NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH AT GUWAHATI

T. A. No.34 of 2016
[C. A. No.461/2015]

M. A. No.02/2017
&
M. A. No.03 of 2017

In
T. P. No.07/GB/2016
(Arising out of C.P. No.969/2012)

Under Section: 397/398 of the Companies Act, 1956

In the matter of:

Gomukhi Construction (P) Ltd. ... Petitioner

-versus-

North East Shuttles (P) Ltd. & Ors. ... Respondents

Order delivered on 05 th January, 2018

Coram:
Hon'ble Mr. Justice P. K. Saikia, Member (J)

For the Non-applicant/ Petitioner : Mr. S. K. Gupta, PCS
Mr. Narayan Sharma, PCS

For the Applicant/Respondent : Mr. A. Saha, Advocate (R 1 & 3)

Mr. Hiranya Das, Advocate (R-4)

O R D E R

M. A. No.03 of 2017

This application has been preferred by the respondent No.1/applicant seeking the recalling of the order dated 11th August, 2017 rendered in T. A. No.34 of 2016. Under the order dated 11-08-2017, this Bench was pleased to appoint AVM Sanjib Bordoloi AVSM (retired) as Special Officer to assist this Tribunal in executing the order dated 14-11-2014 rendered by CLB, Kolkata in CP No.969 of 2012.

It may be stated here that by the order dated 14-11-2014, the learned CLB, Kolkata disposed of the C.P. No.969 of 2012 on the basis of settlement, arrived at by

the parties thereto, incorporating the terms and conditions under which such a proceeding was disposed of.

2. I have heard Mr. Arnab Saha, learned counsel for the respondent No.1/applicant and also heard Mr. Sanjay Kumar Gupta, PCS and Mr. Narayan Sharma, PCS appearing for the petitioner/non-applicant.

3. In order to appreciate the disputes in the present proceeding, I find it necessary to narrate the backgrounds which give rise to the present application. The petitioner/non-applicant herein, had filed a petition under Section 397/398 of the Companies Act, 1956 against the respondent No.1/applicant and 3 others alleging mismanagement in running the affairs of the respondent No.1 company, namely, M/s. North East Shuttles Pvt. Ltd. (hereinafter referred to as "the respondent No.1 company"), which also resulted in oppression perpetuated upon the petitioner/non-applicant.

4. In that proceeding, in due course, pleadings were exchanged and thereafter, the matter was scheduled for hearing. During the course of hearing, several attempts were made to have the matter settled amicably and ultimately, the said proceeding was terminated on the basis of settlement, arrived at between the parties, vide order dated 14-11-2014 in C.P. No.969/2012, under which both the parties thereto were directed to perform certain conditions, incorporated therein and were also given various time limits for implementation of the directions, rendered therein.

5. Subsequently, the petitioner/non-applicant had filed an application seeking enforcement of the aforesaid Order dated 14-11-2014, alleging that the directions, incorporated in the order aforesaid, requiring the respondents to carry out certain directions therein, were not carried out by the later. Said application was registered by the CLB, Kolkota as C. A. No.461/2015. In due course, notices of such proceeding ware served upon the respondents seeking reply to the allegation in C. A. No.461/2015.

6. In the meantime, the respondents No.3 and 4 in the C.P. No.969/2012 had filed an application seeking, amongst other things, the recalling of the order dated

14-11-2014 alleging that the said order was secured by the petitioner therein and the respondent No.2, but without their knowledge and also in a collusive manner vide Para 11, 12 and 13. Being so, the said order is highly prejudicial to the interest of all concerned. The said application was registered as C. A. No.867 of 2015.

7. During the pendency of the proceeding before the CLB, Kolkata, the Companies Act, 1956 was repealed and in its place, the Companies Act, 2013 (in short "the Act of 2013") was brought into operation. Under the Act of 2013, the institution of CLB was abolished and in its place, National Company Law Tribunal (in short NCLT) was installed. With the abolition of CLB, all the proceedings pending before the CLB, Kolkata including C. A. No.461/2016, were transferred to this Bench for disposal in accordance with law.

8. On receipt of those proceedings, this Bench re-registered C.P. No.969 of 2012 as T.P. No.07 of 2016, whereas C. A. No.461/2016 and C. A. No.867/2015 were re-registered as T. A. No.34/2016 and T. A. No.37/2016 respectively. Before this Bench too, both the sides had filed several applications seeking various reliefs.

