NATIONAL COMPANY LAW TRIBUNAL: ALLAHABAD BENCH

Common Orders in
(Company Petition No. 75 (ND) of 2016)
(New Number TP 69/397-398/ALL/16/ CLB
AND
(Company Petition No. 54 (ND) of 2016)

Dated WEDNESDAY, the 19th DAY OF JANUARY, 2017

QUORUM: MR. V.S.R. AVADHANI & MR. H. P. CHATURVEDI
JUDICIAL MEMBERS

In the matter of Omkaleshwar Colonisers Private Limited & Ors

Between

Mr. Satish Kumar Singh
S/O Shri Bhairav Nath Singh
At Plot No.13, Adarsh Nagar,
Mahmoorganj Varanasi,
Uttar Pradesh ..... (Petitioner

&

1) Omkaleshwar Colonisers Private Limited
Having its Regd office at
Plot No.13, Adarsh Nagar,
Mahmoorganj Varanasi,
Uttar Pradesh

2) Sri Sanjeev Agrawal
S/o Shri Kailash Nath Agrawal
R/O D- 60 /33, B-1, KA chhoti Gaibi
Varanasi,Uttar Pradesh

3)Shri Pranvir Pratap Garg
S/O Sh. Manohar Prasad Agrawal
R/O A-2/ 80, Manu Apartment
6, Mayur Vihar Phase – I,
Delhi- 110092

4) Sri Vinod Kumar Singh
S/O Shri Narender Singh
R/O 98, Vindhyavaini Colony
Orderly Bazar, Varanasi,Uttar Pradesh

5) Syndicate Bank,
MCB, Varanasi Trade Centre,
Varanasi, Uttar Pradesh

..... Respondents

For compliance
19/1/2017
19/1/17

AND

(In Company Petition No. 75 (ND) of 2016)

Between

1. Mr. Sanjeev Agrawal
D-60/33, B-1, KA, Chhoti Gaibi,
Varanasi, Uttar Pradesh-221010

2. Mr Pravin Pratap Garg
A-2/80, Manu Apartment,
6, Mayur Vihar, Phase-I,
New Delhi-110092

..... Petitioners

&

1. M/s. Omkaleshwar Colonisers Private Limited
(Formerly known as Onkareshwar Colonisers Private Limited)
Plot No.13, Adarsh Nagar, Mahmoorganj,
Varanasi, Uttar Pradesh-221010

2. Mr. Satish Kumar Singh
Plot No.13, Adarsh Nagar, Mahmoorganj,
Varanasi, Uttar Pradesh-221010

..... Respondents

Claim: To Pass any such order(s)/ in connected petitions filed under Sections 397, 398, 399, 402 and 403 of the Companies Act, 1956 for various reliefs which the Tribunal deems fit and proper in the facts and circumstances of the case.

The above Company Petitions came before us for hearing on different dates and finally on 20.9.2016 and time for orders has been extended by Hon'ble President of National Company Law Tribunal under Sec. 422 (2) of Companies Act, 2013 vide File No. 25/2/2016 NCLT dated 12.01.2017, in the presence of *Shri Kartikeya Saran*, Advocate for Petitioners in CP 54/2016 and for Respondents 2 and 3 in CP 75/2016; *Shri Ashish Agarwal*, Advocate for Respondents in CP 54/16 and Petitioners in CP 75/2016; and *Shri M. L. Sharma*, Advocate for the Respondent No. 4 in CP 75/2016, having heard the arguments of both sides and after considering the material on record and stood over till day for consideration, we deliver the following

ORDER

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

1. Both these Company Petitions are filed under Sections 397, 398, 399, 402 and 403 of the Companies Act, 1956 for various reliefs. These two Company Petitions are relating to the company called "Omkaleshwar Colonizers Private Limited" which was earlier called as "Onkareshwar Colonizers Private Ltd. These petitions are counter to each other and are taken for final disposal by the common order to avoid conflicting views. We propose to make a short reference to the contentions of both parties, relevant to each act of oppression and mismanagement.

2. In CP 54 the 2nd Respondent *Mr. Satish Kumar Singh* is the Petitioner in CP 75; whereas, the Petitioners 1 and 2 in CP 54 are Respondents 2 and 3 in CP 75, besides two other Respondents *Mr. Vinod Kumar Singh* and Syndicate Bank (Respondents 4 and 5 respectively). In both the Petitions, the Company is 1st Respondent. The main relief in CP 54/16 is to set aside Form SH-7 dated 5.3.2015 relating to increase of authorized capital of the Company from 11 lacks to 50 lacks; whereas in CP 75/2016, the main relief is to declare that the

Respondent No. 2 therein who is the Petitioner No 1 in CP 54/16 has caused breach of fiduciary duty as Director of the company. In both the matters, the other reliefs are either supplementary or incidental to the above reliefs and this common order mainly addresses on those core reliefs.

For the purpose of convenience, in the discussion, the parties are referred as per their array in CP 54/2016; and whenever necessary, special reference to their status will be given.

