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

**Company Appeal (AT) No.348 of 2018**

[Arising out of Order dated 06.09.2018 passed by National Company Law Tribunal, Bengaluru Bench in IA No.242/2018 in CP No.74/BB/2017]

| **IN THE MATTER OF:** | **Before NCLT (In Company Petition)** | **Before NCLAT** |
|---|---|---|
| Metmin Investments Holdings Limited<br>C/o AAA Global Services Ltd.<br>1st Floor, The Exchange,<br>18 Cybercity, Ebene,<br>Mauritius | Original Petitioner | Appellant |
| **Versus** | | |
| 1. Rinac India Limited<br>No.5, Saraswati Nivas,<br>Main Channel Road,<br>Saraswathipuram,<br>Ulsoor,<br>Bengaluru – 560 008 | Original Respondent No.1 - Company (Applicant of IA 242/2018) | Respondent No.1 |
| 2. Mr. Puthucode Vaidyanathan Balasubramanian<br>No.46/4, 1st A Cross<br>'TRIDIPA' Cambridge Layour, Ulsoor,<br>Bengaluru – 560 008 | Original Respondents 2 to 6 | Respondents 2 to 6 |
| 3. Mr. Parakkel Sukumaran,<br>No.F155,<br>Mayata Residency,<br>Hebbal Outer Ring Road, Nagawara<br>Bengaluru – 560 045 | | |

4. Mr. U. Haridas
No.361, 'Shantam'
MM Layout,
Kaval Byrasandra,
RT Nagar,
Bengaluru 560 032

5. Mr. U. Balakrishnan
8163, Tower 8
Prestige Shanti Niketan
Whitefield Main Road,
Bengaluru 560 048

6. Modular Cold Rooms
Private Limited
No.29, 1st Cross,
2nd Main Cambridge
Layout Extension
Ulsoor,
Bengaluru 560 008

**For Appellant:** **Shri Arun Kathpalia, Senior Advocate with Shri Krishnendu Datta, Shri Parveen Kumar, Shri Sahil Narang and Ms. Riddhi Jad, Advocates**

**For Respondents:** **Shri Balaji Srinivasan, Advocate (Respondents 2 to 6)**

**Shri Siddhant Kohli, Advocate (Respondent No.1)**

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

**(23rd January, 2019)**

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

1. The Appellant – original Petitioners - M/s. Metmin Investments Holdings Limited (hereafter referred as – Metmin/Petitioner) has filed this Appeal being aggrieved by the Impugned Order dated 6th September, 2018

passed by the National Company Law Tribunal, Bengaluru Bench ('NCLT', in short) in IA 242/2018 in CP 74/BB/2017.

1.1 By the Impugned Order, NCLT allowed the application of Respondent No.1 Company – Rinac India Limited (hereafter referred as - Company) vide which application, modification was sought in the Order dated 16.08.2017 which had earlier been passed by NCLT in favour of Petitioner directing the Company not to create encumbrance over the assets of the Respondent Company till disposal of the Application filed under Section 8 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act', in short) further giving option to the Respondent to approach the Tribunal for any modification of the Order depending upon the situation that may arise in future, before deciding the application filed under Section 8 of the Arbitration Act. NCLT allowed the IA 242/2018 filed by the Company and permitted the Company to create a charge/encumbrance over the assets of the Company so as to enable the Company to raise loans/avail financial facilities from the banks/financial institutions, make investments for the purpose of construction of its corporate office building in Chickajala, Bangalore North Taluk and for other construction works and to meet its pressing needs to execute the orders placed on it as detailed in the application.

