

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**

**NEW DELHI**

**Company Appeal (AT) No.12 of 2018**

[Arising out of order dated 03.10.2017 passed by National Company Law Tribunal, Chennai in TCP 157/2016 (No.6/2015)]

**IN THE MATTER OF:**

1. **Dr. M.A.S. Subramanian  
S/o Late Mr. M.A. Shanmugam  
“Selvanayagam Illam”  
No.83, 2<sup>nd</sup> Cross  
Vasan Nagar, Lawspet  
Puducherry – 605 008**

**...Appellant No.1  
(Original Respondent No.2)**
2. **Mrs. Santhi Subramanian  
W/o Dr. M.A.S. Subramanian  
“Selvanayagam Illam”  
No.83, 2<sup>nd</sup> Cross  
Vasan Nagar, Lawspet  
Puducherry – 605 008**

**...Appellant No.2  
(Original Respondent No.3)**
3. **[Mr. S. Suresh (deceased)  
S/o Dr. M.A.S. Subramanian  
(died on 01.04.2016)] - Deceased**

**...Appellant No.3  
(Original Respondent No.4)**
4. **Mr. S. Sundar  
S/o Dr. M.A.S. Subramanian  
“Selvanayagam Illam”  
No.83, 2<sup>nd</sup> Cross  
Vasan Nagar, Lawspet  
Puducherry – 605 008**

**...Appellant No.4  
(Original Respondent No.5)**
5. **Mrs. Suganthi Prabhakar  
W/o Mr. Prabhakar  
No.27, First Cross Street  
Natesan Nagar,  
Puducherry – 605 005**

**...Appellant No.5  
(Original Respondent No.6)**

**Versus**

1. **Mr. T.S. Sivakumar**  
S/o Late Mr. T. Sivaraman,  
Flat No.5, Subramaniya Appt  
Old No.135/1, Santhome High Road,  
Mylapore, Chennai – 600 004  
...Respondent No.1  
(Original Petitioner No.1)
2. **Mr. T. Thiagarajan**  
S/o Late Thillai Govindan  
No.7, 2<sup>nd</sup> Cross Street  
Anna Nagar  
Puducherry – 605 005  
...Respondent No.2  
(Original Petitioner No.2)
3. **Mrs. Rani Mangammal**  
W/o Mr. G. Elangovan  
“Chez Nous”, 4165,  
13a Main Hal, 2<sup>nd</sup> Stage  
Indira Nagar  
Bengaluru – 560 008  
...Respondent No.3  
(Original Petitioner No.3)
4. **Mr. T. Senthil Kumar**  
S/o. Mr. T. Thiagarajan  
No.7, 2<sup>nd</sup> Cross Street  
Anna Nagar  
Puducherry – 605 005  
...Respondent No.4  
(Original Petitioner No.4)
5. **Mrs. T. Valli**  
W/o Mr. Murugan  
No.7, 2<sup>nd</sup> Cross Street  
Anna Nagar  
Puducherry – 605 005  
...Respondent No.5  
(Original Petitioner No.5)
6. **M/s. Vee Pee Estate and Hotels Pvt. Ltd.**  
No.16, ECR-Cuddalore Main Road  
Kirumampakkam,  
Puducherry – 607 402  
...Respondent No.6  
(Original Respondent No.7)
7. **M/s. Hotel Mass Private Limited**  
Nos.152 and 154, Maraimalai Adigal Salai  
Orleanpet  
Puducherry – 605 001  
...Respondent No.7  
(Original Respondent No.1)

**Present:** Shri A.K. Mylsamy, Ms. Shalini Kaul, Shri Chaman Lal Choudhary, Advocates for the Appellants

Shri R. Jawahar Lal, Advocate for Respondent Nos.1 to 5

Respondent No.6 – served by public notice – Absent.

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

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

1. This appeal has been filed by original Respondents 2 to 6 being aggrieved by the orders passed by the National Company Law Appellate Tribunal, Division Bench, Chennai in TCP 157/2016 on 3<sup>rd</sup> October, 2017. (The Impugned Order in the number of the Company Petition has mentioned “(No.6/2015)” as the number of the Petition as originally registered but copy of the Company Petition with the Appeal mentions the Company Petition as originally filed before CLB having “No.16/2014”).

2. The Impugned Order has been passed in the Company Petition filed by present Respondents 1 to 5, who are the original Petitioners in the Company Petition. Respondent No.6 of the appeal is original Respondent No.7 and the Company concerned M/s. Hotel Mass Private Limited was Respondent No.1 in the Company Petition and has been arrayed here in Appeal as Respondent No.7.