Before dealing with divisive facts of the case, certain admitted facts have to be placed on record. The Company was incorporated on 31.7.2006 with an initial authorised capital of Rs. 10, 00, 000/- and it was increased to Rs. 11, 00, 000/- on 3.6.2009 and further to Rs. 50, 00, 000 on 5.3.15. The 2nd increase is in challenge by the Petitioner in CP 54/16. There is no dispute about the percentage of equity holding by the respective parties. The Petitioner and the Respondent No.2 are Directors of the Company. Mr. *Vinod Singh* and Mr. *P. P. Garg* are members.

3. Then, we refer to facts in disagreement. It is claimed that the Petitioner has brought in huge funds amounting to Rs 40, 90, 000/- but the Respondent No. 2 did not contribute anything. The Petitioner has given personal guarantee in addition to mortgage of the land, for development of a residential project "Palm Heights", with a loan of Rs. 7, 50, 00, 000/ taken from the Syndicate Bank. The Petitioner raised the following acts of oppression and mismanagement in various paragraphs of his Petition in CP 54/16.

i. After part of the loan was released by Syndicate Bank, the said amount was not utilized for the purpose it was taken and therefore, the Petitioner addressed the Bank on 11.2.2016 to stop further release of loan.

ii. The Respondent failed to convene meeting of the Board to avoid 'function' of the Board.

iii. Respondent No. 2 happened to be sole signatory of the Bank account, he had siphoned off about 30 lacks of the company funds and evaded to hold meeting to pass a resolution to make the petitioner also joint signatory to operate the bank account.

iv. The authorised capital was illegally increased from 11 lacks to 50 lacks without knowledge, information and notice to the Petitioners. For this no Board meeting or the AGM/EGM of the members was convened for the approval of increase of the authorised share capital. The Respondent has signed SH7 Form showing falsely that on 5.3.15 EGM was held.

v. The name of the Company was changed from Onkareshwar Colonisers Pvt Ltd to Omkaleshwar Colonisers Pvt Ltd on 9.12.2015 with adopting any resolution by the Board or in the EGM of the members of the Company. This is contrary to Sec. `13 91) which requires that a Special Resolution is necessary for change of the name of the company.

vi. For executing the project, the Respondent no. 2 did not obtain the approval of the Petition for finalization of civil contract, suppliers of construction material, suppliers of electrical, sanitary, cement and steel or for appointment of engineers etc and of sub-contractors, which amounts to oppression.

vii. The Respondent No. 2 has committed financial mismanagement by buying various materials at a much higher prince, accepting 'kickbacks' and collected the money from the suppliers. He has

also indulged in taking the bills for higher qualities of steel, cement and other material but received lesser quality and took differential amount in cash from the vendors.

viii. During FY 2015-16, the Respondent No. 2 has raised funds from individuals including Mr. Ganga Sagar Singh, in a sum of Rs. 55, 99, 714, without authorization and approval from the Petitioner and no approval from the Board was given. Further, the Respondent no. 2 did not provide proper accounts relating to utilization of those funds.

ix. The Respondent No. 2 pad Rs. 5, 72, 715 to Vinod Kumar Singh- one of the share holders (Respondent No. 4 in CP75/16) without any reason or purpose, merely because, Mr. Singh happened to be close associate of Respondent No. 2.

x. Having collected huge amount towards booking of flats in Palm Heights, the Respondent No.2 has not account for that amount to the Company. He has refused to furnish account of those bookings.

4. Besides imputing the above acts to the Respondent No. 2 as oppressive in nature and amounting to mismanagement of affairs of the Company, the Petitioner further alleged that the Respondent tried to induce *Mr. Vinod Kumar Singh* as Director. In this context, it is pleaded further in the following manner. As the Board meeting was not convened by Respondent No.2, the Petitioner has issued notice on 29.2.2016 that he is proposing to hold Board Meeting on 13.3.2016 at Hotel Vaibhav, Varanasi; but the Respondent issued another notice on 5.3.16 informing that Board Meeting is convened on the same day at the registered office of the company, which is the residence of the Respondent No. 2. However, on the email advise of the Petitioner, meeting was held in Vaibhav Hotel, attended by both parties and four others but the Respondent No 2 refused to take up the business of meeting unless the Petitioner withdraws his letter to the Bank that impede the loan disbursement. Subsequently, after exchanging correspondence between both the parties, a notice was issued by Respondent No. 2 that a Board meeting will be convened on 11.4.16 to discuss the appointment of *Mr. Vinod Kumar Singh* (R4 in CP 75/16). It is alleged by the petitioner that this proposal is designed with evil motive as *Mr. Singh* is close associate of Respondent No. 2.

