NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.272/2018

[Arising out of Order dated 29th June, 2018 passed by National Company Law Tribunal, Chennai Bench, Chennai in CP No.56 of 2017]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
1. Mr. S. Gopakumar Nair No.1604, Belchamp, Hiranandani Parks, Thriveni Academy Campus, Oragadam, Tamil Nadu - 603204	Original Petitioner No.1 (Respondent No.2 in Application)	Appellant No.1
2. Smt. Asha Devi No.1604, Belchamp, Hiranandani Parks, Thriveni Academy Campus, Oragadam, Tamil Nadu - 603204	Original Petitioner No.2 (Respondent No.3 in (Application)	Appellant No.2
Versus		
1. OBO Bettermann India Private Limited Plot No.A-51, SIPCOT Industrial Growth Centre, Oragadam, Sriperumbudr Taluk, Kancheepuram, Tamil Nadu – 602105	Original Respondent No.1. (The 'Company' concerned)	Respondent No.1
2. OBO Bettermann Holdings – GMBH Postfach 1120 D-58694 Menden Huingser Ring 52 D58710 Menden, Germany	Original Respondent No.2 (Applicant of I.A. No.228 and 229/2017 in CP 56/2017)	Respondent No.2

For Appellant: **Shri Sanjeev Puri, Sr. Advocate with Shri SidharthSodhi, Shri Kumar Kislay, Advocates**

For Respondents: **Shri KrishnenduDatta, Shri SahilNarang, Ms. Niharica Khanna and Ms. RiddhiJad, Advocates (Respondent Nos.1 and 2)**

J U D G E M E N T

(9th July, 2019)

A.I.S. Cheema, J. :

1. The Appellants – original Petitioners filed Company Petition No.56/2017 (Annexure A2 – Page 91) before the National Company Law Tribunal at Chennai (NCLT - in short) under Sections 241 to 244 read with 246, 337 to 341 of the Companies Act, 2013 against the Respondents. Respondent No.1 - OBO Bettermann India Private Limited (OBO India – in short) is the "Company" concerned regarding which the Company Petition is filed. Respondent No.2 – OBO Bettermann Holding – GMBH(OBO Germany – in short) is shareholder in the Respondent No.1 Company.

We will refer to the parties as arrayed in the Company Petition.

THE COMPANY PETITION

2. The Appellants/Original Petitioners in the Company Petition gave particulars as to how due to business relations with OBO Germany, the Respondent No.1 Company came to be incorporated on 27th December, 2006. Earlier it was in the name of "Cape Electric India Pvt. Ltd."(CEIPL) in which the Appellants were 100% shareholders and later on MOU dated 14th September, 2007 (Page 183) was executed whereby OBO Germany explored possibility of becoming shareholder in CEIPL. The Company Petition gave particulars as to how Respondent No.2 – OBO Germany

invested and the Agreements which took place. Particulars are given as to how and why the various documents and Agreements were executed between the parties and the share capital was increased. It is stated that on 26th July, 2008, CEIPL name was changed to **"**OBO Bettermann India Private Limited"– Respondent No.1 and a fresh Certificate of Incorporation was issued by MCA. It appears that over the course of time, OBO Germany-Respondent No.2 became initially 76% and then shareholder of 99.64% shareholding and the Appellants were rendered holding 0.36% shareholding. It appears that Respondent No.2 made attempts to buy out the equity shares of the Petitioners pursuant to Put and Call Option Agreement dated 20.10.2013 (Page 329) and when the Appellants did not respond, the Respondent No.2 who was in control of Respondent No.1, issued Notices under the provisions of Section 236 of The Companies Act, 2013 ("Act" in short) and went ahead to buy the shares of the Appellants in spite of their resistance. Consequently, the Appellants as Petitioners filed the Company Petition raising various grievances with regard to the documents executed and curtailing their shares and inter alia contended in Para – 6.45 of the Company Petition as under:-

> "6.45 In spite of the petitioners dissent conveyed to the respondents vide their above reply letter dated 20/07/2017 the Respondent in hand and glove with each other and with the help of the Board of Directors who are nominee of the 1st respondent illegally and arbitrarily and fraudulently transferred the entire share holdings of the petitioners i.e. 2,40,000 equity shares of Rs.10 each at a throw away price of Rs.1.70 per share and sent two demand Draft as follow:

i. Rs.2,80,560 in the name of 1st petitioner drawn on Deutsche Bank

ii. Rs.1,20,240 in the name of 2nd Petitioner drawn on Deutsche Bank

The said demand drafts are as on date not presented to the Bank for realisation and still lying with the Petitioners. The copy of the same is marked as **Annexure-P**.

The petitioners therefore state that the respondents initially converted the shareholding of the petitioners from 24% to less than 1% and subsequently acquired their shares against their wishes and in contravention to law thereby causing serious act of oppression as against the petitioners are concerned. The acts of oppression and mismanagement committed by the respondents are highly prejudicial to the interest of the petitioners. Under these circumstances the petitioners have no other remedy except to approach this Hon'ble Bench for appropriate reliefs in the interest of justice."

We will refer to other contentions, later in this Judgement. The Appellants – Petitioners claimed following reliefs in the Company Petition:-

"1. Set aside the transfer of 1,68,000 equity shares of Rs.10 each illegally effected from 1st petitioner to the 2nd Respondent.

2. Set aside the transfer of 72,000 equity shares of Rs.10 each illegally effected from 2nd petitioner to the 2nd Respondent.

