[2017] 78 taxmann.com 208 (NCLT - Ahd.)/[2017] 200 COMP CASE 589 (NCLT - Ahd.)
[16-01-2017]

**CL: Where contract for acquisition of shares of company between petitioners and respondents had not concluded, petitioners continued to have exercised their rights as shareholders in respondent-company and, therefore, allotment of shares by respondents without offering them to petitioners and without knowledge to petitioner's group and, thereby, reducing petitioners to minority clearly, amounted to an act of oppression**

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**[2017] 78 taxmann.com 208 (NCLT - Ahd.)**

**NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD BENCH**

**Sanjivbhai Kiritbhai Patel**

***v.***

**Biocare Remedies (P.) Ltd.**

BIKKI RAVEENDRA BABU, JUDICIAL MEMBER
TP NOS. 58/397-398/NCLT/AHM/2016 (NEW)
CP NOS. 11/397-398/CLB/MB/2014 (OLD)
JANUARY 16, 2017

**Section 241, read with section 242, of the Companies Act, 2013/ Section 397, read with section 398, of the Companies Act, 1956 - Oppression and mismanagement - Petitioners were directors of respondent company holding 100 per cent shareholding - They entered into MOU with respondent No. 2 whereby respondent No. 2 acquired company against payment of an amount - Respondent No. 2 paid substantial amount but a part of amount was outstanding - Respondents were appointed as additional directors of company and in good faith petitioners had resigned from directorship - Petitioners filed petition under sections 397 and 398 alleging that respondent No. 2 illegally allotted shares to respondents and increased authorised share capital of company without any notice to petitioners - Respondent opposed petition on ground that there was arbitration clause in MOU and that civil suit had been filed by respondent claiming a sum - Whether since allotment of shares by second respondent not only affected rights of petitioners but also other shareholders in petitioners group, award of Arbitrator could not bind other shareholders in petitioners group and, therefore, arbitration clause could not bind parties to company petition who were not parties to MOU - Held, yes - Whether since reliefs prayed in petition were not at all subject matter of Civil Suit filed by second respondent or within scope of arbitration proceedings that were pending before Arbitrator, Arbitral Tribunal had no jurisdiction to grant any of reliefs prayed for in instant petition - Held, yes - Whether since contract for acquisition of shares of company had not concluded, petitioners continued to have exercised their rights as shareholders in respondent-company and, therefore, allotment of shares by respondents without offering them to petitioner's and without knowledge to petitioners groups and, thereby, reducing petitioners to minority clearly amounted to an act of oppression - Held, yes - Whether respondents was directed to pay outstanding amount to petitioners who in turn would transfer shares in favour of respondents - Held, yes [Paras 44, 46, 55 & 59]**

## FACTS

- Petitioner No. 1, petitioner No. 3 and 'R' were directors of respondent-company. They along with their relatives held 100 per cent paid up share capital in the company.
- The petitioners entered into Memorandum of Understanding (MOU) with 2nd respondent. As per the MOU, the 2nd respondent had to acquire the company against payment of Rs. 50,00,000. Admittedly, the 2nd respondent paid Rs. 33,05,000 to the petitioners and their relatives.
- Petitioners filed petition under sections 397 and 398 against respondents alleging oppression and mismanagement.
- According to the petitioners, the management of the company had to be handed over to the 2nd respondent and the entire shareholding had to be transferred to the 2nd respondent only after the payment of entire amount of Rs. 50,00,000 but on the request of the 2nd respondent, in good faith, respondents Nos. 2 and 3 and 'V' were appointed as additional directors of the company on the next day of execution of the MOU, *i.e.*, 23-11-2001. Further, on the specific request of the 2nd respondent and in good faith, petitioner Nos. 1 and 3 and 'R' resigned from the Board of Directors of the company with effect from 1-1-2002.
- Respondent No. 2, having taken complete control over the management and affairs of the company, requested the petitioners to transfer the entire shareholding. When the petitioners insisted for balance of amount, respondent No. 2 gave cheques for Rs. 16,95,000 but same were dishonoured.
- According to petitioners, respondent No. 2 designed an artificial excuse in the name of short realization of debts from the debtors and shortfall in the stocks and inventories, etc. respondent No. 2, with a view to thwart the proposed action for dishonour of cheques and to grab the company, without paying the agreed consideration, filed Special Civil Suit in the Court of Civil Judge. The said suit was dismissed. Respondent No. 2 filed First Appeal in High Court of Gujarat. The said appeal was permitted to be withdrawn by the 2nd respondent, with an observation to the effect that, if an arbitrator was appointed rights and contentions of both side on merit of the case would remain open.
- Thereafter, R-2 filed Arbitration Petition in the High Court of Gujarat, wherein 'D' was appointed as the Sole Arbitrator. After the conclusion of R-2's examination and cross-examination in arbitration proceedings, he started making allegations against the arbitrator. The High Court of Gujarat appointed 'M' as Sole Arbitrator replacing 'D', respecting his disinclination to continue as Sole Arbitrator.
- The petitioners contended that respondent No. 2 allotted shares to persons in his group without knowledge of petitioners and without following the procedures laid down under the provisions of the Companies Act, and Articles of Association such that shareholding of petitioners was reduced from 100 per cent to 49.91 per cent.
- Petitioners prayed for declaration that the allotment of equity shares and increase in authorized share capital from 25,00,000 to 50,00,000 as illegal and *void*.
- In the reply, the 2nd respondent took a plea that CLB, had no jurisdiction to entertain instant petition on the ground that there was an arbitration clause in MOU dated 22-11-2001.

**HELD**

- Admittedly, MOU dated 22-11-2001 was entered into between petitioner Nos. 1 and 3 and 'R' as sellers and the 2nd respondent, as buyer. In the said MOU, clause 10 reads that any dispute, controversy or claim arising out of or in connection with the MOU shall be resolved by arbitration as per the procedure, rules of Arbitration laid down by the Arbitration and Reconciliation Act, 1996 in India. [Para 30]
- Admittedly, second respondent, filed special Civil Suit against Petitioner Nos. 1 and 3 and 'R' claiming an amount of Rs. 13,21,670. The Civil Judge in his judgment discussed about the arbitration clause in the MOU and its effect on the suit. The Civil Judge held that when arbitration clause is present in the agreement, Civil Suit is not maintainable. [Para 31]
- The Plaintiff in Special Civil Suit preferred First Appeal before the High Court of Gujarat which permitted the appellant to withdraw the appeal. [Para 32]

- After the disposal of the first appeal, petitioners filed arbitration petition before the High Court of Gujarat, at Ahmedabad, under section 11 of the Arbitration and Conciliation Act praying to appoint an arbitrator and the High Court appointed 'D', Retired Judge of the High Court, as sole Arbitrator to resolve the disputes that arise between the parties out of contract dated 22-11-2001. Thereupon, on the application of the petitioners, the High Court appointed 'M' to act as Sole Arbitration in place of justice 'D', by its order dated 19-7-2013. The matter was fixed for further proceedings on 24-6-2014 before the Arbitrator. It is stated that the arbitral proceedings are still pending before the sole Arbitrator. [Para 33]

- The basis for the claim of the second respondent in Special Civil Suit was that the petitioners failed to honour their commitment and discharge their obligation that arose out of clause 2(g) and 2(i) of the MOU. However, the second respondent also asked for a relief against the petitioners for the transfer of their shares in his favour on the ground that he has paid substantial amount to the petitioners as per the MOU. Therefore, what has been referred to arbitration of the Sole Arbitrator appointed by the High Court was the claim of the second respondent against the petitioners for a certain amount of Rs. 13,21,670. [Para 35]

- The reliefs claimed in instant Company Petition, which relate to acts of oppression and mismanagement said to have been committed by the second respondent in the conduct of affairs of the first respondent-company, which included allotment of shares to him, his wife, son and other relatives and, thereby, reducing the shareholding of the petitioner and increasing the authorized capital of the company. It has to be seen whether clause 10 of the MOU helps the second respondent to successfully plead that instant petition is not maintainable before this Tribunal. [Para 36]