2.1 We will refer to the parties in the manner in which they have been arrayed in the NCLT in the Company Petition.

**Case of Original Petitioners**

3. The Company Petition (Annexure A - 33 Page – 442 of the Appeal) shows the case of Petitioners in brief as under:-

a) The Company Petition refers to the different shares held by the original Petitioners and refers to the Respondent No.1 - M/s. Hotel Mass Private Limited (hereinafter referred as the Company) stating that the same was incorporated in 1982. The object of the Company was to carry on business of restaurants and refreshment rooms. Original Respondent No.2 Dr. M.A.S. Subramanian (Appellant No.1) is son of Late Shri M.A. Shanmugam. The Company Petition gives details regarding other Respondents 3 to 6 which shows that they are relatives of the Respondent No.2. According to the Company Petition, the Company was incorporated in 1982 by Late Shri M.A. Shanmugam, his wife (Late) Mrs. S. Senganiammal and the second Petitioner (Thiagarajan). The petition states as to how subsequently the shares were allotted to other Petitioners and Respondents. As per the petition, vide Form No.2 dated 14.03.1983, 30,000 equity shares were allotted to the family members out of which 17820 were allotted as payable in cash and remaining 12180 equity shares of Rs.100/- each were allotted for a consideration otherwise than in cash to Late M.A. Shanmugam in lieu of selling his property being plot of land measuring 52 Kuzhies and 14 Veesams situated at Pudupalayam Villagem, as described in the petition. The land had unfinished building constructed over it. The shares were allotted to Late M.A. Shanmugam before execution of sale deed. However, the Company was put in

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possession of the land and it completed the construction for setting up the hotel. The Company was in the nature of quasi partnership under the guise of private limited company. Directions had fiduciary duty towards members. Late Shri M.A. Shanmugam died on 06.06.1984 before he could execute the sale deed. Subsequently, Respondent No.2, son of M.A. Shanmugam being eldest educated member of the family who took control of all the affairs of the Company, took over the entire 16,000 equity shares which had stood in the name of Late M.A. Shanmugam, taking consent of other legal heirs. The 12180 equity shares which had been allotted to Late M.A. Shanmugam for consideration payable otherwise than in cash after he had promised to register the land in the name of the Company reflected in the balance sheet of the Company and the Company was in possession of this land and was the real owner.

(b) The Petitioners claimed that wife of Shanmugam expired and her shares were also allotted in the name of Respondents 3 to 6. Petition claims that the Petitioners learnt that Respondent No.2 in connivance with Respondents 3 to 6 held various meetings between 1998 to 2003 to increase authorized issued paid up capital without giving Notice to other members of the Company and that the Petitioners were kept in the dark as no Notices were received by them. The further issued shares were distributed by the Respondents between themselves without offering the same to other members in violation of Section 81 of the Companies Act. The petition gives particulars regarding the shareholding on 31.03.2011. According to the Petitioners, Clause 3 and 15 of the Articles of Association

prohibited transfer of shares to persons other than members. Clause 16 gives rights to members of pre-emption, if any member wants to sell the shares. The petition makes further averments regarding acts of Respondent No.2 and other Respondents to claim that the requests of Petitioners for information were being denied in spite of letters. Petitioners claimed that their enquiries in September, 2014 disclosed that the Respondents 2 to 6 had sold off the land standing in their name while the actual ownership was vesting with the Company, along with other lands of Respondent No.7 by sale deed dated 31.10.2011 which was registered as document No.1844 of 2013 in the office of District Registrar, Puducherry. Petitioner claimed that the Respondent No.2 with his family members had clandestinely sold their shares in the Company along with the assets of the Company. These facts were never informed to the Petitioners by the Respondents 2 to 7. The selling of shares by Respondent No.2 and his family along with assets of the Company was surreptitiously done with mala-fide intentions. The Petitioners had not received any Notice regarding such sale. The same deserves to be set aside. Respondent No.2 as MD sold the buildings, movables and fixtures of the Company for Rs.3,93,80,706/- to Respondent No.7, which was much less than the book value of the building disclosed in balance sheet of Financial Year 2010 – 2011. The substratum of the Company had been completely lost.

c) Thus, the petition claimed various reliefs as mentioned in the Company Petition seeking accounts, audit and directions to Respondent Nos.2 to 6 to deposit Rs.58.50 crores received from Respondent No.7 and

also investigation into the affairs of the Company as well as setting aside of 3,15,860 equity shares sold by Respondents 2 to 6 to Respondent No.7.

### **Case of Original Respondents 2 to 6**

4. The learned NCLT referred to these pleadings of the Petitioners and also referred to the Reply filed by original Respondents 2 to 6. Copy of the Reply is at Page – 466 of paper book of this appeal. These Respondents claimed in NCLT that the immovable property did not belong to the Company. They denied that 12,180 equity shares were allotted for consideration other than money. NCLT referred to the response of these Respondents 2 to 6 that there was sum of Rs.3,80,23,656/- as unsecured loan at the end of March, 2011 and Rs.49,52,892/- as secured loan with accumulated loss of Rs.736.67 lakhs. These Respondents claimed that there was loan from Tourism Finance Corporation of India Ltd. and thus gave reasons as to why authorised share capital was required to be increased on 14.06.1999. NCLT referred to the claim of Respondents that the wives of original Petitioner No.1 and Petitioner No.2 had filed O.S. No. 3 of 1996 where similar issue as in the petition was raised and the same was compromised. These Respondents had claimed in NCLT that O.S. 68/2014 was filed by the wife of first Petitioner and thus they claimed that the petition was hit by *res judicata*. These Respondents claimed that the shares of Respondents 2 to 6 were transferred and conveyed along with land and building which was owned, possessed and enjoyed by Respondents 2 to 6 as on 31.10.2011 and that they do not have any right

or interest in the first Respondent Company and the records pertaining to Respondent No.1 Company were in the custody of 7<sup>th</sup> Respondent. They claimed that the sale was legal, valid and binding. According to them, had the property not been sold at appropriate time, the Company would have ended up in winding up.

