

**NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH.**

C.A. No. 266 of 2013 in C.P. NO. 93/397-397/CLB/MB/MAH/2013

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, MUMBAI**

**Company Application No. 266 of 2013  
IN  
COMPANY PETITION NO. 93/397-397/CLB/MB/MAH/2013**

**In the matter of Section 397, 398, 402 & 403 of the Companies Act, 1956  
AND  
In the matter of Kanodia Tex Industries Limited.**

CORAM:

**SHRI M.K. SHRAWAT**  
MEMBER (JUDICIAL)

**Shiv Kumar Kanodia**, of Mumbai Indian Inhabitant,  
Residing at 49, Ameeta Building, 10<sup>th</sup> Floor, Janannath  
Bhosale Marg, Mumbai-400 021.

.... Applicant  
(Orig. Respondent No. 2)

IN THE MATTER BETWEEN :

Pawan Kumar Kanodia, of Mumbai, Indian Inhabitant,  
Having his Office at 313/319, Samuel Street, R. No. 22,  
5<sup>th</sup> Floor, Mumbai-400 003.

... Petitioner.

Versus

1. Kanodia Tex Industries, having its  
Registered Office at 47, Dadyseth Agiary Lane,  
Kalbadevi Road, Mumbai – 400 021.
2. Shiv Kumar Kanodia, of Mumbai, Indian  
Inhabitant, residing at 49 Ameeta Building, 10<sup>th</sup>  
Floor, Jagannath Bhonsale Marg, Mumbai-400 021.
3. Savitridevi Kanodia, of Mumbai, Indian  
Inhabitant, residing at 49 Ameeta Building, 10<sup>th</sup>  
Floor, Jagannath Bhonsale Marg, Mumbai-400 021.
4. Deepak Kanodia, of Mumbai, Indian Inhabitant,  
Residing at 101, Madhuban Building, "B" Wing,  
Worli Hill Road, Worli, Mumbai – 400 018.
5. Alkadevi Kanodia, of Mumbai, Indian Inhabitant,  
Residing at D-401, Panchavati Gardens, Upper  
Govind Nagar, Malad (West), Mumbai-400 097. ....Respondents.

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**PRESENT ON BEHALF OF THE PARTIES**

Learned Advocate Mr. Sharvan Jagtiani ... for the Petitioner.  
Learned Advocate Mr. Mitesh Naik .... for the Respondents.

**ORDER**

**Date of order: 03<sup>rd</sup> May, 2017.**

1. The main Petition (CP No. 93 of 2013) was filed before the then CLB on 10<sup>th</sup> September, 2013. On receiving the Petition the Respondent has challenged the **maintainability** of the Petition by filing an Application (CA-266 of 2013) dated 28<sup>th</sup> September, 2013. The said Application, challenging the maintainability, is at present under consideration.
2. **FACTS OF THE CASE :-** The main reason on the basis of which the Respondent/Applicant has challenged the main Petition was that on account of a **Family Settlement** the Petitioner (stated to be the only representative of the Kailashchand Kanodia Family) had transferred the entire shareholding of the Respondent No.1 Company as a result ceased to have any interest in the Respondent No. 1 Company. For ready reference only the relevant portions of the impugned Application are extracted below :

" (a) *This Petition is filed by the Petitioner under Section 397 and 398 of the Act in respect of Kanodia Tex Industries Limited which is the 1<sup>st</sup> Respondent herein. The Petition is filed on the basis of a false averment by which the Petitioner claims to be the owner of 50% shareholding in the 1<sup>st</sup> Respondent but without producing either the share certificates or even giving particulars of his alleged shareholding.*

(b) *The Petitioner is the son of one Kailashchand Kanodia. Kailashchand Kanodia, Mahavir Prasad Kanodia and Brishbhan Kanodia are brothers. Prior to 1990, the families of Kailashchand Kanodia, Mahavir Prasad Kanodia and Brishbhan Kanodia were joint and carried on joint family businesses, particularly textile business, under diverse partnerships and limited companies including the 1<sup>st</sup> Respondent. In or around 1987, with the downturn in the textile business, the family businesses were adversely*

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*affected and ran into huge losses. The said Kailashchand Kanodia and his family decided to separate out from the joint family businesses including the 1<sup>st</sup> Respondent. It was mutually decided in the business and assets of the 1<sup>st</sup> Respondent.*

- (c) *Thus on November 16, 1990 Mr. Sanjay Kanodia and the Petitioner, who were the children of Kailashchand Kanodia, resigned as directors of the 1<sup>st</sup> Respondent. The Applicant craves leave to refer to the resignation letters dated November 16, 1990 when produced. On November 30, 1990 the Petitioner, who was the only representative of the Kailashchand Kanodia family in the 1<sup>st</sup> Respondent, transferred his entire shareholding to the family members of Mahavir Prasad Kanodia and Brishbhan Kanodia. The Applicant craves leave to refer to the relevant share certificates in that regard. Thus, in terms of the family settlement, the Kailashchand Kanodia family ceased to have any interest in the 1<sup>st</sup> Respondent. Effective November, 16 1990 they ceased to be directors of the 1<sup>st</sup> Respondent and effective November, 30 1990 the Petitioner has ceased to be a shareholder of the 1<sup>st</sup> Respondent.*
- (d) *This Family Settlement between the three families viz. Mahavir Prasad Kanodia, Brishbhan Kanodia and Kailashchand Kanodia who also recorded in a writing dated January 8, 1991, who was signed by the three brothers. This writing, which the **Applicant believes is in the handwriting of the Petitioner**, records the separation of Kailashchand Kanodia and further records that he will not have any interest in the 1<sup>st</sup> Respondent. Hereto annexed and marked Exhibit "A" is a copy of the said record of Family Settlement dated January 8, 1991.*
- (e) *The Petitioner has ceased to have any interest in the 1<sup>st</sup> Respondent since the year 1990. On the date of the Petition, the Petitioner is neither a shareholder nor a member of the 1<sup>st</sup> Respondent. The Petitioner has no locus to maintain this Petition and does not fulfil the qualification contemplated under Section 399 of the Act. The Petition is not maintainable at the instance of the Petitioner. Without prejudice to the aforesaid, it is submitted that the Petition does not even aver that the facts would justify the making of a winding up order on the ground that it was just and equitable that the 1<sup>st</sup> Respondent*

