In the National Company Law Tribunal
Single Bench, Chennai

CA/90/2017

Under Section 241 r/w 244 (1) of the Companies Act 2013

In the matter of

The Companies Act, 2013

And

In the matter of

M/s. Medici Holding Limited

Vs.

M/s. Photon Infotech Private Limited & 8 Others

Order delivered on: 17.10.2017

For the Applicant: Shri R. Murari, Sr. Advocate
: Shri Rajkumar Jhabakh, Advocate
: Ms. Preeti Mohan, Advocate
: Ms. Harshini Jhothiraman, Advocate
: Ms. Pavitra Venkateswaran, Advocate

For the R1 to R5 : Shri P.H. Arvindh Pandian, Sr. Advocate
: Shri Pawan Jhabakh, Advocate

For the R6 to R8 : Shri Satish Parasaran, Sr. Advocate
: Shri K. Moorthy, Advocate
: Shri S. R. Sundar, Advocate
: Ms. P. Stella Mary, Advocate

For the R9 : Shri V. Mahesh, PCS

Per: K. Anantha Padmanabha Swamy, Member (J)

ORDER

1. Under consideration is an application filed under the provisions of sub-section 1 of Section 244 of the Companies Act, 2013 (in short, '**Act 2013**') by M/s. Medici Holdings Limited, (hereinafter called as '**Applicant**') alleging various acts of oppression & mismanagement against M/s. Photon Infotech Private Limited (hereinafter called as '**R1 company**') and 8 others. While alleging various acts of oppression & mismanagement in the Application, the Applicant has prayed this Tribunal for granting waiver as per the provisions of clause (a) and (b) of section 241(1) of the Act, 2013.

2. Before proceeding with the matter, it is pertinent to give the brief details of the Applicant as well as Respondents. The Applicant is a body corporate and an investment holding Company registered under the law of Mauritius and a minority shareholder in the R1 Company holding 19,69,000 equity shares of Rs. 1 each, representing 6.62% of the paid-up share capital of R1 Company. The Applicant is being represented by its duly authorised power of attorney holder, Mr. Yashpal Kumar. The R1 Company is a Private Limited Company incorporated under the Companies Act, 1956 and engaged in the business of software development and

having its Authorized Capital of & Paid-up Capital of Rs. 4,00,00,000/- & Rs. 2,97,36,850/- respectively. The R2 and R3 are one of the Promoters & Directors of R1 Company holding 46.93% and 46.43% shares respectively of R1 Company. R4 is also one of the Directors in R1 Company holding 0.03% shares in R1 Company. M/s. Photon Interactive Private Limited is R5 Company incorporated under the Companies Act 1956 and having Authorised Capital of Rs. 5,00,000/- and it was increased to Rs. 3,10,00,000/- and Rs. 10,25,00,000/- in the month of October 2013 and November 2013 respectively. Photon BV is R6 Company incorporated under the laws of Netherlands and having paid up capital of EURO 18,000 and its entire shareholding is held by R7. R6 holds 99.52% of the R5's shares. Amistad Capital Cooperatief U.A is R7 Company registered under the laws of Netherlands and having a total contribution of EURO 20,000 by its members i.e. R2 and R8. R2 is a Director of R7. Amistad Capital Pte Ltd is R8 Company incorporated under the laws of Singapore and having paid up capital in SGD 83426 entirely held by R2 & R3, who are also its directors. Mr. Ram Charan is R9 who was previously working as CFO of R1 Company and currently working as CFO of R5 Company.

3. For ready-reference, the brief averments made in the application are reproduced below:-

• R1 Company is a Private Limited Company incorporated under the provisions of the Companies Act, 1956 (Act, 1956) and the R2 to R4 are the directors and majority shareholders together holding 93.38% of the paid up capital of the R1 Company. The Company is engaged in software business which is the single and most profitable business of the Company. The percentage of turnover of the Software business during the year 2013 was 90.4 and it was gradually increased and during the year 2009, the percentage of turnover was 92.7%. The profit which was at Rs. 29.10 crores during the year 2009, increased to Rs. 920/- crores during the year 2009.