The Respondent No. 2 pleads that he did not indulge in any acts of oppression or mismanagement. He contends that under his signature and with his efforts, plan was submitted to Varanasi Development Authority (VDA) for sanction on 13.3.2012 and it was approved on 16.2.13 subject to payment of fee of Rs. 1, 00, 18, 374 (vide letter of VDA in Annexure R12). To raise funds for this purpose, the Petitioner expressed his inability and therefore, the Respondent No. 2 obtained personal loan of 80 lakhs from Union Bank and also arranged remaining funds from his personal Cash Credit Limit from Central Bank of India, and also extended a further interest free unsecured loan of Rs. 1, 02, 20, 000/- to the Company, during FY 2013-14 which was reflected in the balance sheet of that year singed by Petitioner also. Thus, the company could pay the fee as demanded by VDA on 25.3.2014, vide receipt Annexure R 17. According to the sanction terms, the construction shall be completed within five years from 3.4.14. For completion of the project funds are required but the Petitioner was expressing his inability to provide further funds and therefore, the Company applied to bank for financing the said project and for that purpose only, the authorised share capital had to be increased and it was so resolved in the meeting of Board (vide paragraph 11 of the Reply).

In the aftermath of the huge difference of opinion and mutual distrust between Petitioner and Respondent No. 2, who are the only two directors of the Board, the business of the Company came to a standstill that led the parties to hurl allegations and counter allegations in these two Company Petitions, claiming oppression and mismanagement against each other. We examine the disputes involved on the basis of material available on record in the following paragraphs.

5. Question No. 1: Whether increasing of authorised share capital from 11 lakhs to 50 lakhs is duly resolved in the Board meeting dated 5.2.2015?

5.1. A perusal of para 11 of the Reply with reference to the Annexure 19 available at page329 of the Reply paper Book shows that date of Board meeting is not given in the reply para 11. The copy of resolution of the Board is signed by Respondent No. 2. But it shows that the meeting was held on 5.2.2015. In para 6.13.4 and 6.13.5 the Petitioner has specifically pleaded that no notice of meeting was given to him. To improbabilise holding of any Board Meeting at Varanasi on 5.2.15, the Petitioner in his Rejoinder statement at para 11.1 asserted that on that day he was at Lucknow and in support of that plea he has produced Annexure XIII Bank Account statement to show he has drawn money from ATM at Lucknow. No doubt the statement shows a sum of Rs. 10, 000/ and Rs. 5000/ was withdrawn from the Petitioner's account through ATM at Lucknow. This cannot be accepted as proof that the petitioner was not in Varanasi on 5.2.15 because, the account is not showing the time of withdrawal. There is no necessity of account holder alone operating the ATM; anybody on his behalf could withdraw the amount on his instructions.

5.2. Though, the petitioner was unable to show that he was not in Varanasi on 5.2.15, the burden is on the Respondent to prove that the Petitioner was present in the Board Meeting and signed in the minutes. The copy of original minutes of the meeting of the Board dated 5.2.15 is the best evidence in that respect which is not filed and no explanation is offered for non filing of that important document by the Respondent. Therefore, we hold that the Respondent is unable to substantiate his contention that the Board meeting was attended by Petitioner. Because there are only two directors, viz., the Petitioner No. 1 and Respondent No.2, there cannot be a Board Meeting in the absence of one of the Directors. Therefore, there is every reason to accept that the Petitioner was not informed about the Meeting of Board dated 5.2.15 and he was absent. Consequently, the minutes of the meeting shown in Annexure 19 (page 334) of Reply paper Book is not a valid resolution of the Board to be acted upon.

5.3. In continuation of the above discussion, we have looked at the EOGM said to have been convened on 5.3.15 approving the increasing of share capital and for amendment of Memorandum of Association accordingly. The holding of EOGM is also denied by the Petitioner and in his rejoinder the Petitioner has asserted that on 5.3.15, he was with Mr. Ravi Shanker Singh (MLC) at Lucknow and to that effect a 'letter' given by Mr. Ravi Shanker Singh was filed as Annexure XIV. We are not prepared to accept the probative value of this letter for the simple reason it is not a sworn affidavit of the maker of that letter to be used as evidence in the judicial forum. What is the necessity of the Petitioner obtaining the letter from Mr. Ravi Shanker Singh on very same day i.e., 5.3.15 is unknown.

However, at the same time, we are to hold that the burden is on the Respondent who is asserting that the Petitioner and other members attended the EOGM On 5.3.15 by producing the attendance register and the original minutes containing the signatures of the members attending the EOGM. In the absence of that best evidence we are compelled to hold that the EOGM was not convened and the members did not approve the increase of authorised capital of the Company from 11 lacks to 50 lacks.

5.4. The Petitioner made application to direct the Respondent No. 2 to produce all documents relating to Board Meetings viz., minute books, and attendance registers etc and also the account books of the company. As this application was made at the time of final hearing of the matter, we did not entertain that application and it is coming along with this order for disposal. What has to be understood from this application is that the Respondent withheld the material evidence which is in his possession and custody. Irrespective of burden of proof, it is incumbent on the part of the respondent to produce those material documents to prove the fact that the Board and EGM were met and certain important resolutions were adapted thereby. Therefore the tribunal can draw adverse inference against non production of material documents by the Respondent No. 2 to the effect that no board or EOGM meetings were held with the participation of the Petitioner and members, respectively.

