NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI
COMPANY APPEAL(AT) NO.06 OF 2018

(ARISING OUT OF ORDER DATED 7TH DECEMBER, 2017 PASSED BY NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH, CHENNAI IN TCP NO.67/2016)

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
1. K.J. Paul Kureekal House, Near thrikkakara Temple, University Post, Kochi-682021	2nd Respondent	1st Appellant
2. Bindu Paul W/o K.J. Paul Kureekal House, Near Thrikkakara Temple, University Post Kochi 682021	3rd Respondent	2nd Appellant
3. K.A. Mathai, Kochappilly House Chembumuku Kakkanad Ernakulam Kerela 682030	4th Respondent	3rd Appellant
Versus		
1. Seaqueen Builders Pvt Ltd, 32/29 82B, Sahrudaya Building, Ponnurunni Vyttila P.O. Ernakulam Kerela 682019	1st respondent	1st respondent
2. P.M. Johny, Pittappillil House, Bandadka P.O. Kasarkode	1st Petitioner	2nd respondent
3. K.P. Augustine, VII/131, Sastri Nagar Kuzhikkattumyalil P.O. Nadathara, Trichur.	2nd Petitioner	3rd Respondent

For Appellant:- Mr. A.S. Chandhiok, Sr. Advocate, Mr. S.N. Mukherjee, Sr. Advocate with Shri K.R. Sasiprabhu, Mr. Sumesh Dhawan, Mr. Biju P Rama, Mr. Aditya Swarup, Ms Tanya Barnwal, Mr Vatsalya, Advocates.

For Respondents: - Mr. Arun Kathpalia, Senior Advocate with Mr. Jayant Mehta, Shri Anirudh Wadhwa, Shri Bhargav R. Thali, Shri Abhishek Iyer, Mr Samaksh Goyal and Shri Vipul Kumar, Advocates for Respondents.

JUDGEMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

The appellants, original 2nd to 4th respondents, have filed this appeal, under Section 421 of the Companies Act, 2013, being aggrieved by the impugned order passed in TCP No.67/2016 filed in National Company Law Tribunal, Division Bench, Chennai (NCLT in short) whereby the Company Petition has been allowed vide impugned order dated 7th December, 2017.

2. The brief facts of the case are that the 2nd and 3rd respondent filed Company Petition No.24/2011 before the Company Law Board, Chennai Bench, Chennai under the provisions of Sections 307, 398, 402, 111,237, 220, 260, 291 and 292 and other relevant provisions of the Companies Act, 1956. After the establishment of the NCLT in 2016, the company petition was transferred to NCLT and renumbered as TCP No.67/2016.

3. 1st respondent company was incorporated on 2.1.1995 with 1st appellant, 2nd appellant, 3rd respondent and Susha Deny as promoters. Prior to 2005, Susha Denny had transferred her shares to 3rd respondent who later transferred 59000 shares to 2nd respondent on 21.2.2005. As per the Annual Return as on 30.09.2005 the share holding pattern of the first respondent is as under (Page 13)

Name	No of shares	Percentage	Status in the appeal

	(Rs.10 each)		
K.J. Paul	25000	26%	1st appellant
Bindu Paul	10000	11%	2nd appellant
P.M. Johny	59000	62%	2nd respondent
K.P.Augustine	1000	1%	3rd respondent

The above share holding pattern continued upto 31.03.2008 and constituted the base shareholding. As per the above shareholding pattern, 1st and 2nd appellant (who are husband and wife) hold 37% shareholding and 2nd and 3rd respondents collectively hold 63% shareholding.

