

prayed that the appointments of respondents 4 & 5 who have been illegally inducted as Additional Directors be declared null and void with the consequential effect of nullifying decisions taken by them.

2. As per averments made, Respondent no.1 Company, which is engaged in the business of development of Real Estate, was incorporated in March 2011. Respondents 2 and 3 are its Directors and incharge of the day to day affairs of the Company. The paid up capital of the Company is Rs. 1 Lakh, of which the Petitioner, a registered company, acquired a 40 % shareholding from Respondent no. 3, Shri Piyush Tiwari.

3. It is further averred by the petitioner that upon the respondents' representation that they had been allotted plot no. SC-01/D-1, Sector 79 Noida, Dist. Gautam Budh Nagar, UP by the Greater Noida Authority for development of a Group Housing Complex, the plans of which were duly sanctioned, they approached the petitioner for financial assistance. At the respondents' request, the petitioner extended a term loan of Rs. 6 crores for a period of 1 year for development of the group housing complex. The petitioner transferred the aforesaid amount vide an RTGS transaction of 2.10 crores to the Respondent's Bank account on 13.05.2014 and Rs. 3.90 crores vide cheque no. 200235 dated 23rd May, 2014 drawn on HDFC Bank, Preet Vihar, New Delhi. As per the terms and conditions agreed between the parties, the said loan amount was to be repaid within a period of one



year, ie. by 24.05.2015. The respondents had also undertaken not to borrow any further money without the petitioner's consent in writing till their liability stood extinguished. It is stated that as the Respondents failed to adhere to the repayment timeline, the petitioner was constrained to file a suit for a Permanent and Prohibitory Injunction in the court of the Sr. Civil Judge, Delhi for restraining the respondents from selling, parting with or creating third parties right over the allotted land being plot no. SC-01/D-1 Sector 79, Noida, District GB Nagar, UP.

4. The respondents on being served by the Tribunal failed to put in appearance to defend themselves and were proceeded Ex parte. This Bench therefore proceeds to adjudicate the claim of the petitioner on the allegations that the acts of the respondents were oppressive and mismanaged.

5. The grievance of the petitioner is that in complete disregard of the terms of the agreement dated 24th May, 2014 executed with the Respondents, they have not only failed to return the loan on time, but have also taken further loan from third parties. It is alleged that the respondents are siphoning off the money and are defrauding other creditor and customers. The petitioner has made specific allegations of the respondents having received money from prospective buyers, but the work of construction was not carried out in a satisfactory manner. Attention of the bench is drawn to the Audited Balance sheet of the



Respondent Company for the financial year ending 2015-16 reflecting advances of Rs. 157 Crores taken towards booking of the flats against which very little construction has been done.

6. As per averments made, the working of the Company is totally mismanaged for want of carrying out statutory compliances on time. It is alleged that no AGM has been convened after 30th September, 2014. Further, books and other statutory records were not available to the petitioner, for inspection even though they held 40% equity in the Respondent Company.

7. The petitioners have further alleged that respondents 4 & 5 have been appointed as Additional Directors on 09.05.2016 by respondents 2 and 3 despite the Court order dated 20.01.2016 restraining them from such acts, being in gross contempt of the Court's Orders.

8. Taking note of the various grievances, they can be formalised in a nutshell as:

- a. The respondents are not conducting the business affairs of the company in a responsible manner and are guilty of siphoning off the funds of the R1 Company.
- b. The petitioner has not been able to inspect the minute books and other statutory records of the respondent company.
- c. The respondents have illegally appointed R 4 & 5 as additional Directors on the Board of the company who continue to act

illegally despite their tenure not being extended for want of the holding the AGM.

- d. The respondents have not only failed to return the petitioner's loan amount, but have also taken loans from other parties in violation of the terms of their agreement. This act is grossly oppressive to the petitioner.
- e. There are no statutory compliances by the respondents in respect of holding the AGM, Filing Annual Returns/Financial Statements.