5.5. Art. 23 of the AOA of the Company (page 59 of Petition Paper book) reads that the 'notice in writing of every meeting of the Board shall be given to every Director/alternate Director for the time being at his usual address." This was not followed evidently. In *M. S. Madhusoodhanan and others vs. Kerala Kaumudi (P) Ltd and others*[1] the Supreme Court *held* that the notice was required to have been served on all the members of the company either by post or personally in terms Section 53 of the Companies Act. The law is well settled that notice of Board Meeting shall be served on all the Directors and if not served on any single director, the decision taken in that meeting will become invalid. If the authority in this respect is required, it is in *Shri Parmeshwari Prasad Gupta vs. The Union of India.*[2]

In view of above facts and in the result of discussion we hold that the increasing of authorised capital from 11 lacks to 50 lacks is not supported by a valid Board resolution and approval from EOGM.

However, after increasing of the authorised capital, the additional equity shares are not allotted to anybody at the choice of the Respondent No. 2. Mere increasing the capital of the company without any attempt to dilute the share holding of the Petitioner or any other else of his group so as to reduce them to minority, does not lead to an inference that it is an act of oppression for the purpose of sec. 397 of the Act of 1956. To fortify our view, we have on hand the authority of Supreme Court where has considered in *Dale & Carrington Investment (P) Ltd. and another vs. P.K. Prathapan and others*[3]. The Supreme Court having referred to certain earlier precedents held that:

> "Further it was held that if a member who holds the majority of shares in a company is reduced to the position of minority shareholder in the company by an act of the company or by its

[1] (2004) 9 SCC 204
[2] (1973) 2 SCC 543
[3] (2005) 1 SCC 212

> Board of Directors malafide, the said act must ordinarily be considered to be an act of oppression to the said member. The member who holds the majority of shares in the company is entitled by virtue of his majority to control, manage and run the affairs of the company. This is a benefit or advantage which the member enjoys and is entitled to enjoy in accordance with the provisions of company law in the matter of administration of the affairs of the company by electing his own men to the Board of Directors of the company"

The ratio evolved in *Dale* (supra) was followed with approval by Apex Court in *Shri V.S. Krishnan & Ors vs. M/s Westfort Hi-tech Hospital Ltd. & Ors.*[4]

Examining the case on hand, we find no pleading made by the Petitioner in CP 54/2016 to the effect that increasing of the authorised share capital was with a malafide view of reducing the petitioner to minority. Therefore, that circumstance, in our considered view, does not amount to oppression.

6. Question NO.2: Whether Change of name of the Company is without following the procedure?

6.1. It is admitted fact that as per the Certificate of incorporation, (Annexure A6) the Company is titled as "ONKARSHWAR COLONISERS" and the name was changed to 'OMKALESHWAR COLONISERS' on 9.12.2015. (See page 122 to124 of petitioner's paper book). The Petitioner's contention is that without a special resolution as mandated by sec. 13 (1) and without a meeting of the Board by giving notices to the Directors of the company under sec. 173 of the Act, change of name of the company is not legal and it amounts to mismanagement.

6.2. The Respondents pleaded that in the Registered sale deed dated 28.8.2006 (Annexure R8) the name of the vendee Company was mentioned as OMKALESHWAR in Hindi and the petitioner No. 1 himself executed and signed a affidavit to the effect that the names ONKARESHWAR' and 'OMKALESHWAR are one and the same, to satisfy the Bank to release the loan. The said letter Annexure R-9 is the affidavit of the Petitioner *Shri Sanjiv Agarwal* sworn at para 4 that-

> *"I/We stated on oath, Company Onkareshwar Colonisers Pvt Ltd and Omkaleshwar Pvt Ltd as same. No any irregularities or any conspiracy involved in company name or its right and title with its assets."*

6.3. At para 13 of the Reply it is averred that in the meeting of Board of directors held on 1.10.2015, resolved to change the name of the Company. Subsequently on 8.10.2015 the Board adopted a resolution to apply for change of name for 'vastu' reasons, and subject to approval of the Central Government and this proposal was duly approved by the EOGM on 12.11.2015, The Petitioner in his rejoinder flatly denied any such meeting to his notice. The Ld. Counsel for the Respondent argued that by virtue of the affidavit mentioned above, the Petitioner is precluded from challenging the legality of the change of name of the company.

6.4. Whether the change of name is legally done or not is a different question from the question, if such change is not legal, whether it will amount to oppression or mismanagement. In our considered view, mere change of the

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[4] (2008) 3 SCC 363

name of the company does not ipso facto amount to oppression or mismanagement as such unless it is established by the Company Petitioner that thereby, the interest of the members or the Company has been prejudicially affected. Such prejudice is observably absent. The Petitioner did not explicate acceptably as to what is the loss or prejudice sustained by the petitioners or the Company. On the other hand, his own affidavit given to the Bank shows that in the best interests of the Company in order to get loan sanctioned to the company to complete the project, he has declared that there is no 'conspiracy' in the difference in the name of the company appearing in the sale deed and the certificate of incorporation. At the instance of the petitioner, therefore, there is no evidence of prejudice caused to the members or to the company by the change of the name. Whether the change will be approved by the Government or not is not an issue before us.

