BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, MUMBAI

C.P.NO.16/397-398/CLB/MB/MAH/2016

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

In the matter of Companies Act, 1956 ;
AND
In the matter of Sections 397, 398, 399, 402
And 403 of the Companies Act, 1956 ;
AND
In the matter of Span Biotronics Private Ltd.,
A company incorporated under the provisions
Of the Companies act, 1956 having its registered office at 2, Vatika, 14 Bapista Road, Vile Parle (W), Mumbai – 400 056, Maharashtra.

DR. BHAGWATI PRASAD,
Adult Indian Inhabitant residing at
B-2003, Lake Pleasant Lake Homes,
Off Adi Shankaracharya Marg, Powai,
Mumbai-400 076, Maharashtra. **.....Petitioner.**

Versus

1. **SPAN BIOTRONICS PRIVATE LIMITED,**
A Company incorporated under the provisions
Of Companies Act, 1956 and having its registered
Office at 2, Vatika, 14 Baptista Road, Vile
Parle (W), Mumbai – 400 056

2. **ARKRAY HEALTHCARE PRIVATE LIMITED,**
A Company incorporated under the provisions of
Companies Act, 1956 and having its registered
Office at 7th Floor, Opulence 6th Road, TPS III,
Santacruz (E), Mumbai-400 055, Maharashtra.

3. **SPAN DIAGNOSTICS LIMITED,**
A Company incorporated under the provisions of
Companies Act, 1956 and having its registered
Office at 173-B, New Industrial Estate, Road No.6-G,
Udhna Udyognagar, Udhna-394 210, Gujarat. **.....Respondents.**

PRESENT ON BEHALF OF THE PARTIES

FOR THE PETITIONER

Mr. Abhinav Chandrachud along with Dhyaneshwar Jadhav i/b Legasis Partners for Petitioner

FOR THE RESPONDENTS

1. Ms. Prachi Wazalwar i/b Vaish Associates for Respondent Nos. 1 and 2.
2. Mr. Arnav Mohanty i/b M/s Wadia Gandhi & Company for Respondent No. 3.

ORDER

Pronounced on : 22.05.2017

1. The Petition under consideration was submitted before the erstwhile CLB, Mumbai on 26.02.2015 and thereafter transferred to NCLT, Mumbai Bench. Through this Petition, the Petitioner has invoked the provisions of Sections 397, 398, 399 of the Companies Act, 1956. On completion of the pleadings, from both the sides, the matter was listed for hearing. The allegation of the Petitioner is that being in minority, his rights have been oppressed and the affairs Company (R-1) were mismanaged.

2. **FACTS AND BACKGROUND OF THE CONTROVERSY** :- The Respondent No.1 Company viz. M/s Span Biotronics Private Limited (in short SBPL) was incorporated on 8th November, 2006. The Petitioner has claimed that he was appointed as a Vice President (Research and Development) in R-1 Company on 22nd January, 2007. He was also allotted 500 Equity Shares, having face value of Rs. 100/- each of the said Company on 10th of August, 2008. The said Company (R-1) was constituted by two Shareholders i.e. the Petitioner on one hand and Respondent No. 3 i.e. Span Diagnostic Limited, (in short SPAN) holding 95% Shares of R-1 Company, on the other hand.

2.1 The claim of the Petitioner is that, as a Vice President (Research and Development), the Petitioner was responsible for the entire administration and Research & development of the Company. The Petitioner was the first person appointed for the purpose of Research and Development in the Company, which grew the Research and Development business of the Company. In discharging his duties as the Vice President of Research and Development, the Petitioner was involved in the full

spectrum of activities in the company from installing equipment and developing the entire team of the Company of developing patentable products and processes.

2.2 The entire revenue generation of R-1 is from Royalty earnings. After the Research and Development carried out under the guidance of the Petitioner a license is granted to the Customers of the developed products. Royalty is earned by licensing the developed products. A Royalty Agreement was executed by R-1 with R-3 under which R-1 has granted R-3 the rights to possess, manufacture and sale of instruments developed by the R-1 Company for a consideration of a royalty. Claim of the Petitioner is that, in recognition of his contribution, he was given an entitlement of 10% of the gross royalty received by R-1 Company from licensing the technology developed by the Petitioner. The said entitlement was also written down in a **Royalty Agreement dated 14th May, 2010** entered into between the R-1 Company and the Petitioner.