- The legal position that emerges is that, even if there is an arbitration clause, as the reliefs in respect of oppression and mismanagement are not arbitral, they cannot be referred to the arbitration, unless the petition is a dressed up petition or a vexatious petition to avoid arbitration. [Para 40]

- The parties to the MOU are the first petitioner, the third petitioner, 'R' and the second respondent. Whereas the second petitioner, the first respondent, the third respondent and the fourth respondent are not parties to the MOU. The main relief prayed in instant petition is to declare the allotment of shares that took place between 1-9-2002 and 22-11-2012 as illegal and *void* and to de-register them. Another relief prayed in the petition is to declare that the increase in authorised share capital of the company from Rs. 25 lakhs to Rs. 50 lakhs on 13-8-2003 as illegal and *void*. [Para 41]

- Amongst the shares allotted by the second respondent, 36,400 equity shares at the rate of Rs. 10 per share were allotted on 1-9-2002 to 2nd respondent, 3rd respondent and 'G'. [Para 42]

- It is seen that 200 shares were allotted to 'G', who is not a party to the MOU and who is not a party to the company petition. It is not the case of the respondents that 'G' is claiming through or under the 2nd respondent, further in instant case 'R' who is a party to MOU is not a party to the petition. The second petitioner in instant petition is not a party to MOU. The allotment of shares by the second respondent not only affects the rights of petitioners but also other shareholders in the petitioners group, the award of the Arbitrator cannot bind the other shareholders in petitioners group. Since they are not claiming through or under the petitioners. Therefore, on facts in instant case, even if section 8 is read with section 2(h) of the Arbitration Act, the parties to the MOU and the parties to the Company Petition are not common, all of them are not claiming under or through petitioners 1 and 2 or the second respondent who are parties to MOU and they are different. [Para 44]

- The reliefs prayed in instant petition are not at all the subject matter of Special Civil Suit on the file of the Senior Civil Judge, or the subject matter of arbitration proceedings that are pending before the Sole Arbitrator. No request is made by either party to refer the controversy regarding the allotment of shares, increase in authorised share capital between 1-9-2002 and 22-11-2012 to the arbitration. The contention that there is no need to file an arbitration application under section 8 or 45 of the Arbitration Act before filing reply before the Company Law Board since arbitration proceedings have already commenced does not merit acceptance for the above said reason, *i.e.*, what was referred to arbitration was not the allotment of shares by the 2nd respondent between 1-9-2002 and 22-11-2012 and increase in the authorised share capital. In the instant case, the arbitration proceedings have already been commenced in the presence of the sole arbitrator appointed by the High Court of Gujarat. The matter(s) that were referred to the arbitration for the claims made by the second respondent against the petitioner arise out of clauses 2(g)

and 2(i) of the MOU dated 22-11-2001, but not relate to the allotment of shares and increase in the share capital that took place after entering into the MOU. [Para 45]

- The allotment of shares by the respondent to him, his wife, son and other relatives is being questioned in instant petition on the ground that it is an act of oppression and on the ground that it is an act of mismanagement. That is not at all the subject matter of the Civil Suit filed by the second respondent or within the scope of arbitration proceedings that are pending before the arbitrator. It can only be said that the arbitral Tribunal has no jurisdiction to grant any of the reliefs prayed for in instant petition. The sole Arbitrator has no jurisdiction or authority to direct the petitioner to transfer shares. Therefore, what is the subject matter of the petition is not referable to the arbitration in spite of the arbitration clause 10 in the MOU. [Para 46]

- The Petitioners are praying for the reliefs, mainly on the ground that, although the Petitioners continue as shareholders, they were not given any notice of the Board Meetings and Annual General Meetings, and they were not offered to purchase the shares and such action is against the provisions of the companies Act and in violation of the Articles of Association [Para 47]

- In order to substantiate that no notice was given to the petitioners, they are relying upon the cross-examination of the second respondent in the arbitration proceedings. [Para 48]

- From the answers given by the second respondent in cross-examination in the arbitration proceedings, it is clear that the second respondent did not send any notice of the AGM to the petitioners and he has also inducted persons belonging to his group as shareholders by increasing the share capital. In the written submissions filed by R1 to R4 in reply to the Affidavit of Evidence of the petitioners, a notice dated 15-7-2014 is there in respect of AGM of the first respondent company scheduled to be held on 27-9-2014 at 10 A.M. at the Registered Office of the company. The respondents have produced Photostat copy of the postal receipt and the postal acknowledgement of the notice addressed to 'S'. It is pertinent to mention that the said notice relates to the Annual General Meeting of 27-9-2014 and that instant petition is filed on 28-10-2013. That means it is after the filing of the petition. The grievance of the petitioners is that from 2001 onwards, *i.e.*, from the date of the MOU till 2012, no notice of meeting was sent to them. Therefore, written submissions of R1 to R4 is of no help to them. The contention of the second respondent that erroneously R-2 admitted in cross-examination in the arbitration proceedings does not merit acceptance since respondent No. 2 categorically stated that he was under the impression that no notice need be sent to the petitioners who entered into agreement to sell their entire shareholding to the second respondent, as per the MOU dated 22-11-2001. When the second respondent is of such a view, it cannot be said that the second respondent in the cross examination erroneously admitted that he did not send any notice to the petitioners. [Para 49]

- It is pertinent to mention that the petitioners, in spite of an agreement to sell their shareholding in the first respondent-company for Rs. 50 lakhs, as per the MOU dated 22-11-2001, they continued to be the shareholders of the first respondent-company technically speaking and legally speaking. The rights of the shareholders continue to be the same till their shares were transferred to the second respondent or his nominees as per the procedure prescribed in the Companies Act and the Rules framed thereunder and the Articles of Association. Till such time, the petitioners continue to be the shareholders. The petitioners continue to enjoy the right to attend the AGMs. It is needless to say that the petitioners voluntarily resigned from the directorship. Therefore, they may not receive any notice regarding meeting of the Board of Directors, but the petitioners are entitled to receive notices from AGMs. Thus, the right of the petitioners to question the allotment of shares that took place between 1-9-2002 and 22-11-2012 remains intact and it can be enforced. [Para 50]

- Another contention raised by the second respondent is that instant petition is barred by limitation or, even otherwise, the inaction on the part of the petitioners in questioning the allotment of shares that took place between 1-9-2002 and 22-11-2012 disentitles them to file instant petition. [Para 51]

- Coming to the limitation aspect, section 433 of the Companies Act, 2013 says that provisions of the Limitation Act, 1963 shall, as far as may be, applied to the proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be. Whereas section 10G(e) of Companies Act, 1956 says that the provisions of the Limitation Act, 1963 shall as far as may be applied to an appeal made to the Appellate Tribunal. Therefore, there is no provision in the Companies Act, 1956 which says that the provisions of the Limitation Act are applicable to the Company petition filed before the Company Law Board under the

provisions of the Companies Act, 1956. Even in the Limitation Act, 1963, there is no provision that provide period of limitation for the petitions seeking reliefs on the ground of oppression and mismanagement. It may be argued that when there is no provision in the Limitation Act which prescribes period of limitation, article 113 governs the period of limitation. When provisions of the Limitation Act are not made applicable to the proceedings under the Companies Act, 1956, it cannot be said that article 113 of the Limitation Act can be applied. [Para 52]

- As regards, the inaction on the part of the petitioners in challenging the allotment of shares that took place between 1-9-2002 and 22-11-2012, it is necessary to refer to certain facts with relevant dates. Admittedly, the petitioners agreed to sell their entire shareholding in the first respondent-company to the second respondent for a sum of Rs. 50 lakhs, as per the terms contained in the MOU dated 22-11-2001. Admittedly, the second respondent paid Rs. 33,05,000 to the petitioners by way of 25 cheques. As per the MOU, the balance amount that is to be paid by the second respondent to the petitioners' group is Rs. 16,95,000. Even for that amount, cheques were issued by the second respondent to the petitioners with dates from 25-3-2002 to 25-11-2002. Thereafter, the second respondent filed Special Civil Suit. Thereafter, arbitration proceedings were initiated by the 2nd respondent. The petitioners did not keep quite from 2002 till they filed the instant petition before the Tribunal. They moved the Criminal Court against the second respondent and contested the matter before the Civil Court and participated in the arbitration proceedings. Therefore, it is not a case where there is total inaction on the part of the petitioners, but there is delay in launching instant petition. The mere delay may not debar the petitioners from claiming the reliefs, if no prejudice has been caused to respondents because of the delay in launching the proceedings. The delay in filing instant petition cannot be treated waiver of their right to question acts of oppression and mismanagement or it can be treated as acquiescence. In that view of the matter, on the ground of delay, there is no need to disentitle the petitioners to the reliefs prayed in instant petition. [Para 53]