2. Being aggrieved by such modification of the earlier Order at the instance of the Company, present Appeal is filed by the Appellant – Metmin. In short, the case of the Appellant is, and it has been argued for

the Appellant, that the Appellant – Metmin was established as Company in Mauritius in 2001 and has minority shareholding in the Respondent No.1 Company to the extent of 16.38% of the total shareholding. The Appellant entered into Share Subscription-cum-Share Purchase Agreement (SSA) with the Respondent Company on 5th June, 2007 whereby the Appellant – Metmin with Avigo Trustee Company Pvt. Ltd. and Avigo Venture Investment Ltd. (in brief, 'Avigo') made investments in the Company. It is stated that Metmin and Avigo entered into Shareholders' Agreement (SHA) (Page 304) also on the same date of 5th June, 2007 with the Respondents. As per the terms of SHA, the Respondents were obliged to provide the Appellant and Avigo with an exit on or before 30th June, 2010 in the manner set out in the SHA. Provision was made in the Agreement that in the event, no exit is provided to the Appellant and Avigo, then the Appellant and Avigo were entitled to sell the shares subject to provisions as were set out in the Agreement. The Appellant claims that on the assurance given by the Respondents 2 to 6 and the Company, The Appellant invested a sum of Rs.19,00,00,140/- by way of subscription to, as well as, purchase of shares. The appellant as well as Avigo were entitled to receive 45% internal rate of return on the amounts invested by them.

2.1 It is the case of the Appellant that the Appellants entered into Supplementary Agreement dated 28th January, 2008 (Page 347) and second Supplementary Agreement dated 22nd September, 2010 (Page 356). As per the settlement terms, Respondents 2 to 6 and the Respondent

Company were required to provide exit to the Appellant and Avigo latest by 31st March, 2013. The Respondents could not provide the exit and the Respondents had even diluted the earlier agreed internal rate of return on the amounts invested. According to the Appellant, the parties then entered into share purchase agreement (SPA) dated 16th December, 2016 (Page 397) and Respondents 2 to 6 agreed to purchase the shares of the Appellant and Avigo within a maximum period of 40 days from 16th December, 2016 (which is the date of execution of that SPA). It was agreed that in the event, the sale and purchase of shares could not be consummated within the period of 40 days as provided, then the SPA would terminate. According to the Appellant, the Respondents did not act as per the SPA dated 16.12.2016 and the SPA terminated which is clear from e-mail dated 28th March, 2017 and 13th April, 2017 where the Respondents asked the Appellant to extend the SPA. The Appellant claims that due to failures of Respondents 2 to 6, the Appellant went ahead to look for opportunities in the market to sell its shares and negotiated with one Geosansar Mauritius Limited which gave offer letter dated 18.05.2017 to Appellant to purchase the shares of Respondent Company. It is the case of Appellant that the Respondents 2 to 6 with intention to force the Appellant to exit and frustrate efforts of the Appellant to sell its shares to prospective buyer, filed Company Petition 17/2017 under Section 241 and 242 before NCLT. They failed to get an interim relief and initiated another proceeding (Page 448) before Hon'ble High Court of Bombay by filing Application under Section 9 of the Arbitration Act. In that Arbitration

Petition, the Respondents 2 to 6 prayed that the Appellant and Avigo should be restrained from, in any manner, directly or indirectly, selling, pledging, transferring, disposing or alienating or, in any manner, encumbering their shares in the Respondent Company to any third party. This Petition before the High Court came to be disposed on 03.07.2017, when the following Order (Page 487) was passed:-

> "P.C.:-
>
> 1 Ms Vaidehi Naik appearing for the respondent no.2 states that they have settled with the petitioners.
>
> 2 So far as respondent no.3 is concerned, Mr. Subramanian states on instructions that respondent no.3 has had a rethink and have decided not to sell the shares at all. Mr. Subramanian states that as and when respondent no.3 takes a decision to sell the shares, they will give fresh notice to the petitioners.
>
> 3 Petition disposed."

Respondent No.2 in that matter was Avigo and present Appellant was Respondent No.3.

