

**NATIONAL COMPANY LAW TRIBUNAL,  
PRINCIPAL BENCH,  
NEW DELHI.**

CP No.110 (ND)/2009

PRESENT: CHIEF JUSTICE MR. M.M. KUMAR  
HON'BLE PRESIDENT

MR.S.K. MOHAPATRA  
HON'BLE MEMBER (T)

Under sections 397/398 of the Companies Act 1956 and  
241/242 of the Companies Act 2013.

And

In the matter of

Abinash Chander Mahajan & Ors. ....

Petitioners

Vs.

M/s. Vikas Promoters Pvt.Ltd. & Ors. ....

Respondents

**Present on behalf of the Parties:**

1. Mr. K. Datta, Advocate for the Petitioners
2. Mr. Shantanu Parashar, Advocate for the Petitioners
3. Mr. Deepak Vohra, Advocate for the Respondents.
4. Mr.Sunil Fernandes, Advocate for the Respondents.

## ORDER

Petitioners have filed CA 58 of 2015 and the Respondent No. 3 to 5 have filed CA No. 294 of 2015 raising several objections against the valuation report dated 4<sup>th</sup> February, 2015 of Shri Pankaj Jain, Auditor cum Valuer, submitted pursuant to the order dated 16.01.2014 of Company Law Board passed in CP. No. 110 (ND)/2009.

**2.** While disposing the Company Petition No. 110(ND)/2009, Company Law Board in its order dated 16.01.2014 raised the following issues:

*“a) Whether allotment of 1,42,200 shares made to the respondents themselves is valid.*

*b) Whether R 2-5 diverted the funds of the company taken as loan from UBI Bank to the other companies managed and owned by these respondents as interest free loans is oppressive and prejudicial to the petitioners.*

*c) Whether R 2-5 inflated project cost dealing transactions with some companies where the director's interest is lying and whether R 2-5 siphoned off the funds of the company in the name of advertisements.*

*d) Whether R 2-5 diverted the booking amounts in the form of cash without showing them in the books of the company.*

*e) Whether these respondents sold the assets of the company at under valuation.*

*f) Whether these respondents siphoned off the funds of the company.”*

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**3.** Company Law Board discussed all the aforesaid issues in its well- reasoned order dated 16.01.2014 and passed the following operative directions:

*“1. The allotment of 1,42,200 shares to the respondents is held invalid.*

*2. Mr. Pankaj Jain, Chartered Accountant, Mobile: 9810286606 is appointed as Auditor-cum-Valuer. I hereby direct the parties to pay remuneration as agreeable to him. The petitioner group and respondents group in proportion to their shareholding shall pay the remuneration to him.*

*3. This Bench has observed that these Respondents diverted the funds of the company interest free to other companies, and the persons close to them, therefore R 2-5 are directed to pay up the commercial interest accrued upon the loans given to the other companies until the loan amount is paid to the Bank by Respondent No. 1 company, as calculated by the auditor cum valuer appointed in this case. The Auditor, on inspecting the records, will calculate how much fund was given as interest free loan to other companies and others, then R 2-5 shall pay up interest over the said amount until the Bank loan of Respondent No. 1 company cleared.*

*4. I hereby direct the auditor-cum-valuer to inspect the records of the company to assess as to whether the respondents in the management sold or leased out the assets of the company at undervaluation, if so, calculate the same. I hereby direct R 2-5 to bring back the difference of amount undervalued to the till of the company.*

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5. I hereby direct the valuer to assess siphoning of the funds of the company by Respondents 2-5 in relation to the transactions and expenditure in development of the project.

8. I hereby direct the valuer to assess the value of the shares of the petitioner as on 31.3.2013 on asset-based valuation taking market value of the assets as on the dates the spaces sold out, as to remaining assets, assess the same as on 31.3.2013 taking the then market rates in the vicinity in to consideration, then provide exit to the petitioners.

9. I hereby direct the valuer to prepare valuation report within three months from the date order is made available.

10. I hereby direct the respondents 2-5 to pay up the value of the shares of the petitioners in two equal instalments, 1<sup>st</sup> instalment within 3 months and second instalment within six months from the date valuation report supplied to the parties.

11. I hereby reiterate the order dated December 23, 2011 passed by Honourable High Court of Delhi that the respondents shall not create third party rights over 20% of total saleable assets of Respondent No. 1 company until full payment is made to the shares of the petitioner.

