NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.394/2017

[Arising out of Order dated 15.11.2017 passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh in CP No.146/ND/2012/RT CP No.27/Chd/Pb/2016 with CA No.255 of 2015]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
1. M/s Aar Kay Chemicals Private Limited, Village Saroud, Ludhiana Road, Malerkotla, Sangrur, Punjab - 148023	Original Petitioner (OP) No.1	Appellant (A) No.1
2. Mr. Achhru Ram Sharma, 349, A.P. Enclave, Dhuri – 148024 (Punjab)	OP 2	A2
3. Mr. Pawan Kumar Singla, R/o Kothi Opp P.S.E.B. M.K. Road, Dhuri – 148024 (Punjab)	OP 3	A3
4. Mr. Vijay Kumar Goyal, 16B-146/6, Yash Chaudhary Market, Dhuri – 148024 (Punjab)	OP 4	A4
5. Mr. Parshotam Dass Garg, 352, A.P. Enclave, Dhuri – 148024 (Punjab)	OP5	A5
6. M/s Kaveri Shilpkala Limited, TU-19, 2nd Floor,	OP 6	A6

Pitampura, New Delhi – 110019		
7. M/s Rajasthan Plantation Co. Ltd. 485B, Sham Nagar, Ludhiana – 141001, Punjab	OP7	A7
8. Mrs. Rita Singla, R/o Kothi Opp. P.S.E.B. Malerkotla Road, Dhuri – 148024 (Punjab)	OP8	A8
9. Mr. Dev Raj, R/o Kailash Oil Mills, Dhuri – 148024 (Punjab)	OP9	A9

Versus

1. M/s. A.P. Refinery Private Limited, Tapar Harnia, Nakodar Road, Jagraon Ludhiana – 141001 (Punjab)	Original Respondent (OR) No.1	Respondent (R) No.1
2. M/s Dhuri Cold Storage Private Limited, M.K. Road, Dhuri, Distt. Sangrur, Punjab – 148024	OR2	R2
3. Mr. Ravi Nandan Goyal 17-18-19, Apex Nagar, Barewal Road, Near Easy Day, Ludhiana – 141001, Punjab	OR3	R3
4. Mr Shiv Kumar Goyal B-35-951/45/7-1 Shivalik Enclave,	OR4	R4

Barewal Road, Near Easy Day, Ludhiana – 141001, Punjab		
5. Mr. Bhuwan Goyal, 17-18-19, Apex Nagar, Barewal Road, Near Easy Day, Ludhiana – 141001, Punjab	OR5	R5
6. Mr. Arun Kumar Goyal, A-8, Aur Ville, Janpath Estate, Village Zhamat, (District Ludhiana) Punjab	OR6	R6
7. M/s Anu Buildwell Private Limited, 18, Chander Lok Enclave, Pitam Pura, Delhi – 110034	OR7	R7
8. Ms. Anita Rani, B-35-951/45/7-1 Shivalik Enclave, Barewal Road, Near Easy Day, Ludhiana – 141001, Punjab	OR8	R8
9. Ms. Kusum Garg, Gali No.3, Talwandi Road, Raikot, Punjab	OR9	R9
10. Mr. Pratul Goyal, House No.153, Punjabi Bagh, Patiala	OR10	R10
11. Dr. Raj Singh, Registrar of Companies Corporate Bhawan, Plot No.4 B,	OR11	R11

Sector 27 B,
Madhya Marg,
Chandigarh – 160019

12. Sh. S.B. Gautam, Regional Director B-2 Wing, 2nd Floor, Paryavaran Bhawan, CGO Complex, New Delhi – 110003	OR12	R12

For Appellants: **Mr. Salman Khurshid, Senior Advocate with Ms. Tushita Ghosh, Mr. Shashank Katyayen, Ms. Shubhi Sharma and Mr. Aniruddha Choudhury, Advocates and Mr. Gaurav Mehta, PCS**

For Respondents: **Mr. Krishnendu Datta, Mr. Arnav Kumar and Mr. Shivi Sanyam, Advocates**

And

Company Appeal (AT) No.55/2018

[Arising out of Order dated 15.11.2017 passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh in CP No.146/ND/2012/RT CP No.27/Chd/Pb/2016 with CA No.255 of 2015]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
1. M/s. A.P. Refinery Private Limited	Original Respondent No.1 – (OR1)	Appellant (A) No.1
2. M/s Dhuri Cold Storage Private Limited	OR 2	A2
3. Ravi Nandan Goyal	OR 3	A3
4. Shiv Kumar Goyal	OR 4	A4
5. Bhuwan Goyal	OR 5	A5

6. Arun Kumar Goyal	OR 6	A6
7. Anu Buildwell Private Limited	OR 7	A7
8. Ms. Anita Rani	OR 8	A8
9. Ms. Kusum Garg	OR 9	A9
10. Mr. Pratul Goyal	OR 10	A10

Versus

1. M/s Aar Kay Chemicals Private Limited	Original Petitioner No.1 (OP-1)	Respondent (R) No.1
2. Mr. Achhru Ram Sharma	OP 2	R2
3. Mr. Pawan Kumar Singla	OP 3	R3
4. Mr. Vijay Kumar Goyal	OP 4	R4
5. Mr. Parshotam Dass Garg	OP 5	R5
6. M/s Kaveri Shilpkala Limited	OP 6	R6
7. M/s Rajasthan Plantation Co. Ltd.	OP 7	R7
8. Mrs. Rita Singla	OP 8	R8

9. Mr. Dev Raj OP 9 R9

(Addresses of parties are as in CA(AT)394/2017 - Supra)

For Appellants: **Mr. Krishnendu Datta, Mr. Arnav Kumar and Mr. Shivi Sanyam, Advocates**

For Respondents: **Mr. Salman Khurshid, Senior Advocate with Ms. Tushita Ghosh, Mr. Shashank Katyayen, Ms. Shubhi Sharma and Mr. Aniruddha Choudhury, Advocates and Mr. Gaurav Mehta, PCS**

J U D G E M E N T

(16th April, 2019)

A.I.S. Cheema, J. :

1. Both these Appeals arise out of same Impugned Judgement and Order. In Company Appeal 55/2018, there has been some delay beyond the period of 45 days provided for filing of Appeal. We have seen Application for condonation of delay – IA No 204 of 2018. Although the Respondents of Company Appeal 55/2018 are opposing condonation of delay, we accept the reasons given by the Appellants of Company Appeal 55/2018 and condone the delay.

2. Now coming to both these Appeals (the Appeals have been heard at length). They are arising out of different parts of the operative Orders passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh ('NCLT', in short) in CP No.146/ND/2012/RT CP No.27/Chd/Pb/2016 with CA 255 of 2015. The Judgement was passed by NCLT on 15th November, 2017. The Petition was filed by the Appellants of

Company Appeal 394/2017. We are disposing both these Appeals by this common Judgement.

References: For the sake of convenience, we will refer to the parties in the manner in which they were arrayed in the Company Petition and as they have been described while referring to the parties in the cause title of CA 394/2017. We will also be referring to the original Petitioner No.1 Company as "Aar Kay" and original Respondent No.1 Company as "A.P. Refinery" as well as original Respondent No.2 as "Dhuri" Company.

3. It is the case of the original Petitioners and it is argued for the Petitioners that Petitioner Nos.2, 4, 5 and one Bhim Sain - brother of P3 and R6 were five friends and they formed AP Group and initially incorporated A.P. Solvex Limited (now known as Ricela Health Foods Limited) in 1992. In 1998, this AP Group acquired P1 - Aar Kay Chemicals Private Limited, which was at that time a sick industrial unit in order to supplement the business of parent company, i.e. A.P. Solvex Ltd. Later, on 01.08.2003, R1 Company – A.P. Refinery was incorporated to manufacture and supply crude rice bran oil to the parent Company, which was in the business of solvent extraction, refining and supply of refined rice bran oil. When AP Refinery was incorporated – OP2 to 5 along with R3, 4 and 6 subscribed to the Memorandum. The Petitioner group had 12,000 shares together with Respondent Group having 9,000 shares out of total 21,000 shares. Thus, the Petitioner group had 57.14% of total paid up capital of R1 – AP Refinery. According to the Petitioners, later on, R3 and

R4, who were strangers to original AP Group took advantage of their control over Board of Directors in R1 – AP Refinery and started acting against the interest of Petitioners. They consistently diluted the shareholding of original Petitioners from 57.14% to 11.34% by the end of 2009. When the Petitioners took up the issue, it was agreed to restore the shareholding/control of the Petitioner Group through P1 – Aar Kay Company where the Petitioners held majority shares. It was decided that P1 – Aar Kay will acquire/purchase substantial shares of R1 by making long term investment by purchasing shares from existing shareholders of R1 Company. Pursuant to such understanding between the two groups, in May 2010, 14,96,000 equity shares were purchased in the name of P1 – Aar Kay by execution of transfer deeds and due payment of consideration in May, 2010 and the same were duly registered in the records of R1 – AP Refinery on 19th May, 2010 (1st Transfer dated 19.05.2010) and such shares stood on that date in the name of P1 – Aar Kay. Thus, the shareholding of the Petitioners was restored to 56.97% in A.P. Refinery, which was the original shareholding structure.