3. Direct the 1st respondent Company to rectify its Register of Members and Share Transfer Register consequent to the setting aside the transfer of 1,68,000 equity shares of Rs.10 each from the 1st Petitioner to 2nd respondent and 72,000 equity shares of Rs.10 each from 2nd Petitioner to 2nd respondent and restore the name of the

Petitioners as shareholders in the Register of members of the 1st respondent Company.

4. Declare the Share Subscription Agreement and put and Call Option Agreement both dated 20.10.2013 as null and void and to restore the shareholding pattern prior to 04.07.2014 in the ratio of 76% : 24%.

5. Direct the 1st Respondent to pay the bonus of Euro 30,000 for the Financial year 2016.

6. Direct the 1st Respondent to pay the salary and bonus of Euro 1,00,000 for the remainder of terms of appointment i.e., up to December 31, 2017.

7. Direct the 1st Respondent to pay additional amount of Euro 1,00,000 in terms of clause 2.5 of the Separation Agreement dated 07.06.2016.

8. Direct the 2nd respondent to sell its entire shareholdings to the Petitioners at Rs.5 per equity share or such higher amount as may be directed by this Hon'ble Tribunal."

Respondent No.2 filed IA 228/2017 and IA 229/2017

3. The Respondent No.2 – OBO Germany appears to have filed in the Company Petition - IA No.228/2017 and IA No.229/2017 (Annexure A-3 and A-4). Annexure A3 referring to the contents of the Company Petition, claimed that the disputes being raised were required to be referred to Arbitration in view of "Share Subscription Agreement" and "Put and Call Option Agreement" under the provisions of Section 45 of the Arbitration and Conciliation Act, 1996. The other IA (Annexure A4) was filed seeking dismissal of the Company Petition as not maintainable under Section 244 of the Act.

4. The Ld. NCLT heard the parties with regard to these IAs and making brief references to the Company Petition and disputes raised, mainly with regard to maintainability, accepted the averments made in the Application questioning maintainability and held that the Respondent No.2 had acquired the shareholding of the minority shareholders, i.e. the Petitioners and thus, the Petitioners did not hold any shares in Respondent No.1 Company and were not eligible to maintain Application under Section 241 of the Act.

5. Annexure - A4-(Wrongly Mentioned in Appeal as IA No.229/2017 instead of IA No.228/2017 as Impugned Order Para 1 referred to it as IA No.228/2017) The Maintainability Application (Page 483) which was filed by Respondent No.2 questioning maintainability, in short, was as follows:-

I.A. questioning Maintainability of Company Petition

(a) Respondent No.2 claimed that this Respondent entered into MOU with Appellant No.1 on 14.09.2007 and between the Respondent No.2 and the Company (Respondent No.1), following documents were executed which may be referred as "Initial Transaction Doocuments":

i. Trade Marks License Agreement dated 02.04.2008,

ii. Share Subscription Agreement dated 06.06.2008 and

iii. Shareholders Agreement dated 06.06.2008.

The Respondent No.2 claimed that as per such Initial Transaction Documents, it became beneficial holder of 75.76% of issued and paid up

equity share capital of the Company and Appellants/Petitioners jointly held 24.24% shares. These Agreements were subsequently, amended and later superseded by "Shareholders' Agreement" dated 28.07.2011. Respondent No.2 claimed that on 19.11.2008, share capital was increased from 1 Lakh to 10 Lakhs equity shares and gave particulars of the division. This Maintainability Application made reference to the further loan from Respondent No.2 and execution of second MOU dated 01.08.2013 and the execution of "Subsequent Transaction Documents" like –

i. Share Subscription Agreement dated 20.10.2013

ii. Put and Call Option Agreement dated 20.10.2013

iii. Termination Agreement terminating Shareholders Agreement

Revised "Employment Agreement" Dated 20.10.2013 was also executed. On 4.7.2014 share capital was increased to Sixty Seven Crores Fifty lakhs and Respondent No. 2 held 99.64% shares.

(b) The Maintainability Application in Para – 16 claimed as to the efforts which were made by Respondent No.2 to buy out the Petitioners in accordance with Put and Call Option Agreement and the Notices issued in February and May of 2016. Respondent No.2 claimed in the Application that the Petitioners were demanding high value which was unreasonable and that they ignored the attempts of Respondent No.2 to enforce its rights as per the "Put and Call Option Agreement". Respondent No.2 claimed that at such point of time, the Petitioner and Respondent Company and Respondent No.2 executed "Separation Agreement" dated 07.06.2016 and

the Petitioners agreed to step down from the post of Managing Director and did step down. The Application claimed that after the Separation Agreement, the Petitioners continued to remain minority shareholders to the extent of 0.36%. The Maintainability Application further claimed (Para – 18) that the Appellant No.1 failed to comply with the terms of the Separation Agreement and so no payments were made to him by the Respondent No.1 under the terms of Separation Agreement and the Appellant No.1 had issued Notices making claims to which the Company had responded. Respondent No.2 claimed that the Respondent No.1 Company issued Notices to the Petitioners in accordance with provisions of Section 236 of the Act and when there was no response from the Appellant – Petitioners, the Company sent demand drafts to the Appellants in consideration for transfer of their equity shares. It was claimed that the shares were thus transferred in accordance with the provisions of the Act of 2013. On such basis, the Maintainability Application filed by Respondent No.2 (Annexure – A4) sought dismissal of the Company Petition.

