

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

**Company Appeal (AT) No.74 of 2018**

[Arising out of Order dated 01.12.2017 passed by National Company Law Tribunal, Mumbai Bench in TCP 79/2010]

**IN THE MATTER OF:**

1. Mr. Pravin Jain
2. Mrs. Bharti Pravin Jain
3. Mr. Anuj Pravin Jain

All having common address at  
Kalptaru Apartment, Flat No.5,  
3<sup>rd</sup> Floor, 39, G. Deshmukh Road,  
Pedder Road, Mumbai – 400026

...Appellants  
(Original Petitioners)

**Versus**

1. Diastar Jewellery Private Limited  
Plot no.58,  
SEEPZ SEZ, Andheri (East),  
Mumbai – 400096
2. Mr. Pramod Jain  
Flat – 1201,  
Camilla – B-Wing, Amrit Shakti,  
Sector – R-2, Farm House Road,  
Chandiwali, Powai,  
Mumbai – 400072  
And also at C/o.  
Plot no.58, SEEPZ SEZ,  
Andheri (East),  
Mumbai – 400096
3. Mrs. Rachna Srimal  
Flat no.15,  
Deep Sadan Co-op. Hsg. Soc. Ltd.,  
Bldg. no. P-3, Sunder Nagar,  
Malad (West), Mumbai – 400062.

And also at  
Plot no.58, SEEPZ SEZ,  
Andheri (East),  
Mumbai – 400096

...Respondents  
(Original Respondents)

**For Appellants: Shri Santosh Chauriha and Shri Ashish Verma,  
Advocates**

**For Respondents: Shri Siddharth Gautam, Advocate**

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

**(7<sup>th</sup> December, 2018)**

**A.I.S. Cheema, J. :**

1. The Appellants – original Petitioners have filed this Appeal against Impugned Order dated 1<sup>st</sup> December, 2017 passed in TCP 79/2010 (filed on 08.10.2010) whereby National Company Law Tribunal, Mumbai Bench ('NCLT', in short) dismissed the Company Petition filed by the Appellants making grievances of oppression and mismanagement on the part of Respondents.

2. The case of the Appellants as put up before NCLT in the Company Petition in short is as follows:-

2.1 The Appellant No.2 is wife of Appellant No.1 and Appellant No.3 - Anuj Pravin Jain is the son of Appellant No.1. Respondent No.1 – Diastar Jewellery Private Limited is the Company concerned (hereafter referred as 'Company'). Respondent No.2 - Pramod Jain is brother of Appellant No.1

and Managing Director of Respondent Company. Respondent No.3 - Rachna Srimal is another Director in the Company. The Company is in the business of manufacturing and exporting wholesale jewellery made of gold, silver, platinum and some precious metals and materials. The Company Petition claimed that the Petitioners held 24,02,000 shares in their individual capacity in the Company and further owned 40,77,600 shares which were earlier owned by father of Appellant No.1, namely Kishanlal Jain. The Company had approved the transfer of these shares of Kishanlal Jain to Appellant Nos.2 and 3 but the Respondents failed to update the records.

2.2 The Company Petition gave details as to how the Company got incorporated and was allotted Gala No.G-5 at SEEPZ SEZ, Andheri (East), Mumbai. Respondent No.2 is citizen of United States of America. The Petition gave particulars regarding shareholding as in 2007. According to the Appellants, the Company was initially doing well and acquired 5 flats. Respondent No.2 had migrated to United States of America in 1979 – 1980 and adopted citizenship of USA. Respondent No.2 incorporated a Company by name Diastar Inc. in USA. It was family held company in which Respondent No.2 was President and held the entire shareholding with Pradeep Jain – the other brother of Appellant No.1 and Respondent No.2. Respondent No.1 Company was manufacturing diamond and gold jewellery on the basis of raw material and designs supplied by Diastar Inc.

USA and in turn was re-exporting the same to Diastar Inc. in USA. The arrangement worked for the benefit of the whole family.

2.3 In 2001, due to differences with Respondent No.2, Appellant No.1 resigned as Director of the Company but he continued to be shareholder in the Respondent No.1 Company. After resignation of the Appellant No.1, Respondent No.2 was controlling the affairs of the Company. The balance sheet shows that thereafter there was steady decline in the valuation of the Company due to illegal activities of Respondents 2 and 3.

2.4 The Appellants claimed that in 2007, Late Kishanlal Jain desired to transfer his shareholding in the Company in favour of Appellants 2 and 3 and accordingly, executed Gift Deed dated 16.10.2007 and handed his 40,77,600 equity shares which were to the extent of 33.31% to the Appellant Nos.2 and 3. Accordingly, transfer deed was executed and lodged. Respondent No.1 Company passed Resolution dated 16.10.2007 authorizing the transfer of shares in favour of Appellants 2 and 3. However, the Respondents have not updated the records of the Company to reflect names of Appellants 2 and 3 in these shares. The Appellants filed copies of the Resolution and transfer deed as well as Gift Deed dated 16<sup>th</sup> October, 2007 with the Petition.

2.5 According to the Appellants, Kishanlal Jain expired on 07.04.2009. Till he was alive, he assured Appellants that he would resolve the disputes between the Appellant No.1 and Respondent No.2. Out of

respect for the father, the Appellants did not precipitate the matter. Appellants claimed that in 2008 – 2009, they came to know the following:-

- a) Respondents 2 and 3 have floated a company called Diastar Inc., USA in 2008 – 2009. A gross sum of Rs.1822.64 Lakhs still remained to be remitted by Diastar Inc., USA to the Respondent No.1 Company. Diastar Inc., USA failed and neglected to remit the export proceeds. The Company was suffering losses because of the conduct of Respondents 2 and 3 (hereafter referred as 'Respondents'). The Respondents failed to meet statutory commitments and pay provident fund, gratuity, professional tax and income tax dues. The Petition referred to huge amounts outstanding on these counts and claimed that the Respondents have imposed heavy losses on the Company.
- b) The Respondents have defrauded shareholders and the Government and Revenue Authorities. Facts are evident from the Annual Report for the years 2008 – 2009, copy of which was enclosed with the Petition.

2.6 The Appellants claimed in the Petition that the Diastar Inc. has initiated bankruptcy proceedings against itself and Respondent No.1 without initiating recovery proceedings has written off all its receivables

from Diastar Inc. USA, and money has been siphoned, through Diastar Inc.

