

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI

T.C.P. No.02/397/398/CLB/MB/2014.

In the matter of Companies Act, 1956 under Section 397, 398, and
242-242 of the Companies Act, 2013.

AND

In the matter of Mrs. Archana Rajesh Gaikwad and Anr
Versus
M/s. Aarviyas Fashions Private Limited and 6 Others,

CORAM:

Present: M.K.SHRAWAT
MEMBER(JUDICIAL)

Between: Mrs. Archana Rajesh Gaikwad and Anr :Petitioner
Versus

M/s. Arviyas Fashions Private Limited and 6 Ors. :Respondents

Present on behalf of Petitioner.

Mr. R.T. Rajguroo

:...Advocate for Petitioner.

Present on behalf of Respondents.

1) Mr.Sagar Divekar

:....Advocate for Respondents 2 to 6

2) Ms. Aparna Suresh

: ...Advocate for Respondents 2 to 6

Order Pronounced on : 20th April,2017.

1. This Petition was filed before the erstwhile CLB on 23rd December, 2013 and thereafter number of Interim and Ad-interim Orders were passed as available in the folder of the Order Sheets and duly perused by me. On completion of the pleadings this CP was listed for final hearing.

2. **FACTS & BACKGROUND OF DISPUTE :-** The factual background and the constitution of the Company is as under:-

2.1 The Company in question(R-1) was **incorporated on 21-04-1994**. The issued, subscribed and paid up Share Capital of the company was Rs.19,17,500/- having 19,175 Shares of Rs.100/- each.

2.2 The Petitioner namely Mrs. Archana Gaikwad(P-1) and Mr. Rajesh Kashinath Gaikwad (P-2) are husband and wife. Facts of the have also revealed that Petitioner No.1 is daughter of Respondent No. 2 & 3 namely Mr. Manikrao Basappa Hamilapurkar and Mrs. Hemlatha M. Hamilapurkar.

Facts of the case have also revealed that R-4 & R- 6 are brother and sister of Petitioner No.1. Respondent No.5 is wife of Respondent No.4. The composition of the Company thus clearly indicates that it is a **family owned company**.

- 2.3 The Petitioner No.1 is holding 2600 Equity Shares of Rs.100/- each in the paid up Share Capital of the Company. In the Petition it is stated that the Petitioner No. 1 had earlier resigned from the Company on getting married in the year 1996, however re-appointed as Addl. Director on 2nd Nov. 2005. Later on she became a full fledged regular Director of the Company.
- 2.4 Petitioner No.2, husband of Petitioner No.1, is having 175 Equity Shares of Rs.100/- each in the Paid Up Share Capital of the Company.
- 2.5 Respondent No.2 namely Mr. Manikrao Basappa Hamilapurkar, father of Petitioner No. 1 is holding 2959 (15.43%) Equity Shares of the Company. My attention is drawn on the fact that the Respondent No.2 has resigned on 16th Oct. 2013 as a Director from the Company.
- 2.6 Respondent No.3 namely Mrs. Hemlatha Manikrao Hamilapurkar, Mother of Petitioner No.1 is holding 9708 (50.60%) of Equity Shares of the Company. She has also resigned on 16th Oct. 2013 as a Director of the Company
- 2.7 Respondent No.4 namely Mr. Vijay Manikrao Hamilapurkar, brother of Petitioner No.1 holds 3108 (16.21%) Equity Shares of the Company. He has also resigned on 16th Oct. 2013 as a Director of the Company.
- 2.8 Respondent No.5, Mrs. Sheetal Vijay Hamilapurkar, wife of Respondent No.4, hence sister-in-law of Petitioner No.1 holds 375(1.96%) Equity Shares and like wise resigned on 16th Oct. 2013 as a Director of the Company.
- 2.9 Respondent No.6 Mrs. Yashoda Jayant Kelshjekar, sister of Petitioner No.1 and Respondent No.4 is holding 250 (1.30%) Equity Shares and a Director of the Company.
- 2.10 Respondent No. 7 namely Mr. Rajendra H Kulkarni was appointed as an Addl. Director on 22nd August, 2013.
3. **The allegations & grievances** of the Petitioners are summarised as under:-
- 3.1 The First Grievance is in respect of appointment of Addl. Director Mr. Rajendra H Kulkarni vide a Board Meeting held on 2nd Aug.-2013 The allegation is that in-spite-of the fact that R-7 had no professional qualification, even then appointed as Addl. Director and to be treated as Professional Director in the Company. It has also been alleged in the Petition that the impugned Board Meeting was held on 22nd of Aug.2013 but the notice was posted to the Petitioner on 23rd of Aug.2013, one day after the said Board Meeting. The Agenda attached with the said Notice did not contain the matter of Appointment of any Addl. Director. The Petitioner has stated that in a situation when number of Directors, as many as seven, have already been appointed hence there was no requirement to add one more Director that too as Addl. Director.