9. In the meantime, the respondents No. 1 and 2 too had filed an application seeking recalling of the order dated 14-11-2014 rendered by CLB, Kolkata, contending that the said order was passed with profound illegality. In that connection, it has been alleged inter alia that the order dated 14-11-2014 was passed behind their back and that too in a most fraudulent manner. Said application was registered as M. A. No.01/2016.

10. In the aforesaid application, the respondents had also alleged that the Order dated 14-11-2014 cannot be implemented, since it was rendered in total violation of the provisions of Section 77A / 100 to 104 of the Companies Act, 1956. Section 77A of the Companies Act, 1956 deals with the procedure for reduction of shares following the buyback of the shares by the company, whereas Sections 100 to 104 prescribe the procedure for reduction of shares.

11. In support of such connection, it has been stated that the order dated 14-11-2014 is nothing but an order directing the company to buyback of its own shares. But the company cannot buy back its shares unless the procedures, prescribed in

Section 77A as well as Sections 100 to 104 of the Companies Act, 1956 are complied with. More importantly, such provisions are mandatory in nature and any order rendered in violation thereof would make such an order totally unsustainable in law. But, in rendering the order dated 14-11-2014, the learned CLB, Kolkata had given a complete go-bye to such mandatory directions of law in Section 77A and Section 100 to 104 of the Companies Act, 1956.

12. It was also the case of the applicant in M.A. No.01/2016 that the order dated 14.11.2014 cannot be enforced, since said order was rendered in total violation of the various provisions of law, such as, law laid down in Chapter V, Part VI of the Act of 1956, the Companies (Shares, Capital & Debentures) Rules, 2014 (in short the Rules of 2014), Rule 4 of Order XIII of the CPC and the provisions of Legal Services Authorities Act, 1987 (in short "Act of 1987"). The said order was also rendered in violation of Article 3 of the Articles of Association. On all those counts, the order dated 14-11-2014 was required to be declared null and void – contended the applicant in M. A. No.01/2016.

13. The applicant in M. A. No.01/2016, further alleged that the respondent No.2, never agreed to the settlement so recorded in the order dated 14-11-2014. In fact, such an order was rendered behind her back. But then, even if one assumes for the sake of arguments that the respondent No.2 had agreed to such settlement, yet, under the law, a Managing Director of the company was wholly incapable of entering into a settlement for and on behalf of the company with other parties to a proceeding. On this count also, the order dated 14-11-2014 became untenable in law.

14. In due course, the parties to the aforesaid proceeding had exchanged their pleadings. In their reply, the petitioner/non-applicant vehemently contended that the application in M.A. No.01/2016 was premised on falsehood and fiction, not on law and logic. The non-applicant/petitioner quite arduously contended that all those alleged legal infirmities are nothing but a very well-orchestrated design aimed at frustrating the very legal directions in the order dated 14.11.2014.

15. In regard to the other allegations that the respondent No.2 never consented to the settlement, recorded in the order dated 14-11-2014 as well as her allegation

that she left the CLB long before the matter was taken up by CLB for consideration, it has been submitted that such stories are also afterthought ones and the same were invented just to upset the very legal order rendered by the CLB on 14-11-2014, on hearing the parties thereto. Therefore, the non-applicant/petitioner had urged this Bench to dismiss the proceeding.

16. This Bench, on hearing both the parties at length, having regard to the materials on record had found reasons to dismiss such a proceeding on upholding the claims, advanced from the side of the non-applicant/petitioner vide Order dated 25-04-2017 rendered in M.A. No.01/2016. It may be stated here, the said order had never been questioned by the applicant in any forum whatsoever. Consequent upon such decision, the T.A. No.37/2016 was also disallowed, while T. A. No.34/2016 was allowed to continue.

17. Thereafter, the applicants/respondents had filed an application seeking recalling of the order dated 25-04-2017, alleging that all the contentions, which were raised from the side of the applicants in M. A. No.01/2016, were not considered by this Bench. Such a contention was opposed to by the petitioner/non-applicant, alleging that such contentions were ill-motivated and had been manufactured only to delay the execution of the directions in the order dated 14.11.2014.