4. It was alleged that majority capital has been contributed by 2nd and 3rd respondent but the majority of directors on the Board viz., 1st and 2nd appellant resorted to various dubious ways and methods to keep away the 2nd respondent, who was the single largest shareholder and 3rd respondent, who was a director, from the affairs and management of the company despite their having a collective shareholdings of 63% in the 1st respondent. It was further alleged that the Minutes of the Meetings and records were concocted, manipulated and falsified to favour the interest of appellants and in short the appellants are alleged to have misused their positions as directors and are trying to usurp the majority stake from the 2nd and 3rd respondent by making illegal and fake share allotments in their names without knowledge of the 2nd and 3rd respondents to gain control over the 1st respondent. The 1st and 2nd appellant allotted a total of 5,05,000 shares (55000 shares on 25.4.2008 and 450000 shares on 11.8.2010) (Page 225) in their favour in the 1st respondent. It is alleged that this was done by the 1st and 2nd appellant to gain majority

stake and thereby fraudulently reducing the majority shareholders to a minority. It is alleged that without giving any notice of meeting of 11.8.2010, 3rd respondent was removed from the directorship of 1st respondent. With the further share allotment dated 25.4.2008 and 11.8.2010, the shareholding of 1st and 2nd appellants have arisen from 37% to 90% and that of 2nd and respondent reduced from 63% to 10%and the shareholding pattern of company was as under (Page 16):-

Name	No of shares	Percentage	Status in the appeal
K.J. Paul	470000	78.33%	1st appellant
Bindu Paul	70000	11.6%	2nd appellant
P.M. Johny	59000	9.83%	2nd respondent
K.P. Augustine	1000	0.17%	3rd respondent

5. It is further alleged that the Board of Directors appointed 3rd appellant as director of 1st respondent on 22.1.2011. It is stated that the said appointment is in violation of Article 28(i) which stipulates that except the first directors, directors shall be generally appointed only at the AGM. Therefore, due to these certain acts of the appellants, the 2nd and 3rd respondent filed company petition. After hearing the parties the NCLT passed the impugned order dated 7th December, 2017, relevant portion of which is as under:-

> ***"The allotments of shares i.e. 5,05,000 in favour of Respondent Nos. 2 and 3 made on 25.04.2008 and 11.08.2010 are declared illegal, and the same stand set aside.***

The Board Meetings purportedly held on 25.4.2008 and 11.8.2010 are not tenable in the eye of law, the same are declared as illegal and all decisions taken there at are set aside.

The EOGMs dated 22.01.2011 and rights offer dated 01.02.2011 are declared illegal, null and void and hence, are set aside.

The continuance of Respondent No.3 and appointment of Respondent No.4 are declared as illegal, null and void, and hence, set aside.

The 1st Petitioner is appointed as Managing Director of 1st respondent company and Mr. K.J. Paul is removed from the position of Managing Director, but he shall perform the duties as Director of the 1st respondent company. Consequently, the said Board of Directors is directed to rectify the Register of Members by restoring the shareholding patter as on 30.09.2005 as shown under para 6(a) of the Petition.

Keeping in view the totality of circumstances and intention of the parties, it is proposed to appoint an independent Auditor within three weeks of passing this order, with the consensus of the Board of Directors comprising of 1st Petitioner and the 2nd Respondent, failing which, this Bench on mention by any of the Directors, shall appoint the independent Auditor out of the names, if suggested, by the

parties, who (Independent Auditors) shall determine the true and fair value of the shares of 1st Respondent Company by taking into consideration three Financial Years w.e.f. 2011 onwards. Based on the said value, and keeping in view the shareholding pattern as on 30.09.2005, the first opportunity for purchase of shares of Respondents is given to Petitioner, failing which the Respondents shall purchase the shares of the Petitioner. This process shall commence after the submission of the report of the independent Auditor, who shall submit the same within four weeks from the date of his appointment, and shall get completed within the twelve weeks thereafter. Till this process is completed, there shall not be any change in the composition of the Board constituted by this Bench, and shareholding patter shall remain the same as on 30.09.2005. The fee of the Independent Auditor shall be paid by the 1st Respondent company which shall be fixed as per mutually agreed terms. According the interim order, if any, stands vacated. No order as to costs."

6. Being aggrieved by the said impugned order the appellants have filed the present appeal before this Appellant Tribunal.

7. The appellants has stated that the NCLT has no jurisdiction to grant the reliefs as proceedings under Section 397 and 398 of Companies Act, 1956, after transfer of proceedings to the NCLT, have to be decided in accordance with Sections 241 and 242 of the Companies Act, 2013.