We therefore hold that change of the company's name does not amount to oppression or mismanagement.

7. Question No. 3: Whether the Respondent No. 2 has resorted to financial mismanagement prejudicial to the company?

7.1. One of the allegations made in this regard is that the Respondent No. 2 has siphoned off 'about 30 lakhs' of the company's money without showing accounts, taking advantage of the fact that he is the sole signatory for bank operations. In para 6.12, the petitioner has asserted in this regard that he 'verily believe that Respondent No. 2 must have been operating all these bank accounts' but 'on deeper examination and investigation, the results were startling and unbelievable. When that was the positive assertion hurling the allegation of embezzlement of company's money, the petitioner who had deeply examined and investigated, must have stated specific amount siphoned off without mentioning 'about' means 'approximately'.

7.2. The Petition seldom show any further material averments to substantiate such a wild allegation. On the other hand, the Respondent in his pleading stated that complete bills/vouchers relating to the expenditure at the site were given to the Syndicate Bank, Varanasi who has issued a letter on 31.3.2016 about proper utilization of the loan amount. Though that letter is not found in the paper books, it is seen that Mr. Sanjay Mishra, Engineer on 22.3.2016 has certified that the value of the construction was Rs. 3, 32, 00, 000/. Further some of the conditions of the loan agreement with the Bank were (i) the Company shall produce certificate from structure engineer (ii) payments should be into the Escrow/Collection account only; (iii)Release of term loan is subject to satisfactory physical and financial progress of the project duly certified by empanelled valuer and chartered accountant on quarterly basis and (iv) the company shall submit the periodic progress of work, advances received, margin brought in and percentage of completion in relation to the sanctioned plan, (see: Annexure 20 of Petitioners' paper book).

7.3. The Bank is party to the proceedings and it has never raised the question that the above conditions of the loan sanction were violated. The Bank has issued letter on 31.3.205 (page 347 of the petitioner's paper book) that a sum of Rs. 7.50 Crs was sanctioned and gave the revised repayment schedule. During April 2017-2018 a sum of Rs. 3 Cr and during 2018- 2019 a sum of Rs. 4.5 Crs has to be repaid by the Company. When the bank is supervising the income and expenditure of the company in relation to the project, it is unbelievable that the Respondent had siphoned off a hefty sum of 30 lacs. In

the absence of material to substantiate such allegation, the tribunal is unable to accept that plea of the petitioner.

7.4. The second instance of financial mismanagement propounded by the Petitioner is that the Respondent No. 2 has resorted to 'obnoxious, mischievous and deceptive' methods, namely buying material for higher prices and taking kickback in cash from suppliers; procuring material in higher quantities but receiving less quantity and encashing the balance quantity. In para 6.17 of the Petition, it is averred that the Petitioner got this information in confidence from some suppliers of material. That means, except his own self serving statement, the Petitioner is not having any evidence to prove such allegation. In as much as the bank is supervising the cash outflow and inflow, being a lender interested in getting back its money, and as the Valuer has given the certificate regarding value and stage of construction and as the Bank did not raise any question so far on the cash flow aspect, we find no justification to accept the statement of the petitioner to hold that the Respondent has embezzled any amount of the company by deceptive methods as alleged by the Petitioner.

7.5. The 3rd instance cited by the Petitioner in his effort to brand the Respondent as to have mismanaged the affairs of the Company, is that Respondent raised funds from *Ganga Sagar Singh* (Rs. 55, 99, 714) and paid a sum of Rs. 5, 72, 715 to *Mr. Vinod Kumar Singh* and this was without authorization from the Board and without notice and consent of the petitioner.

7.6. The Respondent states that in order to meet the conditions of loan sanctioned by the Syndicate Bank, funds had to be infused for grounding the project and as the Petitioner was not willing to provide funds, the Respondent had to raise the funds from his brother-in law Mr. Ganga Sagar Singh without any interest for one year. In the rejoinder the Petitioner raised the ground that raising this loan from Ganga Sagar is barred under sec. 73 of the Companies Act, 2013 read with Companies (Acceptance of Deposits) Rules 2014 and the said transaction will not fall under exempted borrowings. Further it is alleged in para 18 of the rejoinder that Respondent No. 2 and Ganga Sagar Singh failed to attach any evidence such as Bank accounts and personal Income Tax returns to show the loan given to the Company and therefore, "the contention of the Respondent No. 2 about deposit of money by them is denied-Respondent No. 12 put to strict proof of averments made herein".

7.7. Firstly, we have noticed inconsistency in the pleas of the petitioner. When in the Petitioner he is alleging that the Respondents have unauthorizedly borrowed from Ganga Sagar Singh, in the Rejoinder, he states that Respondent and Ganga Sagar ought to have filed their bank statement and I.T. returns to prove the factum of lending the money to the Respondents. These two averments are mutually inconsistent. Secondly, on an admitted fact, there need not be any evidence from either of the parties. The only question is whether raising a loan or deposit is illegal and if so, whether it amounts to mismanagement effecting prejudicially the interests of the company.

