

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeal (AT) No.57 of 2018

[Arising out of Order dated 19.12.2017 passed by National Company Law Tribunal, Principal Bench, New Delhi in C.P. No.24(ND)/397-398/241-242/NCLT N.D. of 2016]

AND

Company Appeal (AT) No.370 of 2017

[Arising out of Order dated 04.09.2017 passed by National Company Law Tribunal, Principal Bench, New Delhi in C.P. No .24(ND)/397-398/241-242/NCLT/N.D. of 2016]

IN THE MATTER OF:

VLS Finance Limited
2nd Floor, 13 Sant Nagar,
East of Kailash, New Delhi – 110065

...Appellant

Versus

1. Southend Infrastructure Private Ltd.
B-14, Chirag Enclave,
New Delhi – 110 048
2. Dinesh Kumar Gupta
House No.56, Navjeevan Vihar,
Malviya Nagar, New Delhi – 110 017
3. Madhu Gupta
House No.56, Navjeevan Vihar,
Malviya Nagar, New Delhi – 110 017
4. Anuj Kumar Agarwal
D-11/143, Sector – 8, Pocket 11,
Rohini, Delhi 110 085

5. Priyanka Gupta
A-2, Chirag Enclave,
New Delhi 110 048
6. Kamal Chand Jain
A-22, Chief Commissioner Colony,
Rana Pratap Bagh,
Delhi – 110 007
7. Chhaya Jain
F-56, Preet Vihar,
Delhi 110 092
8. Reetu Jain
F-56, Preet Vihar,
Delhi 110 092
9. Subhash Chand Jain
A-22, Chief Commissioner Colony,
Rana Pratap Bagh,
Delhi – 110 007
10. Anita Jain
A-22, Chief Commissioner Colony,
Rana Pratap Bagh,
Delhi – 110 007
11. Rajesh Jain
A-22, Chief Commissioner Colony,
Rana Pratap Bagh,
Delhi – 110 007
12. Churasia Holdings Pvt. Ltd.
6/3, East Patel Nagar,
Delhi 110 008
13. Ms. Sunaini Gupta
W/o Mr. Sushant Mohan Gupta
House No.1, Underhill Lane
Civil Lines, New Delhi 100 054

14. Ms. Renu Munjal
W/o Mr. Raman Kant Munjal
B-109, Greater Kailash Part – I,
New Delhi 110 048
15. Smt. S. Jasbir Singh Riar
W/o Shri Sampuran Singh Riara
Sardar Farm House, Village Bajekhan,
Sirsa, Haryana
16. BMS IT Institute Pvt. Ltd.
56, Navjeevan Vihar
New Delhi 110017
17. Neelamber Associates Pvt. Ltd.
B-2/97, Mohan Co-operative Industrial Estate
New Delhi – 110 044
18. NPMG Developers Limited
B-14, 111rd Floor
Chiraag Enclave
New Delhi 110048
19. Parkland Hospitality Limited
E-19, Defence Colony
New Delhi 110 024
20. Parkland Meadows & Hospitality Limited
E-19, Defence Colony
New Delhi 110 024
21. Cadillac Infotech Pvt. Ltd.
E-4 Defence Colony
New Delhi 110 024

...Respondent Nos.1 to 21
(Original Respondent Nos.1 to 21)
22. Vikrant Puri
S-60, Panchsheel Park,
New Delhi – 110 017

...Respondent No.22
(Original Petitioner)

(Cause title same in CA 370/2017 as in CA 57/2018)

Company Appeal (AT) No.57 of 2018

Present: Shri Vinay Kumar Garg, Sr. Advocate with Shri Harish Pandey, Shri Ashok Kumar Sharma, Shri Harsh Allagh and Ms. Noopur Dubey, Advocates for the Appellant

Shri Amit S. Chadda, Sr. Advocate with Shri A.T. Patra, Shri Gautam Khaitan and Ms. Srishti Govil, Advocates for Respondent No.22

Shri Ashish Aggarwal and Shri Gurcharan Singh, Advocate for Respondent Nos.6 to 11

Shri Kaustubh Sinha, Advocate for Respondent No.12

Ms. Lucky Palta and Shri Pulkit Deora, Advocate for Respondent Nos.13, 14 & 21

Company Appeal (AT) No.370 of 2017

Present: Shri Brijender Chahar, Sr. Advocate with Shri Harish Pandey, Shri Ashok Kumar Sharma and Shri Harsh Allagh, Advocates for the Appellant

Shri Amit S. Chadha, Sr. Advocate with Shri A.T. Patra, Shri Gautam Khaitan and Ms. Srishti Govil, Advocates for Respondent No.22

Shri Ashish Aggarwal and Shri Gurcharan Singh, Advocate for Respondent Nos.6 to 11

Shri Kaustubh Sinha and Shri Umesh Choubey, Advocates for Respondent No.12

Ms. Lucky Palta and Shri Pulkit Deora, Advocates for Respondent Nos.13, 14 & 21

J U D G E M E N T

A.I.S. Cheema, J. :