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*should be wound up, but to wind up the 1<sup>st</sup> Respondent would unfairly prejudice its members. This mandatory requirement of Section 397(2)(b) is not even averred in the Petition. On this ground also the Petition is not maintainable and must be dismissed."*

3. On receiving the aforementioned preliminary objection, i.e. the impugned Application, now under consideration, the Petitioner (Respondent to the Application) has filed Reply on 10<sup>th</sup> February, 2014 wherein it was vehemently objected that the Petitioner was not a signatory of the alleged Family Settlement dated 8<sup>th</sup> January 1991, as well as, challenging the authenticity of the said document. The Petitioner has also submitted that being an original Director, he subscribed 21 Equity Shares at the time of incorporation, which constituted 50% Shareholding. It is stated that although the **Petitioner was not in possession of the Share Certificates** but the Respondents have also failed to provide inspection of the relevant documents. For ready reference only relevant portions of the Reply are extracted below :-

*"2. The Answering Respondent's Application contending that the Petitioner is not a member/shareholder in the 1<sup>st</sup> Respondent Company is premised on a family settlement alleged to have been recorded in a document dated 8<sup>th</sup> January 1991. However, the Petitioner is not a signatory to the alleged Family Settlement dated 08 January 1991 annexed and marked as Exhibit A to the Application, and can in no manner be bound by it. The Petitioner challenges the authenticity of the document appended at Exhibit A which in any event does not appear to have been stamped in accordance with law, and is thus and otherwise unenforceable, in law.*

3. *Furthermore, at the hearing held on 16 September 2013, the Answering Respondent had claimed to be in possession of the "Cancelled share certificate" of the Petitioner, which the Answering Respondent has unsurprisingly failed to produce, or annex to his Application. In view thereof, it would follow that such*

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*assertion was false and misleading, and for that reason too, the present Application is liable to be dismissed in limine.*

4. *The contents of Paragraph 1 that the Petition is not maintainable and /or without jurisdiction, are denied. In regard to Paragraph 1.1, it is denied that the Petitioner is not a shareholder of the 1<sup>st</sup> Respondent Company on the date of the Petition and does not possess the necessary qualification under section 399 of the Companies Act, 1956("Act") Significantly, the Answering Respondent does not deny that the Petitioner was an original director of the Respondent No.1 Company, having subscribed to 21 equity shares at the time of incorporation, which constituted 50% shareholding in the Respondent No.1 Company. The Answering Respondent has failed to produce any document in support of its assertion that the Petitioner is not longer a shareholder/ member of the 1<sup>st</sup> Respondent Company. Consequently, interim reliefs cannot be denied merely on the basis of unfounded allegations made in the present Application. In regard to Paragraph 1.2, the procedural allegation that the Petition does not comply with the mandatory requirement prescribed under Section 397(2) (b) of the Act for the Tribunal to exercise jurisdiction is denied. Section 397(2) (b) merely provides the criterion for the Company Law Board to satisfy itself in an application made under sub-section(1) of section 397.*
  
5. *The contents of Paragraph 2 that the Petition is filed on the basis of a false averment that the Petitioner holds 50% shares in the 1<sup>st</sup> Respondent, are denied. It is denied that the Petitioner has not given the particulars of his shareholding. **The Petitioner is not in possession of the share certificates, which are admittedly in the custody of the Answering Respondent.** The Petitioner's shareholding at the time of incorporation of the Respondent No.1 Company is incontrovertibly established by the documents annexed to the Petition, including the Articles of*

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*Association and Memorandum of Association, and the Answering Respondent has failed to either deny the same, or produce any documents that demonstrate any change in circumstances since incorporation.*

6. ....

7. *The Petitioner puts the Answering Respondent to strict proof of the contents of Paragraph 4 that the Petitioner and his brother Sanjay Kanodia resigned as directors of the 1<sup>st</sup> Respondent Company. It is denied that the Petitioner transferred his entire shareholding to the family members of Mahavir Prasad Kanodia and Brishbhan Kanodia. The Answering Respondent, while making these false and baseless allegations in regard to the Petitioner's resignation as a director and/or transfer of shareholding, has failed to produce any documents in support of such allegations. Without any such documents in support, no allegation made by Answering Respondent is liable to be taken cognizance of. It is denied that it was in terms of any alleged family settlement that the Petitioner ceased to have any interest in the 1<sup>st</sup> Respondent Company. It is denied that the Petitioner ceased to be a director or a shareholder, as alleged or otherwise.*

8. ....