7.8. According to reply of the Respondent, the amount taken from Ganga Sagar Singh is an 'interest free loan' and not a 'deposit'. The definition of 'deposit' engrafted in Rule 2 © of Companies (Acceptance of deposits) Rules 2014 reads thus:

> © "Deposit" includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include-
> ...

> (viii) any amount received from a person who, at the time of the receipt of the amount was a director of the company or a relative of the director of the private company
> ....
> (xi) any non-interest bearing amount received or held in trust;

The above clauses show that if funds are raised from relative of a director, it is a loan. A 'brother-in-law' is not 'relative' as per Rule 4 of the Companies (Specification of Definitions Details) Rules, 2104 read with Sec. 2 (77) (iii) of the Companies Act, 2013. Even if *Ganga Sagar Singh*, being brother in law of Respondent No 2 is not falling within the expression 'relative' under cl. (viii), because the amount is taken as interest free loan, it is regarded as a loan in trust under cl. (xi) and so, it does not fall within the sweep of 'deposit' attracting the procedure under Sec. 73 of the Companies Act, 2013.

7.9. Even otherwise, in a worst situation, if it is presumed that the loan was raised without authority, it is not with malafide intention but only to safeguard the company's interest to meet the requirements of terms and conditions stipulated by Syndicate Bank and no loss or otherwise prejudice is appearing in that transaction so as to accept that it amounts to mismanagement. Further, our view is reinforced by the fact that a joint letter was written by the Petitioner and Respondent No. 2 to the Syndicate Bank on 30.3.2015 stating that cost overrun and debt shortfall/advance sale proceeds shortfall shall be met by promoters /(Company/Directors) from its own sources. (vide letter at page 423 of Respondents Reply paper Book). Therefore, the amount borrowed on interest free basis from *Ganga Kumar Singh* is a bonafide transaction.

7.10 So far as payment made to *Vinod Kumar Singh* is concerned, it is stated in the reply that he is a member of the Company (Respondent No 4 in CP 75/2016) and he arranged labour for the construction work and the payment was made to him after effecting TDS towards the labour charges and this transaction was done in the ordinary course of business only. This assertion is not denied in the rejoinder statement. Therefore, it is taken to be an admitted fact the amount that was paid to *Vinod Kumar Singh* is towards labour charges and TDS was also effected on that sum and so, it cannot be regarded as any dubious or tainted transaction that would effect the interest of members or the company.

8. Other points: Keeping the above answers on certain material issues in view, we now focus our attention on the swivel of the main case of both parties, exchanging the allegations of oppression and mismanagement, referring to the claims made in CP 75 also to some extent.

8.1 As a whole, as discussed above, we find no financial mismanagement with malafide intention of siphoning off company's funds. Leaving the issues thus raised in CP 54/2016, we now switch to the other counter Petition in CP 75/2016 which is based mainly on the cause of action arisen out of the letter written by the Petitioner to the Bank on 11.2.2016 complaining as follows: (see: Annexure R 26-page 371 of Respondents Reply paper book)

> "I Sanjeev Agrawal S/o Late Kailash Nath Agrawal R/o D-60/33, B-1, Chhoti Gaibi, Varanasi is the Director of OMKARESHWER COLONIZER PRIVATE LIMITED.
>
> I have some dispute in Managerial Board of the Company and I have come to know that the Loan amount which you disbursed to the company is not being utilized as per the terms of the sanction.

> You are hereby requested to kindly stop further disbursement and operation of the both current as well as loan account of the company.
>
> Please treat this as most urgent and stop all accounts operated by the company in your reputed bank with immediate effect. Also you are hereby requested to kindly provide me statement of accounts on my maid ID given hereunder."

On that letter, an endorsement in hand writing is appearing as below:

> *"Sir, A/c Blocked on 15.02./2016 as per request."*

8.2. The Petitioner has also written a letter to the Respondent No. 2 on 16.2.2016 (at page 372 as Annexure R 27) about the letter addressed to the Bank to stop operation of accounts until 'the dispute in the management of the company is resolved and a fresh instruction to the bankers are given after discussing the same in the proposed board meeting'. In as much as the Bank has stopped the operation of account of the Company in pursuance of the letter on 15.2.16, the Respondents in their CP 75/16 urge that such act of the Petitioner amounts to oppression and sought the relief of directing the Petitioner to withdraw that letter.

8.3. The events subsequent to 15.2.16 have to be referred at once because they have a considerable bearing on the analysis of situation undertaken by us. They would only show that both the directors are locking in horns. Petitioner issued a notice on 29.2.2016 (Annexure R-28, page 374) that he is proposing to hold a Board Meeting on 13.3.2016 at Hotel Vaibhav, Varanasi at 2 pm. (see para 6.25 of Petition in CP 54/16) The said notice speaks that -

> "Recently the company has raised loan from the bank which I understand is not being utilized for the purpose it was taken and therefore I was constrained to request the bank to withhold further disbursements. I know it is a very unpleasant step; however, I had no choice. Top thrash out these issues it is proposed to hold a Board Meeting on Sunday the 13th Day of March, 2016...."