• The Company issued a notice on 24.11.2010 to the applicant calling for an Extraordinary General Meeting (EOGM) to be held on 14.12.2010 to approve the issuance and allotment of 23,20,000 equity shares of Rs. 1/- each to the R2 & R3 on preferential basis. According to the explanatory statement, the proposal of allotment was made considering the expansion & growth plan of the Company.

• The Company was having sufficient reserves and surplus according to the balance sheet as at 31.03.2010 and 31.03.2011.

The profit before tax was Rs. 21,06,01,621/- and Rs. 21,83,98,293/- respectively during the financial years 2009-10 and 2010-11 and the said substantial reserves and surplus could have been used for the plans of expansion and growth whereas the proposal of preferential allotment was a scheme devised by the R2 to R4 to unjustly enrich themselves by diluting the shareholding of the applicant.

- The applicant has raised serious objections to the said preferential allotment of shares and Respondents did not proceed with the said preferential allotment to the R2 & R3.
- An offer letter dated 25.11.2010 was issued by the R1 Company to the applicant with a proposal to issue shares on right basis, however, the R9 requested the applicant not to subscribe for the said rights issue. The Company could not have provided the said offer letter to the applicant, without even obtaining the prior permission of the RBI as the applicant is an Overseas Corporate Body (OCB). Subsequently the Company has withdrawn the said Rights Issue vide its letter dated 15.12.2010.
- After having cancelled the preferential allotment and rights offers, the Company vide its letter dated 10.01.2011 again proposed to issue shares on rights basis to the applicant. Out of the proposed rights issue of 24,78,070 equity shares of Rs. 1/- each,

the applicant was entitled to subscribe to 1,64,083 equity shares. The duration of the rights issue was from 11.01.2011 to 27.11.2011. The Company has not obtained necessary permission from RBI to allot shares to the applicant and it is evident from the email dated 10.01.2011 sent by the 9th Respondent to the applicant. The 9th Respondent vide his email dated 19.01.2011 has also confirmed that the price of shares held by the promoters as of that date was expected to be in the range of Rs. 200/- to Rs. 250/- per share. The applicant has submitted an application along with the Demand Draft subscribing to the shares, however, on the said date, Company did not possess the permission of RBI. Subsequently the said rights issue was also cancelled by the Company vide its letter 18.07.2011. The proposal of rights issue is nothing but a tactic by the promoters to increase their shareholding by paying a meagre amount to the Company.

• While the offer dated 10.01.2011 for rights issue was in force, the Company issued another letter dated 25.11.2011 calling for an EoGM on 04.02.2011 and the purpose of the said EOGM was inter-alia approving the issuance and allotment on a preferential basis upto 50,00,000 equity shares of face value of Rs. 1/- each for cash at a price of Rs. 1/- per share to the R3 & R4 (25,00,000 shares each). In November 2010, the Company issued notice of

proposal to allot 23,20,000 shares to the R2 & R3 on Rights issue basis, whereas by the EOGM dated 04.02.2011 as preferential allotment, it was proposed to increase and to issue 50,00,000 shares to the R3 & R4.

• The said preferential allotment was also made against the interest of the applicant and it was done at the behest of R2 to R4 Respondents who conspired against the minority shareholders to enrich themselves wrongfully. As per email sent by R9, the value per share of the Company was Rs. 200/- whereas the proposal of preferential allotment was aimed at Rs. 1/- each, the face value of the share. The applicant vide its letter dated 02.02.2011 objected to the proposed resolution and also by the members at the EoGM, therefore, the proposal was dropped.

• The R4 transferred 15 shares to the employees of the Company in and around 15.11.2011 for the purpose of increasing the number of members of the Company. The applicant was always been one of the four shareholders of the Company and the transfer of shares by R4 to the employees was done only to prevent the applicant from initiating proceedings under section 397 & 398 of the Act, 1956 against the Respondents.

• The 9th Respondent was allotted 8,50,000 shares of face value of Rs. 1/- each @ Rs. 53.25/- per share on 28.10.2011 under an

alleged Employee Stock Option Scheme and on the same day the Board of Directors has passed another resolution approving buy-back of these very same shares @ Rs. 66/- per share. Both the allotment and buy-back occurred on the same day and at the same board meeting held on 28.10.2011. By way of this allotment and buy-back, the R9 was enriched of Rs. 1,08,37,500/- under the said dubious scheme.