- Now it has to be considered whether increasing the authorised share capital of the first respondent-company from Rs. 25 lakhs to Rs. 50 lakhs in the General Meeting held on 13-8-2003 and allotment of shares to the 2nd respondent and the persons belonging to his group during the period from 1-9-2002 to 22-11-2012 is an act of oppression or not. Admittedly, the petitioners and their relatives were having 100 per cent shareholding in the 1st respondent-company. Admittedly, the petitioners agreed to sell their entire shareholding to the second respondent under an MOU dated 22-11-2001. The dispute started when the cheques issued by the second respondent for an amount of Rs. 16,95,000 were dishonoured. The dispute precipitated by the filing of Special Civil Suit by the second respondent and by the institution of the arbitration proceedings in respect of the alleged breach of clauses 2(g) and 2(i) of the MOU. [Para 54]

- It is already held that the petitioners continue to be shareholders in spite of the MOU. It is already held that no notice of Annual General Meetings was given to the petitioners. It is a fact that the petitioners group agreed to sell their shares. It is needless to say that the allotment of further shares resulted in reducing the shareholding of the petitioners from 100 per cent to 49.91 per cent, thereby reducing them to minority. It is not a case where the petitioners gave consent to reduce their shareholding, but it is a case where the petitioners and their group agreed to sell their shareholding under an MOU. Till such contract is concluded, the petitioners continue to have exercised their rights as shareholder in the respondent-company. Therefore, the allotment of shares by respondents without offering them to the petitioners and without knowledge to the petitioners group and, thereby, reducing the petitioners to minority clearly amounts to an act of oppression. There is no material on record to substantiate the plea of the second respondent that they have invested more than Rs. 2 crores to augment the business of the company. [Para 55]

- The second respondent not only dishonoured the payment of Rs. 16,95,000, which are payable to the petitioners, but also raised a dispute by invoking clauses 2(g) and 2(i) of the MOU dated 22-11-2001. A reading of the MOU makes it clear that the amount payable on account of breach of clauses 2(g) and (i) of the MOU has no relation or bearing on the payment of Rs. 16,95,000 due to the petitioners. There is no possibility of drawing any implied meaning which goes to show that the payment of Rs. 16,95,000 by the second respondent to the petitioners' group has got anything to do with the amount claimed by the second respondent in Special Civil Suit, which is the subject matter of the arbitral proceedings. [Para 56]

- The finding of the Tribunal is that increasing the authorized share capital and allotment of shares to R 2 and to his group persons without giving any notice to petitioners and without the consent of the

petitioners more so after second respondent raised disputes in payment of balance amount to petitioners group in the pretext of alleged breach of clauses 2(g) and (i) are acts of oppression and detrimental to the rights of the petitioners and their group. But considering the fact the second respondent purchased the entire shareholding of the petitioner group on the first respondent-company and the second respondent and his group persons are in the management of the first respondent-company for the last 16 years and considering the fact that the allotment of shares took place from 2002 to 2012, there is no justification to set aside those allotment of shares. [Para 57]

- In a petition under sections 397 and 398, the Tribunal must come to a conclusion that it is a case of winding up, but it is not in the interest of the company to order winding up. In the instant case, the petitioners' group agreed to sell their entire shareholding to the second respondent's group under an MOU and the second respondent and his group have been managing the affairs of the first respondent-company. But in doing so, they have committed an act of oppression to the petitioners, who continue to be the shareholders. Therefore, it is not a case where the company should be ordered to be wound up. Section 402 gives wide range of powers to the Tribunal without prejudice to the generality of the powers of the Tribunal under section 397 or 398. Therefore, instant case is a fit case where the Tribunal can pass an order under section 402 in order to safeguard the interest of the first respondent-company, the interest of the petitioners and other shareholders, who were allotted shares. In doing so, the Tribunal cannot ignore the terms in the MOU relating to sale of shares. It is a fact that arbitration proceedings are pending in respect of alleged breach of clauses 2(g) and 2(i) of the MOU, whereby the second respondent made a claim of Rs. 13,21,670. That part of the dispute would be resolved in the arbitration proceedings. [Para 58]

- It is also a fact that the criminal prosecution for dishonour of cheques initiated by the petitioners and others against the second respondent is pending before the Magistrate. The proceedings under section 138 of the Negotiable Instrument Act are of penal in nature and the Magistrate can only decide whether the offence of dishonour of cheque has been committed or not within the parameters of section 138. This order cannot be taken as asking the oppressed to buy out the shares because the petitioners and their group themselves offered to sell their shares to the second respondent under the MOU dated 22-11-2001. While moulding the reliefs under section 402 the Tribunal cannot totally ignore the contract between the petitioners' group and the second respondent, which is there in the MOU. Any order passed in total disregard of the understanding between the parties amounts to nullifying the MOU. Therefore, the following reliefs/directions are ordered:

  (*a*) The second respondent is directed to deposit a Demand Draft drawn on a Nationalised Bank in the name of the petitioners for an amount of Rs. 16,95,000 with 12 per cent interest per annum from the date of filing of the petition.

  (*b*) The petitioners shall deposit the original share certificates of all the petitioners and their group persons along with the Share Transfer Forms duly signed by the Petitioners and their group persons in favour of the second Respondent with the Court Officer of the Tribunal. [Para 59]

## CASES REFERRED TO

*Hindustan Petroleum Corpn. Ltd.* v. *Pink City Midway Petroleum* [2003] 46 SCL 337 (SC) (para 26), *Branch Manager, Magma Leasing & Finance Ltd.* v. *Potluri Madhivilal* [2009] 10 SCC 103 (para 26), *Kishori Lal Agarwal* v. *Alliance Engineers (P.) Ltd.* [2015] 130 SCL 304/[2014] 51 taxmann.com 400 (Cal.) (para 26), *Chatterjee Petrochemical (I) (P.) Ltd.* v. *Haldia Petrochemicals Ltd.* [2016] 6 SCC 719 (para 27), *Haryana Telecommunications Ltd.* v. *Sterile Industries* [1999] 5 SCC 688 (para 28), *Rakesh Malhotra* v. *Rajendra Kumar Malhotra* [2015] 53 taxmann.com 135 (Bom.) (para 28), *P.V. Anand Gajapati Raju* v. *PVC Raju* [2000] 4 SCC 539 (para 36), *Konkan Railway Corpn. Ltd.* v. *Rani Constructions (P.) Ltd.* [2000] 28 SCL 357 (SC) (para 36), *Sumitomo Corpn.* v. *CDC Financial Services Mauritius Ltd.* [2008] 4 SCC 91 (para 43), *Chloro Controls (India) (P.) Ltd.* v. *Severn Trent Water Purification Inc.* [2013] 1 SCC 641 (para 43) and *Dale & Carrington Invt. (P.) Ltd.* v. *P.K. Prathapan* [2004] 54 SCL 601 (SC) (para 55).

**Bharat T. Rao**, Adv. and **Kiran Shah**, CA *for the Petitioner.* **Pratik Thakkar**, Adv. *for the Respondent.*

## ORDER

**1.** Mr. Ambalal Hiralal Patel and Mr. Kantilal Purshottamdas Patel incorporated a company in the name and style as M/s. Mentac Pharmaceuticals Pvt. Ltd. on 12.05.1988 under the provisions of the Companies Act, 1956 (hereinafter called as "Act") having its registered office in the State of Gujarat. The name of the company was changed as M/s. Biocare Remedies Pvt. Ltd. i.e. first respondent (herein after called as "company") with effect from 24.02.1994. There has been lot of changes in the shareholding of the company and what is relevant for the purpose of this petition is from 31.03.1999.