- 3.2 The Second allegation is that with *malafide* intention Respondent no.2 to R- 5 have **resigned from the Company on 16th Oct. 2013** without giving notice of the Board Meeting to the Petitioners. The R-No.2,3,4 &5 have submitted their resignation which was accepted on the said Board Meeting for which no intimation was given to the Petitioners.
- 3.3 A technical objection has also been raised by the Petitioner that while submitting the information of resignation on Form No. 32 to RoC , the Digital Signature of R-7 as an Addl. Director was used. An Addl. Director can hold office only up to the next Annual General Meeting of the Company. He was appointed as Addl. Director in the month of Aug. 2013 and the AGM was to be held on 30th Sept.2013, however could not be held. As a result he was not authorised to put Digital Signature in respect of a meeting held in the month of Oct. 2013.
- 3.4 The third allegation is that the Respondents have **sold the undertaking of the Company situated at MIDC, Kulgaon, Badlapur, Thane** before resigning from the Directorship. The rights of the Petitioner has been oppressed. According to the Petitioners on inspection it was found that On the factory premises there was a sign board of "Horizon Industries" as per the Photograph annexed, instead the sign Board of the R-1 Company. Without the knowledge of the Petitioner either the Company was sold or the asset was given on lease. According to the Petitioner the value of the assets as per the Balance Sheet drawn on 31-03.2012 were to the tune of Rs.1,81,98,547/- The allegation is that the Respondents have disposed off the assets and received about an amount of Rs.1,65,00,000/-.
- 3.5 The fourth allegation is that the Respondents were in control of the affairs of the Company and in that capacity contravened the provisions of Section 166 of the Company's act 1956 by not holding AGM within the prescribed time. Hence liable to be penalised under Section 168 of Companies Act 1956. According to the Petitioner vide a letter 29.10.20013 a question was raised for not holding AGM for the year 2012-13.
- 3.6 The next allegation (fifth) is about mismanagement and syphoning of the Company's funds. In the Petition details of the amount allegedly transferred from the Company's Current account with State Bank of India to the Personal accounts are as follows:-

Sr.No.	Date	Particulars	Amount in Rs.
1.	8/10/2013	Credited to Personal Account No. 30022472396 of Mr. Manikrao Hamilapurkar (R-2)	50,00,000/-
2.	8/10/2013	Credited to Personal Account No. 30076569645 of Mrs. Hemlata Hamilapurkar (R-3)	30,00,000/-
3.	8/10/2013	Credited to Personal Account No. 33184960443 of Mr. Vijay Hamilapurkar (R-4)	20,00,000/-
4.	11/10/2013	Credited to Personal Account No. 33184960443 of Mr. Vijay Hamilapurkar (R-4)	10,00,000/-
5.	11/10/2013	Credited to Personal Account No. 30076569645 of Mrs. Hemlata Hamilapurkar (R-3)	15,00,000/-
6.	11/10/2013	Credited to Personal Account No. 30022472396 of Mr. Manikrao Hamilapurkar (R-2)	25,00,000/-

- 3.7 There is an allegation of payment of salary of Rs.20,000 p.m. to Respondent No. 6 as a Director although she is stated to be in employment with M/s. Aramca. Like wise an allegation is that the Additional Director was paid Remuneration although he was not professionally qualified.
- 3.8 The next allegation is that the liabilities, such as Payment to labour have now been shifted on the Petitioner due to the resignation of the Respondents. By this act of resignation the Respondents have defrauded the workers of the Company and the liability has come on the shoulders of the Petitioners. Moreover, The Petitioner was denied the Inspection of the Statutory Records.
4. The **Relief sought** in the light of the above background thus can be summarised as under:-
- That the Respondents be restored to the office of Director of Company and maintain the status quo before their resignations.
 - That the Respondents 7 be directed to vacate the office of director for his appointment being *ultra virus* and therefore null and void.
 - That the Respondents 2,3,4,5 6 and 7 be directed to make good the amount to the Company which they siphoned and diverted to their personal use.

- (d) Direct the Respondents 6 and 7 to refund the moneys to the Company which they received as remuneration or other wise for which they were not entitled.
 - (e) Directions to pay remuneration as Directors to the Petitioners from October, 2011 to their disassociation i.e. upto to March 2012.
5. From the side of the Respondent a detailed Reply is on record. The salient features of the reply viz-a-viz counter allegations are summarised below:-
- a) The Petitioner has suppressed the material facts by not disclosing the diversion of the business of R-1 Company to the **Proprietary concern of the Petitioner namely M/s. Archana Corporation**. The important details of the customers have been stolen from the records of the Company (R-1) and used for personal benefits. The design and patterns of R-1 have been misused by the Petitioner for the benefit of proprietary concern M/s. Archana Corporation.
 - b) Next counter allegation of the Respondents is that the reason for decrease in the Turnover was due to diversion of business by the Petitioner for the benefit of proprietary concern M/s. Archana Corporation. The Petitioner as a Director has breached the fiduciary duties. The Respondents have earlier made a request to direct the Petitioner to file the Balance Sheet of M/s. Archana Corpn. Initially M/s. Archana Corporation was given job work by R-1 to financially support the Petitioner, but later on the Petitioner has systematically diverted all the business of R-1. The customers of R-1 have also been influenced and taken over by the Petitioner for personal benefits. An internal investigation had revealed that the Petitioners have secretly written e-mails to the customers and diverting the business. The Respondent has placed reliance on one e-mail dated 29.02.2012 addressed to BALDUCCI S.P.A ITALY, the important customer of R-1, contents reproduced below:-

"Dear Margot,

Myself 7 my husband, Mr. Rajesh (he had met you in Garda Fair in first year & also had visited your office in last June), we are directors in Arviyas. From the first day of business with your company we both were taking care of your sample developments, production, etc. Even the samples of the next summer season are also developed under our supervision. But now, due to some problems with the other directors we will be resigning from this company with effect from 1st April, 2012 & we are starting our own business under the company named M/s. Archana Corporation. I am writing to you because I thought that as we know your style of working, sampling, quality of goods you require, etc. so I want to introduce ourself

as a new manufacturer for your company if you feel suitable & comfortable. Also you will be glad to know this, that whatever references Kiran had sent you for the ornaments are manufactured by my husband only. I am attaching some pictures which I am sure you will like. Please advise me if you like any of them so that we can send you one odd of each to have an proper idea.