8. The appellants stated that 2nd and 3rd respondents ought not to have been granted first option for purchase of shares as after Board Meeting of 17th March, 2005, 3rd respondent has not participated in the management and affairs of the company. It is further stated that prior to 17th March, 2005, till 12th January, 2011, 3rd respondent has not written a single letter to the 1st respondent regarding, convening, conducting or holding of any Board Meetings of 1st respondent. It is stated that 3rd respondent left India for Australia without giving his address in Australia to 1st respondent. 3rd respondent even did not intimate 1st respondent that he was going to Australia. The appellants stated that 3rd respondent has never been in the management of the company.

9. The appellant stated that 2nd respondent has not attended any AGM of the company and nor has 2nd respondent made any enquiry with regard to the convening, conducting and holding of any AGM. The appellant stated that 3rd respondent was aware of what was happening in the company till 2008 and in spite of the matter alleged, made no enquiries till January, 2011. The appellant further stated that before filing of petition no complaint had been made by 2nd and 3rd respondent about not receiving any notices for any general meetings of the company or by 3rd respondent of not receiving any board meeting of the company or not having knowledge of the same.

10. The appellant stated that the NCLT has not given reasons for giving first option to 2nd and 3rd respondent. The appellant stated that there is no evidence on record to show that the company would benefit if 2nd and 3rd respondents are put in management. However, it is stated that it is an admitted fact that under the management of appellant the company has

prospered as even according to 2nd and 3rd respondent the asset size of the company has increased manifold times. The appellant stated that there is no finding of mismanagement against 1st to 3rd appellant vis a vis the affairs of the company.

11. The appellant stated that 2nd respondent ought not to have been appointed Managing Director vide impugned order as 2nd respondent had not invested directly in the company, 2nd respondent does not have any experience as a director of any company and no relief had been sought by 2nd or 3rd respondent to appoint 2nd respondent as Managing Director of the company. The appellant stated that without being appointed as director of the 1st respondent, 2nd respondent could not have been appointed as Managing Director.

12. The appellant stated that the NCLT's direction that the valuation of the shares of 1st respondent be done by taking into consideration three financial years figures w.e.f. from 2011 onwards. The appellant stated that this is erroneous because the valuation has to be of such shares has to be as on a particular date and 1st respondent being engaged in the business of real estate the valuation of such shares would have had to be the date of passing of the final order in the proceeding. The appellant further stated that the valuation of shares could not be on the basis of shareholding as on 30th September, 2005. The appellant stated that the rights issue could not be set aside as a rights issue cannot be an act of oppression as 2nd and 3rd respondent had notice of rights issue but chose not to subscribe. The appellants further stated that the Tribunal has not taken note of the subsequent investments made by the 1st and 2nd appellant and its impact on the growth of 1st respondent.

13. The appellants stated that 2nd and 3rd respondents were at all times aware that shares were to be allotted in 2008. The appellant stated that 2nd respondent became a shareholder on 21.2.2005 and on 29.4.2004 authorised share capital of the company had been increased from Rs.12,00,000/- to Rs.60,00,000/- and relevant forms had been filed before ROC(Page 13). Therefore, 2nd and 3rd respondents were aware that the 1st respondent is in need of funds and such funds would be brought by issue and allotment of shares. The appellants stated that there is also no finding that 1st respondent was not in need of funds when the issue of allotment of 25th April, 2008 was made.

14. The appellant stated that mere lack of notice could not result in the allotment made on 11.8.2010 being set aside. The appellants stated that the 1st respondent was in need of funds and such funds have been utilised by 1st respondent. The appellants reiterated that there is no finding that 1st respondent was not in need of funds when such issue and allotment was made.

15. The appellant stated that the order requiring 2nd appellant not to continue as a director of the 1st respondent cannot be sustained. The appellant stated that if, however, the reasoning in the impugned order to the effect that because 2nd appellant was not a director on 25th April, 2008 and 11th August, 2010 when shares were allotted would result in such allotment being invalid then in that event, the transfers of shares from Susha Denny to 3rd respondent in 2001 and transfer of 59000 shares by 3rd respondent to 2nd respondent on 21.2.2005 would also be struck down as 3rd respondent and 2nd appellant had been appointed directors on 2nd January, 1995 itself and

thereafter had never faced the General Body of shareholders and were not first directors. The appellant stated that there was no challenge to the 2nd appellant continuation even in the meeting of the Board of Directors dated 17.3.2005.