9. *The contents of Paragraph 6 that the Petitioner has ceased to have any interest in the 1<sup>st</sup> Respondent since the year 1990, are denied. It is denied that on the date of the Petition the Petitioner is neither a shareholder nor a member of the 1<sup>st</sup> Respondent. It is denied that the Petitioner has no locus to maintain this Petition and does not fulfil the qualification contemplated under Section 399 of the Act. It is denied that the Petition is not maintainable. It is denied that the Petition does not comply with the mandatory requirement prescribed under Section 397(2) (b) of the Act for the Tribunal to exercise jurisdiction. Section 397 (2) (b) merely provides the criterion for the Company Law Board to satisfy itself with in an application made under sub-section(1) of section 397."*

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4. The Applicant/Respondent to the main Petition has thereafter filed Rejoinder on 11<sup>th</sup> September, 2014 and 6<sup>th</sup> October, 2016. The events took place have been narrated, relevant paragraphs reproduced below :-

3. *It is submitted that the Petitioner is not a shareholder of the 1<sup>st</sup> Respondent on the date of the Petition and does not possess the necessary qualification under S.399 of the Companies Act, 1956 ("the Act") to file this Petition. The Petitioner has not locus to maintain this Petition. The Petition does not even aver the mandatory requirement prescribed under S.397 (2) (b) of the Act, which is a sine qua non before this Hon'ble Tribunal can exercise any jurisdiction.*

4. *On January 8, 1991 the Petitioners' branch, represented by his father Mr. Kailashchand Kanodia entered into a written Family Arrangement with the 2<sup>nd</sup> Respondents' branch represented by his father Mr. Mahabirprasad Kanodia and the third branch of his family members. The Family Arrangement inter alia provided for the following:-*

*a. The Petitioners branch of the family will be entitled to the premises at 2<sup>nd</sup> floor, 47, Dadiseth Agiary Lane, Ashok Bhavan; 3 rooms in which the Petitioners were staying and the 2 rooms on the 3<sup>rd</sup> Floor. The Respondent No.2's branch & 3<sup>rd</sup> branch of the Family will have no right title or interest in these properties.*

*b. That the Petitioners branch of the family will not have any right, title or interest in (i) Family firm of M/s. Nanduka Dyeing and Printing Mills; (ii) Nandlal & Sons; (iii) Shree Kanodia Fabrics; (iv) Kanodia Tex Industries Pvt. Ltd. (The Respondent No. 1 Company); and (v) Agarwal Textiles.*

*c. The Petitioners branch of the family will not have any right on (i) office on the 2<sup>nd</sup> Floor at Dadi Seth Agiary Lane, (ii) Badlapur*

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*Factory; )iii) Ameeta Building; and (iv) premises at 57, Dadiseth Agiary Lane office.*

*A copy of the Family arrangement along with hindi typed version and along with the translation thereto is collectively marked as Exhibit A to the Comopany Application. The said Family Arrangement, by which the shares in the Respondent No.1 company had been transferred to the 2<sup>nd</sup> Respondent, has been time and again acted upon by the Petitioner and his branch of the family. This is evidenced by the following:*

- a. On November 15, 1990, Kailashchand Kanodia t(the Petitioner's father) addressed letters intimating his retirement from the partnership firm of Nanduka Dyeing and Printing Mills in furtherance of the Family Arrangement to the balance three partners. Copies of these letters dated November 15, 1990, along with Registered A/D envelopes are hereto annexed and collectively marked **Exhibit 'A'**;*
- b. On February 14, 1991 Mr. Kailashchand Kanodia addressed another letter to the Central Bank of India intimating his retirement from the said firm of Nanduka Dyeing. A copy of the said letter dated February 14, 1991 is hereto annexed and marked **Exhibit 'B'**.*
- c. The fact of the retirement as stated above was also recorded in the order of the Bombay High Court dated October 9, 1992 in Notice of Motion No. 2098 of 1992 in Suit No. 2727 of 1992. A Copy of the Order of the High Court dated October 9, 1992 is hereto annexed and marked **Exhibit 'C'**.*
- d. On November 15, 1990, Kailaschand Kanodia (the Petitioner's father) addressed a letter intimating his retirement from the partnership firm of M/s. Shree Kanodia Fabrics in furtherance*

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*of the Family Arrangement. A copy of the said letter dated November 15, 1990, along with Registered A/D envelopment is hereto annexed and marked **Exhibit 'D'***

- e. *On February 14, 1991 Mr. Mailashchand Kanodia addressed two letters to the State Bank of India and Central Bank of India intimating his retirement from the said firm of Shree Kanodia Fabrics. A copy of the said letter dated February 14, 1991 to State bank and Central bank is hereto annexed and marked **Exhibit 'E-1' and Exhibit 'E-2'** respectively.*
- f. *On November 15, 1990 Kailashchand Kanodia (The Petitioner's father) addressed letters intimating his retirement from the partnership firm of M/s. Nandlal & Sons to both the remaining partners in furtherance of the Family Arrangement. Copies of the said letters dated November 15, 1990 along with registered A/D envelopment are hereto annexed and collectively marked **Exhibit 'F'**.*
- g. *On February 14, 1991 Mr Kailashchand Kanodia addressed a letter to the Central Bank of India and State Bank of India intimating his retirement from the said firm of Nandlal & Sons. A copy of the said letter dated February 14, 1991 to the Central Bank and State Bank is hereto annexed and marked **Exhibit 'G-1' and G-2** respectively.*
- h. *Another letter dated April 15, 1991 was addressed by the Petitioner to Central Bank of India intimating his retirement from the said firm M/s. Nandlal and Sons. An acknowledged copy of the said letter dated April 15, 1991 is hereto annexed and marked **Exhibit 'H'**.*

