

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) No. 182 of 2020**

[Arising out of Ex- Parte Ad-Interim Order dated 05.10.2020 passed by the National Company Law Tribunal, New Delhi, Court No.- II in Company Petition No. /133/2020].

**IN THE MATTER OF:**

- 1. J.M. Housing Limited**  
**Having Registered Office At:**  
**D-334,Vivek Vihar,**  
**Delhi – 110095.**  
**Through its Authorised Representative**  
**Shri Smruti Ranjan Swain** **...Appellant No.1**
  
  - 2. Mr. Ankur Aggarwal**  
**S/o Late Sh. R.K. Aggarwal**  
**R/o D-113, Ist Floor,**  
**Vivek Vihar**  
**Delhi – 110092.** **...Appellant No. 2**
  
  - 3. Mr. Neeraj Jindal**  
**S/o Sh. S.L. Jindal**  
**R/o D- 334,**  
**Vivek Vihar,**  
**Delhi – 110095.** **...Appellant No. 3**
  
  - 4. Mr. Rupesh Kumar Gupta**  
**S/o Sh. M.K. Gupta**  
**Flat No. 006,Tower – 2,**  
**JM Park Sapphire**  
**Ramprastha Greens**  
**Vaishali, Sector – 9,**  
**Ghaziabad – 201010**  
**Uttar Pradesh.** **...Appellant No. 4**
- Versus**
- 1. Mr. Surender Kumar Gupta**  
**S/o Late Shri R.K.Gupta**  
**R/o. 109, Shreshta Vihar,**  
**Delhi – 110092.** **...Respondent No. 1**

2. **Mrs. Anita Gupta**  
W/o Shri Surender Kumar Gupta  
R/o. 109, Shreshta Vihar,  
Delhi – 110092. ...Respondent No. 2
3. **Ms. Nikyta Gupta**  
D/o Sh. Surender Kumar Gupta  
R/o. 109, Shreshta Vihar,  
Delhi – 110092. ...Respondent No. 3
4. **Mr. Ashwani Kumar Gupta**  
S/o Late Shri R.K. Gupta  
R/o. 109, Second Floor,  
Shreshta Vihar,  
Delhi – 110092. ...Respondent No. 4
5. **Mr. Ashwani Kumar Gupta Karta (HUF)**  
R/o. 109, Second Floor,  
Shreshta Vihar,  
Delhi -110092. ...Respondent No. 5
6. **Pyramid Commodities Pvt. Ltd.**  
Having Registered Office at:  
Space No. 201,202 & 203  
Second Floor, Plot No. 07,  
LSC Market, Anupama Arcade,  
Mayur Vihar, Phase -1, Extn.  
Delhi – 110091. ...Respondent No. 6
7. **M/s Trikaal Foods and Agro Products Pvt. Ltd**  
Having Registered Office at:  
Space No. 201, 202 & 203  
Second Floor, Plot No. 07,  
LSC Market, Anupama Arcade,  
Mayur Vihar, Phase – 1, Extn.  
Delhi -110091. ...Respondent No. 7
8. **Durga Enterprises Pvt. Ltd.**  
Having Registered Office at:  
Flat No. 006, Tower -2,  
JM Park Sapphire, Ramprastha Greens  
Vaishali, Sector -9,  
Ghaziabad,  
Uttar Pradesh. ...Respondent No. 8

**Present:**

**For Appellants: Dr. U.K. Choudhary, Sr. Advocate along with Mr. Pradeep Kumar Mittal, Mr. Praveen Kumar Mittal and Mr. Sharad Poddar, Advocates.**

**For Respondents: Rakesh Kumar (Caveator) and Ms. Preeti Kashyap, Advocates for R- 1 to 3.  
M/s Kamal Kapoor & Associates, Advocate for R – 4 & 5. Mr. Virender Ganda, Sr. Advocate along with Mr. Kamal Kapoor and Mr. Aman Nandrajog, Advocates for R- 6 to 8.**

**J U D G M E N T**

**Venugopal M. J**

**Preface**

The Appellants have preferred the present Company Appeal being dissatisfied with the order dated 05.10.2020 passed by the National Company Law Tribunal, New Delhi, Court No.- II, in CP/133/2020.