1. Respondent No.22 – Original Petitioner (hereinafter referred as “Petitioner”) filed CP 24/2016 against Respondents 1 to 12. Later on, taking orders dated 25.01.2017 from National Company Law Tribunal (in

short, 'NCLT'), Respondents 13 to 21 were added as creditors in NCLT, New Delhi. Company Petition had come up before the Principal Bench. The Petition was filed under Sections 397 and 398 of the companies Act, 1956 ('old Act', in brief). The Appellant filed CA 211/2016 in the Company Petition for impleadment. However, the NCLT vide Orders dated 04.09.2017 did not allow the impleadment holding the Appellant as neither necessary nor proper party but allowed the Appellant only to intervene. The Appellant being aggrieved by such Order, impugned the same by filing Company Appeal 370/2017. In CA 370/2017, Notice was issued on 07.11.2017 and it was directed that in the meantime, any Order passed by the Tribunal shall be subject to decision of the said Appeal 370 of 2017.

1.1 During the pendency of CA 370/2017 in this Appellate Tribunal, the original Petitioner filed application – CA 459/2017 in the Company Petition in NCLT seeking permission to withdraw the Company Petition. The same came up before the NCLT on 19.12.2017 and the learned NCLT dismissed the Company Petition as withdrawn in view of the statement that the counsel had instructions to withdraw the Petition, as the matter was stated to have been amicably settled and it was stated that all interim orders would stand vacated and the affairs of the Company shall be transacted in accordance with law. This Order dated 19.12.2017 is impugned by the Appellant in CA 57 of 2018.

2. We have heard counsel for both sides in both these Appeals. The main arguments have been submitted in Company Appeal 57/2018

concentrating on whether the NCLT could have permitted the withdrawal of the Company Petition. If the withdrawal is upheld, CA 370/2017 would become infructuous and thus the parties have concentrated their arguments in CA 57/2018. We will be referring to pleadings and documents mainly from the file of Company Appeal 57/2018 except where we specifically mention to anything from the record of CA 370/2017.

3. The Appellant – VLS Finance Limited is admittedly not a member or shareholder of Respondent No.1 Company. The Appellant, however, claims that it was approached by Respondent No.2 – Dinesh Kumar Gupta on behalf of BMS IT Institute (Respondent No.16) as well as other Respondents 3 to 10 as arrayed in OMP 383/2012 (which has been filed by the Appellant in the Hon'ble High Court of Delhi at New Delhi.)

Parties common in present Appeal with those in OMP 383/2012 are:-

| | <u>In CA 57/2018</u> | <u>In OMP 383 in High Court</u> |
|--------------------------------------|-----------------------------|--|
| 1) VLS Finance Ltd. | Appellant | Petitioner |
| 2) BMS IT Institute Pvt. Ltd. | Respondent No.16 | Respondent No.1 |
| 3) Dinesh Gupta | Respondent No.2 | Respondent No.2 |
| 4) Ms. Madhu Gupta | Respondent No.3 | Respondent No.3 |
| 5) Subhash Chand | Respondent No.9 | Respondent No.8 (as for HUF) |
| 6) NPMG Developers Ltd. | Respondent No.18 | Respondent No.11 |
| 7) Southend Infrastructure Pvt. Ltd. | Respondent No.1 | Respondent No.12 |

3.1 According to the Appellant, Respondent No.2 with the other Respondents as arrayed in OMP are promoters of Respondent No.16 - BMS IT who sought investment in BMS to co-develop a plot of land measuring 34275 sq. meters situated at Sector – 62, NOIDA. BMS was developing IT enabled services on the land which was leased and on 12.07.2007, an agreement for contribution towards equity was signed between the Appellant and BMS as well as Respondent No.2 and other Respondents as arrayed in the OMP. It was later on supplemented by supplementary agreement dated 24th September, 2007. There were disputes and due to Arbitration Clause, the matter was referred to Arbitration. Prior to commencement of arbitration proceedings, in OMP 383/2012 certain orders were passed.

3.2 To understand the grievance of the Appellant, a brief reference needs to be made to the said litigation.

The Litigation initiated by Appellant in Delhi High Court

4. The Appellant claims that it had filed OMP 383/2012 in which vide Orders dated 27.04.2012 present Respondent No.1 – Southend Infrastructure was restrained from dealing with its immovable properties. The Order dated 27.04.2012 of the Hon'ble High Court (Annexure A2 – Page 76) reads as under:-

“1. Issue notice to the Respondents, returnable on 4th September 2012.

2. Till the next date of hearing, Respondents 2 to 12 are restrained from alienating, selling, transferring, mortgaging, encumbering, disposing of or in any manner dealing with their immovable properties. The Respondents will, within four weeks of the service of notice, file affidavits indicating the list of their moveable and immovable properties including bank balances.”

Appellant argues that the list of movables which would include shares, was sought so that further restraint Orders could be passed; but that, the lists were not filed.