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- i. On December 23, 1991 Kailashchand Kanodia addressed a letter surrendering his right in the rooms in 47, Dadi Seth Agiary Lane in favour of the Landlord in furtherance of the understanding in the family arrangement. Copies of the letters dated December 23, 2016 are hereto annexed and marked **Exhibit 'I-1 and 'I-2'.***
- 5. It is submitted that since the Petitioner has, time and again of the acted upon and in furtherance of the Family Arrangements, the Petitioner is estopped from contending that it is false and/or not authenticated. **The Family Arrangement has been hand written by the Petitioner in his handwriting. The handwriting of the Petitioner as reflected in the said Family Arrangement was examined by an independent Forensic Document Examiner Hiralal Mehta. By her Report dated September 11, 2014, she has certified that the handwriting as reflected in the Family Arrangement dated January 8, 1991 is the handwriting of the Petitioner. Hereto annexed and marked Exhibit 'J' is a copy of the said Report of the handwriting expert dated September 11,2014.***
- 6. It is pertinent that, **Sawarmal Lohia, who was also one of the witnesses to the said Family Arrangement dated January 8, 1991 filed an affidavit dated January 10, 1995 before the Hon'ble Judge, Cooperative Court No.1 in Case No. CC/I/1267/1994 stating that he has also signed the said family arrangement as a witness. The Petitioner's father Kalashchand Kanodia is the Disputant in the said proceedings. A copy of the said Affidavit dated January 10, 1995 filed in the Cooperative Court is hereto annexed and marked Exhibit 'K'.***
- 7. Similarly the Petitioner had, in pursuance of the aforesaid Family Arrangement, transferred all its shares in Kanodia Tex Industries Pvt. Ltd. in favour of Shiv Kumar Kanodia, Deepak Kanodia and their family*

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members. The inspection and copies of these share certificates were given to the Petitioner on April 1, 2014. The copies so given by Respondent are attached to the Additional Affidavit dated July 19, 2014 filed by the Petitioner. The Petitioner has been given due inspection of the said share certificates. The aforesaid share transfer had also been recorded in the minute book of the Company. Hereto annexed and marked **Exhibit 'I'** is a copy of the extract of the Minute Book Register maintained by a Company recording the aforesaid Share Transfer.

8. Accordingly, the **Requisite entries were also made by the Respondent No.1 in its Register of Members.** Hereto annexed and marked **Exhibit 'M'** is a copy of the relevant portion of the Register of Members recording the transfer of shares by the Petitioner and the relevant details thereof.

9. The Petitioner and his younger brother Mr. Sanjay Kumar Kanodia had also, by their letter dated November 16, 1990 resigned from the Directorship of the Respondent No.1 Company. The said resignation letters along with registered A/D envelope of the Petitioner and Mr. Sanjay Kumar Kanodia are hereto annexed and marked **Exhibit 'N' and 'O'** respectively.

10. The Petitioner has, through his advocate submitted a list of five documents dated August 9, 2001 in the Court of Chief Judicial Magistrate, Thane in CC No. 288/94 which includes the said resignation letter dated November 16, 1990. Hereto annexed and collectively marked **Exhibit 'P'** is a copy of the said list of documents dated August 9, 2001 along with the attachments thereto. He has in the very same proceedings filed an Application dated August 5, 2004 wherein he has himself relied on his resignation from the Respondent No.1 Company. Hereto annexed and marked **Exhibit 'Q'** is a copy of the said Application dated August 5, 2004. The Petitioner has also, in the above proceedings, filed an application dated May 3, 2001, wherein he has stated that he

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*has no connection with the Complaints. Hereto annexed and marked **Exhibit 'R'** is a copy of the said Application dated May 3, 2001.*

11. *This resignation was also recorded in the Directors Report for the year ended March 31, 1990. A copy of the said Directors Report is hereto annexed and marked **Exhibit 'S'**. It is submitted that the fact that the Petitioner had resigned from the Respondent No.1 Company has been time and again been asserted by the Petitioner in various proceedings before other forums.*
12. From the side of the Petitioner (Respondent to the Application) an Additional Affidavit is also on record filed on 21<sup>st</sup> July, 2014 wherein it was reiterated that the Petitioner had sought inspection of all those documents which were relied upon by the Respondent, but the allegation is that the inspection was not provided. The Petitioner wanted the inspection of the following documents.
- a. Alleged Original Resignation Letters dated 16<sup>th</sup> November 1990 of Mr. Pawan Kumar Kanodia and Mr. Sanjay Kumar Kanodia;*
  - b. Alleged Original Share Certificates of the Respondent No.1 bearing nos. 13 to 19 in the name of the Petitioner;*
  - c. Alleged Copy of the Family Settlement dated 08<sup>th</sup> January 1991.*
- 5.1 The Petitioner has also stated in the said Affidavit in Reply that the Respondent had produced only 1,300 Share Certificates although the admitted factual position was that 1800 Shares were allotted. As a result, when the Respondent failed to produce the entire Share Certificates and balance 500 Share Certificates remained to be produced, hence the natural outcome is that the Petitioner continued to be Share Holder of the Respondent No.1 Company.
6. **ARGUMENTS OF THE APPLICANT :-** From the side of the Applicant (Respondent to the main Petition ) Learned Advocate Mr. Mitesh Naik appeared and pleaded that a Family Settlement was executed on 8th of January, 1991, according to which, the Petitioner and his Family Members had agreed not to have