2. The National Company Law Tribunal, New Delhi, Court No.- II while passing the impugned order dated 05.10.2020, had observed the following: -

*“Counsel for the Petitioner is present. The Registry is directed to issue notice to the Respondents. Counsel for Petitioner is permitted to issue private notice to the Respondents by all modes and file*

*proof of service along with an Affidavit on or before the next date of hearing.*

*Counsel for the Petitioners submitted that they are the shareholders in the first Respondent company and together they are holding 37% of shares of the issued capital. It is submitted by the Counsel for the Petitioners that Respondents are selling property and taking the consideration in their accounts. In other words, the Respondents are misappropriating the property of the first Respondent company and in case the property is sold and consideration is taken by the Respondents in their personal accounts, they will deprive the Petitioners of their rights.*

*In the facts and circumstances, the Petitioners have made out prima facie case, balance*

*of convenience is in the favour of Petitioners and in case the property of the Respondent No. 1 is sold, the same will cause irreparable loss to the Petitioners and Respondent No. 7. This cannot be compensated in terms of money.”*

and resultantly restrained the Respondent Nos. 2 to 7 from selling the property of the Respondent No. 1 till further orders and besides this, further directed the Respondents not to change the shareholding pattern of the first Respondent Company without seeking prior permission from this Tribunal, etc.

### **Appellants Submissions**

3. According to the Appellants, the First Appellant/Company was incorporated on 08.05.2009 by the second and third Appellants as a 'Real Estate Developer'. The First Respondent was neither a Promoter nor Founder Director nor Subscriber to the Memorandum and Articles of Association of the first Appellant. The First Respondent was appointed as 'Executive Director' of the Appellant No. 1/Company on 08.12.2009 i.e., after almost seven months of its incorporation.

4. In the Main Company Petition, there are three Petitioners whose aggregate shareholding is 36.65% of the total paid up share capital of the First Appellant. However, the Respondent No. 1 to 3 are falsely claiming

shareholding to the tune of 49% shares; which includes the shareholder whom are neither related to the Respondent No. 1 to 3 nor party in the Company Petition. Except the Respondent No. 1-3 none of the other proclaimed family members had given their written consent to file the Company Petition nor became co- petitioners along with the Respondent No. 1 to 3. A false claim was made by the Respondent No. 1 to 3 by swearing an Affidavit that they along with relatives hold 49% Paid Up Share Capital of the Appellant No. 1/Company.

5. The Respondent No. 1 to 3, in the main Company Petition had claimed themselves that they are 'Quasi Shareholder' of the Respondents. Under the Companies Act,2013, there is no such term whereby a person can claim himself to be 'Quasi Shareholder'. Therefore, the Respondent No. 1 to 3 do not have any right in Respondent No. 6 to 8.

6. The Learned Counsel for the Appellants contends that the Respondent No. 1 to 3 filed CP/133/2020 before the Tribunal on 14.08.2020 and that the copy was served upon the Appellants on 17.08.2020 and that no action was taken for 50 days, for listing the matter and suddenly the Company Petition got listed for the hearing on 05.10.2020 without informing by way of any e - mail, notice or letter – mobile no. of Appellant No. 2 and 3 were got included in WhatsApp chat group but no link was provided for attending virtual hearing on

05.10.2020 and that an ex-parte ad- interim order came to be passed by the Tribunal.

7. The Learned Counsel for the Appellants submits that the concerned Bench of the Tribunal sat only around 3.40 P.M. on 05.10.2020, the mobile no. of Appellant No. 2 and 3 was added in the WhatsApp group and the Appellant No. 2 and 3 noticed the WhatsApp group around 3.40 P.M. and since they had no clue as to the purpose and intent of the said group, the Appellant No. 2 and 3 quit the said group around 3.55 P.M. As a matter of fact, the Appellant No. 4 never joined even the WhatsApp group.

8. The Learned Counsel for the Appellants point out that in the order sheet dated 05.10.2020 of the Tribunal against the names of Appellant No. 2 to 4, the title 'Advocate' is also written at the instance of Respondent No. 1 to 2/ Petitioner so as to create an impression before the Tribunal that the Learned Advocates of Appellant No. 2 to 4 were present. Indeed, the Appellant No. 2 to 4 could not have otherwise attended as the Appellant No. 2 was down with Covid -19 and Appellant No. 3 and 4 were away to Nainital/Jim Corbett for holidays and that they had not given any Vakalatnama to anyone to appear on their behalf before the Tribunal on 05.10.2020.

9. It is represented that on behalf of the Appellants that Respondent No. 1 to 3 in the Reply to the Present Company Appeal have taken a plea that steno of the Tribunal had wrongly written 'Advocate' against the

name of Appellant No. 2 to 4 and in fact they are shifting their mischievous act upon the staff of the Tribunal. In short it is reiterated on behalf of the Appellants that on 05.10.2020, no link was made available to any of the Appellants/Respondents and no way Appellant No. 2 to 4 could attend the hearing before the Tribunal. In regard to the plea of the Appellants that the conduct of the Respondent Nos. 1 to 3 / petitioner amounts to fraud, a reliance is placed upon the decision of **Hon'ble Supreme Court 'S.P. Chengalvaraya Naidu (Dead) by L.Rs.' V. 'Jagannath (Dead) by L.Rs. and Ors.' reported in MANU/SC/0192/1994** wherein it is observed that 'a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another'. Also, on behalf of the Appellants a reference to the judgement of this Appellate Tribunal dated 01.04.2019 in Company Appeal (AT) No. 256 of 2018 is made wherein it is observed that '*in a matter arising under sections 241 and 242 of the Companies Act read with Rule 11, irrespective of what the parties plead, say or do, the paramount consideration of the Tribunal is to keep in view as to what is in the interest of Company and that the interest of the parties is subservient to the interest of the Company*'.