16. The appellant stated that the NCLT's order setting aside appointment of 3rd appellant as director is erroneous. The appellant stated that Article 28 of the Articles of Association of 1st respondent does not say that every appointment of a director has to be appointed at an Annual General Meeting. The appellant further stated that there is no requirement that a director appointed at a Board Meeting has to be described as an additional director in the form filed with the ROC.

17. The appellant stated that the entire litigation has been instituted at the instance of one C.J. Mathew (Para 4 Page 300 and Page 302). The appellant stated that Mr. Mathew is a retired commissioner of income tax and he knows particular of all transactions in all respects. The appellant stated that the reply filed by the respondent has been affirmed by Mr. Arun Mathew who is son of Mr. C.J. Mathew. The appellant stated that Mr. C.J. Mathew has been involved in the past with litigation against 1st and 2nd appellant. The appellant stated that the NCLT has not taken into consideration the order of Disciplinary Committee of Institute of Chartered Accountants of India where similar issues and complaints against Auditor of the company had been dismissed.

18. Reply on behalf has been filed by 2nd and 3rd respondent. The respondent stated that the Board Meetings dated 25.4.2008 and 11.8.2010 were never held. The proof adduced by appellants evidencing that notice for

the said Meetings were sent to 3rd respondent are the two Certificates of Posting dated 11.4.2008 and 31.7.2010 of the said notices. The respondents further stated that the NCLT has correctly held by the NCLT that notices sent by two Certificates of Posting are insufficient proof. The respondents stated that the Certificates of Posting are forged one as both these certificates of posting as well as those issued for notices of AGM dated 3.9.2007 (Annexures R2 Page 39) and 2.9.2009 (Annexure R-11D, Page 104) were issued from the Edapally Post Office which is far away from Registered Office of 1st respondent and bears the same postal stamp of film-maker Satyajit Ray. The respondents further stated that this fact in itself makes it evident that all these certificates of posting were fabricated together as an afterthought only after the appellants received the letters dated 1.1.2011 and 12.1.2011 from respondents inquiring about non-receipt of financial statements and notices regarding Board Meetings and AGM'S. The respondents further stated that the postal stamp of filmmaker Satyajit Ray was only released by the Postal Department on 1.3.2009, thus could not have been utilised on the certificate of posting purported to be dated 11.4.2008 (Annexure R-1A and R-1B, Pages 37 to 38).

19. The respondents further stated that the Form 2 for the said share allocation dated 25.4.2008 was filed before the ROC after 26 months on 25.6.2010 (Annexure R-7, Page 47) in violation of Section 75(1) of Companies Act, 1956. The appellants illegally allotted shares to themselves and forged Minutes of Board Meeting dated 25.4.2008 to legitimize this share allocation.

20. The respondents further submitted that the Board Meetings dated 25.4.2008 and 11.8.2010 were convened, for the sake of arguments, as the

continuance of 2nd appellant as a director of 1st respondent. It is stated that the said Board Meetings are invalid for lack of quorum as only 1st appellant was validly present in the said Board Meeting. The respondents further stated that Article 28(iii) of Articles of Association (Page 127 of Appeal) of 1st respondent stipulates that Directors appointed at AGM shall retired at the second AGM held after their appointment who may thereafter be reappointed. It is stated that 2nd appellant was not a first director and was appointed in AGM subsequent to which she was never re-appointed. Therefore, continuation of 2nd appellant on the board was illegal for failure to get reappointed in terms of said Article. The respondent stated that as per notices of AGM 2006 (Annexure R-10A, Page 65) and 2008 (Annexure 10-B, Page 66) 2nd appellant did not take re-appointment.

21. The respondents stated that 3rd appellant was allegedly appointed as a Director of 1st respondent at the purported Board Meeting dated 22.1.2011 (Annexure R32, Page 198). Form 32 filed with the ROC shows him to be appointed as a Director. The respondents stated that this appointment is invalid and illegal as in terms of Article 28(iii) of the Articles of Association (Page 127 of the Appeal), a director can only be appointed at AGM and not by the Board of Directors. The respondent further stated that the decision of the said Board Meeting was also illegal for lack of quorum as stated above.

