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.04/2016

In the matter of :

The Companies Act, 2013 ;

And

In the matter of :

Sections 58, 59, 241, 242 and 244 and other applicable provisions of the Companies Act, 2013;

And

In the matter of:

Chhotanagpur Rope Works Private Ltd., a company incorporated under the provisions of the Companies Act, 1956 having its Registered Office at 24-A, Anil Roy Road, Kolkata – 700 029 ;

And

In the matter of :

1. Anurag Jhawar, son of Arun Kumar Jhawar, 24A, Anil Roy Road, Kolkata – 700 029

2. Pallavi Jhawar, wife of Anurag Jhawar, 51/C, Gariahat Road, Kolkata – 700 019.

... . **Petitioners**

And

In the matter of

1. Chhotanagpur Rope Works Private Ltd., a company incorporated Under the provisions of the Companies Act, 1956 having its Registered Office at 24-A, Anil Roy Road, Kolkata- 700 029

2. Siddharth Jhawar, son of Arun Kumar Jhawar, residing at 51/C, Gariahat Road, Kolkata – 700 019 and also at C/o- Chhotanagpur Rope Works Private Ltd., P.O. Mahilong, Ranchi- 835 103.

3. Vaijayanti Jhawar, wife of Siddharth Jhawar residing at 51/C, Gariahat Road, Kolkata – 700 019 and at 2A, Shriniket, 14/9, Vasant Vihar, Kanke Road (Raja Bagan), Ranchi- 834 008.

....**Respondents**

:

Counsels appeared :

1. Ms. Swapna Chaubey, Advocate]
2. Mr. Saunak Mitra, Advocate] For the Petitioners
3. Ms. Sutapa Mitra, Advocate]

1. Mr. A. Agarwalla, Advocate]
2. Ms. F. Nasim, Advocate]
3. Mr. A.K.Shrivastava, Advocate] For the Respondents
4. Mr. Shakeel Akhtar, Advocate]

Date of Pronouncing the order : 16-2-2017

ORDER

Per Shri Vijai Pratap Singh, Member (J)

This Company Petition has been filed under section 58,59,241,242 and 244 of the Companies Act, 2013.

Brief facts of the case are that the petitioner no.1 and respondent no.2 are the subscribers, shareholders and promoter directors of the respondent no.1 company. The respondent no.2 looks after the factory operations of the company at Ranchi and the petitioner no.1 looks after the administration, sales and marketing, exports and imports of the company at Kolkata. The authorised share capital of the company, Chhotonagpur Rope Works Pvt. Ltd. (hereinafter referred to as the company) is Rs.2 crores divided into 2 lakhs equity shares of Rs.100/- each. Total issued, subscribed and paid up share

capital of the company is Rs.2 crores divided into two lakhs equity shares of Rs.100/- each.

The company carries on the business of manufacturing of ropes and core ropes of various natural and synthetic fibres and raw materials such as jute, manila, sisal, polyester, nylon, cotton, high and low density polyethylene etc, these ropes and core ropes are used in various industries around the world.

The petitioner no.1 in his name holds 86,320 equity shares of Rs.100/- each in the company and happens to be the shareholder and promoter director of the respondent no.1 company. The petitioner has also stated that he is also the owner of 1240 shares which has incorrectly not been recorded in the name of the petitioner no.1. The shareholding of the petitioner is 87,560 shares. The petitioner no.2, wife of petitioner no.1, in her name holds 13680 equity shares of Rs.100/- each in the company. The petitioners amongst themselves hold 1,01,240 equity shares of and in the company which is equal to 50.62% of the total issued, subscribed and paid up share capital of the company.

The petitioner has further stated that by deed of gift dated 01.09.2011, the respondent no.2 out of his love and affection has gifted 1240 equity shares of and in the company to the petitioner no.1. The original share scripts have also been handed over by the respondent no.2 in respect of the said shares. The petitioner no.1 by letter dated 5th August, 2016 has requested for transfer of the said 1,240 equity shares in his name. However, the respondent no.2 has not taken any steps for transfer of the said shares. The petitioner has annexed the copy of the gift deed dated 05.08.2016 which has been marked with the letter "C".

The respondent no.2 is also a shareholder and promoter director of the company. The respondent no.3 is the wife of respondent no.2. The respondent no.2 is the elder brother of petitioner no.1 and held 86320 equity shares of and in the company out of which he has gifted 1240 equity shares to petitioner no.1. The respondent no.2 now holds 85,080 shares of and in the company. The respondent no.3 holds 13,680 equity shares of Rs.100/- each. The respondent nos.2 and 3 together held 49.38% shares of and in the company.