This has been accepted by the learned NCLT and the Company Petition has been dismissed. NCLT asked petitioners to resort to Arbitration if they want to contest amount of compensation. Thus this Appeal.

6. It appears from the record that when such applications questioning maintainability and need of reference to Arbitration were filed by the

Respondent No.2, NCLT received counter to such applications and rejoinders were also filed and after hearing the parties, impugned order came to be passed. The relief sought in Annexure A-4 questioning maintainability was that the Company Petition should be dismissed as not maintainable under Section 244 of the Companies Act, 2013.

7. The impugned order in short referred to the disputes raised and in para 11 of the impugned order held that applicant (i.e. Respondent No.2) had acquired the shareholdings of the minority shareholders Original Petitioners and in view of this the petitioners did not hold any shareholding in Respondent No.1 company and hence they are not eligible to make an application under Section 241 of the Act. In para 24 of the impugned order, NCLT observed that "It is borne by the facts submitted by the Respondent 2 and 3/petitioners that they are no longer a shareholders of the Respondent 1 company and hence the petition is liable to be dismissed." NCLT in short referred to other disputes also and recorded findings and disposed off the Interim Applications and Company Petition.

8. We have gone through the Company Petition. Copy of the same is at Annexure A-2 (Page 91). The petition traced the history since 11th May, 2005 when Copy of License Agreement was executed between the Respondent No.2 and M/s Cape Electric Corporation a proprietorship of the original petitioner No.1 till 7th June, 2016 when Separation Agreement was got executed from the petitioner No.1. Petitioners claimed that on allurement by Respondent No.2 the said Separation Agreement was got executed and when attempts at Put and Call option did not succeed, the

original Respondents resorted to Section 236 of the Act and cancelled the shares of the original petitioners rendering them zero holding from what was their initial company with 100% shares which petitioners had. The Company Petition and its annexures showed the original petitioners questioning the separation agreement dated 7.6.2016 (Page 500) and relied on notice sent by original Petitioner No.1 on 9.6.2017 (Page 448) through Advocate R. Rajesh to show as to how Clause 2.6 of the Separation Agreement showed that the original petitioner No.1 was made to sign the resignation letter from the post of Managing Director as well as Director on 7.6.2016 itself when separation agreement was got executed. The Company Petition gave various reasons raising questions of law regarding applicability of Section 236 of the Act to the present set of facts and also if the provisions of Section 236 of the Act had really been complied. The Company Petition questions the manner in which the original respondents purporting to act under Section 236 of the Act took away their shares which they claim was at throw away price. The petitioners have also claimed that the Separation Agreement required certain payments to be made and gave particulars as to how the original petitioner No.1 was made to sign the resignation letter. The Petition gives particulars how payments as mentioned in the prayer clauses of the Company Petition were liable to be made. The petitioners also relied on Section 202 of the Companies Act to claim that the Respondents had defaulted in complying with the terms and conditions of the Separation Agreement dated 7.6.2016 and did not pay compensation and other termination benefits and entitlements as per

the Employment Agreement read with Section 202 of the Companies Act, 2013, which deals with compensation for loss of office as MD of Petitioner No.1.

Company Petition Maintainable

9. Looking to the Company Petition and documents referred to and relied on and the averments made in the Company Petition, we are unable to agree with the findings recorded by the NCLT as mentioned above that "It is borne by the facts submitted by the original petitioners that they are no longer a shareholders of the Respondent 1 company and hence the petition is liable to be dismissed." In fact the Company Petition claims that there were only three shareholders i.e. Respondent No.2 and the original petitioners. This fact is not in dispute. Reference can be made to the Annual Returns of 2015-16 (Page 393, 396 as well as Page 407 at Pg.421 of the Paper Book) which show that even in the Return of 2015-16 Respondent No.2 was shown as 99.64% shareholding and the original petitioner No.1 was shown as 0.2494% and original petitioner No.2 was shown as 0.1068% shareholding. It is only after 2015-16 that the disputes relating to Put and Call Option and then original Respondents resorting to Section 236 and purporting to forcibly purchasing the minority shareholding acts took place. These acts have been questioned by the Company Petition. Section 244(1)(a) of the Act makes it clear that for Right to apply under Section 241 amongst the criterion, one of the criteria is that the Members of the company not less than one-tenth of the total number of its members should file the application under Section 241 making

grievances of oppression and mismanagement. When there were only three members and two of them (petitioners) filed the Company Petition claiming that they have been wrongly and oppressively deprived of their shares, and were subjected to other oppressive acts as stated, they had the number of Members required and it was a dispute to be decided whether or not they have lost whole of their shareholding and NCLT could not have simply accepted whatever the respondents claimed (and which was disputed by the petitioner) that they have duly complied and enforced Section 236 of the Act. Thus we set aside the findings of NCLT that the appellants-original petitioners did not hold any shareholding and hence they were not eligible. We hold Appellants/Original Petitioners were and are eligible to maintain the Company Petition on the basis of number of Members.

Dispute regarding Section 236 of the Companies Act, 2013

10. NCLT in the impugned order referred to the disputes raised by the appellants with regard to applicability of Section 236 but did not deal with the same or decided the same and concluded that Section 236 was complied with and Original Petitioners were no longer Members and could not maintain petition.

11. The question of applicability and compliance or otherwise of Section 236 has been extensively argued before us. The documents concerned in this regard are not disputed. It is more a legal question and thus we proceed to decide the same.