9. This Bench has appraised the aforesaid allegations made by the petitioner against the respondents and has arrived at the following conclusion:-

- a. The petitioner has alleged that the respondents are not conducting the business affairs of the company in a responsible manner and are guilty of siphoning of funds of the Respondent Company. It is alleged that the respondents have collected huge amount as advances from the prospective buyers as is evident from the Audited Balance Sheet of 2015-2016, but very little construction has been carried out which is clearly mismanagement and gives rise to the surmise that amounts have been siphoned off. However allegations such as these remain uncorroborated and unsubstantiated in the absence of any concrete material to conclude siphoning off by



the respondents. On the basis of the material on record, this Tribunal cannot come to the conclusion that the affairs of the company are mis-managed nor can appraise whether the advances received justify the quantum of work done. The construction activity of the Respondent Company is its business affair and this Tribunal does not deem it fit to interfere or appraise the business activity which would be beyond the scope of its jurisdiction. Moreover, the Short term or long term loan given may be a business exigency and a financial decision taken by the Board and does not necessarily point out to siphoning of funds. Therefore in the absence of any cogent material, this Bench cannot mechanically accept the allegation of siphoning, or of duping its prospective buyers, nor direct investigation into the affairs of the company at the instance of the petitioner without being satisfied that there are grounds which prima facie require the same.

- b. The petitioner has alleged mismanagement on the grounds that the books and other statutory records have not been made available for inspection. There is nothing on record to show that the petitioner ever attempted to inspect the same or was obstructed from doing so. Without calling upon the respondents to provide inspections, seeking directions from the Court would be an action in haste. As a member of the

Respondent Company the petitioner has a right to inspect the records. However, the petition sadly suffers from any detail as to when it was obstructed from doing so. We do not find oppression of the shareholder on the basis of this avertment.

- c. With respect to allegations of Respondents 4 & 5 being appointed as Additional Directors of the Respondent Company and their tenure not being extended for want of holding the AGM, and challenging their appointment and / or the decisions taken by them as Directors of the Board, there is no material on record to adjudicate how the same amounts to mismanagement. The submission that their appointment was in wilful disobedience of the orders of the Civil Court can invite contempt by the court issuing the direction. It would not be out of place to reproduce the orders passed by the Court of the Sr. Civil Judge, Delhi, which is:-

- i. *The company is restrained from disposing/alienating/transferring or creating any third-party interest in its immovable properties including the suit property and/or creating change in any manner whatsoever upon such properties.*
- ii. *The Registrar of Companies is directed to prevent Sh. Piyush Tiwari and Ms. Shikha Tiwari from promoting any other company till any further orders.*



iii. *Sh. Piyush Tiwari and Ms. Shikha Tiwari are restrained from alienating their shareholding in the company and from effecting any change in the shareholding and management of the company till further orders.*

If there has been a change in the management, the same can effectually be dealt with the Court which restrained the respondents from doing so. There is little material on record to hold that their appointment amounts to mismanagement, or that the same can be considered oppressive and prejudicial to the interest of the petitioner who is a share holder.

d. The petitioner's allegation of oppression on grounds of non-return of the loan amount is misplaced. Their grievance is not in their capacity of a shareholder but as a creditor whose entitlement under an agreement has been violated. In fact, the sum and substance of the entire grievance revolves around the respondents not honouring the liability to repay the loan, as also having availed further loan from third parties. This was in violation of the terms of their agreement vide which the respondents had agreed not to take further loans till the liability of the petitioner stood extinguished. The remedy for recovery of the aforesaid debt under the agreement would clearly lie with the jurisdiction of a Civil Court and non-payment of a debt of a creditor cannot be termed as

oppressive to the shareholder. As per the agreement, the title documents have been handed over to the petitioner besides the interim injunction granted by the Civil Court restraining the respondents from alienating or encumbering the respondent's immovable property, prima facie, secures the interest of the creditor.

