NATIONAL COMPANY LAW TRIBUNAL: ALLAHABAD

Company Petition No. 115(ND) of 2012

Dated MONDAY THE 19th DAY OF DECEMBER, 2016

CORAM: Mr. V.S.R. AVADHANI & Mr. H.P. CHATURVEDI

(Judicial Members)

In the matter of M/s Nirvan Hospitals Private Ltd

Between

1. Smt. Hema Dhapola

2. Shri S. S. Dhapola

...Petitioners

AND

1. M/s Nirvan Hospitals Private Ltd,
A company Incorporated under the provisions of the Companies Act 1956 and having its Regd Office at Pushpi Plaza, Ismail Ganj, Faizabad Road, Lucknow - 226001 (UP)

2. Shri Harish Kumar Agarwal

3. Smt. Shubhra Agarwal

4. Shri Kishan Lal Agarwal

...Respondents

Claim: Petition under Sections 397, 398 read with Sections 402, 403 and 406 of the Companies Act, 1956

Shri Ashish Kumar Srivastava, Advocate for the Petitioner

Shri Amarendra Nath Tripathi, Advocate for the Respondents

The Company Petition came before us for hearing on various dates and finally on 26.10.2016 in the presence of the Advocates for both parties and having heard the oral arguments and after considering the written arguments and the material on record, the Bench delivers the following:

ORDERS

(Per Mr. V.S.R. Avadhani, Judicial Member)

1. The Company Petition is filed under Sections 397 and 398 read with Sections 402, 403 and 406 of the Companies Act, 1956 for diverse reliefs on the grounds of oppression and mismanagement, among the other main reliefs namely, for removal of the Respondent No. 4 from the Board of Directores of the Company, to declare allotment of 31000 equity shares on 12.4.2011 as void ab initio and declare the For 32 filed with the ROC on various dates and to declare that any decision taken by the Respondents 2 to 4 in any meeting of the Board without notice to and participation of the Petitioners has null and void.

(i) The Company was incorporated on 7.12.1998 and after withdrawal of some of the promoters the company is continued with 4 persons -petitioners and the Respondents. Both the groups maintain 50:50 holding in the capital of the Company. In course of time, the terms between the groups became scrawny and the petitioners are hurling accusations against the Respondents' group. The situation has become aggravated with the Respondents' group inducting the Respondent No.4 as Additional Director, stated to be without any resolution of the Board on 11.4.2011; and on 12.4.2011 the Respondents have allotted 31, 000 shares to their family members without any obtaining authority from the Board and without offering 50% of the enhanced capital to the Petitioners' groups. It is alleged, this was with malafide intention of reducing the Petitioners' group to minority.

(ii) However, some wisdom might have prevailed on both the groups that resulted in their entering into a Memorandum of Understanding (MOU) on 10.4.2011 and appointing Arbitrator *Sri K.M. Mittal* to whom the Petitioner No. 2 is said to have given his undated resignation letter and on the basis of that letter, the Petitioner No. 2 was removed from the Board and the information was filed with ROC on 22.8.2011. It is alleged that the proceedings of the Arbitrators were held in a very casual manner and no minutes were drawn by them. In pursuance of arbitration clause incorporated in the MOU the Respondent No.2 applied to the High Court for appointment of Arbitrator and with the consent of both parties, the High Court appointed *Shri Justice U.K. Dhaon* (Retd) on 10.9.2013. The Petitioner No. 1 also filed a civil suit in Lucknow questioning the legality and enforceability of the MOU and later both the Petitioners filed the present Company Petition claiming the relief on the complaint of acts of oppression and mismanagement by the Respondents' group.

(iii) The major charges levelled against the Respondents to substantiate the grounds urged in the Company Petition are indicated in the forthcoming paragraphs of the Order, wherever they are relevant. The Respondents flatly deny every allegation and have taken serious objections on the sustainability of the Petition on the grounds that: (i) The Petitioners have submitted to the jurisdiction of Arbitrator and the disputes are already before the Arbitrator appointed by the High Court even prior to the filing of this Petition: (ii) that a civil suit is also pending at the instance of the Petitioner No.1 in which almost all the grounds taken in the Petition are canvassed and this Petition is therefore affected by sub-judice; and; (iii) The grounds alleged in the Petition said to be acts of oppression and mismanagement, in fact and in law does not constitute such acts sufficient to order winding up of the Company.