4.1 According to the Appellant, Respondent No.1 Company was Respondent No.12 in that Petition and was thus restrained. Later on, further Orders were passed on 04.09.2012 as under:-

- “1. It is stated that the learned Arbitrator has already entered upon reference and the arbitral proceedings before him are in progress.
2. In the circumstances, it is directed that the interim order passed by this Court on 27th April, 2012 is continued till such time the learned Arbitrator passes an order on an application filed by either party under Section 17 of the Arbitration and Conciliation Act, 1996 (Act) for appropriate interim relief including the variation/modification of the interim order dated 27th April 2012 passed by this Court. Such of the Respondents herein who are parties to the arbitral proceedings will in terms of the order passed by this Court on 27th April 2012 file their respective affidavits before the learned Arbitrator within two weeks from today.
3. The petition is disposed of in the above terms. Order be given dasti to learned counsel for the parties.”

4.2 According to the Appellant, in spite of the Orders of the High court, Affidavits of assets were not filed within two weeks as directed. The Appellants claims that the Respondents did not file Affidavits of movable assets which would include shareholding in Southend and Affidavit of other immovable assets.

4.3 It is claimed that in January/February 2013, Respondent No.1 – Southend Infrastructure Pvt. Ltd. (hereafter referred as ‘Southend’) and Wonder Space Properties Pvt. Ltd. (‘Wonder Space’, in short), in collusion with each other entered into arrangement/agreement with reference to the immovable property of Southend, in the teeth of above Orders of the High Court. The Appellant claims that on 10.06.2013 contemptuous, fraudulent and anti-dated conveyance deed dated 10.06.2013 was executed between Southend through Respondent No.2 – D.K. Gupta and Wonder Space, in the teeth of the Orders dated 27.04.2012 and 04.09.2012 of the High Court, giving Wonder Space Development rights in the only property of Southend, namely B-319, Okhla Industrial Area, Phase – I, New Delhi.

4.3 According to the Appellant, Respondent No. 22 (Original Petitioner of CP) who had only 5,000 equity shares (approximately 0.67% in Southend) fraudulently got transferred substantial shares of Southend from DK Gupta (Respondent No.2) in violation of restraint Orders of the High Court. It is claimed that the shares were fraudulently acquired in September, 2013 onwards although Respondent No.2 - DK Gupta was under restraint Orders of the High Court. Appellant claims that the

Appellant came to know of the contemptuous conveyance deed dated 10.06.2013, in December, 2013 and filed Contempt Petition (Cont. Cas (C) No. 970/2013) against Southend as well as Wonder Space regarding violation of the High Court Orders. The High Court referred to the earlier Orders dated 27.04.2012 and 04.09.2012 in its Order dated 09.01.2014 (Annexure A-5 Page - 110). It then referred to the submissions and issued Notice as under:-

“It is further contended at the bar that whilst the aforesaid interim orders then passed in a matter, in which both Sh. D.K. Gupta, as well as Southend Infrastructure Pvt. Ltd. have been arrayed as respondent No.2 and respondent no.12 respectively, even the Directors of respondent No.12, who have passed the Resolution in question in their meeting dated 6th June, 2013, are guilty of violation of the aforesaid interim orders, since it is inconceivable that the Company did not have notice, either actual or constructive, of the aforesaid orders prohibiting the respondents from dealing with the aforesaid properties.

Prima facie, there appears to be no defence to the allegation at least in respect of Southend Infrastructure Pvt. Ltd. who is arrayed as respondent No.1 in the contempt petition. In the first instance, let notice to show cause issue to the first respondent, Southend Infrastructure Pvt. Ltd, through its Director, Sh. Dinesh Kumar Gupta, returnable on 5th May, 2014.”

In the same Order with reference to CM 20181/2013 which was filed for stay, the following Order was passed:-

“CM No.20181/2013

Issue notice to the respondents, returnable on 5th May, 2013.

In the meantime, the second respondent, Wonder Space Properties Pvt. Ltd. in favour of whom the development rights, as described in the Conveyance Deed dated 10th June, 2013, executed between the respondents in respect of the property in question, i.e., B-319, Okhla Industrial Area, Phase I, New Delhi, have been granted, shall maintain status quo.”

Appellant claims that the Contempt Petition is still pending adjudication in the High Court wherein the prayer, inter alia, includes setting aside/cancellation of the contemptuous, collusive and fraudulent conveyance deed dated 10.06.2013.

4.4 According to the Appellant, the Respondent Company – Southend filed IA 10835/2014 for clarification (Page 119) claiming that Order dated 04.09.2012 may be clarified/modified to hold that the Order is not being continued against the Southend as this Respondent Company – Southend was not party to the arbitration proceedings, which according to Appellant shows that Southend was aware that when it moved the said IA in 2014, it was knowing that the Order dated 27.04.2012 was operating against it. The Appellant claims that the said IA 10835/2014 was dismissed on 01.09.2014 (Annexure A-8 Page – 131) as Southend, which was Respondent in that matter, had reneged on its commitments.

4.5 The Appellant has then referred to Petition under Section 9 of the Arbitration and Conciliation Act, 1996 (‘Arbitration Act’, in short) having Original Miscellaneous Petition No.1197/2014 which was filed by the Appellant as pre-award Petition against present Respondent No.16 and

present Respondents 1, 2, 3 18 and Respondent No.9 for HUF. The Appellant claims that in the said Petition, Hon'ble High Court on 30th September, 2014 passed following Order:-

“O.M.P. 1197/2014

Issue notice to the respondents via ordinary post and approved courier.

Mr. Arora accepts notice on behalf of respondent nos.1, 2, 3 and 12.

