

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL****NEW DELHI****COMPANY APPEAL(AT) NO.44 OF 2018**

(ARISING OUT OF JUDGEMENT AND ORDER DATED 6.11.2017 PASSED BY NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH, MUMBAI IN MA NO.172/2016, CA NOS.70/2014, 82/2014 AND 91/2014 IN TCP NO.109/397-398/CLB/MB/MAH/2013)

**IN THE MATTER OF:****Before NCLT****Before NCLAT**

1. Smt Suman Dhir,  
W/o Shri B.K. Dhir,  
MIG 19, Indrawati Colony,  
Raipur, Chhattisgarh.

1<sup>st</sup> Petitioner  
(Original Petitioner)

1<sup>st</sup> Appellant

2. Shri Sarvesh Dhir,  
S/o Shri B.K. Dhir,  
R/o MIG 19, Indrawati Colony,  
Raipur, Chhattisgarh.

2<sup>nd</sup> Petitioner  
(Original Petitioner)

2<sup>nd</sup> Appellant

Versus

1. M/s Gyan Ganga Educational  
Institute,  
School Campus,  
Administrative Block,  
10<sup>th</sup> KM, Vidhan Sabha Road,  
Vill Nardaha PO GSI (Mandhar)  
Raipur 493111  
Chhattisgarh.

1<sup>st</sup> Respondent

1<sup>st</sup> Respondent

2. Shri Sachin Shandilya,  
S/o Late Shri Upendra Shandilya,  
M-25, Rajiv Nagar,  
Distt. Raipur  
Chhattish Garh.

2<sup>nd</sup> Respondent

2<sup>nd</sup> Respondent

3. Smt Manju Shandilya,  
W/o Late Shri Upendra Shandilya,

- M-25, Rajiv Nagar,  
Distt. Raipur  
Chhattish Garh. 3<sup>rd</sup> Respondent 3<sup>rd</sup> Respondent
4. Smt Munish Singh,  
W/o Shri R.P. Singh,  
R/o 4, Golden House,  
Khamardih Shanker Nagar,  
Thana Civil Lines,  
Distt.Raipur Chhattisgarh. 4<sup>th</sup> Respondent 4<sup>th</sup> Respondent
5. Shri Ravinder Pal Singh,  
Shri R.P. Singh,  
R/o 4, Golden House,  
Khamardih Shanker Nagar,  
Thana Civil Lines,  
Distt. Raipur, Chhattisgarh. 5<sup>th</sup> Respondent 5<sup>th</sup> Respondent
6. Registrar of Companies,  
Madhya Pradesh & Chhattishgarh,  
A Block, 3<sup>rd</sup> Floor,  
Sanjay Complex  
Jayendra Ganj, Lashkar,  
Gwalior. 7<sup>th</sup> Respondent 6<sup>th</sup> Respondent
7. Smt Rajkumari Kanda,  
W/o Shri Mohan Lal Kanda,  
R/o MIG 19, Indrawati Colony,  
Raipur, Chhattisgarh. 3<sup>rd</sup> Petitioner 7<sup>th</sup> Respondent  
(Original Petitioner)

For Appellant: Ms Sweta Bharti, Mr John Thomas, Ms Sluchi Sejwar,  
Advocates.

For Respondents: ME. Jeevesh Nagrath, Mr Amit Amist and Mr.Chandan  
Dutta, Advocates.

**JUDGMENT**  
**(20<sup>th</sup> August, 2019)**

**MR. BALVINDER SINGH, MEMBER (TECHNICAL)**

The present appeal under Section 421 of the Companies Act, 2013 has been preferred by the Appellants (Original Petitioner No.1 and 2) against the judgement dated 06.11.2017 passed by the National Company Law Tribunal, Mumbai Bench, Mumbai vide which the Tribunal has dismissed the Company Petition No.109/2013 filed by the petitioners with costs of Rs.1 lakh payable by each of the original petitioners. **The present appeal has not been filed by the Original Petitioner No.3 (who is arrayed as Respondent No.7 in appeal).**

**BACKGROUND**

2. The brief facts of the case are that the original petitioners filed a petition under Sections 397, 398, 399, 402, 403, 406, 235, 237 and 247 read with Section 111 of the Companies Act, 1956 against the acts of oppression, mismanagement, fraud, manipulation and falsification of Statutory and other records by and in active connivance of the Respondents before the Company Law Board, Mumbai Bench, Mumbai.

- a) On 7.9.1991 an agreement was executed between 1<sup>st</sup> appellant, 5<sup>th</sup> Respondent, 7<sup>th</sup> Respondent and one Late Upendra Shandilya for incorporation and promotion of 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent was incorporated on 20.11.1991. The main object of the company was to establish, run and promote educational institutions. It was decided

and agreed in the aforesaid agreement that the four signatories will have equal shares in the company.