### **Impugned Order in brief**

5. The Impugned Order shows that the learned NCLT considered the rival pleadings and the Rejoinder as well as Counter in CA 15 of 2017 filed by Respondents/Petitioners. Reference was also made to the pleadings relating to lease deed which appears to have been executed by original Respondent No.2 in favour of the Company and the fact that the same was not property stamped.

6. The Impugned Order till Page – 34 keeps referring to the pleadings. From Page – 34 of Impugned Order, there are reasons referring to pleadings and findings. It would be more appropriate to reproduce the same as it is:-

“The Respondents/petitioners have sought to set aside the sale of 3,15,860 equity share of Rs.100/- each sold by the applicants/Respondents 2 to 6. In this connection, it is seen that the applicants/Respondents have not adduced any material evidence to prove that the issue of share capital was raised in the Board Meeting and



the same was approved as being beneficial to the R1 Company. The applicants/Respondents have stated that there is no violation of Clause 15(3) of the Articles of Association but this has not been proved as could be seen from reading of the relevant provisions contained in the Articles of Association.

Moreover, before selling the shares to R-7, the shares should have been offered to the other shareholders. On their refusal to exercise the right only the shares should have been allotted to the Respondents. But no records have been adduced which will substantiate the statement made by the Respondents.

The other major issue raised by the petitioners with the sale of immovable property which was to be transferred in the name of the R1 Company for the initial allotment of 12180 equity shares for a consideration, otherwise in cash to late Mr. M.A. Shanmugam. The shares were allotted to late Mr. M.A. Shanmugam in lieu of selling his property being plot of land measuring 52 kuzhies and 14 veesams situated at Pudupalayam Village, Oreleanpet, Pudupalayam Village, Puducherry together with an unfinished building constructed over the aforesaid property.

According to the petitioners, this was done before the shares were allotted in favour of late Mr. M.A. Shanmugam prior to the execution of the sale deed for the above land and building. The R1 company, however, was put in possession of the said land and had completed the construction activities for setting up the hotel. The petitioners have also annexed Form No.2 dt. 14.03.1983 in support of their contention. Since late Mr. M.A. Shanmugam died on 06.06.1984 the sale could not be executed in favour of the Company and after death his son, the R2 controls the Company and its affairs. The entire shareholding of the late M.A. Shanmugam amounting to 16000 equity shares were transferred with the consent of the legal heirs based on the promise of R2 that he will transfer the aforesaid property to the Company for the benefit of all the members of the R1 Company. The property has also been shown as an asset of the R1 Company as on 31.03.2011 and the notes to the Balance Sheet also amplify the above statement. The various averments made by the petitioners and respondents have been discussed above. The petitioners have stated that the Respondents No.2 to 6 had sold the lands belonging to R-1 company along with certain other lands to R7 Company by a sale

deed dt. 31.10.2011 registered as the document No.1844 of 2013 in the office of District Registrar, Puducherry.

The petitioners have further stated that the Companies property including building, movables and fixtures were sold for Rs.3,93,80,706/- to R7 Company which was much less than the book value of the buildings disclosed in the Balance Sheet for the financial year 2010 -11. The respondents have not shown any proof that the valuation was done for the properties of the R1 Company which were sold which due to non execution of the sale deed was held in trust by the R2. The Respondents have also not submitted a Special Resolution with the approval to sell the Company's properties by special resolution approved by AGM/EGM. In view of the fact, that it has been established that the property in question pertains to R1 Company, the sale consideration has not been shown by the Respondents 2 to 6 to have been debited to the books of accounts of R1 Company.

In view of this, we make the order as follows:-

#### ORDER

In view of the facts discussed above, it is clear that the Respondents 2 to 6 have sold their entire shareholding to the R7 Company. They have also sold the properties shown in the last available balance sheet for the

year 31.03.2001 of the 1<sup>st</sup> Respondent Company. All these points have been, at length, discussed above. Both the petitioners and the Respondents have not produced any documents or the accounts of the R1 Company for the subsequent years which could clearly indicate clear financial position of the R1 Company.