**2.** The following are the directors of the company as on 31.03.2009.

(*a*) Shri Sanjivbhai K. Patel (Petitioner No. 1)

(*b*) Shri Pankajbhai C. Patel (Petitioner No. 3)

(*c*) Shri Rajendra kumar N. Arora

**3.** The following are the shareholders of the company as on 31.03.2009:

| Name of Shareholders | No. of Equity shares | % of Paid-up Equity Share Capital |
|---|---|---|
| Pankajbhai Chimanbhai Patel | 44200 | 20.69 |
| Rajulben Sanjivbhai Patel | 41200 | 19.29 |
| Kiribhai Dwarkadas Patel | 8800 | 04.12 |
| Rajendra Nebraj Arora | 22000 | 10.30 |
| Bhanuben Kiritbhai Patel | 9800 | 04.59 |
| Sanjivbhai Kiritbhai Patel | 11400 | 05.34 |
| Jyotikaben Girishbhai Patel | 9000 | 04.21 |
| Kenon Pankajbhai Patel | 9000 | 04.22 |
| Bhumikaben Girishbhai Patel | 9000 | 04.21 |
| Sarlaben Rajendrakumar Arora | 30400 | 14.23 |
| Tina Rajendrakumar Arora | 9600 | 04.49 |
| Dipak Rajendrakumar Arora | 9200 | 04.31 |

**4.** On 22-11-2001, admittedly, there was an understanding between Petitioners 1, 3 and Rajendrakumar Arora as Directors of the Company and their relatives holding 100% Paid-up share capital in the company on one hand and the 2nd Respondent on the other hand, which was reduced into writing in the form of a Memorandum of Understanding (hereinafter referred to as "MOU") on 22.11.2001.

**5.** As per the MOU, the 2nd Respondent has to acquire the company against payment of Rs.50,00,000/-. Admittedly, the 2nd Respondent paid Rs.33,05,000/- to the petitioners and their relatives through 25 cheques between 11.01.2002 and 25.08.2002.

*Case of the Petitioners*

**6.** According to the Petitioners, the management of the company has to be handed over to the 2nd Respondent and the entire shareholding has to be transferred to the 2nd Respondent only after the payment of entire amount of Rs.50,00,000/- but on the *request* of the 2nd Respondent, in good faith, Respondents 2, 3 & *Smt. Rupaben* v. *Gorania* were appointed as additional directors of the company on the next day of execution of the MOU, i.e. 23.11.2001. Further, on the specific request of the 2nd Respondent and in good faith, Petitioners 1, 3 & Shri Rajendrakumar N. Arora resigned from the Board of Directors of the company w.e.f., 01.01.2002.

**7.** Respondent No. 2, having taken complete control over the management and affairs of the company, requested the Petitioners to transfer the entire shareholding. When the Petitioners insisted for balance of amount, Respondent No. 2 gave cheques for Rs. 16,95,000/- with dates from 25.03.2002 to 25.11.2002. The Petitioners and the other holders of the cheques, when presented the cheques, they were dishonoured. Then the Petitioners could realise that the 2nd Respondent, with a dishonest intention, hatched a plan not to pay Rs.

16,95,000/-. The Petitioners and others, having no other way, filed 12 criminal cases before the Learned Metropolitan Magistrate, Ahmedabad, for dishonour of cheques under the provisions of Section 138 of the Negotiable Instrument Act.

**8.** Respondent No. 2 designed an artificial excuse in the name of short realization of debts from the debtors and shortfall in the stocks and inventories, etc. Respondent No. 2, with a view to thwart the proposed action for dishonour of cheques and to grab the company, without paying the agreed consideration, filed Special Civil Suit No. 18 of 2003 in the Court of Civil Judge (Senior Division), Gandhinagar, on 10.02.2003. The said suit was dismissed on 08.09.2008.

Respondent No. 2 filed First Appeal No. 2782 of 2010 in Hon'ble High Court of Gujarat in Ahmedabad. The said appeal was permitted to be withdrawn by the 2nd Respondent by an order dated 07.10.2010, with an observation to the effect that, if an arbitrator is appointed rights and contentions of both side on merit of the case will remain open.

Thereafter, R-2 filed Arbitration Petition No. 7 of 2011 in the Hon'ble High Court of Gujarat, wherein Hon'ble Mr. Justice (Retd.) D.A. Mehta was appointed as the Sole Arbitrator by an order dated 25.11.2011. After the conclusion of R-2's examination and cross- examination in arbitration proceedings, he started making allegations against the Arbitrator. The Learned Sole Arbitrator passed an order dated 01.07.2013 and the same was placed before the Hon'ble High Court. The Hon'ble High Court of Gujarat vide order dated 19.07.2013 appointed Shri M.S. Parikh as Sole Arbitrator replacing Justice D.A. Mehta, respecting his disinclination to continue as Sole Arbitrator.

**9.** R-2 on 01.09.2002 allotted 36,400 equity shares at Rs.10/- each to him and other two persons in his group and thereby reducing the shareholding of the Petitioners group from 100% to 85.44 %, without the knowledge of the Petitioners, without giving notice to the Petitioners and without following the procedures laid down under the provisions of the Companies Act and the Articles of Association.

**10.** The 2nd Respondent, on 13.08.2003, by way of an ordinary resolution in the general meeting increased the authorized capital from 25.00 Lacs to 50.00 Lacs without the knowledge of the Petitioners, without giving notice to the petitioners and without following the procedures laid down under the provisions of the Companies Act, and the Articles of Association.

**11.** Again, on 30.09.2003, the 2nd Respondent allotted 90,000 equity share of Rs. 10/- each to him and his wife, further reducing the shareholding of the petitioners group from 85.44% to 68.12%, without the knowledge of the Petitioners, without giving notice to the Petitioners and without following the procedures laid down under the provisions of the Companies Act, and Articles of Association.

**12.** The 2nd Respondent, on 01.10.2008, again allotted 79,000 equity shares of Rs.10 each, further reducing the shareholding of the Petitioners group from 68.12%. to 50.98%, without the knowledge of the Petitioners, without giving notice to the Petitioners and without following the procedures laid down under the provisions of the companies Act, and Articles of Association.

**13.** On 22.11.2012, the 2nd Respondent allotted 9,000 share @ Rs.10/- with a premium of Rs. 3/- per share to his son Aman Arjun Odedra, thereby reducing the shareholding of the petitioners group from 50.98% to 49.91%, without the knowledge of the Petitioners, without giving notice to the Petitioners and without following the procedures laid down under the provisions of the Companies Act, and Articles of Association.

**14.** It is alleged by the Petitioners that no notice of any General meeting after the year 2001 has been tendered to them at any point of time. Respondent No. 2 acted in an illegal and highly oppressive manner towards the Petitioners who continue to be the shareholders of the company in the eye of Law. It is further alleged the actions of R-2 are harsh, burdensome and detrimental to the interest of the Petitioners and interest of company.

**15.** Petitioners prayed for the following reliefs:

(*a*) To declare the allotment of 36,400 equity shares on 01.09.2002 as illegal and void and for a direction to ROC, Gujarat, Ahmedabad to de-register the said shares in form No. 2 dated 05.09.2002.

(*b*) To declare the increase in authorized share capital from 25,00,000 to 50,00,000 on 13.08.2003 as illegal and void and for a direction to ROC, Gujarat, Ahmedabad to de-register the same in form

No. 5 dated 01.09.2003.

(*c*) To declare the allotment of 90,000 equity shares on 30.09.2003 as illegal and void and for a direction to ROC, Gujarat Ahmedabad to de-register the said shares in form No. 2 dated 06.10.2003.

(*d*) To declare the allotment of 79,000 equity shares on 1.10.2008 as illegal and void and for a direction to ROC, Gujarat, Ahmedabad to de-register the said shares in form No. 2 dated 01.10.2008.

(*e*) To declare the allotment of 9,000 equity shares on 22.11.2012 as illegal and void and for a direction to ROC, Gujarat, Ahmedabad to de-register the said shares in form No. 2 dated 22.11.2012.