- b) 1<sup>st</sup> appellant contributed Rs.2 lakhs during the period April, 1992 to November, 1997 and 2<sup>nd</sup> appellant contributed Rs.4 lakhs during the period November, 1992 to May, 1996 towards the share subscription, but the persons in control of the affairs of the Company have not allotted shares to the 1<sup>st</sup> and 2<sup>nd</sup> appellants and the amount paid by the petitioners was shown as “unsecured loan” in the balance sheet of the company. The petitioners were allotted only 1500 equity shares while the persons in control had taken a major portion of the shareholding of the company.
- c) The authorised share capital of the company till the year 1996 has been 25000 shares of Rs.10/- each out of which the original petitioners held 500 shares each (as per Company Petition). The paid up capital of the Company as per Annual Accounts for the year 1996 has been Rs.1,08,000/- in respect of 10800 shares.
- d) The original petitioners were never provided copies of Balance Sheets or other documents since incorporation inspite of repeated requests. These were provided to the original petitioners only in 2003-04 when these were produced before the Court.
- e) On seeing the Balance Sheet and Annual Reports in 2003-04, it came to the knowledge of the original petitioners that the Balance Sheet for the year 1997 showed an abrupt increase in authorized share capital by Rs.7,20,000/-. In the Balance Sheet, unauthorized increase in the

'paid-up' share capital of the company was shown from Rs.1,08,000/- to Rs.3,16,000/-

- f) The original petitioners were never served with any notice of meeting in which the authorised share capital was increased and also subsequently when the paid up share capital was raised. The original petitioners were never offered any shares of the company whereas Clause 4 of the Articles of Association of the Company mandates that any fresh issue of shares has to be offered to existing shareholders in the ratio of their shareholding on the date of issue of said shares.
- g) The original petitioners relied on the shareholdings of the company as per the Annual return for the year 1996 on which date the issued, subscribed and paid up share capital of the company has been Rs.1,08,000/-.
- h) Initially there were two directors at the time of incorporation of the company. Later on Original Petitioner No.1 and 3 were appointed as directors of the company. Original Petitioner No.3 had resigned from her post of directorship on 3.3.1995.
- i) Sh Laxmi Narayan Shandilya (since deceased) was appointed as Additional Director of the Company on 1.6.1996 and 2<sup>nd</sup> Respondent was also appointed as Additional Director on 11.6.1996.
- j) Later on Original Petitioner No.1 received a communication that she has been removed from the directorship of the company in AGM on 25.9.1998.
- k) The original petitioners filed company petition in July, 2013 before the NCLT alleging forged minutes of Meetings dated 1.6.1996 and

11.6.1996; withholding and non-payment of director's remuneration; withholding and non-payment of interest on contribution to original petitioners; fraudulent and wrongful increase of authorised capital and issue of fresh shares; allotment of 3200 shares as per Annual Return dated 28.10.1992; Minutes of Meetings and Accounts have not been permitted to be inspected nor copy of Accounts and other details of the affairs of the Company furnished to the Original Petitioners; alteration in the manner of operation of Bank Account of the Company; False and void Meetings of the company; staging the removal of the Original Petitioner No.1 and 3 from directorship of the company ; affairs of company in wrong hands and prayed for the following relief:

- i) The of Board of Directors of the Respondent Company be suspended and an Administrator and/or Special Officers be appointed to take charge over the management and affairs of the Company and of all books, papers, records and documents of the company as well as its assets and properties; or in the

#### Alternative

A Committee be constituted by this Hon'ble Bench consisting of the representatives of the Petitioners and of the Respondent Nos 2 to 5 in equal numbers alongwith an independent representative/chairman as appointed by this Hon'ble Board to manage and control of the affairs of the Company on such terms and conditions as this Hon'ble Board may deem fit and proper.

- ii) Frame a scheme for management, administration and control of the affairs of the Company vesting the same with the Petitioners

on such terms and conditions as this Hon'ble Board may deem fit.

- iii) An order for appointment of inspectors or any to her competent person or persons as inspectors to investigate the affairs of the company under Section 235 of the Companies Act, 1956 and to report thereon;
- iv) A Special Officer/administrator be appointed to take charge, custody and control of all books, records, accounts and documents as also assets and properties of the Company with a direction to make an inventory of the same and with further direction to initial all such books, records and documents.
- v) Declaration that the meetings of the board of directors of the company dated 1.6.1996 and 11.6.1996 as stated above and all meeting thereafter are illegal, null and void.
- vi) Declaration that all resolutions passed in the meetings with respect to appointments of Lt. Laxmi Narayan Shandilya, and respondents No.2,3 and 4 referred hereinabove, as directors of the company are illegal, null and void;
- vii) Appropriate reliefs be passed under and in accordance with section 402 and 403 of the Companies Act, 1956;
- viii) Declaration that the appointment and status of the Petitioner No.3 as director on the board of directors of the company continues to subsist as she had never tendered any resignation from here post;

- ix) Declaration that the resolution of the Company dated 25.9.2008 with respect to removal of the Petitioner No.1 from directorship of the Company as null and void, since the same was only a coercive conduct on the part of the Respondents towards stopping the Petitioner No.1 from claiming her rights as shareholder, director and creditor of the Company.
- x) Declaration that petitioners have proprietary interest in all the properties (moveable and immovable purchased/created out of the funds of the Respondent No.1 company as envisaged in Clause 11(e) of the Agreement dated 7.9.1991.
- xi) Injunction directing that one of the persons belonging to Petitioners group be made a compulsory signatory with respect to all the bank account operations of the Company.
- xii) Injunction directing the Respondents to pay to the Petitioners No.1 and 3 the amount of the remuneration due to them in their capacity as directors of the Company with pro-rata increment as compared to other directors, together with interest @ 18% with effect from the period the same fall due till the date of payment.
- xiii) Declare that the issuance and allotment of the equity shares of the Respondent No.1 company after the period from 31.3.1996, to be null and void and thereby direct that the position of the shareholding as on 31.3.1996 be restored.
- xiv) Injunction restraining the Respondents from altering or changing in any manner the shareholding of and in the Company;