- e. With respect to the petitioner's allegations that no AGM has been held after 30th September, 2014 and the statutory compliances for filing the Annual Returns and the Financial Statements have not been carried out, or that the Statutory dues have not been paid, the same need to be addressed. Notwithstanding that the petitioner who holds 40% equity in the Respondent Company could have requisitioned the management to convene a meeting for any specific agenda, the specific prayer for directions in this respect cannot be ignored.

10. In view the observations made above, we find that no case of oppression is made out against the petitioner as a shareholder. The fact that the loan has not been returned can be redressed in civil proceedings as it is between the Respondents and the petitioners in their capacity of a Creditor. As a Financial Creditor who is also concerned about the business activity of the Respondent Company, it may also be entitled to seek Resolution, facts permitting. Further, there is nothing to substantiate that the appointment of respondents 4 & 5

as Additional Directors on 09.05.2016 tantamounts to mismanagement or can be termed as oppressive to the petitioner so as to call for interference by this Bench. The breach of a court's order would invite contempt by that court. There are no specific instances before us that the acts of these Addl. Directors were contrary to the interest of the company. The allegations that the respondents have indulged in rampant manipulation and fabrication of statutory records have also not been proved and therefore are without any legs to stand upon. There is no material on record to substantiate siphoning off. Mere allegations, even if correct, are not sufficient to wrest the control of the management from the respondents in the absence of material facts. Though allegations against the Directors are of breach of fiduciary duties, the conduct complained are vague and general in nature. The respondents who are in the business of Real Estate have to take advances from their prospective buyers. Whether the quantum of construction justifies the money taken from them is beyond the scope of any appreciation by this Bench. The petitioner has prayed for directions for inspections of statutory records, but he has failed to show that he had invoked the provision of Section 94 of the Companies Act, 2013 before agitating the same before this Bench.

11. The allegations that the project was not being developed as per the Brochure or funds were being given as short-term or long-term loans are business decisions and cannot be subject matter to be

entertained under Section 241/242 of the Companies Act, 2013. These are business decisions which should not be questioned by the Courts except in exceptional cases, which have not been made explicit to this Bench.

12. The petitioner has also prayed that they/their nominee be appointed on Board for a proper representation as the articles of Association of the Company provides for the same. We are not inclined to interfere in this respect as it is for the Board of Directors to decide who should be on the Board, keeping the interest of the Company in view.

13. With respect to non compliance of the Statutory requirements, in the absence of any defence or repudiation by the respondents, this would tantamount to mismanagement, therefore we deem it just and fit to pass necessary directions in exercise of the provisions section 97 of the Company Act, 2013 to direct convening of an AGM.

14. Accordingly, the Respondent Directors are directed to hold the AGM for the defaulting years as also for the F.Y ending 31.03.2017, if not yet convened. All Statutory requirements of placing the Financial Statements, Annual returns, Directors report etc be laid for before the members, followed by filing them with the office of the RoC as statutorily required. Government taxes and other statutory dues of the Company be also paid.



15. It is also felt expedient that though courts, should not ordinarily interfere with the management, in facts and circumstances of the case where the respondents have chosen not to appear before this forum, we deem it fit to appoint any Independent Observer/ Administrator to oversee the proper convening of the AGM. Accordingly Mr. Jeevesh Nagrath Advocate Mobile No. 9810710058 is appointed as the Observer in this case to oversee the convening of the AGM and ensure the follow up of other compliances. The fees of the Administrator shall be Rs. 1 Lakh, exclusive of expenses, to be paid by the petitioner in the first instance.

16. Copy of this Order be served on the respondents by the petitioner. Failure to hold the AGM as directed shall invite penal consequences as per the Act

17. Petition disposed off in terms of the above.



(S.K Mohapatra)

Member Technical



(Ina Malhotra)

Member Judicial