To enable this Tribunal to arrive at a decision based on facts, it is hereby ordered;

1. That **an independent Auditor may be appointed**, through mutual consent among the parties, to arrive at the value of the property and the buildings of R1 Company when it was sold to the R7 Company. (as on 31.10.2011 in terms of the sale deed attached with the petition). the auditor may also ascertain whether the proceeds have been brought into the books of R1 Company. The independent auditor will also update the accounts of the Company from 01.04.2011 onwards till the current date to ascertain the factual and financial position, with the comments, if any loss has been caused to the 1<sup>st</sup> Respondent Company by the Respondents 2 to 7, and if so, to quantify the same.
2. **A Practicing Company Secretary may also be appointed** through mutual consent among the

parties to verify whether the procedures and the practices required to be followed in compliance to the Companies Act and various other rules have been followed while selling the shares of R2 to R6 together with the sale of the R1 Company's assets to R7.

3. The Practicing Company Secretary may also **provide the details regarding shareholding pattern in the R1 and R7 Companies together with the particulars of their Board of Directors** at the time when the assets of the Company and the shares held by respondents No.2 to 6 were sold/transferred to Respondent No.7.
4. The independent Auditor and Practicing Company Secretary may **submit their reports within two months** after their date of appointment.
5. In case, the petitioners and Respondents are **unable to arrive at a consensus** for appointing an independent auditor and Practicing Company Secretary **the parties may approach this Tribunal for their appointments.**
6. The **fees** to be paid to the independent auditor and the Practicing Company Secretary **shall be borne by the R1 Company.**

The Registry shall place the matter before bench after the receipt of the report of Auditor and Practicing Company Secretary.”

### **The Arguments**

7. In this present appeal filed by original Respondents 2 to 6, referring to written submissions the learned counsel for the Appellants submitted that 34 pages of the Impugned Order merely refer to pleadings and there is hardly any discussion of the various rival claims. It has been argued that NCLT did not apply its mind to the dispute. According to the Appellants, after the death of M.A. Shanmugam, the LRs namely four daughters and the only son of Late M.A. Shanmugam executed lease deed on 11.06.1984 relinquishing all the rights, titles in the estate of M.A. Shanmugam in favour of wife of Shanmugam. Later on, wife of Shanmugam, on 04.07.1984 executed settlement deed in favour of the original Respondent No.2 (Appellant No.1) and the settlement deed includes the land on which the hotel stood. Mutation was carried out even in revenue records. Respondent No.2 executed lease deed of the land in favour of the hotel registered as document 5890/98. According to the Appellants, the original Petitioners were aware of these things. It has been argued that one of the daughters of Late M.A. Shanmugam had filed CS 352/1985 for partition of the assets, which included the land on which hotel stood. She challenged the lease deed and the settlement deed but the suit entered into compromise on 19.02.1987. Another daughter of Late M.A. Shanmugam filed application wanting to be transposed as plaintiff in

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the said suit and the suit was transferred to District Court, Pondicherry as OS 3/1986. Another modified Compromise Memo was filed on 03.03.1997 before the District Judge, Pondicherry. The Appellants argued that original Petitioners 1 and 2 are the husbands of said daughters of Late M.A. Shanmugam who litigated at the High Court and District Court and thus the original Petitioners have not come with clean hands. According to the Appellants, original Petitioners 1 to 3 had even received dividends. It is argued that original Petitioners did not disclose in NCLT regarding lease deed, settlement deed and various litigations and had thus suppressed material facts. The counsel for Appellants referred to these documents, copies of which have now been filed in the appeal. It has been argued by the Appellants that NCLT did not apply its mind and merely repeated the pleadings viz the allegations in the Company Petition, counter statements, applications filed by the Respondents and counter filed by the Petitioners. According to the Appellants, based on Form 2 regarding allotment of shares, NCLT concluded that the land belonged to the Company without considering the counter filed by these Appellants who were Respondents. Investigation has been ordered on the basis that documents after 31.03.2011 have not been filed by the parties. Appellants have referred to some Judgements, which are not necessary to quote as different on facts, to basically assert the principles that to invoke equity, Petitioners need to be with clean hands (but suppressed litigation by their wives against family) and thus suppressed facts and are not entitled to relief. The Appellants thus claim setting aside of the Impugned Order.

8. Against this, counsel for Respondents 1 to 5 (original Petitioners 1 to 5) submitted that these original Petitioners are minority shareholders. The Appellant No.1 (original Respondent No.2) has been Managing Director of the Company and was controlling the affairs. According to these original Petitioners, the land stood in the name of the Company as per balance sheet for 2010 – 2011. These original Petitioners referred to the document to show that in the balance sheet, the land was shown as fixed asset of the Company having value to the extent of Rs.2 lakhs. They also referred to Form - 2 (Page – 112 of paper book) which is dated 14<sup>th</sup> March, 1983 to show allotment of shares against the land. It is argued that the Company had only this piece of land on which the structure was standing. Reference is also made to the Auditor's Notes for the Financial Year 1987 – 1988, copies of which have been filed (page 165 – 166). The argument is that the land belonged to the Company as well the structure on it, and the Respondents could not have transferred the land and disposed of their shares in favour of original Respondent No.7 – M/s. Vee Pee Estate and Hotels Pvt. Ltd. without holding an EOGM or AGM with specific Resolution on this count. According to original Petitioners, the Articles of Association give rights to the other members and without offering the shares to them, the Respondents could not have transferred their shares to Respondent No.7 who was admittedly not a member of the Company. No Board of Directors' approval or copy of meeting is shown. According to the original Petitioners, they were not served with any Notices regarding any such meetings.