(*f*) To direct the company to rectify its register of members by removing the names of allottees of shares during the period from 01.09.2009 to 22.11.2012.

(*g*) Any other reliefs, orders, or directions.

*Case of Respondents*

**16.** In the reply, the 2nd Respondent took a plea that Hon'ble Bench of CLB, Mumbai has no jurisdiction to entertain this petition on the ground that there is an arbitration clause in MOU dated 22.11.2001. In support of the said plea, R-2 referred to case law also, which will be referred to while discussing the said legal aspects.

**17.** It is the case of R-2 that by the date he took over the company, it was a bankrupt company and not a going concern as pleaded by the Petitioners. According to R-2, they have to pay Rs.26,00,000/- to the Petitioners and shareholders after signing the MOU and the remaining 24,00,000/- to be paid in instalments on a mutually agreed time frame, subject to realization of valid stock worth Rs.24,00,000/- and recovery of bad debts of Rs. 15,00,000/- by the Petitioners. Respondents were inducted as directors after agreeing in principal about the consideration amount and conditions of MOU. R-2, being an NRI, was made to deposit Rs. 15,00,000/- of his hard earned money in the bank A/c. of the bankrupt company on 08.12.2001 instead of depositing it in the A/c. of the petitioners and other shareholders as per the terms of MOU.

Since an amount of Rs. 15,00,000/- was trapped in a Bankrupt company, the Petitioners started playing game. The Petitioners inflated the value of stocks as Rs.24,00,000/-. The Petitioners were aware that they were not in a position to recover the bad debts of Rs. 15,00,000/- due to the company. The Petitioners never cooperated for joint inventory and verification of the stocks and its value. The Petitioners and others, having taken the cheques for the balance amount, escaped the responsibility of stock scrutiny and recovery of bad debts. Petitioners handed over the resignation letters dated 22.01.2002 with retrospective effect from 01.01.2002. The resignations of the Petitioners as directors were not made in good faith. The cheques for Rs.33,05,000/- were credited in the accounts of the Petitioners and other shareholders by 25.08.2002. The 2nd Respondent had been to Africa by the end of January 2002. He visited India only twice, i.e. on 22.01.2002 and on 25.08.2002 and during those visits, the 2nd Respondent asked the Petitioners about the joint verification of inflated and expired stocks and non-recovery of bad debts, but the Petitioners put their deaf ear. By the date 2nd Respondent issued legal notice to the petitioners and others demanding the recovery of short amount realized from the stocks and non-recovery of amount from the debtors, the Petitioners and others were having cheques worth Rs. 16.95 Lacs in their hands. The Petitioners and others presented those cheques only with a view to get them dishonoured and, thereafter, filed prosecution for the alleged offence under Section 138 of the Negotiable Instruments Act.

**18.** Further, it is the case of the Respondents that, pursuant to the orders of the Hon'ble High Court in First Appeal No. 2782/2010 dated 07.10.2010, the Petitioners did not cooperate for appointment of Sole Arbitrator, which made the 2nd Respondent to file Arbitration Petition No. 7 of 2011. It is stated by the 2nd Respondent that petitioners filed SLP before Hon'ble Supreme Court challenging the legality of the orders dated 07.10.2010 & 25.11.2011 passed by the Hon'ble High Court of Gujarat in First Appeal No. 2782/2010 and in Arbitration Petition No. 7/2011, respectively, and the said SLP was dismissed by the Hon'ble Supreme Court of India.

**19.** It is further stated by the 2nd Respondent that the Hon'ble High Court of Gujarat, vide its order dated 19.07.2013, appointed Mr. M.S. Parikh as Sole Arbitrator replacing Hon'ble Mr. Justice (Retd.) D.A. Mehta.

**20.** Article No. 4 of the Articles of Association of the company enables the directors of the company to divide the share in original or any increased capital into different classes and attach thereto, at their discretion, any preferential, differed and any other special rights, privileges, conditions as to dividends, capital, voting or otherwise.

**21.** According to the Respondents, they have injected Rs. 25,00,000 in the company by 31.03.2002, i.e. within four months after taking over the management on 22.11.2001. The Respondents, having invested such a huge amount, have every right to allot 36,000 equity shares of Rs.10/- each on 01.09.2002. The Company Secretary also issued compliance certificates for the accounting years 2002-2003 to 2012-2013.

**22.** Further, as per proviso 3A of the Articles of Association, the company may, from time to time, by ordinary resolution, increase the share capital by sum to be divided into share of such class and amount, as may be specified in the resolution. It is the case of the respondents that a meeting was called on 13.08.2003 and the authorized capital was increased in that meeting.

**23.** The Respondents stated that allotments of 90,000 shares, 79000 shares and 9000 shares on 13.09.2003, 01.10.2008 and 22.11.2012, respectively, were done as per the provisions governing allotment of share in the Articles of Association and statutory forms were filed in ROC from time to time.

**24.** It is the plea of the respondents that the right of pre-emption comes into play when it is transfer of equity shares and the said right is not applicable for new allotment of equity shares.

**25.** The Respondents have invested more than Rs.2.00 crores and nurtured the company with their hard work and business acumen for 12 years, which improved the performance of the company. The Petitioners, with the sole object to de-rail the growth of the company, wrote a letter dated 28.09.2005 to the lender bank of the company for revocation of the bank guarantee. The said move was undertaken by the Petitioners to compel the 2nd Respondent to pay the disputed outstanding amount of Rs. 16,95,000/-. The Petitioners also gave a complaint to the ROC, Gujarat, without any basis. The ROC rightfully did not take any action on the said complaint. The Respondents pleaded, when the foundation of the cause of action was the breach of an agreement, which contains an arbitration clause, a petition seeking reliefs on allegations of oppression and mismanagement is not maintainable.

**26.** In support of the said plea, the Respondents referred to the case of *Pinakin Das Gupta* v. *Madhyam Advertising (P.) Ltd.* The Respondents also pleaded that, in view of the law laid down by the Hon'ble Apex Court in the case of *Hindustan Petroleum Corpn. Ltd.* v. *Pink City Midway Petroleum* [2003] 46 SCL 337 and *Branch Manager, Magma Leasing and Finance Ltd.* v. *Potluri Madhivilal* [2009] 10 SCC 103, the Company Law Board cannot enter into the other questions, including the grant of interim reliefs, without considering the application under section 8 of Arbitration & Conciliation Act.

**27.** Learned counsel appearing for the Respondents, relying upon the decision of the Hon'ble High Court of Calcutta in *Kishori Lal Agarwal* v. *Alliance Engineers (P.) Ltd.* [2015] 130 SCL 304/[2014] 51 taxmann.com 400 (Cal.), wherein a reference was made to the decision of the Hon'ble Apex Court in *Chatterjee Petrochemical (I) (P.) Ltd.* v. *Haldia Petrochemicals Ltd.* [2016] 6 SCC 719, contended that contractual disputes cannot be brought under the purview of Sections 397 and 398 of the Companies Act. He further argued that in this case also, the MOU bars the petitioner from initiating provisions of Sections 397 and 398 of the Companies Act alleging oppression and mismanagement against the respondents.

**28.** Learned counsel appearing for the Petitioner, referring to the decision in *Haryana Telecommunications Ltd.* v. *Sterile Industries* [1999] 5 SCC 688, contended that disputes which are capable of being decided by arbitration can only be referred to arbitration in spite of presence of arbitration clause in the MOU. He also cited another decision in *Rakesh Malhotra* v. *Rajendra Kumar Malhotra* [2015] 53 taxmann.com 135 (Bom.) and contended that no arbitration agreement can vest an Arbitral Tribunal with the powers to grant the kind of relief against oppression and mismanagement that a Company Law Board might grant.

*POINT:-*

**29.** Before going into the aspects of oppression and mismanagement, it is necessary to answer whether this petition under Sections 397 and 398 of the Companies Act is maintainable before this Tribunal in spite of clause 10, in the MOU which relate to arbitration.

**30.** Admittedly, MOU dated 22nd November, 2001 was entered into between Petitioners 1, 3 and Shri R. K. Arora as sellers and the 2nd Respondent, as buyer.