The petitioner has further stated that since the inception of the company, the petitioner no.1 and respondent no.2 are the directors of the company. The respondent no.2 looks after the factory operations of the company at Mahilong, Ranchi where the factory of the company is situated whereas the petitioner no.2 is residing at Kolkata and looking after the administration as well as sales and marketing, procurement/purchase, export and import of the company. The petitioner no.2 and the respondent no.2 are not only shareholders and directors of the company but also belong to family members, which consists of their mother, father and respective wives, who are also the owners of various partnership firms and family business. Apart from the petitioner nos. 1 and 2 and respondent nos. 2 and 3, none of the other family members had any interest in the said company.

Since the incorporation of the company, the petitioner no.1 being the younger brother equally participated in the running of the company with his elder brother being respondent no.2 who handled the manufacturing and operation works of the factory. The petitioner no.1 is staying in Kolkata also maintains the records and logistic management for all the imports and exports of the company. The files related to each and every shipment with detailed records are maintained under the guidance and supervision of petitioner no.1. The petitioner no.1 on numerous occasions has helped the company to save

the cost of production by using his contacts and resources. The petitioner no.1 has made necessary infusion of funds whenever the company was in need of emergency funds or working fund by arranging loan through the personal contacts on personal guarantees. The relationship between the petitioner and the respondent was always amicable and good. The business being a family concern, the petitioner no.1 had full faith and mutual trust on the respondent no.2. Hence, the petitioner never suspected any malafide intention by the respondent no.2. The petitioner no.1 used to travel between Kolkata and Ranchi as per the requirement of the business.

In or about November, 2011, the respondent no.2 came with a proposal for separation of family's assets and business and asked the petitioner no.1 to separate the company's business also. The petitioner no.1 was shocked to hear such proposal from his elder brother, the respondent no.2, on whom he reposed complete faith and trust in respect of not only the business of the company but also as a guiding light in the family. The petitioner no.1 after failing to convince the respondent no.2 agreed for separation but laid down certain conditions so that the value and profitability of the company can be ascertained for separation process amicably. The petitioner to proceed with the separation process made a written request to respondent no.2 to provide him details under various heads of accounts. The intention of the petitioner no.1 was to ascertain the value of the company and its profitability. After the written request was made over to the respondent no.2, the petitioner no.1 started noticing marked change in the behaviour of the respondent no.2. The respondent no.2 started behaving in a very non-cooperative manner. No information from Ranchi factory was given to petitioner no.1. The petitioner no.1 had to constantly enquire about the day to day affairs with respect to major business decisions. The petitioner no.1 being a majority shareholder and director of the company is eligible for all information relating to operation of the factory of the company which is situated at Ranchi.

The company has its own Enterprise Resource Planning (ERP) system which is the business management software adopted by the company. The respondent no.2 had unilaterally developed this software to suit his business plans. The petitioner no.1 is only given partial access to this system. The primary data is not available to the petitioner no.1. This software is not fully accessible by Kolkata Office staff but information regarding the system is sent to Kolkata through flash drive.

The company maintains its primary bank account at State Bank of India, SME branch, Doranda, Ranchi and since inception of the company, cheques are signed by its directors severally. After the separation talks were initiated by the respondent no.2, the petitioner no.1 proposed for joint signatories for operation of bank accounts. The petitioner no.1 wanted to monitor the financial transactions of the bank as he was sensing some foul play but the respondent no.2 disagreed with the said proposal.

The respondent no.2 removed the e-mail address of the petitioner no.1 from the respondent no.1 company's website and has made a new website of respondent no.1 company portraying himself as CEO. The respondent no.2 has also not allowed the e-mail address of the petitioner no.1 to be put on a sales website like Indiamart and others that helps in generating sales enquiries.

The Petitioners have further alleged that the Respondents have refused to become joint signatories for the operation of the bank accounts and that if the outstanding balance of State Bank of India is liquidated, the cash credit account will turn into a Non-Performing Asset to the prejudice of the Respondent 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 for reliefs whereby they have sought for equitable division of the Respondent Company between themselves and the remaining Respondents. They have prayed for an independent valuation of the company's shares, and have stated that there is a deadlock in management. Thereafter they have further prayed for selling their shares or buying the Respondents shares granting in one of the parties to subsequently exit the Company.