12. The parties are liberty to apply.”

4. In compliance of the order dated 16<sup>th</sup> January, 2014 passed in CP No. 110 (ND)/ 2009, the appointed Auditor cum Valuer, Shri Pankaj Jain has submitted its report on 4<sup>th</sup> February, 2015. The report *inter alia* reveals that records and documents from petitioners and respondents were called for and meetings with petitioners and respondents were held on various occasions. The





report also states that the appointed Chartered Accountant being not competent to value the tangible assets, the services of two independent property valuers namely M/s Contex Associates and M/s R. K. Singhal & Company Pvt. Ltd. were taken, in order to arrive at fair market selling price of the spaces booked/sold in Multiplex at different dates, and market value as on 31.03.2013 as directed by CLB. It is stated that the two experts are qualified registered valuers and are also on the panel of valuers maintained by the Official Liquidator attached to the High Court of Delhi and Chandigarh respectively. Copies of the valuation reports submitted by both the experts have been annexed. It is pertinent to note that the valuation of shares of the respondent company is based on the market value of assets/spaces valued by these expert valuers. The Auditor-cum-Valuer's report also indicates that the records of the company were inspected at the registered office and visits were also made at the VikasCinemall situated at 813/1, Radhu Cinema, G. T. Road, Shahdra, Delhi-110032. In the reasoned report the Auditor cum Valuer has arrived at the following conclusion, precisely, on the issues referred to him.

- 1) *Total interest receivable as per bank rate on the interest free advances paid by Respondent No. 1 company to related/other parties comes to Rupees 1, 33, 95, 471.60 Paise.*
- 2) *There does not appear inflation of the project cost by the company on construction of the project in question.*
- 3) *Allegation of siphoning off funds by way of bogus advertisement is not tenable.*





- 4) *There is a material difference between the estimated market value given by the valuers and the rate at which the spaces have been booked or sold by the respondents, which prima facie indicates that the respondents have siphoned off the funds of the company in transaction of booking of the spaces at undervalued rates and collection of cash in addition to the amount reflected in the books and hence siphoning off funds cannot be ruled out.*
- 5) *Value of one share as on 31.03.2003 on asset based valuation taking valuation of properties of Vikas Multiplex comes to Rupees 351.90 Paise. Consequently total value of 3,60,000 shares of petitioners in the Respondent No.1 company has been shown as Rupees 12,66,84,000/-.*

**5.** It is pertinent to mention here that Petitioners have filed CA No. 189/2015 to execute the order dated 16.01.2014. It is the case of the petitioners that CLB had clearly directed the respondents 2 to 5 to pay up the value of the shares of the petitioners in two equal instalments, 1<sup>st</sup> instalment within 3 months and second instalment within six months from the date valuation report supplied to the parties. There has also been allegation of dilatory tactics by respondents in not adhering to the timely compliance of order dated 16<sup>th</sup> January, 2014. It is however seen that even though Auditor-cum-Valuer has filed its report pursuant to the order of CLB, both the parties have challenged the said valuation. Objections filed by both the parties against the report of the auditor are under consideration of this tribunal. It will suffice to say that the impugned report of the

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Auditor-cum-Valuer dated 4<sup>th</sup> February, 2015 is under consideration of this tribunal and has not yet attained finality.

**6.** It is also pertinent to note that the respondents have preferred appeal before Hon'ble High Court of Delhi against the order dated 16.01.2014 of Company Law Board passed in Company Petition No. 110(ND)/2009. Hon'ble High Court disposed of the appeal vide order dated 10.02.2016 inter alia with the following directions.

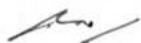
*1. CLB, to first, dispose of the objections to the audit-cum-valuation report dated 4.2.2015 raised by the petitioner and the respondents vide their respective company applications i.e. CA 58 of 2015 and CA No. 294 of 2015.*

*2. Once the CLB decides the tenability of the objections raised by both sides, it will then proceed to the next step, if necessary, which is, that, it would then deliberate upon the execution application CA 293/2015 filed by the respondents to enforce the order dated 16.01.2014.*

*3. CLB is to take up all other pending applications filed in CP 110/2009 as well, after, it disposes of the aforesaid objections.*

**7.** It is relevant to note here that Company Law Board has since been dissolved w.e.f. 1<sup>st</sup> June, 2016. Under Section 434 of Companies Act, 2013 all matters, proceedings and cases pending before the Board have been transferred to concerned National Company Law Tribunal. In the factual background objections to the auditor-cum-valuer's report dated 4.2.2015 raised by both,

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the petitioners in CA 58 of 2015 and the respondents in CA No. 294 of 2015 are taken up for consideration in this order in compliance of Hon'ble High Court order dated 10.02.2016.

