

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA

CORAM

Shri V. P. Singh  
Hon'ble Member (J)

Shri S. Vijayaraghavan  
Hon'ble Member (T)

Company Petition No.191/2007

In the matter of :

The Companies Act, 1956 ;

And

In the matter of :

Sections 397, 398, 399, 402, 403 and 406 of the said Act;

And

In the matter of:

1. Asiatic Oxygen Limited a company incorporated under the Companies Act, 1956 and having its registered office at 8, BBD Bag (East), Kol-700 001;
2. Amstar Investments Private Ltd.
3. B.P. Industrial Corporation Private Ltd.
4. Asarco Inv. And Trading Company Private Ltd.
5. Harsh Investments Private Ltd.
6. Pennzol Investments Private Ltd. all the companies are carrying on business at the same address as in Sl.1;

...PETITIONERS

-Versus-

1. Bihar Air Products Limited, a company incorporated under the Companies Act, 1956 and having its registered office at Phase V, Tayo Complex, Adityapur Industrial Area, Gamharia- 832 108, in the State of Jharkhand
2. Vijoy Prakash residing at 6, Off Polo Road, Patna, Bihar

3. Arvind Kumar Srivastava residing at 401, Raj Enclave, Boaring Road, Patna
4. Manoranjan Prasad Choudhary residing at 405, Pawan Villa Apartment, Ved Nagar, Rukanpura, Patna, Bihar
5. Jai Shankar Mishra residing at 4d, 'B' Block, Alakhraj Apartment, West Boaring Canal Road, Patna- 800 001, Bihar
6. Bihar State Industrial Development Corporation Limited, a government company incorporated under the Companies Act, 1956 and having its registered office at Indira Bhawan Ram Charitra Singh Path, near Bailey Road, Railway Crossing, Patna- 800 001, Bihar

.... **RESPONDENTS**

7. Ajay Kumar Kanoria residing at 1, Bhagwati Bhawan, 31B, M.L.Dahanukar Marg, Mumbai- 400 026.
8. Rama Kant Srivastava residing at D-38, S.K. Puri, Patna;
9. Ramesh Kumar Kejriwal residing at 8, B.B.D. Bag (East), Kolkata-1
10. Shambhu Singh residing at 747, Madhyampara, Naskarhat, P.O. Tiljala, Kolkata – 700 039;

... **PROFORMA RESPONDENTS**

**Counsels appeared :**

1. Mr. Surendra Kumar, Advocate ] For the respondent nos.2 to 6
2. Mr. Nilanjan Chatterjee, Advocate ] For the Respondent no.6
1. Mr. P.K.Jhunhunwalla, Advocate ] For thePetitioners
2. Mr. S. Rudra, Advocate ]

Date of Pronouncing the order : 22-2-17

**ORDER**

**Per Shri Vijai Pratap Singh, Member (J)**

The present company petition C.P. No. 191 of 2007 has been filed before this Tribunal by the Petitioners Asiatic Oxygen Limited and others who

have alleged acts of oppression and mismanagement against the Respondents BSIDC and others, on multiple accounts.

The companies BSIDC and Asiatic Oxygen Limited formed a company in pursuance of a Financial Collaboration Agreement dated 25<sup>th</sup> January, 1975. BSIDC is a company wholly owned by the State Government of Bihar. The company that was formed as a result of the Financial Collaboration Agreement was Bihar Air Products Ltd. (BAPL) which was a public listed company.

The brief facts of this case are that under the Financial Collaboration Agreement on 25<sup>th</sup> January, 1975 and as on 25<sup>th</sup> March, 1975 on which BAPL was incorporated, the shareholding of the Petitioners was 25% and Respondents was 26%. After the Public offer made on 9<sup>th</sup> November, 1977, the Petitioner's shareholding became 38.24% and the Respondent's shareholding became 32.24%. The shareholding pattern of BAPL in 1977 was, the Petitioners held 38.45%, BSIDC held 32.24%, IDBI held 14.85%, Bihar State Credit & Investment Corporation of India (BICICO) held 9.16%, IFCI held 4.95%, and the general public: 0.35%. After BSIDC (Respondents) acquired IDBI shares in November 1992, BSIDC shareholding became 47.09% (32.24% + 14.85%). However, this transfer was contested by the Petitioners. On 2<sup>nd</sup> August, 2007, the Respondents decided to sell their shareholding to M/s. Anjaneya. At present, the Respondents contend they do not want to part with their shareholding anymore.

