NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH: GUWAHATI

I. A. No. 45 of 2017
(Diary No.713/2017)
In
T.P. No.04/397/398/GB/2016
[Arising out of C.P. No.994/2011]

Under Rule 11,13,32, 34 and 51 of NCLT Rules, 2016

In the matter of:

Kanubhai Patel & Ors. ... Petitioners
-versus-
Doloo Tea Co. (I) Ltd. & others ... Respondents

Order delivered on 18th December,2017

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

For the Petitioners: **Mr. S. N. Mitra, Sr. Advocate**
Mr. D. N. Sharma, Advocate
Mr. N. Dasgupta, Advocate
Ms. D. Chatterjee, Advocate
Mr. S. S. Roy, Advocate **- For the Petitioners**

For the Respondents: **Mr. S. Sen, Advocate**
Mr. A. Banerjee, Advocate
Mr. R. Mullick, Advocate
Mr. S. G. Khandalia **- For Respondent No. 1**

Mr. S. K. Medhi, Sr. Advocate
Ms. J. Tripathi, Advocate
Mr. S. G. Bhatacharjee, Advocate - For Respondent No.15

Mr. A. Das, Advocate
Mr. S. Das, Advocate **- For Respondent No.14**

O R D E R

1. This application has been filed by the applicant/respondent No.1 seeking stay of the connected Company Petition, same being T. P. No.4/2016 (arising out of CP No.994/2011), till disposal of Execution Case No.209 of 2014, now pending before the Hon'ble Calcutta High Court.

2. I have heard Mr. S. Sen, Mr. A. Banerjee, Mr. R. Mullick, Mr. G. Khandalia, learned counsel for appearing respondent No.1, Mr. S. K. Medhi, Ms. J. Tripathi, Mr. S. G. Bhattacharjee, learned counsel appearing for respondent No.15, Mr. A. Das and Mr. S. Das, learned counsel appearing for respondent No.14 respectively.

3. I have also heard Mr. S. N. Mitra, learned Sr. Advocate, Mr. D. N. Sharma, Mr. N. Dasgupta, Ms. D. Chatterjee and Mr. S. S. Roy, Advocates appearing for the petitioners/non-applicants.

4. The parties to the proceeding, have filed their synopsis on written arguments before this Bench, in the meantime. In order to appreciate the contentions raised by the applicant/respondent No.1, seeking stay of the company petition, I find it necessary to go through the synopsis on written arguments of the applicant/respondent No.1. The relevant part of the which is reproduced below: -

> *"3) The petitioners in company petition being TP No.04/397/398/GB/2016 filed before the NCLT are claiming to hold 64283 shares held by them in respondent no.1 company. However, in the execution case being EC 209 of 2014 filed by the petitioners before the Hon'ble High Court at Calcutta, they are seeking to execute the decree dated 10th February, 2014 for a sum of Rs.28,32,41,209.70p and assistance is sought for by way of a) sale of 64283 shares lying deposit with the Arbitrator, and b) sale of flat no.5/1, 5th Floor, "Azimgunj House", No.7, Comac Street, Kolkata 700 017, belonging to the judgment debtors (RAP Group).*
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> *4) The averments made in EC 209 of 2014 filed by the petitioner /decree holders if read as a whole will clearly reveal that the petitioners are all along claiming for recovery of the balance unpaid sale consideration of the shares transferred to RAP group under the Memorandum of Understanding dated 1st July, 1991.*
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> *5) The consistent stand of the petitioners in (TP No.04/397/398/GB/2016) at all stages after execution of the memorandum of understanding dated 1st July, 1991 has been to enforce the said memorandum of understanding entered into for transfer of 64283 shares to RAP group for which part consideration was received and a counter claim was filed in arbitration reference claiming the balance sale consideration as per the memorandum of understanding dated 1st July, 1991 which culminated in the award dated 27th March, 2006 declaring the final amount to which the petitioners in (TP No.04/397/398/GB/2016 were held entitled to on account of sale/transfer to RAP group under the memorandum of understanding dated 1st July, 1991. The award also contained a default clause entitling the arbitrator to sell the shares for enabling the CAP group to realize the unpaid decretal amount. Upon the award being made a decree on 10th February, 2014 the petitioners filed EC 209 of 2014 for claiming the sum of Rs.28,32,41,209.70p as per the decree. The understanding claimed themselves as creditors vis-a-vis the sale value of shares as mentioned in Memorandum of Understanding dated 1st July, 1991 entitled to receive the unpaid balance consideration.*
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> *6) The said stand followed by the petitioners consistently from 1991 onwards till passing of the award claiming themselves as creditors for unpaid value of 64283 shares was sought to be charged for the first time in 2011 when the instant company petition being CP 994 of 2011 (TP No.04/397/398/GB/2016) was filed by the petitioners claiming to be owner of 64283 shares. Such claim is a misnomer as the said shares stood transferred in 1991 as revealed from their subsequent conduct in making a counterclaim to recover the unpaid sale/transfer value as rendered in the Memorandum of Understanding and there after seeking a decree on the basis of the said award dated 27th March 2006 whereupon a decree was passed on 10th February, 2014. The petitioners in furtherance of their stand that they are entitled to the decretal amount of Rs.28,32,41 209.70p have put forth the decree for execution in 2014.*
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> *7) The execution proceedings are regularly being heard by the Hon'ble High Court at Calcutta. The petitioners / decree holders are examining MR. Hasmukh R. Patel, a judgment debtor to find out assets or properties owned by the judgment debtors so that the same can be sold for realization of the decretal debt.*