Documents reflect developments

12. We have already referred as to how the parties executed different documents between them. In a nutshell what appears from record is that Respondent No.2 and Cape Electric Corporation which was proprietorship of Original Petitioner No.1 entered into a "Licensing Agreement" (Page 144) on 11.5.2005. The Petitioners registered their company "Cape Electric India Pvt Ltd (CEIPL) on 27.12.2006 (Page 149 to 182). They were 100% shareholders. Later Respondent No.2, which is a company based in Germany, entered into a MOU with Original Petitioner No.1 on 14.9.2007 (Page 183). Between Original Respondent No.2 and Cape Electric India Pvt. Ltd.(CEIPL) Trademark Licence Agreement (Page 188) was executed on 2nd April, 2008 so that Cape Electric India Pvt. Ltd.(CEIPL) can use the trademark of Respondent No.2. On 13th May, 2008 the Respondent No.2 and Original Petitioner No.1 executed Compensation Agreement (Page 197) granting efficiency bonus to the Original Petitioner No.1. On 6.6.2008 by a Shareholders Agreement (Page 198) which was executed between the original petitioners and Respondent No.2 and the "Cape Electric India Pvt. Ltd.(CEIPL)" of Original Petitioner, the Respondent No.2 joined the CEIPL and was to have 76% shareholding and the petitioners were to have 24% shareholding. On the same day Share Subscription Agreement (Page 226) also came to be executed in furtherance of Share Holders Agreement. By another agreement dated 9.7.2008 (Page 245) called "Asset Transfer Agreement", Cape Electric Corporation proprietor of CEC and OBO

Bettermann India Pvt Ltd, the tangible/intangible rights were transferred to Respondent No.1 company. The Company Petition Para 1(A) states that name of Respondent No.1 was on 26.07.2008 changed from Cape Electric India Pvt Ltd to present "M/s OBO Bettermann India Pvt Ltd."

13. It appears that after such initial *bonhomie* relationship as reflecting in the earlier agreements 2007-2008, on 1.8.2013 a Second MOU was executed between original petitioners and original respondents (which this time includes Respondent No.1 company) that Respondent No.2 will get funds so as to ensures that it holds approximately 99% of the shareholding and the necessary documents were to be executed. New arrangements were contemplated. Later, on 20th October, 2013 a "Share Purchase Agreement" (Page 308), "Put and Call Option Agreement" (Page 329) came to be executed between these 4 parties and the third document was "Employment Agreement" (Page 349) dated 20.10.2013 which was between the Original Respondent No.1 and Petitioner No.1 ensuring term of Managing Director for Original Petitioner No.1 from 1.1.2013 till 31.12.2017 (Page 356) and providing for compensation in the form of salary, bonus etc (Page 365). Then suddenly on 7.6.2016 there is a "Separation Agreement" (Page 500) with resignation in format as prescribed in the separate agreement with element of force and allurement mixed (See Clause 2-Page 504) followed by a Circulation circular dated 14.6.2016 (Page 551) and the term of original petitioner No.1 as MD and Director getting cut on 15.6.2016.

14. Before this on 15.2.2016, Respondent No.2 had sent Put and Call Option Notice (Page 401) to the petitioners to sell their shares on sale consideration rather than at the Agreed Price. Giving this up, later on 9th May, 2016 Respondent No.2 sent another notice (Page 405) to the petitioners invoking Put and Call Option calling upon them to sell at agreed price to be decided by mutually acceptable Chartered Accountant. Once the relation of Original Petitioner No.1 got cut with Separation Agreement dated 7.6.2016, Respondent No.2 issued Notice under Section 236 on 7.4.2017 (Page 422) which was followed by Respondent No.1 giving notice on 10.4.2017 asking original petitioners to deliver their shares within 21 days. As per record the original petitioners disputed these notices vide their reply dated 6.5.2017 (Page 438-443) and even a notice through Advocate was sent on 9.6.2017 (Page 448). Respondent No.1, however, cancelled shares by communication dated 20.7.2017 (Page 462).

15. Keeping the above set of facts in view which show the petitioner is a founder promoter of the company, Cape Electric India Pvt. Ltd.(CEIPL) letting Respondent No.2 join the same and changing the name of the company to "OBO Bettermann India Pvt Ltd" and further different documents, specially Share Subscription Agreement dated 20.10.2013 was executed which showed all the present parties agreeing that Respondent No.2 would become 99% shareholder of the company. The documents show that if the petitioners shares are to be bought there would be a formula to compensate them. Question is whether the present set of facts can be said to be covered by Section 236 of the Act so as to throw

out the appellant-petitioners without following up on the agreement and resorting to the law as appearing in Section 236.

Arguments

16. Counsel for both sides have extensively argued with regard to Section 236 of the Act. Learned counsel for the appellants-petitioners submitted that Section 236 is part of Chapter XV of the Companies Act, 2013 the heading of which is "Compromises, Arrangements and Amalgamations". According to the counsel Sections 230 to 240 of this Chapter are all dealing with amalgamations, arrangements or compromises and Section 236 needs to be read in this context. It has been argued that Section 236 could not be applied to the facts of the present matter where there was neither a compromise nor an arrangement or amalgamation as contemplated in Chapter XV. It is argued that this is a new Section which has been notified and it in the nature of squeezing out the minority shareholders by forcibly taking over their shares which type of provisions can be seen in the English Law but were not applied under the Companies Act, 1956. Earlier Section 395-A Companies Amendment Bill, 2003 was framed but the same was never enforced. The argument is that against the fundamental right to have and hold property and not to be forcibly deprived of the same, the present Section has element of forcibly taking away the shares and thus this provisions has to be strictly construed and applied. The counsel submitted that the provision did not apply to the present company which is a private limited company and where there was no such contingency of merger, compromise or amalgamation and thus the respondents could not have

relied upon such section to deprive the appellants of their shares. It is also argued that even if Section 236 was to be applied, its requirement was that price of shares should be determined on the basis of valuation by registered valuer and that too in accordance with the rules. It is argued that at the concerned time registered valuers were yet to be appointed by the Central Government and such rules for valuation were not yet made and the respondents could not have enforced Section 236.