2.7 The Appellant claimed that the Respondents were trying to discharge liabilities of Diastar Inc. utilizing assets of Respondent Company. They were systematically excluding Petitioners from management and affairs of the Company, although Appellants – Petitioners held more than 50% shares in the Company. No Notice of meetings of any nature were being served on the Appellants in their capacity as shareholders. Respondents 2 and 3 have not called for any meeting of shareholders since long. Respondent No.2 holds only 19.60% shares but has continued to remain Director of Respondent Company and that Respondent No.2 was acting to the detriment of the Company. The Appellants referred to the various e-mails and letters sent to the Respondents, copies of which are annexed as Annexure – 5 (colly) with the Petition, to claim that in spite of various requests, the Respondents did not give necessary inspection of statutory records which amounts to depriving the shareholders of their rightful information. No Notice of any AGM has been served on the Appellants. Respondents were siphoning off assets of the Company. The Appellants issued Notice under Section 169 of the Companies Act, 1956 ('old Act', in short) calling EOGM. The statutory period of the said meeting would be fulfilled on 10.10.2010. Copy of the Notice dated 26.08.2010 was annexed with the Petition as Annexure – 6 (copy has handwritten date as 26.08.2008).

2.8 On the basis of such averments against the Respondents, the Company Petition made various prayers seeking removal of Respondents 2 and 3 and appointment of Professional Directors on the Board and to direct the Company to transfer 40,77,600 equity shares of Late Kishanlal Jain in favour of Appellants 2 and 3. The Petition also sought appointment of Commissioner to take charge of the statutory accounts and records and for investigation into the affairs of the Company from 2001 onwards.

3. The Respondents filed Reply in NCLT and in short the defence is as follows:-

3.1 According to the Respondents 1 to 3, Diastar Jewellery Private Limited was incorporated in 1987 by Late Shri Kishanlal Jain and family members who were founder of the Company. The Company was new in the filed of jewellery and technology for mechanised jewellery manufacturing was supplied to the Company under a collaboration agreement dated 19.03.1988 executed by the Appellant No.1 as Joint Managing Director of the Company. Under the agreement, Diastar Inc. incorporated in USA supplied machines and contributed towards equity share capital. The agreement was registered with Reserve Bank of India. Respondent No.2 was residing in USA and frequently visited India. Appellant No.1 was entrusted with all the administration and finance of the Respondent Company since incorporation till June, 2004 with a gap of 3 years of 2001 to 2004. The Appellant No.1 was supported by Appellant No.2 - Mrs. Bharti

Jain as Director and Kishanlal Jain - the father and Chairman of Respondent No.1 Company. According to the Respondents, around June, 2004, due to Appellant No.1 suffering illness of brain stroke, the Chairman called upon Respondent No.2 to look after the business and matters of the Company. Consequently, Appellant No.1 was relieved/suspended from Management Directorship in Extra Ordinary General Meeting. The Respondent No.2 was called from USA to look after the business. The Reply annexed copy of the EOGM Resolution dated 19.06.2004.

3.2 According to the Respondents, after death of Kishanlal Jain on 7<sup>th</sup> April, 2009, Appellant No.1 started writing nasty letters and e-mails to the Respondents which he attached with the Petition. The said letters and e-mails were bad in law and not correct. In view of mental condition of the Appellant, Respondent No.2 remained quiet. According to the Respondents, the intention of the Appellants is to disturb normal working of the Company. The Respondents referred to the e-mail dated 14<sup>th</sup> April, 2010 to state that the Appellants wanted to make life of Respondent No.2 miserable. The Respondents accepted that they were in effective and physical control of the Company. According to them, they never denied the Appellants right to inspect and access documents. They claimed that inspection was given to the Appellant on 10<sup>th</sup> January, 2011 but without recording inspection, he walked away from the factory premises.

3.3 Respondents claimed that no Notice was received from the Appellant for EOGM, as alleged, dated 26<sup>th</sup> August, 2010. The copy



attached with Company Petition has hand written date of 26.08.2008. According to the Respondents, Appellants 1 and 2 frequently visited factory premises located in SEZ area. On 12.11.2010, Appellant under Order of CLB tried to enter factory premises where precious gold and metal jewellery were manufactured, with his Advocate - Ashok R. Verma on 10<sup>th</sup> January, 2011 and access was denied by the management. According to them, the factory premises is situated on Government notified area in free trade zone belonging to Central Government and it is not free sale area. Respondents claimed in para - 11 of Reply that "All Fixed such as land and Building, Plant and Machinery were already Mortgaged by way of deposit of title deeds and Current assets such as Stock in trade and in process and finished goods, Book debts and receivables, stores and spares were Hypothecated to consortium banks", as security for due repayment of cash credit and other loan facilities. The Respondents put the blame on the Petitioners - Appellants to claim that they only carried out secured loan already borrowed by the Appellants. They have added (in para - 11 as Reply to para - 9 C-II):-

"Respondents would like to inform that Bank of India and other consortium bank may declare company accounts as "Non Performing assets (NPA) as per the Norms Prescribed by Reserve Bank of India."

According to the Respondents, the Appellants withdrew their personal guarantees from the bank. Grievance raised is that the Petitioners refused to pledge their equity shares and thus their intention was mala fide. The Respondents oppose the prayer for appointment of

Commissioner. They attached balance sheet as on 31<sup>st</sup> March, 2010 with the Reply and have shown the shareholding of shares from Late Kishanlal as shares (40,77,600) held by Respondent No.2 – Pramod Jain and his wife – Anita Jain claiming that Appellants were wrongly showing the same to be in their favour.

3.4 The Reply has given particulars of Managing Directors to show that Kishanlal Jain was earlier Managing Director and then continued as Director and Chairman. The Reply claimed that the Appellant No.1 was working as MD till 31.07.2001 and then again appointed as Chairman and MD on 02.04.2004 and relieved in a couple of days on 19.04.2004. The Respondents accepted that Pramod Jain - Respondent No.2 was appointed as Additional Director and Vice Chairman on 06.12.2002 and Managing Director on 01.04.2010. Respondent No.3 - Rachna Srimal is stated to have been appointed Director on 21.02.2004 and had continued as Director, however, she could not get the DIN number.

3.5 According to the Respondents, Kishanlal Jain had already executed a Gift Deed of 40,77,600 equity shares of the Company in favour of Respondent No.2 - Pramod Jain and his wife Mrs. Anita Jain on 10<sup>th</sup> December, 2002. The share transfer deed was executed on 24<sup>th</sup> April, 2003 and the shares were transferred in joint name of Respondent No.2 and his wife – Anita Jain. Board Meeting dated 26.04.2003 was held in this regard and Memorandum of Understanding (MOU) was executed. Thus, according to the Respondents, these shares of Kishanlal Jain had already been

transferred in favour of Respondent No.2 and his wife – Anita by way of gift. They claimed that “The original share certificates were stolen from the Factory premises by Petitioners or their agents”. According to the Respondents, Respondent No.2 was assisting as Vice Chairman to Kishanlal Jain who was looking after day-to-day operations of the Company in India. Respondents blamed worldwide depression in jewellery market for the financial stress noticed in the accounts of 2008 – 2009. They claimed that the Company discharged its PF liability and all other liability “has been reduced to some extent”. The Reply claimed that the Company would recover from the debt crunch and would be online in next two years. According to the Respondents, Diastar Inc. was being unnecessarily dragged in the disputes. According to Respondents, the Appellants never approached the Company to record shares of Kishanlal Jain on their names as according to the Respondents, original share certificates were unauthorisedly possessed by them. Respondents claimed that Notice of AGM has been personally handed over to the Appellants from time to time when the Appellant visited the factory. The Reply claimed that the Petition deserved to be dismissed.