2.3 According to the Petitioner an important event took place **on 24th January, 2014,** which had adversely effected the legal rights of the Petitioner. A Conference of all the employees of R-3 Company was held in Surat. To utter shock to the Petitioner, R-3 Company had announced that the process of selling of the entire diagnostics business was in progress, which included the majority stake in R-1 Company. On 25th January a letter was addressed to the employees of R-3 Company that post-transaction between R-2 and R-3 Companies, all the employees would be retained in their existing positions. It was also affirmed that, all the business commitments should also be honoured. To demonstrate the intention, the Petitioner has annexed a letter (email) dated 27th January, 2014 wherein it was reiterated that the commitments made earlier would continue to be honoured.

2.4 The Petitioner stated in the Petition that, as a **minority shareholder** of the Company, it was expected that the Petitioner would receive due intimation and an opportunity to participate in discussions relating to any proposal for divestment of the Company by Respondent No. 3. The Petitioner states that it was incumbent upon Respondent No.3 to consult or at least involve the Petitioner was incumbent upon Respondent No.3 to consult or at least involve the Petitioner in the transaction to protect his minority interest in the Company. However, the Petitioner was not given any notice about the said deal , rather the entire deal was done with malice. It was made a secret in order to deprive him of his legitimate entitlements. The

Petitioner states that both Respondent No. 2 and Respondent No. 3 acted through the Company (R-1)and connived to cause undue loss to the Petitioner by their actions. The Petitioner was denied participation or involvement in that deal, executed for the sale and transfer of the Company by Respondent No. 3 and as a result the **Company (R-1) was sold through the transfer of its bulk shares by Respondent No. 3 along with its related business undertakings, priced on slump sale basis to Respondent No.2 to the utter prejudice to the Petitioner.**

2.5 The Petitioner has also narrated one more event to establish that his rights were oppressed. In the process of Transfer of Undertaking by R-3 in favour of R-2 **(Arkray Health Care Private Limited)** shares of R-1 Company were valued by a Chartered Accountant. As per the Valuation shares were valued at Rs. 2064.74 per share. The Petitioner was not taken into confidence or consulted. The Petitioner was deprived of receiving the said value of his holding of 500 Shares, alleged in the Petition.

2.6 On 10th September, 2014 the Ministry of Finance granted approval of FIPB to R-2 Company for acquiring IVD Business of R-3 Company. The said approval also included the acquisition by R-2 of the entire Shareholding (95%) of R-3 in R-1 Company . It was also approved that, the said acquisition of the Undertaking was along with the employees and an assurance was given that the employees of the R-3 Company would continue even after acquisition.

2.7 After the completion of acquisition the R-2 Company began the act of **oppression** of the Petitioner and pressurized to increase the speed of work, as is evidenced vide email dated 24th January, 2015.

2.8 On 5th March 2015 the Business Transfer Agreement between R-2 and R-3 was closed, as a result of which the R-1 Company had become a subsidiary of R-2 Company. Later on Chairman of R-2 informed the Petitioner in person that R-2 had decided to wind up the operations and Notices would be served. When the Petitioner was harassed and hostile conditions were created, he had offered vide **email dated 3rd April, 2015 to exit as a Shareholder from the R-1 Company.** However, on 28th May 2015 the Petitioner was served Notice with a short letter intimating his **termination** from the employment of R-1 Company. It was communicated that the Company R-1 had taken a decision to discontinue the business activity, hence the employment of the Petitioner would come to an end

w.e.f. 27th June 2015. On 27th June 2015 one more letter was issued at the instance of R-2 purportedly relieving the Petitioner.

2.9 On 6th July 2015 the Petitioner addressed a letter to the Company and R-2 raising his grievance over the fact that the entire transaction between R-2 and R-3 was carried out without involving the Petitioner. On 24th September, 2015 the Advocate of the Petitioner sent a reminder Notice and pointed out to the Respondents that since there was no reply to the Notice dated 18th August, 2015 hence it will be presumed that they have no defence to counter the contentions raised in the said notice. Thereafter R-3 had replied denying the contentions raised.