Bone of Contention

4. Petitioners claim the subsequent facts as bone of contention leading to the filing of the Company Petition. The Petitioners claim that the Respondents taking disadvantage of their management control in R1 Company – AP Refinery by series of oppressive acts, reduced the majority shareholding of the Petitioners in R1 from 56.97 to 9.25%. Petitioners

allege that in the Respondent No.1 Company – A.P. Refinery, the Respondents illegally and unlawfully recorded transfer of 14,96,000 shares, which stood in the name of P1 – Aar Kay, showing the same as transferred to R2 Company – Dhuri on 24th May, 2010 (2nd Transfer dated 24.05.2010) by filing Annual Returns which showed ante-dated transfer. In addition to above, the Petitioners claimed that the Respondents illegally and unlawfully made fresh allotments of :-

a) 3,50,000 shares to OR7 - M/s. Anu Buildwell Pvt. Ltd. on 29th June, 2011 (1st Allotment), and

b) Fresh allotment of 4 Lakh shares to R2, 3, 8, 9 and 10 on 10th October, 2012 (2nd Allotment), behind the back of original Petitioners and without following any procedure.

Because of such acts, the Petition came to be filed complaining of oppression and mismanagement on the part of Respondents.

Ref: Impugned Order

5. The Impugned Judgement and Order of NCLT when perused, shows summary recorded from the Company Petition. The NCLT noted the various contentions raised and prayers made by the original Petitioners. The Respondents filed written Reply in NCLT and the learned NCLT took note of the defence raised by the Respondents. The Respondents defended their actions, details of which can be seen in the Impugned Order. It appears that the original Petitioners filed Rejoinder and Respondents filed

Sur-Rejoinder to support the respective cases as pleaded by the parties. All this is summarized in the Impugned Order which can be seen and we need not prolix this judgement reproducing those details, though we note the same. In para – 88 of the Impugned Judgement, the NCLT after referring to the various pleadings put up by the parties, recorded that the arguments before it were confined only with regard to transfer of 14,96,000 shares and issue of fresh equity shares.

In para – 94 of the Impugned Order, NCLT has recorded that during the pendency of the Petition, R3 and R6 filed CA 255/2015 claiming that the said Respondents being Directors of R1 – A.P. Refinery, entered into the Arbitration Agreement dated 12.07.2015 with P2 to P5, the Directors of Ricela Health Foods for referring the disputes to arbitration and appointing Arbitral Tribunal comprising of Ravi Kalra, Subhash Chand Singla, Meghraj Garg, Hemant Jindal, Satdev Jindal and Deepak Jindal to resolve the dispute between the parties. Copy of the agreement was attached as Annexure A-1. It was claimed that after due proceedings before the Arbitral Tribunal, a consent Order was passed on 12.07.2015 itself. The Impugned Judgement refers to details of what was recorded as consent award, which was tendered as Annexure A-2. The Respondents claimed that because of this, the Petitioners were bound to withdraw the Petition and could not challenge shareholding of R1 – AP Refinery.

5.1 The NCLT appears to have taken Reply of the Petitioners 2 to 5, who opposed the prayers of Respondents and who claimed that the said

Annexures A1 and A2 had nothing to do with the present Petition. NCLT in para – 106 of the judgement took up CA 255/2015 which claimed that the Petition deserved to be dismissed on the ground of Arbitration Agreement and said Award and after discussing the matter and the provisions of Arbitration and Conciliation Act, 1996, found that the jurisdiction of the Tribunal was not barred and for reasons recorded, dismissed CA 255/2015 (para – 144 of the Judgement).

6. NCLT from para – 145 of the Judgement took up the main Company Petition for discussion and considered the disputed transfer of 14,96,000 shares on 24th May, 2010 and the disputed issuance of allotment of fresh shares on 29.06.2011 and 10th October, 2012 referred above. NCLT found (in para – 158 of Judgement) that the transfer of 14,96,000 shares by P1 Company – AP Refinery in favour of R2 – Dhuri was not legal and thus, liable to be set aside. Para – 80 of the Impugned Order reads as under:-

> "80. Regarding the letter of petitioners, it is stated that reliance on the document as an offer for arbitration is misplaced as it was only to give the wider power to the named persons to settle all commercial disputes between the parties, but the mediators ultimately refused to mediate and they gave a letter dated 14.02.2013 Annexure R-12 (with rejoinder), having abandoned the mediation proceedings as no amicable settlement could be achieved. Moreover, any such letter could not give authority to the respondents to unlawfully transfer the shares held by P-1 Company. It is alleged that by the end of the year 2009, the shareholding of petitioner group in R-1 company was substantially diluted and, therefore, the respondents agreed to

> restore majority shareholding of the petitioner group through P-1 company, in which the petitioners along with their associates held majority shares. It was with this understanding that the petitioner group would hold the majority shareholding in R-1 company in the manner that 14,96,000 equity shares were transferred in favour of P-1 company on 19.05.2010 to make it a shareholder in R-1 Company to the extent 45.60%. The petitioners have even expressed their readiness to accept the proportionate offer out of the fresh allotment of 3,50,000 and 4,00,000 shares only if 14,96,000 shares of P-1 company are restored."

7. When the learned NCLT took up discussion regarding allotment of additional shares of 3,50,000 and 4 Lakhs, it mentioned in para – 159:-

> "However, no detailed discussion on this issue is required as the respondents have made an offer which was re-iterated during the course of arguments that the petitioners would be issued in proportion to the shares held by them in R-1 company leaving the balance with the allottees. The exercise would be completed by R-1 company by holding a fresh meeting of the Board by issuing notice to the petitioners No.2 to 9 and if they are willing to purchase the shares at the value on which these shares were transferred to some of the respondents as described above. In case the petitioners do not offer for these shares, the allotment of the additional shares shall remain intact with the respondents."

NCLT noted that the other disputes relating to falsification of accounts and siphoning of funds were not pressed in arguments. NCLT proceeded to pass the following **Operative Order**:-

> "161. From the discussion made above, it is found that the facts of the case would attract the provisions of Section 397 of the Companies Act, 1956, but winding up would unfairly prejudice the members.

The instant petition is disposed of with the following directions:-

i) CA No.255 of 2015 filed by the respondents is dismissed;

ii) 14,96,000 shares now existing in the name of R-2 company be transferred back in the name of P-1 and its name be entered in the register of members of R-1 company. At the same time, the amount of Rs.15,00,000/- shown in the account of P-1 company towards loan to AP Oil Mills shall stand written off and the name of R-2 company be omitted from the register of members of R-1 company; and

iii) R-1 company shall hold fresh meeting of the Board of Directors offering the proportionate shares out of additional allotment of 3,50,000 shares in 2011 and 4,00,000 shares in 2012 respectively at the rates at which these were transferred to some of the respondents. The transfer shall be made in favour of the petitioners proportionately as per shares held by P-2 to P-9, on these petitioners offering to subscribe to these shares at the rates allotted to some of the respondents within the time to be allotted by R-1 company in the said meeting and they shall deposit the required amount with R-1 company; and

iv) Failing the petitioners to send the offer for allotment of proportionate shares as were held by them on the date of allotment of additional shares or in making payment, the Board of Directors of R-1 company would be at liberty to decide against the said allotment of proportionate shares; and

v) Rest of the shares out of the additional allotment of 3,50,000 and 4,00,000 shares, will continue to be held by the respondents to whom the shares were allotted; and

vi) The petitioner No.1 is not to be offered any share in these additional shares on the basis of this order as P-1 company became the shareholder only on 19.05.2010."

The Two Appeals

8. Aggrieved by such Order passed by NCLT, CA 394/2017 has been filed by original Petitioners and it has been argued for the Appellants – Petitioners that the direction of "transfer" of 14,96,000 shares of R1 Company from the name of R2 – Dhuri Company in the name of P1 – Aar Kay was not correct as actually the initial transfer dated 24.05.2010 should have been cancelled and Aar Kay should have been held as holding these shares in AP Refinery since 19th May, 2010. It has been argued that NCLT should have also set aside the additional allotments of 3,50,000 shares and 4 Lakh shares made on 29.06.2011 and 10.10.2012 and NCLT had proceeded on wrong premise recorded in para – 80 of the Impugned Order that the original Petitioners had expressed readiness to accept the proportionate offer. According to the Petitioners, their offer clearly mentioned that it was subject to, only if 14,96,000 shares of P1 Company were restored, which had to be w.e.f. the date when they were wrongly transferred on 24.05.2010, having stood in the name of Aar Kay since 19.05.2010.

