In the National Company Law Tribunal
Mumbai Bench, Mumbai.

C.P. No. 24/397-398/CLB/MB/2014

In the matter of

Sunil Dutt Narayan Goswami,
A-703, Shah Heights, Sect.-7,
Plot 22 Kharghar, Navi Mumbai-410 210

V/s

AMS Marine Services Private Limited,
Registered Office :
Shop No.9-A, Om Neelkanth Apartment, Plot No. 31,
Nerul, Navi Mumbai 400 705

Coram : Hon'ble M.K. Shrawat, Member (Judicial)

For the Petitioners : 1. Ms. Pooja Khandeparkar, Advocate
2. Mr. C.B. Patil, Advocate.

For the Respondents : Mr. Shyam Kapadia.

Judgment dated 03rd July, 2017

1. The Petition under consideration was submitted on 28th March, 2014 before the then C.L.B. Mumbai Bench under the provisions of Section 397, 398, 402 and 406.

2. **PETITIONER'S CLAIM :-** Facts of the case, in short, are that the Respondent No.1 Company was incorporated on 26th August, 2010 having authorized, subscribed and paid up Share Capital of ₹ 10,20,000/-. The Share Holding was 1/3rd (33 %) of 34,000 Equity Shares of ₹ 10/- each held by the Petitioner and Respondent No. 2 & 3 equally. The object as per the Memorandum of Association were to carry on the business of **Shipping Company, Shipping Agent, Commission Agent, Underwriter, Booking Agent, Marine Education etc.** On the date when the Petition was filed it was claimed that the Petitioner was holding 33% Share of the subscribed capital. It has also been claimed that the Petitioner had been the Managing Director since 13th August, 2013. In the Petition it is informed that the Respondent Nos. 2 and 3 were also holding 33% Shares each. The claim of the Petitioner is that vide a **Resolution of 13th August 2013 the Petitioner was appointed as a Managing Director** and he was also authorized to sign papers on behalf of the Company. He has also been authorized to correspondence with statutory bodies and also authorized for Bank Transaction under his signatures mandatorily. This Resolution is stated to be

not only signed by the Petitioner but also by Respondent Nos. 2 and 3 i.e. by all three Directors. The claim of the Petitioner is that due to his continued efforts the Company had procured International Contract from Doha, Quatar and NKOM. Further the claim of the Petitioner is that he is a skilled Consultant and in consultancy work in India and Abroad.

2.1 According to the Petitioner suddenly on **3rd February, 2014** a Meeting was convened wherein Respondent Nos. 2 and 3 have given their ascent for creation of Companies own server and official email id. As a Managing Director the Petitioner had recorded his descent on the said Resolution. The **second Resolution passed on that day was that due to inefficiency of the Petitioner remuneration was stopped with effect from 1st February, 2014.** The allegation of the Petitioner is that no proper Notice was served upon the Petitioner before conducting the said Meeting. One more Resolution was passed on that day to appoint Mr. Sunil Jain as Chief Executive Officer of the Company. As per the said Resolution Mr. Sunil Jain happened to be a Graduate in Marine Engineering. At this juncture it is worth to mention that our attention was drawn by the Learned Counsel that the said Resolution did not contain the signature of the Petitioner. According to the Petitioner he came to know about the said Resolution on 5th February 2014. The allegation of the Petitioner is that no such Meeting was ever conducted. No mandatory Notice as prescribed under Section 286 of the Companies Act, 1956 was ever served upon the Petitioner.

2.2 That pursuant to the said Resolution the Respondent Nos. 2 and 3 have wrongfully withdrawn funds from the Company alleged to be to the tune of ₹5,00,000/-, without the knowledge of the Petitioner. Although it was mandatory as per the earlier Resolution that for every Bank Transaction the signatures of the Petitioner were necessary. On noticing irregularities, the Petitioner wrote a letter dated 15th February 2014 addressed to the BOD pointing out the illegality of the Notice and other discrepancies. Simultaneously the Petitioner has written a letter dated 15th February 2014 to the Branch Manager, Canara Bank objecting for the Bank Transaction without his signatures.

2.3 Immediately thereafter on 18th February 2014 a Notice of Board Meeting was allegedly issued to discuss certain Agenda along with an Agenda to change the designation of Mr. Sunil Goswamy (Petitioner/Director) and also to remove him from the position of Directorship.

