NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No. 127 of 2017

IN THE MATTER OF:

Bihar State Industrial Development Limited ... **Appellant**

Versus

Asiatic Oxygen Ltd. & Ors. ... **Respondents**

Present: **For Appellant :** **Shri Nilanjan Chatterjee and Shri Bishwa Bandhu, Advocates**

For Respondents: Shri Anil Agarwalla, Ms. Neha Sharma and Shri Shakya Sen, Advocates

WITH

Company Appeal (AT) No. 151 of 2017

IN THE MATTER OF:

Asiatic Oxygen Ltd. & Ors. ... **Appellants**

Versus

Bihar Air Products Limited & Ors. ... **Respondents**

Present: **For Appellant :** **Shri Anil Agarwalla, Ms. Neha Sharma and Shri Shakya Sen, Advocates**

For Respondents : Shri Nilanjan Chatterjee and Shri Bishwa Bandhu, Advocates

ORDER

28.07.2017 Both these appeals have been preferred by the contesting parties against the common order dated 22nd February, 2017 passed by the National Company Law Tribunal (hereinafter referred to as 'Tribunal'), Kolkata Bench, Kolkata in Company Petition No. 191/2007.

2. The Company Petition No. 191/2007 was preferred by Asiatic Oxygen Limited (Petitioner/Appellant herein) under Sections 397, 398, 399, 402, 403 and 406 of the Companies Act, 1956 before the erstwhile Company Law Board, Kolkata Bench, Kolkata. It was alleged that the Bihar State Industrial Development Corporation Limited, (Respondent before the Tribunal) was trying to act in a manner which was oppressive to the petitioner-Asiatic Oxygen Ltd. having decided to exit from the Company-Bihar Air Products Limited by inviting tender to sell their shares.

3. The Company Law Board, noticed that the company-Bihar Air Products Limited is a joint venture company. The Bihar State Industrial Development Corporation Limited, a Government Company incorporated under the Companies Act, 1956 in collaboration with Asiatic Oxygen Ltd.-Respondent/Appellant, was running the company named Bihar Air Products Limited (1st Respondent before the Tribunal).

4. The arguments advanced on behalf of the parties were noticed by the Company Law Board which by its order dated 30th June, 2009, observed and passed the following order :

> *"31. Shri Mookherjee advanced an alternative argument alternative argument that since the company is a Joint venture, the principals of partnership should apply. This being the case, according to him one of the partners cannot induct another partner without the consent of the other and when he has decided to exit from the company, he should offer the shares to the remaining partner. This argument has two components. One is that Corporation should have offered its shares only to the petitioners and the other is that it should hot have sold the shares to a third party. As far as the applicability of partnership principles is concerned, I am in full agreement with Shri Mookerjee. The company is the creature of the Collaboration Agreement between the petitioners and the Corporation and in spite of disputes among them, they have continued together for over 30 years. Even though the Corporation was to have 26% shares and the petitioner of 25%, yet, the petitioner was allowed to acquire further shares in the public offer. Thus, the petitioners came to old*

38.45% as against the Corporation of 32.24% making them as the single largest shareholder group. While the petitioners were in control of the company through their nominee MD till about 1992, with the agreement dated 19.7.2006, their nominee has again become the MD. This Board has always taken a view that when disputes and differences arise between two main parties controlling a company, the parting of ways is the best solution in so far as the Interests of the company is concerned and in determining as to who should remain in the company, this Board has always given weightage to the shareholding and also to the fact as to who is in effective control of the company. In the present case, the petitioners are the largest group of shareholders and from 2006, the company is under their control. Further, the determination as to who should go out of the company has become immaterial in this case, as the Corporation has, on its own, decided to exit from the company, as is evident from the fact that it has called for tenders for its shares. In all fairness and in equity, even in the absence of any written agreement, the Corporation has, on its own, decided to exit from the company, as is evident from the fact