17. Against this the learned counsel for the Respondents argued that when the appellants did not respond to put and call option notices, the Respondent No.2 had to resort to Section 236 as it holds more than 99% shares and Section 236 squarely applied and according to them all procedures as prescribed under Section 236 were complied. It is argued that NCLT rightly held that the Respondent No.1 sent demand drafts to the original petitioners as consideration for transfer of equity shares determined in accordance with the provisions of Section 236 of the Act read with Compromises, Arrangements and Amalgamations Rule, 2016 and that the shares were transferred in accordance with these provisions. Argument is that under section 236(1) "*any person or group of persons becoming ninety percent majority or holding ninety percent, of the issued equity share capital of a company, by virtue of any reason*" are entitled to buy out the shares of minority under this Section. Respondents want to submit that any person or group of persons is not defined and thus the Respondent No.2 had the right to invoke Section 236. Section 236 cannot be said to be restricted to only listed companies and it is not necessary

that only in cases of compromises, arrangements and amalgamations this Section can be invoked but it can be invoked "for any other reason also". The price of the shares were determined on the basis of report prepared from a Chartered Accountant. The intention of such legislation was to facilitate ease of business by making a provisions of compulsory acquisition by majority of the shares of the minority.

Section 236 of the Act-Applicability or otherwise

18. Before discussing Section 236, it would be appropriate to reproduce the Section 236:-

> ***236. Purchase of minority shareholding***
> *(1) In the event of an acquirer, or a person acting in concert with such acquirer, becoming registered holder of ninety per cent. or more of the issued equity share capital of a company, or in the event of any person or group of persons becoming ninety per cent majority or holding ninety per cent. of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares.*
> *(2) The acquirer, person or group of persons under sub-section (1) shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a price determined on the basis of valuation by a registered valuer in accordance with such rules as may be prescribed.*
> *(3) Without prejudice to the provisions of sub-sections (1) and (2), the minority shareholders of the company may offer to the majority shareholders to purchase the minority equity shareholding of the company at the price determined in accordance with such rules as may be prescribed under sub-section (2).*
> *(4) The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them under sub-section (2) or sub-section (3), as the case may be, in a separate bank account to be operated by the company whose shares are being transferred for at least one year for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within sixty days:*

Provided that such disbursement shall continue to be made to the entitled shareholders for a period of one year, who for any reason had not been made disbursement within the said period of sixty days or if the disbursement have been made within the aforesaid period of sixty days, fail to receive or claim payment arising out of such disbursement.

(5) In the event of a purchase under this section, the company whose shares are being transferred shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be.

(6) In the absence of a physical delivery of shares by the shareholders within the time specified by the company, the share certificates shall be deemed to be cancelled, and the company whose shares are being transferred shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law and make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by despatch of such payment.

(7) In the event of a majority shareholder or shareholders requiring a full purchase and making payment of price by deposit with the company for any shareholder or shareholders who have died or ceased to exist, or whose heirs, successors, administrators or assignees have not been brought on record by transmission, the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of three years from the date of majority acquisition or majority shareholding.

(8) Where the shares of minority shareholders have been acquired in pursuance of this section and as on or prior to the date of transfer following such acquisition, the shareholders holding seventy-five per cent. or more minority equity shareholding negotiate or reach an understanding on a higher price for any transfer, proposed or agreed upon, of the shares held by them without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation, understanding or agreement, the majority shareholders shall share the additional compensation so received by them with such minority shareholders on a pro rata basis.

Explanation.—For the purposes of this section, the expressions "acquirer" and "person acting in concert" shall have the meanings respectively assigned to them in clause (b) and clause (e) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

(9) When a shareholder or the majority equity shareholder fails to acquire full purchase of the shares of the minority equity shareholders, then, the

provisions of this section shall continue to apply to the residual minority equity shareholders, even though,—

(a) the shares of the company of the residual minority equity shareholder had been delisted; and

(b) the period of one year or the period specified in the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992(15 of 1992), had elapsed.

19. Before analysing Section 236 we refer to the arguments in this context raised by the Learned Counsel for Respondents. Learned Counsel referred to judgement in the matter of ***Commissioner of Income Tax, Bombay Versus Ahmedbhai Umarbhai & Co, Bombay*** *reported in 1950 SCR 335***.** The counsel referred to para 15 of the judgement to argue that marginal notes in an Indian statute, as in an Act of Parliament, cannot be referred to for the purpose of construing the statute. This judgement was arising with reference to interpretation of certain portion of Section 42 of the Income Tax Act. Hon'ble Supreme Court referred to what was pointed out by the Privy Council in "***Balraj Kunwar Vs Jagat Pal Singh"*** *LR 26 All 393 at 406.* Reliance is also placed on judgement in the matter of ***M/s Frick India Ltd Vs Union of India & Others*** reported in (1990) 1 SCC 400 and learned counsel referred to para 8 of the judgement to submit that it has been held that headings prefixed to sections or entries cannot control the plain words of the provisions and that they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous, nor can they be used for cutting down the plain meaning of the words in the provisions. Hon'ble Supreme Court held that only in case of ambiguity or doubt the leading or sub-leading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down

the wide application of the clear words used in the provision. We keep in view the principles as appearing from these judgements and proceed to analyse the section.