2.4 The Compilation annexed with the Main Petition contained several letters/ correspondence between the parties. The Petitioner has vide a letter dated 15.02.2014 has intimated the Board of Directors about his disassociation from the illegal activities of rest of the Two Directors. The Petitioner has

challenged the legality of the Resolution passed and also challenged the wrongful siphoning of the funds. It was stated in the Petition the unpaid remuneration from December 2013 upto the date of the Petition was amounted to ₹22,10,000/- i.e. up till September, 2016 at the rate of ₹65,000/- per month.

2.5 As per the Petitioner, due to the misdeed of Respondent Nos. 2 and 3, the Canara Bank had issued a Notice under Section 13(2) of the SARFAESI Act and also filed Petition bearing O.A. No. 284/2016. At that point of time when the Petition was submitted there was no pending matter before the Debt Recovery Tribunal. It has also been claimed by the Petitioner that Articles of Association clearly provide that no Director is to be removed but Retire on rotation. After his removal Respondent Nos. 2 and 3 were attempting to gain full control of the Respondent Company. A prayer has been made in the Petition that Pending the Final Disposal Respondent Nos. 2 and 3 be directed to provide full and complete information of the day to day conduct of the business to the Petitioner. One of the main relief claimed in the Petition by the Petitioner is that the Respondents be directed to disburse the outstanding remuneration from December 2013 calculated at ₹65,000/- per month. The steps taken thereafter from the 14th February 2014 Meeting be declared as null and void. Rest of the prayers have not emphatically argued.

3. **REPLY OF THE RESPONDENTS :-** From the side of the Respondent a Reply has been furnished wherein it was vehemently contested that the allegations raised were incorrect and not based upon any evidence. It has not been disputed in the Reply that each Directors were having 1/3rd Share Holdings. It is stated that Respondent Nos. 2 and 3 are specialized in Marine Engineering Services. It is informed in the Reply that the Petitioner was carrying the business in the name of M/s. Powermach Services to provide management facility services having its office at Kharghar, Navi Mumbai since 2006. The Petitioner had made a request in the year 2010 to start a Private Limited Company in the area of Marine Engineering Services and assured Respondent Nos.2 and 3 that he would devote full time in the business. Being convinced R-2 and R-3 along with Petitioner have **incorporated the Company R-1 on 26th August 2010,** all three having equal Share Holdings. In the Financial Year 2010-11 and 2011-12 the turn over of R-1 was only ₹ 9,77,000/- and ₹ 52,00,000/- respectively. The allegation is that the Petitioner did not pay attention for the business of the Company. He was paying attention to his own concern M/s Powermach Services where the turn over was ₹2.5 Crores to ₹ 3.00 Crores per annum in those Financial Years. It has also been alleged by the Respondents in the

Reply that on suggestion of the Petitioner the address of the R-1 Company was also changed to the same address from where the Petitioner was running his own Company. It is claimed that the Respondents were looking after the projects being Technical Experts, however, the Petitioner was handling the Commercial, Banking and Administrative Matters. He was using the credentials of R-1 Company to promote his own Company. He has deliberately not completed the formalities of **"Vendor Registration"** with ONGC, Indian Navy, Mazgaon Dockyard etc. so that the R-1 Company could not grow. The Petitioner had also misutilized the Website and email id of the Company.

3.1 In and around mid 2012 the Respondent Company obtained Overseas Work Order from NKOM for manpower supply and Marine Engineering Services. The Petitioner was serving in Indian Navy only as an Engineer Room Artificer in the year 1989 and having association with Commander (Retired) Sunil Jain. He has obtained some work from the Dockyard but in the name of his own Company. However, he incurred Travel Expenses on the account of the Respondent Company. He has used the funds of the Respondent Company for his personal gains and for his own Company. According to the Respondent; Mr. Jain had also accompanied him to Doha in March 2013 and May 2013. It is further informed that due to lack of transparency Mr. Jain left the association of the Petitioner in July 2013. He was not compensated by way of Salary by the Petitioner. The Petitioner was cautioned by the Respondents for not taking interest in the business of the Company but promoting his own Company that too at the cost of the Respondent Company. The Petitioner has deliberately misinformed the process of Registration Certificate applicable for Recruiting Agent to be utilized for Overseas License. There was a hot discussion amongst the Directors that the business of the Respondent Company was hijacked which resulted into a **Board Resolution of 3rd February 2014 stopping the remuneration of the Petitioner.** The Petitioner was informed as he has also attended the Meeting. The Respondent Company had made attempts to serve upon him the Agenda of the Meeting but he had refused to accept. Although he attended but not signed the Attendance Record. Before the said Meeting the Petitioner had communicated his intention of Resignation from the Directorship. As a counter blast the Petitioner wrote email to NKOM to disrupt the Company Operation. It was falsely communicated that the Respondent Company did not have any Valid License to supply manpower. In the Reply certain other allegations of misconduct of the Petitioner have been narrated. He had written threatening letters to the Staff. His activities were against the interest of the Company. The Respondent has tried to