4. The Appellant filed Rejoinder in NCLT and NCLT after hearing the parties has dismissed the Company Petition vide the Impugned Order.

5. Regarding the issue whether Kishanlal Jain’s shares were transferred to the Appellants, the NCLT considered the two Gift Deeds referred to by the parties and was of the view that since beneficial

ownership had already been transferred to Respondents 2 and 3 in the lifetime of Kishanlal Jain and same had been recorded in the share register of the Company, now it could not be said that Kishanlal Jain subsequently gifted his 33% shareholding to original Petitioners 1 and 2 on 16.10.2007. NCLT was of the view that it is established proposition that unconditional Gift Deed executed by any party cannot be revoked unilaterally. The NCLT questioned the Board Resolution dated 16.10.2007 where it was recorded that Kishanlal Jain would continue to be first shareholder till his lifetime and after his demise, the shares would be given to P1 (Petitioner No.1) as the shares had already been gifted to Respondents 2 and 3, but were by then not registered as transferred to R2 and 3 under Foreign Exchange Management Act. The NCLT found fault with the Appellants for not lodging the shares between 2007 to 2010. The NCLT observed that the dispute between the Appellants and Respondents regarding title over the shares of their father would be a matter for Civil Court to decide. For such and other reasons as recorded which can be seen in the Impugned Order, the NCLT was not with the Appellants and did not find the Appellants entitled to the shares of Late Kishanlal Jain.

5.1 Regarding the alleged financial irregularities, NCLT was of the view that Diastar Inc. run by Respondents 2 and 3 became bankrupt whereby loans given to Diastar Inc. were written off in the books of Respondent No.1 Company. It was of the view that solely because of such writing off, it cannot be said that Respondents conducted the affairs of the Company in

prejudicial manner. Regarding the issue of creating third party interest over the assets of the Company, even this issue did not find favour with NCLT which recorded that Respondents had claimed that the assets had been mortgaged to the banks when Appellant No.1 was managing the affairs and so Appellants could not blame the Respondents. For such reasons, the NCLT went ahead and dismissed the Company Petition.

6. We have heard Counsel for both sides. The respective learned Counsel argued on the basis of the rival cases put up by the parties in NCLT and which are still being agitated before us. According to the Appellants, the Gift Deed dated 10<sup>th</sup> December, 2002 was purely conditional gift and due to non-fulfilment of the condition, the shares of Late Kishanlal Jain were never transferred in favour of Respondent No.2 and his wife. It has been argued that Respondent No.2 being citizen of America, it was necessary to have the permission of Reserve Bank of India (RBI) which was not received and thus those shares of Kishanlal Jain could not be transferred in the name of Respondent No.2 and his wife. These shares were subsequently transferred by Late Kishanlal Jain by Gift Deed dated 16.10.2007 in favour of the Appellants 2 and 3. According to them, Kishanlal Jain was the Chairman and Director and had recorded in the Board Resolution and these share certificates were endorsed after completing the formalities. The Appellants argued that Respondent No.2 has misused the funds of the Company. The jewellery exported to Diastar Inc. in USA which was own Company of Respondent No.2 was a device

whereby the assets went to Diastar Inc. and were then diverted by Respondent No.2 to themselves and later on, voluntary bankruptcy was sought in US and on that basis the debts of Diastar Inc. USA were written off in India. The huge amounts have thus been siphoned by Respondents. There were no efforts made for recovery of amounts from Diastar Inc. and the debts were simply written off causing national loss in taxes. According to the Appellants, even when CLB ordered appointment of Commissioner which was converted by High Court into special audit, Respondents did not cooperate with the auditors and did not let the investigations take place. Counsel for Appellants referred to the various e-mails sent by the Appellant to show that the Appellants were kept away from the dealings of the Company with ulterior objects which amounts to oppression. The Annual Returns show mismanagement where the Company is suffering huge losses and even statutory dues are not being paid. Counsel pointed out Form 18 (Page – 361 of Appeal) of Respondent No.1 - Diastar Jewellery Pvt. Ltd. and referred to the address. He then pointed out another Form 18 (Page – 370 of Appeal) to point out that at same address now some “Diastar India Pvt. Ltd.” is shown as operating and Form 32 (Page 372) shows some Gour and others as Directors. Thus he argued that Respondents are hiding facts and transactions.

7. Against this, the Respondents have supported the defence put up by them in NCLT and the reasons recorded by NCLT in the Impugned Order. According to the Respondents, the Appellants failed to prove

siphoning of funds by the Respondents and the allegations are vague. The shares claimed by the Appellants of Late Kishanlal Jain were already transferred to the Respondent No.2 and his wife by way of absolute gift and the transfer forms had been executed on 24.04.2003 and Respondent No.2 and his wife were shown as joint holders in the shares with beneficial interest to them. Board Resolution was also passed in this regard and filed with ROC and reflected in Annual Returns for year ending 2004. According to the learned Counsel for Respondents, there was unconditional gift in favour of Respondent No.2 and his wife. The allegations of mismanagement and oppression as made by the Appellants were bald. The Audit Reports did not spell out financial mismanagement or siphoning of money. When Diastar Inc. in USA went under liquidation and it became impossible to recover receivables from Diastar Inc., the same were written off in the books of the Company and duly recorded in Board Resolution. The five flats of the Company and fixed assets including factory, building, plant and machinery have been already mortgaged by way of deposit of title deeds and current shares were Hypothecated to consortium banks led by Bank of India as security. The Company cannot dispose these assets. Respondents argued that the Bank has already taken possession of 5 flats under Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act' in short).