that it has called for tenders for its shares. In all fairness and in equity, even in the absence of any written agreement, the Corporation should have offered these shares to the petitioners-being the collaborators and only in case when either the petitioners had rejected the offer or had not been able to match the price demanded by the Corporation, then, it could have invited offers from outsiders. Admittedly, no offer was made to the petitioners when the Corporation decided to exit the company. As a matter of fact, when the petitioners came to know of the tender process initiated by the Corporation, they did write on 2.8.2007 expressing their interest to purchase the shares at a mutually agreed price, but the corporation did not react. Thus, I am in full agreement with Shri Mookherjee that by offering the shares to an outsider, and thus creating a new negative control in a third party, that too, without any obligation towards the company, the Corporation has acted in a manner oppressive to the petitioners. One other aspect also requires consideration. There are certain Articles in the Articles of Association of the company, without the alteration of which, the Corporation itself may not be

in a position to exit from the company. Since the petitioners hold 38.45% shares no special resolution is possible to amend the Articles without their support, Article 7 stipulates that the Corporation and the collaborators shall hold at any time, 26% and 25% or more as the Board decides of the issued capital of the company respectively. Therefore, in violation of this Article, the company itself would not be able to register sale of any share held by the Corporation, if by such sale, the shareholding of the Corporation come down below 26%. As a matter of fact, the order of the High Court dated 25.1.1993 restraining the company from registering the transfer of shares held by the Corporation is still in force. Article 101 stipules that the Corporation and the collaborators shall be entitled to appoint four directors each, as long as the shareholding of the Corporation is not below 26% and that of the petitioners not below 26% and that of the petitioners not below 25%. In terms of Article 138, the petitioners are entitled to appoint its nominee as the MD in consultation with the Corporation. Similarly, in terms of Article 138A, the Executive Director is to be the nominee of the Corporation to be appointed in

consultation with the petitioners. From these provisions, it is evident that unless and until the Articles are amended, the amendment of which would require the support of the petitioners, the proposal of the Corporation to sell the shares held by it in the company to an outsider would make the present Articles unworkable. Making the Articles of a company unworkable by their voluntary act by a set of shareholders is also an act of oppression. Thus, taking into consideration the nature of the company that it is joint venture in the nature of a quasi partnership, the provisions of the Articles and also in equity, I am of the view that the petitioners have established their case for grant of the relief sought that the Corporation should be directed not to sell its shares to anybody, other than the petitioners.

32. *However, it is on record that the Corporation had invited tenders and has finalized the offer of M/s. Anjaneya lspat Limited. Even though in the reply to the petition, the Corporation has not indicated any details about the consideration received from Anjaneya, yet, in its interning application, M/s. Anjaneya has indicated that it has already deposited a sum of Rs. 7 lakhs towards*

consideration for the shares. Thus, without giving M/s Anjaneya an opportunity of hearing, no relief as sought for by the petitioners, even though I have opined that the petitioners deserve the same, could be granted. Even though M/s Anjaneya has not been impleaded as a party respondent by the petitioners, M/s Anjaneya itself has applied for such an impleadment and I have already ordered for the same. Shri Mookerjee pointed out that in acquiring the impugned shares, M/s Anjaneya has acted in breach of the SEBI Take Over Code and also the provisions of SCRA as the sale is not on spot delivery basis. Even though, these allegations are not part of the petition, yet, since the same relate to alleged violation of the provisions of statutes, M/s Anjaneya has to respond to these allegations.

33. *Accordingly, I direct M/s Anjaneya and the Corporation to file their response, as to why, the proposed purchase/sale of the impugned shares should not be declared as null and void for the following reasons : That the company, being in the nature of a quasi partnership, the Corporation could not have offered the shares to an outsider without first offer to the petitioners; That the purchase or the*

impugned shares is in violaton of the SEBI Takeover Code and that it also violates the provisions of SCRA.

34. Their response should be filed latest by 15.7.2009 and the petitioners are liberty to file their counter by 10.8.2009. The matter will be further heard on a date to be notified. The earlier interim order dated 19.11.2007 will continue till the matter is finally decided."