Thanks & Regards,

Archana Rajesh Gaikwad"

- c) The next serious counter allegation is about the mismanagement by the Petitioner -1 working as Director. The Petitioner acted against the interest of the business of R-1. The ITALY customer(BALDUCCI S.P.A.) had given substantial business to the tune of 1.60 crore from July 2010 to Feb. 2013 to the Company but after the said e-mail dated 29.2.12 the said customer had stopped business with R-1 company from March 2013.
- d) After noticing the illegal act of the Petitioners a **Criminal Complaint** against the Petitioners was filed at the Powai Police Station for infringement of Copy-right Act and infringement of Information Technology Act 2000. The Petitioner as a Director has misused and abused her position. The Petitioner had started a parallel business of her own which was not only in direct competition with R-1 Company but also misutilized the technology of R-1 Company. They have diverted the business of R-1 Company to M/s Archana.
- e) In the Reply the Respondents have narrated the brief back ground that **since 1983** the family was in the business of manufacturing and exporting of leather foot wear under the proprietary concern **M/s Jay Components** under sole Proprietorship of R-3 . To further expand the business , this Company was **incorporated in the year 21/04/1994** as " Arvivas Shoes Pvt. Ltd. R-2 (father) and R-3 (mother) were the promoters of the Company. The Company was manufacturing shoes, sandals, kid foot wears side by side out sourced some other leather products. In the year 1996 the Petitioner got married with P-2 thus resigned from the Company. **From 1995 to 2003 the R-3 infused her funds in R-1** and by utilising those funds the Company had acquired factory premises at **Plot No. A-3 MIDC Kulgaon Badlapur, Thane** and started manufacturing finished leather footwear products. It is claimed that R-3 had further inducted her own funds to renovate the factory as also to purchase additional machineries. **In the year 2003, M/s Jay Components, proprietary concern of R-3, was closed** and all the customer along with Goodwill was diverted to the Company.

That Petitioner-2 were running a Crane Hiring business (**M/s Gurudev Hiring**) however in and around the **year 2005 facing financial crises** and approached the Respondents to involve them in the family business of Leather products manufacturing business so as to get financial help. On considering the financial position of the Petitioners, the Respondents have helped the Petitioners by introducing P-2 as a shareholder and appointed P-1 as a Director. Presently P-2 is holding 175 shares (0.91%). At that relevant time side by side inducted R-5 & R-6 as Shareholders, respectively holding 375 (1.96%) & 250 (1.30%) shares and appointed them Directors. The managerial duties claimed to have been assigned to the Directors were as under :-

Sr.No.	Name of the Director	Profile Handled in Respondent No.1
1.	Mr.Manikrao Basappa Hamilapurkar, Managing Director (Respondent No2.)	Being an experienced leather and footwear technical and designer was giving experience, guidance and making important decisions in the Respondent No.1
2.	Mrs.Hemlatha Manikrao Hamilapurkar, Director (Respondent No.3)	Giving experience, guidance and making important decisions in the Respondent No.1
3.	Mr. Vijay Manikrao Hamilapurkar, Director (Respondent No.4)	Handling leather Purchase, Sales Control other material purchase control and related decision making
4.	Mrs.Sheetal Vijay Hamilapurkar, Director (Respondent No.5)	Assisting Mr. Vijay Manikrao Hamilapurkar in Leather Purchase, Sales Control and other material purchase control.
5.	Mrs. Yashoda Jayant Kelshjekar, Director (Respondent No. 6)	Assisting Mr. Vijay Manikrao Hamilapurkar in Leather Purchase, Sales Control and other material purchase control.
6.	Mrs. Archana Rajesh Gaikwad, Director Petitioner No.1)	Handling accounts, compliances of the Respondent No.1 and liaising for the same with Practicing Company Secretary and Chartered Accountants
7.	Mr. Rajesh Kashinath Gaikwad, Director (Petitioner No.2)	Handling production, labour and labour issues and quality control.