(iv) Having heard the extensive arguments addressed at the bar and after conscientiously verifying the facts and circumstances present in the case as per the documents filed by both sides, we adjudicate upon the disputes as follows:

II. Question No. 1. Whether the Company Petition is not maintainable in view of pending Arbitration before *Shri Justice U.K. Dhaon* (Retd)?

We shall examine the above question from two points of view, namely-

(i) What is the effect of MOU; and

(ii) What is the impact of constitution of Arbitral Tribunal under Section 11 of the Arbitration and Conciliation Act 1996 on the Company Petition?

(i) There is no dispute about the execution of the MOU between the two groups. The said document is at page 31 of the Respondents' Reply paper Book. In the Petition the Petitioners have admitted at para (19) that the decision on the appointment of Arbitrator is awaited. The present Petition is filed on 13.9.2012 before the Company Law Board whereas the High Court appointed the Arbitrator on 10.9.2012 itself as can be seen from the order placed at page 43 of the Reply.

(ii) The contention of the Respondents is that in view of the dispute already referred to the Arbitrator on 10.9.2012, the present petition which was subsequently filed is not maintainable. The Petitioners, on the other hand, contend in favour of maintainability of the Petition on two grounds: (1) the MOU containing the Arbitration Clause is not binding on the Petitioner No. 1, who is not a party to the MOU; and (2) the Arbitral Tribunal is not competent to order liquidation on the basis of acts of oppression and mismanagement. To buttress that contention, the Ld Counsel for the Petitioner has relied upon the certain judicial precedents from the CLB which we will refer during course of our discussion in the forthcoming paragraphs.

(iii) The binding nature of the MOU on the Petitioner No. 1 is concerned, it is on record that the Petitioner No.1 has filed a civil suit No. 972 of 2012 before the Civil Judge (Senior Division), Lucknow. (Vide page 71 of Reply). The Petitioner No. 1 filed that suit against three defendants namely *Dr. Harish Kumar Agarwal, Smt Shubhra Agarwal* (the Respondents 2 and 3 herein) and *Sri Suresh Singh Dhapola*, the Petitioner No. 2 in the Company Petition. In various paragraphs of the plaint, the Petitioner No. 1 namely, *Smt. Hema Dhapola* has averred that she is unaware of the settlement between the defendants 1 and 2 on one hand and the 3rd defendant on the other; that the MOU is not legal as it was not registered. Most importantly at para 20 of the plaint, she has made the following averment to impeach the validity of the MOU dated 10.4.2011.

> "that the memorandum of understanding dated 10.4.2011 (tenth April two thousand eleven) was executed by the defendant No.1 (one) by playing fraud upon the defendant No. 3 (three) and by adopting and using undue influence and coercion upon the defendant no. 3 (three) and as such the aforesaid memorandum of understanding has got no legal sanctity in the eyes of law."

She has also referred to the appointment of *Mr. R.K. Mittal and Dr. K. M. Singh* as arbitrators (who have subsequently withdrawn by their proceeding dated 27.5.2012, at page 37 of the Reply) and pleaded further that the MOU is nullity as it cannot be executed at the instance only two directors more so when the subject matter of the memorandum of understanding is related with the private limited company which was having four Directors. The Petitioner's case is that they have not agreed to appoint *Dr. K. M. Singh* as second arbitrator and that change was made in the MOU by the Respondent unilaterally. However, it seems that such an objection is not raised when they have reported no objection before the High Court for the appointment of Arbitrator on the ground that the MOU is not enforceable on the ground of material alteration. The reliefs, she claimed in the suit are (i) to declare the MOU dated 10.4.2011 to be null and void and un-enforceable and (ii) a permanent injunction against the defendants 1 and 2 from interfering with the management of the Hospital owned by the Company.

(v) A plain reading of the plaint referred above shows that the Petitioner No. 2 was seeking the Civil Court to avoid the MOU and challenging the Arbitration clause contained therein. She is showing the 2nd Petitioner herein as a defendant in that suit. That means, there is adverse interest between the Petitioners 1 and 2, in terms of the pleadings in the plaint. It is well known principle of law that those who are having common interest in the cause of action can maintain a single proceeding; and those who have conflicting interest cannot join as petitioners. In the plaint and in the company petition, the petitioners are disputing the validity of MOU and also the Arbitration. The Petitioner No. 2 who is a signatory to the MOU never filed a civil suit questioning the validity and enforceability of the MOU. On the other hand, the Petitioner NO.1 filed that suit taking the grounds to impugne the validity of MOU which ought to have been taken by the Petitioner NO. 2. This indicates that both the Petitioners are having a common object of defeating the terms incorporated in the MOU and therefore, the argument that because the Petitioner No. 1 is not signatory to the MOU and so it is not binding on her, cannot be accepted.