- xv) Injunction restraining the Respondent Nos 2,3,4 and 5 and each of them from dealing with or disposing of, encumbering or alienating and/or transferring the assets and properties of the company in any manner.
  - xvi) Injunction restraining the Respondent from using the funds of the Company for the purpose of the instant litigation in any manner whatsoever;
  - xvii) Injunction restraining the Company from dealing with the assets of the company in any manner whatsoever;
  - xviii) Cancel and set aside the audit since the year 1996-97 to till date and direct to conduct special audit and re-audit of Respondent No.1 company.
  - xix) Cost of and incidental to this petition be paid by the Respondents;
  - xx) Direct Respondents 2 to 6 to bring back/plough diverse amount siphoned and/or caused loss to the Respondent Company.
  - xxi) Such further order or orders and/or direction or directions be given as to this Hon'ble Board may deem fit and proper;
- 1) Respondents filed its reply and stated that the company petition is miserably and hopelessly time barred. Respondent stated that the company petition is based on an agreement executed in the year 1991 and the petition has been filed after 22 years. Respondents further stated that the original petitioners have filed various civil suits, criminal proceedings against the respondents in different permutations and combinations seeking relief based on the so called agreement and the

sole purpose of multi-litigation is to force the Respondents to yield to their lust for a compensation at their dictated terms.

- m) Original Petitioner No.2 filed civil suit on 8<sup>th</sup> May, 2000 which was unconditionally withdrawn later on. On 29<sup>th</sup> March, 2001, original petitioners filed another suit seeking declarations based on the said agreement and the said suit was dismissed with costs on 24<sup>th</sup> September, 2012.
- n) Original petitioners serviced a Notice under Section 434 of the Companies Act, 1956, without claiming a specific amount and demanding bonus, dividends, shares, remuneration and interest on the said amount besides accepting as a Creditor of the Company and to call her on every meeting. Original petitioners filed CP No.6/2003 before the High Court of Chhatisgarh for winding up of 1<sup>st</sup> respondent on the ground as stated in the notice and later on it was withdrawn with liberty to approach Company Law Board, if permissible.
- o) Respondents stated that a number of suits and complaints have been filed by the original petitioners either jointly or severally. Since all the pending suits are based on the same cause of action as prayed in the petition, the petition deserved to be struck down and dismissed with costs on the ground of res judicata.
- p) Respondents prayed that the original petitioners are not entitled to choose different legal forums on the same cause of action; original petitioners have not come to court with clean hands; Original petitioners are causing harm to the interest of the Respondent No.1 company and further abusing the process of the Court by indulging in

judicial process through coercive correspondence with various authorities. The agreement which is between two groups of persons, which cannot be agitated in Company Law Board and prayed that the Company petition be dismissed.

### **Issues Framed**

3. After hearing the parties the NCLT framed the following issues:
  - a) Whether the petition is hopelessly time barred and whether the Limitation Act is applicable to the present case?
  - b) Whether the acts complained of in the Petition are continuous in nature and the provisions of Section 397 and 309 of the Companies Act, 1956 are applicable or whether the Petition is dressed up to suit the requirements of Sections 397 and 398 of the Companies Act 1956?
  - c) Whether a private agreement dated 7<sup>th</sup> September, 1991, which is purportedly entered between the parties before the incorporation of the Respondent Company, binds the Respondent Company?
  - d) Whether the Company Petition is barred by the principle of res judicata?
  - e) Whether the Petitioners approached the Company Law Board with clean hands and whether there was forum shopping to somehow get the desired relief?

4. After hearing the parties the NCLT decided the above issues in favour of the Respondents and passed the order dated 6<sup>th</sup> November, 2017. Relevant portion of the impugned order is as under:

**“18. Taking into consideration the above reasoning, we are of the considered view that the Company Petition No.109/397-398/CLB/MB/MAH/2013 is not maintainable on any count.**

**19. Application questioning the maintainability of the Company Petition is allowed on all the aforementioned counts. The Company Petition No.109/397-309/CLB/MB/MAH/2013 is, therefore, dismissed with costs of Rs.1,00,000/- (Rupees One lakh only) payable by each of the Petitioners.”**

5. Being aggrieved by the said impugned order dated 6.11.2017 the Original Petitioner No.1 and 2 have preferred the present appeal seeking the relief of quashing of impugned order dated 6.11.2017 and all other reliefs which were sought in the Company Petition.

### **Case of the Appellant**

6. The appellant stated that the 1<sup>st</sup> respondent company had been incorporated pursuant to the agreement dated 07.09.1991 in consonance with the terms and conditions of the agreement executed between appellant and respondents. The appellant stated that the NCLT, Mumbai has wrongly held that the petitioners cannot seek to enforce the terms and conditions of the agreement against the company and the directors which is not permissible in law and has wrongly decided the issue in favour of the Respondents.