8) *The petitioners upon pursuing EC 209 of 2014 are actually intending to realize balance unpaid value of 64283 shares as declared by the decree dated 10th February, 2014. The final outcome of EC 209 of 2014 will result in realization of the unpaid transfer value. The necessary corollary of proceeding with EC 209 of 2014 implies that the petitioners are creditors and they have no right in the shares. The right as creditors pursued by the petitioners from 1991 continuously and even at present in EC 209 of 2014 is inconsistent with and/or mutually destructive of the right claimed in TP No.04/397/398/GB/2016 as shareholders.*

9) *The petitioners by claiming the balance unpaid consideration money in lieu of transfer of shares in the arbitration proceeding which was initiated in 2002, is now by their own conduct stopped from claiming themselves as shareholders of the respondent no.1 company, when in the arbitration proceeding was initiated much before filing of the said company petition.*

...

...

12) *The execution petition being EC 209 of 2014 is a continuation of the arbitration reference which commenced in 2002 and culminated into the award of 27th March, 2006. The arbitration proceeding which finally crystalized the rights of the parties by passing the award which became a decree is a proceeding filed prior to the said company petition and as such the award/decree declaring the petitioners as creditor for unpaid value of the shares is binding on the petitioners in the subsequently instituted company petition being CP 994 of 2011 which is to be stayed applying the principle of Section 10 of the Civil Procedure Code.*

13) *Assuming but not admitting that EC 209 of 2014 is a separate proceeding and has been filed later than the company petition then also if the reliefs claimed in the company petition is overriding and conflicting to the rights claiming in EC 209 of 2014, then to avoid conflict of judgments the earlier proceeding can be stayed for maintaining judicial discipline and for effective adjudication. In such regard petitioners cite*

i) *2007 (14) Company Cases 157*
ii) *2012(17) Company Cases 93*

14) *The respondent no.1 further states that the petitioners are guilty of forum shopping by filing the company petition claiming themselves as shareholders which is not only inconsistent but also mutually destructive of the plea taken by them all along since the Memorandum of Understanding dated 1st July, 1991 till passing of award and event subsequent thereto when decree was passed on 10th February, 2014. Pleas which are mutually destructive are not permissible. The institution of company petition is a chance litigation since on the other hand they asking the executing Court to sell of the selfsame 64283 shares on the basis of which the said company petition was filed. As such, by the subsequent conduct the petitioners have waived their rights to claim themselves to be the shareholders of the respondent no.1 company.*

15) *The respondent no.1 states that the ploy adopted by the petitioners to get into the affairs of the respondent no. company is very evident. The petitioners instead of pressing prayer (b) of the execution application at page 126 for selling those 64283 shares intentionally going on examining the judgment debtors for more than 6/7 months. The main intention of the petitioners seems to be very clear that they will keep the execution application pending and on the other hand before execution application is finally disposed of the petitioners will also fish out evidence in regard to the affairs of the business of the respondent no. 1 company by claiming themselves as shareholders of the respondent no.1 company. The filing of the Company Petition is thus clearly an abuse of process and to prevent perpetuation of the same, the said TP No.04/393/398/GB/2016 is liable to be stayed.*

Submissions of the petitioners in opposing the prayer of Diary No.713 of 2017 arising out of TP No.04/397/398/GB/2016 are as follows: -

i) *No member of RAP group has asserted that they are the owners of 64283 shares;*
ii) *The award is not final;*
iii) *If they are not successful in realizing the decretal debt, then they cannot be rendered remediless.*

The aforesaid submissions have no factual or legal basis since.

a) *Once the petitioners themselves have asserted their rights to receive the unpaid sale value of 64283 shares at all stages upto execution proceeding and specific prayers have been made for sale of 64283 shares by the receiver as well as for sale of the assets of the RAP group, they have themselves admitted*

that they no longer have any title to the 64283 shares which they have already been transferred. It is also a matter of record that part consideration has been paid by RAP group.