2.10 The Petitioner has highlighted that around 5th March, 2015 the Business Transfer Agreement between R-2 and R-3 was closed, as a result, R-1 Company had become a subsidiary of R-2. It is reiterated by the Petitioner that within 4 weeks thereafter on 31st March, 2015 the Chairman of R-2 informed the Petitioner in person that it was decided to wind up the operations of the R-2 Company, also referred email dated 31st March, 2015 issued by Chairman of R-2, addressed to the management of R-1 Company informing winding up of the Company. The Petitioner vide email dated 3rd April 2015 objected and sought clarification. The Petitioner has informed that due to hostile conditions created by R-2 he had surrendered and offered to exit from the R-1 Company. Informed that the termination of employment and subsequent winding up of the Company is prejudicial to the interest of the Company. The Petitioner addressed a letter dated 6th July, 2015 to the Company and Respondent No. 2. In the said letter dated 6th July, 2015, the Petitioner lay emphasis on his vital role in setting up and in the development of the Company. The Petitioner also raised his grievance over the fact that the entire transaction between Respondent No. 2 and Respondent No. 3 was carried out without involving the Petitioner despite he being a minority shareholder of the Company, a fact which was sidelined and ignored by the Respondent No. 2. In the said letter it was stated that the Petitioner was being victimised and oppressed and that acts prejudicial to the interest of the Company were being undertaken by the Respondent No. 2. **The Petitioner claimed compensation for his wrongful termination, payment towards royalty under the Royalty Agreement dated 14th May, 2010 and the value of his 500 Shares.**

2.11 The Petitioner has thus sought relief in the Petition as follows, reproduced below only relevant portions :-

" *(a) That the Hon'ble Board be pleased to issue appropriate orders, directions and reliefs under Sections 397, 398, 399, 402, 403 and 406 fo the Companies Act, 1956 to bring to an end the aforesaid acts of oppression and mismanagement being perpetrated by the Respondent Nos. 2 and 3, including the necessary orders, directions and reliefs as prayed for herein ;*

(b) .....

(c) .....

(d) .....

(e) .....

(f) Direct the Company to pay compensation to the Petitioner for the accrued and potential royalty to the Petitioner quantified to Rs. 5,00,000/-.

(g) To direct the Compay to pay compensation to the Petitioner for the severance pay to the Petitioner according to the norms in his appointment letter amounting to Rs. 26,75,000/- for the wrongful termination of employment caused for achieving unlawful stoppage of operations of the Company immediately after acquisition against the principles set in the FIPB Order ;

3. **ARGUMENTS FROM THE SIDE OF THE PETITIONER** :- From the side of the Petitioner Learned Mr. Abhinav Chandrachud along with Advocate Mr. Dyaneshwar Jadhav, appeared and vehemently pleaded that this is a case where the Petitioner was systematically deprived of his right of salary and royalty. He has pleaded that in addition to the above, he has also been deprived of the value of the shareholding in R-1 Company. The Company was incorporated in the year 2006 and immediately thereafter the Petitioner was appointed as a Vice President. According to Learned Counsel the Petitioner was involved since inception hence worked hard to establish the company. However, when the Company was established, the Petitioner was illegally removed. The Company was established for Research and Development of Diagnostic Pathological Instruments, the field in which the Petitioner is highly qualified. The Company had taken the advantage of his qualifications. Learned A.R. has drawn attention on the Letter of Appointment dated 22nd January, 2007