**8. CA 58 of 2015 :**

In CA 58 of 2015 petitioners have raised two objections to the impugned valuation report dated 4.2.2015.

8.1) The first objection of the petitioners is that despite direction of CLB and also auditor's own *prima facie* conclusion, the auditor-cum-valuer has not proceeded to calculate the extent of such undervaluation/ diversion/ siphoning. Ld. Counsel for the petitioner referred to the concluding finding of the report on the issue of siphoning off funds, where Auditor-cum-valuer clearly concluded that:

*"It is noted that there is a material difference between the estimated market value given by the valuers and the rate at which the spaces have been booked or sold by the respondents. This prima facie indicates that the respondents have siphoned off the funds of the company in transaction of booking of the spaces at undervalued rates and collection of cash in addition to the amount reflected in the books, and hence siphoning of funds cannot be ruled out."*

8.2) Ld. Counsel for petitioner further referred to paragraph 55(4) of the order dated 16.01.2014 of Company Law Board, wherein it was directed that, *"the auditor-cum-valuer to inspect the records of the company to assess as to whether the respondents in the management sell or lease out the assets of the company at undervaluation, if so, calculate the same"*. Besides

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there was also a direction on Respondent 2-5 to bring back the difference of amount undervalued to the till of the company.

8.3) It is the case of the petitioner that despite the direction of the Board and aforesaid finding of the auditor on apparent existence of siphoning off funds, the Auditor-cum-valuer failed to calculate the monetary extent of diversion and/or siphoning by undervaluation.

8.4) The second objection raised by the petitioner is that *erstwhile* CLB had directed the valuer to assess the value of the shares of the petitioner as on 31.3.2013 on asset-based valuation but the valuer had wrongly discounted the same by 15%. It is contended that such discount is erroneous and unreasonable, as it reduces the value of the shares. The petitioner has prayed that the valuation of shares be determined without applying discount of 15%.

8.5) It is pertinent to mention here that the Auditor-cum-valuer in its subsequent letter dated 21<sup>st</sup> April, 2015 has clarified as to why discount has been applied to the valuation and also why monetary extent of diversion and/or siphoning by undervaluation could not be calculated.

**9. CA294/2015 :**

9.1) Auditor cum Valuer in its report dated 4<sup>th</sup> February, 2015 has assessed that total interest receivable by Respondent No. 1 company on the interest free advances paid to related/other parties comes to Rupees 1, 33, 95, 471.60 Paise.

9.1.1) Against the finding of auditor on this issue the respondents have submitted that as per the order dated

16.01.2014 of Company Law Board interest should have been calculated on the loans given by Respondent No. 1 company only from the amount received from the bank, namely UBI. It is accordingly contended that the auditor's report fails to identify as to which of the funds of Respondent No. 1 company, as received from UBI, were allegedly given to other companies without interest.

9.1.2) Respondents further alleged that the auditor has failed to identify as to who are "related parties", to whom such interest free loans were given and who are unrelated parties.

9.1.3) The third contention of the respondents is that floating bank rate of interest has been unreasonably applied in every transaction as high as 16.5% in some instances, which could never have been charged in the nature of commercial transactions through which such advances were extended.

9.1.4) It is also alleged that the auditor has failed to appreciate that the advances were essentially for the commercial growth of Respondent No. 1 company and every rupee that was extended, has been repaid/received by the Respondent No. 1 company much before the date of the present company petition.

9.1.5) It is submitted that that UBI, the lender bank itself has taken the stand that none of the actions of the respondent be termed as breach of any provisions of the loan agreement. Respondents accordingly contended that when the bank, who has issued the loan, is of the view that the funds have not been diverted for any other purpose, then the allegation in question cannot stand.

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9.1.6) It is also the respondents case that Auditor cum Valuer has failed to appreciate that the said transfer were in relation to business transactions in regular course for booking space in the Cinemall or advance for purchase of land etc. It is submitted that despite furnishing the requisite documents / Agreements in support of such transactions, the auditor has disregarded the same.

9.1.7) Learned counsel for the respondents further submitted that the respondents over the years have infused capital in to the respondent company on which substantial interest was foregone for the betterment of the respondent company, the details of which were furnished to the Auditor cum Valuer, however it is alleged that the same were ignored by the Auditor cum Valuer. Respondents contended that they had invested huge sums of amount in the company as unsecured loans interest free to ensure that the project is developed on time. It is their case that the auditor has failed to appreciate the extent of private funds invested by the answering respondents in Respondent No. 1 company.