7. The appellant stated that 1<sup>st</sup> appellant contributed Rs. 2 lakh and 2<sup>nd</sup> appellant contributed Rs.4 lakhs towards share subscription whereas the same has been shown as unsecured loan in the Balance Sheet.

8. The appellant stated that the NCLT has given a wrong finding that the underlying the principles of res judicata is that a decision once rendered by a competent authority on a matter in issue between the parties after a full enquiry should not be permitted to be re-agitated. The appellant submitted that the Civil Suit No.49A/1998 was dismissed on 21.12.2016 (Page543 of the appeal). The appellant further stated that in the said order dated 21.12.2016 the Hon'ble Court had clearly held that the appellant had been succeeded to prove that the appellant has been illegally removed from the directorship of the 1<sup>st</sup> respondent company. The appellant further stated that the Hon'ble Court rejected the claim only on the ground that Civil Court does not have jurisdiction to try the present suit in view of Section 10 of the Companies Act, 2013 (Page 539 of appeal). The appellant, therefore, stated that the Civil Suit was decided on merit but was dismissed on the ground that the jurisdiction of the Civil Court is barred by the provisions of the Companies Act, 2013. Therefore, the appellant stated that it is a settled law that the principles of res judicata are applicable only when a matter has been decided by the competent court/tribunal on the basis of merits and not on any other technical ground and stressed that in the present matter the decision of the Civil Court was not based on merits.

9. The appellant stated that the appellant No.1 and Respondent No.7 had been illegally removed from the directorship on 25.9.1998 and 3.3.1995 of 1<sup>st</sup> Respondent respectively without any notice of the same to them. The appellant further submitted that the Respondent have not shown any

document pertaining to the resignation of 7<sup>th</sup> respondent and the respondent only submitted that it was an oral resignation.

10. The appellant further stated that the Board Meetings dated 1.6.1996 and 11.6.1996 in which Late Sh Laxmi Narayan Shandilya was appointed as Additional Director and 2<sup>nd</sup> respondent as the Managing Director of 1<sup>st</sup> respondent are forged and fabricated documents and the same has been confirmed in the forensic expert report wherein it has been recorded that the said minutes of the Meeting were prepared after the alleged dates of Meetings.

11. The appellant stated that the increase in the authorized and paid up share capital by the Respondents had been done without any knowledge or consent of the 1<sup>st</sup> appellant and 7<sup>th</sup> respondent and was also in contravention of Clause 4 of the Article of Association. The appellant further stated that respondent had illegally allotted 22000 equity shares in the Board Meeting dated 31.3.2010 which is again contrary to the Articles of Association of the Company.

12. The appellant stated that the Chartered Accountant of 1<sup>st</sup> respondent has reported that the appointment of 2<sup>nd</sup> respondent as Managing Director of the 1<sup>st</sup> Respondent is not valid as no notices were received by the directors regarding the Board Meeting. It is further stated that no documents were produced by the Respondents showing the resignation of 7<sup>th</sup> respondent.

13. The appellant stated that the company petition cannot be dismissed on the sole ground of delay and laches. The appellant stated that the delay caused in filing of the company petition is not solely due to the fault of the

appellants. It is further stated that it was the Respondent who had been time and again filing several frivolous applications thereby delaying the matter. It is stated that the 1<sup>st</sup> Class Judicial Magistrate, Raipur directed the respondents to produce all the relevant record, however, the respondents did not produce the same despite the order of the Court. The Respondents only submitted the documents when the Hon'ble Supreme Court vide its order dated 13.1.2014 directed the respondents to submit the record to Chartered Accountant. It is stated by the appellant that in catena of judgements the Courts has held that the delay is not an absolute bar for dismissing the petition and the petition is not required to be dismissed when the delay has been explained. At last the appellant stated that the appeal may be allowed and the impugned order dated 6.11.2017 passed by the NCLT, Mumbai Bench, Mumbai may be dismissed.

### **Reply of the Respondents**

14. The Respondent No.1 to 3 stated that the said agreement dated 7.9.1991 has been never in their knowledge. The said Respondents further stated that even if it is assumed though not admitted that the said agreement existed, it being a private agreement between the individuals to which 1<sup>st</sup> respondent was never a party to the said agreement. The said Respondents further stated that none of the persons who were parties to the Agreement were the founding Directors of the company (Minutes of Meeting dt. 25.11.1991-Page 8 of the application filed by Respondent for additional documents). The said Respondents further stated that the said Agreement dated 7.9.1991 is neither a part of the Article of Association of 1<sup>st</sup> respondent

nor was it ratified or adopted at any time and the agreement is neither binding for the operation and management of the affairs of the 1<sup>st</sup> respondent nor on the shareholders or Directors of 1<sup>st</sup> respondent. The Respondents stated that on the basis of the said agreement the 1<sup>st</sup> appellant and 7<sup>th</sup> respondent filed criminal complaint alleging commission of offence of criminal breach of trust, fraud and forgery against late Mr Laxmi Narayan Shandilya and 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondent. However, the Court discharged the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent from the alleged commission of the offence.