18. On hearing the parties hereto, this Bench was pleased to reject the same on holding that all the allegations raised from the side of the applicants in M. A. No.01/2016 were not true, since all the contentions, raised from both the parties thereto were duly considered and answered vide order dated 24-08-2017 in T. A. No.34/2016. It may be noted here that the order dated 24-08-2017 had never been questioned in any higher forum till date. For ready reference, the relevant paragraph of the order dated 24-08-2017 is also reproduced below: -

> *"12. I have considered the submissions, advanced by the learned counsel /legal representatives appearing for the respective parties and found that the most of the allegations against the order dated 14.11.2014 which were raised by the counsel for the non-applicants/respondents on 24.07.2017 had been answered by this Tribunal in its order dated 25.04.2017. The allegations ----- which were raised for the first time on 24.07.2017 ----- were also answered by this Tribunal in its order rendered on 11.08.2017. Being so, I am in full agreement with the submissions, advanced by the legal representatives of the applicant/petitioner. Resultantly, I am to hold that all those points which were raised on 24.07.2017 need no further deliberations."*

19. Even thereafter, the applicant/respondent No.2 had again come up with the present application, once again alleging that all the contentions, raised from the side of the applicants in M. A. No.01/2016, were not considered and, therefore, this Bench cannot proceed with the connected application seeking execution of the directions rendered in the order dated 14-11-2014.

20. In the interest of justice, I find it necessary to reproduce the relevant parts of the application in the present proceeding: -

> *"2. It was submitted that such direction to buy the shares of the petitioner could not bind the applicant company in light of section 100 of the Companies Act, 1956, which provides that: -*
>
> *SPECIAL RESOLUTION FOR REDUCTIN OF SHARE CAPITAL*
>
> *(1) Subject to confirmation by the 1 (Tribunal), a company limited by shares or a company limited by guarantee and having a share capital, may, if so authorized by its articles, by special resolution, reduce its share capital in any way, and in particular and without prejudice to the generality of the foregoing power, may –*
>
> *(a) Extinguish or reduce the liability on any of its shares in respect of share capital not paid-up;*
> *(b) Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost, or is unrepresented by available assets; or '*
> *(c) Either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company; Page 66 of 332 and may, if and so far as is necessary, after its memorandum by reducing the amount of its share capital and of its shares accordingly.*
>
> *(2) A special resolution under this section is in this Act referred to as "a resolution for reducing share capital.*
>
> *3. As per section 100, the buyback of its own shares by the applicant company would require a reduction in its share capital and such reduction in share capital could not be directed by the Learned Tribunal unless the applicant company is authorized to bring about a reduction in its share capital in its articles of association. Since the articles of association of the applicant company are not on record in these proceedings, the Learned Tribunal could not have directed the applicant to buy back its own shares.*
>
> *4. The counsel for the applicant also relied on section 77A of the Companies Act of 1956. Section 77A (2) particularly provides that:*
>
> *(a) No company shall purchase its own shares or other specified securities under sub-section (1), unless -*
> *(b) A special resolution has been passed in general meeting of the company authorizing the buy-back.*

5. *The counsel for the applicant moreover submitted that in the event that there was a provision in the articles of the applicant company authorizing the reduction in its share capital, a special resolution would need to be passed directing the reduction in the share capital of the applicant company. As the petitioner's nominee directors alone could not secure the number of votes required to pass a special resolution, any direction by the Learned Tribunal on the applicant to buy back its own shares by reducing its share capital would be an order in futility. It is a settled position of law that the Courts will not pass orders in futility which can be undone by acts of the parties.*

6. *The applicant's counsel further submitted that even in the event that the reduction in the share capital of the applicant company was authorized by its articles and a special resolution was passed to reduce the share capital, the applicant company would still need to abide by the provisions of Section 101 of the Companies Act, 1956, which provides that:*

   APPLICATION TO 1 (TRIBUNAL) FOR CONFIRMING ORDER, OBJECTINOS BY CREDITORS, AND SETTLEMENT OF LIST OF OBJECTNG CREDITORS

   (1) Where a company has passed a resolution for reducing share capital, it may apply, by petition, to the 1 (Tribunal) for an order confirming the reduction.
   (2) Where the proposed reduction of share capital involves either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the 1 (Tribunal) so directs, the following provisions shall have effect subject to the provisions of sub-section
   (3) (a) every creditor of the company who at the date fixed by the 1 (Tribunal) is entitled to any debt or claim which, if that date was the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction;

   (b) the 1 (Tribunal) shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction;

   (c) where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the 1 (Tribunal) may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the 1 (Tribunal) may direct, the following amount:

   (i) if the company admits the full amount of the debt or claim, or, though not admitting it, is willing to provide for it, then, the full amount of the debt or claim;

   (ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then, an amount fixed by the 1

(Tribunal) after the like inquiry and adjudication as if the company were being wound up by the 1 (Tribunal).