This Financial Collaboration Agreement had a negative covenant as to the transfer of shares by the Respondents in favour of anyone in the first five years following the first public offer and thereafter the transfer of shares could be done by the respondents only after seeking permission by the Petitioners. The duration of this agreement was for ten years which could be renewed for a further five years by mutual consent. Since the said agreement

was made on the 25<sup>th</sup> January 1975, it was to expire on 25<sup>th</sup> January, 1985. The first public offer was made by BAPL in the year 1977. Neither the Respondents nor the Petitioners sought to transfer their shareholding in BAPL to any party within five years of the first public offer. Thereafter in 1991, the Respondents sought to sell their entire shareholding in BAPL to the Petitioners but declined to do so as the price, that was determined by the auditor, to be paid to the Respondents was too meagre. Thereafter in November 1992, the Respondents acquired IDBI's shareholding in BAPL which was contested by the Petitioners as they relied on the Financial Collaboration Agreement whereby the Respondents could not have increased or reduced their shareholding in BAPL without the permission of the Petitioners.

In 1993 the Hon'ble High Court passed an order of injunction restraining the Company from registering transfer of these shares that the Respondents bought from IDBI, which was later vacated.

Meanwhile the Petitioners had lost control in the affairs of the Company owing to their Managing Director turning hostile in 1992. Thereafter until July, 2006 the Respondents were in sole control of the management of the affairs of BAPL. In July, 2006 the Respondents and the Petitioners entered into an agreement whereby they decided on an equal representation of Directors on the Board of the Company. The Petitioners after getting involved in the management of the company found a misappropriation of funds amounting to Rs. 6 Lakhs by the Respondents in the name of advance dividend.

In July 2007, the Respondents took out a tender which they published in Times of India, Calcutta Edition for the sale of their shares including the shares they had acquired from IDBI. The Petitioners filed a Special Leave Petition before the Supreme Court in 2007 which granted an order of status

quo which is continuing. Consequently the Respondents thereafter withdrew the IDBI shares and only chose to sell their own shares in BAPL as the status quo order was relating to the IDBI shares as per the Respondents. The Petitioners mentioned that they should be given preference over other shareholders to buy the shareholding of the Respondents in BAPL. However, BAPL received the offer of M/s. Anjaneya following the tender they had floated earlier. The Petitioners filed this Company Petition contending oppression by the Respondents before the Company Law Board.

In the Company Law Board's order dated 30<sup>th</sup> June, 2009, the terms of the Financial Collaboration Agreement were discussed extensively, whereby the tenure of the Agreement was a period of ten years subject to its renewal for another five years by mutual consent of both the parties, and both the parties could seek the specific performance of the Agreement.

The CLB in its order had asked for Anjaneya's response as to why the share transaction between itself and the Respondents not be held as void. The CLB had found the Respondents' behaviour as oppressive towards the Petitioners. However, it also found that the Petitioners were a controlling stakeholder alongside the Respondents as a special resolution cannot be passed in BAPL without their support. Among other things the CLB had recorded the statement of the Respondents whereby they had mentioned that despite one of the Clauses of the Financial Collaboration Agreement mentioning that the said Agreement will be incorporated in the Articles of Association, the amendment to carry out the same was not made in the Articles of Association of BAPL as per what was agreed upon in the meeting in 2006 between the Petitioners and the Respondents.

Pursuant to the CLB's order the Respondents chose not to transfer their shares to M/s. Anjaneya and had multiple meeting with the Petitioners in order to determine a suitable price to sell their shareholding in BAPL to the

Petitioners. However, despite the many meetings, the Respondents failed to effect the sale, and are now contending that they no longer want to part with their shares and remain a shareholder of BAPL as they were earlier.