5. Against the said order, the Respondent/Appellant moved an appeal before the Jharkhand High Court under Section 10-F of the Companies Act, 1956 but the said appeal was not pressed and was dismissed for default. Thereby, the order passed by the Company Law Board on 30th June, 2009, in so far as it relates to the finding with regard to 'oppression and mismanagement' has reached finality.

6. Thereafter, the matter remained pending after notice to the third party i.e. M/s. Anjaneya Ispat Limited and Bihar State Industrial Development Corporation Limited. Thereafter, no final order was passed and the matter was transferred to the Tribunal, Kolkata Bench at Kolkata. The Tribunal, by the impugned order dated 22nd February, 2017, while observed that there is 'oppression

and mismanagement', further held that there is a deadlock between the parties and passed the following order :

> *"In view of the facts briefly enumerated above in the present case, it is clear that there is a deadlock which has adversely affected the functioning of the Company-BAPL, as a viable enterprise. In a situation where a deadlock has arisen in the management of a company rendering the functioning of the company inoperative, and even in the event where oppression or mismanagement cannot be established against any party, the Tribunal can make an order under Section 402 (b) of the Companies Act, 1956.*
>
> *Additionally in the case of M.S.D.C. Radharamanan vs. M.S.D. Chandrasekara Raja and Another, 2008 (2) SCC 901, it was recorded that there could be a method of valuation whereby at the first instance, one of the parties to the dispute shall purchase the shares of the petitioners, within six months from the date of finalisation of such valuation and on his failure to do so, the other party shall purchase the shares of the other within six months thereafter. In the event both the alternatives fail the purchase of shares of either of the parties to*

the dispute could be transferred to third parties depending upon the exigency, to ensure the smooth running of the company.

ORDER

Preliminary decree is being passed for valuation of main business by an independent Valuer. Both the groups of shareholders are being directed to give the name of an independent Valuer through consensus within fifteen days from the date of order, failing which both the groups will have the option to give names of three independent Valuers within one week thereafter, so that the Tribunal may issue directions for valuation of the aforesaid company and report of valuation is directed to be submitted within three months. The amount payable to independent Valuer will be borne by both the Petitioners and Respondents in equal proportion.

Based on the current valuation by the registered valuer, either of the parties may then sell their shares to the other that they hold in BAPL and subsequently exit the company in question.

Parties are to bear their own costs."

7. The Appellant/Respondent-Bihar State Industrial Corporation Limited has challenged the impugned order dated 22nd February, 2017 on the ground that the Tribunal without any basis and without any ground held that there is a deadlock between the parties.

8. Learned counsel for the Respondent/Appellant-Asiatic Oxygen Ltd., accepted that the order dated 30th June, 2009 passed by the Company Law Board, Principal Bench at Kolkata, has reached finality, in so far as the question as to whether there was any 'oppression and mismanagement' on the part of Appellant/Respondent-Bihar State Industrial Development Corporation or not.

9. It appears that a restoration application has been filed by Respondent-Bihar State Industrial Development Corporation Limited before the Jharkhand High Court but in view of the development as taken place in the meantime, it is not necessary to keep the matter pending for the same.

10. Learned counsel for the Respondent-Bihar State Industrial Development Corporation Limited submitted that the Corporation has now decided 'not to sell its shares to any third party', including M/s. Anjaneya Ispat Limited. The tender as was issued in the year 2007 has not been given effect to. Thus, in view of such decision

as taken by the Corporation, we hold that 'oppression' as the Asiatic Oxygen Ltd. (Respondent/Appellant) was anticipated by Petitioner no more subsists.

11. In view of the aforesaid development, we set aside the impugned order dated 22nd February, 2017 passed by the Tribunal in Company Petition No. 191/2007 and dispose of the appeals. However, on the facts and circumstances of the case, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Balvinder Singh]
Member (Technical)

/ng/