2.2 Before the above Order was passed by the High Court, the Respondents had withdrawn the CP 17/2017 filed by them, from NCLT on 29.06.2017 (Annexure A2 – Page 60). The Petition was withdrawn since the Petitioners therein (i.e. present Respondents) had already moved the High Court for similar relief. The Appellant wanted the conduct of the Respondents to be recorded but in that Order, NCLT noted the request but mentioned that there was no need to record any conduct. The present

Respondents claimed in that Petition that as the Appellant had claimed that under Section 8 of the Arbitration Act, the Tribunal had no jurisdiction to entertain the petition, so they had moved the High Court. The Petition thus was being withdrawn.

2.3 After the Hon'ble High Court of Bombay disposed the arbitration proceeding on 03.07.2017, the Appellant filed the present Company Petition 74/2017 on 09.08.2017 (Page – 63) on the grounds of oppression and mismanagement. The Appellant claimed that the Appellant is entitled to have a nominee Director on the Board of the Company and as on date, there was no nominee Director appointed. As per the Articles of Association of the Company, express consent of such nominee Director of the Appellant is mandatory. The Respondents 2 to 6 were in the process of mortgaging or creating third party interests on the assets of the Company, which cannot be done without explicit consent of the nominee Director of the Appellant. The Appellant claimed in the Company Petition that the Respondents were going ahead with such process which violated the Articles of Association and was against the interest of the Company and the Appellant. The Appellant claimed that on three occasions, the Appellant made written requests to the Respondents to appoint its nominee but the same was not considered by the Respondents. The Appellant claimed that such acts amounted to oppression and mismanagement of the affairs of the Company. The Appellant expressed apprehension that the Respondents 2 to 6 may transfer, sell or otherwise

encumber their shares or other assets of their Company and cause loss to the Appellant – Petitioner and this was well illustrated as mentioned in the petition and thus, Petition required urgent relief. Inter alia, in the reliefs sought in the Company Petition, following was claimed:-

> "C. Direct Respondent 1 to 6 to appoint Mr. Singhi, the Petitioner's nominee, as a Director on the Board of Respondent No.1 Company."
>
> …….
>
> "E. Declare all the transactions done by the Respondent No.2 to 6 on behalf of the Board of the Respondent No.1 Company without the express consent of the Petitioner and in the absence of the Nominee Director of the Petitioner, as illegal and order restoration."

In the interim relief, inter alia, relief sought was:-

> "A. Appoint an independent observer on the board of the Respondent No.1 Company in order to ensure that the rights of the Petitioners are not trampled upon and to ensure that the affairs of the Respondent No.1 Company are not mismanaged.
>
> B. Restrain Respondent No.1 to 6 from creating any encumbrance on the assets of the Company."
>
> …….

> "D Restrain Respondents No.1 to 6 from undertaking any restructuring of the business in any manner whatsoever."

2.4 It has been argued that when the Company Petition making such allegations of oppression and mismanagement came up on 16.08.2017, following Order was passed:-

> "Counsel for petitioner is present. Shri K. Suman, Advocate filed vakalat for R-1 company. Counsel for R-2 to 6 is present. He has filed one application under Section 8 of the Arbitration and Reconciliation Act.
>
> Registry is directed to check and put up. Counsel for petitioner requested the Tribunal to pass an interim order prohibiting the petitioner company from creating any encumbrance on the 1st respondent company pending further hearing on the main petition. The counsel for petitioner would contend that the 1st respondent company is proposing to create encumbrance over the assets which would seriously affect the interest of the petitioner.
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> Counsel for R-2 to 6 informed the Tribunal that there is no intention on the part of the respondents including the Company to create any encumbrance on the property of the company. Counsel would contend that the petition itself is not maintainable and that any dispute, is to be settled by the Arbitrator and therefore a separate application was filed to refer the matter to the Arbitrator.
>
> Considering the submissions made by the counsels on both sides, the Tribunal directs the respondent company not to create any encumbrance over the assets of the 1st respondent company till disposal of the application filed under Section 8 of the Arbitration and Reconciliation Act and it is also open to the respondents to approach the Tribunal for any modification of order of the Tribunal depending upon the situation that may arise in future before deciding

> the application filed under Section 8 of the Arbitration and Reconciliation Act.
>
> List it on 07.09.2016. Counsel for petitioner to file their objections if any in application filed under Section 8 of the Arbitration and Reconciliation Act."