(3) Where a proposed reduction of share capital involves either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the 1 (Tribunal) may, if, having regard to any special circumstances of the case, it thinks proper so to do, direct that the provisions of sub-section (2) shall not apply as regards any class or any classes of creditors. 1. Substituted for 'court' by the Companies (Second Amendment) Act, 2002.

7. *The counsel for the applicant submitted that the order of the Learned Tribunal dated 14.11.2014 directing the respondent group of shareholders to buy the shares held by the petitioner group in the applicant company did not and in any event could not have bound the applicant company itself in light of the provisions of the Companies Act 1956 enumerated hereinabove and more so in the face of the settled proposition of law that no Court will pass an order in futility which can be undone by acts of the parties.*

8. *Under the circumstances, in light of these contentions advanced, the counsel for the applicant submitted that there can be no question of a special officer being appointed to dispose of the assets of the applicant company in furtherance of the obligation on one group of shareholders to buy the shares held by the other, as per order of 14.11.2014.*

9. *Despite recording the submissions advanced by the applicant's counsel, by its order dated 11th August, 2017 the Learned Tribunal proceeded to reject the contentions so advanced without any considering them at all or adjudicating upon them whatsoever.*

10. *The Learned Tribunal summarily rejected the submissions advanced by the counsel for the applicant without considering or addressing the same by merely stating that the counsel previously appearing for the applicants had advanced the same submissions, which had been answered by the Learned Tribunal in its order dated 25th April, 2017 and that the Learned Tribunal was not inclined to entertain the said contentions advanced by the counsel appearing for the applicant on the last occasion.*

11. *The applicant states that on careful perusing the said order dated 25th April, 2017 in minute detail, the applicant finds that the submissions advanced by its counsel on the last occasion have neither been recorded nor been dealt with, considered or addressed by the Learned Tribunal in any way in the said order dated 25th April, 2017.*

12. *The applicant states that the Learned Tribunal cannot proceed to dispose of the company petition being CP 969 of 2012 or TA No.34 of 2016 therein without deciding these issues first.*

13. *The applicant further states that in light of the arguments advanced and the provisions of the Companies Act, 1956, no special officer can be appointed to dispose of the assets owned by the applicant in order to*

ensure compliance of the direction issued vide the order dated 14.11.2014, which imposes an obligation only on one group of shareholders to buy out the shareholding of the other in the applicant company.

14. *It is as such expedient and in the interest of justice to pass an order recalling order dated 11th August, 2017 and to consider and adjudicate on the legal submissions advanced by the applicants.*

15. *The applicant states and respectfully submits that the orders prayed for in the instant application are required to be made in the interest of the justice. As such unless orders as prayed for herein are made, the applicant company and all its shareholders, including the Petitioner will suffer irreparable loss, prejudice and injury."*

21. The petitioner/non-applicant filed reply to the respondent No.1/applicant, to which, the applicant filed rejoinder disputing the facts stated in the reply submitted by the non-applicant/petitioner. In order to appreciate the dispute under consideration, I also find it necessary to reproduce the relevant part of the reply submitted by the non-applicant/petitioner, which runs as follows: -

"8. With respect to sub-paragraph 1 of paragraph V of the application, it is denied and disputed that the order dated 14th November, 2014 passed by the Hon'ble Company Law Board in Company Petition No.969 of 2012 is not binding on the respondent No.1 company and/or there is only a direction on the respondents/shareholders to buy out the shares held by the petitioner, as contended or at all. It is submitted that the said order dated 13th November 2014 is binding on all the respondents as well as the petitioner.

9. With respect to subparagraphs 2 and 3 of paragraph V of the application, it is submitted that the erstwhile Company Law Board did not have any jurisdiction to take up matter under the provision of Section 100 of the Companies Act, 1956, which was vested upon Court. Secondly, there is no direction to buy shares in the said Order dated 14.11.2014.