22. The respondents stated that the appellants have wrongly alleged that the 3rd respondent had vacated the directorship of the 1st respondent for failure to attend Board Meetings dated 10.12.2009, 20.03.2010 and

19.6.2010 (Annexure R-34, Page 194). The respondents stated that the Board Meetings dated 10.12.2009 and 20.3.2010 were never held.

23. The respondent stated that the share application money of Rs.7,00,000/- brought in by 3rd respondent vide Cheque No.999542 dated 30.6.2004 is duly reflected in the Bank Statement of 1st respondent (Annexure A-31 Page 35 of Rejoinder). The respondents further stated that instead of issuing shares to 3rd respondent, appellants produced a false affidavit of Mr. Tom Jose (Annexure R22 Page 178) stating that he brought in the said amount as flat advance.

24. The respondents stated that the appellants have fabricated the share application ledgers. The respondents further stated that the appellants claim that they allegedly brought in share application money to the tune of Rs.3,78,77,551/- up till year 2011(Refer Para 11 Page 12 of Rejoinder). However, the share application ledger of the appellants does not match with the Bank statement of 1st respondent.

25. The respondents submitted that when they inquired about non-receipt and non-filing of financial statements and Board Meetings Minutes, the appellants have immediately unloaded several documents with ROC (Annexure R-15, Page 150) including Annual Returns for FY ending 2006 to 2010 which show that all these documents were forged and filed together belatedly.

26. We have heard the learned counsel for both the parties and perused the record.

27. The first issue argued by the Learned counsel for appellant is that the respondents were not interested in running of the 1st respondent and only in 2011 with mala fide intentions to extort money from the appellants filed the company petition before the Tribunal in 2011.

28. Learned counsel for the respondents argued that the respondents were shocked and surprised when they observed after their letter dated 1.1.2011 and 12.1.2011 that 2 illegal share allotments had been purportedly shown to have taken place on 25.4.2008 and 11.8.2010. The respondents further argued that the appellants filed the annual accounts and annual returns for the years ranging from 2005 to 2010 in January 2011 after enormous delay, therefore, seeing the oppressive acts on the part of the appellants that the Respondents No.2 and 3 were constrained to approach the LD. CLB.

29. We have seen the Annexure R-15 at Page 150 of the reply filed by the 2nd and 3rd respondents and find that the Balance Sheets, Annual Returns and change in directors' forms for the years 2006 to 2010 have been filed by the appellants during the month of January, 2011 and February, 2011. We have also noted that has been done after Respondent made querries from the appellant and they filed the necessary documents with the ROC after 26 months and that there is something amiss in the running of the company with an intent to delay the knowledge of allotment to the respondents. We donot appreciate the logic that this has been filed to extort the money. This could only be possible if it could be presumed that the respondent are intending to sell their shares and take unreasonable advantage in this matter. We have

also noted that this logic falls flat in view of the Tribunal's orders of giving 1st option to purchase by the respondents and not by appellants.

30. The next issue argued by the Learned counsel for the appellants is that the NCLT wrongly held that the shares allotted vide Board Meetings dated 25.4.2008 and 11.8.2010 are not legal and valid. The learned counsel argued that the 1st respondent was in need of funds and the NCLT has given no finding that 1st respondent was not in need of funds when such issue and allotment was made. The learned counsel for the appellants further argued that mere lack of notice could not result in the allotment being set aside.