b) The question whether the CAP group will realize the entire decretal amount or even part of the decretal amount, will depend upon the final outcome of EC 209 of 2014. Once they have filed and pursuing EC 209 of 2014 the same implies that they are only interested to realize the decretal debt arising out of transfer of shares. It automatically follows that as long as the said proceeding being EC 209 of 2014 is pending they cannot pursue the remedy by way of instant company petition claiming themselves as shareholders.

c) Whether the CAP group becomes remediless by reasons of non-realization of the decretal debt cannot be a ground for refusal for stay of proceeding in TP No.04/397/397/GB/2016 because both the proceedings cannot be proceeded with together and the rights pursued by way of EC 209 of 2014 is mutually destructive of the rights canvassed in TP No.04/397/398/GB/2016."

5. Such contentions were strenuously opposed to by Mr. S. N. Mitra, learned Sr. counsel appearing for the non-applicants/petitioners stating that the applicant/respondent No.1 has structured the present application on surmises, conjectures and fictions, instead of premising it on facts and law and, therefore, such an application is required to be rejected straightway and in that connection, several reasons are cited which were recorded in the synopsis on the written arguments submitted from the side of non-applicant.

6. In their synopsis on written arguments, it has been stated that the connected company petition, same being T. P. No.4/2016, was originally filed by the non-applicants/petitioners against the respondents, in the month of September, 2011 before the Hon'ble Company Law Board, Calcutta Bench, Kolkata (in short CLB) alleging oppression and mismanagement in running the affairs of the respondent No.1 company. Said petition was registered as C. P. No.994/2011 at CLB, Kolkata.

7. During pendency of C.P. No.994/2011, the respondent No.1 had, at first, filed C. A. No.369 of 2011 for dismissal of the aforesaid company petition questioning the maintainability of the same on the ground that the petitioners did not have required share qualification to initiate such a proceeding U/s 397/398 of the Act of 1956. However, the CLB, Kolkata, on hearing both the parties, was pleased to dismiss the C.A. No.369 of 2011 vide order dated 07-12-2011.

8. Thereafter, the respondent No.1 had filed an appeal before the Hon'ble Gauhati High Court under Section 10F of the Companies Act, 1956 challenging dismissal of C. A. No.369 of 2011. The Hon'ble Guwahati High Court dismissed the appeal vide order dated 31-07-2012. The respondent No.1 carried the matter to the Hon'ble Apex Court by way of a Special Leave Petition challenging the aforesaid order of the Hon'ble Gauhati High Court but the same was also disposed of by an order darted 20-03-2015.

9. On 01-10-2015, the Hon'ble Supreme Court had passed an order in I. A. No.2 of 2015 preferred by the petitioners in the SLP challenging non-grant of interim order by the Hon'ble CLB, Kolkata. In the aforesaid order, the Hon'ble Supreme Court had clarified that the CLB, Kolkata was at liberty to proceed with the CP No.994 of 2011 since there was no bar in hearing the aforesaid CP No.994 of 2011.

10. Before rendering the order, passed by the Hon'ble Supreme Court in I. A. No.2 of 2015 on 01.10 .2015, the respondents particularly, the respondent No.1, on several occasions, had tried to prevent the CLB, Kolkata from commencing the hearing of the CP No.949 of 2011 on the plea that the

Hon'ble Supreme Court under the order dated 20-03-2015 had stayed further proceeding in CP No.994 of 2011 and, therefore, the company petition cannot be heard.

11. According to the respondents, the order, passed by the CLB, Kolkata on 12-02-2014, 18-08-2014, 03-03-2015, 19-11-2015 and 22-01-2016 are prolific testimonies to such facts. The respondents, more particularly the respondent No.1, have thus, employed all possible steps to prevent the CLB, Kolkata from hearing the CP No.994 of 2011, thereby abusing the process of law to frustrate the well-meaning measures, employed by the petitioners, to secure their very legitimate claims.

12. Even after transfer of the CP No.994 of 2011 from the Hon'ble CLB, Kolkata to the NCLT, Guwahati Bench----------which has been renumbered as TP No.04/397/398/GB/2016---- the respondents have been using all the tactics to prevent this Bench from disposing of the said company petition on merits, by submitting several misconceived, ill-design applications during the course of hearing of the same. However, this Bench upon hearing the parties found that the purported question of law was, in fact, a mixed question of law and facts and therefore, directed them to advance their respective arguments, both on law as well as on facts simultaneously so that this Bench could pass a composite order on all the controversies under consideration vide Order dated 17-11-2017 and posted the matter on 22-11-2017 for further hearing.

13. In the meantime, before the date, fixed for hearing on 17-11-2017, the respondent No.1 had, once again, filed an application which has initially been numbered as Diary No.713 of 2017, seeking stay of CP No.994 of 2011 till disposal of the execution case filed by the petitioners before the Hon'ble Calcutta High Court since such an execution proceeding, amongst other things, shows that the petitioners have no locus, whatsoever, to file the connected company petition.