On steps being taken, notice shall issue to the remaining respondents.

Reply, if any, be filed within four weeks of service being effected.

Rejoinder thereto, if any, be filed before the next date of hearing.

In the meanwhile, respondent nos.2 to 10 shall not deal with shares in respondent nos.1, 11 and 12. The said respondents will file the particulars of their shareholding held in respondent nos.1, 11 and 12. The particulars, inter alia, will include the number of shares held, share certificate numbers as well as the face value of the shares. The sad details will be filed by way of an affidavit.

In respect of shares of respondent nos.2 to 10, no transfer will be registered by respondent nos.1, 11 and 12 till the next date of hearing.”

Thus it is claimed that present Respondents 1, 16 and 18's shares cannot be dealt with.

4.6 The Appellant claims that Respondent No.2 – Dinesh Kumar Gupta, Respondent No.3 – Madhu Gupta, Respondent No.9 – Subhash Chand for HUF were restrained from dealing with their shares in

Respondent Company – Southend as well as in NPMG Developers Limited (Respondent No.18) and BMS IT (Respondent No.16). This Order dated 30th September, 2014 was confirmed by the Hon’ble High Court vide Order dated 15th January, 2015 (Annexure A-10 Page – 136). Appellant claims that by such Orders Respondent No.1 is restrained from giving effect to transfer of shares held by Respondents (Gupta and Jain groups).

4.7 According to the Appellant, the Award in the dispute came to be passed on 2nd March, 2015 and then Appellant filed OMP 114/2015 in the High Court. The Hon’ble High Court passed Orders on 5th May, 2015 (Annexure A-11 Page – 146). According to Appellant, this Order shows that Respondents were directed not to alienate their assets as disclosed by them in their Affidavits dated 27.03.2015. It is claimed that Respondent No.1 - Southend was directed not to give effect to transfer of its shares held by Respondents. Southend was R12 in the OMP.

4.8 The Appeal claims that the Hon’ble Supreme Court of India in SLP CC 8178 – 80 of 2017 converted into SLP (Civil) 13548-50 of 2017 and later Civil Appeal 11111 – 11113 of 2017 while granting leave granted interim relief as under:-

“Delay condoned.

Issue notice.

The interim relief sought for reads as under:-

“(a) till such time the interest bearing fixed deposit and/or unconditional bank guarantee to

satisfaction of the Petitioner is furnished, Restrain Respondent No.12 from creating any kind of third party rights or encumbrances or dealing in any manner whatsoever with its share (i.e. 47.5% of constructed area in terms of the Conveyance Deed dated 10.6.2013 with Wonder Space Properties Pvt. Ltd., B-319, Okhla Industrial Area Phase – I, New Delhi – 110020 and appoint a Court Receiver for the said share of Southend under the Conveyance Deed dated 10.06.2013 pending the execution of the award dated 2.3.2015.”

Interim relief, as above, is granted until further orders.”

Appellant claims it does not have sufficient security to secure its dues under the Award and therefore the Appeal is pending.

4.9 The Appellant claims that present Respondent No.1 – Southend is the Respondent No.12 in the Supreme Court and Southend has been restrained from creating any kind of third party rights and encumbrance or deal in any manner whatsoever with its share i.e. 47.5% of constructed area in terms of the conveyance deed dated 10.06.2013 with Wonder Space Properties, with regard to B-319, Okhla Industrial Area.

4.10 The above litigation is a matter of record. The directions and Orders bind the parties concerned. Any violation will attract action. The above shows various directions and Orders already in favour of Appellant and the Hon'ble High Court and Supreme Court are considering the reliefs claimed by Appellant to safeguard its interest.

5. According to the Appellant when such litigation was going on, in 2016, Respondent No.22 - Vikrant Puri stepped forward and filed the Company Petition CP 24/2016 which is collusive and fraudulent on the basis of illegal and fraudulently acquired shareholding in Southend. The object of the Petition is to overreach the Orders of the Hon'ble High Court which had been passed on 27.04.2012, 04.09.2012 and 01.09.2014. Respondent No.22 suppressed facts about litigation as mentioned above. The Petition was filed making false allegations regarding removal of Directors but the Petition was being kept alive taking consent Orders from NCLT so as to overreach the Orders of the Hon'ble High Court and now Hon'ble Supreme Court. The Appellant filed Impleadment Application (Annexure A-13). In Annexure A-13, Appellant referred to the litigation as above and claimed that the Respondents had violated the Injunction Orders of High Court dated 27.04.2012 and 04.09.2012 and proceeded to create third party interest of Wonder Space in the only asset of the Company and had thus committed contempt. The Appellant claimed in the Impleadment Application that Respondent Nos.2 to 10 of the Company Petition had 98% shareholding in the Respondent Company in 2011 which had thereafter been reduced to 58% in 2015. It is mentioned as under:

“It is submitted that the Applicant was shocked to learn that the Petitioner herein was claiming to be having controlling stake in the management of the Respondent No.1, filed the present company petition. It is the bonafide belief and understanding of the Applicant that in the event that the

shareholding of the Respondent Nos.2 to 10 in the Respondent No.1 herein is dealt with in any manner in the course of present petition, the Applicant would be irreparably prejudiced more so in face of specific orders and directions of the Hon'ble High Court. The Applicant, therefore, has a legitimate interest in the present petition and its vitally, directly and legally affected by the orders passed therein. The present Petition has been filed by concealing & suppressing vital facts and previous orders of the Hon'ble High Court.