In reply to the petitioner's allegations, the Respondents have admitted that the allegations of the Petitioners are baseless and merits scarce attention. The Respondents in turn contended that the Petitioners have acted in a manner which is oppressive, unfair and prejudicial to the interest of the Respondent Company. The Respondents have admitted that that since the incorporation of the Company, the shareholding of both the Petitioners and the Respondent No. 2 and 3 were in the ratio of 50:50, but in the financial year 2005-2006, 2480 shares of the Respondent Company were offered to private companies to raise funds for the company, which were bought back and allotted in the name of Respondent No. 2, who in order to maintain the historical parity transferred 1240 shares in the name of the Petitioner No. 1 under a Deed of Gift dated 1st September, 2011, which is evident from Form 20B uploaded by the Petitioner No. 1 on the website of the Registrar of Companies, West Bengal, for the year 2012, 2013, and 2014. The Respondents contended that the Petitioners have made an inadvertent delay in filing their appeal before the Tribunal in relating to the refusal for registration of transfer of shares by the Respondents.

The Respondents further contended that the Directorate General of Foreign Trade had cancelled the advance authorisation that had been acquired by the Respondents from the Directorate for the purposes of export

and import, which the answering Respondent had applied for and obtained from its regional office in December 2015, at the instance of the Petitioner No. 1 who had written a letter to the Directorate General's office alleging that the advance authorisations so issued had been stolen and of which they apprehended a misuse. According to the Respondents such a cancellation had led to severe inconvenience whereby the respondent company suffered wrongful loss. This loss was a consequence of- the detention of the raw materials at the Kolkata Port meant for export, the demurrage and detention charges to the port and Customs authorities, and money spent for obtaining release of imported goods from the designated ports. Such cancellation had also affected the production of the respondent company that was curtailed due to shortage of raw materials and had also led to losses because of the untimely delivery of finished products to foreign buyers.

The Respondents contended that the Petitioners have failed to clarify the several queries of the Statutory Auditor pertaining to the withdrawals and payments made from the said bank account maintained with ICICI Bank in the financial year 2014-15 and have failed to submit any accounts relating to the said withdrawals and payments made from the same account in the financial years 2015-16 and 2016-17. As a consequence of the same the Statutory Auditors have been unable to audit the Balance Sheet for the financial year 2104-15, and therefore the Respondents have not been able to file Income Tax Returns for the financial years 2014-15 and 2015-16 and neither could the principal banker to the respondent company, SBI, renew the cash credit account of the respondent company.

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financial year 2014-15 and have failed to submit any accounts relating to the said withdrawals and payments made from the same account in the financial years 2015-16 and 2016-17. As a consequence of the same the Statutory Auditors have been unable to audit the Balance Sheet for the financial year 2104-15, and therefore the Respondents have not been able to file Income Tax Returns for the financial years 2014-15 and 2015-16 and neither could the principal banker to the respondent company, SBI, renew the cash credit account of the respondent company. The same cash credit account became irregular in February 2014 due to non-cooperation of the Petitioners who failed to submit the accounts for the financial years 2012-13 and 2013-14 on time.

The Respondents further contended that the Income Tax Returns for the financial year 2012-13 of the Respondent Company had been filed unilaterally by the Respondents themselves in compliance of the statutory provisions. The Income Tax Return for the financial year 2012-13 was filed after the audit of the Balance sheet of the respondent company for the same year and it was duly adopted in the Annual General Meeting held in the year 2013. The Balance sheet for the relevant year was signed by the Petitioner No. 1 and Respondent No. 2 together and thereafter adopted at the Annual General Meeting.

The Respondents contended that the allegations by the Petitioners against the Respondents regarding the freezing of the accounts with the SBI bank in Ranchi is a consequence of the acts of the Petitioners themselves who failed to furnish the necessary documents such as the accounts of the ICICI bank at Kolkata, despite repeated requests by the Respondents, which were required to make the balance sheets for the company for the financial years 2013-2014 and 2014-15 and get them audited for renewal of facilities at the SBI Bank. The non-compliance by the petitioners has also caused the

Respondents to be exposed to statutory penalty. The Respondents contended that they had Rs. 5 Crores due in SME branch of SBI and feared that it will turn into non-performing asset. Therefore, they paid 62% to SBI which reduced the loan amount and in addition to this SBI had created a lien over incentives receivable by the respondent company against the exports incentives to the tune of Rs. 1 Crore to be received from the office of the Joint Director General of Foreign Trade which brings the dues of the bank to around Rs. 80 Lakhs only. The Respondents have contended that the Petitioners have sold off several incentives received by the Respondent company against exports to third parties and misappropriated the proceeds thereof. The Respondents contend that due to the alleged wrongful acts of the Petitioners, sharing further information about the bank accounts was not in the interest of Company. To freeze the current account of the respondent company, that is also being maintained with its principal banker (SBI SME Branch) and which the Respondent Company has been allowed to operate by the principal banker, would lead to delay in the functioning of the production units of the company and would affect the interests of the company in more ways than one. It could potentially lead to the non-payment of wages to the employees and stalling of production as well, which in turn could lead to rendering a substantial number of workers jobless.