9. Against this, the original Respondents have come up with their own Appeal CA 55/2018. They have challenged the Impugned Order claiming that the Impugned Order wrongly held the Respondents guilty of

oppression and mismanagement and that the NCLT wrongly held that 2nd transfer of 14,96,000 shares was illegal. They have also challenged the dismissal of CA 255/2015. They want the direction recorded in para – 161(i) of the Impugned Order to be set aside**.** Their prayer is to uphold the 2nd transfer of 14,96,000 shares of Aar Kay Company, in the records of AP Refinery to R-2 – Dhuri. The prayer is that the original Petitioners should be directed to exit from AP Refinery in terms of settlement agreement dated 12.07.2015.

10. The pleadings as raised by the parties and the developments when the matter was before NCLT, have been summarized in details by the learned NCLT in the Impugned Judgement and as such, we are not burdening this Judgement with those many details. To go by chronology, first we take up CA 55/2018 for consideration as the result of CA 55/2018 would impact CA 394/2017 also.

CA 55 of 2018 (Appeal of Original Respondents)

11. References: While dealing with CA 55 of 2018, unless mentioned otherwise, we will be referring to documents and page numbers as from the record of CA 55 of 2018.

We will continue to refer to the parties as original Petitioners or original Respondents, in the manner in which they were referred in the Company Petition and which is in line with CA 394 of 2017.

Grounds of Challenge in CA 55 of 2018

12. In CA 55/2018, original Respondents are finding fault with the Impugned Order on the following grounds:-

(A) Original Respondents claim that it has been wrongly held by NCLT that case of oppression and mismanagement is made out against them;

(B) NCLT has wrongly held that the 2nd transfer of 14,96,000 shares of Respondent No.1 Company – AP Refinery held by original Petitioner No.1 Company – Aar Kay, to original Respondent No.2 – Dhuri Company on 24.05.2010, was illegal;

(C) NCLT wrongly dismissed the application – CA 255 of 2015 filed by the Respondents seeking dismissal of the Company Petition in view of settlement agreement dated 12.07.2015.

13. Before proceeding further, it needs to be noted here that it appears original Respondents 3 and 4 were Directors in OR1 – AP Refinery as well as they were Directors in OP1 – Aar Kay and they were also Directors in OR2 – Dhuri Company.

13.1 It is the case of the original Petitioners that OR3 and 4 had purchased 14,96,000 shares of the Company OR1 – AP Refinery from the funds of OP1 – Aar Kay and on 19.05.2010, those shares stood transferred in the name of OP1 – Aar Kay in the record of OR1. They relied on Ledger Folio dated 19.05.2010. The fact that 14,96,000 shares of the Company –

AP Refinery had been transferred in the name of P1- Aar Kay and on 19.05.2010, stood in the name of P1 – Aar Kay, is not in dispute. The dispute is with regard to the 2nd transfer of these shares on 24th May, 2010. The transfer form on record dated 24.05.2010 has signature of the original Respondent No.4 claiming to represent original Petitioner No.1 and has signature of OR3 as representing OR2 –Dhuri Company, is also not in dispute.

Arguments of Appellants in CA 55/2018 – Original Respondents

14. It has been argued by the leaned Counsel for original Respondents – Appellants that the transfer deed dated 24.05.2010 was signed by one of the Directors of original Petitioner No.1 and so, the original Petitioner No.1 cannot challenge its own actions. It is alleged that the OR1 Company – AP Refinery could not be said to have acted in oppressive manner because when the transfer form was submitted, it had only to register the transfer and registering the change could not be faulted with. It is argued that when R4 was Director of P1 Company, if he acted beyond authority, the shareholders of the OP1 – Aar Kay would be the aggrieved persons and not the shareholders of OR1 – AP Refinery.

15. It has also been argued that the NCLT wrongly dismissed CA 255/2015 which had been filed on the basis of Global Settlement Agreement dated 12.07.2015 (Page 634), but according to the Counsel, when the Company Petition was pending, the original Respondent No.3 and original Respondent No.6 as well as original Petitioners 2 to 5 had

entered into the agreement on behalf of the original Petitioner group including their family members, associates, affiliates, group companies and thus, NCLT wrongly ignored the settlement and directed transfer back of 14,96,000 shares in the name of Aar Kay (P1). NCLT wrongly brushed aside the settlement agreement dated 12.07.2015, only because there was no prayer in CA 255 of 2015 to treat the settlement agreement as compromise. The original Petitioners had agreed to exit OR1 Company – AP Refinery under the settlement and this was required to be considered. The learned Counsel for the Appellants – original Respondents submits that NCLT wrongly held that OR1 – AP Refinery was not party to the settlement agreement. The agreement was binding on OP1 – Aar Kay as it was signed and approved by its majority shareholders and majority Directors.

16. It is further argued by the Appellants – original Respondents that the transfer of 14,96,000 shares on 24.05.2010 (2nd Transfer) was in accordance with the Companies Act. When OR4 – Director of Aar Kay and OR3 – Director of OR2 – Dhuri had signed the transfer deed, there was sufficient cause for OR1- AP Refinery to register the said transfer. It was wrong to hold that only because no valid Board Resolution was produced on behalf of two Companies (Aar Kay and Dhuri), the transfer was illegal. Under Section 108 of the Companies Act, 1956 ('old Act', in short), it was not necessary for AP Refinery to insist on Board Resolutions of the Transferor Company and Transferee Company. It is claimed that the 2nd

Transfer, which is dated 24th May, 2010, is supported by Board Resolution of OR1 – AP Refinery dated 24.05.2010 of which the Board of Directors comprised of OR3, 4 and 5. It is also argued that there is Board Resolution of original Respondent No.2 – Dhuri dated 1st April, 2010 authorizing purchase of 14,96,000 shares of AP Refinery from OP1. The Board of Dhuri Company comprised of original Respondent Nos. 3 and 4. As regards the Board Resolution of OP1 – Aar Kay, it is argued that there was Board Resolution taken on this count by original Respondents 3 to 5 and they had authorized sale of 14,96,000 shares of Aar Kay to Dhuri. It is argued that the Respondents could not produce the Board Resolution as the statutory records of Aar Kay Company were kept at the factory premises of OP1 Company at Malerkotla, which was under the control of original Petitioners. It is claimed that in one of the Company Petitions which has led to CA 2/2018, the original Petitioners have been found guilty of manipulating and forging statutory records of Aar Kay Company. The learned Counsel submitted that the NCLT wrongly doubted Resolution dated 24.05.2010 of OR1 – AP Refinery only because the same was not filed when the Reply was filed in NCLT and was produced only at the time of inspection. According to the Counsel, NCLT wrongly held that as the Board Resolution dated 24.05.2010 does not find mention in compliance report of the AP Refinery Company, the same was doubtful. The learned Counsel for the Appellants – Respondents submitted that NCLT wrongly doubted transfer deed dated 24.05.2010 as the document bore the stamp of Registrar of Companies dated 05.05.2010 and there was delayed

payment of consideration. (It may be mentioned that in para 152 of Impugned Order, NCLT questioned rationale for transfer deeds bearing stamp of ROC dated 05.05.2010 when OP1 itself was not having 14,96,000 shares till 19.05.2010.)

17. It is further argued by the learned Counsel for the Appellants – original Respondents that in 2010, the Respondent group had majority directorial control in AP Refinery, Dhuri Company as well as Aar Kay Company. At that time, 5 investment companies of the Respondent group had 14,96,000 shares in AP Refinery. The Respondent group through those 5 investment companies, purchased these shares for total consideration of 3,74,00,000. It is claimed that in order to secure and consolidate shareholding of the Respondent group in OR1 – AP Refinery and for the purpose of tax planning, it was decided that the 5 investment companies would first transfer 14,96,000 shares in the name of OP1 – Aar Kay Company which in turn would immediately be transferred further in the name of OR2 – Dhuri Company. Since the transfer would be amongst the companies controlled by the Respondent group, it was agreed that sale consideration for both the transfers would be a minimal sum of Rs.15,10,960. Thus, the submission is that the 1st Transfer which was transfer in the name of OP1 – Aar Kay was required to be kept in view and 2nd Transfer of transferring the shares of Aar Kay to Dhuri could not have been seen in isolation.