14. However, as stated above, such application is liable to be rejected in limine----since ----such an application is nothing but mere extension of many earlier applications seeking the dismissal of connected company petition on grounds which were very similar to the ground, agitated in the application in hand and which are already repeatedly held to be untenable in law. Being so, the present application is a clever design to delay the disposal of the connected company petition. Therefore, the non-applicants/petitioners have urged this Bench to dismiss the application with cost.

15. I have perused the application seeking stay of the proceeding in TP No.04/397/398/GB/2016 [arising out of CP No.994 of 2011] in the light of the arguments, advanced by the parties. On a bare reading of the application under consideration, in the light of the arguments advanced by the applicant/respondent No.1, it is found that it had objected the continuance of connected company proceeding till the disposal of the execution proceeding on three counts. According to the applicant/respondent No.1-

(i) the averments, made in the execution proceeding, clearly demonstrate that the petitioners are no longer the title holder in and of the shares of the respondent No.1 company, the number of the same being 64283, since, the title thereon had already been transferred to RAP group on 01-07-1991 when the RAP group and CAP group had entered into an MOU.

(ii) The applicant further contends that in view of the stand, taken by the respondents in the aforesaid execution proceeding, they are, now, prevented from prosecuting the company petition as shareholders of the respondent No.1 company--- since ----the stand they have taken in the said execution proceeding undoubtedly demonstrates that the respondents are only the creditors of the company aforesaid. In simple words, the principle of estoppel, now, comes in the way of the petitioner's prosecuting the proceeding in hand as being shareholders of the same.

(iii) It has also been contended that if the proceeding in hand and the proceeding, now, pending before the Hon'ble Calcutta High Court, are allowed to proceed simultaneously, there is every possibility of decision in this proceeding and the final result in the execution proceeding, pending before the Hon'ble Calcutta High Court, running counter to each other. Such a situation is not permissible under the law, more so, when the aforesaid proceeding is pending before the Court as high as the highest Court of the State.

16. I have considered such submissions in the light of the materials on record and the law holding the field. The applicant/ respondent No.1 as well some other respondents, over a long period of time, have been agitating that the non-applicants/petitioners did not have requisite qualification to initiate the connected company proceeding—since--- they had transferred their title on the shares in the respondent No 1 company to the RAP group way back in 1991, some of whom are respondents herein. Since they have no legal qualification to file the said proceeding, under section 397/398 of the Act of 1956, on this ground alone, the connected petition is required to be dismissed.

17. This Bench has considered such submissions and found reasons to conclude that the purported question of law, raised from the side of the respondents/ applicants, is not a question of law alone; rather, it is a mixed question of law and facts and, therefore, such a question cannot be decided in an offshoot arising from the original proceeding. The various orders, passed in different Interlocutory applications including one which was rendered on 17-11-2017 in T. P. No. 04/397/398/GB/2016 (CP No.994 of 2011) with I. A. No.20/2017 (in T.A.No.29/2016 –C.A. No.369/2011) & I.A. No.16/2017, make such position very clear. For ready reference, the order rendered on 17-11-2017 T. P. No. 04/397/398/GB/2016 (CP No.994 of 2011) with I. A. No.20/2017 (in T.A.No.29/2016 –C.A. No.369/2011) & I.A. No.16/2017 is reproduced below: -

"***ORDER***

Date of Order: 17th November 2017

This proceeding under Section 111A, 235, 397, 398, 399, 402, 403 and 406 of the companies Act, 1956 (in short, the Act of 1956) was initiated by Kanubhai C. Patel, since deceased, along with 6 others, so named in the petition, against Doloo Tea Company Limited (in short, respondent No.1 company) and 13 others alleging that persons/other entities, named therein as respondents, have been carrying on the affairs of the respondent No.1 company in a profoundly illegal manner which not only resulted in serious mismanagement of the affairs of respondent No.1 company but also caused enormous oppression to the petitioners therein. They, therefore, seek various reliefs as specified in the petition aforesaid.

2. It may be stated here that some of the petitioners herein and their predecessors (hereinafter referred to as CAP group) as well as some of the respondents and their predecessors (hereinafter referred to as RAP group) were the owners of several properties including respondent No.1 Company as well as M/s Lallmookh Tea Estate, situated in the district of Cachar in Assam. However, in course of time, the RAP group and CAP group fell apart and, therefore, in 1991, they had entered into an agreement {(Memorandum of Understanding (MOU for short)} for settlement of their disputes. Under such MOU, the Lallmookh Tea Estate along with some other properties was to go to CAP group whereas the respondent No.1 company along with some other properties was to come to the fold of RAP group.