9.2) In regard to the allegation pertaining to the purchase of ready mix concrete, the Auditor cum Valuer has not found the allegations of the petitioners to be true and has stated that there does not appear inflation of the project cost by the company on construction of this project. Auditor cum Valuer's finding on this issue has gone in favour of respondents.

9.3) In connection with the allegation of siphoning off funds by way of bogus advertisements, the Auditor cum Valuer has come to the conclusion that the said allegation of the petitioners

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on this count is not tenable. Auditor cum Valuer's finding on this issue also has gone in favour of respondents.

9.4) In respect of the issue as to whether Respondent 2 to 5 diverted the booking amount and sold assets of Respondent No. 1 company at under valuation, the respondents have contended that the auditor has failed to give any conclusive finding against the respondents. It is submitted that CLB has not tendered any specific finding on this issue and has only directed the auditor to look in to the aspect. No doubt the report *prima facie* alleges the siphoning off funds, however there is no authoritative or conclusive finding given by the auditor with regard to the manner and quantum of alleged siphoning.

9.4.1) It is submitted that petitioners have filed a false and frivolous criminal complaint against the respondents on the same issue i.e. siphoning off funds. In such criminal complaint, the investigating officer has filed report stating that there has been no diversion or acceptance of unrecorded cash by the respondents.

9.4.2) Respondent submitted that EOW also conducted a detailed enquiry on the complaint by the petitioners and has submitted a report at Patiala House Court, whereby there is another finding that there has been no diversion of funds.

9.5. In respect of valuation of shares as on 31.03.2013, respondents submitted that the petitioner had invested Rs. 1.80 Cr. in Respondent No. 1 company on 30.09.2006. As per auditor's report as on 31.03.2013 petitioner's stake is assessed at Rs. 12.67 crores. Admittedly the only business of Respondent No. 1 company was the construction of the said Cine Mall. It is



therefore pointed out that the investment of petitioner in real estate to the tune of Rs. 1.80 Cr. in 2006 turned to be worth Rs.12.67 Cr. in 2013, in a period of 7 years in the background of depressing real estate market, is highly exaggerated and fanciful.

9.5.1) It is the respondents case that if the auditor's valuation is to be accepted then there has been an increase of 750% in the share value of the petitioners share in Respondent No. 1 company within a span of seven years i.e. from September 2006 to March 2013.

9.5.2) Learned counsel for respondents submitted that the reports given by the two property valuers had vital bearing on the assessment of the valuation of shares of the company. However, there is no record to indicate whether the said property valuers considered the sale deeds of properties situated in the vicinity of Respondent No. 1 company before arriving at their findings. It is the respondent's submission that the reports of the so called expert valuers do not point out which sale deeds of which area were considered for arriving at the valuation. Neither copies of such documents were provided to the respondents nor any attempt has been made to ask for the views of respondents. It is emphasized that in the absence of supporting material evidence, the valuation report given by the expert valuers deserves to be rejected.

9.5.3) Respondents further alleged that the valuers have failed to take in to consideration the advertisement notice of DDA for auction of shops in the vicinity of Cine Plus Complex. The said auction could not be successful due to lack of bids and DDA had to re-auction the said shops. It is submitted that the rates

quoted by DDA in its auction notice of Category-F property in the vicinity of Cine Mall were not considered while arriving at the valuation.

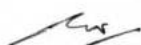
9.5.4) Respondents have pointed out that auditor has arbitrarily taken the flouted rates just to enhance the net result of the property. It is submitted that the prevailing rates of the property in the vicinity are not the same as stated in the report and the sale documents with respect to commercial properties sold out by other developers in the same area have been ignored.

9.5.5) Respondents have submitted that expert valuers have given their valuation without taking in to consideration the crisis that afflicted the real estate market since last few years. It is also alleged that the valuers have not taken in to consideration the deleterious effect on the economic price of the assets of Respondent No. 1 company due to various protracted litigation between the parties.

9.5.6) Respondents have referred to the letters issued by the Respondent No. 1 company pursuant to order dated 20.04.2011 giving petitioners the option of first purchase of the unit /spaces of the Cine Mall. It is stated that in response there to the petitioners vide letter dated 7.11.2011 expressed their inability to purchase the same.