Respondents 2 to 6 then filed IA 104/2017 on 16.08.2017 (Page 510) under Section 8 of the Arbitration Act claiming that the Petition itself mentioned that the Respondent had caused Avigo to sell its shares; that issue of sale of shares was subject matter of Arbitration Agreement traceable to share purchase agreement and consequently, the right of the Petitioner to nominate the Director was also traceable to the Shareholders' Agreement and it was an arbitral dispute.

2.5 Same Respondents 2 to 6, however, filed IA 189/2017 (Page 585) seeking modification of the interim orders which had been passed on 16.08.2017 and prayed that the Respondent Company should be allowed to create charge/encumbrance over the assets of the Company to the tune of Rs.1250 Lakhs to enable the Company to make investments for the purpose of construction of its corporate office building at Chickajala, Bangalore North Taluk and other construction works as mentioned in the application. The Appellant – Metmin filed objections (Page 598) to the application, which was filed for modification. Pending applications were combinedly heard on various dates, it is argued by Appellant. Later, on 20.08.2018, Respondent No.1 Company filed IA 242/2018 (Page 764) referring to the IA 189/2017 which had been filed by Respondents 2 to 6

and adding further grounds, sought similar relief. According to the Appellant, the Respondents did not file any documents in support of the Application for modification and when the same was objected by the Appellant, some documents were produced. The Appellant was thus forced to file multiple memos.

2.6 It is the case of the Appellant that the Respondents violated the Interim Orders dated 16th August, 2017 and created additional charge over the assets of the Respondent Company on 23.11.2017 in favour of Punjab National Bank for a sum of Rs.34 Crores (Page 726 and Page 731) and the Appellant – Petitioner had earlier filed Application for taking action of contempt vide IA 36/2018 (Page 642). The Respondents filed their statement of objections and the fact that additional charge had been created was not disputed.

2.7 According to the Appellant, it was noticed that the Respondents 2 to 6 have filed before the Hon'ble Supreme Court, Arbitration Petition (C) 42/2017 (Annexure R-4 – Page 50 – Diary No.8135) seeking appointment of Arbitrator or Arbitrators in terms of Section 11(6) of the Arbitration Act. According to the Appellant, the Respondents did not file copy of such Petition filed in Supreme Court before the NCLT and ultimately on 27.07.2018, NCLT passed following Order:-

> "1 IA 104/2017 is filed by Shri Puthucode Vaidyanathan Balasubramanian (Respondents No. 2 to 6) u/s 8 Companies (Arbitration and

Conciliation) Act, 1996, inter-alia seeking to refer the matter to arbitration.

2. Heard Shri Udayarkar Rangarajan and Shri Praveen Kumar, Learned Counsel for Respondents. After hearing the case for some time, the Tribunal noticed that the same Applicants have filed an Arbitration case (Civil) No.42/2017, before the Hon'ble Supreme Court, inter-alia seeking appointment of an Arbitrator in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996, for resolution of disputes relating to Shareholders Agreement dated 05.06.2007, Share Subscription cum Share Purchase Agreement dated 05.06.2007 and Share Purchase Agreement dated 16.12.2016.

3. Therefore, the Tribunal cannot decide the matter, since the matter is sub-judice in the Hon'ble Supreme Court.

4. Registry is directed to return the original documents filed by the Respondents, after taking certified copies.

5. Post the case on 20.08.2018."

Thus according to the Counsel for Appellant – Petitioner, the NCLT itself recorded that the Tribunal cannot decide the matter since the matter was sub-judice in the Hon'ble Supreme Court. According to the learned Counsel, the Application under Section 8 filed by the Respondents was thus kept in abeyance after such Order dated 27.07.2018. The IA 242/2018 mentioned earlier, thereafter came to be filed on 20.08.2018 on behalf of the Company seeking modification of the Interim Order dated 16.08.2017. It is the case of the Appellant that after such fresh application was filed at the behest of the Company, the above Impugned Order came to be passed on 06.09.2018 without giving opportunity to file objections to