15. The Respondents stated that the appellants have categorically admitted that the amount contributed by them was towards the unsecured loan. The Respondent have further stated that the appellants have itself in para 7.3 of the appeal (Page 12 of the appeal paper book) stated that it is the case of the appellants that the amounts paid by them could be treated as unsecured loan. The respondents further stated that in the agreement dated 7.9.1991, in Clause 3 (Page 173 of paper book) it is mentioned that the amount paid could be treated as an unsecured loan and on which interest shall be paid as provided in Clause 10(e) (Page 175). The Respondents stated that the appellants being aware of the same never challenged the same within the period of limitation. The Respondents further stated that the Balance Sheet and Annual Return are public documents and could have been obtained by the appellants from the ROC. The Respondents stated that as there was no grievance, therefore, the appellant never obtained the said documents. The Respondents further stated that confirmation of accounts, ledger and balance sheet of the 1<sup>st</sup> respondent are duly signed by the appellants acknowledging



that the amounts paid by them is an unsecured loan as per the books of account and on which they were receiving interest (Pages 26 to 29 of the Application filed by Respondents for additional documents). The Respondents further stated that the appellants had received interest @ 15% per annum on unsecured loan. The Respondents stated that the 1<sup>st</sup> respondent was duly deducting TDS on the interest paid on the unsecured loan given by the appellants. The TDS was duly deposited with the Income Tax Department. The Respondents has further stated that in the Suit No.49-A, it is stated by the appellant that the appellants were to be given interest on deposits (Page 318, Para 18). The Respondent further stated that a sum of Rs.1 lac was returned to 1<sup>st</sup> appellant vide Cheque No.173327 dated 17.4.1997 drawn on Allahabad Bank (Page No.49 of Additional Documents) which was issued by 2<sup>nd</sup> Respondent as Managing Director.

16. The Respondents stated that the shares were allotted to outsiders and Article 4 will not be binding. The Respondent further stated that 1<sup>st</sup> appellant was personally present in the meeting dated 28.10.1992 in which it was decided to allot shares of outsider and the 1<sup>st</sup> appellant never opposed the same.

17. The Respondents stated that the notice was given to 1<sup>st</sup> appellant on 8.9.1998 to 1<sup>st</sup> appellant that she was going to be removed as a Director in the AGM to be held on 25.9.1998. The resolution was also sent with the notice. The Respondent stated that the 1<sup>st</sup> appellant was proposed to be removed as Director due to her acts against the 1<sup>st</sup> respondent and making defamatory and baseless allegations against 1<sup>st</sup> respondent. The Respondents

further stated that the 1<sup>st</sup> appellant have himself mentioned in his Suit No. 49-A in para 16 and 19 (Page 318 and 319 of Appeal) that the appellant have received notice that they were going to be removed as Directors in the AGM on 25.9.1998. The Respondent stated that the suit was filed by the appellant on 11.9.1998 (Page 481 of the appeal) against the notice dated 8.9.1998 for removal of 1<sup>st</sup> appellant as director. The Respondent stated that the 1<sup>st</sup> appellant was very well aware and receipt of the notice dated 8.9.1998. The Respondent further stated that 1<sup>st</sup> appellant by her letter dated 15.9.1998 (Page 39 of Application filed by the Respondents for additional affidavit) admitted that 1<sup>st</sup> appellant has received the notice dated 8.9.1998. The Respondent stated that 1<sup>st</sup> respondent replied the letter of 1<sup>st</sup> appellant, vide letter dated 23.9.1998 (Page 42 of application filed by the Respondent for additional affidavit). The Respondent further stated that the decision of the AGM was intimated to 1<sup>st</sup> appellant vide letter dated 30.9.1998 (Page 340 of Appeal Paper Book).

18. The Respondent stated that 2<sup>nd</sup> respondent was appointed as Additional Director in the Board Meeting dated 11.6.1996. The Respondent stated that the Minutes of the Meeting dated 11.6.1996 were confirmed in the Meeting held on 28.9.1996 (Page 45 of the Application filed by the Respondent for additional documents) in which 1<sup>st</sup> appellant was present. The Respondent further stated that in the notice dated 6.6.1998 (Page 50 of the Application filed by the Respondents for additional documents) for convening the Meeting of the 1<sup>st</sup> respondent on 13.6.1998, 1<sup>st</sup> appellant has signed as Director and in the same very notice itself 2<sup>nd</sup> respondent name is also mentioned as a

Director and 2<sup>nd</sup> respondent has also signed as Director. The Respondents further stated that 2<sup>nd</sup> appellant filed a suit before the Court seeking inter alia the relief of declaration that late Shri LN Shandiliya and 2<sup>nd</sup> respondent are not validly appointed directors of the Company and 2<sup>nd</sup> appellant is entitled to dividend and interest on the amount of shares. Respondent stated that 2<sup>nd</sup> appellant filed an application to unconditionally withdraw the suit without any liberty (Page 62 of the Application filed by the Respondents for additional documents). The Respondents stated that by unconditionally withdrawing the suit has abandoned all its claim and allegations against 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent.