8. The Learned Counsel for Respondents has submitted that the Appellant No.1 was on the Board till 31.07.2001 and then he had resigned

and the Respondent No.2 came down from USA to take charge of the affairs of the Company on the request of his father Late Kishanlal Jain who continued to be Director and Chairman of the Company till his death on 07.04.2009. The learned Counsel stated that the Respondent No.2 became MD on 19.06.2004. When the Company entered into agreement with Diastar Inc., the Appellant No.1 was MD. Referring to the Gift Deed dated 10<sup>th</sup> December, 2002, the learned Counsel stated that the Respondent No.2 was American citizen and so permission of RBI was required but in spite of efforts, permission could not be obtained and because of that Late Kishanlal Jain transferred the shares making the Respondent No.2 and his wife joint shareholders with Late Kishanlal Jain for which Board Resolution dated 26.04.2003 was recorded and endorsements in the shares were also made as can be seen from copies of share certificates, some of which have been filed as samples with Diary No.7467 by the Appellants. The learned Counsel submitted that the earlier Gift Deed of 2002 which was in favour of Respondent No.2, was not acted upon as RBI did not give the permission. According to the Counsel, as names of Respondent No.2 and his wife have been entered in the share certificates as joint shareholders with Late Kishanlal Jain, subsequently Kishanlal Jain could not have deleted the names of Respondent No.2 and his wife to add the names of Appellants 2 and 3 as done vide Gift Deed dated 16.10.2007 and Resolution dated 16.10.2007. The Counsel submitted that Respondent No.2 was not aware of passing of any such Resolution at the instance of Late Kishanlal Jain. Diastar Inc. went into liquidation and the



Respondents were bound to write off the dues in the circumstances and siphoning cannot be alleged.

9. We have gone through the record and heard Counsel for both sides. It appears from the record and the submissions made that Late Kishanlal Jain, the promoter of the Company who was Director and continued to be Chairman in the Company till his death, was looking after day-to-day operations of the Company during his lifetime. Appellants and Respondent No.2 appear to have let Late Kishanlal manage the affairs of the Company out of regards and at will, he could ask Appellant Nos.1 and 2 to step aside and to call back Respondent No.2 to take over management and could execute different Gift Deeds and get Board Resolutions passed so that once he added Respondent No.2 and his wife as joint holders in his shares and later substituted Appellants 2 and 3 as joint holders with him. Even thereafter, till his death a couple of years later, these parties did not protest. Respondents have pleaded (in Reply para – 18) in NCLT that at Pedder Road flats of Late Kishanlal Jain, Petitioners as well as Respondents were staying with their father. As such, ignorance cannot be pleaded when Petitioners 1 and 2 and Respondent No.2 have been concerned with running of affairs of the Company. Kishanlal Jain appears to have earlier taken assistance of the Appellants 1 and 2 in conducting the affairs of the Company and in 2001, the Appellant No.1 resigned as MD on 31.07.2001 (which is clear from the Reply of Respondents as filed in NCLT.) Of course, in the Reply, the Respondents have shown that the

Appellant No.1 was again appointed as MD on 2<sup>nd</sup> April, 2004 and again relieved as Chairman and MD on 19<sup>th</sup> April, 2004. These couple of days would not be material. Point is that the Appellant No.1 separated from the conducting of the affairs of the Company on 31.07.2001. The Appellant No.2 – Bharti Pravin Jain also appears to have resigned on 31.07.2001 as can be seen from the Reply of Respondents. Respondent No.2 is stated to have become Additional Director and Vice Chairman on 6<sup>th</sup> December, 2002 and MD on 01.04.2010. He entered the Board Management since 2003. Respondent No.3 – Rachna Srimal appears to have been associated as Director since 21<sup>st</sup> February, 2004 although the Reply of these very Respondents states that she did not get the DIN number. The Companies (Amendment) Act, 2006 amended the Old Act to insert new Sections 266A to 266G w.e.f. 01.11.2006 for the first time, providing for requirement to have Director Identification Number with provision of penalty for contravention. The aim and object was to facilitate effective legal action against Directors keeping in view possibility of fraud by companies. The Respondent Company, which has been more of a family affair appears to have continued with such Director against whom both the rival sides do not appear to have had objections considering the fact that if the Respondents 1 and 2 are continuing with a person like Respondent No.3 even during the course of this litigation and involving her in the Company affairs, the Appellants also are relying on the support she gave to Late Kishanlal Jain in the Resolution dated 16.10.2007 (copy of which is filed as Board Resolution at Page – 133 of the Appeal), vide which Late Kishanlal

Jain joined Appellants 2 and 3 as joint holders with him and which also appears to have been bearing signature of Respondent No.3.

**Gift Deed dated 10<sup>th</sup> December, 2002**

10. It would be now appropriate to consider the Gift Deed dated 10<sup>th</sup> December, 2002 on which the Respondents have relied in NCLT and which was accepted by the learned NCLT.

11. Copy of this Gift Deed is at Page – 228 of the appeal. It is unregistered Gift Deed. Although the Gift Deed in para – 2 claims that it was an absolute Gift from Kishanlal Jain - the donor in favour of Respondent No.2 – Pramod Jain and also claimed that the donor has delivered the donee share certificates, para – 3 of the Gift Deed reads as under:-

- “3. The Donee has duly signed the said transfer forms as a Transferee as acceptance of the said gift and has also agreed to take effective steps to get the same transferred in the records of the Company after taking permission from Reserve Bank of India as required by provisions of Foreign Exchange Management Act, 1999.”

In the subsequent paragraph marked as 1, the document read as under:-

1. Pursuant to the said desire of the Donor and in consideration of natural love and affection the Donor bears to the Donee, the Donor DOTH transfer by way of an absolute gift the said fully paid of Equity Shares of face value of Rs.10/- each of M/s. Diastar Jewellery Ltd. together with right, title and interest of the Donor declares that the said shares will be transferred in the name of

the Donee in the Company's record after obtaining Reserve Bank of India permission and till that they will be deemed to be held by the Donor as Trustee for the Donee.”

11.1 The document showed only Respondent No.2 as Donee and not his wife Anita. It is apparent that although the document claimed that it was absolute Gift, the donor and the Respondent No.2 (Donee) were aware that Respondent No.2 being a citizen of America could not get the share transferred to him without the permission of Reserve Bank of India. Now admittedly, (considering the submissions made by the Counsel for Respondents) Reserve Bank of India did not grant the permission and the argument now adopted is that subsequently, Late Kishanlal Jain added the names of Respondent No.2 and his wife – Anita Jain in the share certificates on 26<sup>th</sup> April, 2003 as joint holders. Although the Gift Deed dated 10<sup>th</sup> December, 2002 appears to have been executed, there is yet another document as Memorandum of Understanding ('MOU', in short) (Page 231 of the Appeal) which appears to have been attested on 12<sup>th</sup> December, 2002 (which would be subsequent to the Gift Deed) which is between Late Kishanlal Jain and Respondent No.2 and still recorded that Kishanlal Jain “is desirous of transferring his 33% fully paid up equity shares” to the Respondent No.2. Para – 2 of this MOU refers to family settlement which “can be arrived at between all the member of the family” viz Kishanlal Jain, Respondent No.2, Appellant No.1 and the other son of Kishanlal Jain namely, P.K. Jain and their respective spouses. Para – 3 of the MOU recorded that a meeting for the purpose would have to be held.