the same and the NCLT passed the Impugned Order allowing the Company to raise loans/avail financial benefits. It is argued for the Appellant that looking to the Articles of Association, without consent of the nominee Director of the Appellant, who is referred as investor in the Company, and even considering the Articles of Association, no such liabilities can be created without consent of the Investor and the Impugned Order is unreasoned Order which did not take note of the facts of the matter as well as provisions of the Articles of Association. No Board Meetings can be held without nominee Director of the Appellant and Articles of Association have articles protecting the investor. Orders violating the Articles of Association could not have been passed. The learned Counsel also referred to the definition of "investor" in the Articles of Association to submit that the Respondents cannot act unilaterally ignoring the investor and such liabilities in the face of provisions in the Articles of Association could not be allowed to be created without the consent of the investor.

3. Against this, the Respondents have filed the statement of objections and it has been argued on behalf of the Respondents making reference to the various developments in the litigations as noted above, that when CP 17/2017 was filed, the Appellant and Avigo had both sought time claiming that under Section 8, the dispute concerned was arbitrable. Because of such stand taken by the Appellant, the Respondents withdrew the said CP 17/2017. In the commercial Arbitration Petition 362/2017, which came up before the High Court of Bombay, the Appellant made a

statement that the Appellant did not wish to sell the shares. Avigo and Respondents amicably settled their disputes, inter se, and the Bombay High Court disposed of the Petition on the statement of the Appellant. Thus, according to the Respondents, the Appellant was taking multiple stand to prejudice the business of the Company. The Appellant then filed CP 74/2017. The Respondents referred to Clause 11 of Shareholders' Agreement to claim that it provides that all disputes, controversies and difference of opinion in connection with Agreement or breach thereof shall be settled by arbitration. As the Appellant did not appoint Arbitrator, the Respondent approached the Hon'ble Supreme Court in Arbitration Petition 42/2017 to appoint Arbitrator. According to the Respondents, the Appellant knew about the Petition, but have avoided service to delay the proceedings. When the Respondents filed Application under Section 8 in CP 74/2017, the Appellant backtracked from its earlier stand that the dispute was arbitrable. According to the Respondents, the Tribunal erroneously disposed application - IA 104/2017 and against such Order of NCLT dated 27.07.2018, SLP 28260/2018 (Annexure R-5 - Page 350 – Diary No.8135) has been filed. It is claimed by the Respondents that they had sought modification of the Interim Order dated 16.08.2017 as there are bona fide business requirements of the Respondents. The Company and its Directors, who are majority shareholders, want to establish its corporate office having all infrastructural facilities which land at Bangalore is owned by the Company. They want to raise funds for civil construction to construct approach road to the Murbad Factory. They furnished details

to the Tribunal. The current premises of the company are rented premises and the lessors had written to the Company to vacate the premises by letter dated 06.11.2017. According to the Respondents, the Appellant indulged in vexatious and acrimonious business practices and that Avigo had issued Right of First Refusal Notice on 19.05.2017 and when Respondent No.6 sent an acceptance notice, Appellant sent letters to disturb funding arrangements. The Respondents have submitted that they did not commit any contempt, no new charge was created and it was merely a renewal of charge with Punjab National Bank which had been continuing since 2013. According to the Respondents, the second investor – Avigo had already sold its shares and thus, now cannot coerce or arm twist the Company into loss making ventures. According to the Respondents, Appellant is filing frivolous and vexatious petitions to stifle the business of the Company. The investment is undertaken to bolster the business of the Company and to construct its principal place of business at Bangalore. It is argued that the NCLT had given adequate opportunities to both the parties to present their cases. The Respondents are supporting the Impugned Order which had been passed.