The Petitioners have submitted that the Respondents have violated the Financial Collaboration Agreement on many counts. The Petitioners were in the sole control of BAPL till April, 1992 and had appointed a nominee director. The control shifted to BSIDC as the nominee director became disloyal to the Petitioners. BSIDC solely controlled BAPL from April 1992 to 19<sup>th</sup> July, 2006. On the 19<sup>th</sup> July, 2006 there was an arrangement between Petitioners and Respondents regarding the control and management of BAPL. The Petitioners appointed a new Managing Director to manage the day-to-day affairs of the company and found that the Respondents had withdrawn Rs. 6 lakhs as an advanced dividend which they had paid only to themselves and to no other shareholder, during the time when they had sole control of the affairs of the company.

The Petitioners contended that BSIDC had surreptitiously floated a tender and received an offer of Rs. 29.51 per share from M/s. Anjaneya Ispat Limited. This has been contended by the petitioners to have been an oppressive behaviour by BSIDC against the Petitioners.

The Petitioners have further contended that such behaviour is oppressive to them because it was done in violation of one Financial Collaboration Agreement that the Petitioners had entered into with the Respondents prior to the incorporation of the company BAPL. According to that agreement the Respondents were not allowed to sell their shares for a period of 5 years after the first public offer and even after if they wanted to sell or acquire shares they would have to do the same after seeking permission from the Petitioners. The fact that the Respondents sought to sell their shares off without giving any preference to the Petitioners was in

violation of the said Collaboration Agreement, which had been allegedly incorporated into the Articles of Association of the Company by conduct of both the parties to this suit. The basis of this, as per the Petitioners, happens to be the nature of the joint venture that the Petitioners had entered into with the Respondents, which was like that of a partnership.

The Petitioners further contended that owing to the wrongful act of the Respondents of floating a tender for the selling of shares to M/s. Anjaney Ispat Limited, the Petitioners had filed an application before the Company Law Board on 19<sup>th</sup> September, 2009 that the transfer of shares so made by the Respondents was additionally violative of Securities Contract Regulation Act, 1956 and the Takeover Code, and therefore it was prayed by the Petitioners that the Respondents be directed to sell their entire shareholding in the Company be sold to the Petitioners at Rs. 30 per share.

It is violative of Section 16(2) of the Securities Contract Regulation Act, 1956 as the contract of sale or purchase of securities in question was not a spot delivery contract whereby the transfer of shares takes place on full payment of the consideration in lieu of the fully paid up shares that are listed, as M/s. Anjaneya were asked to pay 10% of the value at the time of bidding for the shares. It is violative of the Takeover Code because M/s. Anjaneya is now an acquirer of more than 15% of the shareholding of BAPL and therefore according to the regulations, such acquisition triggers not only disclosure obligation but also an obligation to make an open offer to the existing shareholders of BAPL, which has not been followed.

The Petitioners contended that BSIDC have overall acted in breach of the mutual trust and faith and have denied them the pre-emptive right whereby the Respondents had to offer the existing shareholders of BAPL before making a sale of their shares to third parties not related to BAPL. The Petitioners further contended that the Respondents should also reimburse

Rs. 6 Lakhs that they had withdrawn as advance dividend from the coffers of BAPL.

The Petitioners through various letters sent to the Respondents and to the State Government of Bihar have also contended that prior to the floating of the tender and even after that, there were negotiations that were held between the Petitioners and the Respondents whereby finally after various offers, the Petitioners had agreed to buy the Respondent's shares at Rs. 36 per share which was an escalated amount keeping in view the valuation that the independent auditor had arrived at for BAPL shares. Even after that, the Respondents had declined to sell their shares to the Petitioners as the State Government of Bihar which was the sole owner of the Respondent Company BSIDC had not approved the same, and thereafter they had chosen to make the sale to M/s. Anjaneya.