10. The Learned Counsel for the Appellants brings to the notice of this Tribunal that the First Respondent made an exit from the First Appellant/Company through his letter of resignation on 01.11.2016, as Director of the First Appellant/Company and that a Statutory Return in



Form DIR – 12 was filed with the Registrar of Companies. In fact Respondent No. 1 to 3, after November 2016, had not attended the Annual General Meeting of the year 2017,2018 & 2019 respectively. The fourth Respondent is the real brother of First Respondent but he supports the Appellant No. 1 to 4.

11. The Learned Counsel for the Appellants proceeds to submit that the First Appellant during March 2017, had decided to completely quit the First Appellant/Company and signed the Settlement Deed dated 19.04.2017, which was concealed by the first Respondent in the Company Petition. The First Respondent, before resigning his position as ‘Director’ of the First Appellant/Company use to look after the day- to-day affairs and with a view to siphon off the funds, instructed the suppliers to raise invoice on a higher price than the market price and the amount is to take back as kickback in cash and that the suppliers had given Affidavits.

12. It is the version of the Appellants that the First Respondent made false complaints with the Company’s Banker Punjab & Sind Bank for freezing the banking operations to jeopardize the operations of the First Appellant/Company. However, the Bank had not freezed the banking operations because of the fact all ‘Equal Monthly Instalments’ were paid in time.

13. The Learned Counsel for the Appellants contends that the First Respondent prior to his resignation in November,2016 parked/gave the

funds to various entities, without any approval of the Board of Directors of the first Appellant/Company, before November,2016. The First Respondent, who was responsible for the day- to- day affairs of the First Appellant/Company had also signed the Annual Accounts for the financial year ended 31.03.2016.

14. The stand of the Appellants is that the First Respondent purchased 8 Luxury Cars which were given for his family members. Moreover, the Appellant No. 2 to 4 had paid back a sum of Rs. 159,29,07,782/- towards the liability pertaining to the period prior to the resignation of the first Respondent.

15. The Learned Counsel for the Appellants forcefully submits that the interests of the Company is paramount in a petition under Section 241 of the Companies Act, 2013, as observed by the Hon'ble Supreme Court.

16. On the side of the Appellants, without prejudice to the above contentions and demur, it is projected that the Appellants offer not to dispose of 25 flats (Vide Annexure -III of written submissions) is purely to protect temporarily the Appellants, in case this Tribunal, is inclined to set aside the impugned order, till the matter is heard by the Tribunal.

17. The Learned Counsel for the Appellants contends that the sale of flats are the 'stock in trade' of the First Appellant/Company being the only source to generate funds to bear administrative expenses etc. Furthermore, the First Respondent had levelled totally wild, baseless,

absurd allegations against the Appellant no. 2 to 4 of making money in every possible way out of the sale of flats of J.M.Florence Project.

18. According to the Appellants, the ad-interim exparte order dated 05.10.2020 of the Tribunal is very much detrimental to the very survival and existence of the First Appellant/Company. Added further, one Mr. Rajkumar Goel was given the possession of flat and his matter was settled and already the petition was withdrawn in 2018 itself. In respect of Aggarwal Finance Company and Tilak Raj, the First Appellant / Company had already offered possession of their respective flats to them as per the judgement of this Appellate Tribunal and, therefore, their petitions are not maintainable.

19. The Learned Counsel for the Appellants submits that the eighth Respondent is now in the advance stage of development of industrial park and is offering 'industrial plots' in the said 'industrial park' to the interested parties and majority of the said plots were allotted and sale deeds were executed and the balance plots are also in the process of being sold. Also, that the First Appellant/Company had no role to play in the sale of industrial plots of M/s. Durga Enterprises Pvt. Ltd. (the 6<sup>th</sup> Respondent) which had separate business operations.

20. The Learned Counsel for the Appellants takes a plea that the First Respondent levelled vague allegations qua 66 acres of land in the main company petition and portrayed as if the said chunk of land is owned by the First Appellant/Company and in fact, the same is owned by 8<sup>th</sup>

Respondent. Besides this, the obligation / liabilities paid back by the First Appellant/Company relates to the period prior to the resignation of the First Respondent. In respect of the outstanding amount to the Punjab and Sind Bank out of the total availed credit facility of 173.46 crores, now only Rs. 68.37 crores are outstanding.