4. We have heard both sides. Above narration of facts as appearing from the documents makes the dispute clear. The above narration makes it clear that in spite of the earlier application filed by Respondents 2 to 6 for modification of the Interim Order dated 16.08.2017 being pending, NCLT had on 27.07.2018, itself come to a conclusion that the Tribunal

cannot decide the matter since the question of referring the matter to arbitration was pending in the Hon'ble the Supreme Court of India. Once having said this, the same Tribunal entertained the subsequent IA 242/2018 filed by the Company for modification and went ahead to pass the Impugned Order to permit the Company to create huge loans and financial liabilities and encumbrance on the property of the Company. The fact that Avigo has transferred its shares to Respondent No.6 is no more disputed before us. The document by which such transfer was made, was not produced before NCLT and it was not produced before us also. We have gone through the Company Petition and also the Articles of Association. This is not a matter where merely there is Shareholders' Agreement between the shareholders. In the present matter, the various Agreements appear to be with the Company as well as with the Respondents 2 to 6 and the Agreements were not only entered into, the Appellant and Avigo had ensured protection of their interests by ensuring that the Articles of Association included the rights which had been created in their favour by the documents. It would be appropriate to reproduce some of the Articles. (Copy of Articles of Association is at page – 95 of the Appeal.) In Article - 2 dealing with definitions, Clause (x) relates to investor/s. Same reads as under:-

> (x) "Investor/s shall mean Avigo and Metmin collectively, which term shall unless repugnant to the context and meaning thereof be deemed to mean and include their successors in interest and permitted assigns."

Article 10 is as follows:-

> "10. The financing requirements including working capital requirements of the Company and its Subsidiaries shall be met in the first instance by internal accruals and any external financing will be availed of only in accordance with the Business Plan and the Annual Budget approved by the Investors. In the event of any future borrowings, the Investors shall not be required - to provide any guarantees/collaterals, etc. The Investors and its nominees shall not be required to pledge their Shares or provide any other support to any third party, including without limitation the lenders of the Company. The Promoters shall provide guarantees and such other security as may be required for any such loans required by the Company."

Clauses A to C of Article 13, which deals with appointment of Directors, reads as follows:-

> 13. (a) The Directors of the Company will be nominated by the Shareholders in the manner set out below and shall be appointed in the manner prescribed under the Act. Subject to sub-article (b) below, the Board may also appoint additional Directors from time to time, who will hold office until the next annual general meeting of the Company. The Business of the Company shall be managed and conducted by the Board.
>
> (b) The Board of the Company shall have a maximum of 8 (Eight) Directors to be nominated and appointed as follows and which number of directors shall not be changed, except pursuant to an amendment to these presents with the consent of the Investors. The investors shall be jointly entitled to nominate fifty percent of the directors to the Board of the Company and the Promoters shall be entitled to nominate fifty percent of the directors to the Board of the Company. Any appointment of the Independent

> Directors to the Board shall be carried out with the consent of Investors and Promoters. Notwithstanding anything to the contrary contained elsewhere, in case, the equity shareholding of the Promoters or the Investors in the Company falls below 20% (Twenty Percent) of the total equity shareholding of the Company at any time, the entitlement of the Parties to nominate directors to the Board shall be in proportion to the inter se shareholding of the Parties in the Company. The Promoters undertake not to veto or otherwise obstruct the appointment of the Investors Directors and Independent Directors in accordance with this Article.
>
> (c) The Investors shall have the right to nominate 1 (One) director to the Board as long as they hold more than 5% equity share holding in the Company. The removal, appointment and re-appointment of any investors Director and Independent Director shall be subject to the prior written consent of the Investors."

Article 14 of the Articles of Association lays down the quorum at the time of commencement of the meeting and passing of any Resolution at a Meeting of the Board shall require the presence of at least three Directors, provided that at least one investor Director shall be present in person or by an alternate Director at and throughout each meeting of the Board. Thus, the quorum also requires presence of investor Director. Relevant portion of Article 20 are as follows:-

> "20. (a) Subject to sub-article (b) below, resolutions of the Board shall be passed by a simple majority of votes of the Persons entitled to vote thereon (being not less in number than a quorum for meetings of the Board).