9.5.7) Respondents have filed valuation report dated 26.04.2015 issued by one Mr. S. L. Dhir registered valuer, in respect of 25 unsold shops/ offices as on 31.03.2013, where the market value of the property in question was fixed at Rs. 26,48,00,000/-. It is submitted that the said valuation report has been prepared after considering DDA notice for E-Auction and

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sale deeds of central business district Karkarddoma, east Delhi besides market survey. However it is pointed out that in the present auditor-cum-valuer report of Mr. Pankaj Jain, the average market value of the self-same 25 unsold shops/offices has been assessed as Rs.60,08,78,503/-. Referring to the huge difference in the valuation respondents contend that valuations derived by both R. K. Singhal and Associates and Contex Associates are erroneous and frivolous.

9.5.8) In the written submission, respondents have offered their 85% of shareholding to the petitioner at the rate which the auditor has arrived to value the 15% shareholding of the petitioners. In addition respondents have undertaken to offer equivalent space in the Cine Mall, as per the rate quoted by the auditor in its report dated 4.2.2015, meaning thereby that whatever the average rate of per sft. area that has been arrived at by the auditor in its report dated 14.02.2015, the petitioner have an option of purchasing the area equivalent to their shareholding in the said Cine Mall at the said rate.

9.5.9) Petitioners in their reply have countered that respondents are reiterating their arguments on allegations of mismanagement and oppression, which was already adjudged by the erstwhile CLB. It is submitted that CLB order dated 16.01.2014 has attained finality and there is no stay order passed by any court on operation of order dated 16.01.2014.

9.5.10) It is also the contention of the petitioners that respondents are misusing the process of law and misusing the alleged report of investigating officer. It is submitted that respondents repeatedly referred to the report submitted by the

concerned investigating officer, but suppressed the fact that the report was challenged by the petitioners which was decided by Ld. ACMM II vide order dated 24.10.2013 in which it was said that matter was not properly investigated. Petitioners further pointed out to the order dated 21.02.2015 passed in the same matter to buttress their stand. Petitioners have also placed on record FIR No. 121/10 and urged that the concerned DCP was called by Ld. ACMM-II and the conduct of DCP and investigating officer was taken note of, in order dated 4.11.2015.

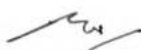
9.5.11) Petitioners further submits that conduct of respondents has ever since been to delay/avoid the process of law.

**10.** Heard the parties and we have perused the case records including the report dated 4<sup>th</sup> February, 2015 of Shri Pankaj Jain, appointed Auditor cum Valuer.

**11.** As discussed at paragraph 4 above, in terms of order of Company Law Board dated 16<sup>th</sup> January, 2014 passed in CP No. 110 (ND)/ 2009, the Auditor cum Valuer, Shri Pankaj Jain has submitted its report on 4<sup>th</sup> February, 2015 on the following issues.

- 1) *Interest receivable on interest free advances.*
- 2) *On inflation of the project cost.*
- 3) *On siphoning of funds by way of bogus advertisement.*
- 4) *On siphoning of funds in booking of the spaces.*
- 5) *Valuation of share as on 31.03.2003.*

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**12.** On the first issue the report of the Auditor cum Valuer shows that total interest receivable as per bank rate on the interest free advances paid to related/other parties comes to Rupees 1, 33, 95, 471.60 Paise.

12.1) In this regard it is relevant to refer to the operative direction contained in paragraph 55(3) of order dated 16<sup>th</sup> January, 2014 of Company Law Board passed in CP No. 110 (ND)/ 2009, which envisages that:

*“3. This Bench has observed that these Respondents diverted the funds of the company interest free to other companies, and the persons close to them, therefore R 2-5 are directed to pay up the commercial interest accrued upon the loans given to the other companies until the loan amount is paid to the Bank by Respondent No. 1 company, as calculated by the auditor cum valuer appointed in this case. The Auditor, on inspecting the records, will calculate how much fund was given as interest free loan to other companies and others, then Respondents 2-5 shall pay up interest over the said amount until the Bank loan of Respondent No. 1 company cleared.”*

12.2) The well-reasoned and self-contained finding of the auditor on this issue is also reproduced below.