according to which the Designation granted was "Vice President Research and Development" with the promise of basic salary amount of Rs. 7,20,000/- and with allowances Rs. 14,00,000/-. Thereafter an Agreement was executed on 14th May, 2010 between R-1 Company and the Petitioner, according to which, it was agreed upon to share 10% of the Commercial Receivable i.e. Gross Royalty. Royalty was earned for licensing the Technology to others. The grievance of the Petitioner is that without his knowledge an Agreement was executed between R-1 Company and R-3 Company, according to which, R-3 had agreed to pay R-1 an Annual Royalty on Nett Sales at the rate of 5% upto 5 years from the date of Commercial Launch. R-1 Company had granted R-3 an exclusive right to possess, manufacture, use and sale the instruments. When the work of the Company was flourishing due to the hard work of the Petitioner it was connived between R-1 and R-3 to take over the Research Work of the Petitioner. R-3 Company had sold 95% Shareholding in favour of another Company R-2 viz. Arkray Health Care Private Limited on 24th January, 2014. On 27th January, 2014 the Petitioner was informed about the said transaction through email from R-3. Without his information a Valuation was also procured on 1st February, 2014 and the value was determined of Rs. 2064.74 per share. All this was happening at the back of the Petitioner. The requisite approval from the Ministry of Finance called as FIBP was also obtained through intimation dated 10th September, 2014 granting foreign collaboration of Singapore Company to invest in R-3 (SPAN). The approval sought was as under :

" The approval is to M/s Arkray Healthcare Private Limited, Mumbai for the following :-

(a) To bring in share application money aggregating Rs. 1,00,10,34,930/- from M/s Arkray & Partners Pvt. Ltd. Singapore and its existing shareholder M/s Arkray Flobal Business Ic. Japan, and

(b) *To require/purchase the business undertaking of M/s Span Diagnostics Limited, Gujarat (SPAN) (i) SPAN's entire IVD Business, consisting of the corresponding assets, liabilities (secured and unsecured) employees, etc. on going concern basis and (ii) SPAN's shareholding in its subsidiary company, M/s Span Biotroics Private Limited, an entity registered under the Companies Act, which renders research and development services primarily to SPAN.*

3.1 The Respondents were adamant to remove the Petitioner to enjoy the maximum advantage of the profits. The Petitioner has developed a device for sample collection which was objected on some pretext or the other. The Petitioner, highly qualified professional, was humiliated. The Petitioner was working in bonafide manner to protect the interest of the Company, hence written letter for SSI Registration and ITES Registration on 10th March 2015 which was not acknowledged. His research and technique of PCS was also not appreciated vide email of 27th March 2015 and finally through a letter dated 28th May, 2015 services were discontinued w.e.f. 27th June, 2015. On 6th July, 2015 Petitioner had written a letter demanding his legitimate dues i.e. Royalty of Rs. 5,00,000/- and severance pay for wrongful termination of Rs. 26,75,000/-. The Respondents have not paid the said amounts, therefore a Notice was also served but nothing had happened, hence this Petition.

3.2 To buttress the allegation of Mismanagement and Oppression Learned A.R. has placed reliance on the decision of **S.P.Jain V/s Kalinga Tubes (AIR 1965 SC 1535).**

4. **RESPONSE OF THE DEFENDANT : -** A Reply from the side of R-1 and R-2 is on record denying the allegation of oppression and mismanagement. The Respondent R-1 and R-2 have stated that the Petitioner was one of the **employee** and he alone was not responsible for the building of the Company. The entire revenue to the Company was not derived under the guidance of the Petitioner and a very small Royalty Income constituted the share of the Petitioner. The acquisition of R-3 by R-2 was under correct process of law and the objection of the Petitioner were stated to be baseless. The valuation of the shares have also been systematically considered hence a second valuation was done in February 2015 by one more C.A. Firm, who have valued the equity share at Rs. 1165/ per share. The purpose of the said valuation was to ascertain the quantum of the Stamp Duty required to be paid on Transfer of Shares from R-3 to R-2. The Petitioner was not capable of delivering the expected results. Hence the new management had taken the decision to terminate the services. From the side of the Respondents detail of the Settlement Payment made to the Petitioner is furnished, according to which, **the full and final salary and royalty from April 2015 to May 2015 was Rs. 4,15,183/- and Gratuity Rs.5,14,423/- and Royalty Rs. 3785/-** was paid. A cheque was issued which was duly

encashed by the petitioner. He has not raised any objection. Therefore, the claim now made in the Petition is nothing but an afterthought. The termination of the Petitioner was based upon certain basic irregularities committed on his part. His removal was justified and executed according to the correct process of law. Once he is removed then there is no oppression of continuing in nature. Hence the Petition has no force rather unsustainable in the eyes of law. In an Affidavit of R-3 it was affirmed that the Petitioner was aware about the Transfer of Shareholding by R-3 in favour of R-2. The Petitioner had no legal right to object such transfer because he had no locus standi in the said companies.