31. Learned counsel for the 2nd and 3rd respondent argued that no notice was sent to the respondents. Learned counsel for the 2nd and 3rd Respondents further argued that the appellants have filed only the extracts of Resolution passed at the Meeting dated 25.4.2008. Learned counsel for the respondent drawn our attention to Annexure R-1, Page 36 of the reply filed by them and argued that only the Certificate of Posting dated 11.4.2008 and 31.7.2010 as proof has been filed for which the NCLT has correctly held as insufficient proof. Learned counsel for the respondents further argued that both these certificate of postings as well those issued for notices of AGM dated 3.9.2007 (Annexure R2 Page 39) and dated 2.9.2009 (Annexure 11D Page 104) were issued from the same Edapally Post Office which is far away from the registered office of 1st respondent when regular, nearby Post Office was there and bears the same postal stamp of filmmaker Satyajit Ray. Learned counsel for the respondents further argued that the postal stamp of filmmaker Satyajit Ray was only released by the Post Department on 1.3.2009, thus could not

have been used on the certificate of posting purported to be dated 11.4.2008 (Annexure R-1A and AnnexureR-1B, Page 37 and 38). Learned counsel for the respondents further argued that the Form 2 for the said share allocation dated 25.4.2008 was filed with ROC after 26 months on 25.6.2010(Annexure R-7 Pages 47 to 49).

32. We have seen the letter dated 7.11.2012 (Annexure R-1B, Page 38) issued by the Department of Posts, India thereby intimating that "***Department of Post has released stamp on Satyajit Ray (Denomination -300P as part of 10th Definitive series stamp release on 01.03.2009".*** This establishes that the proof of certificate of posting filed by the appellants is a fabricated one and cannot be accepted. It puts serious question mark on the bona fides of the Appellants. We have also perused the Form 2 at Pages 47 to 49 of reply and are satisfied that the Form 2 was filed with ROC on 25.6.2010 belatedly in violation of Section 75(1) of the Companies Act, 1956 which requires that the filing to be done within 30 days of share allocation. Therefore, we are in agreement with the orders passed by the NCLT on this issue.

33. Learned counsel for the appellants argued that the impugned order requiring 2nd appellant not to continue as a director of 1st respondent cannot be sustained because such finding ignores Section 290 of the Companies Act, 1956. Learned counsel for the appellants further argued that if the reasoning in the impugned order to the effect that because 2nd appellant was not a director on 25.4.2008 when shares were allotted would result in such allotment being invalid then in that event the transfers of shares from Susha

Denny to 3rd respondent in 2001 and transfer of 59000 shares by 3rd respondent to 2nd respondent would also be struck down as 3rd respondent and 2nd appellant had been appointed directors on 2nd January 1995 itself and thereafter had never faced the General Body of shareholders and were not first directors.

34. Learned counsel for the 2nd and 3rd respondents argued that Articles 28(iii) of the 1st respondent stipulates that directors appointed at AGM shall retire at the second AGM held after their appointment; who may thereafter be reappointed. It is an admitted position of the Appellants that 2nd Appellant was not a first director and was appointed in AGM subsequent to which she was never re-appointed. Learned counsel for 2nd and 3rd respondent further argued that 2nd appellant's continuation on the Board was illegal and failure to get reappointed in terms of Article 28(iii) the Articles of Association. Learned counsel for the 2nd and 3rd respondent further argued that as per notices of AGM 2006 and AGM 2008, 2nd appellant did not seek re-appointment.

35. We have heard both the parties on this issue. We have also perused the impugned order passed by the NCLT on this issue. It is admitted that 2nd appellant was initially appointed as Additional Director by the Board as on 2.1.1995. 2nd appellant was due to retire and seek re-appointment at the AGM of 1996. As per Article 28(iii) of the Articles of Association she was to retire at every 3rd AGM commencing from AGM 1996. As per notices of AGM 2006 and 2008 filed by 1st respondent, she has not retired by rotation and did not seek re-appointment. Therefore, her continuance in office as Director is

illegal and invalid. It is noted that the remedy of Section would be dealing with the matter which are normally to be done by the Board on which no application for oppression and mismanagement can be made. Hence the plea of ignoring Section 290 of Act is devoid of any logic. We are in agreement with the NCLT on this issue.

36. The other issue raised by the appellants that the orders setting aside appointment of 3rd appellant (original 4th respondent) is erroneous. The appellants argued that Article 28 of the Articles of Association of 1st respondent does not say that every appointment of a director has to be appointed at an Annual General Meeting. The appellants further argued that there is no requirement that a director appointed at a Board Meeting has to be described as an additional director in the form filed with the ROC.