*“It has been found from the accounts records of the company that the company has given interest free advances which are in the nature of loans to various parties where directors of the company were directly or indirectly interested, such as Vikas Multiplex Pvt. Ltd., Vikas Infrastructure Pvt. Ltd., VikasJagran Developers Pvt. Ltd., Vikas Travels& Tours, Vikas Associates Pvt.*

*Ltd., VikasGyanUday Foundation etc. The respondents have clarified and have shown agreements to prove that these are normal business transactions for booking of space or advance for purchase of land etc. But considering the nature of transactions, that the money has been transferred to group business entities for setting of their project and money has been returned back by way of cheque without implementation of the agreement to which money was transferred. Therefore these transactions are in the nature of loans and against the terms and conditions of the sanction of term loan by Union Bank of India. On the basis of relevant records maintained by the company, a tabular statement has been prepared giving the details of such financial transactions. The interest has been calculated at the rate charged by the bank during the relevant period, on the basis of interest rate provided by the company Vide its letter dated 14/10/2014. It appears that some of the parties are not related with director/ promoter of the company but considering the transactions, which appears to be in the nature of financial accommodation, we have calculated interest on such loan also. A copy of the tabular statement giving the period of loan / advances and accrued interest thereon is annexed as Annexure-3.”*

12.3) Ld. Counsel for the respondents submitted that as per the order dated 16.01.2014 of the CLB interest should have been calculated on the loans given by Respondent No. 1 company only from the amount received from the bank namely UBI. It is accordingly contended that the auditor's report fails to identify as to which of the funds of Respondent No. 1 company, as received

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from UBI, were allegedly given to other companies without interest.

12.4) In this regard there is no dispute that Respondent No. 1 company had availed loan from United Bank of India (UBI) and were liable to pay the principal along with applicable interest calculated at the rate charged by the bank during the relevant period. There is also no dispute that interest free advances were given by Respondent No. 1 company to 13 concerns during the period as specified at Annexure 3 of the report. During the subsistence of bank loan, providing interest free aforesaid several advances, unless duly justified case wise, cannot be termed to be in the interest of the company. Amount of loan received from the bank becomes the fund of the company. What is material is that interest free advances admittedly were given from Respondent No. 1 company's fund *during the subsistence of bank loan* causing loss to the company. In other words during the period of subsistence of bank loan, on one hand advances were given from Respondent No. 1 company's fund without asking for interest, whereas on the other hand interest was paid from company's fund to the bank. This has caused loss to the Respondent No. 1 company necessitating aforesaid order for recovery. Accordingly the objection to identify as to which of the funds of Respondent No. 1 company, as received from UBI, were given to other companies without interest, is wholly frivolous and cannot be sustained. Therefore the same is rejected.

12.5) Similarly respondent's allegation that *'the auditor has failed to identify who are "related parties", to whom such interest free loans were given and who are unrelated parties'*, is

also not maintainable. At paragraph 55(3) of the order dated 16.01.2014, Company Law Board has clearly observed that these respondents diverted the funds of the company interest free *to other companies, and the persons close to them*. The direction therefore includes both related and other companies. In the same paragraph the auditor was also directed to calculate how much fund was given as interest free loan *to other companies and others*. Accordingly the auditor was only complying with the direction of the Board in considering all the interest free advances given by respondent No. 1 company *to both related / other parties* during the relevant period. Even otherwise it would not have any consequences because loan from bank was taken and interest paid. Likewise interest free loan was advanced to 'other companies and others'. No company is reasonably expected to adopt such a self-harming policy. Therefore this objection too lacks merit and is hereby rejected.

12.6) With regard to the objection on rate of interest, the impugned report states that the interest has been calculated at the rate charged by the bank. In this connection admittedly Company Law Board has ordered that, "the Auditor appointed in this case is directed to calculate the interest accrued upon the loans given to other companies *at the rate UBI collected from the company*." In compliance of the direction the auditor has stated in his report that the interest has been calculated *at the rate charged by the bank during the relevant period*, on the basis of interest rate provided by the company vide its letter dated 14/10/2014. In that view of the matter calculation of interest at

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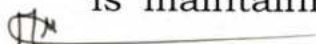


the rate charged by the bank during the relevant period is as per the direction of Company Law Board.

12.7) Annexure 3 of the report reveals the name of the parties, amount and the period during which interest free advances were given and also shows the bank rate of interest including the amount of interest receivable. As per the report total interest receivable as per bank rate fixed by the Board on the interest free advances paid to related/other parties comes to Rupees 1, 33, 95, 471.60 Paise. Respondents could not point out any calculation mistake in the said assessment.