21. The Learned Counsel for the Appellants 1 to 4 points out that the Appellants No. 1 to 4 had made dedicated efforts to release the immovable property bearing No. 109, Shreshta Vihar, Near Yamuna Sports Complex, Delhi, valued at around Rs. 12 crores which was charged mortgaged to Aditya Birla Finance Ltd. which belongs to the second Respondent and the 8<sup>th</sup> Respondent in Company petition. That apart, another immovable property bearing No. 26, Manak Vihar, Near Yamuna Sports Complex, Delhi valued at Rs. 3.5 crores (owned by Sh. Narender Kumar Gupta, real brother of the First Respondent) which was also charged to Aditya Birla Finance was also discharged and relevant title deeds of these properties were handed over to the First Respondent.

22. The Learned Counsel for the Appellants submits that the First Respondent without any occasion had preclosed the loan availed from the 'Aditya Birla Finance Ltd.' much before the scheduled repayment plan amortized with the loan and prepaid Rs. 1,43,83,366/- which is from his own account (Rs. 1.35 crores) and from his son's account (Rs. 8,83,366) which is outstanding as payable in the books of the First Appellant/Company. Also that the First Respondent had fraudulently

and illegally shown the employment of his relatives, friends and associates without approval and authority from the major shareholders of the First Appellant/Company and that out of the salary, perks and benefits paid by the First Appellant/Company, the First Respondent used to get cuts from these persons.

23. The Appellants take a stand that the investment of the Respondents remains Rs. 2.34 crores against Rs. 11.78 crores of the Appellants and Respondents and for such a small investment, no order can be passed prejudicial to the interest of the First Appellant / Company. Furthermore, even for 'misappropriation' restraint order is not the remedy.

### **Contentions of Respondent Nos. 1 to 3**

24. The Learned Counsel for the Respondent No. 1 to 3 submits that it is the admission on the part of the Appellants that the Petition was served upon them on 14.08.2020, and that they ought to be vigilant of the listing of the said Petition before the Tribunal. Further, after removing the objections raised in the matter, the main Company Petition was listed before the Tribunal on 05.10.2020, and in fact, the Appellants were very well aware of filing of the said Petition and definitely putting a surveillance on its listing and in fact, when the matter was listed on 05.10.2020, the 'WhatsApp Group' was created by the Bench Officer of the Tribunal and in the said 'WhatsApp Group' the three Appellants were added by the answering Respondents.

25. The Learned Counsel for the Respondent No. 1 to 3 takes an emphatic stand that the Appellants were part of the 'WhatsApp Group' throughout the day and the matter was listed at 2.30 P.M. before the Tribunal in the cause list and that the Appellants were there in the group till the hearing of the petition and they left the group after the petition was heard.

26. The Learned Counsel for the Respondent No. 1 to 3 comes out with a plea that not only the copy of the Petition was already served upon the Appellant on 14.08.2020, they should have engaged Learned Counsels to appear on their behalf. According to the Respondent No. 1 to 3, the Appellants were added in the morning at 10 A.M. – 11 A.M. and they could have informed their Learned Counsels to be present and seek for a date. However, the Appellants were under the impression that nothing would happen and only when ad-interim order was passed by the Tribunal, they woke up and instead of approaching the Tribunal, they directly approach this Tribunal.

27. The Learned Counsel for Respondent No. 1 to 3 before this Tribunal, points out that the impugned order dated 05.10.2020, categorically only records the Counsel for the Petitioners (answering Respondents) was present and that the directions were issued by the Tribunal, for serving the copy of the impugned order to the Appellants.

28. Further pursuant to the directions issued by the Tribunal, the Respondents had served the copy of the interim order to the Appellants

through e-mail dated 08.10.2020, and that through e-mail dated 12.10.2020, the Appellants had answered the said e-mail.

29. The Learned Counsel for the Respondents No. 1 to 3 submits that the Respondents No. 1 to 3 do have 36.65% equity shareholding of the First Appellant Company and that the First Respondent Company is in 'Real Estate Business' and it has two 'Real Estate Projects', one at Noida in the name of J.M. Florence and the other is the Real Estate Land it owns through the eighth Respondent.

30. The Learned Counsel for the Respondent No. 1 to 3 points out that when the Appellants were not entertaining the concern of the Respondent No. 1 to 3 in regard to the Properties, they are selling of the First Respondent Company and of the eighth Respondent Company, the answering Respondent wrote a detailed Letter dated 05.03.2020, to the Appellants seeking the relevant financial information of the First Respondent and the eighth Respondent.

31. It is stated on behalf of the Respondent No. 1 to 3 that the answering Respondents e-mail dated 20.03.2020, was not answered by the Appellants and even further the Respondent No. 1 to 3 came to know that the Appellants were selling the properties of Respondent No. 1 and Respondent No. 8 and misappropriating the funds, the letters were sent to the Appellants as well as to the Other concerned.