37. Learned counsel appearing on before of 2nd and 3rd respondent argued that 3rd appellant was appointed as a Director of 1st respondent at the Board Meeting dated 22.1.2011. Learned counsel further argued that Form 32 filed with the ROC shows 3rd appellant to be appointed as a Director. Learned counsel argued that this appointment is invalid and illegal as in terms of Article 28(iii) of Articles of Association of 1st respondent, a director can only be appointed at an AGM and not by Board of Directors. Learned counsel also argued that the decision of the said Board Meeting was also illegal for lack of quorum.

38. We have heard both the parties on this issue. We have also perused the impugned order dated 7th December, 2017 and noted that no new arguments or facts have been brought to our notice which have not been dealt with by

the NCLT. As per Article 23 of the Articles of the Association of the Company, Board of Directors has the power to appoint Additional Director in accordance with Section 260 of the Companies Act, 1956 and the director so appointed shall hold office only upto the date of the next Annual General Meeting following such appointment. The appointment of Directors is regulated under Article 28 of the Articles of Association of the Company. Learned NCLT has discussed this issue in its para 33 of the impugned order. NCLT has made observations on the basis of these articles and the law quoted therein. Therefore, we do not have any alternative but to endorse the observations made by the NCLT on this issue.

39. The other issue argued by the counsel for the appellants is that the first option given to 2nd and 3rd respondent to purchase shares is contrary to law and despite it being undisputed that it is the appellants who have been in management of the 1st respondent since its inception. In support of this the appellants have relied upon the judgement pronounced by this Appellate Tribunal in ***Company Appeal (AT) No.150 of 2017-Upper India Steel Manufacturing and Engineering Co Ltd & Others vs Gurlal Singh Grewal alongwith Company Appeal (AT) No.189/2017 decided on 14.11.2017.*** In the cited case the Tribunal has held that oppression and mismanagement has not been proved. But in the present case NCLT has come to a definite conclusion that the case has been proved against the appellant for oppression and mismanagement. Therefore, the judgement cited above is not applicable to the case in hand.

40. On this issue learned counsel appearing on behalf of the Respondents placed reliance on the judgement pronounced by Hon'ble Supreme Court of India in the case of ***MSDC Radharamanan Vs MSD Chandrasekara Raja and another (2008) 6 Supreme Court Cases 750*** *which held as under:*

> ***"xxxx But, the jurisdiction of the CLB to pass any other or further order in the interest of the company, if it is of the opinion that the same would protect the interest of the company, must be held to be existing and the CLB is not powerless in this regard."***

41. On the question of relief, reliefs depend on a particular facts of the case. Such an order should not amount to rewarding the wrong doers and penalise the oppressed party. NCLT, seeing the totality of circumstances, interest of the company and the intention of the parties, has rightly given first opportunity for purchase of shares of appellants to 2nd and 3rd respondent failing which the appellant shall purchase the shares of the respondents. We are of the considered opinion that where the option to purchase the shares is given to the existing management to avoid prejudice to the interest of the respondent (original petitioners) for various reasons such as diversion of funds/siphoning of funds etc then valuation is done on the date of filing of the company petition. On the other hand, where the first option to purchase the shares is given to who were not in management and who have been oppressed to avoid prejudice to either of the parties the date of valuation should be the date of decision of the company petition. Even the appellant has asked that the valuation should be the date of decision of the company petition. In this case the appellants have been in the management of the company who have been found by the Tribunal to have oppressed the

respondent (petitioners), therefore, valuation of shares to be done on the date of decision of the company petition.

42. In view of the above observations and discussions we direct that:-

In last un-numbered paragraph of the operative order in para 34 of the impugned order dated 7.12.2017 for words:-

> "shall determine true and fair value of the shares of 1st respondent company by taking into consideration three financial years w.e.f. 2011 onwards"
>
> shall be deleted and in their place the following words are substituted:-
>
> "shall determine the true and fair value of the shares of 1st respondent company, as on the date of this decision, i.e. 7.12.2017".

Except for modifications as above in the impugned order, the impugned order is maintained. The appeal is disposed accordingly. Interim order passed, if any, shall stand vacated. No order as to costs.

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

(Balvinder Singh)
Member (Technical)

New Delhi
Dated: 13-12-2018

BM