(vi) For examining the effect of MOU on the present dispute in the Company Petition, invariably, we have to examine the circumstances under which the parties have entered into the MOU. The preamble of the MOU reads:

> "Both the parties have since decided to work separately independent of each and for this purpose entered a mutual understanding to this effect in their meeting held on 24.2.2011 which is annexed as per Annexure-A
>
> Both the parties have in order to set off any doubts in order to carry out the smooth transition decided to enter into this formal memorandum of understanding and that both the parties agree to abide by the mutually decided terms and stipulations mentioned herein under: Both the parties hereby agree and accept Shri R.K. Mittal, Retd IAS as the sole arbitrator whose decision shall be binding on both of us"

(vii) In the MOU the following are the important terms incorporated by the parties:

1. Petitioners shall take Nirvan Social Welfare Organization exclusively and the Respondents shall take Nirvan Hospitals, the company, exclusively

2. The Petitioners and their associates shall relinquish and transfer their enquiry in favour of the Respondents and the Respondents shall transfer their share in the ownership rights in the property in the land and building at Hira Nagar, Haldwani in favour the Petitioners;

3. Both shall cooperate with each other for creating liability and create separate identities for their organization and company respectively including the name, before final separation or resigning within a stipulated time.

The un-allotted share application money standing in the Books of Company in the names of 3 persons shall be settled by the Petitioners.

4. Both parties after honoring their above mentioned commitments confirm no other balance due on each other/their respective institutions and shall also confirm that thereafter do not have any grievances against each others' company or organization.

5. In the event of any failure of any of the parties in complying of the terms and conditions contained in the MOU the matter shall be referred to an arbitrator.

> "(a) As to whether the disputes in a petition properly brought under Sections 397 and 398 read with section 402 of the Companies Act, 1956 can be referred to arbitration, the answer is no, subject to the caveat that I have noted regarding a mala fide, vexatious or oppressive petition and one that is merely 'dressing up' to avoid an arbitration clause"

(xii) In the second reported decision, it is clear from the facts of the case that during pendency of Petition in the Civil Court for making the award passed by the arbitrator as decree and when a petition was also pending in the court for setting it aside at the instance of opposite parties, under the provisions of the Arbitration Act, 1940, the other group filed Company Petition and sought for stay of proceedings in the civil court. It was argued before the High Court in the Company Petition that even if there is award that has to be ignored as the company dispute is not arbitrable. The High Court held that:

> 'It is abundantly clear that merely because there is an arbitration clause or arbitration proceeding or for that matter an award, the Court's jurisdiction under sec. 397 and 398 cannot stand fettered. On the other hand, courts have gone to the length to hold that the matter which can form the subject matter of a petition under sections 397 and 398 cannot be subject matter of arbitration, for an arbitrator can have no powers such as conferred on the court, such as sec. 402 of the Companies Act..."

That is, in the first case, matter was sought to be referred to Arbitrator and in the second case, Arbitrators' award was delivered and pending in the Civil Court for being declared as decree of court. In *Booz Allen and Hamilton Inc vs. SBI Home Finance Limited and Others*[3], the Supreme Court while dealing with an application under Sec. 8 of the Arbitration and Conciliation Act, 1996 laid down certain test to refer the dispute pending in civil court to arbitration. Those tests include whether the reliefs sought in the suit are those that can be adjudicated and granted in arbitration;

In *Haryana Telecom Ltd vs. Sterlite Industries* [4] it is laid down an arbitrator has no jurisdiction to order winding up of a company, in spite an agreement between the parties. It is important to note that both the decisions of the Supreme Court arise in a petition under Sec. 8 of the Act, 1996.