10. With respect to sub – paragraph 4 of paragraph V of the application, Section 77A of the Companies Act, 1956 is not applicable in the present case, since the same deals with the power of a company to purchase its own shares. It is submitted that the instant proceedings were initiated inter alia under section 397 and 398 of the Companies Act, 1956 and the Original Petition was disposed off on settlement amongst the parties. Therefore, the question of buying back of shares by the Company does not arise at all.

11. With respect to sub – paragraph 5 of paragraph V of the application, it is submitted that the statements made therein are not relevant in as much as the provisions of Section 100 or Section 77A of the Companies Act, 1956 are not applicable, in the instant matter, as aforesaid.

12. With respect to sub – paragraph 6 of paragraph V of the application, it is submitted that the provision of Section 101 of the Companies Act, 1956 is also not applicable, in view of the aforesaid.

13. *With respect to sub – paragraph 7 of paragraph V of the application, it is submitted that the order dated 14th November, 2014 was passed by the then Hon'ble Company Law Board and not the Hon'ble Tribunal, as contended or at all. It is also submitted that there is no direction on the respondents group of shareholders to buy the share of the petitioner group, as contended or at all.*

14. *With respect to sub – paragraph 8 of paragraph V of the application, it is reiterated that a Special Officer be appointed to dispose off the assets of the respondent No.1 company, in order to enforce the order dated 14th November 2014. It is also submitted that the obligation to comply with the order dated 14th November 2014 is on all the respondents including the applicant / respondent No.1 Company.*

15. *With respect to sub – paragraphs 9 to 11 of paragraph V of the application, it is denied and disputed that this Hon'ble Tribunal has rejected the contentions of the applicant's counsel without considering them at all and adjudicating upon them whatsoever, as alleged or at all. It is submitted that this Hon'ble Tribunal has already dealt with the matter at length in its previous order. A copy of the order dated 25th April 2017 is annexed herewith (marked A) for ready reference and the petitioner craves leave to refer to the same at the time of hearing.*

16. *With respect to sub – paragraph 12 of paragraph V of the application, it is submitted that the company petition being CP No.969 of 2012 is already disposed off vide order dated 14th November 2014. It is also submitted that this Hon'ble Tribunal has heard the matter relating to enforcement of the order in terms of TA No.34 of 2016 at length and has come to a conclusive finding that the order dated 14th November 2014 needs to be enforced. It is also submitted that the respondents are unnecessarily raising frivolous issues to delay the enforcement of the said order.*

17. *With respect to sub – paragraph 13 of paragraph V of the application, it is denied that in the light of arguments advanced and provisions of the Companies Act, no Special Officer can be appointed to dispose off the assets of the respondent No.1 company and/or the order dated 14th November 2014 imposes an obligation only on one group of shareholders to buy out the shareholding of the petitioner, as alleged or at all. It is submitted that the order dated 14th November 2014 is binding on all the respondents and enforceable under Section 634A of the Companies Act, 1956.*

18. *With respect to sub – paragraph 14 of paragraph V of the application, it is denied and disputed that the order dated 14th November 2014 passed by this Hon'ble Tribunal needs to be recalled or that the same can be recalled at all. It is submitted that once an Order is passed, the same cannot be recalled, rather any mistake apparent from the record can only be rectified. The relevant provisions of Section 420 of the Companies Act, 2013 is reproduced herein below for ready reference:*

> *420. Orders of Tribunal. —*
>
> *(1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.*
> *(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it,*

and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

19. With respect to sub – paragraph 15 of paragraph V of the application, it is denied and disputed that the orders prayed for in the instant application are required to be made in the interest of justice, as contended or at all. It is submitted that this application be dismissed with exemplary costs."

22. One of the main contentions from the side of the applicant/respondent in the present proceeding, is that in rendering the order dated 14-11-2014, the learned CLB, Kolkata did not keep in mind the law laid down in Section 77A and Sections 100 to 104 of the Act of 1956 and, therefore, the said order is unsustainable inasmuch as the same was rendered in total violation of mandatory directions rendered in aforesaid provisions of law.