20. To analysis sub-section (1) of Section 236, it can be seen that the sub-section (1) deals with two events. The first event is of an "acquirer, or a person acting in concert with such acquirer becoming registered holder of ninety per cent or more of the issued equity share capital of the company. This is the first event. The second event is -

> "*of any person or group of persons becoming ninety percent majority or holding ninety percent, of the issued equity share capital of a company-*
>
> *by virtue of –*
>
> *-an amalgamation*
>
> *-share exchange,*
>
> *-conversion of securities; or*
>
> *-for any other reason"*
>
> *Then such acquirer, (which refers to the first event) or the person or group of persons (which refers to second event) as the case may be shall notify the company of the intention to buy the remaining equity shares*

21. The meaning of expression "acquirer" or "a person acting in concert" with such acquirer as referred in sub-section (1) has been explained by Explanation after sub-section (8) to mean as stated in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers)

Regulations, 1997. Under Securities & Exchange Board of India Act, 1992, the SEBI has various powers and functions under Section 11 (2)(h). One of its functions is to regulate substantial acquisition of shares and take overs of companies. For this purpose the Regulations of 1997 as referred in explanation of Section 236 dealt with acquisition of shares and take overs. The said regulations have now been repealed and the operating provisions are Securities & Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. The word "acquirer" and "person acting in concert" are dealt with under these Regulations and have specified meaning in the context of listed companies.

22. Thus the first event with regarding sub-section (1) of Section 236 is in the context of the "acquirer" and the "persons acting in concert" as defined in provisions of SEBI Act with which we are not concerned in the present matter.

23. As such, we come to the second event as noticed in sub-section (1) of Section 236 which should be read for companies other than listed companies. Although it has been argued by the respondent that the words "for any other reasons" should not be circumscribed by the preceding words of amalgamation, share exchange, conversion of securities, we find it difficult to accept these submissions. If the intention of the legislature was to give a free hand to person or persons who anyhow become 90% shareholders, it was not necessary to use the sentence "by virtue of amalgamation, share exchange, conversion of securities or for any other reasons". The words "for any other reasons" have to be read *ejusdem generis* with the preceding word and must take the same or similar colour. If this was not so the provision could have been simply that in the event of any person or group of persons becoming

90% majority or holding 90% of the issued equity share capital of a company such persons or group of persons shall notify the company of the intention to buy the remaining equity shares.

24. Words “for any other reasons” are ambiguous. If what Respondents are submitting is accepted to say that “any other reasons” is uncontrolled by the context, becoming 90% by even resorting to criminal acts will also have to be accepted. These words require us to read the section as a whole and require us to read the section with other sections of the Chapter XV which deals with “Compromises, Arrangements and Amalgamation”. Section 230 deals with power to compromise or making arrangements with creditors and members. Whenever such compromise or arrangement as mentioned in the Section is proposed the Tribunal has a role to regulate the proceedings and under sub-section (7) of Section 230, the Tribunal can provide for all or any of the matters, like-where compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable, etc. There are other matters also in this sub-section (7) of Section 230 for which the Tribunal can make provision. Section 231 gives power to Tribunal to enforce the compromise or arrangement which are ordered under Section 230. Section 232 deals with merger and amalgamation of the companies, where application is made to the Tribunal under Section 230 for sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section. Scheme of merger and amalgamation of companies is dealt with. Notwithstanding provisions of Section 230 and 232, under

Section 233 there could be a scheme of merger or amalgamation entered into between two or more small companies or between a holding company or its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed. Section 234 deals with merger or amalgamation of companies with foreign companies. This section provides that a foreign company, may "with the prior approval of the Reserve Bank of India" merge into a Company registered under this Act. The Section makes provisions to protect the shareholders (To recall-we have here Respondent No.2, a foreign company which having taken over more than 99% shareholding in Respondent No.1-an Indian company is now throwing out the Indian shareholders which in effect must be held to amount to back door merger or amalgamation by foreign company without approval of RBI as Respondent No.1 would then have no separate identity as respondent No.2 would be 100% shareholder of Respondent No.1). In this background Section 235 provides for power to acquire shares of shareholders dissenting from scheme or contract approved by majority. This is followed up by the present Section 236 dealing with purchase of minority shareholding. Thus there can be compromise or arrangement or mergers or amalgamation with certain percentage of persons-members dissenting, or, all could be assenting. The dissenting are dealt with under Section 235. Section 236 deals with the residuary in the event of all assenting shareholders and amalgamation or share exchange or conversion of securities taking place need may arise to those who have become 90% majority or are holding 90% to acquire the remaining minority shareholding. The present set of facts of this matter as discussed earlier do not fall in any of such or similar contingency so as to be

covered by the words “for any other reason”. The documents show gradual change of shareholding under agreements with liabilities of the parties including Respondent No.1 company. Thus in our view Section 236 was not available to the Respondents.