The Respondents contended that the Enterprise Resource Planning System was adopted by the Respondent Company to streamline the accounting procedures making it fully automated and prevent leakage of confidential financial data of the company. According to the Respondents such a system is very efficient and was duly accepted and approved by the statutory auditors of the respondent company, commercial taxes authorities, central excise authorities and other statutory authorities. It had been upgraded from time to time as well. However, it has been alleged that the Petitioners

even though the profits earned could justify a higher rate of dividend, may not amount to oppression by themselves. However the cumulative effect of several acts may indicate oppression.

Denial of shareholders of access to the books is not oppression because there is an adequate remedy against such denial in the Act. A petition under Section 397 may be rejected on the ground of delay and acquiescence, as has been laid down in Gover Rustom Irani vs. Property Co. (P) Ltd. 1976 Tax LR 1682 (Cal.).

It was discussed in Re Posgate & Denby (Agencies) Ltd., 1987 BCLC 8 (Ch D), that since the spirit of the shareholding of the company was in the nature of a partnership whereby each member would have equal shares in the company at any given point of time, it was the Petitioner's legitimate expectation whereby he could have had an access to the books of the Company. In deciding whether there has been oppression the Court has power to take into consideration not only the rights of the members under the company's constitution but also their legitimate expectations arising from agreement between members inter se.

It will only be in certain circumstances that a shareholder would have any legitimate expectation to be involved in the management of the company. In the case of Re Westbourne Galleries Ltd., (1973) AC 360 it was discussed that the classic example where such a legitimate expectation may arise is that of a quasi partnership which has one or more of the following ingredients- (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence- this element will often be found where a pre-existing partnership has been converted to a limited company, (ii) an agreement, or understanding, that all, or some of the shareholders shall

participate in the conduct of the business, (iii) restriction upon the transfer of member's interest in the company, so that if confidence is lost or one member is removed from management, he cannot take out his stake and go elsewhere.

In the present petition, the contention of the Petitioners that the Respondents have tacitly tried to oust them from the management of the company by making it apparent to not recognise the Petitioners as the Directors of the Company, it could be said that whether exclusion from management would be prejudicial would depend upon whether the complainant had a legitimate expectation to be consulted over the affairs and whether his exclusion would depress the value of his investment. This rule has been laid down In re Elgindata Ltd. (1991) BCLC 959 (Ch. D).

In the case of Re: A Company, 1986 BCLC 362, Hoffmann J. had discussed about the realities of business where the exclusion of a joint venture would not amount to prejudice. There are many cases in which it becomes in practice impossible for two people to work together without obvious fault on either side. They may have come together with a confident expectation of being able to co-operate but found that insurmountable differences in personality made it impossible. In those circumstances the only solution is for them to part with the company. It must depend on whether it is reasonable that one should leave rather than the other and even more important on the terms on which he is asked to go.

The situation in the present petition seems to be that of deadlock in management where both parties are unrelenting and want to part with the company. Such a deadlock has been contended by both the parties as well in their written notes. However in such a situation winding up of the company

of the Company by the Respondents alone. The answering Respondents have also prayed for appointment of an independent auditor who can audit the accounts of the Respondent company from 2014 to 2016.

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

(1) Whether the denial of access to the books of the Company and the other acts as contended by the Petitioners against the Respondents amount to oppression and mismanagement in the management and control of the company- Chottanagpur Rope Works Private Limited?

(2) Has the loss of mutual trust between the Petitioners and the Respondents led to a situation of deadlock in the management of the Company? If so, what should be the mode of division if the company is apparently run in the nature of a partnership considering the parity in the shareholding of both Petitioner and Respondent?

(3) What relief, if any, parties are entitled to, keeping in view the interest of the company?

Keeping in view the contentions it could be made out that the Petitioners have been denied access to the statutory records of the company despite being a shareholder and a Director of the Company.

Regarding the contention of the Petitioner that despite their requests to the respondents, they were not given a higher dividend out of the accounts of the Respondent Company and such an act on the part of the Respondents amounts to oppression that has been enunciated in the case of Maharani Lalita Rajya Lakshmi vs. Indian Motor Co. (1962) 32 Com Cases 207, where it was held that the denial of right of Inspection or other rights of a shareholder or failure to comply with formalities required the matter of giving notice of a general meeting or refusal to declare more than a moderate rate of dividend

even though the profits earned could justify a higher rate of dividend, may not amount to oppression by themselves. However the cumulative effect of several acts may indicate oppression.