- f) At present the share holding pattern is stated to be is that R-2 is holding 2959 (15.43%), R-3 is holding 9708 (50.63%) and P-1 is having 2600 (13.56%). Respondent-4 became Director in 1994 and presently holding 3108 (16.21%) shares. R-5 is holding 375 (1.96%) and R-6 is holding 250 (1.30%) shares.
- g) Next , in the Reply is it claimed that as per the statement of account the Company is to repay **loan of Rs.2,29,95,000/- to R-2 to R-4**. To further expand the business a piece of land was taken on lease at Survey No. 68, Lonad, Bhiwandi, Thane. An amount of Rs.45,00,000/- was spent to construct the shed, for installing transformer etc. For that reason a loan of Rs.1.12 Crore taken from Central Bank of India by the Company. For obtaining loan the **personal property of R-2 & R-3 as well A3 Unit MIDC was mortgaged**. Due to sudden decline in the business, in and around 2012, loan could not be repaid to Central Bank Of India. To settle with the Bank and to foreclose the loan account further **a sum of Rs.96 Lacs was infused by R-2 to R-4 out of their personal resources**.
- h) In the Reply it is further stated that due to decline in business it was decided to shift the manufacturing **Unit at Lonad** . The premises was to be peacefully handed over to the Owner but it was not allowed by the Petitioners. The R-4 was not allowed to shift the machinery, transformer, finished leather stock etc. from Lonad Unit. It was found out that the Petitioners were illegally utilising the electric power connection , transformer , machineries etc. for the use of M/s Archana Corporation. It was an illegal trespass on the Lonad Unit. A board meeting was called on 2/12/2012 for the purpose of taking legal action against the Petitioners and to file a **Police complaint**.
- i) In the Reply another instance of misuse of position by the Petitioners have been quoted. In a Board meeting held on 25/06/2013 it was resolved to **shift A-3 Unit to a smaller place** at Plot No W-23 MIDC Badlapur East, Thane . One more meeting was held, during that period, on 12/06/2013 to repay the loan and to find out a suitable buyer for the purchase of the Unit . In the month of July 2013 the shifting of A-3 Unit to W-23 Unit was completed. **The Petitioner-2 was not attending the work of the Company from April 2012**. Thereafter a permission was required from the MIDC to transfer the Unit in the name of one M/s Horizon Industries and vide a letter dated 17th September 2013 MIDC allowed the request of transfer , however, Petitioner had informed the MIDC not to allow such transfer. The said objection of the Petitioners was communicated by the MIDC to the Company vide a letter dated 23rd September 2013. The Respondents informed MIDC that R-2 to R-5 Directors were having adequate quorum by holding 85.53% share and in that capacity duly consented for the transfer. On due consideration, MIDC had not objected for the said transfer.

Thereafter through a **Deed of Assignment dated 14th October 2013 Unit A-3 was transferred to M/s Horizon Industries for a consideration of Rs.1 Crore.** The Respondents have alleged that during the said period the conduct of the Petitioners was not supportive rather created objections. However they (Petitioners) were duly informed about every development. The process of transfer was transparent, pleaded by the **Ld. Counsel.**

j) The turnover of the Company had gone down from Rs.2,90,39,903/- to Rs.1,93,05,343/- for that reason a meeting was called and the minutes of that meeting was duly circulated dated 5th September 2013. On internal investigation it was found that the Petitioners were secretly writing e-mails to the customers and suppliers and diverted the business of the Company to their own proprietary concern M/s Archana Corporation. To ascertain the fact, R-4 had inspected the Laptop of the Petitioners and found several such emails. The Petitioners have stolen the data of R-1 viz. list of customers, designs & patterns confidential details thus breached their fiduciary duties.

k) A meeting of the Board of Directors was held on 22nd August 2013 and resolved to appoint R-7 as Additional Director since he was associated with the Company for around 8 years and on the other hand P-2 was not attending the duty given to him. Hence it was decided to appoint an Addl. Director. On 16th October 2013 the Respondents - 2 to R-5 have tendered their resignations. In that meeting it was resolved that R-7 was authorised to file Form No. 32 with the R.O.C. and to do needful to give effect of the said resolution. On that day R-6 chaired the meeting, but on 17th October 2013 filed her resignation to R.O.C. The said resignation was acknowledged by the R.O.C. on 11th November 2013.

6) ARGUMENTS OF THE PETITIONERS'S COUNSEL :- From the side of the Petitioner **Ld. Representative Mr. Rajguroo** appeared. He has drawn the attention on a Written Submissions and the Rejoinder filed. The salient points are as under:-

i) That the appointment of R-7 was incorrect and unwarranted because he had no professional knowledge. He worked in the Company only as a helper. According to the information he is only 8th Standard pass. His appointment was with *malafide* intention and ulterior motive so that **R-2 to R-4 could escape the liabilities of the Company.** His appointment was not even regularised in the AGM dated 5th September 2013. As a result the intimation of resignation of R-2 to R-5 under his digital signature was improper. **The impugned resignation deserves to be nullified.**

ii) That generally the practice was to intimate the dates of Meetings by oral intimation but for the Meeting to be held in the Month of August 2013, the intimation was through formal notice. That notice was refused by the Petitioner on the ground that the meetings were being conducted to regularise the wrong doings of the Petitioners.

iii) That the transfer of plot A-3 MIDC Badlapur was without proper authorisation. Such type of authorisation can only be granted by holding AGM, however R-2 was authorised by the Board Resolution dated 23rd August 2013. This is the prerogative of the Share holders to pass resolution for sale of any asset of the Company as prescribed U/s 293(1) (a) of the Act. No such legal procedure was adopted by the Company.

iv) That the plot A-3 was sold below the market price which was prejudicial to the interest of the Company. Even the factory premises along with machinery was sold for a sum of Rs.1.00 Crore although market was much higher. Like wise, Purchase price of the sold machinery at Chennai was approx. Rs. 1.50 crore but it was sold for a sum of Rs. 50 lacs only. Ld. Counsel has thus pleaded that all those decisions were bad decision of the Respondents which was objected by the Petitioners.

v) That the sale proceeds were siphoned to repay the Directors instead of settling the outstanding dues of secured creditors and the govt. dues. Such action was against the law since the govt. liability should have been settled first.