25. Respondent No.2 had become 99% shareholder in view of MOU dated 1.8.2013 and consequent Shares Subscription Agreement and Put and Call Option Agreement as were executed on 20.10.2013 between both the petitioners and both the respondents. The parties had entered into arrangements as per these agreements and that included the procedure for original petitioners to part in the manner in which it was prescribed in Put and Call Option Agreement. This Agreement (Page 331 and 332) shows that a formula was made as to how the petitioners will be compensated for parting. The option window was to be exercised between 1st January and 28th February for Respondent No.2. However, (Respondent No.2 although had earlier issued Notice dated 15.2.2016 (Page 401) did not want to rely on the agreed price. Then, that notice was given up. Respondent No.2 again sent notice on 9.5.2016 (Page 405) and when the original petitioners did not agree it resorted to Section 236 of the Act.

26. Sub-Section (1) of Section 236 for its applicability would require occurring of “the event” of any person or group of persons becoming 90% of majority or holding 90% of the issued share capital of a company. That event too must be, by virtue of amalgamation, share exchange, conversion of securities or for any other reasons. No such “event” has taken place in the set of facts which we have. Here there is a gradual entry of Respondent No.2 in Respondent No.1 and there are a set of agreements to which even the

Respondent No.1 is a party and which were to be honoured and in the event of dispute the affected had the option to move arbitration. There could not be a one sided takeover by Respondent No.2 who had by way of agreements got 99% shares in Respondent No.1 and thus was akin to Respondent No.1. Thus Section 236 of the Act was inapplicable to the facts of the matter.

Invoking of Section 236

27. Further, even if it was to be said and held that Section 236 of the Act is applicable, question is if it was duly and legally invoked. After having considered the inapplicability of Section 236 even if in the alternative, if we proceed to look into the invoking the same also, we find fault with the steps taken by the Respondents. Sub-section (2) of Section 236 which we have reproduced above clearly provides that the offer to the minority shareholders of the company for buying the equity shares held by shareholders has to be at a price determined on the basis of valuation, "by a registered valuer" "in accordance with such rules" as may be prescribed. The notice given by Respondent No.2 under Section 236 is dated 7.4.2017 (Page 422). Notice refers to the original petitioners not honouring call option notice. The notice then declares that the earning before income tax of the company is in the negative and thus claims that the agreed price calculated in accordance with the agreement is zero. Then notice claims that the Respondent No.2 has obtained valuation for the minority shareholders from "a reputed chartered accountant" who has confirmed that the fair value of the minority pursuant to Section 236(2) of the Act is INR 1.67 each. Thus a company in which huge investments are there the share of Rs.10/- is stated to be of value of Rs.1.67 ps. On such basis the notice went ahead to claim that the Respondent No.1

should step in and the shares of the petitioners should be transferred to the Respondent No.2. Admittedly the shares were not got valued from "registered valuer". It has been argued that till the concerned time Government was yet to appoint registered valuers and was yet to make rules regarding valuation and so valuation was obtained from the chartered accountant. In our view the provision of Section 236 has drastic nature of forcibly transferring the shares. When this is so the Section 236 has to be strictly construed and applied. In the present matter apart from the fact that Section 236 could not have been invoked in the set of facts, we find that even if it could have been resorted to, in the absence of valuation by registered valuer, shares could not have been deemed to be cancelled under sub-section (6) of Section 236. The appellants-original petitioners have raised various grievances with regard to such valuation done by the respondents and we find that the same could not have been ignored. We need not deal with those grievances in detail considering the fact that when registered valuer has not valued the shares, Section 236 could not have been enforced. Only because the Central Government, till the relevant time when Respondent No.2 sent notice had not appointed registered valuer or framed rules for basis of valuation, can be no reason to enforce Section 236 which has the potential to forcibly taking away the property of original petitioners, i.e. their shares.

28. Sub-Section (2) of Section 236 requires that there should be "valuation by a registered valuer in accordance with such rules as may be prescribed". If Section 236 of the Act has to survive, it has to be insisted upon that the valuation must necessarily be by registered valuer and that too in accordance with the rules prescribed. The Legislature appears to have been conscious

and careful while using these words because it has made a special Chapter relating to Registered Valuer. Chapter XVII has only one Section which is Section 247 which reads as under:-

"**247. Valuation by registered valuers-**

(1) Where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets (hereinafter referred to as the assets) or net worth of a company or its liabilities under the provision of this Act, it shall be valued by a person having such qualifications and experience, registered as a valuer and being a member of an organization recognized, in such manner, on such terms and conditions as may be prescribed and appointed by the audit committee or in its absence by the Board of Directors of that company.

(2) The valuer appointed under sub-section(1) shall,-

(a) make an impartial , true and fair valuation of any assets which may be required to be valued.

(b) exercise due diligence while performing the functions as valuer;

(c) make the valuation in accordance with such rules as may be prescribed; and

(d) not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during a period of three years prior to his appointment as valuer or three years after the valuation of assets was conducted by him.

(3) If a valuer contravenes the provisions of this section or the rules made thereunder, the valuer shall be punishable with fine which shall not

be less than twenty five thousand rupees but which may extend to one lakh rupees.

Provided that if the valuer has contravened such provisions with the intention to defraud the company or its members, he shall be punishable with imprisonment for a term which may extend to one year and with fine which shall not be less than one lakh rupees but which may extend to five lakhs rupees.

(4) Where a vlauer has been convicted under sub-section (3), he shall be liable to

(i) refund the remuneration received by him to the company; and

(ii) pay the damages to the company or to any other person for loss arising out of incorrect or misleading statements of particulars made in his report."