The Petitioners have contended that keeping in mind BAPL's declining performance and the virtual deadlock in management caused due to an equal representation of the Petitioners as well as the Respondents in the Board of Directors, decisions in favour of BAPL's growth cannot be made. This is based on the premise that the Respondents are least interested in the welfare of BAPL which is evident from the absence of Respondent's Directors from most of the meetings convened to decide the future course of action for the Company. The above allegations of oppression and mismanagement has been pointed out in the petition by the petitioners and on the above basis petitioners have made prayers to the Honourable Tribunal for relief under Section 402(b) of the Companies Act, 1956 whereby upon conclusive proof of oppression the Honourable Tribunal can direct the purchase of shares or interests of any members of the company by other members thereof or by the company itself.

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In reply to the petitioner's allegations, the Respondents, BSIDC, contended that the Petitioners have not prayed for directing the Respondents to sell their shares to the Petitioners thereby ceasing all their ties in BAPL, therefore such a contention should be inadmissible. The Respondents contend that Petitioners deal with like business as that of BAPL and by praying before the Honourable Tribunal to restrain the Respondents from transferring their shares to anyone else other than them, they are trying to gain a bigger market share in the business thereby threatening a distorted competition in the market. Since the Respondents have already made it apparent that it is no longer their intention to part with their shares, the present petition is not maintainable.

The Respondents have contended that the contention of Petitioners that they should have been offered the shares first by the Respondents before they effected any sale with any other party is baseless as neither the Financial Collaboration Agreement or the Articles of Association lay down the same. Since the Respondents are a wholly owned State Government Company, they had taken out a tender for the sale of their shares and intended to sell it to the highest bidder. However, the Petitioners themselves had chosen not to take part in the tender by themselves, despite being fully eligible for the same. The tender was additionally, not taken out surreptitiously as it was published in a leading national daily in its Calcutta Edition.

The Respondents contended that the embargo on the transfer of shares as per the Financial Collaboration Agreement doesn't stand as the embargo was for five years after the first public offer and the tenure of operation of the Agreement as such was for ten years since its inception. According to Respondents, this negates the contention of the Petitioners whereby they contend violation of the Agreement by the Respondents.

Additionally the Respondents contended that the Articles of Association of BAPL also does not have any embargoes on transfer of shares. However, the Respondents also state that there has been no concluded contract between the Respondents and M/s. Anjaneya yet.

Finally the Respondents have contended that the arrangement made in July, 2006 was to resolve disputes as to the constitution of the Board of Directors in BAPL and not to renew the Financial Collaboration Agreement. Moreover, the Respondents claim that there has not been any evidence as to mismanagement or creating any impediments in the smooth running by them. BSIDC concludes that it is its prerogative as to whether they decide to sell their shareholding or not and cannot so be compelled. Moreover, the Respondent BSIDC no longer wants to part with its shares in BAPL anymore.

On the basis of the pleadings of the parties following question arises for the decision of the case:

- (1) Whether the Financial Collaboration Agreement is a part of the Articles of Association of BAPL ever since the 2006 meeting between the Petitioners and the Respondents, and if the violation of the Financial Collaboration Agreement by the Respondents amounts to oppression against the Petitioners?
- (2) Whether there is a deadlock in the management of the company: BAPL? If so, then what should be the relief, if any, the parties are entitled to, keeping in view the interest of the company BAPL?

The Financial Collaboration Agreement (FCA) which is in question in the petition had been entered into by the Petitioners and the Respondents prior to the incorporation of the company BAPL. This Agreement had a negative covenant regarding an embargo as to transfer of shares by the Respondents. The Financial Collaboration Agreement had a moratorium

mentioned in it relating to an absolute restriction in transfer of shares by the parties to the Agreement for a period of five years. The Agreement was in itself in operation for ten years starting from the date of its execution. Even in 2006, when the Agreement was supposedly renewed according to the Petitioners, the meeting that was convened was only to resolve disputes as to constitution of the Board of Directors of BAPL and the FCA cannot be said to have been renewed on the same day "by conduct", in absence of an explicit renewal by the Parties in question.

Therefore, after the expiry of the Financial Collaboration Agreement after the aforementioned ten years, the rules relating to transfer of shares as per the Articles of Association of BAPL and rules as per the Companies Act for public listed companies apply thereafter. Therefore, the said transfer made to M/s. Anjaneya cannot be contested on this ground.

