competent to deal with the matter arising under the Act and does

not invest the company court with jurisdiction over every matter arising under the Act.

Further Issue of Share Capital

44. Section 62 of the Companies Act, 2013 speaks of 'Further issue of share capital'. In fact, the 'Rights Issue' is not defined under the Companies Act, 2013. The power to issue further shares ought to be exercised for the benefit of the Company, notwithstanding the fact that the 'Increase of Capital' is an internal administration matter of the Company. Continuing further, whether the decision of the Board of Directors to increase share capital by way of issuing rights is in the interest of the company or bonafide or otherwise can be ascertained from each and individual set of attendant facts of a given case.

Agents

45. It is an axiomatic principle in law that the Directors of a Company are just 'Agents' of the Company and they are quite competent to decide the Agency at his / her own end. In fact, Section 168 of the Companies Act, 2013 pertains to 'Resignation of director'.

Res Judicata

46. The aspect of '*Res Judicata*' is inhibition *against* the Court / Tribunal and it is certainly a mixed question of facts and law, to be specifically averred in one's pleading before the *competent fora.* In fact,

'*Res Judicata*' precludes a person from pleading the same thing in successive litigation. The burden to establish the plea of '*Res Judicata*' is on the person to raises such plea. No wonder, the doctrine of '*Res Judicata*' is rested on the principles of equity, good conscience and justice applies to all judicial proceedings equally before the Tribunals.

47. Section 244 speaks of 'Right to Apply' u/s 241 of the Companies Act, 2013. Section 244(1) be of the Companies Act, 2013 confers powers upon a Tribunal to waive all or any of the requirements specified in clause(a) or clause (b) so as to enable to members to apply under section 241 of the Act.

48. In a petition under Section 241 of the Companies Act, 2013, the petitioner is to furnish (i) relevant materials (ii) to furnish the figures (iii) the allegations are to be proved. The power of a Tribunal under Section 241 of the Companies Act, 2013 is to put an end to 'oppression and mismanagement' on the part of controlling shareholders to suppress mischief. An individual who approaches the Tribunal alleging 'oppression' must come before it with utmost clean hands and in a bonafide manner.

Power of Waiver

49. Under the Companies Act, 2013 the exercise of power by a Tribunal to waive the requirements to file a petition under section 241 of the Act is at its discretion which may be exercised on an application made to it in this behalf.

50. The interest of an applicant in a company whether it is substantial or significant, the issues raised in the petition u/s 241 of the Companies Act, 2013 is the appropriate / competent jurisdiction to deal with them by the Tribunal, and whether the cause / case projected in the petition is of primordial importance to an 'applicant' or to the 'company' or to 'any class of members' etc. are some of the pertinent factors to be taken note of for projecting an application for waiver of the requirements under section 244 of the Companies Act, 2013.

51. It cannot be forgotten that in genuine and hardship cases, the discretion to waive the conditions specified in Section 244(b) of the Companies Act can be pressed into service.

52. It is to be remembered that when no case is made out by the petitioner relating to the 'oppression and mismanagement' of the affairs of the company that the concerned Tribunal has the requisite power not to grant any relief in a given case.

53. Even though the Tribunal in the impugned order in IA No. 170 of 2020 in C.P. No.110/BB/2019 dated 05.06.2020 had observed among other things that the contention of the Respondent that Civil Court has already decided the issues and thus the present application and main company petition are not maintainable, are baseless on facts and law etc.; these are in the considered opinion of this Tribunal only rendered at an interlocutory stage, the same cannot preclude the Appellants to

raise all factual and legal pleas like the locus standi of the petitioner(First Respondent) to file petition under section 241 of the Companies Act, 2013 Issue of Estoppel, Res Judicata, Delay / Latches in its Reply/Response/Counter and to advance arguments on merits at the time of final hearing of main petition before the Tribunal and that the Tribunal is to pass orders on merits in a fair, just and dispassionate manner uninfluenced and unhindered with any of the observations made by this Tribunal in the present Appeal. Suffice it for this Tribunal to point out that a petition at the initial stage cannot be thrown out if the averments contained therein require detailed / elaborate / an in-depth examination / inquiry based on relevant materials / evidence, if any, to be let in by parties in a given case.

Disposition

54. The First Respondent / Petitioner has 9% of the total share capital even after a shareholding was reduced from 45%, by means of 'Rights Issue' which is a subject matter of the main company petition. The Tribunal, has exercised its discretion and opined that a meritorious litigation cannot be thrown at threshold without examining the merits of the case and further observed that the First Respondent / Petitioner had made out a *prima facie* case to entertain the main company petition for its final adjudication and resultantly allowed the waiver application IA No. 170 of 2020 in C.P. No.110/BB/2019 dated 05.06.2020 which in the

considered opinion of this Tribunal requires no interference. Viewed in that perspective the instant Appeal fails.

In fine, the Appeal is dismissed. No costs.

[Justice Venugopal. M]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI

22nd December, 2020

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