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participate in the conduct of the business, (iii) restriction upon the transfer of member's interest in the company, so that if confidence is lost or one member is removed from management, he cannot take out his stake and go elsewhere.

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The situation in the present petition seems to be that of deadlock in management where both parties are unrelenting and want to part with the company. Such a deadlock has been contended by both the parties as well in their written notes. However in such a situation winding up of the company

would not be in public interest keeping in consideration the bright prospects of the Respondent Company. However, a solution has to be arrived at regarding the Board of Directors of the Company which will ensure the smooth running of the company and further its profit making potential.

In the cases : Gnanasambandam (CP) vs. Tamilnad Transports (Coimbatore) (P.) Ltd (1971) 41 Com Cases 26 (Mad), and In Re: Modern Furnishers (Interior Designers) P. Ltd., (1985) 58 Com Cases 858 (Cal.) it was held that if each side is equally strong, and one is unable to oppress the other, there may be a deadlock but not oppression. It is not a case for winding up.

However, in another case of Krishan Lal Ahuja vs. Suresh Kumar Ahuja (1983) 53 Com Cases 60 (Del.), it was held that where there was a deadlock in the management of a private limited company, the Court first gave an option to one group to buy out the other group and ordered that on default or failure by both parties to exercise the option the company would be wound up under the just and equitable clause.

In another case of Combust Technic P. Ltd. Re. (1993) 1 Comp LJ 61 (Cal), a closely held company was composed of two groups where there arose a deadlock between shareholders of a company who occupied the position of quasi-partners. The Court felt that asking the majority shareholders to buy out the minority was the only practical solution of the problem but that could not be adopted because there was a pending civil suit between the parties over the fact as to the percentage of shares held by each of the parties to the dispute. The Court appointed a special officer to attend the meetings of the Board of directors and to elect a new Board so as to assure that a proper direction was given for sale of shares.

In the case of Yashovardhan Saboo vs. Groz Beckert Saboo Ltd., (1993) 1 Comp LJ 20 (CLB), where both groups of shareholders had equal managerial power in the company and when disputes arose as to collaboration within the company between the two groups of shareholders, the CLB applied quasi-partnership principles and ordered the majority group to buy out the minority at the fair price with necessary permissions.

In Daulat Makanmal Luthria vs. Keshav S. Naik, (1992) 3 Comp LJ 119 (CLB), it was held that in case parties have lost mutual trust, necessary for the harmonious working of the company, it is impossible for them to work together even if an independent Chairman was appointed. An order under Section 397/398 is to put an end to the alleged acts of oppression and mismanagement so that the interests of the shareholders and the company could be protected. The respondents expressed their readiness to either purchase the petitioner's shares or sell their shares to him but the petitioner expressed his inability to mobilise resources to buy the shares and was ready to dissociate himself on payment of suitable consideration. In the circumstances, a fixed amount was ordered to be paid to the petitioner as fair and equitable settlement towards his equity capital and loans.

In the light of the historical parity that the answering Respondents sought to maintain by dividing the additional shares equally between themselves and the Petitioners, and the division of the supervision of two offices, namely the factory and the sales office, of the respondent company, it can be concluded that the Respondent company was being run in the nature of a quasi-partnership.

Therefore, the participation of both the Petitioner and the answering Respondents in the management of the company happens to be equal in the affairs of the company as a whole. In such a situation where the shareholding structure is the same for both the parties, and where both the parties have

alleged separate acts of oppression and mismanagement against the other, neither of them can be held guilty of oppressing the other. Moreover, both the Petitioners and the answering Respondents have also contended that there exists a deadlock in the management of Respondent company, M/s. Chottanagpur Rope Works Private Limited.

ORDER

Order of preliminary decree is being passed for updation of account and audit and also for valuation of the entire movable and immovable assets of the respondent company. Both the groups of the shareholders are being directed to give the names of an independent auditor and valuer with their consensus within seven days from the date of order, failing which both the groups will be at liberty to give an option to give the names of three independent auditors and valuers so that Tribunal may issue the order, firstly for audit for the financial years 2014-15 and 2015-16 by the Independent auditor and when the audit report comes, then valuation will be done by the valuer and after getting the Valuation Report, both the parties will be given option either to purchase entire shareholding of the respondents or to exit from the company on the same terms and conditions.

16/2/17

(S. Vijayaraghavan)
Member(T)

(Vijai Pratap Singh)
Member (J)

Signed on this 16th ~~the~~ day of February, 2016