In a Sur-Rejoinder of R-3 it has also been pleaded that in a situation when the entire shareholding have already been transferred, thereafter, R-3 company should not have been impleaded in this Petition. A prayer has been that R-3 should be dropped out of this litigation.

5. **ARGUMENTS FROM SIDE OF RESPONDENTS :-** From the side of the Respondents Learned Ms. Prachi Wazalwar Counsel for Respondent Nos. 1 and 2 and Mr. Arnav Mohanty Advocate for Respondent No. 3 appeared and intensely supported the pleadings furnished from the side of the Respondents. It is pleaded that the Petitioner was simply an employee of R-1 Company therefore his removal did not involve any legal implication. The Petitioner has not challenged his removal on any legal ground. The purpose of this Petition is to extract more money from the R-1 Company, although on termination his account was properly settled by issuance of cheque. According to Learned A.R. the revenue/income had declined from the year 2014 of Rs. 1,84,27,571/- to the year 2015 of Rs. 1,46,24,827/-. After meeting of the expenses there was a loss suffered by the Company. When the Directors Report was submitted for the period ended on 31st March, 2015 it was duly pronounced and duly written in the notes that the Company had decided to close down its operations. Therefore, it is incorrect to argue from the side of the Petitioner that due to his efforts the Company had good progress and that at his back the management had changed hands. The arguments were concluded by drawing distinction on facts from the case law of Kalinga Tubes (supra) cited from the side of the Petitioner.

6. **FINDINGS :-** Arguments of both the sides have been heard at length. Pleadings are carefully perused in the light of the evidences annexed. At the outset, it is worth to make an observation that the basic facts such as

incorporation of the R-1, involvement of the Petitioner in the business of R-1 Company , his entitlement as Salary plus Royalty, taking over of R-3 Company by R-2 Company etc. are not in dispute. Such averments of the Petitioner and connected evidences for e.g. Letter of Appointment, Royalty Agreements and Correspondence amongst the parties have also not been challenged on the ground of genuineness. As a result, the merits of the case is thus required to be decided on due appreciation of the facts and surrounding circumstances as existed during the period of controversy. This case is required to be decided on its own facts. Otherwise also, the question of "Oppression", ~~which~~ depends on the facts of each case. Events happened shall be in such manner so as to evidence a consecutive set of prejudicial acts unfair to the minority shareholder. A harsh conduct, burdensome behaviour or troublesome attitude are the examples of "Oppression". Majority is therefore not to be allowed to take the advantage of their strength specially when it is expected that the affairs of the Company are to be conducted in a democratic manner. On these lines this case is examined and decided.

6.1 The Respondent Company was constituted with two Shareholders, one was the Petitioner, having 5% shareholding and the other was R-3 M/s Span Diagnostic Limited, having 95% shareholding. The Petitioner was invited to join the Company because of his professional qualification. For this purpose the 'Letter of Appointment' is worth mentioning, wherein his Designation was approved as "Vice President Research and Development". He was expected to devote full time to perform the duties assigned as per an Annexure to the Letter of Appointment. As discussed above, his Salary was also mutually decided. The grievance of the Petitioner is that from the date of his appointment i.e. February 2007 he worked very hard and the Company has earned name. But in the year 2010 without his knowledge an Agreement/ Arrangement was made between R-3 (Span Diagnostic Limited) and the Respondent No.1 Company. The Petitioner is aggrieved that R-1 had granted exclusive right of use of Instruments and Research activity to R-3 which were significant in this line of business as well as monetarily valuable. It had all happened without informing the Petitioner, although denied by the Respondents. When the Management was transferred in the hands of R-2 Company viz. Arkray Healthcare Private Limited on 5th of March 2015, the Petitioner started facing several difficulties. It transpires from the corroborative evidences that although he was persistently working in the best interest of the Company, but he was unable to

please the new management. It appears from the correspondences, placed on record, that on one pretext or the other they have started belittle/ disparage the Petitioner by avoiding communication with him, as well as, not approving his Research Activities.