The above section shows that Legislature has taken precautions to ensure that there should be valuers who shall be impartial, exercise due diligence and make valuation in accordance with the rules as may be prescribed. There are also penal provisions if the valuer contravenes the provisions with intention to defraud the company or its members. Clearly there can be no comparison between such valuers and the said "reputed Chartered Accountant" being relied on by the respondents.

29. For the above reasons we are unable to uphold the findings of NCLT which has not at all either dealt with applicability of Section 236 or the manner in which respondents have tried to enforce the same and simply accepted whatever was claimed by the respondents in their application that

they have already taken over the shares of original petitioners and so the petitioners are not shareholders and so they cannot maintain the petition. Conversely we find that the petition was maintainable at the behest of original petitioners who were inter alia challenging the manner of take over of their shares and who constituted 2/3rd of the members of the company and were perfectly competent to maintain the company petition.

30. For such reasons we hold that the notices given by the respondents under Section 236 and their subsequent act of cancelling the shares of the original petitioners were illegal and stand set aside. Such acts of Respondent constituted oppression of minority shareholders-the petitioner.

Cursory Findings on other issues

31. It does not appear from the record that the respondents had filed any detailed response to the company petition or that Petitioners got opportunity to file rejoinder. It does not appear that the company petition as such was taken up and argued for final hearing. When the respondents moved application questioning maintainability, there may have been, as before us, reference to the other aspects of the matter but that would require proper pleadings, evidence and hearing. If the impugned order is perused which, considering the volume of the matter, is only a short order, there are findings recorded by NCLT which hardly have references to the record and are supported by little or no reasoning. We are making a brief reference to the same.

32 Till para 16 of the impugned order there is reference to cases put up us by the parties except in para 11 where while reproducing the contentions put up by the petitioners the Tribunal directly recorded finding that the applicant

has already acquired the shareholding of the minority shareholders, and thus the petitioners were not eligible to apply under Section 241 of the Act. In para 17 of the impugned order the Tribunal referred to the Shares Subscription Agreement, Call Option Agreement and mentioning that the same were signed by the petitioners and that petitioner No.1 was Managing Director till he ceased to be the MD on 15.6.2015 (The year recorded is also wrong. It should be -2016). The Tribunal recorded finding that the petitioners now want to declare the agreements null and void after receiving compensation for the remaining period of his tenure and this challenge was an afterthought and there is no legal basis. We have already referred above regarding the disputes raised by the petitioners with regard to Separation Agreement dated 7.6.2016 and their contentions in the company petition read with notice dated 9.6.2017 sent through Advocate. These were disputes raised and there cannot be jumping to findings only because documents were signed by the parties. The finding that the Petitioner No.1 received compensation for remaining period is vague. Rather the Respondent No.2 in Maintainability Application, para 18, raised dispute, claiming that Petitioner No.1 failed to comply the terms of Separation Agreement and so "no payments were made by the Company". Petitioners have in Company Petition raised dispute relying also on Section 202 of the Act has also been ignored.

33. Then there is finding in para 21 of the impugned order, that the contention of the petitioner that he was forced to sign documents and reduced to minority shareholding is unacceptable. This again is based only on the bare reason that "at this juncture" after signing the documents and drawing salary and allowances the contention was being raised. Again there is finding

even against the Respondents that their claim of issue of one share to M/s OBO Bettermann Produktions holding International-GMBH was supported only by Company Board Resolution of Respondent No.2 and that there was restriction to induction in the Articles of Association. Even Respondents do not appear to have been given opportunity on this count.

34. In our view looking to the stage at which the matter was argued and impugned order passed, there were and are disputes raised in the proceedings which require pleadings to be completed by parties, evidence and arguments to legally decide the same. While deciding maintainability, cursory recording of findings regarding other aspects of the matter without proper reasoning and support of evidence is inappropriate and the impugned order as a whole would require to be set aside and the matter deserves to be remitted back to the Learned NCLT to decide the other issues raised in the matter. As we are not deciding other issues raised in the matter, we are not burdening this judgement with rulings referred to by Respondents to claim that Appellants are trying to enforce contractual rights. NCLT needs to decide the other issues in the matter.

FINAL ORDER

35. For the above reasons, we set aside the impugned order. We hold that Appellants could maintain the Company Petition under Section 241, 242 of the Act. We further hold that in the facts of the matter, respondents could not have invoked Section 236 of the Companies Act, 2013 as it did not apply, and we hold that even if the section could be invoked, the notices issued by the respondents under Section 236 of the Act and the communication cancelling the shares of the original petitioners, are illegal and set aside the

same. Such acts amounted to oppression of the Appellants/Petitioners. Consequently, the shareholding of the original petitioners shall stand restored and Register of Members of Respondent No.1 will be corrected, and benefits will be granted to Appellants ignoring these acts under Section 236of the respondents.

36. a) We defer recording finding under Section 242(1)(b) of the Act, as there are issues yet to be decided by NCLT, for which we are remitting back the matter. After deciding the other issues NCLT is requested to pass further order under Section 242(1)(b) and other consequential orders under the Act.

b) We remit back the matter to Learned NCLT, Chennai for decision of other issues arising in the Company Petition by giving due and proper opportunity to both sides for completing pleadings and evidence and give hearing to the parties Learned NCLT will then decide the other issues raised (other than what we have decided finally, as concluded in above para 35, regarding maintainability and Section 236 of the Companies Act, 2013). No orders as to costs.

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

(Mr. Balvinder Singh)
Member (Technical)

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