9. In the arguments and in this matter, the main stress of the original Petitioner is on 3 aspects:-

1) The Petitioners are minority shareholders and original Respondent No.2 (Appellant No.1) was looking after the affairs of the Company along with the other original Respondents 3 to 6 who are his immediate family members and although the land belonged to the Company, these Respondents illegally transferred the land as well the structure of the Company to original Respondent No.7 (Respondent No.6 in this appeal) and thus, the substratum was transferred.

2) The other dispute mainly stressed is that original Respondents 2 to 6 sold off their shares to an outsider – original Respondent No.7 – M/s. Vee Pee Estate and Hotels Pvt. Ltd. in violation of the Articles of Association and without offering the same to the other members of the Company.

3) The land of the Company and the structure of the Company as well as the business has been sold off to original Respondent No.7 and substratum has been disposed by the original Respondents 2 to 6 without holding any EOGM on the subject and without Notice to other members.

### **Discussion of Points raised by Parties and Findings**

10. In the Company Petition, the original Petitioners raised points as mentioned in Para – 9 (supra) (see para – 12 of the Company Petition [Annexure A - 33 at Page - 453]) but the stand taken by the Appellants (Original Respondents 2 to 6) in their reply (copy of which is Annexure A

34 Page 466 of the Appeal) shows the pleadings of these Appellants as under:-

“19) .....The allegations made in para 12 are without any basis. The conveyance of land and transfer of share to the seventh respondent made by respondent 2-6 are valid and legally binding on the parties. The allegation that there has been fabrication of accounts and mismanagement of company are false and the petitioner is put to strict proof of the same.

From and out of the sale proceedings only the loan of Tourism and Finance Corporation of India and other financial institutions with interest was repaid. It is to be noted that respondents 2 to 6 have sold their movables and immovables to liquidate the outstanding of the first respondent company with TFCI Ltd and other institutions. The allegations as though the petitioners did not have any knowledge of the sale are false. The intent of late M.A. Shanmugam cannot be spoken by the petitioners herein who do not have any personal knowledge. The allegations of relinquishment of right are denied. The petitioners do not have any right other than the present share holding, which they still own, in the first respondent company.

20) With regard to para 13, it is submitted that the sale made with the respondent is legal, valid and binding. This respondent submits that proper notice was issued to the petitioners. The allegation that the sale was done surreptitiously and with malafide intention is false. There is no necessity for the second respondent to harass the petitioners or oppress the minority share holders as claimed by the petitioners. But for the act of the respondents 2 to 6 in selling their movables and immoveables standing in their name and discharging the loan availed from various financial institutions and individual, the 1<sup>st</sup> respondent would have been liquidated by winding up or any other recovery proceedings initiated by the creditors. The respondents 2 to 6 submit that the sale made by them is legal, valid and binding and has been done in accordance with law. Special resolution dt: 25/6/11 was properly passed and the sale was executed by the respondent 2 to 6.....”

11. The Petitioners in the petition have pleaded in paragraphs – 14, 15 and 16 of the Company Petition that the Original Respondents 2 to 6 had sold off their entire equity shares held by them to Respondent No.7 in contravention of the Articles of Association and the original Respondent No.2 had sold off the buildings, movables and fixtures to Respondent No.7 at an amount which was much less than book value of the building and

that such alienation would require a special Resolution of the General Body but there was no Notice of General Body Meeting and the only business had been sold off lock, stock and barrel without informing other shareholders; and that the substratum had been lost. In reply to these averments in the Company Petition in paragraphs – 14, 15 and 16, the Appellants – original contesting Respondents in Para – 21 of their reply merely stated that the allegations in paragraphs – 14, 15 and 16 with regard to the sale deed are matter of record and claimed that the sale was according to the law and added that even after receipt of Notice, the Petitioners or other shareholders did not choose to attend the meeting. They claimed that the sale consideration had been fixed properly for the movables and immovables. These Appellants added that due to financial status of the Company, they were forced to sell the movables and immovables. They added that the rights of the original Petitioners as shareholders were still intact.