6. In the aforesaid circumstances, the Applicant is filing the present application seeking its impleadment. In the event that the Applicant is not impleaded, there is every likelihood of the Petitioners and Respondents concealing the material facts or seeking indulgence of this Hon'ble Board in the face of various orders passed by the Hon'ble High Court of Delhi. The Respondent No.1 company (of which the Petitioner allegedly claims to be having controlling stake) was always a party/Respondent in the proceedings before the Hon'ble Court and was always represented by its Counsels.”

5.1 For above reasons, the Appellant claimed impleadment in the Company Petition. The learned NCLT, however, after hearing the parties passed Order dated 04.09.2017, the operative part of which reads as under:-

“Having heard the learned Counsel for the parties at some length, we are of the view that the presence of the

applicant in the proceeding may be required but they are neither necessary party or nor a proper party. The petition filed by one group against the other is for mismanagement and oppression. The applicant has neither levelled any allegation of mismanagement or oppression nor it could have and therefore, the applicant is allowed to intervene only. Accordingly, we allow them to intervene and make submissions to assist the Bench in the present case.

Application stands disposed of.”

This is the Impugned Order in CA 370/2017.

6. The Appellant has referred to some other Orders passed by NCLT including the application filed by Respondent No.22 to permit him to represent Respondent – Southend in the Hon’ble Supreme Court which came to be dismissed with costs. The Appellant claims that some unsecured creditors were allowed to be added to the Company Petition as Respondents vide Orders dated 25.01.2017 (Annexure A-16). According to the Appellant, there were serious problems in the Company and thus even a Court Administrator came to be appointed on 07.07.2017 vide Order at Annexure A-20 (Page – 225). However, when Petitioner filed CA 459/2017 for withdrawal of the Company Petition, the same came to be allowed. According to the Appellant, in order to avoid facing averments regarding fraud, misfeasance, suppression and concealment committed by them, Respondent No.2 in collusion with other Respondents of the Company Petition surreptitiously and fraudulently sought withdrawal of the Company Petition so that the Appellant should not come to know of such acts and to make the Appeal infructuous. The Notice of CA 459/2017 was

deliberately not served on the Appellant to overreach the earlier Orders of the NCLT permitting the Appellant to assist the NCLT. The Company Petition was allowed to be withdrawn although there were serious allegations of fraud, misfeasance, oppression and mismanagement made by the parties in the Company Petition.

7. In this Appeal, the Prayer of the Appellant is that the Impugned Order dated 19.12.2017 be set aside and wants directions to NCLT to hear the Appellant and pass speaking orders on its objections to the Company Petition where there are serious allegations of fraud and misfeasance pointed out.

8. The Impugned Order reads as under:-

“C.A. No. 459(PB)/2017

Learned counsel for the petitioner states that he has instructions to withdraw the petition as the matter has been amicably settled. It is stated that all interim orders would stand vacated and the affairs of the company shall be transacted in accordance with law.

Dismissed as withdrawn in terms of the aforesaid statement.

Application stands disposed of.”

9. At the time of arguments, the learned counsel for the Appellants in both these Appeals have argued with reference to the above litigation to submit that Respondent No.2 – Dinesh Kumar Gupta and some of the other Respondents in the Company Petition had Orders passed by the

Hon'ble High Court operating against them and while the Orders were operating against them, surreptitiously Dinesh Gupta transferred his shares to Respondent No.22 – Vikrant Puri who suddenly stepped forward to file collusive Petition in 2016 to claim that he was holding major stakes in the Respondent Company – Southend. The argument is that the Petition was filed so as to obtain collusive Orders from NCLT to overreach the Orders which had been passed by the Hon'ble High Court. It is argued that thus the impleadment of the Appellant in the Company Petition was necessary but only intervention was allowed and when the Company Appeal 370/2017 was filed, in order to make the same infructuous, the Company Petition came to be withdrawn. The argument is that the learned Senior Counsel for the Appellant as appearing in CA 370/2017 happened to be present when the withdrawal Petition came up and sought opportunity to oppose the withdrawal, but the same was declined as only intervention had been allowed and the Impugned Order as above came to be passed.

10. It is argued for the Appellant that for withdrawal of the Company Petition, it was necessary to file the application in Form NCLT – 9 as is required by Rule 82 of the National Company Law Tribunal Rules, 2016 ('Rules' in short) and this was not followed. The application for withdrawal was not properly verified. Notice to the parties had not been given and the Appellant was also not given opportunity to reply to the withdrawal application and its objections were not noted.