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any relation in **Kanodia Tex Industries Limited** in lieu of entitlement on certain immovable properties. Learned Advocate has pleaded that the said document in question was written in the Handwriting by non other than the Petitioner himself. Number of steps have been taken after the said Family Settlement and the Petitioner is one of the beneficiaries of the terms of the said Family Settlement. He has clarified that the process of the Family Settlement was going on since 1990 however, it was recorded in writing on 08.01.1991. The sequence of events and steps taken, as happened in the year 1990, have duly been recorded in an Affidavit filed by the Applicant to demonstrate that Mr. Kailashchand Kanodia, father of the Petitioner, had intimated his retirement from the Partnership Firms and also written Letter on 14<sup>th</sup> February, 1991 to the Banks intimating his retirement from the Firms. The Petitioner should therefore, be estopped from not honouring the said Family Settlement. Even the younger brother of the Petitioner Mr. Sanjay Kumar Kanodia had also written a Letter on 16<sup>th</sup> November, 1990 through which resigned from the Directorship of the R-1 Company. The Family Members of the Applicant/**Respondents to the main Petition** viz. Mahavir Prasad Kanodia, Shiv Kumar Kanodia (R-2) and Deepak Kanodia (R-4) have **surrendered their rights in the Family Property** to comply with one of the condition of the said Family Settlement that second floor of 47, Dadiseth Lane, Ashokvan having 3/5 Rooms in which the Petitioner along with his Family Members was staying shall remain with the Family Members of Kailashchand Kanodia and on those 5 Rooms the Family Members of Mahavir Prasad and Brishbhan shall have no right. Learned Advocate has placed before me **a torn page of the Minute Book** stated to be written in due course when the said Settlement was acted upon. A Resolution was passed accepting the Resignation of the Family Members of Kailashchand Kanodia. It was recorded/ resolved that the Resignation was given by Mr. Pawan Kumar Kanodia (Petitioner) and his brother Sanjay Kumar Kanodia stated to be effective from 30<sup>th</sup> November, 1990. It was also recorded that, their respective Resignations would also be forwarded to the Registrar of Companies, Maharashtra. In the said Resolution it was also recorded that the Company had received 5 Transfer Deeds from Pawan Kumar Kanodia for transferring his entire Share Holding in the Company. My attention was drawn on the **Register of Members** to demonstrate that the requisite transfer of shares was duly recorded. As a result, the entire

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Share Holding of Pawan Kumar Kanodia, thus got transferred in favour of the Family Members of Shiv Kumar Kanodia. There was a Letter addressed by Pawan Kumar Kanodia to the Branch Manager, State Bank of India, dated 15<sup>th</sup> April 1991 wherein Mr. Pawan Kanodia had informed his resignation and requested the Bank to discharge him from "Liability" or "Personal Guarantee", if any, as on 16<sup>th</sup> November, 1990. My attention had also been drawn on a Letter of Mr. Pawan Kanodia dated 15<sup>th</sup> April, 1999 addressed to Regional Office, MPCB Board, Kalyan wherein it was informed that the signatory had **no connection with Kanodia Tex Industries and have resigned 8 years ago**. In short Learned Advocate has pleaded that on the date when the Petition was filed, the Petitioner was not a Share Holder of the R-1 Company, therefore the Petition in question is not 'Maintainable' thus deserves to be dismissed at this preliminary juncture.

- 6.1 In support of the arguments raised, challenging the maintainability of the Petition, certain case laws have been cited by the Applicant as under :-
- (a) Madakuwar Rekhcandji Parakh & Others V/s Sushila Gyanchand Katariya and Another (2016(4) Bom.C.R. 100, for the legal proposition that the Family Arrangements have "binding effect".
  - (b) Hari Shankar Singhania & Others V/s Gaur Hari Singhania & Others (AIR 2006 Supreme Court 2488) for the legal proposition that rule of "estoppel" applies on the Descending Family Members not to challenge enforceability of a Family Arrangement.
  - (c) Murat Viniyog Limited V/s Bijay Kumar Kajaria and Others (2011 SCC Online Cal. 1568 for the legal proposition that the contemporaneous rectification of the Register of Members by the Company is to be taken into consideration.
  - (d) Balakrishnan Gupta and others V/s Swadeshi Polytext Ltd. and another (AIR 1985 Supreme Court 520) for the legal proposition that a person ceases to be a member by transferring his shares to another person by transmission of his shares by operation of law, by forfeiture of shares, by death or by any other reason known to law.
7. **ARGUMENTS OF THE RESPONDENT:** - From the side of the Respondent ( Petitioner of the main Petition ) Learned Advocate Mr. Mitesh Naik appeared and

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at the outset objected the manner in which reliance was placed on the Family Settlement of the year 1991. According to him, the alleged transfer of shares took place in the year 1990, hence the alleged transfer of shares had nothing to do with the said Family Settlement. According to him, the alleged transfer is also in dispute but the fact remained as it was that the Petitioner was one of the Promoter/Director since inception of the incorporation of the Company. Placing reliance on the contents of the main Petition, Learned Counsel has pleaded that the Petitioner was holding 21 Equity Shares in the Respondent No.1 Company which had never been disturbed or transferred. His next limb of argument is that the Applicant had not given the account of the balance 500 Shares. Only 1300 Shares have been described, as a result the Petitioner was having 500 Shares in R-1 Company, therefore, legally entitled to submit the Petition. The next legal argument is that as per the provisions of **Section 108 of the Companies Act, 1956** it is prescribed, "Transfer not to be registered except on production of Instrument of Transfer". Learned Advocate has emphasized that a Company shall not register a Transfer of Shares unless a proper Instrument of Transfer executed by the Transferor specifying the name of the Transferee has been delivered to the Company along with the Share Certificates. It is therefore pleaded that, in the absence of the Share Transfer Deed the claim of the Respondent is baseless. He has pleaded that the Respondents have conspired and changed the Share Holding Pattern without informing the Petitioner. Surreptitiously the holding was diluted from 50% to 23.62%. It was an accepted fact that the Petitioner was holding 1800 Equity Share out of the total 7620 Equity Shares. In spite of the fact that the Petitioner was a Director, no information was provided with regard to the issuance of Additional Shares to the Family of Shiv Kumar Kanodia (Respondents). The Petitioner was harassed by the Respondents to procure his Resignation in and around 1990. By undue influence and false promises the Resignation was demanded. Such nature of resignation letter should not be recognised in law.