vi) That the Respondents, particularly R-4, had incurred heavy expenditure and money was siphoned to the tune of Rs. 87.98 lacs during the period of April 2013 to October 2013 despite there was no business activity. The Petitioner had raised objection somewhere in July 2011 and the dispute started. In fact R-4 had taken several wrong decisions which were objected by the P-1 being concerned about the accounts, which resulted into serious differences with R-4 and ultimately disassociation with him. He had not taken any interest in the business which started diminishing. Due to his adamant behaviour once he had decided to **set-up a company in London** which was ultimately closed but with a loss of setting up expenditure of about Rs. 12.90 lacs. Likewise it was decided to start another office at Vikhroli, Mumbai on a rented premises. Hefty rent of Rs.75,000/- was paid but it was vacated after 2yrs with the waste of more than Rs.16,30,000/-

vii) That the assets were sold and the amount was siphoned so it was reduced to an empty Company 'khoka'. The Respondents have not settled the payment of the labourer and told them to contact the Petitioners. **By resigning they manipulated to get rid off the legal responsibility of repayment of loans and liabilities.** Therefore the Petitioners are guilty of Oppression and Mismanagement, Ld. Counsel has pleaded.

viii) That it was a baseless allegation that the existence of proprietary concern M/s Archana Corporation was not in the knowledge of the Respondents. This concern was doing the job-work of the Company. **The M/s Archana Corporation started business activity in the year 2009** hence it is wrong to allege that the business activity was not known to the Respondent. The business of the Company was adversely affected because of negligence of the R-4, hence Petitioner No.1 had started contacting the clients of the Company. A question has been raised that the Respondents were aware about the business of the Petitioner but why they have not objected in the past? Why they have preferred to resign from the R-1? It is alleged by the Ld. A.R. that R-2 to R-4 have made the Company financially bankrupt and thereafter left the Company with the burden of several types of liabilities.

ix) Learned Counsel has concluded that the Majority Shareholders have oppressed the Petitioner being in Minority as well as mismanaged the business of the Company. Hence the relief against the Respondents deserved to be granted. The Directors who have resigned should be reinstated with the direction to take the responsibilities of the liabilities. Further Respondents 2 to 5 be directed to redeposit the amount syphoned of above Rs.1.65 crore.

7) **ARGUMENTS OF RESPONDENTS COUNSEL :-** From the side of the Respondents Ld. Counsels Mr. Sagar Divekar & Ms Aparna Suresh appeared. The main argument was that the Petitioners have acted in breach of their fiduciary duties. They have misused their position as a Director. They have secretly written e-mails to the customer of the Company. By this act they have diverted the business of the Company in the benefit of M/s Archana Corporation. Ld. Counsel has drawn attention on the admission of the Petitioner that they have approached the clients of R-1 Company. P-2 had deliberately stopped coming to look after the business of the Company and failed to attend the duty assigned. He devoted time in promoting his own business of Archana Corporation. As

far as the resignation of the Directors was concerned, the same was legal as prescribed under law. The Petitioners have made difficult to run the business and compelled the Directors to resign so that to have total control over the Company. However the Petitioners were never willing to undertake the responsibility to square-up the outstanding liabilities. The allegation of syphoning of the funds by the Respondents was baseless because the Respondents have advanced loan to the Company which was repaid to them out of the sale consideration received by the Company. Ld. Counsel has placed reliance on the following decisions:-

- i) Needle Industries (1981)3 SCC 333
- ii) Sangramsinh Gaekwad & Ors. Verses Shantidevi P. Gaekwad,(2005) 11 SCC 314.
- iii) Shanti Prasad Jain Versus Kalinga Tubes Ltd. AIR 1965 SC 1535.

8) **FINDINGS / JUDGEMENT :-** Heard at length the arguments of both the sides in the background of the factual matrix of the case, compilation submitted, evidences annexed and case laws cited. It may not be out of place to mention at this juncture i.e. in the beginning of my findings that this case is one of the rare instance in which a daughter has filed a suit against her parents and brother. In general , my experience is that in Indian Society a daughter after marriage gets settled in the house of her husband. In this case also this has happened. Nevertheless, it is worth to clarify that each case has to be decided on it's merits without being influenced by extraneous circumstances. Petitioner No.1 got married to P-2 in the year 1996 . Facts of the case has revealed that P-2 was running a Crane Hiring business (M/s. Gurudev Hiring). In and around 2005 the financial position of the Petitioners was in crisis and therefore they approached the Respondents to involve them in the Family business of manufacturing of leather products. On considering the financial position of the Petitioners it was decided to induct P-1 in the business of the family by appointing her as a Director. She was allowed to hold 2600 Equity Shares. Likewise her husband, P-2 was granted 175 Shares and given the responsibility to look after the production of the Company. However later on there was misunderstanding among family members which resulted into this Petition. The nature of the dispute as well as the allegation viz. a viz. counter allegation now require adjudication, therefore point wise discussed as under:-

8.1) In respect of the appointment of Addl. Director namely Mr. Rajendra H Kulkarni a serious objection has been raised by the Petitioners on his qualification to become a Director. It has also been questioned that there was no necessity of the Company, then why he was appointed ?. On the question of validity of meetings convened , *prima facie* the validity of the meeting appears to be satisfactory because the intimation was proper

to all the Directors through issuance of Notice which was duly attended by them as well. For the appointment of a Director there is no prescribed qualification in the statute. As far as this appointment is concerned, the explanation is that R-7 worked in the Company for last 8 years therefore his experience in the manufacturing unit was required especially when the P-2 was not taking interest in handling the production. Hence I am of the view that in the absence of any guidelines or law laid down it is not justifiable to put a condition precedent of qualification before appointing a Director. Explanation of the Company appears to be a plausible one that the decision was taken by the existing Directors to appoint an Addl. Director considering the business requirement of the Company. As a result, there is no logical basis to substitute or impose my decision on the majority decision of the Board. No interference is called for hence this objection is dismissed.