Other aspects regarding distribution of assets are then recorded. It is obvious that the Gift Deed dated 10<sup>th</sup> December, 2002 was not an absolute Gift and it was subject to RBI permission and the content themselves show that Late Kishanlal Jain continued to keep the shares with himself. The MOU also was only a hope of family settlement.

The learned Counsel for the Respondents argued that when permission was not received, Late Kishanlal Jain on 26<sup>th</sup> April, 2003 executed Share Transfer Form (Page – 234) and in Board Meeting (copy at Page – 235), the names of Respondent No.2 and his wife – Anita Jain were added as Joint holders after the name of Kishanlal. From the Board Resolution dated 26<sup>th</sup> April, 2003, Resolution – 4 needs to be reproduced. It reads as under:-

**“4. Transfer of shares:**

Shri B.L. Tiwari Director placed before the Board letter received from Shri Kishan Lal Jain, as shareholder of the company requesting to add the name of his son and daughter in laws in the 40,77,600 Equity shares held by him, and as part of the family settlement the joint holder of the shares shall be the beneficial owner of the shares after his death. He further informed that due to old age he is intending to add the name of his son Mr. Pramod Kumar Jain as Joint holder. The Board after some discussion considered the request of Shri Kishan Lal Jain.

Being an interested Director Shri Kishan Lal Jain and Shri Pramod Kumar Jain neither participated in discussion nor voted for the same. Mr. B.L. Tiwari, placed before the Board, transfer deed duly signed by Shri Kishan Lal Jain and Shri Pramod Kumar Jain and Smt. Anita P. Jain and share certificates. The Board passed the following resolution.

“RESOLVED THAT the share transfer deed for 40,77,600 Equity shares of the company duly signed by the existing shareholder and other joint holders placed before the Board along-with letter from transferor for the addition of the name of the Mr. Pramod Kumar Jain and Smt. Anita P. Jain be and are hereby approved and Shri B.L.Tiwari and/or Shri Jatan Bothra Directors of the company are hereby authorized severally to sign the transfer Register and endorsement on the share certificate for and on behalf of the company.

- No of Equity shares: 40,77,600 Folio no 51 & 52
- Name of transferor : Shri Kishan Lal Jain
- Name of transferee : Shri Kishan Lal Jain jointly with  
Shri Pramod Kumar Jain jointly with  
Smt. Anita P. Jain”

[Emphasis Supplied]

11.2 Now, the reliance on the Gift Deed dated 10<sup>th</sup> December, 2002 has been given up by the Respondents and they are relying on the subsequent Act of Kishanlal Jain in adding the names of Respondent No.2 and his wife – Anita Jain in the shares on the basis of the Share Transfer Form (Page – 234) read with Board Resolution dated 26<sup>th</sup> April, 2003. It is apparent that the names of Respondent No.2 and his wife – Anita Jain were added gratis. No consideration was apparently paid by Respondent No.2 and his wife to Late Kishanlal Jain. When this is so, if the above Resolution is perused which appears to have signature of Late Kishanlal Jain as Chairman, the contents are more in the nature of Will declaring that the joint holders of the shares shall become beneficial owners of the shares “after the death” of Kishanlal Jain. Such will or wish, which did not transfer rights in the present, were naturally not binding on Kishanlal in the times to come.

12. The physical shares of Kishanlal Jain are all in possession of the Appellants, is not in dispute. Respondents vaguely stated in their Reply in NCLT that the shares were stolen by the Appellants from the factory premises by themselves or through their agents. As the facts appear from the record, this appears to be only a name sake defence. The original shares are all in possession of the Appellants and on directions, the Appellant No.1 filed Affidavit with Diary No.7467 with which he has filed photocopies of a couple of shares. The back side of the front page of the share certificates shows endorsements of 26<sup>th</sup> April, 2003 on which the Respondents are relying and also endorsement stamped as 16<sup>th</sup> October, 2007 on which the Appellants are relying. The shares which were initially in exclusive name of Kishanlal Jain have endorsement of 26<sup>th</sup> April, 2003 showing the names of transferees in the following order:-

Mr. Kishanlal Jain

Mr. Pramod Jain

Mrs. Anita Jain

The certificates have the stamp of the Company with authorized signatory signing the same. Similarly, the endorsement dated 16<sup>th</sup> October, 2007 has following names:-

Mr. Kishanlal Jain

Mrs. Bharti Pravin Jain

Mr. Anuj Pravin Jain

Even this entry in the share certificates has stamp of the Company with signatures which appear to be of the present Respondent No.3 who is now siding with the Respondents. We may state that the entries and endorsements appear to be in the ordinary course of business.

**Gift Deed dated 16.10.2007**

13. Now we come to the Gift Deed dated 16<sup>th</sup> October, 2007 relied on by the Appellants. The document of Gift deed is at Page – 128. This is also unregistered Gift deed, executed by Kishanlal Jain as donor. It was executed in favour of the Appellant No.2 - Bharti Pravin Jain and Appellant No.3 – Master Anuj Pravin Jain. In this document, Late Kishanlal Jain recorded that he had executed Gift deed dated 10<sup>th</sup> December, 2002 which now he referred as “conditional”, in favour of Pramod Jain (Respondent No.2) recording that the Gift Deed was subject to necessary permission from RBI and family settlement. Late Kishanlal Jain recorded that the MOU which had been executed for the transfer of the said shares to Respondent No.2 was subject to family settlement and family arrangement. This document recorded that the permission from Reserve Bank of India for the Gift of shares to Respondent No.2 and his wife – Anita Jain who were US citizens, was not received and, therefore, the Gift Deed dated 10<sup>th</sup> December, 2002 had become void and the same was revoked by the donor. The document also recorded that the family settlement was not arrived at among all the legal heirs and the MOU was also cancelled. This Gift Deed then proceeded to record that out of natural love and affection, the donor



was donating by way of irrevocable confirmed and absolute Gift the fully paid up shares and also delivered the shares to the donee with Transfer Forms duly signed. The document appears to have been signed by Late Kishanlal Jain, Bharti Pravin Jain and for Appellant No.3 who was then a minor, by guardian - the Appellant No.1.

14. Then there is Board Resolution dated 16<sup>th</sup> October, 2007 (Page – 133). Although Respondent No.2 has claimed that he was MD he still tried to claim that he did not have knowledge of such Resolution. We are unable to accept this defence of the Respondents considering that Respondent No.3 appears to have signed this document along with Kishanlal Jain. The Company was being run more as a family affair in which Kishanlal Jain was the Chairman and admittedly was looking after affairs of the Company in spite of his one or the other children being made MD, to assist him. We are unable to accept the defence that Respondent No.2 did not know about such Resolution being passed. The Resolution No.3 in the Minutes (Page – 133) reads as under:-

### **3. Transfer of shares**

Smt. Rachna Srimal, Director placed before the Board following documents received by the company from Shri Kishanlal Jain, Director and promotor shareholder of the company.