clarify the position of ₹ 5,00,000/- withdrawal stated to be used to make payment to the Travel Agent, however, proper bill and invoice were duly recorded. Finally it is prayed that the Company was in the nature of *quasai* partnership, hence the Directors were required to act honestly and for the interest of the Company. The Petitioner had breached the trust hence he was removed, therefore the Petition deserves to be dismissed.

4. In the **REJOINDER** it is contested that the Company M/s Powermach was incorporated on 5th May, 2010, much prior to the incorporation of R-1 Company and the Respondents were fully aware of the presence of the said Company. The Respondents have wrongly stated about their Qualifications and in fact their Qualification is only upto H.Sc. Pass. Only because of the contacts and Qualification of the Petitioner the Respondent Company was able to obtain certain work from L&T, Ambuja Cement etc. According to the Petitioner, solely due to his efforts the work of NKOM Doha Shipyard was procured. It has also been negated that the turn over of the Petitioner's Company was high because in the Financial Year 2012-13 the Respondent Company had turn over of ₹ 1.27 Crores as against turn over of ₹ 80,00,000/- of his Company (Powermach). Regarding Mr. Sunil Jain the Petitioner has stated that on his Retirement Mr. Jain had requested him for a Job but later on in August 2013 removed from the Job. Rest of the allegations have also been denied. As a Managing Director his signatures were mandatory for all Bank Transactions. Therefore, the transaction made by the Respondents should come back to the Company. According to the Petitioner, as stated in the Rejoinder, it is submitted that the Respondent No.1 Company is to receive ₹ 98,00,000/- from Ambuja etc. hence the claim of the Petitioner can easily be settled.

5. An Additional Affidavit was filed by the Respondent, duly perused to be dealt with hereinbelow, nevertheless stated therein that the time given had not been adhered hence to be treated as barred. It has also been urged that the Petitioner is in the habit of not giving sufficient time by not serving well in advance to the Respondents to react and to file a Reply. It was further stated that The Petitioner on the other hand is pressing for interim relief to obstruct the business of the Respondent Company which is being run continuously by the Respondents. Since the Petitioner is in the habit of submitting at the last moment hence such pleadings tantamount to mockery of the process of law. Further it is stated that there for no coherence in the amount of allegation of siphoning. The Company has proper accounts which itself explain the nature of expenditure. The bank statements have already been provided for the period demanded but no discrepancy was pointed out

by the Petitioner. It was stated that the conduct of the Petitioner was prejudicial to the interest and growth of the Company.

6. **FINDINGS** : Parties heard at length. Case record perused. Evidences are examined. Precedents cited are analysed in the light of the facts of this case. Before we proceed it is befitting in this case to short list the Relief claimed in the petition which are otherwise many in number. General compliant is oppression and mismanagement in number of grounds raised, however, on that basis the main relief sought can be summarised as below:-

> *"Prayer F-(i)*
>
> *That this Hon'ble Board be pleased to direct the Respondents to disburse the remuneration of the Petitioner outstanding from December 2013 till payment and/or actual realization to be calculated at ₹65,000/- per month;*
>
> *f-(ii)*
>
> *That this Hon'ble Board be pleased to declare that the Resolution dated 19th May 2014, wrongfully removing the Petitioner as a director is illegal, null and void;*
>
> *f-(iii)*
>
> *That this Hon'ble Board be pleased to direct the Respondents to bring back the monies wrongfully siphoned off from the accounts of the Respondent no.1;*
>
> *h. That this Hon'ble Board be pleased to pass a mandatory order of injunction thereby directing the Respondent No 2 and 3 and/or through their servants, agents and/or any person/s claiming through or under them, to restore status quo ante prior to passing of Resolution dated 3rd February 2014;"*