23. However, before proceeding further, one may note here that in *Cosmos Steels Private Ltd. and Ors. Vs Jairam Das Gupta and Ors.* reported in AIR 1978 SC 375, the Hon'ble Apex Court had the occasion to examine the power of the Court under Section 402 of the Act of 1956, including the power to order purchase of shares of minority shareholders by the company. On examining such a question from various angles, the Hon'ble Apex Court held as follows: -

"8. Sections 397 and 398 enable the minority shareholders to move the Court for relief against oppression by majority shareholders. In a petition under Sections 397 and 398, Section 402 confers power upon the Court to grant relief against oppression, inter alia, by providing for the purchase of shares of any of the members of the Company by other members thereof or by the Company and in the case of purchase of its shares by the Company, the consequent reduction of the share capital of the Company. Rule 90 of the Companies (Court) Rules, 1959, provides that where an order under Sections 397 and 398 involves reduction of capital, the provisions of the Act and the Rules relating to such matter shall apply as the Court may direct.

9. The question is: whether when on a direction given by the Court, while granting relief against oppression to the minority shareholders of the Company, to the Company to purchase the shares of some of its members which would ipso facto bring about reduction of the share capital "because a Company cannot be its own member, is it obligatory to serve a notice upon all the creditors of the Company? It was conceded that the procedure prescribed in Sections 100 to 104 is not required to be followed where reduction of share capital is necessitated by the direction given by the Court in a petition under Sections 397 and 398. Section 77 leaves no room for, doubt that reduction of a share capital may have to be brought about in two different situations by

two different modes. Undoubtedly, where the Company has passed a resolution for reduction of its share capital and has submitted it to the Court for confirmation the procedure prescribed by Sections 100 to 104 will have to be followed, if they are attracted. On the other hand, where the Court, while disposing of a petition under Sections 397 and 398, gives a direction to the Company to purchase shares of its own members, a consequent reduction to the Company to purchase shares of its own members, a consequent reduction of the share capital is bound to ensue, but before granting such a direction it is not necessary to give notice of the consequent reduction of the share capital to the creditors of the company. No such requirement is laid down by the Act. Two procedures ultimately bringing about reduction of the share capital are distinct and separate and stand apart from each other and one or the other may be resorted to according to the situation. That is the clearest effect of the disjunctive or in Section 77.

10. The scheme of Sections 397 and 406 appears to constitute a code by itself for granting relief to oppressed minority shareholders and for granting appropriate relief, a power of widest amplitude, inter alia, lifting the ban on company purchasing its shares under Court's direction, is conferred on the Court. When, the Court exercises this power by directing a purchase of its shares by the Company, it would necessarily involve reduction of the capital of the Company. Is such power of the Court subject to a resolution to be adopted by the members of the Company which, when passed with statutory majority, has to be submitted to Court for confirmation? No canon of construction would permit such an interpretation in which the statutory power of the Court for its exercise depends upon the vote of the members of the Company. This would inevitably be the situation if reduction of share capital can only be brought about by resorting to the procedure prescribed in Sections 100 to 104. Additionally, it would cause inordinate delay and the very purpose of granting relief against oppression would stand self-defeated. Viewed from a slightly different angle, it would be impossible to carry out the directions given under Section 402 for reduction of share capital if the procedure under Sections 100 to 104 is required to be followed. Under Sections 100 to 104 the Company has to first adopt a special resolution for reduction of share capital if its article so permit. After such a resolution is adopted which, of necessity must be passed by majority, and it being a special resolution, by a statutory majority, it will have to be submitted for confirmation to the Court. Now, when minority shareholders complain of oppression by majority and seek relief against oppression from the Court under Sections 397 and 398 and the Court in a petition of this nature considers it fair and just to direct the Company to purchase the shares of the minority shareholders to relieve oppression, if the procedure prescribed by Sections 100 to 104 is required to be followed, the resolution will have to be first adopted by the members of the Company but that would be well-nigh impossible because the very majority against whom relief is sought would be able to veto at the threshold and the power conferred on the Court would be frustrated. That could never have been the intention of the Legislature. ***Therefore, it is not conceivable that when a direction for purchase of shares is given by the Court under Section 402 and consequent reduction in share capital is to be effected the procedure prescribed for reduction of share capital in Sections 100 to 104 should be required to be followed in order to make the direction effective****."*

24. It may be noticed here that the decision in Cosmos Steels Private Ltd. (supra) was rendered when Section 77 put several restrictions, on the purchase of its shares by the company. The restrictions, so imposed, under the section 77 of the Act of 1956, were almost absolute. However, the rigidity of such ban got somewhat relaxed with the incorporation of section 77A in the Act. But then, even under section 77, in Cosmos Steels Private Ltd. (supra), it was held that under Section 402, the Court had enormous power to give a direction to the company to purchase its shares although such a direction resulted in consequent reduction in share capital of the company and same can do so without following the prescriptions in Sections 100 to 104.