**Arguments of the parties:**

19. We have heard the parties and perused the record.

20. Learned counsel appearing on behalf of the appellant argued that 1<sup>st</sup> respondent company had been incorporated pursuant to the agreement dated 07.09.1991 in consonance with the terms and conditions of the agreement executed between appellant and respondents. Learned counsel further argued that the Learned NCLT, Mumbai has wrongly held that the appellants cannot seek to enforce the terms and conditions of the agreement against the company and the directors which is not permissible in law and has wrongly decided the issue in favour of the Respondents. Learned counsel for the appellants argued that 1<sup>st</sup> appellant contributed Rs. 2 lakh and 2<sup>nd</sup> appellant contributed Rs.4 lakhs towards share subscription whereas the same has been shown as unsecured loan in the Balance Sheet. Learned counsel for the appellant argued that the Learned NCLT has given a wrong finding that the

underlying the principles of res judicata is that a decision once rendered by a competent authority on a matter in issue between the parties after a full enquiry should not be permitted to be re-agitated. The appellant argued that the Civil Suit No.49A/1998 was dismissed on 21.12.2016 and the Learned Court had held that the appellant had succeeded to prove that the appellant has been illegally removed from the directorship of the 1<sup>st</sup> respondent company, however, rejected the claim only on the ground that Civil Court does not have jurisdiction to try the present suit in view of the Companies Act, 2013. The appellant, therefore, argued that the Civil Suit was decided on merit but was dismissed on the ground that the jurisdiction of the Civil Court is barred by the provisions of the Companies Act, 2013. Therefore, the appellant argued that it is a settled law that the principles of res judicata are applicable only when a matter has been decided by the competent court/tribunal on the basis of merits and not on any other technical ground and stressed that in the present matter the decision of the Civil Court was not based on merits.

21. Learned counsel appearing on behalf 1<sup>st</sup> to 3<sup>rd</sup> Respondent argued that the said agreement dated 7.9.1991 has never been in their knowledge. Respondents further argued that even if it is assumed though not admitted that the said agreement existed, it being a private agreement between the individuals to which 1<sup>st</sup> respondent was never a party to the said agreement. Respondents further argued that none of the persons who were parties to the Agreement were the founding Directors of the company (Minutes of Meeting dt. 25.11.1991-Page 8 of the application filed by Respondent for additional documents). Respondents further argued that Agreement is neither a part of

the Article of Association of 1<sup>st</sup> respondent nor was it ratified or adopted at any time and the agreement is neither binding for the operation and management of the affairs of the 1<sup>st</sup> respondent nor on the shareholders or Directors of 1<sup>st</sup> respondent. Respondents argued that on the basis of the said agreement the 1<sup>st</sup> appellant and 7<sup>th</sup> respondent filed criminal complaint alleging commission of offence of criminal breach of trust, fraud and forgery against late Mr Laxmi Narayan Shandilya and 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondent. However, the Court was not satisfied and discharged the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from the alleged commission of the offence.

22. Respondents further argued that the appellants have categorically admitted that the amount contributed by them was towards the unsecured loan. Respondent argued that the appellants have itself in para 7.3 of the appeal (Page 12 of the appeal paper book) stated that it is the case of the appellants that the amounts paid by them could be treated as unsecured loan. The respondents further stated that in the agreement dated 7.9.1991, in Clause 3 (Page 173 of paper book) it is mentioned that the amount paid could be treated as an unsecured loan and on which interest shall be paid as provided in Clause 10(e) (Page 175). Respondents argued that the appellants being aware of the same never challenged the same within the period of limitation. Respondents further argued that the Balance Sheet and Annual Return are public documents and could have been obtained by the appellants from the ROC. Respondents argued that as there was no grievance, therefore, the appellant never obtained the said documents. Respondents further argued that confirmation of accounts, ledger and balance sheet of the 1<sup>st</sup> respondent

are duly signed by the appellants acknowledging that the amounts paid by them is an unsecured loan as per the books of account and on which they were receiving interest (Pages 26 to 29 of the Application filed by Respondents for additional documents). Respondents further argued that the appellants had received interest @ 15% per annum on unsecured loan. The Respondents stated that the 1<sup>st</sup> respondent was duly deducting TDS on the interest paid on the unsecured loan given by the appellants. The TDS was duly deposited with the Income Tax Department. The Respondents has further stated that in the Suit No.49-A, it is stated by the appellant that the appellants were to be given interest on deposits (Page 318, Para 18). The Respondent further stated that a sum of Rs.1 lac was returned to 1<sup>st</sup> appellant vide Cheque No.173327 dated 17.4.1997 drawn on Allahabad Bank (Page No.49 of Additional Documents) which was issued by 2<sup>nd</sup> Respondent as Managing Director.

23. We have heard the parties on these issues and we have also gone through the Agreement dated 7<sup>th</sup> September, 1991 (Page No.173 to 176) and noted that 1<sup>st</sup> to 3<sup>rd</sup> Respondent are not party to the agreement and it is a private agreement between the four individual in which 1<sup>st</sup> appellant, 5<sup>th</sup> Respondent, 7<sup>th</sup> Respondent and one Late Mr. Upendra Shandilya are signatories. We noted that the Agreement has been executed on 7.9.1991 and the 1<sup>st</sup> respondent was incorporated subsequently on 28.11.1991. We further noted that 7<sup>th</sup> respondent, who was one of the signatories to the Agreement and was also one of original petitioners before Ld. NCLT in the Company Petition, has not challenged the impugned order and we assume

that she has no grievance with the impugned order. The company after incorporation is regulated by the Memorandum of Association and Articles of Association of the Company and not by any agreement prior to its incorporation. It was for the interested parties to see that what is their previous agreement and if it is suitably incorporated in the Articles of the Association of the Company. Admittedly the terms and conditions of the agreement are not part of the Articles of Association. Therefore, the reliance on the agreement not being a part of the Articles of Association is not permissible under the law. The appellants are seeking to enforce the agreement for which this Appellate Tribunal cannot help them. The appellants are seeking to enforce the terms and conditions of the Agreement against 1<sup>st</sup> respondent and Directors, which is impermissible under Law.