• The repeated action of majority shareholders allotting additional shares to the R2 to R4, transferring shares to the employees and allotting and buying back the shares are done at the behest of the R2 to R4 which are aimed at diluting the shareholding of the applicant and further, to deprive the applicant filing petition under section 397 and 398 of the Act, 1956 and also enrich themselves including the R9. All said acts are nothing but oppressive in nature.

• The Company scheduled an EoGM on 23.11.2012 for approving a proposed Scheme of Arrangement (Demerger) wherein the software business would be demerged with R5. The said scheme was against the interest of the applicant and applicant has opposed the said Demerger on 01.03.2013 before the Hon'ble High Court, Madras.

• It was envisaged in the scheme to demerge the software business of the Company into the 5th Respondent for a miniscule consideration. Under the scheme, it was proposed that the equity shareholders of the Company would be issued and allotted Cumulative Redeemable Preference Shares (CRPS) at par in R5 in the ratio of 105 CRPS of face value of Rs. 1/- each fully paid up for every 10 equity shares of Rs. 1/- each fully paid up in the R1 Company. Resultantly, post-merger, the applicant would hold 2,07,67,789 CRPS of the face value of Rs. 1/- each in the R5. The value of the applicant's shares even as of November, 2011 was not less than Rs. 12.99 crores and in October, 2012, this value could have been increased. However, by way of the scheme, the applicant was offered, that too CRPS, in R5 which was a Shell Company. The idea was that at any point of time the CRPS allotted to the applicant would be bought out and it would be denuded of equity ownership.

• The Company has informed the Hon'ble High Court that by a resolution passed by the board of directors of R1 Company and the R5, the scheme has been withdrawn and the Hon'ble High Court disposed of the scheme petitions as withdrawn.

• The applicant came to know during the month of December, 2013 that the Company and the 5th Respondent had executed a

Business Transfer Agreement (BTA) dated 27.03.2013 whereby the Company had sold the sole profitable software business to the R5 on slump sale basis. The BTA was entered into just few days after the scheme petitions were withdrawn by the R1 Company and R5. The BTA was entered into in lieu of the Scheme which was withdrawn. The R2 to R4 controlled R5 to R8 directly or indirectly, either through shareholding or through directorship. The sole profitable business of the Company was vested with the R5 and still continuous to vest with the R5 and therefore, there is continuing act of oppression and mismanagement.

• R1 Company issued a notice dated 28.11.2013 for the 14th AGM to be held on 31.12.2013 whereby the Company inter-alia sought to amend the "Object" clause in its MoA and said amendment seemed to be to alter the object clause so as enable the Company to commence new business pursuance to the business transfer. The proposal of amendment was nothing but collateral part of commercial fraud perpetrated by the R2 to R4. If the object clause is amended, the Company would start making investments in securities or other companies so as to siphon off and or divert the funds of the Company and benefit the promoters/directors of the Company.

• In result, the applicant was constrained to file a Derivative Action Suit in Civil Suit No. 887/2013, in view of the BTA and the notice dated 28.11.2013 for the 14th AGM. The Hon'ble High Court passed interim orders to the effect to continue with the AGM, however, it was directed that the result of the AGM shall not be given effect till 20.01.2014. The interim order was extended from time to time and made absolute subsequently.

• The Respondents failed to get the approval of audited accounts from the members for the financial years 2013-14, 2014-15 and 2015-16. In the notice dated 03.09.2014 for the 15th AGM and notice dated 31.10.2015 issued for the 16th AGM, it was mentioned that adoption of accounts and appointment of Auditors could not be taken up in view of the Hon'ble High Court order dated 30.12.2013 in Civil Suit No. 887 of 2013. The Respondents deliberately misinterpreted the said order of the Hon'ble High Court for non-filing of statutory documents and thereby committed non-compliance with the provisions of the Companies Act 1956/2013. However, R1 Company, taking a contrary stand taken by the Respondents with regards to the order of the Hon'ble High Court, vide notice dated 05.09.2016 issued for the 17th AGM, the Respondents sought to propose and consider passing of

financial statement for the financial year 2013-14, 2014-15 and 2015-16.