12.8) Respondents have failed to produce and rely on any of the alleged agreements and also could not justify categorically as to which of the several interest free advances stated at annexure 3 of the report has not caused loss to the company. Be that as it may in the interest of justice an opportunity is afforded to respondents to justify specifically as to which of the advances, even if given interest free, has not caused loss to the company. Simultaneously in order to show their *bonafide*, Respondent No. 2 to 5 are directed to deposit a sum of Rs. 50 Lakhs with the registry of this Tribunal within a period of 30 days hereof, which shall remain subject to further order of this Tribunal.

**13.** In connection with the allegation of siphoning off funds in relation to the transaction and expenditure in development of the project, the report states that there does not appear inflation of the project cost by the company on construction of this project. In this regard the auditor has inter alia stated that the company is maintaining books of accounts as required and the auditor





could not find instances to prove that there is any inflation in the cost of construction. It is felt that a roving enquiry on this aspect is not required. It is pertinent to mention here that parties have also not challenged the findings of the expert on this issue. Accordingly in the light of the report of the appointed auditor the allegation in question is closed.

**14.** Similarly on the issue of siphoning off funds by way of bogus advertisement, the auditor has concluded that the allegation made by the petitioner on this count is not maintainable. None of the parties has challenged the finding of the expert on this issue. Accordingly we agree with the view of the auditor that the allegation regarding siphoning off funds by way of bogus advertisement is not tenable.

**15.** Before the report of Auditor-cum-Valuer in respect of next two issues i.e. siphoning off funds by undervaluing the booking price and valuation of shares of Respondent No. 1 company, are taken up in detail, it would be necessary to project some of the vital objections to the report for proper appreciation of the matter. In the event it is felt to call for another valuation, this Tribunal should restrict its observations on the impugned report as far as possible so as not to influence the new Auditor-cum-Valuer proposed to be appointed, but should leave the matter to the wisdom of the expert for appropriate consideration.

**16.** Be that as it may it is important to note that both the sides have challenged the valuation of share as determined by the

Auditor-cum-Valuer. Secondly there is no dispute that two expert valuers were appointed by the auditor and not by the court, nor with the consent of the parties. As there was difference in the values given by the two valuers, the Auditor has calculated the property value of 'Vikas Complex' by averaging the values derived by the valuers. Needless to say that the market value of spaces given by the valuers was the base and was relied upon to calculate the share price of the company.

16.1) It is not clear from the report of the two expert valuers as to which sale deeds of which area were considered for arriving at the valuation. Sale deeds are of prime importance, so as to derive the proper market value of the property at the relevant point of time. There is also no proper justification or explanation as to why sale deeds filed by respondents have been ignored in preparing the valuation. It has not been placed on record as to which sale deeds of the area/nearby area for deriving the market price of the property have been relied upon. In the facts and circumstances the stand of the respondents that, *'in the absence of supporting material evidence the valuation report given by the expert valuers deserves to be rejected,'* cannot be ignored.

16.2) In order to buttress their stand Respondents have filed valuation report dated 26.04.2015 issued by one Mr. S. L. Dhir, registered valuer, in respect of 25 unsold shops/ offices as on 31.03.2013, where the market value of the property in question was assessed at Rs. 26,48,00,000/-. However, the average market value of the self-same 25 unsold shops/offices in the present auditor-cum-valuer report of Mr. Pankaj Jain was

assessed at Rupees 60,08,78,503/-. Such huge difference in the valuation of the self-same properties cannot be overlooked. Similarly respondents have filed share valuation report as on 31.03.2013 of Respondent No. 1 company prepared by Chartered Accountancy firm dated 12.02.2016 showing valuation at Rs. 76.54. Whereas the share value in the auditor's report dated 4<sup>th</sup> February, 2016 has been shown as Rs. 351.90. Such sharp difference in valuation creates concern and therefore cannot be lightly ignored.

16.3) In support of the contention that the share valuation is highly exaggerated, respondents have submitted that the petitioner had invested Rs. 1.80 Cr. in Respondent No. 1 company on 30.09.2006. As per the auditor's report as on 31.03.2013 petitioner's stake is evaluated at Rs. 12.67 crores. Admittedly the only business of Respondent No. 1 company was the construction of the said Cine Mall. It is therefore pointed out that the investment of petitioner in real estate to the tune of Rs. 1.80 Cr. in 2006 increased to Rs.12.67 Cr. in 2013, which shows that there has been an increase of 750% in the share value of the petitioners share in Respondent No. 1 company within a span of seven years i.e. from September 2006 to March 2013, in spite of depressing real estate market. Accordingly the contention of respondents that the valuation of shares has been exaggerated, merits consideration.