The purpose of the proposed meeting is therefore, obviously to discuss and sort out the issue relating to utilization of loan obtained from the Bank. The contention of Respondent No. 2 in CP 54/16 as against this meeting is that he was always flexible and agreed to the suggestion of the petitioner to hold meeting at Hotel Vaibhav. Yet, he contends that the intentions of the petitioners are malafide and the steps taken by them are pre-planned to create false evidence in their favour. The fact remains, convening of this meeting was not materialized. On the other hand, the Respondent sent a notice on 5.3.2016 (even before the meeting proposed by petitioner scheduled on 13.3.16) informing that he is holding the meeting on 13.3.16 at the Registered Office of the company which is his residence. (Annexure A10).

8.4. A reading of the above notice sent by e-mail discloses that the Respondent is objecting the petitioner's complaining to the Bank to freeze the account operations because "a director is also under an obligation not to create hindrance in the affairs of the company". Further the said notice reads that the Petitioner shall attend the meeting on 13.3.2016 at the registered office with a caveat that in the meantime he should withdraw his letter written to the Bank for freezing the bank account of the company "so that the working of the company is not effected having regard to nature of business i.e., construction'.

For the meeting proposed by the Respondent, the agenda circulated is available in page 150 of the Petition Paper book in CP 54/16. It includes:

i. cost incurred, bookings done and progress of the construction of the project;
ii. to take note of the amount of term loan, rate of interest, utilization of term loan availed from Syndicate Bank and funds received against the booking of flats;
iii. to review the contractors and suppliers of materials appointed by the company
iv. to take note of various bank accounts of the company and to decide on the mode of operation of the accounts;

8.5. Interestingly, the Petitioner did not attend this meeting. The Petitioner objected for the venue of the meeting. Ultimately, vide letter dated 26.3.16, the project site of the company was fixed as venue. The respondents then objected for the presence of special invitees, as proposed by the petitioner. There is thus a impasse created in management of the affairs of the company, perceptibly for the reason that there are only two directors. The respondent was weighing up to introduce another Director into the Board so that majority decision will prevail but the Petitioner is objecting for this on the pretext that *Mr. Vinod Kumar Singh* is close associate of the Respondent, forgetting the fact that *Mr. Vinod Singh* is also a share holder of the company having 2000 equity shares.

8.6. With this back ground on hand, what is appearing to us from the circumstances on record is that both the Directors who are at the helm of affairs of the company are not pulling the cart in one direction, losing mutual confidence in each other. Conceivably, for that reason only, the Petitioner in CP 54/16 instead of calling for a Board meeting to discuss the misusing of borrowed funds by the Respondent, rushed to make a complaint in utter haste to the Syndicate Bank that has resulted in adversely affecting the business of the company, besides damaging its goodwill in the records of the financing institution. This will also lead to leave distrust in the investors who wanted to book/purchase flats in the project as they will entertain a doubt whether the project will be completed in time or not. It will frustrate the very purpose of incorporation of the Company.

8.7. Thus, in our considered view, if we examine the allegations and counter allegations individually, they may not strictly imply the acts of oppression or mismanagement, but certainly, if examined cumulatively in the discordant environment created by Petitioner and Respondent, would amount to oppression and mismanagement for compelling the Tribunal ordering liquidation of the company which is the perquisite of sec. 397 and 398 of the Act. If liquidation is ordered, the investment already made in the project will become a profligate outflow and if anybody had booked the flats already, he or they will be at loss. Therefore, instead of ordering liquidation, by virtue of powers vested in the Tribunal under Sec. 402 of the Companies Act, 1956 read with Sec. 242 of the Companies Act, 2013, we have to pass appropriate order for the future progression of the Company. For that purpose, we read the relevant parts of those provisions which are given as below:

> ***Section 402 - Powers of Tribunal on application under section 397 or 398:***Without prejudice to the generality of the powers of the[1][Tribunal] under section 397 or 398, any order under either section may provide for -

(a) the regulation of the conduct of the company's affairs in future;

(b) to (f) xxxxxxx

(g)any other matter for which in the opinion of the[1][Tribunal] it is just and equitable that provision should be made.

Section 242 - Powers of Tribunal: (1) If, on any application made under section 241, the Tribunal is of the opinion--

(a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and

[1][(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.]

(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for--

(a) the regulation of conduct of affairs of the company in future;

(b) to (i) xxxxxxx

(h) removal of the managing director, manager or any of the directors of the company;

(k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;

8.8. Section 402 of the Companies Act contemplates issue of directions with reference to administration and management of the affairs of the company. The power of the Tribunal under Section 397 is to make 'such order as it thinks fit', with a view to bringing an end to the matters complained of. Having regard to the very wide nature of the power conferred on the tribunal and the object which is sought to be achieved through the exercise of such power, the only limitation that could be impliedly read on the exercise of that power would be that a nexus must exist between the order that may be passed there under and the object sought to be achieved by Sections 397 and 398. We have also noticed from Section 398 read with Section 402 of the Act of 1956, that if the Court is required to provide for the regulation of the conduct of the company's affairs in future because of oppression or mis-management that has taken place in the course of normal corporate management, the Court must have the power to supplant the entire corporate management or corporate mis-management by resorting to non-corporate management which may take the form of appointing an administrator or special officer or a committee of advisors to be in charge of the affairs of the company. The powers of the tribunal under Section 402 of the Act cannot obviously have any regard to or be subject to the other provisions dealing with the corporate form of management.