(b) Notwithstanding anything contained in sub-article (a) above, the Shareholders shall procure that no action shall be taken or resolution be passed by the board except with the affirmative vote of all the Investors Directors present at the meeting, in respect of the following matters, unless written consent in respect of specific items has been given in writing by the Investors prior to the meeting or such consent is specifically waived in writing by the Investors hereto. The term "Company" is expanded to include the Company and all its Subsidiaries for the purpose of this Article:

..... ..... .....

(v) Finalise, approve and adopt the Business Plan of the Company and the Annual Budget and any change or deviation thereto;"

..... ..... .....

(x) Any significant change in the liability structure i.e. greater than Rs.25,00,000/- (Rupees Twenty Five Lakhs) (including but not limited to secured and unsecured debt but excluding working capital related items as specified in the approved Annual Budget) of the Company including off-balance sheet items, such as leasing, and any Encumbrances;

..... ..... ....."

5. Respondent No.6 – Modular Cold Rooms Private Limited is one of the promoter as per Annexure – A of Articles of Association. This promoter

has now admittedly bought the shareholding which was held by Avigo earlier. The Counsel for both sides heavily argued on the definition of "investor/s" as mentioned above to make rival claims. The Counsel for Appellant has tried to submit that when Avigo has left, the only investor remains is Metmin and Avigo has lost its identity in the promoter. According to the Counsel, looking to the various Articles of Association, participation of the investor and consent of the investor on various aspects is necessary and the Respondents cannot sit over the requests made by the Appellant to have its nominee Director on the Board and still proceed to seek reliefs as sought in the Impugned Order, which would violate the Article – 20 of the Articles of Association as there is no consent of the nominee Director of the investor. According to the Counsel, the definition used the word "investor" with a slash and 's' is added for the plural, and this includes singular as well as plural.

6. Against this, the learned Counsel for the Respondents argued that after Avigo has parted with the shares of the Respondents looking to the definition of "investor/s" in the Articles of Association, the Appellant cannot be treated as having right to have nominee Director because the definition of investor/s in the Articles of Association would be enforceable only when Avigo and Metmin act collectively. It is argued that Metmin now remaining single cannot claim to have Nominee Director of Investor.

7. The Company Petition has been filed claiming right to be on the Board and also to restrain the Respondents from entering into transactions

without express consent of the Investor's Nominee Director, violating Articles of Association. The fear of the original Petitioner that the Respondents are trying to create liabilities, is well founded from the fact that the Respondents after Order dated 16.08.2017, came up with IA 189/2017 and IA 242/2018 seeking to create charge/encumbrance on the assets of the Company. Respondents, against whom Appellant filed Contempt Application for creating further charge to the tune of Rs.34 Crores with the Punjab National Bank and which Application is still pending, claimed the relief as above. Respondents who have filed the Application (Annexure A-5) in NCLT under Section 8 of the Act trying to claim that the right of Appellant – Petitioner to appoint nominee Director is also liable to be referred to Arbitration, have not shown as to how the various other provisions of Articles of Association would permit them to go on with the affairs covered in the Articles in the absence of nominee Director of investor/s when the Articles of Association which was accepted by the Respondents as binding on them provide otherwise. The Articles of Association do not appear to say that if one of the two Investors exits, the other would lose identity of Investor. It does not appear that NCLT took response of the Appellant – Petitioner to IA 242/2018 which was filed after NCLT declined to proceed with IA 104/2017. In the Impugned Order, there is reference made to the submissions made and the only portion of reasoning is in para – 6, which reads as under:-

> "6. In view of the above facts and circumstances, IA 242/2018 in CP No. 74/BB/2017 is allowed by

> modifying the order dated 16.08.2017 passed by this Hon'ble Tribunal in CP No.74/2017 and permit the Applicant Company to create a charge/encumbrance over the assets of the 1st Respondent Company so as to enable the Applicant Company to raise loans/avail financial facilities from Banks/Financial Institutions, make investments for the purpose of construction of its Corporate Office building in Chickajala, Bangalore North Taluk and for other construction works and to meet its pressing needs to execute the orders placed on it as detailed in the application.
>
> 7. The Company is directed to account for the loans raised by virtue of modification of this order.
>
> 8. Post the main CP No. 74/BB/2017 for final hearing on 04.10.2018."