- 7.1 On the validity of the Family Agreement dated 08.01.1991 the Learned Counsel has pleaded that the impugned document in question was not written on any "Stamp Paper" but written simply on a "Piece of Paper", thus had no legal value in the eyes of law. The terms and conditions of the said Agreement are not binding on the Petitioner because he was **not a signatory** of the alleged Family

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Settlement. Nevertheless, the Petitioner wanted to inspect the documents in original on which the Respondents have placed reliance, such as Original Resignation Letter dated 16<sup>th</sup> November, 1990 of the Petitioner and Sanjay Kumar Kanodia, Family Settlement dated 08.01.1991 and the Original Share Certificates etc. However, the Petitioner had never been given opportunity by the Respondents to examine those important documents. In support reliance was placed on the following decisions :-

- (a) Mahadei Kunwar V/s Padarath Chaube and Another 1937 Manupatra 610 decided on 29<sup>th</sup> April, 1937 for the legal proposition that a Family Arrangement through which immoveable property was transferred, not a valid document for want of Registration of the Document.
- (b) Vijayan Rajes and Another V/s MSP Plantations P. Ltd. and Others (2009) 151 Comp Cas 413 (Karn.) for the legal proposition that in a situation the Company is allotting shares to near relative and regulating the other affairs to benefit the family members then the company intends to be run as a family concern which is not permissible.
- (c) J.P. Srivastava & Sons (P) Ltd. and others V/s Gwalior Sugar Co. Ltd. and others (2005) 1 Supreme Court Cases 172 for the legal proposition that although restriction imposed in Sec. 397 to ensure that frivolous litigation be avoided but such matter also be decided on a broad common sense approach if involvement of the Company is lightly in nature. Substance must take precedence over form.
- (d) Scottish Co-operative Wholesale Society Ltd. V/s Meyer and Another (1959) House of Lords 324 for the legal proposition that the purpose of legislature is to put an end to the matters complained.
- (e) Mannalal Khetan V/s Kedar Nath Khetan (AIR 1977 Supreme Court 536) for the legal proposition that if an act is prohibited by statute then such contract or transfer is not operative in law. Unless a proper Instrument of Transfer duly stamped, registered and executed by the Transferor is not available, such document is not enforceable.

8. **FINDINGS :-**

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Arguments of both the sides have been heard at length. The main Petition along with the Application under consideration are duly perused. The other connected pleadings, Reply, Rejoinders etc. have also been carefully examined in the light of the evidences placed on record. A Petition had been filed on 18<sup>th</sup> of September, 2013 by Shri Pawan Kumar Kanodia son of Shri Kailashchand Kanodia. The Petitioner is one of the member of the Family of Shri Kailashchand Kanodia, on one hand. On the other hand, Shiv Kumar Kanodia, Deepak Kanodia, Smt. Savitridevi Kanodia are members of the branch of another family headed by Mahavir Prasad Kanodia, (all are Respondents of the main Petition ). The Petition had been filed under the old provisions of the Companies Act under Sections 397 and 398 of the Act. One of the main relief sought by the Petitioner is to reinstate the shareholding of the Petitioner to 50% in the Respondent No. 1 Company.

- 8.1 The Petitioner has stated that since incorporation he had 21 Equity Shares and is one of the Director of the R-1 Company. The allegation of the Petitioner is that his 50% Shareholding was diluted to 23.62%, hence seeking relief to restore the original percentage of the shareholding.
- 8.2 On the other hand, the Respondents have challenged the maintainability of the Petition on the ground that the Petitioner was not holding a single share on the date when the Petition was filed in the year 2013. The background of the legal question of "maintainability" starts from the year 1990 and 1991 when the families have decided to enter into a Family Settlement. Along with the impugned Application (CA-266/2013 in CP No. 93/2013) a copy of the **Family Settlement dated 08.01.1991 is annexed**. The Applicant has stated that there was Family Settlement amongst the three brothers viz. Mahavir Prasad Kanodia, Kailashchand Kanodia and Brishbhan Kanodia. Prior to 1990 the elders were jointly carrying out the family business of Textile. The said business was run by the Registered Firms and by the Company. There were losses in the business hence Kailashchand Kanodia (father of the Petitioner) had decided to segregate from the Joint Family Business. To act upon the process of segregation certain steps were taken and on completion of the legal formalities of separation, the Petitioner's father had executed a Family Settlement declaration/deed dated 08.01.1991, claimed to have been written by the Petitioner ( Sri Pawan Kumar Kanodia ) in his own handwriting.

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8.3 The main contents of the Settlement Deed are two fold. As per clause 1 there was a description of immovable property (*described as Second floor 47, Dadiseth Agiary Lane, Ashok Bhavan, the three rooms in which we are staying and two rooms on third floor are ours. In these five rooms you (Mahavir Prasadji) and Brishbhan will have no right. We can do anything with these rooms, whether rent out or sell.*) It is clarified that since the said **Deed was written by the Petitioner for the family of Shri Kailashchand Kanodia** therefore, he has used the term "we" representing Kailashchand Kanodia, his wife Geetadevi and two sons **Pawan Kanodia** and Shri Sanjay Kanodia. The said property had thus fallen into the bucket of assets of the family of **Kailashchand Kanodia, whose son Shri Pawan Kanodia is the Petitioner.**

8.4 As per clause 5 of the said Settlement, the family of Kailashchand Kanodia, in lieu of the property, bequeathed their right/interest in certain firms and the company written as (*we will not have any relation with Nanduka Dyeing & Printing Mills, Nandlal & Sons, Shri Kanodia Fabrics, Kanodia Tex Industries Pvt. Ltd., Agarwal Textiles, meaning we will not have any give and taken in the above firms. We will not have any contact or responsibility with Khata-Peta, Bank, Market*). It is reiterated that the term "we" represented Mr. Kailashchand Kanodia and his family members.