32. The categorical stand of the Respondent No. 1 to 3 is that the Appellants wanted to conceal the facts and to run the Affairs of the First

Respondent at their own whims and fancies and to misappropriate the funds unto themselves. Only under these circumstances, the restraint order was passed by the Tribunal protecting the interest of the answering Respondent relating to the properties of the First Respondent and the eighth Respondent.

33. The Learned Counsel for the Respondent No. 1 to 3 points out that when the Appellants were not entertaining the concern of the Respondent No. 1 to 3 in regard to the Properties, they are selling of the First Respondent Company and of the eighth Respondent Company, the answering Respondent wrote a detailed Letter dated 05.03.2020, to the Appellants seeking the relevant financial information of the first Respondent and Respondent No. 8.

34. It is stated on behalf of the Respondent No. 1 to 3 that their e-mail dated 20.03.2020, was not answered by the Appellants and even further the Respondent No. 1 to 3 came to know that the Appellants were selling the properties of Respondent No. 1 and Respondent No. 8 and misappropriating the funds, the letters were sent to the Appellants as well as to the Other concerned.

35. The categorical stand of the Respondent No. 1 to 3 is that the Appellants wanted to conceal the facts and to run the Affairs of the First Respondent at their own whims and fancies and to misappropriate the funds unto themselves. Only under these circumstances, the restraint order was passed by the Tribunal protecting the interest of the answering



Respondent relating to the properties of the First Respondent and Respondent No. 8.

36. The Respondent No. 1 to 3 had never signed any documents for 8 flats in J.M. Florence Project. The Appellants had misappropriated the funds of the Respondents by allotting 8 flats in their name without consent. The Appellants are transferring the funds from the First Respondent Company to their associate companies as advances. The First Respondent Company had itself took loan of Rs. more than hundreds of crores and paying the interest and that the money is being siphoned off.

37. There is no clarification furnished by the Appellants that how the liability of Noida Authority is being discharged. The Appellants are not providing the details of selling of the plots of Respondent No. 8 to the Respondent No. 1 to 3. The Respondent No. 1 to 3 are also the personal guarantor to the loan taken from the Punjab National Bank and further that they are also liable for other contingencies of the Appellant No. 1/Company. The Tribunal had protected the interest of the answering Respondents by passing the impugned order.

38. The Learned Counsel for the Respondent Nos. 1 to 3 submits that as on 31.03.2019 audited financial statement of the First Appellant/Company, there was an outstanding balance of INR 99,25,96,178 towards the loan from Punjab and Sind Bank and

additionally the outstanding balance of loans from other Banks and Noida and Greater Noida Authorities was INR 1,06,60,85,837.

39. The Learned Counsel for the Respondent Nos. 1 to 3 points out that the First Appellant / Company and the 7<sup>th</sup> Respondent together have 50-50% equity shareholding in the 6<sup>th</sup> Respondent and that the 8<sup>th</sup> Respondent is wholly owned subsidiary of the 6<sup>th</sup> Respondent. In fact, the First Appellant/Company's investment of Rs. 42 crores is lying with Respondent No. 8 through Respondent No. 6.

40. The Learned Counsel for the Respondent Nos. 1 to 3 contends that the Company '**SPR Agrogtech Pvt. Ltd.**' is controlled by the Appellants and that the Appellant No. 2 is the bank signatory of the Company and that the employees of the First Appellant/Company are the Directors of the said Company and that the 8<sup>th</sup> Respondent had transferred Rs. 40-50 crores to the said Company. Besides this, one more Company 'Cross River Construction and Developers P. Ltd.' belongs to the Appellants and a sum of Rs. 6 crores were transferred from the 8<sup>th</sup> Respondent to the said Company. Moreover, the properties of the 8<sup>th</sup> Respondent are being sold secretly and funds are diverted to the related company of the Appellants.

41. The Learned Counsel for the Respondent Nos. 1 to 3 contends that the Appellants may be permitted to sell the properties provided that they file the affidavit and undertakings which run as under:-

*(i) The details of the properties so far being sold by the First Appellant and the Respondent No. 8, the amount released from the such properties, the amount deployed after releasing the sale consideration of such properties and the production of the documents of selling such properties be submitted before the 'National Company Law Tribunal'.*

*(ii) The details of unsold inventory as on today in the First Appellant/Company and Respondent No. 8 be filed before the Tribunal.*

*(iii) The unsold inventory in Appellant No. 1 and Respondent No. 8 may be sold only with the permission of the Tribunal and with the participation of the contesting Respondents.*

*(iv) The amount realized from the selling of the properties should be deposited in the designated bank and the amount ought to be withdrawn after giving intimation to the Respondent No. 1 to 3 and the Tribunal. Furthermore, the utilization of the sale proceeds must be strictly monitored with an involvement of Respondent No. 1 to 3 in order to ensure recovery of funds from the home buyers and related parties and utilisation thereof to complete the project and also to pay off all the loan liabilities towards banks, Noida Authority and others.*

42. The Learned Counsel for the Respondent Nos. 1 to 3 contends that since 'Noida Authority' dues and the 'Bank' dues are already pending and the fate of 6000 persons are based on the First Appellant/Company and there being an involvement of public interest, the Appellants cannot have free hands to sell the properties of the First Appellant/Company.