- a) Copy of Note sent to Mr. Pravin kumar Jain, Pramodkumar Jain and Pradeepkumar Jain.
- b) Note regarding revocation of the Gift of shares made to Mr. Pramodkumar Jain and Mrs. Anita Pramodkumar Jain (U.S. citizen)
- c) Copy of the Gift deed and affidavit executed by Shri Kishanlal Jain in favour of Mrs. Bharati

Pravinkumar jain and Master Anuj Pravinkumar Jain for the shares held by him in the company.

d) Transfer deed duly signed by him in favour of himself jointly with Mrs. Bharati P. Jain and Master Pravinkumar Jain (through his father and natural guardian Mr. Pravinkumar Jain)

He further explained the board that in view of non arrival of family settlement among the three sons he decided as per his personal wish to have the shares transferred jointly in the name of Mrs. Bharti Pravinkumar Jain and Master Anuj Pravinkumar Jain. He also informed that he will continue as first shareholder till his life time and after his demise the shares will be given to Master Anuj Pravinkumar Jain, Grand son. Since Mr. Pramodkumar Jain and Mr. Pradeepkumar Jain, both have opted for US citizenship, shares could not be transferred or gifted under Foreign Exchange Management Act, (FEMA). He further explained that the company is now a Private Limited family company and therefore he intend to keep the shares within family members who are staying with him in India. The board after considering the details and representation made by Shri Kishanlal Jain passed the following resolution:

“RESOLVED THAT the share transfer deed for 40,77,600 Equity shares of the company duly signed by the existing shareholders placed before the Board along with copy of the Gift deed and affidavit and other documents for addition of the name of Mrs. Bharati Pravinkumar Jain and Master Anuj Pravinkumar Jain in the said equity shares be and are hereby approved and Smt. Rachna Srimal Director of the company is hereby authorized to sign the transfer register and endorsement on the share certificate for and on behalf of the company.

No of Equity shares: 40,77,600 Folio no 51/65

Name of transferor : Shri Kishanlal Jain

Name of transferee : Shri Kishanlal Jain

Smt. Bharati Pravinkumar Jain

Master Anuj Pravinkumar Jain”

There is also Share Transfer Form executed by Kishanlal Jain and Appellant No.2 and for Appellant No.3 signed by Appellant No.1. The Respondent No.3 took the same on record on behalf of the Company as can be seen from the endorsements below Page – 135. When we read the above Resolution No.3 in the document, which is stated to be Board Resolution dated 16<sup>th</sup> October, 2007, here again what can be seen is Late Kishanlal Jain adding names of Appellant Nos.2 and 3 gratis and without any consideration other than love and affection for his family. With the Gift Deed of 2002 given up by the Respondents in their arguments and even otherwise it was apparently unenforceable for want of permission of Reserve Bank of India, the Gift Deed in favour of the Appellants of 2007 becomes relevant. In 2007, Kishanlal Jain did execute Share Transfer Form as can be seen at Page – 135 of the Appeal which was accepted by the Company on the official side, through Respondent No.3. The Affidavit of the Appellant No.1 filed with Diary No.7476 with which copies of some of the share certificates have been filed as samples does show the Respondent Company taking on record the endorsement of Appellants 2 and 3 being added as joint holders with Kishanlal Jain. The Gift Deed of 2007 read with the Resolution dated 16<sup>th</sup> October, 2007 and the Share Transfer Form accepted by the Respondent Company do show the Will of Late Kishanlal Jain that after his demise, his shares shall be owned by Appellants 2 and 3. Although the Respondents disputed such transfer of 2007, Respondents who are in management of the Company since 2002 – 2004 and have custody of records did not bring on record original Transfer

Register of Company maintained in Ordinary Course to show that in the Company records in 2007, such entries were not recorded.

15. If the Gift of 2002 could not be acted upon for want of permission from RBI to transfer the shares of Late Kishanlal Jain in favour of Respondent No.2 and his wife – Anita Jain, both US citizens, merely by adding their names as joint holders in 2003 would also be hit for want of necessary permission. In the absence of permission, the joint names added of Respondent No.2 and his wife in 2003 could not be legally recognized. The transactions of 2002 and 2003 in favour of the Respondent No.2 and his wife were conditional and there was a caveat of Late Kishanlal Jain that the rights would flow in favour of Respondent No.2 and his wife only after his death. He did not even handover the shares, a movable property, to Respondent No.2 and his wife which he did by handing over the shares duly endorsed to Appellants after entries of 2007. In 2002, no vested right was created in favour of Respondent No.2 and his wife. It was not a confirmed right transfer to Respondent No.2 and his wife and when Kishanlal Jain exercised his option in 2007 to make Appellants 2 and 3 as joint holders, it cannot be said that he could not have done so in view of the earlier Gift Deed of 2002 which could not be acted upon. We thus do not agree with NCLT on this count.

### **Oppression and Mismanagement**

16. Keeping aside the dispute regarding transfer of shares of Late Kishanlal Jain, the fact remains in this matter that the Appellants 1 and

2 have admittedly been shareholders of the Company and even without the shares of Late Kishanlal Jain, Petitioners have been holding 19.60% of the shares. Thus even independently they could maintain the Company Petition. They have made allegations of mismanagement and oppression on the part of Respondents. We have referred to the grievances of the Appellants while referring to their pleadings and Reply by the Respondents. When we go through the Impugned Order, we find that the learned NCLT did not properly consider the allegations of the Appellants regarding oppression and mismanagement. We have already referred to the Reply of Respondents which shows that actually the Appellants 1 and 2 separated from the management of the Company on 31.07.2001. Starting 6<sup>th</sup> December, 2002, the Respondent No.2 has been Additional Director, then Director and Vice Chairman and later Managing Director. Admittedly, initially the Company was doing well. When the management has been with the Respondent No.2 since 2002 and the Company Petition has come to be filed on 8<sup>th</sup> October, 2010, we are not ready to accept the defence put up in the Reply in vague manner that the building, plant and machinery were already mortgaged by way of depositing title deeds and even the current assets were hypothecated to consortium banks led by Bank of India for which the Appellants should be held responsible. No documents have been shown to us of creation of such mortgage and charge at the time of tenure of the Appellant No.1 but even if it was so, there is nothing shown by the Respondents to show that before Company Petition was filed at any earlier time it was put on record or any grievance was made that the

burden of 2001 was so heavy that the Company was unable to come out of the problems even till 2010. Vaguely blaming the earlier management which went out more than 9 years earlier cannot be simply taken on the face value.