8.2) There is one more major allegation that most of the Directors i.e. R-2 to R-5 have resigned from the Company on 16th Oct. 2013 with an ulterior motive to leave Company after syphoning the assets of the Company. As far as the legality of the resignation is concerned the notice was found to be circulated and the quorum was complete as a result the legal formalities to convene a meeting have found to be complied with.

The allegation of syphoning of the funds requires some deliberation. The Company was **incorporated on 21st April 1994**. R-2 was Promoter Director by holding 2959 Shares (15.43%) at that time. Likewise his wife R-3 was also a Promoter Director by holding 9708 shares (50.63%). Facts of the case have further revealed that R-2 was in the **business of leather goods since 1983 by running his proprietary concern M/s. Jey Components**. This Company was incorporated to expand the family business. Since the business was run by the father hence he had made the largest contribution towards the Capital of the Company. The financial assistance provided by the parents have duly been displayed in the reply filed by the Respondents. In short, to foreclose the Bank loan of Central Bank of India the Respondents have contributed Rs. 96,00,000/- so that the business of the Company should not suffer. There are several instance, placed on record, when father i.e. R-2 has contributed out of his personal funds a sum , such as for the construction of the A-3 unit. Facts of the case have also established that during the year 2011 to 2013 the Company was in requirement funds, hence R-3, mother had again contributed her own funds to financially assist the Company. On pages 240 to 262 of the Reply of the Respondent, the Ledger Accounts of the family members are available in the compilation to demonstrate time to time contribution made by the Respondents. A Ledger Account titled as "Loan from Directors" as appearing on page 244 of the said compilation for the accounting period ended on 31-03-2007 has shown a balance of

Rs.1.30 crore towards credit side of the Directors. Although it was a running account and the closing balance kept on changing but the fact is that the Respondents have contributed out of their personal resources whenever the Company was in need of funds. On the other hand there is no evidence that the Petitioners have as well contributed their own funds, what to say equal to the other directors. Naturally when the factory situated at MIDC, Kulgaon, Badlapur was sold, it was decided to repay the loan to the Directors. The allegation is that it was syphoning of the funds, but according to me it was the decision of the Board that the Company should repay the loan of the Directors. There is no specific instance of taking away the funds of the Company without having a proper explanation. The out standing dues in the books of the Company's account were squared up to some extent. The action of settling of an account can not be branded as syphoning of funds. From the side of the Petitioner it was demonstrated that proper entries have been made which are self-explanatory hence the allegation is without any cogent basis.

8.3) In respect of the allegation that R-4, brother of the Petitioner has mismanaged the affairs of the Company, the reply is that a commercial decision was taken to increase the business of the Company, somehow that decision had not given desired results. In the business it is not always possible to earn profit out of each decisions. There is always an element of risk in running a business. In this regard a decision was taken by the Board of Directors to close the manufacturing unit situated at Lonad, Bhivandi, Dist- Thane (termed as Lonad Unit). That decision cannot be blamed merely because of the strained relationship and unsatisfactory business result. Rather it was found that father of Petitioner No.2 with whom the Company had entered into a lease contract had not cooperated. Be that as it was, the Respondents have issued the notices duly informing the convening of the said meetings and only thereafter the impugned decision was taken on due consideration of the business interest. In the absence of any contrary direct evidence against the said *bonafide* decision, no adverse view is legally justifiable.

8.4) There is one strong objection as well as allegation that a bad/illegal decision was taken to sale one unit situated at Plot A-3, MIDC, Badlapur, Dist- Thane (Termed as A-3 Unit). On careful examination of the background it was noticed that during the year 1995 to 2003 it was decided to expand the business hence R-3 (Mrs. Hemlata M. Halmilapurkar) was asked to infuse her funds to acquire the said property. A-3 unit was started to manufacture the finished leather Footwear products. The Respondents have asserted that more funds have further been infused by R-3. Not only this, even R-3 had closed down her sole proprietary concern namely M/s. Jey Component in the year 2003 and diverted her customers and Good will from Proprietary concern to Respondent No.1 Company.