8.9. According to the Supreme Court in *M.S.D.C. Radha Ramanan vs. M.S.D. Chandrasekara and Anr.,* [5]the just and equitable principle embodied in clause (g) of Section 402 is an equitable supplement to the common law of the company which is to be found in its Memorandum and Articles of Association. The Court, on another occasion, made the statement of law that, the Court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation any further relief or reliefs, as the Court may deem fit and proper, are warranted. (Vide: *Sangramsingh P. Gaekwad vs. Shantadevi P. Gaekwad*)[6]

Perhaps, in tune with the law explained by the Apex Court on the interpretation and ambit of Sec. 402 of the Act of 1956, in Sec. 242 of the Act, 2013 the legislature has provided power specifically in the Tribunal for removal of the managing director, manager or any of the directors of the company and appointment of such number of persons as directors, as postulated by clauses (h) and (k) of subsection 2 of sec. 242. However, both clauses, one for removing the directors and the other for appointment of directors, are separate from each other and operate in different circumstances either conjointly or disjoint. That means, the Tribunal, for the reasons, may remove the existing directors etc substitute the Board by new directors; or, without resorting to removal of present directors, can also appoint directors to the Board to report to the Tribunal.

9. Result: Keeping in view the overall circumstances of the case, and the interests of the Company and of the prospective purchasers of the flats of the Company's project and those who have already booked the flats and the objective of Sec. 397, 398 and 402 of the Companies Act, 1956 read with Sec. 242 (2) (h) and (k) of the Companies Act, 2013 the following Order is passed:

1) (a) That the Syndicate Bank shall nominate one of its officers as Additional Director of the Company who shall co-ordinate with the present two Directors namely, *Shri Sanjeev Agarwal* and *Shri Satish Kumar Singh* to hold Meeting of the Board within 45 days and take decisions on the following subjects, besides the other issues pending between both the directors;

i) Appointment of additional director from any of the members;

ii) Proper utilization of the funds for the projects;

iii) To take steps for proper and timely implementation of the project;

iv) To review the financial soundness of the company to work out the ways and means to strengthen the company.

(v) to seek independent audit of the accounts of the company;

1. (b) Further the Board shall call for a Meeting of Members either as AGM or EOGM within the statutory time after the Board meeting as the above, for getting approval of the decisions taken in the Board meeting.

2) (a) *Dr. Pawan Jaiswal,* Practicing ICWA is appointed as observer of the Board Meeting, who shall supervise the service of notices of the Board Meeting (s) and the AGM/EOGM respectively, to have been in strict compliance of procedure and Rules, attend the meetings and report to the Tribunal whether the meetings were conducted in proper manner

[5](2008) 6 SCC 750
[6] (2005) 11 SCC 314

and the outcome of the same. The observer is empowered to seek necessary instructions or appropriate directions from this Bench as and when necessary for the smooth and effective convening of the meetings of the Board, AGM, or EOGM as the case may be.

2) (b) Both the parties shall pay a sum Rs. 25, 000/- (Rs. Twenty five thousand only) each to *Dr. Pawan Jaiswal* as his honorarium in advance besides reimbursing his traveling and incidental expenses;

3) (a) That the Petitioner in CP 54/16 *Shri Sanjay Agarwal* shall withdraw /waive his objection made to the Syndicate Bank against the disbursal of further loan amount forthwith positively within 15 days from the date of service of this Order. If he fails to do so, it is deemed that the said letter of objection is withdrawn /waived and the Bank is at liberty to ignore the same. However, the Syndicate Bank is at liberty to take a decision on disbursal of the further amounts of loan on the basis of the outcome of the Board Meeting as above said and also on the basis of the financial health and repayment capacity of the Company and other parameters as per the Bank rules;

3) (b) The Bank is further expected to examine the feasibility of restructuring the loan facility according to the norms, provided the Board makes an application to that effect.

4) The Company shall report the compliance of the above order to the Registrar of Companies, Kanpur within 15 days from the date of the Board Meeting/(s), AGM /EOGM as the case may be, as directed above;

5) That the Petitioners in the CP 54/16 and 75/16 shall report to the Registrar of Companies, Kanpur by filing certified copy of this Order within 30 days from the receipt of this Order;

6) All the applications pending as on today are hereby disposed off and merged with this common order;

7) Both the Company Petitions viz., CP 54/2016 and CP 75/ 2016 are disposed off accordingly and both the parties in both causes shall bear their respective costs.

Typed by self, corrected by us, delivered in open Court this Wednesday, the 18th day of January, 2017

18.01.2017

MR. V.S.R. AVADHANI, JDL. MEMBER

MR. H.P. CHATURVEDI, JDL. MEMBER

18th January, 2017