24. We have noted that the appellants have contributed Rs.2 lakhs and Rs.4 lakhs. We have gone through the para 7.3 of Appeal Paper Book (Page 12 of the Appeal) in which the appellants have stated *“that necessary funds for the above said objective had to be brought in by said four executants which was to be shown in the accounts of the said Pvt Ltd company either as **“capital or as unsecured loan”**. We have further noted that in Clause (3) of the Agreement dated 7.9.1991 (Page 173 of the Appeal Paper Book) it is also written *“funds so brought may be shown **as capital** of the aforesaid private limited company and/or **unsecured loans** in the names of aforesaid person(s)”* and on which 15% interest shall be paid as provided in Clause 10(e) of the Agreement. We also noted that in the Suit No.49-A filed by the appellants (Page No.312 at Para 7 and Page No.318 at Para No.18) the appellants have*

also demanded interest on deposit @ 18% p.a. We have seen the Balance Sheet and Confirmation of Accounts (Pages 13 to 29 of additional documents filed by Respondent). We have also seen Annexure F Page 49 of additional documents filed by Respondent, which is a cheque No.173327 dated 17.4.1997 of Rs.100000/- favouring Original Petitioner No.1 Ms Suman Dhir. On the basis of these documents we are of the view that the amount invested by the appellants is shown as unsecured loan and the confirmation of accounts are duly signed by 1<sup>st</sup> appellant and the appellants' accounts with 1<sup>st</sup> respondent are showing provision of interest on the amount invested and the 1<sup>st</sup> respondent is deducting TDS on the said interest as per IT Act. Similarly the confirmation of accounts are also signed by 2<sup>nd</sup> appellant. We also noted that in para 2.b at Page 6 of Reply to Application the appellants have themselves admitted that have also contributed unsecured loan to the 1<sup>st</sup> respondent company. We have also seen the copy of the cheque at Page 49 of Additional documents filed by Respondent which is in the name of 1<sup>st</sup> appellant and noted that the said amount was returned to 1<sup>st</sup> appellant by the Managing Director of 1<sup>st</sup> respondent. We further noted from Copy of Accounts of Smt Suman Dhir filed by the Respondent (PageNo.23 and 24 of Application on behalf of the Respondent No.1) and Copy of Accounts of Sh Sarvesh Kumar filed by respondent (Page 31 and 32 of Application on behalf of Respondent No.1) that a noting has been given on the bottom of these pages which states that ***"The company has been discontinue the payment of interest w.e.f. 1.4.1999."*** Respondents have not argued why they have discontinued provision of interest on the unsecured loans of the appellants. No reasons for non-payment/non-provision of interest on unsecured loan has



been put forth. If any person provides an unsecured loan to the party it is the bounden duty of the borrower not only to make a provision for the interest but also make the actual payment for the same as well. Here in this case the provision of interest has been made only for few years but have been discontinued with effect from 1.4.1999. We also note that the appellant is shareholder and has also invested handsome amount in the company. It has not been brought on record that the company has been declaring dividend so as to give return on the money invested. We have also noted that for the amount invested neither he has been given any shares against its money nor interest has been provided but it has been stopped and no payment of interest has been provided. The appellants are litigating since long in the situation where there is no reward for a person who has invested the money. On the face of it, it looks to us that provision of interest has been discontinued solely on the ground that the appellant is a shareholder of the company and has raised a number of issues with the company.

25. Learned counsel appearing on behalf of the appellants argued that 1<sup>st</sup> appellant and 7<sup>th</sup> respondent had been illegally removed from the directorship of 1<sup>st</sup> respondent without any notice to them. Learned counsel further argued that the Respondent have not shown any document pertaining to the resignation of 7<sup>th</sup> respondent and the respondents only submitted that it was an oral resignation.

26. Learned counsel appearing on behalf of the Respondent argued that the Notice was given to 1<sup>st</sup> appellant on 8.9.1998 (Page 176 of short Reply) that she was going to be removed as Director in the AGM to be held on 25.9.1998

(Page 171 of short reply). The Members resolution was also sent with the Notice.

27. We have heard the parties and have gone through the record. We found that the notice dated 8.9.1998 (Page 176 and 177) was duly served to 1<sup>st</sup> appellant as the postal acknowledgement is also there. Further we also noted from para 16 and 19 of Suit No.49-A filed by the appellant (Page No.318 and 319 of the Appeal) in which 1<sup>st</sup> appellant has admitted that appellant have received notice that they were going to be removed as Directors in the AGM on 25.9.1998. In the face of the evidence available on record it cannot be said that 1<sup>st</sup> appellant has been removed without a due notice and hence her contention that she has been illegally removed has no merit. As regards the removal of 7<sup>th</sup> respondent is concerned, the said 7<sup>th</sup> respondent has not challenged the impugned order and we presume that 7<sup>th</sup> respondent is satisfied with the impugned order.