On one more property i.e. Office on Second floor Badlapur factory, the family of Kailash Chand Kanodia had agreed not have any right.

The explanation of the Applicant is that it was mutually agreed upon by the elders of the Family Members that one group shall retain the residential portion in which living with the family members, however, rest of the brothers shall take the charge of the firms , company and office premises.

8.5 To demonstrate that the terms of the Family Settlement were in fact implemented in **letter and spirit**, certain documents/evidences are placed on record. On 15<sup>th</sup> November, 1990 Shri Kailashchand Kanodia father of the Petitioner addressed a letter intimating his retirement from the Partnership Firms. On 14<sup>th</sup> February, 1991 he had written a letter to the Bank and intimated his retirement from the Firm. There are few other letters written to Bank Authorities declaring his intention

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of retirement from the firm. Likewise, brother of the Petitioner viz. Shri Sanjay Kumar Kanodia had written a letter dated 15<sup>th</sup> November, 1990 intimating his resignation from the Directorship of R-1 Company. My attention was also drawn on a letter of 15<sup>th</sup> April 1991 written by the Petitioner himself to Central Bank of India intimating his retirement from the firm M/s Nandlal & Sons. Further, vide a letter dated 16<sup>th</sup> November, 1990 Shri Pawan Kanodia (Petitioner) had resigned as a Director of R-1 Company.

From the side of the Respondent an Affidavit has been filed in support of the Application filed, now under consideration, wherein number of evidences were annexed to demonstrate that the said Family Settlement was acted upon by the Family Members including the Petitioner himself. One of the document annexed is 'Register of Members' to demonstrate that Pawan Kumar Kanodia had transferred his total share holding in favour of the family members of Shivkumar Kanodia. My attention was drawn on a letter dated 15.04.1999 written by Pawan Kanodia (Petitioner) addressed to the Chief Judicial Magistrate, Thane Court, Thane and copy to Member Secretary, Maharashtra Pollution Board to answer a Notice issued in connection with Water Pollution by Respondent No.1 Company. In the said letter the Petitioner has clearly stated that since more than **8 years after his resignation he had no connection whatsoever, w.e.f. 16.11.1990 with M/s. Kanodia Tex Industries**. One of the document i.e. Form No. 32, stated to be submitted before Learned ROC was in respect of the Intimation of the Resignation of Shri Pawan Kumar Kanodia from the Company viz. Kanodia Tex Industries Private Limited.

- 8.6 A fundamental question has been raised by the Respondents/Applicant that in a situation when rest of the terms and conditions of the said Family Settlement have been agreed upon, as well as acted upon by the concerned family members then the Petitioner had no *locus standi* to submit the main Petition staking claim in the R-1 Company. It has also been challenged that the Petitioner otherwise had accepted the terms of the Settlement in respect of rest of the properties, but chosen to be selective in not accepting the rest of the terms and conditions. The Petitioner should have accepted the said settlement **in toto and not partially**. Once it was agreed upon that the Family Members of Kailashchand Kanodia shall

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have no interest, whatsoever, and shall not "give and take" from the Firms and the Company then it is ethically wrong to stake claim in the R-1 Company by the Petitioner.

Learned Advocate of the Applicant has raised a question that whether the legality of the possession over the Residential Accommodation, Transfer of Telephone and one car had ever been questioned or challenged by the Petitioner? The reason said to be was that whatever was beneficial to the Petitioner had not been questioned by him. As far as the Petition is concerned, it is silent. Nevertheless, the settled position is that if one part of a "Settlement" is acted upon then it is deemed that rest of the part of the Agreement/Settlement is also agreed upon. It is not permissible to adopt the policy of ' **pick & choose** ' which is more beneficial.

It appears that by filing this Petition, the Petitioner is now trying to re-enter into the affairs of the Company, although he had earlier resigned and the shares have also been transferred. The fact of transfer of shares and the fact of resignation was duly intimated to the concerned authorities including ROC. Neither legally nor ethically it is permissible to take "U Turn" at this stage when number of other actions/ steps have already been taken, as well as implemented upon, by the either sides to fulfil their part of commitment as agreed upon while signing the "Settlement Deed".

- 8.7 This Petition is admittedly filed in the year 2013 and not immediately after the Settlement was signed in the year 1991. The Petitioner is aware of this fact, hence under the column "Limitation" declared that, quote *"in view of the Kanodia Families unanimous decision to partition family assets and business, which was concluded in the year 2012"*, unquote, so as to justify the delay. This admission itself suggest that there was a family settlement which was carried out for number of years and concluded in the year 2012. Presently we are not on the question of legality of the provisions of "Limitation Act", still worth to mention that the settlement executed in the year 1991 was as it was at it's place, however, the execution part was carried out in the subsequent years. If rest of the terms of the settlement have been honoured by the either side, then it is obligatory on the part of the Petitioner to honour Clause 5 of the said Family Settlement.