18. The learned Counsel for the Appellants has claimed that the original Petitioners wrongly claimed that there was oral understanding that the Petitioner group would have majority shareholding in OR1 – AP Refinery. Between 2004 – 2009, several share allotments were made as a result of which, original Petitioners held merely 11.40% shareholding in AP Refinery. The original Petitioners never earlier protested. According to the Appellants, the original Petitioners wrongly claimed that 14,96,000 shares from the 5 investment Companies were transferred in the name of OP1 – Aar Kay so that the Petitioners' promoter group could re-acquire majority controlling interest in AP Refinery.

19. The learned Counsel for the Appellants further submitted that the original Petitioners challenged the transfer of 14.96.000 shares after a gap of 2 years and thus, there was delay and latches. They knew about the transfer and did not immediately object. Thus, the learned Counsel claimed that the Impugned Order directing retransfer should be quashed and set aside.

Arguments of Respondents of CA 55/2018 – Original Petitioners

20. Against this, the learned Senior Counsel for the original Petitioners, who are Respondents in this CA 55/2018, has argued that it is an admitted fact that in CA 255 of 2015, which was filed in NCLT, the original Respondents had merely sought dismissal of the Company Petition on the basis of document, which was allegedly termed as Arbitration Award dated 12.07.2015 and thus, the Appellants cannot claim that the

document should have been treated as settlement agreement, which document was not even signed by all the parties to the Petition and which it is claimed, did not cover the subject matter of the Company Petition. It is further argued that the original Petitioner No.1 – Aar Kay Company as well as the original Petitioners 2 to 9, who are members of the OR1 Company – AP Refinery, were aggrieved persons as the shares which stood in the name of Aar Kay on 19.05.2010 had been wrongly shown as transferred to Dhuri and they had right to seek rectification of the Register of members. It is argued that there was no sufficient cause for the OR1 Company – AP Refinery to register the transfer for reasons which have been recorded by NCLT in the Impugned Order. Justification now being shown that the Auditors had shown the amount of cheque under the head "Unsecured Loan" is afterthought and no statement of the Auditors was brought on record. The alleged Board Resolution dated 01.04.2010, which has now been brought on record in the Appeal, is false and fabricated document. In the absence of Board Resolutions of the Transferor and Transferee Company accompanying the transfer form, AP Refinery could not have recorded the transfer. No share certificates were delivered to OR1 – AP Refinery when such transfer was recorded, which is clear from the minutes of Board Meeting purportedly held on 24th May, 2010. There is no justification for alleged tax planning and there is no evidence in support for making such two transfers. It is claimed that the original Petitioners came to know about the illegal transfer in May, 2012 and filed the present Petition and there are no delays or latches. As the original Petitioner group

which on 19.05.2010 had 56.97% shareholding was reduced by such illegal 2nd Transfer, case of oppression was clearly made out. The learned Counsel submitted that Compliance Certificate is statutory document and it did not show any such meeting dated 24th May, 2010 taking place. It has been argued by the learned Counsel for the Respondents that the shares in the name of Aar Kay were illegally transferred on 24th May, 2010 by the original Respondents and NCLT has directed retransfer of 14,96,000 shares in the name of OP1 – Aar Kay, instead of cancelling the 2nd transfer. It is argued that it must be held that since 19.05.2010 itself, the shares were in the name of Aar Kay in AP Refinery. It is stated that the NCLT wrongly held that on 19.05.2010, OP1 was not holding shares in AP Refinery. Even if transfer back was to be directed, it has to take retrospective effect and OP1 – Aar Kay could not be deprived of the status of having held 14,96,000 shares since the time its name was entered in the registers of AP Refinery on 19.05.2010. The counsel submitted that the original Petitioners have on this count, filed their Civil Appeal 394/2017.

Dismissal of CA 255/2015 by NCLT

21. We have heard Counsel for both sides with regard to disputes being raised by original Respondents relating to dismissal of their CA 255/2015. Copy of CA 255/2015 has been filed by the original Respondents in CA 55/2018 at Annexure – W. The application was filed by original Respondents 3 and 6. The prayer made was to dismiss the Company Petition as it was claimed that OP2 to 5 - Directors of Ricela

Health Foods Ltd. and OR3 and 6 – Directors of AP Refinery had entered into an agreement to refer their disputes to arbitration and for the purpose, an agreement dated 12.07.2015 was entered into. The application referred to certain persons as the Arbitral Tribunal to resolve disputes of the aforesaid parties. It was further claimed that the Arbitral Tribunal passed consent award on the same date of 12.07.2015 and the application referred to what was stated to be the "Award". The application annexed the agreement for appointment dated 12.07.2015 as Annexure – A1 and the said Arbitral Award as Annexure – A2. The application claimed that the appointment of the Arbitral Tribunal and Award were the subject matter of the Company Petition and the Award had come into force and acted as res judicata to the parties. The application claimed the right to enforce all directions in terms of the Award including execution of money decree granted in their favour by the Award. Inter alia, the application claimed that OR3 and 6 – the Applicants were filing the said application on limited issue of seeking enforcement of the direction of the Arbitral Award for withdrawal of the proceedings before the CLB (as it was).

21.1 Thus, the application claimed that the settlement award had been passed and as per the said Award, the original Petitioners mentioned therein were liable to withdraw the Company Petition. The NCLT has in the Impugned Order, dealt with the contentions raised with regard to such application in details. It considered the Reply filed by the original Petitioners also and took note of the fact that (against what was stated in

the document of Award) OR3 and 6 had approached the Police also for enforcement of the said Award instead of approaching the persons named as the Arbitrators. NCLT found that OP2 to 5 had appended their signatures to the said document. The original Petitioners claimed before NCLT that it was only an attempt for entering into the settlement by mediation but it was not an arbitral matter. It is to be noted that when such alleged agreement was entered into and the alleged Order was passed, the Company Petition was already pending since about two years. Considering the persons who were signatories, NCLT observed that in the facts and circumstances of the case, such document could at the best be considered as a compromise in writing signed by a few of the parties but it was not an Arbitration Agreement or Award (para - 110 of the Impugned Order). NCLT found that the prayer made in the application was not to treat the document as a compromise to be recorded and to pass a Judgement/Order on its basis. The NCLT appears to have rightly referred for principle, to Order 23 Rule 3 of the Code of Civil Procedure as to how the compromise is recorded in the Courts. In NCLT, the original Respondents claimed the document to be Award dated 12.07.2015 and the various arguments raised to claim that it was an Award were extensively dealt with by the NCLT which found that the provisions as found in the Arbitration and Conciliation Act, 1996, did not appear to have been followed with reference to the concerned document claimed to be “Award”. The NCLT also found that the terms of reference were not at all clarified in the document of “Appointment of Arbitrators” (Annexure – A1 para – 138

of the Impugned Order). The NCLT observed that the document of "Appointment of Arbitrators" mentioned that there are some disputes between the parties and did not at all relate to what is the dispute between the parties and how the terms of reference would be governed. It is to be noted that although in this Appeal by original Respondents, they have filed copy of the CA 255/2015 at Annexure – W and copy of said Award, what is now being referred as "settlement agreement" at Annexure – V, the document of "Appointment of Arbitrators" (Annexure – A1), which is said to have been filed with the CA, has not been filed and not argued before us. Now the Appellants – original Respondents have turned around to refer to the concerned document which was filed as "Award" (Annexure – V) to be a "Settlement Agreement". At the time of arguments, the document has been referred by the Counsel for original Respondents as "Global Agreement" but in NCLT, it was not the case of the Appellant. In any case, NCLT has already dealt with the provisions of Order 23 Rule 3 of CPC also. If during pendency of the Company Petition, outside, some of the parties enter into any such document as at Annexure – V titling the same as "Arbitration Award", that by itself is not sufficient to call upon the Court (NCLT here) to dispose the Petition in terms of the same, unless the concerned parties come before the Tribunal and accept the contents and signatures and the same is recorded in Court/Tribunal. Again, there is no material to show OP2 to 5 were in any way authorized by the other original Petitioners to enter into any such document on their behalf. It would naturally not bind the other Petitioners. Having gone through the contents

of the said Annexure – V (Arbitration Award) also, we do not find that it is helpful for disposal of the concerned Company Petition and the issues which have been raised in the same mainly by the OP1 - Aar Kay Company. We have gone through the reasons recorded by the NCLT and we are unable to accept the submissions made by the learned Counsel for the Appellants – original Respondents questioning the rejection of their CA 255/2015. We find the reasoning recorded by learned NCLT on this count to be correct and we do not interfere with the same.