3. The proceeding in hand was originally filed before the Company Law Board (for short, CLB), Kolkata. However, on the repeal of the Act of 1956, the Companies Act, 2013 (for short, Act of 2013) was brought into existence. With the repeal of the Act of 1956, the institution of CLB stood replaced by National Company Law Tribunal (in short, NCLT). Thus, this proceeding came to be transferred to this Bench from CLB, Kolkata for disposal in accordance with law.

4. This Tribunal, being in seizin of the proceeding, takes up the same for disposal in accordance with prescription rendered in the Act of 2013 and the Rules framed there-under. During the course of hearing, some parties hereto had filed demurer questioning the maintainability of the proceeding in hand. Mr S. Sen, learned Advocate for respondent No.1, in the course of argument, referring to the order of Hon'ble Apex Court rendered on 09.12.2016 in SLP No.29566/2012 contended that in a proceeding, where demurer has been filed questioning the maintainability of the main proceeding, the Tribunal is duty bound to hear such demurer first. He, therefore, urged this Bench to hear the demurer first.

5. In that context, Mr Sen submitted that the petitioners herein ceased to be the shareholders of the respondent No.1 company as back as 1991 following the execution of MOU between the CAP group and RAP group in 1991 and, therefore, on the date of filing of present proceeding in 2011, the petitioner, being the members of CAP group, did not have a single share in the respondent No.1 company, much less, their having requisite shares in the company to file a petition under Section 397/398 of the Act of 1956.

6. Mr S.N. Mitra, learned Sr. Advocate appearing for the petitioners, however, objected to such submission, seeking hearing of the demurer first, stating that the argument, advanced from the side of respondent No.1, aimed at showing that the petitioner did not have requisite qualification to file the proceeding in hand, is structured---- not on law, logic and facts--- but ---on speculation, surmise and conjecture instead which no court or tribunal would ever approved.

7. Mr S.N. Mitra further submits that Hon'ble Apex Court in its aforesaid order also requires the Court/Tribunal to hear the company petition and the demurer simultaneously and also as expeditiously as possible. According to Mr. Mitra, in the present proceeding, the purported question of maintainability is so intrinsically interlinked with various disputed facts on record that it would be impossible for the tribunal to consider the so called question of maintainability without considering various other disputed facts on record.

8. In other words, the question of maintainability, so raised by the respondents, is nothing but a mixed question of law and facts and, therefore, in view of the provisions of Order XIV Rule2 (2) (a) and (b) of the CPC, the question of maintainability, as projected through the demurer, cannot be taken up as a preliminary issue. Mr Mitra, therefore, urged this Bench to hear the company petition and all the demurrers simultaneously.

9. This Tribunal, on hearing the parties was pleased to pass the following order on 22.03.2017.

"Heard Mr. S.N.Mitra, learned Sr. Advocate assisted by Mr.D.N.Sharma, Mr. A.Choudhury, Ms. D.Chatterjee, and Mr.S.S.Ray, learned counsel appearing for the

petitioners. Also heard Mr. S.Sen, Mr. A.Banerjee and Mr. R.Mullick, learned counsel appearing for the Respondent No.1.

"Referring to the order dated 9th December, 2016 rendered in SPL No 29566/2012 by Hon'ble Apex Court of the Country, Mr. S.Sen, learned counsel appearing for the Respondent No.1. submits that in terms of the order dated 09.12.2016, in the aforesaid proceeding, the demurer, filed by the respondent, questioning the maintainability of the present proceeding is required to be heard first.

"Mr. S.N.Mitra, Senior Advocate, objected such prayer seeking hearing of demurer first stating that the Hon'ble Apex Court order, rendered on 9.12.2016 in the SLP, referred to above, requires this court to hear the company petition and other application including demurer simultaneously and also as expeditiously as possible. Therefore, as prayed for by the learned counsel for the respondent, the demurer cannot be heard first, more so, when demurer involves a mixed question of law and facts.

"Having heard learned counsel for the parties and also having regard to the pleadings of the parties, I find it necessary to hear the petition itself first.

"However, due to paucity of time, Mr. S.N.Mitra, learned senior counsel could not complete his argument today and prays for some time.

"As agreed to by the learned counsel for the parties, list the matter again on 19.04.2017 for further hearing as first item."

10. Accordingly, the petition was heard at length and in the meantime, the argument from the side of the petitioner was concluded and argument from the side of respondent No1 Company on law points was also concluded. However, on 15.09.2017, Mr Sen, after concluding his arguments on law points, submitted that the Hon'ble NCLAT in its judgment dated 18.01.2017 rendered in Company Appeal (AT) No.17, 18 & 19 of 2017 held that when in a company petition, a demurer has also been filed questioning the maintainability of the main proceeding, the Tribunal is duty bound to hear the petition, both on merit and on maintainability, simultaneously but during the final hearing, the question of maintainability should be decided first and if it is answered in negative, then the petition is to be heard on merit.