(xiii) The above legal position makes it clear that Arbitrator has no jurisdiction to decide a company dispute and pass an award for winding up of Company. The Court before which a civil suit is pending cannot refer the parties to Arbitration under Sec. 8 of the Act, 1996 in the light of any agreement for arbitration. The Bombay High Court in *Manvendra Chitins* (Supra) was dealing with a case under Arbitration Act, 1940 where under, the Arbitrator has no power to decide his own jurisdiction. But the Act, 1996 provides such power in the Arbitrator to rule on his jurisdiction. Section 16 of the said Act reads:

> Section 16 - Competence of arbitral tribunal to rule on its jurisdiction: (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,–
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> > (a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

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[3] (2011) 5 SCC 532

[4] *(1999) 5 SCC 688*

It is pertinent to note that all the acts of oppression and/or mismanagement complained by the Petitioners are almost pertaining to the period earlier to MOU; and to those events occurred after one or the party had failed to observe their respective commitments incorporated in the MOU.

(viii) On 27.5.2012, the Arbitrators appointed in the MOU *Sri R.K. Mittal* and *Dr. K. M. Singh*, while withdrawing from the Arbitration has mentioned in their proceedings that in spite of several meetings held by them and last meeting being on 9.4.2012, the Petitioner No. 1 has raised certain new points changing the terms of MOU. It is also mentioned in the proceedings that Dr. H.K. Agarwal (Respondents' group) raised proposal for appointment of a 3rd arbitrator. In those circumstances, the learned arbitrators expressed their inability to deal with the proceedings and withdrew from the Arbitrators. This has led to the Respondents approaching the High Court under Sec 11 of the Arbitration and Conciliation Act for appointment of Arbitrator. It was ordered on 10.9.2012 as earlier said and this Petition is filed before the CLB on 13.9.2012.

(ix) A reference to the above material would disclose that all the complaints made against each other were compounded and merged in the MOU and only in case the commitments are not honoured, reference of dispute to the Arbitrator has occasioned. Therefore, the cause of action for the Petitioners to file a Petition under Sections 397 and 398 of the Act was not available after the MOU and after the dispute was referred to the Arbitrator appointed by the High Court. It is not in dispute that the proceedings before the Ld. Arbitrator are pending. In the light of the above circumstances, even without referring o various acts of oppression and mismanagement alleged by the Petitioners in the Company Petition, we conclude that those acts will not enable the Petitioners to complain after the MOU dated 1010.4.2011.

(x) So far as the validity or enforceability of MOU on the ground of coercion, undue influence etc as pleaded by the Petitioner No. 1 in the civil suit is concerned, those questions cannot be agitated before this Tribunal, as those issues are sub-judice before a competent civil court. Till the Civil Court set aside or declare the MOU as void, the parties are bound by the terms of it. It is brought to our notice during course of hearing that the Civil Suit was dismissed and in the written arguments, the Petitioners mentioned that an application to restore the suit is pending in the Civil Court. That means, the Petitioners are prosecuting the civil suit even now and the MOU is still in force.

(xi) We now divert to the 2nd facet of our discussion i.e. whether the Petitioners can maintain this Petition after the Arbitral Tribunal was constituted. Ld. Counsel for the Petitioners placed reliance on certain judgments of the CLB to sustain his contention that the CP is maintainable and the Arbitrator has no jurisdiction to adjudicate upon the disputes falling under Sections 397 and 398 of the Act. The case referred in this regard is

(i) Rakesh Malhotra vs. Rajinder Kumar Malhotra[1]

(ii) Manvendra Chitnis vs. Leela Chitnis Studios[2]

In the first case, the Ld. Judge observed:

[1] (2015) 192 CompCas 516 (Bom)

[2] (1985) 58 CC 113

(b) A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall he raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

(xiv) Where certain clauses in the MOU between the parties was challenged on the grounds of manipulation and forgery, the Supreme Court in an application for appointment of Arbitrator under Sec. 11 (6) of the Act observed: (vide*: Sanghi Brothers (Indore) Pvt. Ltd vs. Muktinath Airlines Private Limited & anr*[5])

"Whether the petitioner is entitled to performance of the terms of the said MOU dated 17th July, 2013 is the precise dispute between the parties. Therefore, in terms of the arbitration clause contained in the said MOU dated 17th July, 2013, the dispute is liable to be referred to arbitration by appointment of an arbitrator under Section 11(6) of the Arbitration Act. The grounds on which the respondent No.1 seeks to resist the appointment of an arbitrator, namely, that the period contemplated under the MOU dated 4th July, 2013 (one month) within which payment was to be made to the respondent No.1 by the respondent No.2 is over; that clause 12 and clause 19 of the MOU dated 4th July, 2013 had been materially altered by changing the period of the power of attorney was forged by the respondent No.2 are questions that cannot be gone into by the court in exercise of jurisdiction under Section 11(6) of the Arbitration Act. These are matters which can be raised before the learned Arbitrator and answered by the said authority."