In the said MOU, clause 10 reads as follows: —

> "10. Any dispute, controversy or claim arising out of or in connection with this MOU or the interpretation, validity, performance, breach or termination thereof shall be resolved by arbitration conducted in Ahmedabad, India as per the procedure, rules of Arbitration laid down by the Arbitration and Reconciliation Act, 1996 in India. "

**31.** Admittedly, second Respondent, through his power attorney holder, filed Special Civil Suit No. 18 of 2003 on the file of Civil Judge (senior divison) of Gandhinagar against Petitioners 1, 3 and Shri R. K. Arora claiming an amount of Rs. 13,21,670/-. The basis for the claim, as can be seen from the judgment of the learned Senior Civil Judge of Gandhinagar, is the alleged breach of clauses 2(g) and 2(i) of the MOU. The learned Senior Civil Judge, by his judgment dated 08.09.2008, dealt with the issues raised by the plaintiffs in that Special Civil Suit No. 18 of 2003 and decided against the plaintiff. The learned Senior Civil Judge in his judgment discussed about the arbitration clause in the MOU and its effect on the suit. The learned Senior Civil Judge held that when arbitration clause is present in the agreement, civil suit is not maintainable.

**32.** The Plaintiff in Special Civil Suit No. 18 of 2003 preferred First Appeal No.2782 of 2010 before the Hon'ble High Court of Gujarat. The said appeal was disposed of by the Hon'ble High Court of Gujarat on 07.10.2010 with the following order:—

> "Ms. Samta Patel, learned counsel appearing for M/s Nanavati Associates for the appellant seeks permission to withdraw the appeal on condition that any observations made by the trial Court may not operate as a bar to the Arbitrator in the event the Arbitrator is appointed. She has also stated before us that on the withdrawal of the present appeal is with a view to resort to the arbitration proceedings.
>
> It appears to us that the Civil Court declined to exercise its powers on the ground that there is an arbitration clause. Therefore, the observations can be read only for declining to exercise the powers of the Civil Court and cannot be read for merits of the case. Further if the Arbitrator is appointed, naturally rights and contentions of both the sides on merits of the case will remain open.
>
> Subject to the aforesaid observations, the appellant is permitted to withdraw the appeal Disposed of as withdrawn with liberty as aforesaid."

**33.** After the disposal of the First Appeal, Petitioners filed Arbitration Petition No.7 of 2011 before the Hon'ble High Court of Gujarat, at Ahmedabad, under Section 11 of the Arbitration and Conciliation Act praying to appoint an arbitrator and the Hon'ble High Court appointed Shri D. A. Mehta, Retired Judge of the High Court, as sole Arbitrator to resolve the disputes arise between the parties out of contract dated 22.11.2001. Thereupon, on the application of the Petitioners, the Hon'ble High Court appointed Shri M. S. Parikh to act as Sole Arbitrator in place of Justice D. A. Mehta, by its order dated 19.07.2013. As can be seen from Annexure-Rl attached to Sur-Rejoinder dated 5th May, 2014, the matter was fixed for further proceedings on 24.06.2014 before the learned Arbitrator. It is stated that the arbitral proceedings are still pending before the learned sole Arbitrator.

**34.** In this factual background, it has to be seen whether the petition under Sections 397 and 398 of the Companies Act is maintainable before this Tribunal.

**35.** The basis for the claim of the second Respondent in Special Civil Suit No. 18 of 2003 was that the Petitioners failed to honour their commitment and discharge their obligation that arose out of clauses 2(g) and 2(i) of the MOU. However, the second Respondent also asked for a relief against the Petitioners for the transfer of their shares in his favour on the ground that he has paid substantial amount to the Petitioners as per the MOU. Therefore, what has been referred to arbitration of the Sole Arbitrator appointed by the Hon'ble High Court was the claim of the second Respondent against the Petitioners for a certain amount of Rs. 13,21,670/-.

**36.** The reliefs claimed in this Company Petition, which relate to acts of oppression and mismanagement said to have been committed by the second Respondent in the conduct of affairs of the first Respondent- company, which included allotment of shares to him, his wife, son and other relatives and, thereby, reducing the shareholding of the Petitioner and increasing the authorized capital of the company. Now it has to be seen whether clause 10 of the MOU helps the second Respondent to successfully plead that this petition is not maintainable before this Tribunal. It is necessary to refer to the case law on this aspect from the beginning.

In *Hindustan Petroleum Corporation Ltd.* (*supra*), the Hon'ble Supreme Court referred to the decision in *P.V. Anand Gajapati Raju* v. *PVC Raju* [2000] 4 SCC 539 and *Konkan Railway Corpn. Ltd.* v. *Rani Constructions (P.) Ltd.* [2000] 28 SCL 357 (SC). In the decision in *P. V. Anand Gajapati Raju* (*supra*), it is held that it is the Arbitral Tribunal that has to rule on its jurisdiction but not Civil Court or any other Court. In *Hindustan Petroleum Corpn. Ltd*. (*supra*), it is held that in the presence of an arbitration clause in the contract, Civil Court to refer to arbitration.

**37.** In *Pinaknidas Gupta* (*supra*), the Hon'ble Vice-Chairman of the Company Law Board, Mumbai, held that the reliefs prayed arise out of MOU and, if there is arbitration clause, it has to be referred to arbitration.

**38.** In *Haryana Telecom Ltd.* (*supra*), a distinction has been made out between the disputes which are capable of being decided by arbitration and those which are not.

**39.** In *Rakesh Malhotra* (*supra*) (relevant paragraphs 86 to 90), it is held that no arbitration agreement can vest an Arbitral Tribunal with the powers to grant the kind of reliefs that the Company Law Board might grant in a petition against oppression and mismanagement. In that decision, it is further held that the Arbitral Tribunal has no jurisdiction to pass judgment in rem and it can only pass judgments in person am. In that judgment, Their Lordships referred to even a dressing up petition under the provisions of the Companies Act with a dishonest attempt to escape the arbitration clause. In that decision, it is also held as follows in paragraph 90:—

> "It is one thing to say that the disputes validly covered by Chapter VI of the Companies Act, 1956 and specially Section 402 cannot be referred to arbitration because they are by their very nature and having regard to the source of power not arbitrable. It is another thing to say that when a mala fide, vexatious, oppressive or dressed up petition is brought only to avoid an arbitration clause, all that the CLB can do is to dismiss the arbitration petition and drive the applicant seeking arbitration to some other forum in which to file an application under Section 8 or 45 of the Arbitration Act. "

**40.** In the above said decision, the Hon'ble Bombay High Court referred to almost all the judgments of the Supreme Court on the topic and arrived at those findings. Therefore, from the above said decision, the legal position that emerges is that, even if there is an arbitration clause, as the reliefs in respect of oppression and mismanagement are not arbitral, they cannot be referred to the arbitration, unless the petition is a dressed up petition or a vexatious petition to avoid arbitration.

**41.** The parties to the MOU are the first Petitioner, the second Petitioner, Shri R. K. Arora and the second Respondent. Whereas the second Petitioner, the first Respondent, the third Respondent and the fourth Respondent herein are not parties to the MOU. The main relief prayed in this petition is to declare the allotment of shares that took place between 01.09.2002 and 22.11.2012 as illegal and void and to de-register them. Another relief prayed in the petition is to declare that the increase in authorised share capital of the company from Rs.25 lakhs to Rs.50 lakhs on 13th August, 2003 as illegal and void.

**42.** Amongst the shares allotted by the second Respondent, 36,400 equity shares at the rate of Rs.10/- per share were allotted on 01.09.2002 to Odedra Arjun Jivabhai (2nd Respondent), Odedra Minaxi Arjun (3rd Respondent) and Gorania Rupa Vijabhai vide Annexure-8 annexed to the petition.

**43.** In *Sumitomo Corpn.* v. *CDC Financial Services (Mauritius) Ltd.* [2008] 4 SCC 91, it is held that the matters relate to the oppressive action not covered by arbitration agreement need not be referred to arbitration and the Company Law Board is right in refusing to invoke Section 45 of the Arbitration and Conciliation Act. In paragraph 20 of the said judgment, it is held as follows: —

> 'Section 2(h) of the Arbitration Act mentions that "the party" means a party to an arbitration agreement. To put it clearly, the party to the judicial proceedings should be a party to the arbitration agreement.'