### **The Pleas of Respondent Nos. 4 & 5**

43. The Respondent No. 4 & 5 collectively hold more than 7% share and share in the Company and Respondent No. 4 is the real brother of Respondent No. 1 and Respondent No. 5 is Respondent No. 4's Hindu Undivided Family. The impugned order of the Tribunal is blanket one and also a non-speaking one, the same being passed without providing an opportunity to them.

### **Stand of the Respondent No. 6**

44. The Sixth Respondent is distinct, separate registered company and that as neither control nor interest in the internal functioning of the Appellant No. 1/Company. The Respondent No. 1 to 3 are neither Director nor Shareholders nor in any manner connected with the day-to-day affairs of the Respondent No. 6/Company. Hence, the Respondent No. 1 to 3 have no cause of action against Respondent No. 6. The Respondent No. 1 to 3 have no locus standi to file the Company Petition Under Section 241 and 242 of the Companies Act.

45. The Respondent No. 1 to 3 have admitted that they are not the shareholders of the Sixth Respondent/Company. The Respondent No. 6 is neither proper party or a necessary party to the present list. The Company Petition is nothing more than an attempt to discredit the sixth Respondent and obtain confidential records of the company to which they are in no way entitled to get by way of indulging in fishing expedition.

### **Pleas of the Respondent No. 7**

46. The Company Petition filed by Respondent No. 1 to 3 contains no cause of action against the Seventh Respondent and in fact, the company Petition alleges no mismanagement or oppression of the Respondent No. 7. In short, the Respondent No. 7 is wrongly arrayed as one of the Respondents to the main Company Petition. The Respondent No. 7 is neither a necessary nor proper party to the present lis.

### **Stand of the Respondent No. 8**

47. The Respondent No. 1 to 3 have no cause of action against the Respondent No. 8. The Respondent No. 1 to 3 are neither Directors nor Shareholders nor Connected with the day-to-day affairs of the Respondent No. 8/Company. The Respondent No. 8 is neither a necessary nor proper party to the present lis and it is wrongly arrayed as one of the Respondents in the present Appeal.

### **Appraisal**

48. At the outset, this Tribunal pertinently points out that the Respondents 1 to 3 / Petitioners in Company Petition No. /133/2020 (filed u/s 241-242 of the Companies Act) against the Appellants and others, before the Tribunal had sought the reliefs of oppression and mismanagement, appointment of an investigator to investigate into the affairs of the First Appellant / First Respondent Company for the diversion of funds in favour of third parties viz. subsidiary companies / associate companies and other parties, to find

out the mis-appropriation and siphoning of the funds by selling the plots of the 7<sup>th</sup> Respondent Company at market price but looking the books of the First Appellant / First Respondent Company on a lesser price etc.

49. The 'National Company Law Tribunal', New Delhi, Court No.- II had passed the impugned order on 05.10.2020 in the main company petition by restraining the Respondents 2 to 7 mentioned in the Company Petition No. /133/2020 from selling the property of First Appellant / First Respondent Company till further orders and also directed the respondents therein not to change the shareholding pattern of the First Appellant / First Respondent Company without seeking prior permission from it.

50. The forceful stand of the Appellants is that the second Appellant and third Appellant were added to the Whatsapp group at 3.40 P.M. on 05.10.2020 before the Tribunal and left at 3.55 P.M. and that the 4<sup>th</sup> Appellant never joined any group and in fact the Appellant No. 2 and 3 not joined for virtual hearing on 05.10.2020 before the Tribunal and they were not present during the course of hearing as shown in the attendance since they had not logged in at all. In short, it is the contention of the Appellants that the cell phone numbers of the Appellants Nos. 2 to 4 were provided to the Bench officer of the Tribunal by the Respondents No. 1 to 3 side without any prior notice / intimation or knowledge of the Appellants No. 2 to 4.

51. The plea of the Appellants is that none of the Appellants

represented before the Tribunal on 05.10.2020 and in the appearance column their names were wrongly mentioned as Advocates appearing for Appellants No. 2 to 4 and in fact there was mis-representation and misconception which had resulted in the impugned order adversely being passed by the Tribunal.