6.2 On hearing on this issue, as well as, considering the factual matrix I am of the opinion that two objections/ relief of the Petitioner do not require any interference. First is in connection of his removal from the Vice Presidentship. This is not a case where a Director has been removed. This is a case where an employee (Vice-President) has been removed by the employer. The steps taken by the Respondent No.1 and the legal formalities observed before removal has not been technically objected by the Petitioner. The Petitioner had not raised any serious legal question on this issue. Otherwise also, number of events have taken place after his removal which could not be undone. Once the due legal process has been adopted, therefore in my considered opinion, specially when not seriously contested, this grievance of the Petitioner do not survive in the eyes of law. Essentially it is right now necessary to make myself clear at this juncture, before dealing the question of "Oppression", that this Petitioner is associated with the R-1 Company in two capacities, one as a Vice President (employee) and two as a Shareholder (500 Shares).

6.3 The second objection of the Petitioner is regarding Transfer of Shareholding by R-3 in favour of R-2. Prima facie there is nothing on record to establish that such acquisition was not enforceable in law. It appears that due process of law was adopted and thereupon the said transfer took place, hence in the absence of any cogent material no interference is judicially required.

6.4 The Petitioner in one of the Relief is demanding appointment of an Administrator. Another demand is to carry out inspection of the Account Books by an independent Auditor and such other like nature relieves. However, at this stage when lot of water had flowed under the Bridge hence at this stage, it is not in the interest of the business of the Company to reverse those events. Moreover no instance of financial irregularity is cited. No gainful purpose is going to be served if request is allowed hence, it is hereby decided not to interfere.

6.5 Overall contents of the Petition and the evidences on record have given an indication about the intent of the Petitioner that he is no more interested to continue with the Respondent No.1 Company. A letter in this regard dated 17th July, 2015 written by SBPL (R-1) to the Petitioner has clearly indicated that the

Petitioner had expressed his intention to transfer his shareholding in favour of AHPL (R-2). Considering the circumstances and the factual matrix it is beneficial to the Petitioner as well as to the Respondent Nos. 1 and 2 to accept **Exit Plan** of the Petitioner. The Company thereafter can run without legal hurdles.

6.6 Interalia, it is justifiable to direct the Respondent No. 2 (AHPL) to accept the offer of transfer of 500 shares by the Petitioner. As far as the Two Valuation Reports are on record, it is better not to comment on the Valuation Report dated 16th February, 2016 wherein the fair value of shares of SBPL (R-1) were valued at Rs. 1165/-, because the said report was not with the intention to determine the transfer price/consideration but to place it before the concerned authorities to pay the Stamp Duty. The Valuation originally made by the Valuer vide Valuation dated 1st February, 2014, as also adopted by the concerned parties, can be said to be a fair and reasonable price for transfer, hence, Rs. 2064.74 shall be taken into account for arriving at the consideration amount of 500 Shares to be transferred by the Petitioner. Ordered accordingly.

6.7 The Petitioner is demanding a sum of Rs. 5,00,000/- (Rupees Five Lakhs only) towards Royalty due on the R-1 Company. The Petitioner is also demanding "severance pay" of Rs. 26,75,000/- in lieu of the services rendered in the past and as a compensation of alleged unjustified termination. In my opinion, the dispute should set at rest after prolonged litigation, if a reasonable amount is directed to be paid to the Petitioner in lieu of his Professional qualification utilized during the initial days of establishment. Therefore, after due consideration of the financial position of R-2 (AHPL) available as per record i.e. correspondence made for taking FIPB approval, a reasonable amount can be allowed to be disbursed to the Petitioner. Keeping a holistic view in mind, a fair and reasonable amount can be a sum of Rs. 20,00,000/- (Rupees Twenty Lakhs only) to be disbursed by R-2 (AHPL) in favour of the Petitioner. A reasonable period of 30 days on receipt of the Order is therefore granted to complete the formalities by either side, so that from one party the shares can be transferred and by the other party payments can be made.

7. Petition is partly allowed. No order as to costs. Since finally disposed of, therefore, directed to consign to Records.

Sd/-

M.K. SHRAWAT
MEMBER (JUDICIAL)

Date: 22nd May 2017.

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