16.4) Petitioners also have challenged the Auditor-cum-Valuer report against the valuation of shares as well as on the count that the auditor has failed to calculate the monetary extent of diversion and/or siphoning by undervaluation. It is the case of





the petitioner that despite direction of Company Law Board and auditor's own *prima facie* conclusion of siphoning off funds, the auditor-cum-valuer has failed to calculate the extent of such undervaluation/ diversion/ siphoning.

16.5) To be precise the allegations are that the two property valuers appointed by Auditor have not considered cogent documents referred to by respondents and have also not annexed supporting documents relied upon by them. Adoption of market value is very subjective and complex concept and can vary from one valuer to the other, however this has to be based on cogent evidence. It has been affirmed before us that the management has not come across any buyer who is willing to purchase even at 50% of the rates quoted by the valuers. Besides valuation of some other experts have been placed showing sharp difference in the valuation. In addition both the parties have challenged the valuation on several cogent grounds as detailed above.

16.6) Valuation of share raises complex and technical issues and normally is left to the wisdom of experts. It is impossible to calculate the real value of any share with mathematical accuracy. There were bound to be differences of opinion as to what is the correct value of shares. However in the present case valuation of some other experts placed on record reveals sharp differences in the valuation of shares. Such sharp difference and vast discrepancies in the assessment of different experts, raises a doubt on the reasonableness of the impugned valuation. It has been demonstrated by projecting such vast discrepancies, that the impugned valuation arrived at may not *prima facie* represent the true value.

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16.7) In the background and in view of serious contest on the question of valuation, a strong case has been made out for referring these two issues afresh to another expert, who shall afford opportunity to both the parties to produce documents as required to facilitate valuation. Auditor-cum -Valuer shall consider the relevant sale deeds concerning sale transaction in the vicinity and other cogent documents, if any, produced by the parties and shall comply with the directions of Company Law Board as at Sub-para (4)and(8) of paragraph 55 of the order dated 16.1.2014 passed in C.P. No. 110/2009. They shall also take into account the circle rate for the area issued by the local revenue authorities for the purpose of paying transfer of property by registered sale deed. The Auditor-cum-Valuer shall prepare valuation report in the light of order dated 16.1.2014 of Company Law Board passed in C.P. No. 110/2009.

**17.** It is pertinent to mention here that in the written submission, respondents have offered their 85% of shareholding to the petitioner at the rate which the auditor has arrived to value the 15% shareholding of the petitioners. In addition respondents have also undertaken to offer equivalent space in the Cine Mall, as per the rate quoted by the auditor in its report dated 4.2.2015, meaning thereby that whatever the average rate of per sft. area that has been arrived at by the auditor in its report dated 4.02.2015, the petitioner have an option of purchasing the area equivalent to their shareholding in the said Cine Mall at the said rate. In that view of the offer, it is felt to accord a chance to the parties to explore the possibility of settlement, if any, failing





which as discussed the matter can be referred for opinion of expert afresh.

**18.** In view of the aforesaid discussion the following directions are passed:

1. Respondent No. 2 to 5 are directed to deposit Rupees 50,00,000/- (Rupees Fifty lakhs only) with the registry of this Tribunal within one month from the date of receipt of this order which shall remain subject to further order of this Tribunal.

2. The Auditor-cum-Valuer's report dated 4<sup>th</sup> February, 2015 in respect of quantum of interest receivable on interest free advances, shall be finalized on 27.04.2017 after hearing the parties.

3. Valuer's report on the issue of inflation of the project cost and siphoning off funds by way of bogus advertisement stands finalized.

4. With regard to the issues of siphoning off funds and valuation of shares, parties are directed to come prepared on the next date of hearing to explore the possibility of arriving at a settlement in the matter.

5. In the event settlement is not achieved, parties should come prepared with proposed names of Auditor-cum-Valuer, for appointment of an Auditor-cum-Valuer and for fixation of his remuneration.

6. Parties are also directed to furnish details of all pending Company Applications filed in CP 110/2009 along with written synopsis to enable their early hearing in terms of direction of Hon'ble High Court of Delhi dated 10.02.2016 ,except

execution application filed by the petitioners to enforce the order dated 16.01.2014.

Next date of hearing is fixed on 27.04.2017.

Pronounced in open court on 22.03.2017.

22.03.2017

Sd- \_\_\_\_\_  
[ CHIEF JUSTICE M.M. KUMAR]  
PRESIDENT

Sd- \_\_\_\_\_  
[S.K. MOHAPATRA]  
MEMBER[T]