Second Transfer of 14,96,000 shares of OP1 in OR1 to OR2 as challenged in CA 55 of 2018

22. As regards this issue, there is no dispute regarding the First Transfer and the documents at Annexure – F show transfers of shares from different companies as mentioned in the share transfer forms in favour of transferee – OP1 – Aar Kay Chemicals Pvt. Ltd. At Annexure – G (Page – 220), there is copy of Resolution of AP Refinery (OR1) dated 19.05.2010 recording the transfer of 14,96,000 shares in the transfer register in the name of transferee – OP1 – Aar Kay.

23. The present dispute relates to the Board Resolution of OR1 – AP Refinery dated 24th May, 2010 (Annexure – J – Page 225) recording the Second Transfer of the shares which stood in the name of OP1 – Aar Kay in favour of OR2 – Dhuri. We have already noted that OR3 and 4 were Directors in AP Refinery as well as in Aar Kay and also in OR2 – Dhuri. This naturally facilitated them to commit the act of transfer of the disputed

shares in the second transfer of Dhuri. The share transfer form (Annexure – H) has signature of OR4 in the column of transferor – Aar Kay Chemicals and OR3 in the column of transferee for Dhuri. There is no document shown from Board of Directors of OP1 – Aar Kay authorizing OR4 to execute any such transfer. Original Respondents claimed that the records relating to Aar Kay Chemicals are at premises in control of the original Petitioners at the factory premises of OP1 – Aar Kay in Malerkotla and so they were not in a position to produce the Resolution on that count. Before NCLT, it was not disputed that OP1 – Aar Kay is in control of other Petitioners. In any case, when the Company itself is a shareholder in another Company, the shares standing in the name of the Company is a matter of right for all the shareholders of that Company (Aar Kay here). The general right of Directors to handle shares of their own Company is different from their right to deal with shares held by the Company itself in another Company. Once the shares stood in the name of OP1 – Aar Kay, in our view, it would require consent of the General Body which, as a whole, has interest in the shares held by their Company in another Company. Without their consent, even the Board of Aar Kay must be said to be incompetent to transfer what would be the property of the Company. This is apart from the fact that in the present matter, there is not even the Resolution of the Board of Directors of OP1 –Aar Kay brought on record authorizing OR4 to execute any such document like Annexure –H. Only because OR3 and 4 happen to be Directors who are common in the three

companies, they cannot be presumed to have authority for committing acts disputed in this matter.

24. It is argued by the learned Counsel for the Appellants in CA 55/2018 on behalf of the original Respondents that under Section 108 of the old Act, OR1 – AR Refinery while recording the transfer, had limited role to see whether proper form has been signed and submitted of the transfer of shares and according to the Counsel, in the present matter when AP Refinery received such Form like Annexure – H signed by the Directors of OP1 and OR2, they had only to record the transfer. In the facts and circumstances of the present matter, we are not impressed by this argument looking to the fact that undisputedly OR3 and 4 were linked in all the three Companies as Directors. When the transfer form was being executed of shares which stood in the name of OP1, it was duty to ask for attaching not only copy of Board Resolution of the Board of Directors of the Company but also to see whether the Resolution indicated consent of the General Body of OP1, as shares being handled were of the ownership of the Company.

25. No Board Resolution of the transferee company was also filed in NCLT and in view of the observations of NCLT drawing attention to this aspect (see para 149 of the Impugned Order), at the time of filing this Appeal quietly in the documents, a resolution purporting to be of 1st April 2010 passed by OR3 and 4 in the record of Dhuri Cold Storage Pvt. Ltd. has been added at Annexure – BB (Page – 733) recording that the Company

was interested in purchasing 14,96,000 shares of AP Refinery and that funds were to be invested in AP Refinery in 14,96,000 equity shares. The Appellants – original Respondents have not disclosed as to why this was not produced in NCLT and why it could not be filed in NCLT. The picking up of the date of 1st April, 2010 is also interesting considering the fact that on 1st April, 2010, the shares which were at that time naturally held by different companies, had yet to pool in. They got pooled in only by 19th May, 2010. This date of 1st April, 2010, however, appears to have become necessary to be adopted by the Respondents so as to, not to be on the wrong side of the secretarial compliance certificate of R2 – Dhuri (copy of which has been filed by the original Petitioners in their Reply in this Appeal – Diary No.3675). At Annexure – R11, the compliance certificate had recorded that the Board of Directors of the Company met six times on 01.04.2010, 31.08.2010, 30.09.2010, 20.12.2010, 28.02.2011 and 31.03.2011. Thus, between 01.04.2010 and 31.08.2010, there was no Board Meeting of R2- Dhuri. NCLT has already found fault with the Appellants – original Respondents while referring to compliance certificates (copies at Annexure – R9 and 10) relating to AP Refinery and Dhuri where the Company Secretaries referred to the minute book of those companies to record various dates when the Board of Directors met and NCLT had noted that for both these companies – AP Refinery and Aar Kay, compliance certificate did not show that there was any meeting held on 24th May, 2010. Such Compliance Certificates are required to be kept in view of Section 383A(1) read with Rule 3(1) of the Companies (Compliance Certificate)

Rules, 2001. The form prescribed requires examination of records. Certificate issued in ordinary course of business cannot be ignored. Thus, we look at, with suspicion, the alleged Board Resolution dated 1st April, 2010 (Page – 733 of the Appeal), which has been now filed to claim that Respondent No.2 – Dhuri had decided to purchase 14,96,000 shares of OR1 – AP Refinery, and ignore it.

26. As regards the consideration, the Appellants – original Respondents claimed that OR2 Company had issued a post-dated cheque No.730964 to OP1 Company. The Appeal (para – 25) claims that the payment was deferred as under the lease agreement, the Appellant No.2 – Dhuri (OR2) was yet to receive majority of its payments from M/s. PepsiCo India Holdings Limited. Then, for such big amount, the Appeal claims that there was oversight (which is unnatural) and the cheque was not cleared till April, 2011 and the Respondents noticed this in April, 2011 while finalizing the books of accounts of OR2 and immediately deposited another cheque in HDFC Bank Account of Respondent No.1 on 22.04.2011 which returned as drawer's signatures were incomplete and so on 26.04.2011, OR2 Company made direct electronic transfer of Rs.15,10,960/- into HDFC Bank Account of OP1 – Aar Kay. The Appellants referred to Annexure – K of the Appeal. This document (Page – 227) relates to the Bank Account of OP1 – Aar Kay. It shows on 26.04.2011, RTGS from Dhuri of Rs.15,10,960/- on the credit side and interestingly on same date, there is RTGS entry of debit of Rs.15,00,000/- showing money transfer to A.P. Oil

Mills. Before NCLT, it appears to have been claimed that the A.P. Oil Mills was a family firm of the Respondents (see para – 157). NCLT ignored the contention of the original Petitioners that it was a sham transaction only because it reflected in the balance sheet of OR1. But, we find substance in the arguments of the learned Senior Counsel for original Petitioners that the original Respondents, realising that there was nothing to show regarding payment of consideration, resorted to such subsequent entries putting in accounts by one hand and withdrawing the same by the other. It does appear to us that the claim being made by the original Respondents that there was a post-dated cheque is baseless and the claim that subsequently, it was replaced due to passage of time and thus ultimately RTGS mode had to be adopted is afterthought action to justify somehow the Second Transfer. In the circumstances of the matter, such payment of alleged consideration shown almost 11 months after the disputed transaction is not at all above Board. The OR3 to 5 who claimed to have recorded the Board Meeting Resolution of A.P. Refinery as at Annexure – J dated 24th May, 2010 who were linked as Directors in these different companies, clearly had fiduciary responsibilities towards shareholders of respective companies. It appears to us that they failed to discharge their responsibilities as trustees of the shareholders of the respective companies.

27. We find substance in the arguments of the learned Counsel for the original Petitioners that it could not be said that there was compliance of

Section 108 of the old Act if along with the share transfer forms, Board Resolutions of the transferor company and transferee company duly authorizing the OR3 and 4 to sign the transfer deeds on behalf of the OP1 and OR2 were not accompanying. It has also been rightly argued that there was no material to show that when such transfer was recorded, the relevant share certificates were also presented as required by Section 108 of the old Act.

28. It is argued by the learned Counsel for the Appellants – original Respondents that NCLT should have seen a link between first transfer and second transfer. It is argued that in order to secure and consolidate shareholding of Respondent group in AP Refinery and for purpose of tax planning, it was decided that 5 investment companies would transfer 14,96,000 shares in the name of OP1 which in turn would immediately be transferred further in the name of OR2 – Dhuri.