The question of adoption of the Financial Collaboration Agreement in the Articles of Association cannot be ascertained as the Agreement was more in the nature of a shareholder's agreement and its subsequent adoption in the Articles of Association of the Company would make it binding on every shareholder of the company, which was not the case as the negative covenant was only applicable to the Respondents.

But as per the CLB's record, the Respondents had contended that although there was an agreement to incorporate FCA within the Articles of Association of BAPL, the amendment to carry out the same was not made. Even going by the Agreement, where it has been mandated under Clause 19 (as per the CLB's order), the first offer needs to be made to the Petitioners after the moratorium period is over. Considering the list of dates provided by the Petitioners in 1991, BSIDC had intended to sell their shares to the Petitioners, however, they were not agreeable to the price that the Petitioners had offered for the shares which was fixed by the auditors.

Thereafter, they took out the tender wherein the Petitioners did not participate and M/s. Anjaneya won the bid. The Arbitration clause as mentioned in the FCA does not stand as the FCA itself had expired and was never renewed.

The contention of oppression and deadlock in management of BAPL owing to the incompatibility between the Petitioners and Respondents can be highlighted on various instances. The lack of interest on the part of the respondents in getting involved in the issues of management and the affairs of the company pertaining to its smooth running is visible by the lackadaisical attitude of their directors. It is the contention of the Petitioners that the Directors of BSIDC had attended few meetings and were apathetic towards the growth and development of BAPL.

Secondly, if the disputed transfer of shares by the Respondents to M/s. Anjaneya is carried out, then considering the trigger limits of mandatory disclosure and making an open offer enshrined in the Takeover Code of 2007, M/s. Anjaneya will have violated the same by not following the said procedures, as the shareholding of M/s. Anjaneya has crossed 15% in BAPL which establishes M/s. Anjaneya's control in BAPL. Also, M/s. Anjaneya in pursuance of a concluded sale between themselves and M/s. Anjaneya must also pay the full consideration in lieu of the share transfer and not pay in instalments as has been mandated in the tender since it would then be violative of Section 16 of the Securities Contract Regulation Act of 1956.

Thirdly, according to the records, the respondents have clearly misappropriated Rs. 6 Lakhs in the name of "advance dividend" which they paid only to themselves and to no other shareholders.

It is an established principle of law that non-maintenance of statutory records and not conducting the affairs of the company in accordance with the Companies Act amounts to an act of oppression. This has been held in the

case of Bhajirao G. Ghatke vs. Bombay Docking Co. (P.) Ltd. [1984] 56 Comp. Cas. 428 (Bom.) Additionally depriving a member of the right to dividend amounts to an act of oppression too as has been held in the case of Mohan Lal Chandu Mal vs. Punjab Company Ltd. [1962] 32 Comp. Cas. 937 (Punj.)

Further where there is a serious in-fighting between directors resulting in serious prejudice being caused to the company was held as amounting to mismanagement, in the case of Suresh Kumar Sanghi vs. Supreme Motors Ltd. [1988] 54 Comp. Cas. 235 (Delhi). In the present case the Petitioners and Respondents have failed to arrive at a mutually agreed valuation of the shares that the Petitioners are willing to buy from the Respondents. It is explicit from the past events that have led to the present dispute that the Respondents wanted to sell their shares off and exit BAPL. However due to the circumstances where their sale was contested, the Respondents have now arrived at a decision that they no longer want to part with their shares.

In the present petition both the parties have mutually alleged acts of oppression against the other. The refusal to register the shares that the Respondents acquired from IDBI could also be construed as an act of oppression as per the case of Kumar Exporters (P.) Ltd. vs. Naini Oxygen and Acetylene Gas Ltd. [1986] 60 Comp. Cas. 984 (All.)

The payment of advance dividend by the Respondents to themselves could be construed as an act of mismanagement as per the case of Bhaskar Stoneware Pipes (P.) Ltd. vs. Rajindernath Bhaskar [1988] 63 Comp. Cas. 184 (Delhi), where it was held that the diversion of funds of the company for the benefit of majority group is an act of mismanagement.