25. Over a long period of time, the said decision was followed by various courts of the country. The Hon'ble High Court of Karnataka too followed the said decision in a recent case [(Somashekara Rao S/o. Late U Gopalkrishna Rao Vs The Canara Land Investment Ltd. reported in [2012] 169Compcas35 (Kar)]. The necessary discussion can be seen in Para 18 of the judgment aforesaid.

26. It is in the above backgrounds, let me consider how far the allegations that the order dated 25-04-2017 was rendered without considering the submissions, advanced from the side of the applicant in M.A.No.01/2016, stand to reason. Coming to the allegation that the arguments, premised on Section 77A and Sections 100 to 104 of the Act of 1956 were not considered, I find it necessary to peruse the order dated 25-04-2017 and found that such allegation was duly considered and appropriately answered.

27. A perusal of paragraph 60 to 82 of the order dated 25-04-2017 would make such a position more than clear. For ready reference, the most relevant paragraphs are reproduced below: -

> *"78) In the context of power of CLB in granting relief(s), one may look into the decision of the Apex Court in Cosmos Steels v. Jairamdas Gupta (1978) 48 Camp Cas 312(SC), wherein it was held that Company Court (now NCLT) has wide powers under sections 397, 398 and 402 of the 1956 Act and it can make any order for regulation of the conduct of company's affairs as may be just and equitable in the circumstances of the case.*
>
> *79) It was also held there that in granting relief, the CLB can also order reduction of capital, and that too, even without following provisions of*

sections 100 to 104 of the 1956 Act. However, in doing so, CLB needs to keep interest of creditors in mind. In D Ramakishore v. Vijayawada Share Brokers Ltd. (2009) 89 SCL 279 (AP), it was also held that technicalities cannot defeat exercise of equitable jurisdiction under section 402 of the Act of 1956.

80) In IFCI Ltd. v. TFCI Ltd. (2011) 107 SCL 512/11, it was held by CLB, Delhi that Court (now NCLT) has extremely wide powers under section 402 of the 2013 Act to mould relief and also to examine subsequent events. Again in Bennet Coleman & Co. v. UOI (1977) Comp Cas 92 (Bom) also, it was held that High Court has ample jurisdiction and very wide powers, without any limitation or restriction, to pass orders and give such directions to achieve the object.

81) What, therefore, emerge from the decisions aforementioned, and that too quite noticeably, is that the order under challenge, if found equitable and just and if such order meets the ends of justice, mere non-compliance of various provisions of law would not make such order illegal or unsustainable since as is held in catena of decisions, CLB, in appropriate case, may grant relief which may even run counter to provisions of various laws or to the Articles of Association.

82) I have already found that the order dated 14.11.2014 was rendered by the learned CLB on being satisfied that the parties to CP No.969/2012 had decided to dispose of said proceeding on the basis of mutually acceptable settlement and therefore, on recording such settlement in the order, learned CLB disposed of such a proceeding on the basis of such said settlement."

28. In regard to the allegation that the order dated 14-11-2014 was secured without the knowledge of the respondent No.2 (who was the Managing Director at the time relevant) in a most fraudulent manner, I have found that a detailed discussion was made on such allegation too, having regard to the averments made in the pleadings as well as arguments advanced by the counsel for the parties and thereafter, it was concluded that such allegation was without any substance. In that regard, one may peruse the discussion in Para 15 to 47 of the order dated 25-04-2017.

29. In regard to the contention that the order dated 14-11-2014 was bad for rendering the same in violation of the provisions incorporated in Chapter V, Part VI of the Companies Act, 1956, more particularly, Section 391, 392 and 394 thereof, found that this Bench considered such submission as well and came to the conclusion that the said provision had no application to a proceeding pending before CLB and as such, said provision cannot come in the way of CLB rendering the order

dated 14-11-2014. In that connection, one may look into the discussions made in Para 61 to 69 of the order dated 25-04-2017.

30. The applicant/respondent also contended that the order dated 14-11-2014 is also bad, since it was rendered in total disregard to the law incorporated in the Legal Services Authorities Act of 1987. This Bench had considered such submissions and found that such allegation too is without any merit. Necessary discussions in that regard can be found in Para 72 to 83 of the order dated 25-04-2017.