12. Looking to the above pleadings, it is clear that the fact that the contesting Respondents have sold off the movables and immovables of the Company and have transferred all their shares is not at all in dispute. This is thus admitted fact. Although the Appellants – original Respondents claimed in their reply that there was a special Resolution dated 25.06.2011, no such Resolution has been pointed out to the NCLT nor to us. We have already referred to the reasonings recorded by NCLT which includes the observation that the Respondents have also not submitted a special Resolution that the approval to sell the Company's properties by

special Resolution approved by AGM/EGM. At the time of arguments before us, we pointedly asked the learned counsel for the Appellants referring to the copy of sale deed dated 31.10.2011 (Volume II Page 343) which sale deed, along with other properties includes the land on which the Company is standing, to show us where is the Resolution of the Company to transfer the land as well as the structure to original Respondent No.7. The learned counsel for the Appellant stated that the Resolution to sell is not there. The sale deed shows that the original Respondents 2 to 5 joined the sale deed as vendors 1 to 4 and the Company was added as vendor No.5 through the original Respondent No.2 - M.A.S. Subramanian claiming to be duly authorized to sell and these original Respondents 2 to 4 along with their other properties appear to have sold off the land of the Company to original Respondent No.7 – M/s. Vee Pee Estate and Hotels Pvt. Ltd. The sale deed is dated 31<sup>st</sup> October, 2011 but appears to have been recorded in the office of concerned Registrar on 7<sup>th</sup> October, 2014. The Company Petition was filed on 25<sup>th</sup> October, 2014. Thus, there is no substance in the claims of the Appellants regarding delay.

13. At the time of arguments, the learned counsel for the Appellants was confronted with this sale deed and when he was asked to show the Resolution to sell property of the Company, he merely stated that the land belonged to original Respondent No.2 while the factory building belonged to the Company.

13.1 Even regarding this claim of the Appellants, at the time of arguments before us, we had noticed as pointed out by the learned counsel for the original Petitioners, Form 2 (Page 112 and 113 of the Appeal) which recorded and which was signed by the Managing Director that there were 12180 shares allotted for a consideration otherwise than in cash and in the concerned column, the plot of land measuring 52 Kuzhies and 14 Veesams as described in the Form 2 was recorded. There is no dispute regarding the fact that late Shri M.A. Shanmugam had established this Company and being the owner of this land and while establishing the Company, he showed the land as consideration given to the Company against which he was allotted 12180 shares. This document is of 1983 and there is no reason to doubt the same. Then there are Notes of Balance Sheet for the year ending 31.03.1988 (Appeal page 165) which refer to the Pondicherry Municipality levying municipal tax, the quantum of which had been disputed and the fact that the Appellate Authority has reduced the same but that the Commissioner had gone in revision to the High Court. These notes dated 31.03.1988 mentioned in Note No.4 that the title deeds are still in the name of the Directors and steps are being taken to get them transferred in the name of the Company. The learned counsel for the original Petitioners referred to schedule annexed to the Balance Sheet of the Company as on 31<sup>st</sup> March, 2006 (page 256 of Appeal) where also in Schedule - A relating to share capital, there is mention that out of subscribed and paid up capital 323860 equity shares, 12180 shares had been allotted as fully paid up without payments being received in cash.

Part of this Balance Sheet, Schedule – E (Page 273 of the appeal) shows that land was counted along with building and other movables when the Company book shown for the purpose of depreciation. Of course, again the land depreciation shown was zero and in the net block, value of the same was recorded. The latest Balance Sheet available is of 31.03.2011 (Page - 316) where also in the details of fixed assets, land and its value have been shown.

14. All these documents clearly show that late Shri M.A. Shanmugam was issued shares to the extent of 12180 against the land, possession of which was handed over to the Company and the Company had even made structure of the same and the land and structure were shown as property of the Company and was treated accordingly right from 1983 till 2011. It appears that Shri M.A. Shanmugam after establishing the Company in 1983, suddenly passed away on 6<sup>th</sup> June, 1984. It is not in dispute that the shares of late Shri M.A. Shanmugam have come down to the present Appellant No.1 (original Respondent No.2). Thus, the Appellant No.1 who were managing the affairs of the Company had the fiduciary duty to protect such land which was in possession of the Company by way of part-performance of the contract. This Appellant No.1 on 16.09.1998 preferred to get a lease deed recorded (Appeal Page – 189) of the land of the Company. It is an interesting document. The lessor is the Appellant No.1 holding himself out as Managing Director and the lessee is M/s. Hotel Mass Private Limited (the present Company) represented by the same Appellant No.1 again describing himself as Managing Director of the Company to be the

lessee. Thus, the lease deed was created by Appellant No.1 in two capacities and he acted for the lessor and lessee both and created the document to be a lease for 27 years, fully loaded in his favour in individual capacity putting the liability on the Company to pay 32 lakhs as rental interest free deposit with other conditions like the company may make a fresh construction and when the lease expires, the structure will have to be left at the time of expiry of the lease. He even brought into existence another rectification deed (Page - 218) on 2<sup>nd</sup> March, 1999. Thus this Appellant No.1 who was Managing Director of the Company which was established on such land and as a trustee of the shareholders, instead of ensuring that sale deed of the land is executed in favour of the Company, appears to have committed breach of trust by first creating a lease deed (although the Company was in possession as a prospective purchaser who has transferred the consideration namely the shares) and then instead of trustee protecting the possession of land with the Company holding it in Part Performance of Contract, Appellant No.1 sold off the land to original Respondent No.7.