28.1 The argument of original Respondents trying to link first and second transfer is countered by the original Petitioners claiming that a new case is being put up that exactly same procedure was followed in the first and second transfer. We find that there is no document of any Resolutions by different Companies to enter into such exercise of first and second transfer. Apart from this, how such exercise is helpful for which tax planning is also not clear nor explained. We are not convinced by arguments raised on this count by the original Respondents – Appellants, and reject the same.

28.2 The learned Counsel for the original Petitioners referred to the Company Petition to point out that AP Refinery was integral part of AP Group which originally comprised of 5 close friends – the Appellant Nos.2, 4, 5, Bhimsen – brother of Appellant No.3 and Respondent No.6 as arrayed in CA 394 of 2017. It is argued that in 1992, AP Group incorporated M/s. A.P. Solvex Limited – now known as Ricela Health Foods Limited. Subsequently in 1998, Aar Kay Chemicals was acquired by the AP Group jointly. The Counsel referred to the Company Petition to say that the original Petitioners 2 to 5 and original Respondent No.6 were engaged in handling business of the parent Company at Dhuri and as original Respondent No.6 insisted that his brother OR3 and OR4 be included in AP Group so they could look after day-to-day affairs of AP Refinery located at Jagraon, this was agreed. It is stated that OR3, 4 and 6 later became greedy and took undue advantage of their control over the Board of Directors of AP Refinery and in collusion diluted shareholding of the original Petitioners by the end of 2009 when the issue was taken up with the Respondents and they agreed to restore the major shareholding/controlling interest of the original Petitioners in OP1 Company – Aar Kay Chemicals and it was decided that Aar Kay Chemicals will acquire/purchase substantial shares of Respondent No.1 Company by making long term investment by purchasing the shares from other existing shareholders of R1 Company – AP Refinery. The argument is that it was because of this that the investment Companies transferred the 1496000 shares and thus according to him, the new case being put up by the

original Respondents deserves to be discarded. We find that in the absence of document to show that the companies pre-decided to go into the exercise of First and Second Transfer, bare arguments of contesting Respondents cannot be accepted.

29. It has been then argued by the learned Counsel for the Appellants – original Respondents that the shares of OP1 – Aar Kay had been transferred, the shareholders of OP1 would be the affected parties and the other original Petitioners could not have filed the Company Petition.

29.1 This has been countered by the learned Counsel for the original Petitioners submitting that it is already on record that the original Petitioners were in control of Aar Kay Chemicals and looking to the manner in which these group of Companies came into existence, original Petitioners have right to safeguard interest of the Company – Aar Kay Chemicals and that the original Petitioners are entitled to maintain the Petition.

29.2 It is claimed by the learned Counsel for the original Petitioners that original Petitioners 2 to 9 were admittedly members of AP Refinery and OP1 – Aar Kay is itself aggrieved and if the name of OP1 had been wrongly omitted from the register of members, all the petitioners were aggrieved by the illegal transfer and it cannot be said that they did not have locus standi. The argument is also that OP1 – Aar Kay is itself aggrieved and the Company can maintain its Petition.

30. We have gone through the reasons recorded by the learned NCLT and we have seen the conclusion drawn by NCLT that the transfer of 14,96,000 shares by OP1 Company in favour of R2 was not legal and thus, liable to be set aside. This is recorded by the NCLT in para – 158 of the Impugned Order. We agree with the NCLT to this extent with regard to this second transfer. We, however, do not agree with the other observation of NCLT that such shares were required to be directed to be "transferred back" in favour of OP1. In fact, what was required to be directed was that the transfer recorded was illegal and the shares continued to stand in the name of OP1, as if they had never been transferred once they had been taken on record of OR1 on 19.05.2010 (vide Annexure – G). We will not maintain the further direction of the NCLT regarding writing off of the alleged loan of Rs.15,00,000/-. That would be a matter for the auditors of OP1 to see. In the present matter, NCLT was required to consider whether the second transfer was valid or it was illegal. NCLT found the second transfer in favour of R2 – Dhuri to be illegal. When this is so, the transfer recorded by Respondents in the records of OR1 was clearly oppressive of the Company – OP1 which had a right of rectification.

CA 394/2017 (Appeal of Original Petitioners)

References: In the following paragraphs, unless mentioned otherwise, we will refer to documents and pages from the record of CA 394/2017.

31. Original Petitioners in this Appeal have challenged what is stated to be:-

(a) Issue of illegal allotment of 3,50,000 shares to OR No.7 on 29.06.2011 (**First Allotment** - in short) and

(b) Issue of illegal allotment of 4 Lakh shares to OR 2, 3, 8, 9 and 10 on 10.10.2012 (**Second Allotment** - in short).

The Appellants claim that the first transfer of 14,96,000 shares in the name of OP1 – Aar Kay Chemicals had consolidated the position of the original Petitioners and the second transfer was done by Respondent promoter group to dilute the shareholding of the original Petitioners. The original Petitioners have referred to their Company Petition where in details, they specified as to how they were holding shares in OR1 – AP Refinery and how due to transfer of shares by the first and second allotment mentioned above, the concerned Respondents benefited while the shareholding of the original Petitioners got reduced. The Appeal makes grievances that the learned NCLT proceeded on wrong basis to observe that detailed discussion of the first and second allotment was not necessary as the original Respondents had made an offer that original Petitioners would be issued shares in proportion to their shareholding in AP Refinery, from shares issued to them.

32. Learned Counsel for the Appellant referred to observations of NCLT in para – 80 and para – 159 (which we have reproduced in this

Judgement earlier). The Appellants are making grievances that it was necessary for NCLT to consider their submissions on merits. According to the Counsel for Appellants – original Petitioners in CA 394/2017, the original Petitioners never accepted offer of Respondents to issue proportionate shares only to the Appellants 2 to 9. It is basically claimed that the case put up by the Appellants before NCLT was that the first and second allotments were mere paper entries and no Board Meetings had been convened by OR1 – AP Refinery and that the allotments of shares were not as per law. The allotments were invalid and illegal and documents had been fabricated to justify the allotments which according to the Appellants, have not resulted in any increase in funds of the Company OR1 – AP Refinery. They claimed that deposits were merely re-routed as subscription money for making the allotments. The learned Counsel for the Appellants has argued that there is no record to show holding of any Board Meeting of OR1 – AP Refinery laying down terms and conditions for offer of shares so as to show as to how much capital was required to be increased and the purpose for increase of capital and how many new shares need to be offered and as to who would be eligible etc. The argument is that Respondents failed to show any Resolution authorizing any individual to sign share certificates to be issued. It is also argued that copy of Resolutions attached by Respondents to Form - 2 submitted and subsequently filed copies of Resolution, had vast differences regarding the text and wordings. The Appellants argued that the allotments were made in favour of Respondents who were related parties without offering the

shares to all the shareholders of the Company. It is claimed that the Appellants 2 to 9 were shareholders of the OR1 – AP Refinery when the First and Second allotments were made, but they were given no Notice and no offer was made to them and the Respondents proceeded to allot the shares to people from their group or their relatives. The Counsel for Appellants referred to the Affidavit filed of OP4 dated 16.03.2015 (Annexure A8) to show as to how it was brought to the notice of NCLT that the issue of shares had not resulted in any increase of funds with the Company. Although the Respondents claimed that further shares were issued to increase debt equity ratio and due to requirement from the Bank, there was no co-relation between the letter from the Bank or credit rating agencies and the issue of first and second allotment of shares. According to the Counsel for Appellants – original Petitioners, the shares were not issued for any proper purpose and they were issued to improve the shareholding of the Respondents at the cost of the original Petitioners. Although Section 81 of old Companies Act did not apply, as laid down in the matter of **"Dale and Carrington Invt. P. Ltd. vs. P.K. Prathapan and Others"** reported in 2005 1 SCC 212, the Respondent promoter group had fiduciary responsibility to issue shares for proper purpose and it was obligatory on their part to first offer the shares to the existing shareholders of the Company. As this was not done, the issue of first and second allotment of shares cannot be upheld, it is argued.