But in the decision in *Chloro Controls (India) (P.) Ltd.* v. *Severn Trent Water Purification Inc.* [2013] 1 SCC 641, it is held that what is held in paragraph 20 of the judgment in *Sumitomo Corpn.* (*supra*) is not a good law. In that judgment, the Hon'ble Supreme Court, referring to Section 45 of the Arbitration and Conciliation Act in light of Section 2(h), held that the interpretation given by the Court in *Sumitomo Corpn.* (*supra*) does not stand test of reasoning. It is further held in that decision that Section 45, in explicit language, permits the parties for claiming through or under a main party to the arbitration agreement to seek reference to arbitration. This is so, by fiction of law, contemplated in the proviso to Section 45 of the 1966 Act.

**44.** Sec.45 is in Part II which relate to enforcement of certain foreign awards and it is applicable to the agreements referred in Sec.44. Whereas Sec.8 of Arbitration Act deals with power to refer parties to arbitration where there is an arbitration clause in the agreement. Now, if we see Annexure-8, under which 36000 shares were allotted, it shows that 200 shares were allotted to Gorania Rupa Vijaybhai, who is not a party to the MOU and who is not a party to the Company Petition. It is not the case of the Respondents that Gorania Rupa Vijaybhai is claiming through or under the 2nd Respondent, further in this case Sri R.K. Arora who is a party to MOU is not a party to the petition. The second Petitioner in this petition is not a party to MOU. The allotment of shares by the second Respondent not only affects the rights of petitioners but also other shareholders in the petitioners group. The award of the learned Arbitrator cannot bind the other shareholders in petitioners group Since they are not claiming through or under the Petitioners.

Therefore, on facts in this case, even if Section 8 is read with Section 2(h) of the Arbitration Act, the parties to the MOU and the parties to the Company Petition are not common, all of them are not claiming under or through Petitioners land 2 or the second Respondent who are parties to MOU and they are different.

**45.** The reliefs prayed in this petition are not at all the subject matter of Special Civil Suit No. 18 of 2003 on the file of learned Senior Civil Judge, Gandhinagar or the subject matter of arbitration proceedings that are pending before the learned Sole Arbitrator. No request is made by either party to refer the controversy regarding the allotment of shares, increase in authorised share capital between 01.09.2002 and 22.11.2012 to the arbitration. The contention that there is no need to file an arbitration application under Section 8 or 45 of the Arbitration Act before filing reply before this Company Law Board since arbitration proceedings have already commenced does not merit acceptance for the above said reason, i.e. what was referred to arbitration was not the allotment of shares by the 2nd Respondent between 01.09.2002 and 22.11.2012 and increase in the Authorised share capital. In the case on hand, the arbitration proceedings have already been commenced in the presence of the sole Arbitrator appointed by the Hon'ble High Court of Gujarat. The matter(s) that were referred to the arbitration for the claims made by the second Respondent against the Petitioner arise out of clauses 2(g) and 2(i) of the MOU dated 22nd November, 2001, but not relate to the allotment of shares and increase in the share capital that took place after entering into the MOU.

**46.** The allotment of shares by the Respondent to him, his wife, son and other relatives is being questioned in this petition on the ground that it is an act of oppression and on the ground that it is an act of mismanagement. That is not at all the subject matter of the Civil Suit filed by the second Respondent or within the scope of arbitration proceedings that are pending before the learned Arbitrator. It can only be said that the Arbitral Tribunal has no jurisdiction to grant any of the reliefs prayed for in this petition. The learned sole Arbitrator has no jurisdiction or authority to direct the Petitioner to transfer shares. Therefore, what is the subject matter of the petition is not referable to the arbitration in spite of the arbitration clause 10 in the MOU dated

**47.** The Petitioners are praying for the reliefs, which are already narrated in paragraph 15 of this judgment, mainly on the ground that, although the Petitioners continue as shareholders, they were not given any notice of the Board Meetings and Annual General Meetings, and they were not offered to purchase the shares and such action is against the provisions of the Companies Act and in violation of the Articles of Association.

**48.** In order to substantiate that no notice was given to the Petitioners, they are relying upon the cross-examination of the second Respondent in the arbitration proceedings. In the cross-examination, question No. 14 reads as follows:—

> "Q.14 Have you sent any notice about AGM to be held at any time between 2001 till this date to these 12 shareholders?
>
> Ans. No, no notice has been sent.
>
> (Q) What is the basis for the statement?
>
> Ans. It is my understanding that they lose their right to their share of profit."
>
> "Q.15 The three shareholders enumerated at Items 13, 14 and 15 have been inducted by you, i.e. they are your group of persons, is it correct?
>
> Ans. Yes."

**49.** From the above said answers given by the second Respondent in cross-examination in the arbitration proceedings, it is clear that the second Respondent did not send any notice of the AGM to the Petitioners and he has also inducted persons belonging to his group as shareholders by increasing the share capital. In the

Written Submissions filed by R1 to R4 in reply to the Affidavit of Evidence of the Petitioners, at page 61 (Annexure-13), a notice dated 15.7.2014 is there in respect of AGM of the first Respondent Company scheduled to be held on 27th September, 2014 at 10 A.M. at the Registered Office of the Company. At page 62, the Respondents have produced Photostate copy of the postal receipt and the postal acknowledgement of the notice addressed to Sanjaybhai K. Patel. It is pertinent to mention that the said notice relates to the Annual General Meeting of 27th September, 2014 and that this petition is filed on 28th October, 2013. That means it is after the filing of the petition. The grievance of the Petitioners is that from 2001 onwards, i.e. from the date of the MOU till 2012, no notice of meeting was sent to them. Therefore, Annexure-13 of Written Submissions of Rl to R4 is of no help to them. The contention of learned counsel for the second Respondent that erroneously R-2 admitted in cross-examination in the arbitration proceedings does not merit acceptance since Respondent No.2 categorically stated that he was under the impression that no notice need be sent to the Petitioners who entered into agreement to sell their entire shareholding to the second Respondent, as per the MOU dated 22.11.2001 (Annexure-2 of the petition). When the second Respondent is of such a view, it cannot be said that the second Respondent in the cross-examination erroneously admitted that he did not send any notice to the Petitioners.

**50.** Here it is pertinent to mention that the Petitioners, in spite of an agreement to sell their shareholding in the first Respondent-company for Rs.50 lakh, as per the MOU dated 22.11.2001, they continued to be the shareholders of the first Respondent-company technically speaking and legally speaking. The rights of the shareholders continue to be the same till their shares were transferred to the second Respondent or his nominees as per the procedure prescribed in the Companies Act and the Rules framed thereunder and the Articles of Association. Till such time, the Petitioners continue to be the shareholders. The Petitioners continue to enjoy the right to attend the AGMs. It is needless to say that the Petitioners voluntarily resigned from the Directorship. Therefore, they may not receive any notice regarding meeting of the Board of Directors, but the Petitioners are entitled to receive notices for AGMs. In view of the above discussion, the right of the Petitioners to question the allotment of shares that took place between 1.9.2002 and 22.11.2012 remains intact and it can be enforced.

**51.** Another contention raised by the learned counsel for the second Respondent is that this petition is barred by limitation or, even otherwise, the inaction on the part of the Petitioners in questioning the allotment of shares that took place between 01.09.2002 and 22.11.2012 disentitles them to file this petition.

**52.** Coming to the Limitation Aspect, Section 433 of the Companies Act, 2013 says that provisions of the Limitation Act, 1963 shall, as far as may be, applied to the proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be. Whereas Section 10G(e) of Companies Act, 1956 says that the provisions of the Limitation Act, 1963 shall as far as may be applied to an appeal made to the Appellate Tribunal. Therefore, there is no provision in the Companies Act, 1956 which says that the provisions of the Limitation Act are applicable to the Company Petition filed before the Company Law Board under the provisions of the Companies Act, 1956. Even in the Limitation Act, 1963, there is no provision that provide period of limitation for the petitions seeking reliefs on the ground of oppression and mismanagement. It may be argued that when there is no provision in the Limitation Act which prescribes period of limitation, Article 113 governs the period of limitation. When provisions of the Limitation Act are not made applicable to the proceedings under the Companies Act, 1956, it cannot be said that Article 113 of the Limitation Act can be applied.