Again, where it was contended that the Arbitrator has no power to decide whether the dispute is arbitrable or not, the Supreme Court observed in *M/s MSP Infrastructure Ltd vs. M.P Road Development Corp. Ltd.* [6]that:

"It is not possible to accept this submission. In the first place, there is nothing to warrant the inference that all objections to the jurisdiction of the Tribunal cannot be raised under Section 16 and that the Tribunal does not have power to rule on its own jurisdiction. Secondly, Parliament has employed a different phraseology in Clause (b) of Section 34. That phraseology is "the subject matter of the dispute is not capable of settlement by arbitration." This phrase does not necessarily refer to an objection to 'jurisdiction' as the term is well known. In fact, it refers to a

[5] 2015(6)ArbLR100(SC)

[6] AIR 2015 SC 710

situation where the dispute referred for arbitration, by reason of its subject matter is not capable of settlement by arbitration at all."

(xv) There is the contention of the Petitioners that the MOU is vitiated by fraud, coercion etc. Even though those grounds are not explicitly pointed out in the Company Petition they are mentioned by the Petitioner No. 1 in the civil suit filed by her, which was already referred by us in the above paragraphs. In this context, the Supreme Court ruled in *Enercon (India) Ltd. & Others vs. Enercon GMBH & Another*[7] that the questions whether the contract is vitiated by any such grounds and whether there is a concluded contract for enforcement etc are also within the domain of the Arbitrator.

Even if the party resists the petition under Sec. 11 on the ground that the Contract is void ab initio, that does not prevent the Court from referring the dispute to Arbitrator, as laid down by the Apex Court in *Swiss Timing Limited vs. Organising Committee, Commonwealth Games 2010, Delhi.*[8]

(xvi) The above legal principles evolved by the Supreme Court clearly demonstrate that the Arbitrator can decide whether the dispute referred to him is arbitrable or not. The Petitioners herein are therefore not precluded from raising the question of jurisdiction of the Arbitrator in the proceedings before him. It is not a case where the question is not raised before this Tribunal about the arbitrability of the issue under Sec. 8 of the Arbitration and Conciliation Act; nor was it cases, where the Arbitrator cannot rule on his jurisdiction like the one arise before the Bombay High Court in Manvendra Chitins. On the other hand, it is a case where the High Court has appointed Arbitrator and the Arbitration proceedings are pending. The Order of the High Court appointing the Arbitrator is binding on this Tribunal. Whereas in the decision cited by the Ld. Counsel for the Petitioner, the Arbitrator was not appointed by the High Court but by the Civil Court under the Arbitration Act, 1940. Therefore, those decisions are distinguishable. This Tribunal, who is bound by the Order of the High Court, cannot ignore it on the ground that there is no issue for arbitration. If we were to hold like that, it will be commenting upon the jurisdiction exercised by the High Court, which is a Court of Record and also passing an order in conflict with the order passed by the High Court.

(xvii) We are therefore repelling the contention of the Ld. Counsel for Petitioner, and hold that when once the Petitioners have submitted to the jurisdiction of the Arbitral Tribunal, they are precluded from raising the question of jurisdiction of the Arbitrator on the disputes referred to him before any other forum and at best, they can raise that issue of jurisdiction for ruling before the Ld. Arbitrator only.

(xviii) Apart from that, we have another reason also to refuse to accept the contention of the Petitioners. The petitioners who are complaining certain acts of the Respondents as acts of oppression and mismanagement falling within the scope of Sections 397 and 398 did not sought relief of winding up in the Company Petition. Of course, they have to make out a case for an order under these sections that a case exists for ordering winding up. At any rate, this petition cannot be treated as a petition for winding up of the Company as such. Further, all those acts of oppression and mismanagement are merged in

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[7] (2014) 5 SCC 1

[8] 2014 6 SCC 677

the MOU and after the MOU is acted upon by both the parties, they cannot reopen the same disputes to bring the action before the Company Tribunal.