11. The Respondent Nos. 6 to 11; Respondent No.12; Respondent Nos.13, 14 and 21; and Respondent No.22 have filed Replies in this Appeal. Main contesting Respondent is Original Petitioner - Respondent No.22. It has been argued on behalf of this Respondent that the Appellant is neither necessary nor proper party. The Company Petition was dispute between the shareholders and when the disputes were settled, he withdrew the Company Petition and only because of the withdrawal, the Appellant cannot claim that it is aggrieved. The Company Petition can be maintained only by a member and Appellant is not a member of the Respondent – Southend. According to Respondent No.22, the dispute in the Company Petition (copy of which is at Annexure A-4 Page – 163) and Rejoinder by the Appellant (Diary No.3993) is with regard to dispute about control of the Company. This Respondent claims that the Appellant had agreement with BMS IT (Respondent No.16) which Company was managed by the Guptas and the relatives of the Jains. The Award passed is against BMS IT. He claims that in the Award, Southend or the Original Petitioner is not party. In the litigation in High Court, as Respondent No.2 – Gupta was having share in Southend and Southend had got valuable asset to secure interest of the Appellant, the Appellant made Southend a party. The counsel for the Respondent No.22 pointed out that the Appellant itself has claimed that the Company Petition was not maintainable as the original Petitioner did not have valid legal shareholding and there was non-compliance of provisions of Section 399 of the old Act. It is argued that on one hand the

Appellant itself was claiming that the Company Petition was not maintainable and when the Company Petition has been withdrawn, the Appellant itself is opposing and cannot be heard saying that the withdrawal affects the Appellant. Referring to the synopsis in Company Petition 370 of 2017, the counsel for Respondent No.22 argued that the Appellant claimed that the Company Petition was infructuous and was collusive etc. and was kept pending in order to obtain consent orders. If keeping the Company Petition pending was harming the Appellant, the same Appellant wanted the Company Petition not to be withdrawn. It is argued that the Appeal does not claim as a ground that the application for withdrawal was defective. The submission is that if the concerned Form is kept in view, there was substantial compliance with the provisions and even if it could be said that the pendency of the Appeal was not pointed out, the issue becomes redundant as counsel for the Appellant was present and did make submissions which were not accepted. It has been argued that non-mentioning of the CP 370 of 2017 pending was by oversight and when the counsel attended, there cannot be said to be any prejudice.

12. The counsel for Respondents 6 to 11 is supporting the Respondent No.22. It is argued even if the Petition is restored, no relief can be granted in favour of the Appellant. When the Appellant is not member of the Company, without support of the members of the Company, the Appellant cannot maintain the Company Petition. It is argued that it can be seen from para – 7.45 of CA 57/2018 that the Appellant wants the Company

Petition to remain pending merely on apprehensions that the Respondents will deal with issues relating to development of the property of Respondents – Southend. This cannot be sufficient ground to stop the Petitioner from withdrawing. The argument is that if there is any violation of the Orders of the Hon'ble High Court, the Hon'ble High Court will take needful action and merely for apprehensions, the Company Petition could not be kept pending.

13. The Respondent No.12 in his Reply claimed that in order to escape liabilities from initiated claims/legal actions, the Respondents 1 to 11 and 22 added parties to the Petition. He claimed behind his back, a compromise was arrived at between Respondents 1 to 11 and 22. He want the present Appeal CA 57/2018 to be allowed.

13.1 Here itself, we refer to Impugned Order at Page – 74 where Advocate for Respondent No.12 – Mr. K. Sinha is shown in the array of counsel representing the parties at the time of passing of the Impugned Order. This Respondent No.12 has not filed appeal against withdrawal.

14. Counsel for Respondents 13, 14 and 21 supported the Appellants referring to claims of these Respondents to say that they were not given opportunity to oppose the withdrawal and the withdrawal affected their rights. The counsel accepted that these Respondents had not filed the Appeal against the withdrawal.

15. We have gone through the record and noted the submissions of parties as mentioned above. The first grievance raised by the Appellant is with regard to the withdrawal application which was filed and manner in which the same was disposed. In this regard, the counsel for the Appellant raised grievances that the application for withdrawal was not as per form prescribed under Rule 82 of the Rules and the Affidavit was not duly verified or notarized. The documents concerned were not attached and that the application did not contain declaration regarding the pending CA 370/2017. In substance, it is claimed that the NCLT could not have acted upon such application.

16. The counsel for Respondents countered the submissions by stating that defect of Form has not been made ground in the Appeal. When the Appellant started making grievances on these counts, the learned counsel for Respondent No.22 and original Petitioner took time from us and on adjourned date filed certified copy of the application and its Annexures. The same was filed at Diary No.5134.

17. Rule 82 of the Rules, 2016 applicable to NCLT reads as under:-

“82. Withdrawal of Application filed under section 241.— (1) An application under clause (a) or clause (b) of sub-section (1) of section 241 of the Act, shall not be withdrawn without the leave of the Tribunal.

(2) An Application for withdrawal under sub-rule (1) shall be filed in the Form NCLT-9.”

