

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL****MUMBAI BENCH, MUMBAI****Company Application No. 49//2016****In****Company Petition No.05/241-242/CLB/MB/MAH/2016****CORAM:****Present: SHRI M.K. SHRAWAT  
MEMBER (JUDICIAL)**

In the matter of Section 241-242 of the Companies Act, 2013.

**BETWEEN****Mr. Hemant Mahabala Kotian**... **Petitioner****Versus****M/s. Batto Green Batteries India Pvt. Ltd.**... **Respondent****Present:****For the Petitioner:** Mr. Chirag R. Sonecha**For the Respondent:** 1. Ms. Anagha Anasingaraju, (Kanj & Associates)  
2. Mr. Mahesh Athavale, (Kanj & Associates)**ORDER**Reserved on 9<sup>th</sup> November, 2016  
Order pronounced 17<sup>th</sup> November, 2016

1. From the side of the Applicant Ld. Counsel Ms. Anagha Anasingaraju appeared and he pleaded that the Petition under consideration is not maintainable.

2. On this issue IA 49/2016 was submitted on 15.9.2016 wherein it is alleged that the Petitioner No.1 Mr. Hemant Mahabala Kotian has not established the oppression and mismanagement in the Petition, hence the Petition is not maintainable and to be rejected at the preliminary stage itself. The Ld. Counsel has vehemently argued that the Company namely M/s. Batto Green Batteries India Pvt. Ltd. was incorporated in the year 2011 and the Petitioner No.1 as well as Respondent No.2 of the Petition were the first Directors having equal shareholding.

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3. On the question of non-maintainability, the first ground was that the decision taken in the meeting of the Board of Directors was always in the presence of the Petitioner; hence it is wrong to allege that the action against him was illegal in any manner. The second point of argument is that the shares of the Petitioner were transferred in favour of Respondent No.3 as per the consent and Agreement of Petitioner No.1 for which he has duly signed the Transfer Forms and also received the consideration through banking transaction. Therefore, it was wrong on the part of the Petitioner to allege that transfer of shares was not *bona fide*. The next argument of the Ld. Counsel is that the stake of the Petitioner is very nominal if compared with the amount invested by Respondent No.2 and Respondent No.3 in the said Company Petition. As per the chart of percentage of holdings and investments, the other two Directors are having above 98% stake, however, the Petitioner had only 0.14% stake in the total holding and the capital of the company. The Ld. Counsel has also made certain allegations that the Petitioner is having parallel business of selling the Batteries which is illegal. The Petitioner owes more than Rs.10 lakhs which has not been paid so far to the Respondent No.1 Company. His conduct remained non-co-operative. The Petitioner had written letters to the banks due to which the accounts have also been freezed. Since the Petitioner himself is acting against the interest of the company and indulged in competitive business activities, he has no right to file any case against the company or the Directors.

4. In support of this arguments, the following case laws have also been cited :

i) *Appellants : Rai Saheb Vishwamaitra and Ors.*

*v/s.*

*Respondents : Amar Nath Mehrotra and Ors. ...,  
decided on 7.01.1986, in Special Appeal No.12 of 1983 in the High  
Court of Allahabad.*

ii) *Appellants : Shanti Prasad Jain,*

*v/s.*

*Respondent : Kalinga Tubes Ltd.,  
decided on 14.1.1965, in Civil Appeals Nos.734 to 747 of 1964 in the  
Supreme Court of India.*

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## C.A. No. 49//2016 In C.P. No. 05/241-242/CLB/MB/MAH/2016

iii) Appellants : Hanuman Prasad Bagri & Ors.

v/s.

Respondent : Bagress Cereals Pvt. Ltd. & Ors., decided on 27.3.2001 in Special Leave Petition (Civil) 17137 of 2000 in The Supreme Court of India.

iv) Appellant : Atmaram Modi

v/s.

Respondent : ECL Agrotech Ltd. and Ors., decided on 15.7.1999 in C.P. No.51 of 1998 in the Company Law Board.

5. From the other side, Ld. Counsel Mr. Chirag R. Sonecha appeared and pleaded that the Application is not as per law because the contentions raised are covered in the Petition filed by the Petitioner. At this preliminary stage, without hearing the Main Petition it is unjust to hold that the Petition is not maintainable when the Petitioner has alleged oppression and mismanagement. The Ld. Counsel has referred few instances in support of the fact that the decision taken by the Board of Directors was not within the notice of the Petitioner; hence those decisions have been challenged in the Petition. The Ld. Counsel also pleaded that there was serious misconduct on the part of the Respondent Directors, hence the Petition should be decided on merits. In response to one of the arguments of the Applicant's Counsel that if there was oppression, then the issue of winding up could have been raked up, he has argued that it is not always necessary to claim for winding up of the company under provisions of Section 242 of the Companies Act, 2013. However, the Petitioner has placed on record the evidences of oppression and mismanagement on the part of the Respondent Directors and, therefore, the Petition is required to be decided on merits. He has also argued that the case laws which are cited are in respect of old provisions of Section 397/398 of Companies Act, 1956 which can be dealt with at the time of hearing of the Petition and for that purpose he has several case laws in his favour.

6. On hearing the submissions of both the sides and after due consideration of the Application, as well as the case laws filed, I am of the considered opinion that the Application under consideration is devoid of legal force. My first observation is that a litigant who has filed a suit / case or a Petition before a Judicial Forum should not be thrown out of the litigation at the very threshold without giving a chance of hearing on the merits of the Plaint. The question of maintainability can be entertained if there is a

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**C.A. No. 49//2016 In C.P. No. 05/241-242/CLB/MB/MAH/2016**

legal lacuna in the filing of a Petition. There are several instances where question of maintainability has been decided on the basis of the question of law applicable. However, if the question of maintainability is a mixed question of fact and law, then, it is always justifiable to hear the Petition on merits; instead of dismissing at the preliminary stage of start of the litigation. As far as the applicability of the provisions of Section 242(1)(b) of the Companies Act, 2013 is concerned, the issue of winding up of the company cannot necessarily be raised by a Petitioner if he is of the opinion that the grievance can be redressed if the question of oppression and mismanagement is decided in a Petition, so that later on he can participate in the functioning of the Company.

7. I have also considered the facts of the Application wherein the Applicant has tried to establish that there was no oppression of the Petitioner and that the Petitioner himself has not co-operated with rest of the Directors. However, the facts which are narrated in this Application are also subject matter of the Main Petition, yet to be decided. It shall be unfair as well as unjustifiable to reject the Main Petition on the ground of maintainability at this preliminary stage. As a result, I hereby hold, that IA No.49/2016 has not successfully established the issue of non-maintainability of CP No.05/2016 and, therefore, deserves to be dismissed.

8. I order accordingly.

9. Now CP No.05/2016 shall be fixed for final hearing on 19.12.2016.

Dated: 17.11.2016

sd/-  
**Shri M.K. Shrawat**  
Member (Judicial)