• In view of the continuing acts of oppression and mismanagement, the applicant has approached the Central Government on 25.04.2014 seeking the permission under section 399(4) of the Act, 1956 to file petition under section 397 and 398 of the Act, 1956. After hearing the applicant and the Company, the Central Government granted permission dated 06.05.2015 to the applicant to file a petition under section 397 and 398 of the Act, 1956 before the erstwhile Company Law Board (CLB).

• The Respondents filed a writ petition No. 17681 of 2015 before the Hon'ble High Court challenging the order dated 06.05.2015 of the Central Government and the Hon'ble High Court vide its order dated 22.06.2015 granted interim stay of the said order which continues till date.

• Subsequently the Central Government has withdrawn the earlier order dated 06.05.2015 vide its communication dated 07.07.2015 and issued a new order (second order) dated 03.07.2015 and the said new order was also challenged by the Respondents in Writ Petition No. 10779 of 2017. The new writ petition was filed by the Company alone after the applicant filed this present application before this Hon'ble Tribunal.

- The Central Government issued a Notification No. A-45011/14/2016 dated 01.06.2016 whereby the provisions of section 241, 242, 243 etc. of the Act, 2013 have been brought into force w.e.f 01.06.2016. While the applicant being entitled to rely upon the permission granted by the Central Government to file the petition for the acts of oppression and mismanagement in the affairs of the Company, this present application is filed seeking waiver of the requirements of clause (a) and (b) of section 244(1) of the Act, 2013 in view of the further acts of oppression and mismanagement being perpetrated by the Respondents in the affairs of the Company.

4. The learned Senior Counsel for the applicant while reiterating the averments made in the petition has contended that the purported proposal of issuing additional shares to the 2nd to 4th Respondents under the basis of preferential issue and rights issue are nothing but act of oppression against the applicant who is the minority shareholder of the Company and it was aimed to only to dilute the shareholding of the Applicant. The decision of allotting 8,50,000 of face value of Rs. 1/- each to the R9 @ Rs. 53.25 per share on 28.10.2011 under an alleged employee stock option scheme and the decision of buy back the very same shares @ Rs. 66/- per share on the same day by the Board of Directors would show that

the Respondents have enriched themselves by the dubious methods. He also contended that the Respondents who withdrew the scheme of demerger before the Hon'ble High Court, indirectly transferred the sole profitable software business of the Company to the R5 only for the purpose of enriching themselves through the BTA which is also detriment to the interest of the Company and the applicant. The subsequent acts such as offering CRPS to the applicant with an idea of converting it from equity shareholder to preferential shareholder and amendment of object clause of the Company for commencing new business would further prove that the affairs of the Company are being continuously mismanaged by the Respondents and the applicant is being oppressed.

5. In contrary to the submissions made on behalf of the applicant, the learned Counsel for the Respondents contended that the application is liable to be dismissed *in limini* as it is miserably failed to qualify or meet any of the requirements/criterion laid down for granting waiver under section 244 of the Act, 2013. He further submitted that the waiver application has failed to disclose any cause of action giving rise to the present proceedings and the applicant failed to establish even a single act of oppression and mismanagement and it renders the present proceedings a pure farce and frivolous action. He also contended that the applicant

has approached the Hon'ble Tribunal with unclean hands and has cleverly concealed several facts and events which would render their waiver application untenable and indefensible. He has further contended that the applicant has complained of alleged actions of oppression and mismanagement allegedly to have been committed in the year 2010 to 2013 and the applicant would have approached the Hon'ble Tribunal immediately for adequate reliefs and protection. The present application is made only to pressurize the Respondents in settling and providing an exit opportunity to the applicant. There being irretrievable and significant delay with the fact that no reason has been disclosed regarding any existing cause of action, the waiver application is liable to dismissed.

6. He also submitted that the applicant is a chronic litigant and is guilty of forum shopping. The prayers sought for in the application for the oppression and mismanagement are identical and the same prayers are made by the applicant in the civil proceedings pending before the Hon'ble High Court, Madras. The applicant being vexed and frustrated of having failed to obtain any reliefs from the Hon'ble High Court has subsequently approached this Hon'ble Tribunal with the present application. While making submissions for the issues raised by the applicant, the learned Senior Counsel for the Respondents has raised one technical

objection that the application has failed to comply with the requirements of Rules 83A of the National Company Law Tribunal Rules (NCLT Rules) and also the format prescribed under Form NCLT 9 and therefore it is not maintainable.