33. Against this, the learned Counsel for the original Respondents has submitted that the first and second allotments were done to improve debt equity ratio of the Company, at the instance of credit agencies and financial institutions. According to him, in 2009, there were allotments in which the original Petitioners had also participated and had been issued shares. It is stated that at that time, share application money to the tune of Rs.1,75,00,000/- and Rs.75,00,000/- were received from M/s. Home Land City Project Ltd. and M/s. K.K. Continental Trade Ltd., the associated companies of Respondent group in lieu of which, no shares were allotted at that time. It is stated that there was pressure from banks to allot shares against this amount. Counsel referred to letter dated 07.12.2010 of Punjab National Bank to submit that the Bank had sanctioned renewal-cum-enhancement of credit facility from Rs.1950.00 Lakhs to Rs.2250.00 Lakhs on the condition that OR1 – AR Refinery would issue shares against the share application money of Rs.1,75,00,000/-. According to the original Respondents, share application money of Rs.75,00,000/- was returned to K.K. Continental Trade Ltd. in financial year 2009 – 2010 and the share application money of Home Land City Project was lying with the Company. It is argued that since Home Land City Project insisted that shares be allotted to it at lower price and not at premium, it was decided in the interest of Company not to allot shares to M/s. Home Land City Project Ltd. According to the original Respondents, additional funding was arranged by Respondent No.7 who accepted to acquire fresh shares at a price of Rs.50/- in lieu of share application money received by the

Company in 2009. It is claimed that in view of this, though the share application money of Rs.1,75,00,000/- received in 2008 – 2009 was for 7,00,000 shares at Rs.25/- per share, but the allotment made in June, 2011 was made of 3,50,000 shares at Rs.50/-.

34. The learned Counsel for original Respondents further supported the allotment of 4 Lakh shares to Respondents 2, 3, 8, 9 and 10 claiming that this was done to improve the debt equity ratio of the Company and as there was dire need of infusion of fresh equity. It is claimed that the shares were not issued for any collateral purposes. The discrepancy in the language of Board Meetings Resolution and the Resolution attached with Form – 2 relating to the first and second allotment were mere typographic errors. As regards not offering shares to the shareholders, it is claimed that Section 81 of the old Act did not apply to private limited companies and it was not mandatory for the company to make proportionate allotment. It is claimed that on 03.08.2010, original Petitioners 2 to 5 had signed a document titled as "Letter of Authorization for Arbitration" (Page – 261 of Reply) and had agreed to exit the OR1 and so it was not necessary to offer shares being issued to them. It is also argued that in earlier years from 2003 to 2009, the Company had never allotted shares on pro rata basis and at those times, the original Petitioners did not challenge the allotments. With regard to the funds, it is argued that when the first allotment was made, the Company returned money of Home Land City Project Ltd. and fresh share application money was received from OR7 of

Rs.1,75,00,000/- regarding which, bank statement has been filed. As regards second allotment, it is claimed that temporary loans lying in the books of OR1 – AP Refinery were converted into permanent share capital. It is argued that the unsecured loans were converted into share subscription money. Thus, the Respondents are defending the first and second allotment.

35. We have gone through the material pointed out by the learned Counsel for both sides and heard their submissions. Firstly, we will refer to the observations of the learned NCLT in not dealing with these allotments on merits. At Annexure – A9 of CA 394/2017, there is copy of the Reply which was filed by the original Respondents in the Company Petition. The Respondents mentioned in para – 8.3 as under:-

> "8.3 As a result of the new allotments, the shareholding of Petitioners No.2 to 9 was reduced from 11.37% to 9.25%. In light of this grievance expressed by the means of the present Petition, the **Respondents make an express offer to restore the combined shareholding of Petitioners No.2 to 9 from 9.25% to 11.37%.** This would be effected by existing Respondent shareholders offering each of the Petitioners No.2 to 9 such number of shares as to restore their respective percentage of shareholding as it was before the allotment of 3,50,000 new equity shares in June 2011 and 4,00,000 new equity shares in October 2012."

At Annexure – A-10 is part of the Rejoinder which original Petitioners filed in NCLT. The Appellants have filed relevant pages from

that Rejoinder and with regard to para – 8.3, the original Petitioners stated:-

> "8.2 - 8.5 It is submitted that by making such offer in the para under Reply, the Respondents are trying to play smart. The motive behind offering to restore the shareholding of Petitioner No.2 to 9 back to 11.37% without offering to restore the shareholding of Petitioner No.1 Company back to 45.60%, is that the Respondents want to continue to hold majority position as such an offer will raise the shareholding of the Petitioner group to only 48.48% of the present paid up capital. As the offer made by the Respondents doesn't put an end to the series of acts of oppression and mismanagement by the Respondents, whereby the majority position of the Petitioners was reduced to minority, hence, the same is expressly denied. Since, all the allotments of shares under challenge have been made without following the due procedure of law as explained in the foregoing paras, so the same are liable to be struck down.
>
> Be that as it may, the Petitioners have always believed and have always acted in the interest of Respondent No.1 Company. Therefore the Petitioners do not want to disturb the working capital of the Company. The proposal of the Respondents in the corresponding paras of proportionate allotment of shares will be accepted by the Petitioner No.2 to 9 only when the 14,96,000 shares of Petitioner No.1 Company (illegally transferred to Respondent No.2) will be restored in its name and proportionate allotment of shares is made to all Petitioners including Petitioner No.1 Company."

Thus, the original Petitioners claimed that the offer made by Respondents would not put an end to series of acts of oppression and mismanagement and they expressly denied the same. They reiterated that the allotment of shares was without following due procedure and was liable to be struck down. The sub-paragraph also made a conditional statement. The Impugned Order does not show that at the time of final arguments, the original Petitioners agreed to such offer. Para – 159 of the Impugned Order (which we have reproduced earlier) shows the Respondents reiterating their offer. It does not show that the Petitioners accepted the same. Again, if the NCLT wanted to rely on the offer made by Respondents and the Rejoinder which we have referred, it could not have picked up something in part from one place and something in part from the other and given something in part. Para – 8.3 of the Reply of Respondents did not make any offer to OP1 and the original Petitioners did not want to do anything unless OP1 was also being considered on the basis of 14,96,000 shares in dispute. NCLT picked up the offer made by the Respondents and ignoring what the Petitioners stated, proceeded to pass the final Orders as if the issue relating to first and second allotments required no consideration due to mutual agreement of the parties and gave what only Respondents wanted to give. When disputes had been raised and argued the same were required to be decided and no shortcut could be adopted without both sides categorically agreeing. NCLT could not have abrogated its responsibility to decide the legality or otherwise of first and second

allotment. We are thus not in agreement with NCLT with the manner in which it dealt with the first and second allotment.

36. Before us, the matter has been extensively argued. None has asked and we do not wish to let matter protract by remanding the issue. Parties have argued the merits and we proceed to decide the same. We proceed to examine the first and second allotment as made by the OR1, if it could be maintained. Learned Counsel for the Appellants referred to Annexure – A3 (Page – 234) Form – 2 relating to the allotments made on 29.06.2011. It is argued that this document at Page – 239, is the document which was attached for filing with ROC as true copy of the Resolution dated 29.06.2011. The learned Counsel submitted that the Resolution merely stated "RESOLVED that the Company M/s. AP Refinery Private Limited will issue 350000 shares of Rs.10 each at premium of Rs.40 each to M/s. Anu Buildwell Private Limited." The learned Counsel then pointed out document at Page – 262 which, it has been argued to have surfaced later, as the Resolution dated 29.06.2011. The learned Counsel rightly pointed out from this document that there was vast difference between what was filed as true copy of the Resolution with ROC and what was later shown as the Resolution. This Resolution signed by OR3 to 5 with regard to Item No.4 read as under:-

"<u>Item No.4</u>: Allotment of Shares	Sh. Bhuvan Goyal informed the present Board of Directors that a list of persons from who share application money were received & whose

applications were complete in all respect are placed before the Board. He further informed that out of these 350000 equity shares of Rs.10/- at Premium of Rs.40/- each can be allotted. Board took note of the same and passed the following resolutions:

"Resolved that 350000 equity shares of Rs.10/- at a Premium of Rs.40/- per equity shares totalling to Rs.1,75,00,000.00 (One Crore Seventy Five Lacs only) payment of which has been received in full be and is hereby allotted to M/s Anu Buildwell Private Limited of Delhi."

"RESOLVED further that share certificate for the share allotted as aforesaid be issued to the allottees under the signature of Directors of the company and a common seal be affixed on these shares certificates in the presence of witnesses."

"RESOLVED FURTHER that Sh. Shiv Kumar Goyal, Director of the Company be and is hereby authorized to sign. execute return of allotment on Form No.2 and to do all acts, deeds, things etc. which she may deem necessary or expedient to give effect the above resolution."