In conclusion therefore, we observe that there happens to be a deadlock in management of the company whereby both the parties are not relenting. With the expiry of the Financial Collaboration Agreement the

claims of the Petitioners for oppression against the Respondents do not stand. However, in the light of the loss that BAPL is currently incurring due to the non-performance by the Board of Directors in furthering the interests of BAPL and the impasse at which the management has arrived, it is neither in the interest of the company nor in the interest of the shareholders that the company be wound up on just and equitable grounds.

The animosity and the non-cooperation between the two groups of shareholders represented by the Petitioners and the Respondents respectively, seems to have a direct impact in the matter of conduct of the affairs of the company. Therefore it is in the interest of the company that one of the groups of shareholders exit the company, and subsequently the Board of Directors be reconstituted for the efficient conduct of the affairs of the company where its losses can be recovered. This shall be carried out notwithstanding the unwillingness of the Respondents in selling their shares in BAPL.

After a careful consideration of the facts, the arguments by both the parties and the order by the Company Law Board, the Tribunal is of the opinion that the welfare of the company BAPL is the main concern before the Honourable Tribunal, which the Petitioners claim to have been compromised with by the Respondents, and with the Respondents no longer interested in selling their shares to anyone, the situation has become stalemate.

The deadlock in management caused due to the equal representation in the Board of BAPL can thereby be resolved between the Petitioners and Respondents whereby either of the parties may sell their shares to the other and thereafter, the other party may then reconstitute the Board of Directors of BAPL.

Through this, either the Petitioners or the Respondents can have a fair chance to successfully run BAPL and recover its losses in due course of time.

In the present case of Asiatic Oxygen, under Section 242 of the Companies Act, 2013 the Tribunal has the power to direct the members or the company to purchase the shares of the defaulting members who are found guilty of oppression.

*Under the powers vested in the Tribunal, under Section 402(b) of the Companies Act, 1956, on application under section 397 or 398, without prejudice to the generality of the powers of the Tribunal under section 397 or 398, any order under either section may provide for—*

- (a) the regulation of the conduct of the company's affairs in future;*
- (b) the purchase of the shares or interests of any members of the company by other members thereof or by the company;.....*
- (c) any other matter for which in the opinion of the [Tribunal] it is just and equitable that provision should be made."*

*In pursuance of such an order, to carry out the sale, a valuer is to be appointed for valuing the shares of the Company as per the procedure.*

This has also been discussed in the following cases.

In M.S.D.C. Radharamanan vs. M.S.D. Chandrasekara Raja and Another (2008) 6 SCC 750 the Apex Court specifically rejected the submission that the CLB was not justified in issuing a direction to the petitioner to purchase the shares of the respondent under Section 402 of the Act, despite arriving at a finding of fact that no act of oppression had been committed by him. The judgment also found in favour of the argument that was put forth by Mr. K. Parasaran, learned Senior Counsel, appearing for the

respondents, in *M.S.D.C. Radharamanan vs. M.S.D. Chandrasekara Raja and Another*, on the other hand that, *the Company Law Board, in exercise of its jurisdiction under Sections 397 and 398 read with Section 402 of the Companies Act has the requisite jurisdiction to direct a shareholder to sell his shares to the other, although no case for winding up of the Company has been made out or no actual oppression on the part of the Director has been proved. Additionally in this case it was held that Section 402 provides for the powers of the Company Law Board on an application made under Section 397 or 398 of the Act which includes the power to pass any order providing for the purchase of the shares or interests of any member(s) thereof or by the company. The deadlock in regard to the conduct of the business of the company has been noticed by the Company Law Board as also the High Court in this case. Keeping in view the fact that there are only two shareholders and two directors and bitterness having crept in their personal relationship, the same, in our opinion, will have a direct impact in the matter of conduct of the affairs of the company. When there are two directors, non-cooperation by one of them would result in a stalemate and in that view of the matter, the Company Law Board and the High Court have rightly exercised their jurisdiction as to the appointment of the valuer and purchase of each other's shares by either shareholder's group or purchase of either the petitioner or the second respondent's shares and transferring it to third parties depending upon the exigency. Ordinarily, therefore, in a case where a case of oppression has been made a ground for the purpose of invoking the jurisdiction of the Board in terms of Sections 397 and 398 of the Act, a finding of fact to that effect would be necessary to be arrived at. But, the jurisdiction of the Company Law Board to pass any other or further order in the interest of the company, if it is of the opinion, that the same would protect the interest of the company, it would not be powerless. The function of a Company Law Board in such matters is first to see as to how the interest of*