Parties have pointed out copy of the Form No. NCLT 9. If Form NCLT - 9 is seen, it is a common Form in the context of Rules – 72, 76, 82, 88 and 154 and is also general Form for all purposes, if no specific Form is prescribed under these Rules and Forms. Rule 82 deals with withdrawal of applications under Section 241. Rule 72 relates to Appeals against the Order of Government under Section 62(4); Rule 76 deals with inspection of minute books of General Meeting in Company refused to give inspection to member; Rule 88 relates to seeking permission to opt out class action under Section 245 and Rule 154 is for application for rectification of Order. It is apparent that common Form is prescribed for various acts like may be Appeal, or may be seeking permissions or may be application – same Form 9 is to be used. Naturally, the Form is to be used and applied with suitable modifications and columns as applicable would have to be referred to. From the Form – NCLT 9, the Appellant has raised grievances with regard to Column – 10 which requires submitting index containing details of documents to be relied on. When we peruse the Application CA 459/2017, which was filed for withdrawal although it refers to the original Petitioners and Respondents 2 to 11, settling their disputes and that Articles of Association “has been duly amended”, no documents were admittedly filed. The prayer in the application being only leave to withdraw, if the original Petitioner did not want to rely on documents and did not attach the same, no capital can be made out of this.

17.1 The other grievance made by the Appellant is that Column – 8 of the Form required the original Petitioner to declare regarding the matter of Appeal being pending made but he did not do so. This, of course, does not appear to have been stated in the application for withdrawal. However, the Petitioner attached proof of service to the parties which can be seen from the courier receipts attached. Apart from this, the Impugned Order records presence of the Advocates of respective parties as well as the counsel for Appellant marked as Intervener. Senior Counsel for Appellant in CA 370/2017 - Mr. Brijender Chahar submitted at the time of arguments that the Appellant somehow came to know about such withdrawal application being moved and thus he had appeared before the NCLT and submitted to the NCLT that the Appellant was objecting to the withdrawal and that no copy of the withdrawal application had been given to the Appellant but that he was told by NCLT that he (that is – the Appellant) had been permitted to address only in the Company Petition but for withdrawal, he need not be given chance. Thus, the learned counsel for the Appellant, which Appellant had already moved CA 370/2017 was present at the time of withdrawal and had an opportunity to address the NCLT and it cannot be said that the NCLT was not aware of the pending Appeal when the withdrawal was permitted. Thus the Advocate for the Respondent No.22 – original Petitioner not mentioning in the application for withdrawal regarding pendency of the Appeal of Intervener cannot be said to be fatal and in the facts of the matter, merely on such technicality, the withdrawal as permitted by NCLT need not be interfered with. Under Section 424 of

the Companies Act, 2013, NCLT while disposing the proceeding which was in front of NCLT, accepted the application for withdrawal in the face of objection raised by the learned Senior Counsel for the Appellant. In the Impugned Order, NCLT did not note the submissions made by the learned counsel for the Appellant, may be due to the view it was taking that even if the Appellant had been permitted to intervene for the purposes of the Company Petition, hearing Appellant was not necessary for the purpose of withdrawal of the Company Petition which was a matter between the Petitioner and the party Respondents.

18. The Appellant is claiming referring to the litigation as mentioned above that the Appellant had a right not only of impleadment in the Company Petition but also had a right to be heard at the time of withdrawal of the Company Petition. Reference to the litigation shows that there were Orders passed against some of the Respondents in the Company Petition who were party in the litigation before High Court as well as Respondent – Southend. There were initial Orders regarding immovable property and subsequently on 30.09.2014, orders came to be passed even regarding these Respondents' shareholding of the Company by the Hon'ble High Court. When the Company Petition came to be filed in 2016 with Respondent No.22 stepping forward as a Petitioner and he trying to show that he had the controlling shares, the Appellant applied for impleadment. We have already reproduced paragraphs from his impleadment application which show what is the concern of the Appellant in the litigation which

was by way of Company Petition. The concern of the Appellant from the portions reproduced above shows that the Appellant was shocked as to how Respondent No.2 came forward claiming to be having controlling stake and Appellant claimed it would be prejudiced in the event shareholding of Respondents 2 to 10 in the Company – Respondent No.1 was dealt with in any manner. The Appellant also expressed likelihood of the Petitioner and Respondents concealing material facts seeking indulgence of the CLB (now NCLT) to overreach the Orders passed by High Court. Even in the present Appeal in para – 7.45 of the Appeal (Page – 55), it is stated by the Appellant as under:-

“7.45 That on 11.9.2017 and 15.9.2017, the Petitioner and Respondents held Board meetings of R-1 company Southend. It is pertinent to note that in view of minutes of the said Board Meetings the interse dispute relating to appointment and removal of director (due to which the instant company Petition CP No. 24(ND)/2016 was filed) is amicably resolved and the Company Petition has become infructuous. In the garb of holding such Board meetings the Petitioner and Respondent have authorized themselves to deal with issues relating to development of the R-1 property. However what essentially they are planning to do is to alienate the 47.5% constructed area (proposed to be built) in violation of the order of the Hon’ble Supreme Court as was done earlier by them in the past when they violated and overreached Hon’ble Court order dated 27.4.2012 and 4.9.2012.

That Further Board Meetings are held details of which the Appellant is unaware of.

The above is against the interest of the Appellant and therefore its impleadment is necessary in the given peculiar facts of the case.”