As per a Board of Directors meeting held on 25-06-2013 it was decided to shift A-3 Unit to a smaller unit. As a result the A-3 unit was shifted to Plot No. W-23, MIDC, Badlapur, Thane (termed as W-23 Unit). The shifting from A-3 Unit to W-3 unit was concluded in July 2013. The business was continued from a smaller premises. It was a commercial decision to cut the business expenditure. Thereafter one another meeting was held and made a request to R-4 to find out suitable buyer for A-3 unit. The Respondent had again reiterated that the notices of all such meetings have duly been circulated. For the purpose of transfer/ sale of A-3 unit a clearance was required from MIDC. The decision to sale A-3 unit was taken to clear the burden of outstanding borrowed loan. However, evidences on record have demonstrated that the Petitioners have written letters to MIDC independently suggesting not to give clearance. The question which has been raised by the Respondents is that whether such communication with MIDC authorities made by the Petitioners was in the interest of the Company or not? However on 3rd Sept. 2013 the R-1 had applied to MIDC to get clearance for transfer of A-3 unit to a concern namely M/s. Horizone Industries. Vide a communication of MIDC dated 17th Sept. 2013 it was allowed to transfer the unit subject to certain conditions. During the said period the Petitioners have written to MIDC intimating their withdrawal from the responsibility of the loan advanced. **The Petitioners have insisted upon MIDC not to allow transfer of A-3 Unit.** The conduct of the Petitioner can be said to be uncalled-for and also lacking sincerity towards Company's business. **The unit was sold through a Deed of Assignment dtd. 14-10-2013 for a consideration of Rs. 1 Crore.** This transaction being taken after due diligence and in the interest of the business cannot be branded as an illegal transaction. After due process of formalities the "Deed of Assignment" was executed and the amount of consideration received on sale of the said unit was stated to be duly recorded in the regular books of accounts of the R No.1. The facts and the corroborative evidence do not indicate that there was any malafide on the part of the Respondents hence it is justifiable to hold that the impugned allegation is baseless; as a result dismissed.

8.5) The allegation is that the Respondents were controlling the affairs of the Company and in that capacity contravened certain provisions of Companies Act 1956, such as not holding AGM within prescribed time. Since the Petitioners were also members of the Board then ought to have shared the responsibility. In the reply the Respondents have stated that the intimation well in advance was given to the Petitioners, however some times they have chosen not to appear in the Board Meeting. As far as the correct procedure was concerned the same was duly followed. *Inter alia*, rest of the decision whether to attend or not to attend any such meeting entirely depended upon the willingness of the Petitioners. The answer given by the Respondents is therefore convincing hence can be held that there was no infringement of law.

8.6) About the alleged siphoning of the funds the Respondents have placed copy of loan accounts of R-2, R-3 and R-4 as appearing in the Books of Accounts of R-1 Company. The said annexed accounts have duly been examined and thereafter it is noticed by me that there was regular credit and debit entries in those loan accounts of the Directors. From the Closing Balance the figure of outstanding loan of each one of them is can be ascertained which was relevant for the period 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11. Although in the Ledger it was titled as "Loan Account" but there were regular debit and credit transactions hence also in the nature of a current account; but in the end there was substantial outstanding balance shown as liability of the Company. It was decided to repay the outstanding loan. At one point of time when A-3 unit was sold, **the figure of outstanding loan was as high as Rs.2,29,95,000/- payable to R-2 to R-4.** The sale consideration of A-03 Unit was therefore utilised to adjust against the said loan figure. Therefore, it could not be treated as siphoning of funds but it was simply repayment of loan to the Respondents. The case of the Respondents is that since inception of the Company, on number of occasions the personal funds of R2 and R-3 have been infused in R-1 Company to overcome the financial hardship hence there was no question of siphoning of the funds but it was only the recovery of the outstanding dues by the Respondents. Moreover mere withdrawals by itself can not tantamount to siphoning if an explanation is tendered or it is found that there is a direct nexus of the said withdrawals with the business need of the Company. Resultantly, On plain appreciation of the statement of accounts annexed, it appears that there was no fallacy in the explanation offered by the Respondents. This objection is therefore not sustainable in the eyes of law.

8.7) In the light of the above factual matrix and on due consideration of the circumstances of the case one legal position emerges that the **constitution of the Company was akin to the constitution of a Partnership Firm.** In this case the undisputed position is that the family members have constituted this Company. This is a Pvt. Ltd. Company, hence for the purpose of this decision it draws a clear distinction from a Public Company. A Pvt. Ltd. Company being run by the family members are in general treated as a closely held Company having a characteristic of a Registered Firm. The Typical characteristic of a registered firm is that there is always a total existence of trustworthiness among the partners of a firm. It is to be quoted from a celebrated decision of **Needle Industries (India) Ltd. (1981) 3 SCC Page No. 333 "The Company in substance, though not on Law, a Partnership"**. It is common in partnership that there should be utmost good faith between the constituent members. Hence on the same lines it is also expected from the shareholders/Directors of a Pvt. Ltd. Company to run the business in good faith and with fair motives. In a law abiding society it is expected from the stake holders of a Pvt. Ltd. Company to conduct themselves in fair and trustworthy manner. It can be added at this juncture that there is no harm in protecting one's own interest but that should not adversely effect the legitimate right of other members of a Company.

8.8) In this case on due analysis of the evidences an observation can be made that whether the Petitioners have acted throughout fairly / conscientiously ? It is worth to quote, **"He who seeks equity, *sine qua non*, must do equity "**. It is also expected that he who seeks equity must come with **"clean hands"**. Meaning thereby, a Petitioner/ litigant must not ask for relief on the ground that the other man's hands are unclean if his own hands are also not clean. If the ethics are doubtful then such litigant must not demand for **parity and impartiality**. On due appreciation of the events took place in this case, it transpires that since induction of Petitioners into the Company, the business had suffered adversely. The Petitioners appeared to be more worried and concerned about their proprietorship concern i.e. M/s Archana Corporation. Not only undisputed but admitted fact is that Archana Corporation was established only to perform Job work of the Company, that too with the *bonafide* intention to help the Petitioners. Therefore in the family it is expected that **if a kind gesture is bestowed then it must be responded in the same manner**, rather expected to display more kindness with gratitude. This is necessary to maintain harmony among the family members.