7. The learned Senior Counsel finally made the following submissions on the issues raised by the applicant which are summarised as below:-

• There is no requirement under law for the Respondents to inform and obtain the consent of the applicant on the proposed allotment of shares by way of preferential allotment and rights issue and the Respondents have accepted the view of the applicant and never proceeded with any of the allotments. The bonafide and genuine approach of the Respondents is now maliciously and capriciously being tainted as an act of oppression against the applicant.

• The Scheme of Demerger was withdrawn due to reasons which were commercially beneficial to the interests of all stakeholders and not for any other reasons whatsoever. The minutes of the board meeting of the Company agreeing to withdrawn the Scheme has recorded without any ambiguity the benefits of executing a business transfer agreement vis-à-vis, the Scheme of Demerger. The applicant conveniently and purposely ignored the notification issued by the Central Board of Direct Tax (CBDT) and the resolution passed by the Company. Apart from the commercial reasons and prudence exercised by the board of directors of the Company, the Scheme of Demerger was withdrawn by the orders of the Hon'ble High Court.

• The pleadings and prayers made in the present application for waiver and the petition under section 241 of the Act, 1956 in comparison to the Civil Suit No. 887 of 2013 pending before the Hon'ble High Court of Madras filed by the applicant are verbatim similar. The prayers made in the petition under section 241 of the Act, 2013 are barred by the principle of res judicata and cannot be agitated or contended or relied on by the applicant before this Hon'ble Tribunal. The applicant has elected its forum by filing suit before Hon'ble High Court by way of derivative action and the same cannot be relied on or placed before this Hon'ble Tribunal. The Respondents has prayed the Hon'ble High Court to dismiss the said civil suit filed by the applicant as they have failed to disclose any cause of action, secondly have paid insufficient court fees and thirdly that the applicant has failed to obtain the leave of the High Court as it is a suit filed in representative capacity. The applicant has conveniently failed to disclose and chosen to misrepresent facts before this Hon'ble Tribunal. Besides the principle of Res-Judicata, the BTA is also as per the requirement under law and the erstwhile section 293 of the Act, 1956 only requires the approval of the Board of Directors of the Company and does not require the approval of the shareholders. The BTA has been executed as per the requirement of law during its execution and implementation. The BTA has been made as per section 293 of the Act, 1956 and it does not mandate to obtain the approval of the shareholders, the Company is being a private limited Company. The said BTA is valid and it is lawful transaction executed between the Company and the 5th Respondent and it cannot by any stretch of imagination be termed as Commercial Fraud and Oppression. A committee was formed

to evaluate whether the software business can be transferred by way of slump sale and on the recommendations of the committee the board of directors of the Company and the 5th Respondent had entered in to the said BTA.

- The net worth of the Company has increased from Rs. 195/- crores in the financial year 2012-13 to Rs. 294/- crores in the financial year 2016-17 which is post execution and transfer of business under BTA.
- The applicant has approached this Hon'ble Tribunal with unclean hands and it has failed to disclose the Writ Petition No. 17681 of 2015 and Writ Petition No. 10779 of 2017. The said petitions are still pending before the Hon'ble High Court and it is sub-judice. The applicant has picked and chosen fact to their convenience and are guilty of concealing the facts relating to the order of stay and the subsequent writ petition which are directly attributable to present proceedings before this Hon'ble Tribunal.
- The applicant has stated that the present application is filed as a matter of abundant caution in view of the second order passed by the Ministry of Corporate Affairs. The significant issues in view of the first and second order passed by the Ministry of Corporate Affairs are to be contended and argued in the writ petitions pending before the Hon'ble High Court and cannot be relied upon by the applicant. Once the applicant has elected and chosen to rely on the provisions of section 244 of the Act, 2013, the first and second orders passed by the Ministry of Corporate Affairs have no relevance to the present proceedings.