19. It is quite clear that the Appellant is labouring under apprehensions as to what the original Petitioner and Respondents – shareholder/Directors of the Company were up to. At the time of arguments, the Appellant has tried to show that the Company Petition was collusive between the Appellant and Respondents and it was being pursued to obtain collusive Orders from NCLT so as to overreach the Orders passed by the Hon'ble High Court and now the Hon'ble the Supreme Court. Although such stand is taken at the same time, the Appellant has opposed the withdrawal and the argument made by learned counsel for Appellant is that the right of the Appellant of hearing was taken away because of the withdrawal. The prayer of this Appeal CA 57/2018 seeks setting aside of the Impugned Order and seeks direction to NCLT “to hear the Appellant and pass speaking order on its objections to the Company Petition wherein serious allegation of fraud and misfeasance have ben pointed out.” The paragraphs reproduced by us from the CA 211/2016 which was filed for impleadment show the Appellant wanted to be impleaded in view of his apprehensions not trusting the parties, so as to safeguard his interest. If the original Petitioner decided to withdraw the Company Petition, we find it difficult as to how the Appellant could insist on pendency of the Company Petition to hear out grievances Appellant was making. The Appellant is not a member or shareholder. The Company Petition filed under Section 397 and 398 of the old Act cannot be continued at the behest of an Intervener seeking impleadment when he is not a shareholder or member of the Company. It is settled position that such

application of oppression and mismanagement can be filed only by a member of the Company. If the Appellant could not file such a Petition, the Appellant cannot insist on independently maintaining the same so as to hear out his grievances against the Petitioner and Respondents claiming that they are in collusion.

20. It has been argued that under Section 402 of the old Act, NCLT has wide powers to pass any Orders when Petition of oppression and mismanagement is filed. The argument is that in the present matter, there were various earlier Orders of NCLT which showed that things were not being legally conducted in the Company and the NCLT had even passed Orders to appoint Administrator. It is argued by the learned counsel for the Appellant that in such situation merely because the withdrawal application was filed, NCLT should not have allowed the withdrawal.

20.1 It is claimed that withdrawal under Order XXIII Rule 1 of Code of Civil Procedure, 1908 is different as there the Plaintiff has a right to withdraw the suit while the same cannot be said with regard to Rule 82 where the provisions say that an application under Clause 'A' or Clause 'B' of Sub-Section (1) of Section 241 of the Act "shall not be withdrawn without the leave of the Tribunal."

21. It is true that compared with the Code of Civil Procedure, the power of NCLT is broader when Rule 82 of the Rules is perused. NCLT would have absolute discretion regarding the withdrawal and the Petition

cannot be withdrawn unless the NCLT grants leave. The discretion to grant permission or refuse cannot be exercised arbitrarily. In the present matter, it was stated before the NCLT that the contesting parties had settled their disputes between them and the Petitioner was seeking withdrawal. In such circumstances, only because the Appellant - Intervener had objections and wanted NCLT to keep the Petition pending, if the NCLT thought it fit to let the withdrawal take place, we do not think that the discretion exercised was arbitrary. The Appellant may be having a good case for which it has moved Hon'ble High Court and has indeed Orders passed by the Hon'ble High Court in his favour which are operating against the Respondent Company as well as some of the shareholders of the Company, but that does not mean that the forum of NCLT should remain available to a non-member of the Company to keep watch on the Directors and shareholders of the Company. The rights of the Appellant are apparently being looked into and protected by the Hon'ble High Court and now there are Orders even of the Hon'ble Supreme Court. If the Respondents or any of them violate any of the directions or Orders of the Hon'ble High Court or Hon'ble Supreme Court, they will face the consequences. Thus, we find no reason as to why the NCLT should have kept the Petition pending only because the Appellant wanted it to do so. The impleadment of the Appellant had been refused and he had been permitted only to intervene when the Company Petition was taken up for hearing so that he could point out wrong, if any. That by itself did not create such a vested right that the

Appellant could claim that Company Petition should not be allowed to be withdrawn.

21.1 No doubt powers of NCLT in a petition complaining oppression and mismanagement are very wide to safeguard the interest of the Company. But it would still be matter of discretion to permit withdrawal of the Petition in the given set of facts. When a claim of settlement between the warring group is stated and simple withdrawal is asked, NCLT cannot be asked to continue with the petition on a roving enquiry at the instance of a non-member.

22. Although the withdrawal application referred to settlement and amendment of Articles of Association, the withdrawal application did not seek any directions or orders on that count. The application did not seek recording of any settlement or terms of settlement. The application merely made statement as to what according to the Respondent No.22 – the Petitioner has happened between him and Respondents 1 to 11 and sought withdrawal of the Company Petition. It is a simple withdrawal. There is apparently no operative order. Thus, the original Petitioner and Respondents remain as much liable to answer for their acts to the Hon'ble High Court and Hon'ble Supreme Court in the litigation pending at the instance of the Appellant, as they were before withdrawal.

23. For all such reasons, we are not interfering with the Impugned Order dated 19.12.2017 passed by the learned NCLT. Consequently, the

Company Appeal 57/2018 is dismissed. The result is that the original Company Petition having been withdrawn, Company Appeal 370/2017 does not survive for impleadment. Company Appeal 370/2017 is disposed accordingly.

No orders as to costs in both the Appeals.

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

[Balvinder Singh]
Member (Technical)

New Delhi

7th September, 2018

/rs/nn