17. The Appellants filed in NCLT copy of the Annual Return of 2008 – 2009. Here also, the Respondent Nos.2 and 3 are shown as Directors and if the Auditors' Report is perused, the Auditors inter alia recorded as under:-

“vi. We further report that

a) The company has entered in to transactions with parties where the directors of the Company are interested, without prior approval from government as per provisions in section 207(1) of the Companies Act, 1956. The company has applied for the permission, which is awaited.

b) The Company during the year had no full time Company Secretary.

c) The company has not provided for interest expense due to M/s. Gold Metal Trading amounting to Rs.62.42 lakhs for the current year and hence profit is over stated to that extent.

d) The liability for tax is shortly provided as auditors came across the instances wherein the additional tax liability on Statutory liability expense claimed Rs.26.08 lakhs. However few more instances for non deduction of tax was not quantified due to unavailability of records. The deferred tax amount cannot be quantified considering the above fact and due to absence of future reliable certainty of payment of statutory dues.

e) The company has not provided the employee's dues in respect of leave encashment as required by AS-15. Further as per letter dated 30/01/2009 received from Life Insurance Corporation of India (Pension and Group schemes department), there is a shortfall of Gratuity fund over the present value of past service Liability of Rs.1534957/-. The same is not provided in financial Statement affecting the profitability and financial position to that extent.

f) Attention is invited to note no.11 for non provision of impairment loss based on company's contentions as per Accounting Standard 28 of Institute of Chartered Accountants of India. The amount of impairment loss cannot be quantified by us.

g) As per letter 1/03/2008 Diastar Inc. a debtor with out standing debit balance of Rs.1822.64 lakhs and credit balance of 969.02 lakhs as on 31/3/2008 has filed Bankruptcy proceedings with U.S. Bankruptcy Court District of New Jersey (Newark). The Company has provided for a Write off of Rs.826.55 lakhs on debtor after netting off Rs.129.98 lakhs with creditors outstanding and adjusting the balance creditor of Rs.833.27 lakhs (the reversal of opening reserves in debtors & Creditors was Rs.6.95 lakhs & Rs.5.77 lakhs). In our opinion netting off Rs.129.98 lakhs should be done only after prior approval of Reserve Bank of India and subject to liquidators of Diastar Inc. Further the remaining creditor of Rs.833.27 lakhs should not be adjusted against debtors and provision for foreign exchange loss of Rs.266.93 lakhs should be provided on total creditors of Diastar Inc. outstanding as on 31/03/2009. Considering the above the total Write off on account of Diastar Inc. should be of Rs.1787.05 Lakhs and loss is understated to that effect.

h) In our opinion the inventories are over valued. While valuing Work in process expenses like Financial Charges, Repairs and Maintenance, Bank charges, Conveyance & other Overheads pertaining to non-productive staff not linked to production are considered and the same is not in accordance with Accounting Standard-2 and

should be excluded. We are not in a position to quantify the exact amount of such over valuation.”

Thus, the Auditors recorded that the total write off on account of Diastar Inc. should be of Rs.1787.05 Lakhs and loss is under stated to that effect by the Company. Now, admittedly, Diastar Inc. was a Company managed by Respondent No.2 in USA. Copy of proceedings from U.S. Bankruptcy Court, District of New Jersey (Newark) (copy of which is at Page 149) and which was filed before NCLT also shows that the Company in USA itself invoked proceedings of bankruptcy. Thus, here we have this Respondent No.2 who is managing Respondent No.1 Company admittedly since 2002 which Company was basically doing business with Diastar Inc. in U.S.A. and same Respondent No.2 was also managing the Company Diastar Inc. in USA. He wrote off dues recoverable from Diastar Inc. worth Rs.1787 Lakhs because Diastar Inc. has invoked bankruptcy proceedings. If Diastar Inc. had been a Company which had no relations with the Respondent No.1 Company, the matter could have been looked upon differently. But in the present state of facts where Respondent No.2 is in-charge of Respondent No.1 Company and he is also himself in-charge of Diastar Inc. in USA and the business of Respondent No.1 Company is mainly of dealing with Diastar Inc., by sending jewellery to Diastar Inc., the filing of Diastar Inc. of bankruptcy proceedings cannot be looked upon as an innocent act for which Respondent No.2 can say that he need not be blamed. According to us, this is serious act which is not merely oppressive of the Appellants but it relates to revenue and economy of this country. As



per the Auditors netting off Rs.129.98 Lakhs could be done only after approval of RBI. There is also reference to loss of foreign exchange. Without following any procedures and without making any efforts to recover money which would have come as foreign exchange is serious. Apart from siphoning, there appear to be acts against the economy of this Country and in public interest, it appears necessary to investigate, if there is fraud in such acts.

18. Apart from the above factors, the Annual Report of 2008 -2009 shows the auditors recording that the Respondent Company does not regularly deposit the statutory dues applicable to the Company including Provident Fund, Employees' State Insurance Corporation, Professional Tax and Maharashtra Labour Welfare Fund with the appropriate authorities. The Report listed huge dues which were pending for more than 6 months and which appears to be running into lakhs of rupees. The Report also recorded that there were dues of income tax and customs duty also. Apart from the Annual Report of 2008 – 2009, although Respondents filed copy of Annual Report of 2009 – 2010, even that did not give any rosy picture. The copy of the same is at Page – 247 of the Appeal and there is endorsement at Page – 256 by the Auditors that the Statutory Registers maintained under the Companies Act were not available for their verification and so they were unable to comment on compliances and entries in the Register. Mere reading of this Annual Report shows it to be

a testament of mismanagement. Sadly, NCLT did not examine these details.

19. We have then various copies of e-mails sent by the Appellant to the Respondents copies of which he filed in the NCLT as Annexure – 5 (colly) and which copies have been filed in this Appeal at Pages - 161 to 177. Although constantly the Appellant No.1 appears to have been asking for details and particulars of various matters relating to the Company, the Respondents maintained stoic silence and only in the Reply dated 15<sup>th</sup> April 2010, Respondent No.2 responded that he was thanking for showing interest in the wellbeing of the Company and list of answers will take time and he will get all the Replies by the end of 30<sup>th</sup> April. The learned Counsel for the Respondents wanted to rely on isolated sentence in the e-mail dated 14<sup>th</sup> April, 2010 sent by the Appellant No.1 telling Respondent No.2 that he will make his life in USA also miserable by contacting various agencies who would like to investigate his activities in that country. The Respondents claimed that the object of such e-mails was to make life of the Respondents miserable. We find that in Reply filed in NCLT, the Respondents claimed that they remained silent because of what they called the mental condition of the Appellant No.1. What we can see from the e-mails is that when the Appellant No.1 was admittedly shareholder and was raising concerns, he did not get any response. The e-mail dated 14<sup>th</sup> April, 2010 also records that the Appellant No.1 wanted to take every single step to protect his interest and that of Respondent Company -