8. The learned Senior Counsel for the Applicant while vehemently opposing the above contentions raised by the learned senior

counsel for the respondents submitted the following counter arguments by way of the Rejoinder which are summarised below:-

• As per Rule 83A, an application under section 244 can be made in Form No. 9 of the NCLT Rules and the application filed is substantial and the same has been followed by making necessary modification wherever required to present the application. The Respondents failed to refer Rule 4 which permits to make any other such modifications or variations as the circumstances of each case and Rule 58 envisages that the failure to comply with the requirement of these rules not invalidate any proceeding, merely by reasons of such failure, unless the Tribunal is of the view that such failure has resulted in miscarriage of justice. Therefore, the technical objection has no force in it.

• The present application is filed seeking waiver of requirement of clause (a) and (b) of section 244 of the Act, 2013 and the sequence of events that has been committed by the Respondents and as detailed by the applicant in the present application and also the continuing acts of oppression and mismanagement would show that the Respondents have acted oppressively against the applicant and at present stage, only a prima facie view regarding entitlement of waiver is required and there is no need to go deep into technicalities. Also, the Respondents have miserably failed to

even satisfy the Hon'ble Tribunal as to why this application should not be allowed. The contentions of the Respondents are mutually contradictory and self-destructive in as much as the fact that on one hand the Respondents admit the contents of the application and on the other hand they have chosen to allege that the actions taken by the Respondents do not constitute acts of oppression and mismanagement.

• The Respondents have challenged the orders of the Central Government by which the applicant was enabled to file a petition under Section 397 and 398 of the Act, 1956 and by virtue of interim order made by the Hon'ble High Court in WP No. 17681 of 2015, the applicant was handicapped from filing the petition before the CLB. Therefore, any argument that there has been delay and laches and the petition is barred by limitation is ex facie unsustainable and the Respondents who have effectively prevented the applicant from filing the petition cannot contend that there has been delay or laches and it is barred by limitation. Moreover, the applicant can file a petition under section 241 of the Companies Act 2013 by virtue of legal rights entrusted to him.

• A common person has executed the counter statement on behalf of the R1 Company & R5. The Respondents 6 to 8 and also 2 to 4 have adopted the counter statement filed by the 1st and 5th

Respondent. The memo adopting counter of the 1st and 5th Respondent filed by the 6th to 8th Respondent has also disclosed the details of the authorized signatory nor any authority to file the same. The authorized representative has signed the same for the 6th to 8th Respondents at Chennai whereas they are located outside India. The counter and memo not being in accordance with the prescribed procedure and requirement of law, therefore, it is liable to be discarded.

• The Respondents have badly contended that the application does not establish any cause of action without showing as to how the acts perpetrated by the Respondents are not oppressive and does not tantamount to mismanagement. The permission given by the Central Government is sufficed to show that there are merits in the case of the applicant. The allegation that the applicant has approached the Hon'ble Tribunal with unclean hands and has cleverly concealed several facts and events is false, vague and unsupported by any material facts. The applicant has mentioned about the writ petition No. 17681 of 2015 in its application and the writ petition No. 10779 of 2017, which is an afterthought, has been filed by the Respondents much after filing of the present application. There is no delay in filing this present application and it is well within limitation. The exercise of legal rights of the

applicant cannot be termed as forum shopping. The case of the Respondents that the reliefs as sought for in the civil suit and the present proceedings are the same, does not arise for consideration before this Tribunal at this stage. Both the actions initiated by the applicant are under different footings and one proceeding can neither act as an estoppel against the other nor legally barred.

• The R5 company is only a sham and shell company created only to transfer the sole profitable business of the Company to deprive the applicant of its legitimate rights.

• The Respondents have only invested the monies that have accrued from the software business of R1 Company and the Treasury Division of the Company as on date has a net worth of Rs. 270/- crores out of which Rs. 250/- crores is invested by the Company is far from truth. Moreover, no licence has been obtained by the Company for carrying on treasury/investment business and the Hon'ble High Court has stayed the amendment of the object clause vide the order made in CS No. 887 of 2013. As on date of BTA, the only significant and profitable business of the Company was the software business.