15. Even regarding transfer of shares, when the learned counsel for the Appellant has referred to Page – 440 of the appeal which is part of the search Report, he accepted that the document shows the shareholding pattern as on 29.09.2011. The search Report shows 3 persons on Board of Directors No.1 - Kumaravel Varatha Rajan and No.2 – Jayanthi Kumaravel (both appointed as Additional Directors on 31.10.2011) and No.3 – Manikandan Kumaravel appointed as Additional Directors on  
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31.08.2012. The learned counsel for the Appellants accepted that the original Respondents 2 to 6 had transferred all their shares in favour of these 3 persons. This date of 31.10.2011 is the same date on which the sale deed (Page – 344) selling all the properties in favour of original Respondent No.7 was passed. This Kumaravel Varatha Rajan signed that sale deed representing original Respondent No.7 - Vee Pee Estate and Hotels Pvt. Ltd. We have already referred to the pleadings of the Appellants – original Respondents that there is no denial regarding the fact of transfer of the Company properties and also the shares by them. The counsel for Appellants when asked at the time of the arguments was unable to show us any document or Notice by appellants to other shareholders offering them the shares or to show us any procedure which was followed or adopted for transferring the shares to original Respondent No.7 - Vee Pee Estate and Hotels Pvt. Ltd. The counsel was unable to show us any document on that count. The Appellants in the Company Petition and in this Appeal have referred to Article 4 of the Articles of Association (Page – 98 and 99 of Appeal). According to the Appellants as per Article 4, the shares of the Company are under the control and discretion of the Directors who may allot, transfer or otherwise dispose the same to such person or persons and for such consideration upon such terms and conditions and at such time as Directors may in their absolute discretion think fit. The argument is that this gave discretion to the Directors to transfer all the shares as per their will and wish. We find that Article 4 is part of Articles 3 to 7 under the heading of Share Capital. These Articles

cannot be read in isolation and are required to be read along with Articles 15 to 27 of the Articles of Association, which Articles are under the heading of “Transfer on Shares” (should be Transfer of Shares). Admittedly, this was not a new allotment or transfer of shares at the time of incorporation. The Appellants (original contesting Respondents) admittedly transferred the shares which had come to them after the incorporation of the Company and on death of late Shri M.A. Shanmugam and then his wife. Reading Article 4 with Articles 15 to 27 makes it clear that the shares cannot be transferred to any person who is not a member of the Company so long as any other member is willing to purchase the same at fair value. Articles 15 to 27 have detailed procedure in this regard. There is nothing on record to show that the Appellants had followed any procedure under the Articles of Association or the Companies Act. They appear to have treated the land and the structure and the shares of the Company as their private property and simply sold off the same and walked away. Thus, the synopsis of the appeal in para – 6 claims that 97.83% of the paid up share capital of the Company was held by the Appellant No.1 and his family and the Appellants negotiated with the 6<sup>th</sup> Respondent (original Respondent No.7) - Vee Pee Estate and Hotels Pvt. Ltd. for sale of properties and the shares held by Appellants and that they handed over 3,23,860 shares and transfer deeds to the Directors of Respondent No.6 (in Appeal). As per synopsis, in this regard sale deed was executed by all the Appellants and the Company on 31.10.2011 in favour of the 6<sup>th</sup> Respondent (Original Respondent No.7) and on 31.10.2011, shares were transferred to 1) Mr. V. Kumaravel 2) Mrs. K.

Jayanthi and 3) Mr. K. Manikandan. In the face of such stand taken by the Appellants themselves, and on their apparent failure to show any notice to any other shareholders regarding holding EOGM to transfer the properties and business of the company and failure to show any Board Meeting relating to transfer of shares, really speaking there is not much required to be stated as a whole that the acts of the Appellants were clearly oppressive of the minority shareholders and their actions of transferring the land as well as structure and business of the Company to original Respondent No.7 as well as their transfer of shares without following any procedure cannot be upheld. However, we have recorded the above reasonings in some details as this is last court of facts. The Appellants criticized the Judgement of the learned NCLT claiming that it did not record much reasonings. We find that looking to the pleadings as were there in the record, really there was no much to be stated but the learned NCLT did observe that the shares had been allotted to late Shri M.A. Shanmugam in lieu of selling his property being plot of land measuring 52 Kuzhies and 14 Veesams together with unfinished building constructed over the property. The reasonings show that the NCLT was aware of the fact that possession of the land had been handed over to the Company which completed the construction for setting up the hotel and that Form No.2 dated 14.03.1983 was there in support. NCLT noticed the early death of M.A. Shanmugam before execution of the sale deed and that the property had been shown in the assets of the Company even as on 31.03.2011. NCLT found that the Respondents did not show any proof that valuation

was done on the properties which were being sold. NCLT found that it was established that the property in question pertained to Respondent No.1 Company. According to us, when the learned NCLT noticed and even found that the property in question was pertaining to Respondent No.1 Company and when it was finding that the burden on the Respondents had not been discharged by them, the NCLT was duty bound to set aside the sale deed transferring the land which was in possession of the Company. Looking to the pleadings, it was necessary that NCLT should have also directed setting aside of the shares which had been transferred without following any procedure.