It can hardly be said that NCLT satisfied itself that there was, in the facts of the matter, prima facie, case made out by Respondents to seek the relief which they were seeking on interim stage, and that balance of convenience lay in their favour or that the Company would suffer irreparable injuries, if the relief as sought in IA 242/2018 was not granted. When the NCLT had itself said that the disputes being raised were arbitral and the matter was before Hon'ble Supreme Court and refrained passing further Orders, in our view, it was inappropriate for the NCLT to have modified the Order dated 16th August, 2017. The Impugned Order did not consider the case, which was put up by the Appellant – Petitioner, and how in the face of Articles of Association as they existed, Respondents could be allowed to unilaterally proceed creating huge liabilities without a shred of

protection to the cause of Appellant – Petitioner who had brought in substantial amounts. We are aware that interest of Company is matter of priority, but parties in management cannot be heard taking adamant stand in the name of interest of Company and expect Orders which prima facie do not appear to be in line with its Articles of Association. The case of the Petitioner is not merely based on the Agreements, but it is also based on the Articles of Association which binds both sides. Prima facie, we find that the Petitioner has made out a good case in its favour based on the Articles of Association as discussed above. Prima facie, purposive interpretation of the definition of "Investor/s" in Articles of Association, (reading the Articles as a whole) shows that Respondents cannot wish away the Appellant only because the promoters have bought Avigo, the effect of which is that only one investor is left with the other having merged into one of the Promoters – a bigger entity. We find substance in the arguments made by learned Counsel for Appellant and find that the interim Order dated 16.08.2017 should not have been disturbed. Respondents claim that in Board Meeting dated 02.09.2016, when initially resolution was taken regarding upgradation of infrastructure, Nominee Director of Investors was present. But then, that resolution itself recorded that detailed expenditure will be tabled before the Board on receipt of final drawing from the Architect. Admittedly, now on the Board, there is no nominee of the Investor. We find that, looking to the prima facie case as appearing in favour of the Petitioner, if the Respondents want to block out Petitioner,

hiding behind the Arbitration clause, in equity, they cannot claim discretionary relief to create such a huge liability of Rs.1250 Lakhs, riding on the back of NCLT Order which, prima facie, is against the Articles of Association. We find, the initial Order dated 16.08.2017 was wrongly disturbed by NCLT. Considering the disputes, balance of convenience lay in not disturbing the Order dated 16.08.2017, which when passed, the Respondents 2 to 6 had stated that there was no intention to create encumbrances on the property. Respondents made out no prima facie case for change of stand soon thereafter. Alleged Notice (Page 786) to vacate from landlord is stated to be from wife of Respondent No.2 which, it is argued by Appellant, is merely effort to create urgency. Appellant – Petitioner will suffer irreparable injury if in spite of Articles of Association of the Company prima facie protecting it, gets ignored by NCLT giving go ahead to Respondents which may render the Company Petition fruitless, if to-morrow Appellant was to succeed. In the facts of the matter, it appears to us that the Impugned Order passed is not legally sustainable and deserves to be set aside. We pass the following Order:-

**ORDER**

The Appeal is allowed. The Impugned Order is quashed and set aside. Earlier Order dated 16.08.2017 passed by NCLT is restored. Our observations in this Judgement will not weigh

with NCLT at the time of deciding the Company Petition finally on merits. Parties to bear their own costs of the Appeal.

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

[Balvinder Singh]
Member (Technical)

*/rs/nn*