In one breath they challenged the legality and enforceability of the MOU before the Civil Court; and on the other hand they have submitted to the Jurisdiction of the Arbitrator by giving consent for the appointment of Arbitrator in the Application under Sec. 11 of the Act, before High Court. It is not known, whether they have raised the question of jurisdiction under sec. 16 of the Act before the Arbitrator. It is admitted fact that the result of Arbitration is awaited. That means, the Petitioners must have participated in the Arbitration proceedings. The Arbitrator will necessarily decide as to the performance or non-performance of the all or some of the terms of MOU, including the acts complained of which are merged in the MOU. Even though, the Arbitrator may not order 'winding up' of the company, it may be recalled, the MOU itself has provided for separation of the Company and the NGO between the parties and division of the assets between both the group which, if materialized would put an end to the stalemate created by the misunderstandings between them. If that arrangement is materialized, there cannot be any more acts of oppression and mismanagement as complained.

III. Question NO. 2: Whether the acts complained of by the Petitioners amount to oppression and mismanagement that warrant ordering Winding up of the Company?

We will extract the acts complained in the Company Petition, which are said to be oppressive in nature and amounting to mismanagement.

1. Respondent No. 4 was appointed by the Board on 11.4.2011 without notice of meeting served on the Petitioner NO. 2, who was Director;

2.The name of Dr. K.M. Singh was added as second mediator in the MOU without consent of the Petitioner No.2;

3. In the garb of MOU, the respondents have taken control of the Company with malafide;

4. The Respondents did not pay the salaries of the Petitioners and forced to keep them away from day to day affairs of the Hospital. Up to 31.8.2012, a sum of Rs. 32, 63, 193 was due to the Petitioners towards their salary;

5. During pendency of Company Petition also, the conduct of the Respondents is questionable , particularly they did not produce records for inspection, did not allow the Petitioners to inspect the record in the Hospital premises, in spite of the orders of the Tribunal;

6. During pendency of the CP, the Respondents have conducted the Board meeting illegally and removed the Petitioner No.1 from the Board;

7. The Respondents did not allow the Petitioners to enter the hospital premises;

8. Siphoned off the funds, by opening a new account in ICICI Bank and withdrew the funds;

We have thoroughly examined the pleadings of both sides and the relevant documents. At the outset most of the allegations are either prior to or

in pursuance of the MOU and those issues are already raised before the Arbitrator, in view of the finding recorded on the Question No.1. Further, any dispute arisen between the parties with reference to performance of duties and discharge of obligations imposed by the MOU are not regarded as 'oppression' with reference to the affairs of the company. They shall be treated as affairs between the parties interse.

Therefore, we find that the allegations of oppression and mismanagement made by the Petitioners as above will not result in granting a relief of winding up of the Company and is, they are not sufficient to pass any order under Sec. 402 of the Act, 1956. Question No. 2 is answered against the petitioners and in favour of the Respondents.

IV. Conclusions: In view of the above findings, we record the following conclusions:

1. The Company Petition is not maintainable when the disputes between the parties are already referred by the High Court under Sec. 11 of the Arbitration and Conciliation Act, 1996 to the Arbitrator appointing *Shri Justice U.K. Dhaon* (Retd) even before filing of this Petition.

2. The acts of oppression and mismanagement complained of in the Company Petition are part of the MOU which were resolved between the parties, cannot be reopened after the MOU is entered into and acted upon by filing the Company Petition

3. The validity and enforceability of the MOU has to be decided by the civil Court before whom the Civil Suit which is filed even earlier to filing of the present Company Petition.

4. Whether the matters referred to the Arbitrator are arbitrable or not is to be decided by the Ld. Arbitrator only under Sec. 16 of the Arbitration and Conciliation Act, 1996;

5. In view of the matter being sub-judice before Arbitral Tribunal and the Civil Court, this Tribunal as a rule of judicial discipline, will not inquire into the issues and matters covered by the MOU, which are incidentally, if proved, may amount to acts of oppression and mismanagement. However, we refrain ourselves from expressing any view or making any observations on the said issues.

6. The acts of oppression and mismanagement attributed by the Petitioners to the Respondents are only with reference to the performance of duties and discharge of obligations imposed by various terms incorporated in the MOU, arisen between the parties in their individual capacity without any reference to the affairs of the Company as such and it is not adequate to order winding up of the Company and therefore, no order could be passed under Sec. 402 of the Act.

V. Result: In the result of the findings above, the Company Petition is dismissed. There shall be no order as to Costs.

Typed by self, corrected and pronounced in open Court this Monday, the 19th Day of December, 2016

Mr. V.S.R. AVADHANI (JUD. MEMBER)

Mr. H.P. CHATURVEDI (JUD. MEMBER)