8.9) A vital question is whether the Directors in Majority have acted in "Oppressive manner" towards the Petitioners. A thumb rule is that the affairs of a Company should be conducted fairly and in good faith. There is no scope of "Oppression", means not to be burdensome , harsh and wrongful. So the question is that whether an unwise, inefficient or even a careless decision of one of the Director may tantamount to 'Oppressive' in character. In this case the allegation is that the R-4 has taken decision, such as setting up an office in London or one more office in Vikhroli, Mumbai. Those decisions can be said to be non-profitable but cannot be branded as 'Oppressive'. **It is not necessary, while running a business, that every decision should turn out to be a profitable decision.** The Profitability depend upon market condition which keeps on fluctuating. Any business does not have a straight line graph but line of the graph keeps moving up and down. Therefore it is not justifiable to contend in this case that the said unwise decisions of that Director were also to be termed as "Oppressive" in nature.

8.10) Before pronouncing verdict **it is worth to elucidate that the purpose of creation of this judicial forum is not to punish but to resolve a dispute in the best interest of the Company.** To resolve the controversy among the family members and also to strike a right balance among the rival parties , in my opinion, doctrine of Natural Justice demands to direct both the sides to respectively accomplish their part of duties. The litigation is old related to the events took place in and around the years 2011 to 2013 therefore as a consequence some of the relief sought have lost their significance by the passage of time. Due to this reason it shall be more realistic to look for a wholistic solution. In my considered opinion the relief sought in this Petition can be addressed as under:-

- a) The Petitioner is seeking direction to restore the Directors who have resigned from the Board of the R-1 Company. However in a situation when the family members are not keeping good relation, rather a Police Complaint was lodged, it is not worthy to force the Directors who have resigned to sit together with the Petitioners to run the company. This proposition is not suitable considering the background of the case. There is no harmony among the family members as is evident from the attempts of settlement made by the learned member of CLB in the past but all such efforts have gone in vain. The Petitioners at present are having control over the affairs of the Company, therefore the prayer for cancellation of resignation and in consequence restoration of the Directors who have resigned is not worthy to accept.
- b) The Petitioner is seeking direction that Respondent 7 be ordered to vacate the Office of Directorship. In this regard it is worth to note that the settled legal position is that the sitting Directors of the Company can take appropriate decision for removal of a Director if his presence in the Board is not suitable for the day to day functioning of the Company. As a result the prayer as raised by the Petitioner is left open, rather leave it upon the sitting Directors, to decide the fate of R-7, so as to take due legal steps, if deem fit. However no specific separate order, as demanded, is lawfully required to be passed.
- c) That one of the prayer is to direct to make good the amount siphoned by the Respondents. Inter-alia, in this regard, the accounts of the Respondents as appearing in the Books of the Company are the only guiding factor, refer pages 240 to 260 of the Reply of the Respondents, to arrive at the accurate conclusion. It is well known that every Corporate litigation, in one way or the other, has an economic angle causing dispute. **So, the prevalent practice is that the contribution of capital/funds in the business should be in equal proportion by all the groups or the participants.** However in this case the admitted position is that the financial contribution by the Respondents was much higher than the Petitioners. Rather the Petitioners have not demonstrated their financial involvement as also financial risk in running this business. Undoubtedly, the Respondents have advanced huge amount of loan to R-1 Company which was in fact returned in the phase manner as and when the funds were available in the Company. A common understanding of 'Siphon of funds' is drain off of money from business without having legitimate authority. Conversely, if the transfer of funds is duly recorded in the books of accounts with legitimate narration and that narration is a rightful explanation which

is not found to be fabricated or untruthful than no court of law shall hold such legitimate transfer of money as illicit siphoning of funds. Entries in the accounts have established a direct nexus of adjustment of loan; duly appearing previously; which was undisputedly used for the purpose of the business of the Company. On the face of records this is an unsubstantiated allegation. **Consequently, this is not a case of siphoning of funds but simplistically refund of loan.** The relief sought is therefore unjustifiable.

- d) The Petitioners have also objected to the remuneration paid to R-6 and R-7 side by side demanding payment of remuneration to the Petitioner. According to me this is a trifle issue because the remuneration was not alleged as excessive or unreasonable paid to R-6 and R-7. The demand of payment of remuneration to the Petitioner has become redundant because the decision in this regard henceforth shall be in the hands of the remaining Directors i.e. Petitioners, of the Company.
- e) A fundamental question is how to provide **Equitable Justice to both the sides**, especially when they are closely related to each other. To maintain the harmony as also to maintain status of the Company it is justifiable to suggest **one party to exit** from the Company. In this case Respondents have already resigned from the Directorship, except R-7. In furtherance of the said decision already taken by the Respondents it is justified to ask them to surrender their Shareholding in favour of Petitioners at the value to be determined by an independent valuer, to be picked-up from the list of empanelled Chartered Accountants. On the basis of the valuation report the shares can be transferred by the Respondents in favour of the Petitioners or their Representatives after receiving the consideration so determined and also to complete other legal formalities required to accomplish the exit plan. Second, to complete the process of handing over by the Respondent and taking over by the Petitioners the existing loan accounts of the Directors should be settled after due adjustment of liabilities.
- 9) The Petition under consideration is therefore partly allowed on the terms directed herein above. No order as to cost. Registry is directed to consign the Petition to records.

Sd/-

Date: 20 -04-2017

M.K.SHRAWAT
MEMBER(JUDICIAL)