The learned Counsel for the Appellant then referred to Annexure – A4 (Page 240) Form – 2 with regard to the second allotment done on 10.10.2012 and the document at Page – 244 where again the true copy of the Resolution showed it to be Resolution of just one sentence "RESOLVED that the Company M/s. AP Refinery Private Limited will issue 4,00,000 shares of Rs.10 each at premium of Rs.30 each as per Annexure." At Page – 245, is the copy of Annexure – A format of list of allottees. The Counsel then referred to copy of Resolution dated 10th October, 2012 as appearing at Page – 266. It is argued that such Resolution surfaced later during the litigation and it now showed in Item No.4 as under:-

"ITEM NO. 4: ALLOTMENT OF SHARES	Sh. Bhuvan Goyal informed the present Board of Directors that a list of persons from who share application money were received & whose applications were complete in all respect are placed before the Board. He further informed that out of these, 400000 equity shares of Rs.10/- at premium of Rs.30/- each can be allotted. Board took note of the same and passed the following resolutions: "RESOLVED that the statement showing the name(s), address(s) and numbers of shares applied for by some applicants which is in aggregate to 400000 equity shares of Rs.10/- at a Premium of Rs.30/- per equity share

totalling to Rs.1,60,00,000.00 (One Crore Sixty Lacs only) payment of which is received by cheques in full submitted to this meeting for the purpose of identification, initialled by the chairman, be and is hereby approved and that each applicant for the shares pursuant to his/her application be allotted the exact number of shares applied for, and that such number of shares hereby allotted be put in the column of the statement provided for the purpose against such applicant, and that notice of such allotment communicated to the respective allottees."

"RESOLVED further that share certificate for the shares allotted as aforesaid be issued to the allottees under the signature of Directors of the company and a common seal be affixed on these shares certificates in the presence of witness.

RESOLVED FURTHER that Sh. Bhuvan Goyal, Director of the Company be and is hereby authorized to sign, execute return of allotment on Form No.2 and to do all acts, deeds, things etc. which she may deem necessary or expedient to give effect the above resolution."

A reading of the above does make it clear that there was no comparison in what was filed with ROC as true copy of Resolution and what surfaced during the litigation. It is being argued by the Appellants/Original Petitioners that these documents were prepared later to justify the allotments which had already been made.

37. The learned Counsel for the original Petitioners referred to Judgement in the matter of "Dale and Carrington" (supra) in which in Para 11(d), the Hon'ble Supreme Court observed as under:-

> "The fiduciary capacity within which the Directors have to act enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all important matters relating to the company. It follows that in the matter of issue of additional shares, the directors owe a fiduciary duty to issue shares for a proper purpose. This duty is owed by them to the shareholders of the company. Therefore, even though Section 81 of the Companies Act, 1956 which contains certain requirements in the matter of issue of further share capital by a company does not apply to private limited companies, the directors in a private limited company are expected to make a disclosure to the shareholders of such a company when further shares are being issued. This requirement flows their duty to act in good faith and make full disclosure to the shareholders regarding affairs of a company. The acts of directors in a private limited company are required to be tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives. Non-applicability of Section 81 of the Companies Act in case of private limited companies casts a heavier burden on its directors. Private limited companies are normally closely held i.e. the share capital is held within members of a family or within a close knit

> group of friends. This brings in considerations akin to those applied in cases of partnership where the partners owe a duty to act with utmost good faith towards each other. Non-applicability of Section 81of the Act to private companies does not mean that the directors have absolute freedom in the matter of management of affairs of the company."

38. The original Respondents in Reply filed in NCLT (Annexure R1 – Diary No.2886) in para – 8.1 referred to earlier instances of issued subscribed and paid up capital as per its need. It was claimed that in 2008, there was fresh infusion in equity capital. It was claimed that it was decided by the Board of Directors of AP Refinery to establish a refinery at Jagraon and OR5 – a fresh MBA joined as Director and that it was a matter of time that the Company commenced refinery unit, to give opportunity to Respondent No.5 to prove his mettle. It is claimed that Jagraon plant was established on a relatively larger scale and required capital infusion. Inter alia, it is claimed that Petitioners were also offered equity shares at that time but since the control of OR1 was with Respondents 2 to 5, the Petitioners decided to contribute a small portion of the new capital and balance was arranged by the Respondents themselves. Then reference is made to raising of share capital on 09.03.2009. It was claimed that the Petitioners were not participating in the equity before the first and second allotments of 2011 and 2012. The Reply claimed that the Respondents had bona fide belief that original Petitioners 2 to 9 were never willing to contribute new capital to R1 which was, since inception, being transferred and managed by Respondents 2 to 4 and later Respondents 5 and 6. Reply

claimed that the Company was in dire need of infusion of new equity and there was need to maintain debt equity ratio. It was then mentioned:-

> "e: Hence, in the best interests of the Company, and after following due procedure, an allotment of 3,50,000 shares was made in June 2011 to Respondent No.7 company, and a further allotment of 4,00,000 shares was made in October 2012 to Respondents No.2, 3, 8, 9 and 10."

38. Thus, such stand was taken in NCLT at the time of filing of Reply but now in the Reply filed in this Appeal and in the arguments being made (see Reply to Appeal - para 6-d) relating to allotments 1 and 2, various defences are being raised to claim that there was money lying from Home Land City Project Ltd., which was returned for reasons stated, and Respondent No.7 came forward to acquire fresh shares and was thus issued shares. This does not match with the Resolution (Page – 262) dated 29.06.2011 also where it was claimed that there is list of persons from whom share application money was received and whose applications were complete were being put up. Then it was resolved that shares were being issued to M/s. Anu Buildwell Pvt. Ltd.

39. The argument of the Respondents that due to requirement raised by Punjab National Bank, such allotments were required to be made is also not appealing. The letter at Annexure – R5 dated 07.12.2010 is apparently with reference to the credit proposal made by the OR1 – AP Refinery. For increasing the limits permitted to the Company, if the Company showed the manner in which it will meet the liabilities of the Bank, it cannot be

said that the Bank had "asked" for issue of additional allotments. Again, even if the Bank or CRISIL were to ask raising of debt equity ratio, there is no reason why the Company should not give equal opportunity to all the shareholders by offering shares on pro rata basis to all the shareholders at the given time. Nothing of this sort appears to have been done in both the first and second allotments made by the Company. The learned Counsel for Appellant is rightly relying on the Judgement of "Dale and Carrington" referred supra. Reasons discussed show that there appear no bona fide acts on the part of Respondents in the manner in which First and Second Allotments were made by pick and choose. We find substance in the submission that the Directors of OR1 were under a responsibility to disclose to all the shareholders that further shares are to be issued and such of them as were interested, may apply for further shares in proportion to their shareholding. In the present matter, the Respondents are rather taking a defence that on earlier occasions, the original Petitioners did not invest much and thus, they were not interested and so it was not necessary to offer shares to them. Reliance is placed on some letter of authorization for arbitration said to have been signed by original Petitioners 2 to 5 on 03.08.2010. There is nothing that such letter led to any follow up or resolution. Picking up such letter and then saying that all the original Petitioners 1 to 9 would not have interest and so need not be offered shares, cannot be upheld. If money of Home Land City Project Ltd. was being returned, the Directors of OR1 had responsibility to offer shares to all shareholders in the Company and cannot pick up R7 to say that he

offered the money and so we took it. Similarly, in the second allotment also, the allotments were made to select Respondents which the original Petitioners claim were part of the group of original Respondent promoters. We are not impressed by the arguments for Respondents that temporary loans were lying of those Respondents and the same were converted into share subscription money and in support they referring to Annexure – R13 (Page – 265 Diary No.2886). The learned Counsel for the Appellant rightly countered that if such document was to be relied on even OP1 had money lying with OR1 – AP Refinery, but was not treated similarly. We find, original Respondents cannot be allowed to tide over the illegality by claiming to offer to select original Petitioners 2 to 9 from, what was issued under these allotments to select Respondents.

40. We pass the following Order:-

(A) We do not disturb directions in para marked – 163 of the Impugned Order. We agree with the learned NCLT as regards operative direction – 'i' in para 161 of the Impugned Order that CA 255 of 2015 filed by the Respondents deserved to be dismissed. However, for reasons discussed above, we set aside rest of the operative Order as recorded in para – 161 of the Impugned Order and reasons recorded by NCLT in support of the same. Any steps taken by the parties pursuant to such directions recoded in para – ii to vi, pending Appeals shall stand set aside.

(B) For the above reasons, we set aside the second transfer dated 24.05.2010 recorded in the register of members in the record of OR1 transferring the shares of OP1 in favour of OR2. The Respondents will rectify the register of members so as to reflect 14,96,000 shares standing in the name of OP1 – Aar Kay Chemicals Pvt. Ltd. with effect from 19.05.2010, and the second transfer dated 24.05.2010 done shall stand ignored.

(C) We find that the first allotment made on 29.06.2011 as well as the second allotment made on 10th October, 2012 were both illegal and are hereby struck down.

(D) The Company Petitions shall stand disposed accordingly.

(E) Original Respondents 3 to 5, each will pay costs of Rs.50,000/- to each of the Original Petitioners (Appellants of CA 394/2017), from their own funds.

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

[Balvinder Singh]
Member (Technical)

/rs/nn