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- 8.8 The Petitioner has challenged the authenticity of the said document. But that doubt had also been cleared by seeking report of handwriting expert namely **Mr. Hiralal Mehta ( Forensic Document Examiner )** who had certified that the **said settlement was written in the hand-writing of the Petitioner.**

Further, one **of the witness of the said Deed viz. Shri Sawarmal Lohia** had also been examined who had affirmed that the existence of the said Settlement Deed. Therefore, it is worth to make a remark that '**much water had flowed under the Bridge**' since the said Deed was documented, hence it is improper and very late on the part of the Petitioner to raise issues which may thwart the basic intent of the "Settlement" amongst the family members. At present it is pointless to change the past because long time ago number of events have taken place and actions taken in recognition the Family Settlement which should not and could not be un-done now.

- 8.9 Another legal question has been raised that in the absence of Share Transfer Deed the Company made a mistake is rectifying the Register of Shareholders. On perusal of the contents of the said Register it was noticed that the date at which Mr. Pawan Kanodia ceased to be a Member was 30<sup>th</sup> November, 1990 and that information was furnished to the ROC Office. Although it is correct that the provision Section 108 of the Old Act prescribe that a company shall not register a Transfer or Share unless a proper Instrument of Transfer is in possession of the Company, however, a suspicion is that why the Petitioner had not objected much earlier the said rectification of Register of Members if he had any interest in the affairs of the Company. Rather the facts revealed that he had resigned as a Director on 16<sup>th</sup> November, 1990. **The corroborative evidences are so strong that the objection of the Petition appears to be ill founded.** An extract of the Minutes, although in shambles and torn state, describe that the Company had received 5 Transfer Deeds from Pawan Kumar Kanodia for transferring his entire shareholdings. Another fact also has a direct bearing on this controversy the why the original share certificates are not in the possession of the Petitioner ? The Petitioner had admitted that the original share certificates are not in his possession. A general practice is that when an asset is transferred/sold/ alienated then the owner hand over the possession of the original Title Deeds to the Purchaser.

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Therefore, I am of the conscientious view that a judicial decision depends on the totality of the facts and circumstances of the case. It is not judicially correct to pick and choose one segment of an event. As a result, it can be safely believed that in a situation when rest of the requirements of the Transfer of the Shares have been fulfilled then merely on the basis of doubts raised it is not legally correct to question the Transfer of Shares.

- 8.10 A legal question has also been raised that why this Settlement Deed was simply on a Paper and not on a Stamp Paper. It has also been questioned that why no Stamp Duty had been paid ? The Respondent/Petitioner had placed reliance on the decision of Mannalal Khetan (supra) and Mahadei Kunwar (supra) that unless a proper instrument of Transfer duly stamped and executed by the transferor the same is prohibited by statute and to be treated as void. To answer this question, my attention is drawn on the fact that the immoveable properties in question have not changed hands. The family of Kailashchand Kanodia were residing in the 5 Rooms, used as residential accommodation. Since there was no transfer or exchange or alienation and since there was no sale hence there was no question of payment of Stamp Duty. The respective parties already in physical possession have retained their right over that very property, as a result, there was no question of payment of Stamp Duty.
- 8.11 In the case of J.P. Shrivastav and Sons V/s Gwalior Sugar Company (2005) 1 Supreme Court Cases 172 an observation has been made that the object of prescribing a qualified percentage of shares under section 397 and 398 is clear to ensure that frivolous litigation to be avoided. Only real stake holder in the Company should be allowed to indulge in the affairs of the Company. Undoubtedly, this condition does help in curtailing uncalled for litigation. If a party to the litigation raises an objection about the requisite number of shareholding then the Petitioner is under a strict obligation to place on record sufficient evidence to demonstrate his percentage of shareholding so as to validate the filing of the Petition. In the present case the Petitioner has not discharged his part of onus which had caused a serious doubt on the maintainability of the Petition. In the case of Murat Viniyog Limited V/s Bijay Kumar Kajaria (supra) a view has been expressed that if contemporaneously action have been taken such as Rectification





of the Register of the Company then the Court has to go by the action taken as also to acknowledge the contemporaneous steps taken. As already expressed supra the action taken by the Respondents do not cast any doubt on those *bonafide* steps taken to carry-out the intent of the family settlement.

- 8.12 In the case of Madankuwar Rekhchandji Parakh V/s Sushila Gyanchand Katariya (supra) certain guidelines have been issued to examine a controversy in which Family Arrangement is in question. To put the binding effect of a Family Settlement it is prescribed that the Family Settlement must be a bonafide one so as to resolve family disputes. A settlement should display a fair and equitable division of properties between the rival members of the family. Such settlement must not be obtained by inducement of fraud, coercion or undue influence. The settlement must be voluntary on the part of the signatories. As far as the facts of this case are concerned, there is no such allegation that the settlement was procured by adopting any of the illegal means. The same proposition is laid down in the case of Needle Industries (India) Limited (supra).
9. In the light of the foregoing discussion as well as on examining of the facts along-with the case laws it is evident that the Petitioner has not proved to the hilt the ownership or the possession on the requisite number of shareholding on the date of filing of the impugned Petition. The law is unambiguous that if the Petitioner had failed to demonstrate the requisite number of shareholding as prescribed under the law then debarred by operation of law to pursue such Petition. Elders of the family have taken a decision way back in the year 1990/1991 for the welfare of the members, hence the heir- successors are duty bound to honour the decision of the elders. In the present case I hereby hold that in the absence of undisputedly establishing the holding of shares of R-1 Company with the Petitioner on the date when the Petition was filed, he is not entitled to pursue the Petition in question being not maintainable on account of non-fulfilment of condition precedent. As a consequence the Petition (C.P. No. 93/2013) is dismissed in limine. The Application (C.A. No. 266/2013) filed by the Respondents is allowed. No order as to costs. Registry is directed to consign the pleadings to the Record.

**Date: 03<sup>rd</sup> May, 2017.**

**M.K. SHRAWAT**   
**MEMBER (JUDICIAL)**