Diastar. We do not think that single sentence as tried to be torn and read by the Respondents can be read in isolation. The learned Counsel for the Appellants brought to our notice Annexure A-5 (Page 396) the copy of Order of CLB dated 30<sup>th</sup> November, 2012. In the Company Petition which was then before CLB, at initial stage, the CLB had appointed one Hari Shankar Acharya, Ex-Chief Commissioner of Income Tax to investigate into the Company accounts and affairs, but which on Appeal by the Respondents was set aside by the Hon'ble High Court of Judicature at Bombay in CA 32/12013 (Annexure A-7 – Page 438) and the Hon'ble High Court had appointed M/s. K.C. Jain & Co. as special auditors to investigate the finance of the Respondent Company. The learned Counsel submitted that when the special Auditor tried to investigate, the present Respondents who were Appellants in the High Court did not cooperate and did not attend as can be seen from the meeting dated 29<sup>th</sup> January, 2015, copy of which has been filed at Page 484. Subsequently Hon'ble High Court passed Orders dated 4<sup>th</sup> April, 2016 whereby the Respondents through their Counsel gave undertaking that they would bear the cost of the Auditors and would comply the Orders of the High Court dated 14<sup>th</sup> October, 2015. The learned Counsel submitted that in spite of this, the Respondents did not cooperate with the audit and it could not take place. Although the learned Counsel for Respondents is submitting that if the Order of High Court was not complied, procedure of contempt was open to the Appellants, we are not on the question of contempt. What we are finding from the record is that the Respondents have an approach of non-

disclosing facts. We have already noted above that the statutory records have not been shown even to the Auditors.

20. The Appellants – original Petitioners had filed Rejoinder when the matter was before CLB (Annexure A-3 (colly) – Page-328) and in para – 6(hh), had pointed out that the Respondent No.1 Company had been declared NPA by Bankers. We have already referred to the Reply filed by the Respondents where they themselves were wanting declaration of the Company as NPA.

Further in para – 6(pp) of the Rejoinder, the Appellants claimed that the Respondent No.2 or on his behest, a Company by name “Diastar India Pvt. Ltd.” has been incorporated having its registered office at same address at Plot No.58, SEEPZ where Respondent No.1 is also having its registered office. The Appellants claimed that this showed that the Respondents are taking away the business of the Respondent No.1 and making Respondent No.1 Company a paper company. The Counsel for the Appellants pointed out Form – 18 relating to the Respondent Company (Page – 361), which needs to be read with Form – 18 (Page – 370) where some “Diastar India Pvt. Ltd.” is shown to be having the same address as of Respondent No.1 Company. Form – 32 of that Company (Page – 372) does not appear to be showing the Respondents as the Directors. The learned NCLT did not consider this material and failed to appreciate that the Respondents were suppressing facts and the Appellants were deprived of information and they were oppressed while the Company was

mismanaged. If at the address of the Respondent Company, some other company is shown to be functional, the substratum itself can be stated to be in danger.

21. In the Company Petition, the Appellants by way of Interim Resolution, sought appointment of Commissioner which was granted by CLB, but Hon'ble High Court changed the same so as to appoint Special Auditor which aspect we have discussed. It appears to us that forensic audit in the present matter should have been done. The Appellants in Company Petition have prayed for removal of Respondents 2 and 3 from the Board of Directors. Respondent No.3 deserves to be removed as it is stated that she does not have DIN number. We propose to appoint Independent Director to look after the management of the Company and thus, Respondent No.2 should be allowed to be continued only as Director and not Managing Director. Considering the shareholding of Appellants and that shares of Late Kishanlal Jain should come to Appellants 2 and 3 by way of transmission of interest, the Appellant No.1 should be on the Board, in interest of the Company.

22. Looking to these factors, we find that there is material on record, which was also before NCLT that the Respondents have mismanaged the Company affairs, which is facing proceedings in SARFAESI, and there is also material to show that investigation is necessary relating to loss of revenue to the Company with allegations of siphoning of money by diverting the funds to Diastar Inc. and then put Diastar Inc. into

bankruptcy proceedings and write off dues in this Company. The non-responsive attitude of the Respondents to the Appellants and shareholders also amounts to oppression of the Appellants.

23. We are unable to maintain the Impugned Order passed by NCLT.

We passed the following Order:-

**ORDER**

A. The Appeal is allowed. The Impugned Order is quashed and set aside. We remit back the matter to the National Company Law Tribunal, Mumbai Bench. We hold that the Respondent Nos.2 and 3 are guilty of oppression of the Appellants and also guilty of mismanagement of the Respondent No.1 Company. At the present stage, passing directions to winding up Company would unfairly prejudice the Appellants and other members of the Company. We leave this aspect open for the learned NCLT, Mumbai to consider at subsequent stage as we are directing investigation into the affairs of the Company.

B. Under Section 242(2)(h) of the Companies Act, 2013, we remove Respondent No.2 as Managing Director of the Company. He will, however, continue as Director. We remove Respondent No.3 from the position of Director of the Company. Under Section

242(2)(k) of the Act, we appoint Appellant No.1 as Director of the Company and his continuation subsequent to next AGM, would be subject to decision of the AGM.

C. Keeping in view Section 242(2)(a) & (k) of the Act, we request the learned NCLT, Mumbai to immediately appoint an Independent Director to the Company for regulating the conduct of the affairs of the Company in future on such remuneration as the learned NCLT may decide. The learned NCLT will consider need of continuation or otherwise of the Independent Director after a period of two years of appointment. The Independent Director will take over the administration of the Company as well as its official and statutory records. In the meeting of Board of Directors, the decision would require concurrence of the Independent Director and in case of difference between the other Directors, the Independent Director would have the casting vote which will prevail.

D. Copy of this Judgement be forwarded to the Central Government through Ministry of Corporate Affairs for information and with a request to get the affairs of Respondent No.1 Company investigated

under Section 210 of the Companies Act, 2013, keeping in view observations made by us in para – 17 of the Judgement and record. The Company, through the Independent Director, will co-operate in the investigation. If the investigation finds anybody responsible for acting against public interest, the person/s would be liable for action.

E. The Company will take on record in the Transfer Register relating to Register of Members the names of Appellants 2 and 3 as joint holders of 40,77,600 equity shares of Kishanlal Jain, since the death of Kishanlal Jain on 7<sup>th</sup> April, 2009.

F. Costs of this Appeal of the Appellants are quantified at Rs.2 Lakhs, which shall be paid by Respondents 2 and 3 jointly or severally from their own funds.

G. The Appeal is disposed accordingly.

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

[Balvinder Singh]  
Member (Technical)

/rs/nn