52. The contra stand of the Respondents No. 1 to 3 is that because of the inadvertent mistake committed by the staff of the Tribunal the appearance of Appellants' name in the impugned order was shown and in fact the Respondent Nos. 1 to 3 had added all the three Appellants in the WhatsApp group created by the Bench Officer of the Tribunal on 05.10.2020 and apart from that the Appellants were added in the morning at 10.00 a.m. – 11.00 a.m. on 05.10.2020 and the Appellants could have informed the Learned Counsel to represent them and seek the date. Apart from this, the copy of the main petition since it was already served on the Appellants on 14.08.2020 they should have engaged some counsel by the time when the matter got listed on 05.10.2020.

53. In the instant case, although the Appellants have come out with the plea that the Appellant No. 2, his wife and both children were tested positive for COVID 19 and were self-home-quarantine on 05.10.2020 and that the Appellant No. 3 and 4 were out of station along with their family and friends for excursion during the weekend of 2<sup>nd</sup> October, 2020 to 6<sup>th</sup> October, 2020 etc. and none of the Appellant Nos. 2 to 4 were aware of



any such hearing on 05.10.2020 and neither in a situation to attend the hearing or nor was in a position to appoint any Advocate for them to attend the hearing, and not withstanding the fact that the name of Appellant Nos. 2 to 4 were wrongly shown in the appearance column of the impugned order as Advocates, this Tribunal without precipitating the matter any further and not delving deep in this regard is of the considered view that a latent and patent error had crept in the appearance column of the impugned order and by mistake the Appellants Nos. 2 to 4 were shown as Advocates and this Tribunal at this juncture is of the earnest view that utmost diligence, care, caution and circumspection are required on the concerned person(s) of the Tribunal while marking / noting the appearance of Learned Advocates / Parties/Representatives and quite in the fitness of things, this Tribunal hope and trust such an inadvertent error will not recur again in the near future. Further, the registry of the Tribunal hearing a particular matter is to furnish requisite information to the parties / Learned Counsels representing the matter much prior to the hearing of the case, of course well in advance, so that it will enable them to get prepared for their matters.

54. In this connection, this Tribunal pertinently points out in Company Petition No.133/2020 dated 05.10.2020 the Tribunal while passing the impugned order had directed its registry to issue notice to

the Respondents etc. Therefore, it is quite evident that the impugned order of the Tribunal is an ex parte one.

### **Tribunal's Powers**

55. It is to be pointed out that the Tribunal as per Section 241 of the Companies Act, 2013 has wide powers to grant relief in cases of oppression etc. It can pass interim orders pertaining to the functioning of the Company in case of oppression and mismanagement. Apart from that, the Tribunal has discretion in moulding the relief even when the concerned petitioner fails to make out a case of an oppression and mismanagement. The Tribunal has to weigh equitable considerations, to be super imposed on legal rights. However, whether an act is an oppressive one or not is basically a question of fact.

56. Undoubtedly, the Tribunal has power to decide whether a particular transaction is a bonafide one entered into in the ordinary course of business without notice of any internal squabbles of the Directors of a Company. In a petition u/s 241 of the Companies Act, 2013 (i) materials ought to be supplied (ii) figures are to be furnished (iii) the allegations are to be proved.

57. Be it noted, that every illegal act may not be oppressive, some illegal acts can be considered oppressive depending upon the facts of the case. The Companies Act provides a remedy to the minority shareholders against oppression by majority shareholders by their continuous acts.

The legality or illegality of an act has nothing to do with an oppressive or

non-oppressive act and, therefore, the Tribunal must examine the facts of each case.

58. The plea of limitation is a mixed question of Law. The power of the Tribunal is to correct oppressive conduct and the said power under section 241-242 of the Companies Act, 2013 is a statutory one.

59. Section 420(1) of the Companies Act, 2013 enjoins that the Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit. The settled legal proposition is that the rules of justice are to supplement the law and not to supplant the same. The term natural justice relates to the quality of fairness to be adopted and the term 'Natural Justice' is another name for common justice.

### **Audi Alteram Partem**

60. The 'audi alteram partem' rule is that no one ought to be condemned unheard. Assigning of reasons for a decision to be arrived at in an administrative but also a judicial of order is the basic hallmark of an order, passed by the Competent Authority / Court of Law / Tribunal.

61. As a matter of fact, the rule of 'just and proper opportunity of hearing' connotes that no order should be passed against a party without providing him a reasonable opportunity of being heard as per decision of **Hon'ble Supreme Court 'Swadeshi Cotton Mills Company Ltd.' V. 'Union of India' reported in (1981) 51 Comp. Cases 210 255 (SC).**

62. The term 'Natural Justice' is incapable of precise definition. The

rules of 'Natural Justice' are not the edicts of a statute. In short, the principle of natural justice is a rule of fair play and it cannot be brushed aside so lightly because of the fact that justice is founded on human values.