6.1 It is also worth mentioning that the above mentioned short listed reliefs were the centre point of argument of the rival sides. Undisputedly the Company was incorporated in the Year 2010 by the efforts of the three promoter directors each having 33% shareholding equally for running the business of 'shipping agent', 'marine education', 'underwriter' etc. The Petitioner was also appointed as Managing Director in August 2013. The Petitioner has not denied the fact of running independently a business of like nature in the name of M/s Powermach Services. The allegation of the Respondents was that it was wrong on the part of the Petitioner of running a parallel competitive business. However, on the other hand, the Petitioner's stand was that it was very much informed to all the Directors that the Petitioner was having an independent business since 2006 i.e. before the incorporation of this Company, in the name of M/s Powermach Services. On due analysis of the factual matrix one thing appears to be appropriate that the running of a parallel business by the Petitioner was the root cause of this litigation. Although, It could be a possibility that it was known to the other two Directors that the Petitioner was having his own business but even then the allegations were that the Petitioner was devoting

more time and money in promoting his own business. The allegation was that the business of the Respondent Company was ignored which resulted into more turn over in his own concern than the Company's turn-over.

6.2 That was the reason of bitterness among the Directors. In a meeting held on 03/02/14 it was decided to stop the remuneration of the Petitioner as a Director. It was also resolved to remove the Petitioner from the post of Managing Director. As far as the validity of the said meeting is concerned, the facts have clearly indicated that the Petitioner was aware of the meeting. Rather it is vehemently stated that the Petitioner had attended the meeting but refused to sign the attendance. Facts and circumstances of the case have thus clearly indicated that the said meeting was not to be held as an invalid meeting.

6.3 The major concern is that in such cases of closely held Private Limited Companies the dispute among the Directors definitely hamper the business of the corporate entity, but in the interest of the society the business is to be protected. Because of the disagreement the management of the Company always get suffered. Allegation and counter allegation revolve around the conduct of the parties, some time misbehaviour, mismanagement and oppression of the rights of one of the party, so on and so forth. To overcome such type of problems sometimes an intervention of the court is required to help to overcome the stalemate. In general, the Courts are aware of the responsibility to strike the right balance and to take balanced decision in the best interest of revival of the business. It has also been considered and decided by the Honourable Higher Courts that 'Winding-up' of a Company is not always the appropriate solution. One of the solution is found to be justifiable and adequate to give management in the hands of one group. While doing so it has also been decided that the other party must be compensated adequately for quitting their interest and rights in a Company. In my humble opinion it is not suitable to close down / wind up a running business of a Company. Such decision, modestly according to me, is neither healthy for the society nor for the economy. Likewise, in this case also it shall not serve the true purpose if an order is passed to shut the business so as to end the dispute of the rival parties. The closing down shall not be beneficial to either of them. It is also not an intention of section 397 & 398 of the Act to punish someone but the purpose is to protect the Company. Rather punishment to one on a complaint by another is in the nature of personal dispute for which separate judicial forum exists; but under Companies Act a litigation is to be examined and to be settled by keeping in mind the larger perspective of business interest. A decision under this Act, while dealing the issue of Oppression &

Mismanagement, is to be delivered in such manner which is beneficial to the Company in operation as also economy at large. A running Company caters so many families. Therefore, in this case the endeavour is to settle the dispute which shall be most workable and viable for the Company.

6.4 It is an acceptable position that the Promoters have natural affiliation with the Company which came into life by their efforts. Hence it is not easy for those Promoters to part-with the Company. However under changed circumstances and sometimes due to changed business trend it becomes indispensable to ask one party to quit from the Company, but which ought to be beneficial for that Promoter as also advantageous for the revival of the Company's business. In the case of **Hanuman Prasad Bagri v/s Bagress Cereals Pvt Ltd (2000)2 Cal. HN 798 { AIR 2001 Supreme Court 1416}** it was pleaded that even if in a case the 'oppression' is not made out by the Petitioner , the Court is not powerless to de substantial justice between the parties , therefore on the facts available if it is not possible for the Petitioner and the Respondent to carry on the business then the only solution is that one group can opt to purchase the share holdings of the other group at a proper value. Further an observation was made that

"No case appears to have been made out that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive of any member of members. Therefore, we have to pay our attention only to the aspect that the winding up of the company would unfairly prejudice the members of the company who have the grievance and are the applicants before the Court and that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. In order to be successful on this ground, the petitioners have to make out a case for winding up of the company on just and equitable grounds. If the facts fall short of the case set out for winding up on just and equitable grounds no relief can be granted to the Petitioners. On the other hand, the party resisting the winding up can demonstrate that there are neither just nor equitable grounds for winding up and an order for winding up would be unjust and unfair to them. On these tests, the Division Bench examined the matter before it."