11. Mr Sen, therefore, urged this Bench that since he has raised the question of maintainability of the proceeding and since he has concluded his arguments on maintainability of the proceeding in hand, in terms of judgment dated 18.01.2017 rendered in Company Appeal (AT) No.17, 18 & 19 of 2017, this Bench is duty bound to decide the question of maintainability before deciding the other controversies on merit. This Bench, therefore, on 15.09.2017, rendered the following order:

"Mr. S. N. Mitra, learned Sr. Advocate assisted by Mr. D. N. Sharma, Mr. A. Choudhury, Mr. N. Dasgupta, Ms. D. Chatterjee and Mr. S. S. Roy, Advocates appeared today for and on behalf of the petitioners.

"On the other hand, Mr. S. Sen, learned Sr. Advocate assisted by Mr. A. Banerjee, Mr. R. Mullick and Mr. G. Khandelia are present representing the respondent No.1, Mr. Anirban Das, Advocate is present representing Respondent No.14, Mr. S. K. Medhi, Sr. Advocate and Ms. J. Tripathi, Advocate are present representing respondent No. 15.

"Mr. S. K. Sen, counsel for the respondent No.1 completed his arguments in respect of issue of maintainability of the present proceeding in hand. While arguing the case, Mr. Sen has drawn attention of the Bench to a decision of NCLAT, New Delhi dated 03-02-2017 rendered in the case of Cyrus Investment Pvt. Ltd. & Anr. Vs Tata Sons Ltd. and others in Company Appeal (AT) No. 17, 18 and 19 of 2017, to contend that the question of maintainability of an issue as raised in a particular proceeding, the Tribunal is first required to decide the maintainability point before

going for other controversies. In this connection attention of the Bench has also been drawn to Para 422 of the aforesaid order, which is reproduced herein below for ready reference:

> *"42. In the aforesaid circumstances, if the Tribunal has fixed the Company Petition for hearing both on the question of maintainability and if so required on merit, we find no reason to interfere with such order passed by Tribunal. However, we are of the opinion that during the final hearing the question of maintainability should be decided first and if it is answered in negative, against the appellants, the question of waiver of the petition be decided if any strong ground has been made out to claim exception under proviso to sub-section (1) of Section 244. In case, aforesaid issues are decided in favour of the appellants, then the Tribunal can decide the case on merit."*

"He, therefore, urges this Bench to decide the question of maintainability first before deciding the proceeding on merit.

"In this connection, Mr. Mr. S. N. Mitra, learned counsel appearing for the petitioners referring to another decision dated 24th January, 2017 rendered by the NCLAT, New Delhi in Company Appeal (AT) No.17 of 2016 in the case of Anup Kumar Agarwal & Anr. Vs Crystal Thermotech Ltd. & Others has submitted that in a proceeding, when question of maintainability is raised along with other controversies, all the points should be heard together. In this regard, he has drawn attention of the Bench to Para 31 of the above order, which is reproduced herein below for ready reference: -

> *"31. The question of oppression and mismanagement and maintainability in the present case is a mixed question of facts and law. As the petition was filed on the ground that the shareholding of the applicant(s) has been brought down below 1/10th of the total shareholding of a Company by oppression and mismanagement, Tribunal was required to decide the question of maintainability at the time of final hearing of the Petition. Both the merit and question of maintainability were required to be decided together. On hearing the parties, in case the Tribunal forms opinion that there was no oppression and mismanagement on the date of cause of action as alleged by the applicant then in such case it was open to the Tribunal to dismiss the petition as not maintainable in view of Section 399 of the Companies Act, 1956."*

"Since, Mr. Sen, learned counsel for the respondent No.1 raised the point that this Tribunal is duty bound to decide the point of maintainability first, which is objected by Mr. S. N. Mitra, learned counsel for the petitioners referring to the aforementioned judgment of the NCLAT, New Delhi dated 24th January, 2017, I am of the considered opinion that this point be discussed during final hearing on the next date.

"Here, it may be stated that at one point this proceeding, this Bench was of the opinion that since the matter regarding maintainability of the proceeding in hand involves both question of law as well as question of facts, hence, such a matter (maintainability of the present proceeding) is required to be considered along with all other disputes in the present proceeding when the matter is finally taken up for hearing.

"Accordingly, this Bench requests all the parties to remain present on the next date.

"List this matter on 09-11-2017 as well as on 23-11-2017 for further hearing."