16. We reject the averments made by the Appellants that the land belonged to them. The land was in possession of the Company under an agreement which can be seen from the records that against the transfer of shares the original owner of the land had agreed to sell the land to the Company. For long the land was in possession of the Company and the Company was in possession by way of part-performance of the contract and there was nothing remaining to be done by the Company except that late Shri M.A. Shanmugam had to execute and register the sale deed which unfortunately he could not do as he suddenly passed away in a year of incorporation. The Appellants cannot take advantage of the position they hold as trustees to deprive the Company of the possession of its land. The Appellants have argued that the wives of original Petitioners 1 and 2 who were also near relatives of the Appellants had litigated with them regarding the partition of the properties left by late Shri M.A. Shanmugam in which

litigation the present land was also included. The Appellants have given details regarding those litigations and their ending into compromise to argue that original Petitioners had knowledge about the disputes and thus they must be said to have come without clean hands. We find that even if the wives of the original Petitioners 1 and 2 had any litigation with reference to the properties left by Shri M.A. Shanmugam and their relationships with the Appellants, those disputes cannot be basis to say that the original Petitioners who are shareholders in their own rights can be debarred from making the claims they made in the Company Petition. We have already discussed as to how the sale deed dated 31.10.2011 was executed which came to be entered into books of the District Registrar as Document No.1844/2013 and that the Company Petition filed on 25.10.2014 could not be said to be delayed. The argument of the Appellants that the original Petitioners did not disclose in the NCLT the lease deed, settlement deed and litigations have no substance. We hold that the petitioners could maintain the petition in their individual rights as shareholders. We reject the arguments that the original Petitioners brought the Company Petition without having clean hands or that they had suppressed material facts.

17. In appeal, when this matter came up before us and the arguments had begun, we had expressed to the learned counsel for the Appellants that looking to the pleadings and admitted facts and the state of record, the NCLT should have set aside the sale deed as well as transfer of shares but had instead directed audit and asked the Company Secretary

to be appointed to verify if the procedure had been followed. We had asked the learned counsel if he still wants to continue with the arguments of the appeal. The learned counsel preferred to argue the appeal and thus we have heard the whole appeal on merits and now we have come to this conclusion that the transfer of assets and business of the Company as well as transfer of shares is not liable to be upheld. Although the Respondents – original Petitioners did not file the appeal and appear to have gone along with the Impugned Order which is more in the nature of Interim Orders, we find that looking to the provisions of the Companies Act, 2013, when there is sufficient material to record a finding that the acts of the Appellants – original Respondents were oppressive to the other members of the Company, it is necessary to safeguard the interest of the Company. The admitted facts of the present matter show not only oppression on the part of original Respondents 2 to 6 but also mismanagement as in the name of clearing loans, the whole Company itself has been transferred without letting the other shareholders know. The present appeal being continuation of the original Company Petition, we can exercise powers which were required to be exercised by the learned NCLT under Sections 241 and 242 of the Companies Act, 2013 read with Rule 11 of the National Company Law Tribunal Rules, 2016 as well as Rule 11 of National Company Law Appellate Tribunal Rules, 2016. We find that at present, passing of Orders of winding up the Company would unfairly prejudice members, but otherwise the facts justify the making of a winding up order considering the acts committed by the Appellants. If in spite of the efforts

as per Order we propose to pass don't succeed, NCLT may consider directing steps for winding up. The ends of justice require this Appellate Tribunal to pass necessary orders although these orders are required to be passed against the Appellants who have come up in the appeal as we find that this is necessary in the interest of the Company which was established by late Shri M.A. Shanmugam. We thus pass the following order:-

**Order**

We maintain direction 1 issued by the learned NCLT in the Impugned Order that an Independent Auditor should be appointed to carry out audit as proposed by the learned NCLT. The fees of the Auditor to be appointed by NCLT shall be borne by the original Respondent No.1 Company. The other directions 2 to 6 of the Impugned Order are quashed and set aside.

We quash and set aside the shares transferred by original Respondents 2 to 6 in favour of three persons -  
1) Kumaravel Varatha Rajan, 2) Jayanthi Kumaravel and  
3) Manikandan Kumaravel. We restore the shareholding of the Company as on 29.09.2011.

We declare that the sale deed dated 31.10.2011 executed by original Respondents 2 to 6 in favour of original Respondent No.7 as not binding on the Respondent No.1 Company.

The NCLT shall immediately appoint an Administrator to take over the land and structure of the Respondent No.1 Company and to manage the affairs of the Company. The NCLT is requested, under Section 242(2)(k) of the Companies Act, 2013, to appoint such number of persons as Directors of the Respondent No.1 Company as it finds appropriate to manage the affairs of the Company under supervision of the Administrator and to ensure holding of free and fair EOGM for the shareholders to decide future course of action for the Company.

It would be open for learned NCLT to later consider, if necessary, if Orders of winding up need to be passed.

The appeal is disposed accordingly.

There shall be no Orders as to costs.

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

[Balvinder Singh]  
Member (Technical)

New Delhi

12<sup>th</sup> July, 2018

/rs/nn