**53.** Now, coming to the inaction on the part of the Petitioners in challenging the allotment of shares that took place between 01.09.2002 and 22.11.2012, it is necessary to refer to certain facts with relevant dates. Admittedly, the Petitioners agreed to sell their entire shareholding in the first Respondent-company to the second Respondent for a sum of Rs.50 lakhs, as per the terms contained in the MOU dated 22.11.2001. Admittedly, the second Respondent paid Rs.33,05,000/- to the Petitioners by way of 25 cheques. As per the MOU, the balance amount that is to be paid by the second Respondent to the Petitioners' group is Rs. 16,95,000/- Even for that amount, cheques were issued by the second Respondent to the Petitioners with dates from 25.03.2002 to 25.11.2002. Thereafter, the second Respondent filed Special Civil Suit No. 18 of 2003. Thereafter, arbitration proceedings were initiated by the 2nd Respondent. The Petitioners did not keep quiet from 2002 till they filed the present petition before this Tribunal. They moved the Criminal Court against the second Respondent and contested the matter before the Civil Court and participated in the arbitration proceedings. Therefore, it is not a case where there is total inaction on the part of the Petitioners, but there is delay in launching this petition. The mere delay may not debar the Petitioners from claiming the reliefs, if no prejudice has been caused to Respondents because of the delay in launching the proceedings.

The delay in filing this petition cannot be treated waiver of their right to question acts of oppression and mismanagement or it can be treated as acquiescence. In that view of the matter, on the ground of delay, there is no need to disentitle the Petitioners to the reliefs prayed in this petition.

**54.** Now it has to be considered whether increasing the authorised share capital of the first Respondent-company from Rs.25 lakhs to Rs.50 lakhs in the General Meeting held on 13.08.2003 vide Annexure-9 to the petition and allotment of shares to the 2nd Respondent and the persons belonging to his group vide Annexures-8, 10, 11 and 12 to the petition during the period from 01.09.2002 to 22.11.2012 is an act of oppression or not. Admittedly, the Petitioners and their relatives were having 100% shareholding in the 1st Respondent-company. Admittedly, the Petitioners agreed to sell their entire shareholding to the second Respondent under an MOU dated 22.11.2001. The dispute started when the cheques issued by the second Respondent for an amount of Rs. 16,95,000/- were dishonoured. The dispute precipitated by the filing of Special Civil Suit No. 18 of 2003 by the second Respondent and by the institution of the arbitration proceedings in respect of the alleged breach of clauses 2(g) and 2(i) of the MOU.

**55.** It is already held that the Petitioners continue to be shareholders in spite of the MOU. It is already held that no notice of Annual General Meetings was given to the Petitioners. It is a fact that the Petitioners group agreed to sell their shares. It is needless to say that the allotment of further shares resulted in reducing the shareholding of the Petitioners from 100% to 49.91%, thereby reducing them to minority. It is not a case where the Petitioners gave consent to reduce their shareholding, but it is a case where the Petitioners and their group agreed to sell their shareholding under an MOU. Till such contract is concluded, the Petitioners continue to have exercised their rights as shareholders in the first Respondent-company. Therefore, the allotment of shares without offering them to the Petitioners and without knowledge to the petitioners group and, thereby, reducing the Petitioners to minority clearly amounts to an act of oppression. In the decision in *Dale and Carrington Invt. (P.) Ltd.* v. *P.K. Prathapan* [2004] 54 SCL 601 (SC) the Hon'ble Apex Court held issue of shares solely to gain control over company cannot be allowed. There is no material on record to substantiate the plea of the second Respondent that they have invested more than Rs. two crores to augment the business of the company.

**56.** The second Respondent not only dishonoured the payment of Rs. 16,95,000/-, which are payable to the Petitioners, but also raised a dispute by invoking clauses 2(g) and 2(i) of the MOU dated 22.11.2001. A reading of the MOU makes it clear that the amount payable on account of breach of clauses 2(g) and (i) of the MOU has no relation or bearing on the payment of Rs. 16,95,000/- due to the Petitioners. There is no possibility of drawing any implied meaning which goes to show that the payment of Rs. 16,95,000/- by the second Respondent to the Petitioners' group has got anything to do with the amount claimed by the second Respondent in Special Civil Suit No. 18 of 2003, which is the subject matter of the arbitral proceedings.

**57.** The finding of this Tribunal is that increasing the authorized share capital and allotment of shares to R-2 and to his group persons without giving any notice to petitioners and without the consent of the Petitioners more so after second Respondent raised disputes in payment of balance amount to Petitioners group in the pretext of alleged breach of clauses 2(g) and (i) are acts of oppression and detrimental to the rights of the Petitioners and their group. But considering the fact the second Respondent purchased the entire shareholding of the Petitioner group in the first Respondent-company and the second Respondent and his group persons are in the management of the first Respondent-company for the last 16 years and considering the fact that the allotment of shares took place from 2002 to 2012, there is no justification to set aside those allotment of shares.

**58.** In a petition under Sections 397 and 398 of the Companies Act, the Tribunal must come to a conclusion that it is a case of winding up, but it is not in the interest of the company to order winding up. In the case on hand, the Petitioners' group agreed to sell their entire shareholding to the second Respondent's group under an MOU and the second Respondent and his group have been managing the affairs of the first Respondent-company. But in doing so, they have committed an act of oppression to the petitioners, who continue to be the shareholders. Therefore, it is not a case where the company should be ordered to be wound up. Section 402 of the Companies Act, 1956 gives wide range of powers to this Tribunal without prejudice to the generality of the powers of the Tribunal under sections 397 of 398. Therefore, this is a fit case where this Tribunal can pass an order under Section 402 of the Companies Act in order to safeguard the interest of the first Respondent-company, the interest of the Petitioners and other shareholders, who were allotted shares. In doing so, the Tribunal cannot ignore the terms in the MOU relating to sale of shares. It is a fact that arbitration proceedings are pending in respect of alleged breach of clauses 2(g) and 2(i) of the MOU, whereby the second Respondent made a claim of Rs. 13,21,670/-. That part of the dispute would be resolved in the arbitration proceedings.

**59.** It is also a fact that the criminal prosecution for dishonour of cheques initiated by the Petitioners and others against the second Respondent is pending before the learned Magistrate. The proceedings under Section 138A of the Negotiable Instruments Act are of penal in nature and the learned Magistrate can only decide whether the offence of dishonour of cheque has been committed or not within the parameters of Section 138A. This order cannot be taken as asking the oppressed to buy out the shares because the Petitioners and their group themselves offered to sell their shares to the second Respondent under the MOU dated 22.11.2001. While moulding the reliefs under Section 402 of the Companies Act, this Tribunal cannot totally ignore the contract between the Petitioners' group and the second Respondent, which is there in the MOU. Any order passed in total disregard of the understanding between the parties amounts to nullifying the MOU. Therefore, the following reliefs/directions are ordered: —

(*a*) The second Respondent is directed to deposit a Demand Draft drawn on a Nationalised Bank in the name of the Petitioners for an amount of Rs. 16,95,000/- with 12% interest per annum from the date of filing of this petition, i.e. 28th October, 2013, till the date of Demand draft, before the Court Officer of this Tribunal on or before 17th March, 2017 under intimation to the Petitioners.

(*b*) The Petitioners shall deposit the original Share Certificates of all the Petitioners and their group persons along with the Share Transfer Forms duly signed by the Petitioners and their group persons in favour of the second Respondent with the Court Officer of this Tribunal on or before 17th March, 2017, under intimation to the second Respondent.

(*c*) The Court Officer a shall list the matter before this Tribunal in the last week of March, 2017 for passing appropriate orders for return of the Demand Draft and for return of the original Share Certificates along with the duly signed Share Transfer Forms. The registry shall send notice of date of hearing to both parties.

Petition is disposed of accordingly. Both parties to bear their own costs.

SHRUTI