12. I have heard both the parties on ***09.11.2017****. Mr Sen has reiterated his arguments which advanced on 15.09.2017 urging this Bench to decide the question of maintainability first. In that*

connection, he has heavily relied on the decision passed by the Hon'ble NCLAT, more particularly, para 42. For ready reference, said para is reproduced below:

> "In the aforesaid circumstances, if the Tribunal has fixed the Company Petition for hearing both on the question of maintainability and if so required on merit, we find no reason to interfere with such order passed by Tribunal. However, we are of the opinion that during the final hearing the question of maintainability should be decided first and if it is answered in negative, against the appellants, the question of waiver of the petition be decided if any strong ground has been made out to claim exception under proviso to sub-section (1) of Section 244. In case, aforesaid issues are decided in favour of the appellants, then the Tribunal can decide the case on merit."

13. However, Mr S.N. Mitra, learned Sr, Advocate, referring to the judgment Hon'ble NCLAT, rendered on 24.01.2017 in Anup Kumar Agarwal & Anr. Vs. Crystal Thermotech Ltd. & Others, submitted that the NCLAT in the aforesaid proceeding also held that on the basis of facts on record, the Tribunal is to decide the question of maintainability at the final hearing of the petition and both the merit and question of maintainability were required to be decided together. The relevant part of the judgment is reproduced below:

> "The question of oppression and mismanagement and maintainability in the present case is a mixed question of facts and law. As the petition was filed on the ground that the shareholding of the applicant(s) has been brought down below 1/10th of the total shareholding of a Company by oppression and mismanagement, Tribunal was required to decide the question of maintainability at the time of final hearing of the Petition. Both the merit and question of maintainability were required to be decided together. On hearing the parties, in case the Tribunal forms opinion that there was no oppression and mismanagement on the date of cause of action as alleged by the applicant then in such case it was open to the Tribunal to dismiss the petition as not maintainable in view of Section 399 of the Companies Act 1956."

14. It may be stated here that the respondent No.14 (Eastern Tea Estate Ltd.), had also filed a demurer application challenging the maintainability of the present proceeding on counts more than one. **On 09.11.2017, M**r P.K. Roy, learned Sr. Advocate appearing for respondent No.14, while arguing the case for the respondent No.14 also adopted arguments, advanced by Mr Sen, learned Advocate respondent No. 1 company.

15. However, as stated above, he questioned the maintainability of the present proceeding on some other law points as well. All those points were incorporated in the e-mail notes, submitted from the side of respondents which I have reproduced herein below:

> "The demurer application has also been filed on the ground that in the company petition the petitioners have challenged the agreements entered into between the Eastern Tea and Dalao Tea both dated 19th February, 2008 for lease of the tea garden as well as for exclusive sale of green tea leaves. The company petition was filed on 18th October, 2011.
>
> "Admittedly there is a delay of more than three years from the date of execution against the Eastern Tea in filing the said company petition. The said company petition the petitioners have prayed for cancellation of the agreement entered into between the Dalao Tea and the Eastern Tea on 19th February, 2008.
>
> "Eastern Tea is a third party to the disputes between the petitioner and the respondent no.1. The petitioner is neither shareholders of Eastern Tea nor Dalao is a holding company of the Eastern Tea nor Eastern Tea is the holding company of Dalao Tea. As such, the Eastern Tea is a complete stranger to the disputes between the parties and has been unnecessarily dragged the proceedings. As such the said company petition suffers from misjoinder of parties and should be dismissed. It further stated that Section 242 sub-section 2 Clause (f) of Companies Act, 2013 there

is a legal bar from cancellation or setting aside or terminating any agreement entered into by the company with any third party unless or until consent is obtained from such third party. In the instant case, there is no consent obtained from Eastern Tea. As such, no prayer against Eastern Tea for termination of contract can be passed. Admittedly, the company petition is barred by the laws of limitation against the Eastern Tea since it is filed much beyond three years which is maximum period of time within which a proceeding for equitable relief can be brought into.

"There are more than three years delay and laches on the part of the petitioners and they have explained why there was so much delay and laches. The maximum period provided even though there are delay and laches cannot go beyond three years. As per Article 137 of the Limitation of 1963 in proceedings where there is fixed period of limitation.

"The agreement of Eastern Tea was uploaded in ROC on 20th February, 2008 which is a public document and upload of public document deem constructive notice of the same to public as on date. As such, the petitioner being barred under Section 242 Sub-section 2(f) of the 1963 Act and being barred by the laws of limitation and is not maintainable and should be dismissed with costs."