*the company vis-à-vis its shareholders can be safeguarded. If the consequences of refusal to exercise jurisdiction would lead to a total chaos or mismanagement of the company, the Company Law Board would not be powerless to pass appropriate orders is the question. But jurisdiction of the Company Law Board having been couched in wide terms and as diverse reliefs can be granted by it to keep the company functioning, it is desirable to pass an order which for all intent and purport would be beneficial to the company itself and the majority of the members. A court of law can hardly satisfy all the litigants before it. This, however, by itself would not mean that the Company Law Board would refuse to exercise its jurisdiction, although the statute confers such a power on it."*

The Supreme Court in *Needle Industries (India) Ltd. & Ors. vs. Needle Industries Newey (India) Holdings Ltd. & Ors.* AIR 1981 SC 1298 has held that even though the company petition fails and the appeals succeed on the finding that the Holding Company has failed to make out a case of oppression, the court is not powerless to do substantial justice between the parties and place them, as nearly as it may, in the same position in which they would have been in accordance with law.

In *M/s. Venture India Properties P. Ltd. & Ors. vs. Capt. Manmohan Singh Kohli & Ors.* 2011(123 )DRJ 520 and *IFCI Ltd. vs. TFCI LTD.* (2011 )3Comp LJ 603 (Del), the Court has taken the view that the powers under Section 402 of the Act are residuary in nature and in addition to the powers available under Sections 397(2) and 398(2) of the Act. This Court further held that CLB has the power to make such order as it thinks fit with a view to bring an end to the matters complained of under Section 397(1) of the Act and/or with a view to prevent the matters complained or apprehended under Section 398(1) of the Act.

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In view of the facts briefly enumerated above in the present case, it is clear that there is a deadlock which has adversely affected the functioning of the Company- BAPL, as a viable enterprise. In a situation where a deadlock has arisen in the management of a company rendering the functioning of the company inoperative, and even in the event where oppression or mismanagement cannot be established against any party, the Tribunal can make an order under Section 402 (b) of the Companies Act, 1956.

Additionally in the case of M.S.D.C. Radharamanan vs. M.S.D. Chandrasekara Raja and Another, 2008 (2) SC 901, it was recorded that *there could be a method of valuation whereby at the first instance, one of the parties to the dispute shall purchase the shares of the petitioners, within six months from the date of finalisation of such valuation and on his failure to do so, the other party shall purchase the shares of the other within six months thereafter. In the event both the alternatives fail the purchase of shares of either of the parties to the dispute could be transferred to third parties depending upon the exigency, to ensure the sooth running of the company.*

### ORDER

Preliminary decree is being passed for valuation of main business by an independent Valuer. Both the groups of shareholders are being directed to give the name of an independent Valuer through consensus within fifteen days from the date of order, failing which both the groups will have the option to give names of three independent Valuers within one week thereafter, so that the Tribunal may issue directions for valuation of the aforesaid company and report of valuation is directed to be submitted within three months. The amount payable to independent Valuer will be borne by both the Petitioners and Respondents in equal proportion.



Based on the current valuation by the registered valuer, either of the parties may then sell their shares to the other that they hold in BAPL and subsequently exit the company in question.

Parties are to bear their own costs.

*S. Vijayaraghavan*

(S. Vijayaraghavan)  
Member(T)

*Vijai Pratap Singh*  
22/2/17

(Vijai Pratap Singh)  
Member (J)

Signed this the 22nd day of February, 2017