6.5 To buttress above view an order of the Hon'ble Supreme Court is worth mentioning pronounced in the case of **Sagramsingh Gaekwad 15 (2005) 11 SCC 314 pg. 323 , as referred in the case of Kamal Kumar Dutta v/s Ruby General Hospital Ltd. (2006) 7 SCC 613,** cited by the Petitioner . Relevant portion is as under :-

> *"The jurisdiction of the court to grant appropriate relief under Section 397 of the Companies Act indisputably is of wide amplitude. The court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation a further relief or reliefs, as the court may deem fit and proper, are warranted. Moreover, in a given case the court despite holding that no*

case of oppression has been made out may grant such relief so as to do substantial justice between the parties."

6.6 So, the endeavour ought to be to resolve the controversy in the best interest of the justice. Relief has to be equitable. With all these thoughts in mind I have examined the "Relief" claimed by the Petitioner in the main Petition, as also noted *supra.* The legality about holding of meetings dated 03/02/2014 & 18/02/2014 and the reasonableness of the Resolution dated 19th May 2014 through which the Petitioner was removed from the Directorship were raised, but this must not be ignored that after lapse of so many years i.e. from 2014 till date of the year 2017 the relevancy of such dispute ought to have been diluted. According to me the reinstatement of the Petitioner as Director at this stage i.e. after lapse of so many years is not going to help the cordial business of the Company or going to water down the ill-will among the Directors. As stated, the remaining Directors are at the helm of the affairs of the Respondent Company, on one hand, and the Petitioner is running his own business viz. M/s Powermach Services independently, on the other hand. In a manner, both the sides have already parted ways long ago. This is not going to help either party to get them united by restoring Petitioner at that stage from where he left this Company. Neither it is wise nor it is beneficial. The right solution under the circumstances is to propose, as well as direct, an exit plan to a party who is not involved presently in day-to-day functioning of the Respondent Company. Admittedly, the Petitioner was removed from the Directorship, although legality of the removal challenged, nevertheless from that date onwards not involved in the business activity of the Company. After the removal of the Petitioner, he has not rendered any service to the Company. In the Petition, the Petitioner has otherwise also claimed the remuneration @ ₹65,000 per month for the said period. Therefore, a practical and wise solution is to compensate the outgoing Director by making the payment of the remuneration due. This is the first part of the permanent solution to resolve the bitterness among the Directors.

6.7 The next step towards permanent solution is to ask the Petitioner to sacrifice, so as to gain mental peace, by rendering his 33% shareholding in favour of the Respondent No.2 or his nominee. At this juncture a point of fair valuation of the Shares had also struck but on due perusal of the Statement of Accounts whatever available on record, it is noticed that hardly any material gain may accrue to the Petitioner. However, to compensate an amount is required to be ear-marked. The outcome of this solution shall be an all-time end of the acrimony among the Directors because the outgoing Director i.e. the Petitioner shall get the payment of the outstanding

remuneration although not participated in the functioning of the Company after removal, on one part and on the other part, the Respondents shall have full uninterrupted control over the affairs of the Company by receiving the shareholding of the Petitioner.

6.8 As a result, it is hereby directed that the Company or the Respondent shall make a payment of ₹22,10,000/-, as demanded in para 7-B of the Petition, to the Petitioner and simultaneously the Petitioner shall transfer the 33% shareholding in favour of the Respondent No.2 or his nominee by signing the Share Transfer Deed. Both sides in this manner henceforth shall be comfortable in running their respective businesses.

6.9 Since through this Judgment a settlement is arrived at; hence the legality of some of the meetings and resolutions passed in those meetings have become redundant hence need not to be adjudicated upon.

7. This Petition is, therefore, partly allowed on the terms as set forth above. No order as to cost. Finally disposed of. To be consigned to Records.

Sd/-

M.K. SHRAWAT
Member (Judicial)

Date : 03.07.2017