28. Learned counsel appearing on behalf of appellant argued that Board Meetings dated 1.6.1996 and 11.6.1996 in which Late Sh Laxmi Narayan Shandilya was appointed as Additional Director and 2<sup>nd</sup> respondent as the Managing Director are forged and fabricated documents and the same has been confirmed in the forensic expert report wherein it has been recorded that the said minutes of the Meeting were prepared after the alleged dates.

29. Learned counsel appearing on behalf of the Respondents argued that the minutes of the Meeting dated 11.6.1996 were confirmed in the Meeting held on 28.9.1996. Learned counsel further argued that 1<sup>st</sup> appellant was present in the Meeting held on 28.9.1996. To prove this learned counsel for

the Respondent has drawn the attention of the Appellate Tribunal to Page No.45 (Annexure E of the Respondents' additional documents). Learned Counsel for the Respondent further argued that in the notice dated 6.6.1998 for convening Meeting on 13.6.1998, 1<sup>st</sup> appellant has signed as Director and on the same notice 2<sup>nd</sup> Respondent has also signed as Director and the notice has been signed by Mr. L.N. Shandilya as Chairman.

30. We have heard the parties on this issue and perused the record. It is natural that the notice for the Meeting is issued before the date of the Meeting and the Minutes of the Meeting are prepared either on the date of Meeting or on subsequent date and normally confirmed in the next Meeting. Even the Expert Forensic Report stated that the Minutes of the Meeting have been prepared after alleged dates (date of the Meeting). We do not see any fundamental flaw as they are normally prepared after Meeting is over. On going through the documents argued by the Learned counsel for Respondent, we noted that 1<sup>st</sup> appellant was very well aware that 2<sup>nd</sup> respondent has been appointed on the basis of the documents placed before us.

31. We have also noted that the parties have been in litigation for a long period. It is also noted that a number of cases have been instituted by appellant group as well as the respondent group. The very fact that there have been a lot of litigation resulting in removal of directors of petitioners group (before CLB/NCLT), it will be detrimental to the interest of the company if litigation is continued on one pretext or other either by one group or the other. To save the company from litigating shareholders divided in groups

and appellant group being too small in minority (holding 500 shares each), it would be desirable that an exit route is provided to the appellants.

### **CONCLUSION**

32. From the above we noted that the allegations of the appellants are pertaining to and arising out of the Agreement dated 7.9.1991. Appellants under the garb of the petition before NCLT and appeal before Appellate Tribunal are seeking specific performance of the Agreement dated 7.9.1991. We also noted that the appellants have launched various litigations before the various forums and have not succeeded. Since the dispute is contractual in nature, Company Petition under Section 397 and 398 was not maintainable. However, we noted that the original petitioners are holding 500 shares each and 1<sup>st</sup> and 2<sup>nd</sup> appellant have infused Rs. 2 lakhs and Rs.4 lakhs respectively. We noted that Rs.1 lakh has been returned to 1<sup>st</sup> appellant vide cheque No.173327 dated 17.4.1997 drawn on Allahabad Bank favouring Ms Suman Dhir. We have noted that it is a fact that when the shares were allotted after 1992, the money invested by the 1<sup>st</sup> and 2<sup>nd</sup> appellants were lying in the books of the 1<sup>st</sup> respondent. That the issue whether the allotment should have been done or so as per the appellant contention is too old to be adjudicated now.

It is admitted by the Respondent that the amount infused by the appellants is unsecured loan on which the Respondent were paying interest @ 15% p.a. and TDS was also being deducted. Further the documents placed before us by the Respondent establishes that the Respondent has discontinued payment of interest on the contractual rate to the appellants for which no reasons has been given by the Respondents. On the face of it, it

looks to us that the provision of interest has been discontinued solely on the ground that the appellant is a shareholder of the company and has raised number of issues to the company. In these circumstances the appellants are entitled for interest on their investment made as unsecured loan to 1<sup>st</sup> respondent. Further we observe that litigation is going on between the parties since long which is not in the interest of the 1<sup>st</sup> respondent company and it affects economy which hurts public interest. We deem it appropriate that an exit route may be provided to the 1<sup>st</sup> and 2<sup>nd</sup> appellant.

### **ORDER**

33. For above reasons and observations, the impugned order dated 6.11.2017 is upheld with the following directions:-

i) 1<sup>st</sup> Respondents will pay the appellants their balance of unsecured loan with interest at agreed rate which Respondents have discontinued providing since 1.4.1999 within one month of this order.

ii) The Respondent No.1 company will get the price of each share determined by registered valuer who will act as per Section 247 of the Companies Act, 2013. Respondent No. 1 Company will ensure compliance within one month of the date of this Judgement.

iii) After getting report of Registered Valuer, Board of Directors of 1<sup>st</sup> Respondent will offer shares of 1<sup>st</sup> and 2<sup>nd</sup> appellant to the existing shareholders adopting procedure akin to Section 62 of the Companies Act, 2013 within one month of the offer given by the company. In case none of the existing shareholders purchase the shares of 1<sup>st</sup> and 2<sup>nd</sup> appellant, in that

event 1<sup>st</sup> respondent will purchase the shares of 1<sup>st</sup> and 2<sup>nd</sup> appellant within one month thereafter.

iv) There shall be no order as to costs.

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

(Balvinder Singh)  
Member (Technical)

New Delhi

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