16. He further submits that Hon'ble Apex Court in Nextgen Dealers Pvt. Ltd. & Anr. Vs. Agarpara Company Ltd. & Ors. also held that the question of maintainability is required to be heard before considering the other controversies on factual front on merit. Such a claim from the side of the respondents has again been reiterated in the email note forwarded to this Bench form the side of respondents. The relevant part is reproduced below:

> *"Eastern Tea relies upon various judgments of Jainlink which has been decided on the ground of maintainability and company petition has been dismissed on the ground of limitation in the maintainability petition which has been upheld by the Hon'ble NCLAT vide order dated 18th October, 2017 which is latter in time as that of the Agarpara judgment dated August 16, 2017. Eastern has also relied upon a judgment of Next Gen Dealers Vs. The Agarpara Company which has been upheld by the Hon'ble Supreme Court by dismissing the civil appeal by the other cited on 23rd October, 2017 on the ground that maintainability point is to be decided first before going into the merits. Such order of the Hon'ble Supreme Court is also letter in time than the order of the Agarpara Jute Mills dated August 16, 2017."*

17. I have considered the submissions, advanced from the side of the parties having regard to the decisions, relied on as well as materials on record. On making such an exercise, it is found that the questions of law, raised from the side of respondents, more particularly from the side of respondent No.14 are of such nature which cannot be said to be pure questions of law and which can alone be heard as preliminary issues before deciding other controversies on merit.

18. Rather such questions appear to be mixed questions of law and facts and, therefore, in terms of law, laid down in Order XIV Rule 2(2) (a) and (b) of the CPC, such questions cannot be taken as preliminary issues. Therefore, as held in the order dated 9th December, 2016 rendered in SLP No 29566/2012 by Hon'ble Apex Court of the Country as well as by Hon'ble NCLAT in Anup Kumar Agarwal & Anr. (supra), the controversies, projected through the company petition as well as all the demurer applications, being mixed question of law and facts, are required to be taken up for consideration simultaneously.

19. In such a scenario, I have no other option but to direct learned Advocates appearing for their respective parties to advance their arguments both on law points and on facts simultaneously.

20. List this matter on 22.11.2017 as ordered earlier."

18. Once again, the applicant/respondent No.1 has urged this Bench to stay the company petition citing pendency of the execution proceeding before the Hon'ble Calcutta High Court. In my view, such a

plea is nothing but the extension of very similar prayer, raised on many earlier occasions, which were already held to be mixed question of law and facts and which cannot be decided in a misc. proceeding; rather, the same needs to be addressed on merit on the basis of materials on record along with all other contentions, raised from the side of the respondents.

19. Coming to the second allegation aforesaid, it is found that the question whether the present proceeding is barred by principle of estoppel etc., is again, in my considered view, a mixed question of facts and law and, therefore, the same cannot be addressed in an offshoot, like the one in hand. Therefore, the said question, in my opinion, can only be addressed on merit on the basis of materials on record, while considering many other contentions, raised from the side of the respondents.

20. Coming to the third allegation, I find it necessary to see the law holding the field. Section 10 of the Civil Procedure Code deals with the matter relating to stay of the subsequent suit. For ready reference, Section 10 of the CPC is reproduced below: -

> *"Section-10: Provides-*
>
> *No court shall proceed with the trial' of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any other Court beyond the limits of India established or constituted by the Central Government and having like jurisdiction or before he Supreme Court."*
>
> *Explanation: The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."*

21. A bare perusal of Section 10 of the CPC reveals that the object of Section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The section intends to prevent a person from multiplicity of proceedings and to avoid a conflict of decisions. This section will apply where the following conditions are satisfied:

> *1) Presence of Two Suits: Where there are two suits, one previously instituted and the other subsequently instituted.*
>
> *2) Matter in Issue: The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit.*
>
> *3) Same Parties: Both the suits must be between the same parties or between their representatives.*
>
> *4) Pendency of Suit: The previously instituted suit must be pending: - a. in the same Court in which the subsequent suit is brought, or b. in any other Court in India, or c. in any Court beyond the limits of India established or empowered by the Central Government, or d. before the Supreme Court. e. Jurisdiction: The Court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit of Same Title: Such parties must be litigating under the same title in both the suits.*

22. A careful perusal of section 10 of the CPC reveals that unless the aforesaid conditions are fulfilled, a subsequent suit cannot be stayed in view of pendency of a former suit. In the instant suit, I

have found that almost all the conditions, necessary for application of Section 10 of the CPC, are found conspicuously lacking and, therefore, I am of the view that this proceeding cannot be stayed till disposal of the execution proceeding, now, pending before the Hon'ble Calcutta High Court, as prayed for by the applicant/respondent No.1.

23. In view of the above, the present proceeding is liable to be dismissed, which I accordingly do. This Bench sincerely hope and trust that the parties to the company petition would render necessary assistance and co-operation in disposing the same at an early date inasmuch as it awaits disposal since 2011.

Member (Judicial)
National Company Law Tribunal
Guwahati Bench: Guwahati.

Dated, Guwahati, the 18th December, 2017

Deka/18-12-2017