63. When an order has adverse consequences, the Competent Authority / Court of Law / Tribunal before passing the order must provide an adequate opportunity of hearing to the concerned person(s). If reasons are given in an order then, when the matter is taken up before a higher forum, there will be an opportunity to examine the concerned order in regard to the manner and quality of exercise undertaken at the time of passing it. A reasoned order will have an appearance of justice. An unreasoned order will not be of any assistance to the affected person(s) and that the absence of reasons in an order will make it susceptible to challenge before an Appellate Forum.

64. If reasons are assigned in an order then it will point out fairness in decision making and also that the affected person(s) will come to know as to why the said order was passed. In this connection, this Tribunal pertinently points out that Section 424 of the Companies Act says that the 'Tribunal' and the 'Appellate Tribunal' shall be guided by the principles of 'Natural Justice'. In fact, the Tribunal can regulate its own procedure.

### **Glimpses of 'NCLT' Rules, 2016**

65. **Rule 37 of the 'NCLT' Rules** (part IV General Procedure) speaks

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of 'notice to opposite party' in and by which the Tribunal shall issue notice to the Respondent to show-cause against the application or petition on a date of hearing to be specified in the Notice etc. **Rule 38** of the Rules deals with 'service of notices and processes'. **Rule 39** deals with 'production of evidence by affidavit'. **Rules 40** relates to 'production of additional evidence before the Bench'.

66. In fact, **Rule 41 of 'NCLT' Rules, 2016** pertains to 'Filing of reply and other documents by the Respondents'. **Rule 42** is concerned with 'Filing of rejoinder'. **Rule 43** relates to 'Power of the Bench to call for further information or evidence'. **Rule 44** mentions about 'Hearing of petition or applications'. Rule 45 pertains to 'Rights of a party to appear before the Tribunal'. Rule 46 deals with 'Registration of authorised representatives interns'. **Rule 48** enjoins 'Consequence of non-appearance of the Applicant'.

67. In the present case the Appellants have come out with a plea that the impugned order of the Tribunal has paralysed, jeopardized and completely affected the operations of the First Appellant/Company in a grave manner thereby affecting the 'Allottees' 'Bankers' and 'Creditors'.

68. As far as the present case is concerned, ongoing through the impugned order dated 05.10.2020 in Company Petition No. /133/2020 passed by the National Company Law Tribunal, New Delhi, Court No.- II, it is latently and patently evident that it is an exparte ad-interim order wherein the registry of the Tribunal was directed to issue notice

to the Respondents (Appellants and others). In fact, the Respondents No. 2 to 7 in the main Company Petition by the impugned order were restrained from selling the property of the Respondent No. 1 (Appellant No. 1) till further orders etc. and a copy of the order was directed to be obtained by the Counsel for the petitioners (Respondent Nos. 1 to 3 in Appeal) for sending to the Appellants and other Respondents for information and compliance.

69. Be that as it may, in the light of foregoing discussions, on a careful consideration of the contentions advanced on respective sides, this Tribunal, based on the surrounding facts and circumstances of the instant case in a conspectus manner and especially bearing in mind the ex-parte impugned order dated 05.10.2020 was passed by the Tribunal in Company Petition No./133/2020 which has adverse civil consequences of affecting the First Appellant / Company's business arising thereto without expressing any opinion on the merits of the subject matter in issue, one way or other comes to a consequent conclusion that the said impugned order is in negation of the '*Principles of Natural Justice*' and, therefore, to prevent an aberration of justice and to promote substantial cause of justice the said impugned order dated 05.10.2020 in Company Petition No./133/2020 is set aside by this Tribunal. Further, this Tribunal remits back the matter to the 'National Company Law Tribunal', New Delhi, Court No.- II for denovo consideration and appreciation of the whole gamut of the controversies

centering around the main Company Petition in Company Petition No./133/2020 in an objective, threadbare and dispassionate manner on merits and to pass necessary orders by taking into account of the reply/response/explanation/rejoinder, if any, offered by the parties in respect of allegations made in the petition, of course after providing due opportunity of hearing to the respective parties by adhering to the principles of '*Natural Justice*'. Liberty is given to the respective parties to raise all factual, legal pleas and to put forward their suggestions (including the offer of Appellants not to dispose of 25 flats to protect their interests, as well as the plea of R1 to R3 made before this Tribunal as regards the selling of properties by Appellants) at the time of fresh hearing of the Appeal before the Tribunal.

In fine, the instant Appeal is allowed. No costs. I.A. No. 2556/20 (stay application) is closed.

**[Justice Venugopal M.]  
Member (Judicial)**

**[Dr. Alok Srivastava]  
Member (Technical)**

**NEW DELHI**

**18<sup>th</sup> December,2020**

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