31. Coming to the allegation that the order dated 14-11-2014 is bad for not taking into consideration the provisions of the Rules of 2014 as well as the provisions of Rule 4 of Order XXIII of the CPC, it has been found that such allegation too bears no substance at all. The discussions in that regard can be seen in Para 70 to 83 of the order dated 25-04-2017, which makes such position more than clear and, therefore, same needs no further reiteration.

32. The applicant/respondent also contended that at the time relevant, the respondent No.2 was Managing Director of the company and in that capacity, it was beyond her competence to enter into the settlement aforesaid with the petitioner company on behalf of the other respondents. Being so, even if one assumes for the sake of arguments that the respondent No.2 consented to the settlement aforesaid, it is not binding not only on the respondent No.1, 3 and 4, but also on respondent No.2.

33. Such allegation was also considered in the light of submissions made by the parties and found that the Managing Director of the company had necessary authority to enter into a compromise on behalf of the company, binding the company with the terms and conditions contained in such settlement. Necessary discussions in that regard can be seen in Para 48 to 55 of the order dated 25-04-2017.

34. It may be stated here that the non-applicant/petitioner has questioned the maintainability of M. A. No.01/2016 on counts more than one. It is alleged that if the respondents felt aggrieved by the order dated 14-11-2014, they could have preferred an appeal before the Hon’ble High Court in terms of law laid down in

Section 10F of the Companies Act, 1956. But, at no point of time, the respondents/applicants preferred any appeal, against the order dated 14-11-2014. Since, no appeal was preferred in time against the order dated 14-11-2014, it is not possible for the respondents to question the validity and propriety of such an order in the same forum which have no power whatsoever to review its earlier order.

35. It has also been contended from the side of the non-applicant/petitioner that the power to review is a creation of Legislature but, neither the learned CLB nor the NCLT was/is vested with such power to review its own order. It has also been argued that the Court/Tribunal has inherent power to recall its earlier order provided that it must be shown that such an earlier order has, in fact, occasioned severe miscarriage of justice, but then, the order dated 25-04-2017 is found free from any infirmity whatsoever, much less its suffering from some severe irregularity and illegality.

36. Since the application which was registered as M. A. No.01/2016 questioning the validity of the order dated 14-11-2014 did not have any basis whatsoever, such an application ought to have been rejected outright instead of admitting the same for hearing --- contends Mr. Gupta, PCS**.** All those contentions from the side of the non-applicant/petitioner were considered and it was found that such allegations from the side of the non-applicant/petitioner against M. A. No.01/2016, were based on facts and law. Necessary discussions thereto can be found in paragraph 84 to 100 of the order dated 25-04-2017.

37. In view of what I have discussed in the forgoing paragraphs and what has emerged therefrom, I am of the clear opinion that the contentions that all the allegations which were raised in M. A. No.01/2016, were not considered at all by this Bench, is found to be not only absurd, but, the same is also found to be ill-motivated one and the motive of the same being to delay, more and more, the disposal of the proceeding seeking enforcement of the order dated 14-11-2014.

38. One may note here that a consent order cannot be modified/rescinded/recalled unless the parties thereto, agreed to such modification/rescission/recall. The decision rendered by the learned CLB, New Delhi in the case of Mrs. Michelle Jawad-Al-Fahoum Vs. Indo Saudi (Travels) (P.) Ltd.

reported in (1998) 30 CLA 42 (CLB) makes such position clear. In the instant case, I have already found that the order dated 14-11-2014 is a consented order and since the petitioner insisted in the execution of the same, it is impossible for this Bench to recall the order dated 14-11-2014.

39. In view of the above, I have no other option, but to dismiss this application. However, I make it clear that any further attempt to raise the same matter would be viewed seriously and would be dealt with accordingly.

40. The parties are directed to render necessary assistance in executing the Order dated 14-11-2014 rendered by the CLB, Kolkata in C.P. No.969/2012, in letter and spirit.

41. With the above observations, this proceeding, the same being M. A. No.03/2017 in TP No.07/397/398/GB/2016 (arising out of CP No.969/2012), is disposed of.

Sd/-
Member (Judicial)
National Company Law Tribunal
Guwahati Bench:
Guwahati.
Dated, Guwahati, the 05th January, 2018

Deka/05-01-2018