• The Respondents failed to substantiate the need for allotting preferential shares and rights issue as there was sufficient reserves and surplus at that point of time. The Respondents could not

provide any document from RBI giving them permission for the rights issue. The Respondents failed to assign any reason for the allotment of shares at par when they have categorically accepted the valuation of shares of the Company. The malafide intention of the Respondents can be understood for the reason that they came up with the scheme of rights issue & preferential issue but at last moment, got backtracked. The Company's financial position was very sound as on the said date and it has not required any funds for its growth and expansion. The RBI gave its approval on 28.01.2011 and it was made known to the applicant only on 13.05.2011 in spite of several requests for providing the same. The averment that the right issue has been cancelled due to the objection of the applicant is far from truth. Also, the said averments are not part of the financial statement of the Respondents and the applicant was never given an opportunity to verify the same. The allegation of transfer of shares was made against the R4 and it was replied by the R1 & R5 Companies and it would prove that they are hand in glove. The Respondents miserably failed to show the rationale behind the transfer of 15 shares to the employees and it was intended only to foreclose the right of the applicant to approach the CLB.

• It is also against the truth that the business of the Company was facing a downward trend and there was need to demerge the business of the Company. It was nothing but a device proposed by the Respondents to transfer the only profitable business of R1 Company by way of the demerger with the R5 Company. It is also false that the demerger was planned only for the purpose of getting the SEZ tax holiday benefits. The averment that the other shareholders have approved the scheme is immaterial since apart from R2 to R4, the 15 other shareholders are the nominees of R2 to R4. Moreover, the Circulars relating to SEZ relied upon by the Respondents for defending their illegal action were not part of the Scheme/BTA document and it was nothing but an afterthought. The BTA is nothing but an act of oppression and mismanagement in the affairs of the Company.

• During the month of November, 2011, the values of shares were estimated between Rs. 200 and Rs. 250 and the total net profit made out of the software business was Rs. 42.43 crores. In the month of March 2013, the software business was valued at a meagre Rs. 39 to 40 crores. It is nothing but a commercial fraud intended for illegal and unjust enrichment of the R2 to R4. The R2 to R4 are the major shareholders and in control of the R5. The BTA may be perfectly in compliance and consonance with the

provisions of the Act and merely by compliance of law, the act does not cease to be oppressive. The consideration fixed for the said transfer was miniscule and the Respondents also failed to produce any recommendations of the committee constituted for the purpose of such transfer.

• The action initiated in CS 887 of 2013 is different from one initiated before the Hon'ble Tribunal. The present proceeding is filed for seeking waiver of clause (a) and (b) of section 241 of the Act, 2013. The Respondents are trying to cover up their illegal acts and they have filed their written submission in the civil suit in the month of July 2017. The pendency of the said civil suit to reject the present application is being pleaded only to confuse this Tribunal. Further the principle of Re-judicata would not apply to the present proceedings. The pending derivative action suit was filed for the benefit of the Company and the action against the oppression and mismanagement under the Act are independent of the derivative action. The applicant is entitled to maintain both the proceedings and there is no conflict at all.

• The interim order by the Hon'ble High Court in respect of 14th AGM for a limited purpose which was subsequently made absolute. The Respondents also failed to explain how they chosen to adopt the financial statement of the Company for the year 2013-

14, 2014-15 and 2015-16 at the general body meeting on 30.09.2016 while the very same order of the Hon'ble High Court is still valid and subsisting. The representative of the applicant has also raised the said issue in the AGM held on 30.09.2016.

• The Respondents have challenged the second order of the Ministry of Corporate Affairs in the WP No. 10779 of 2017 and there is no stay of the said order which is operating against the applicant.

• The perpetrated and continuing acts of the Respondents squarely constitute acts of oppression and mismanagement, therefore, the question of delay and laches do not arise. The entire action of the Respondents would prove the commercial fraud played against the applicant and it is against the interest of the applicant and also the Company.

9. The learned Senior Counsel for the Applicant has relied upon the following case laws in support of his submissions:

- **Owners and Parties interested in M. V. Vali Pero Vs Fernandeo Lopez & others (1989) 4 SCC 671** - to show that a technical non-compliance (which even if true) cannot take away a substantive right of a party.
- **Starlight Real Estate (Ascot) Mauritius Limited Vs Jagrati Trade Services Private Limited (2016) 195 Comp Cas 434** – to show that that there is a clear distinction between individual and corporate membership rights of shareholders. A member can always sue for wrongs done to

himself in his capacity as a member. The individual rights of a member arise in part from the general law. Under general law he is entitled to restrain the company from doing acts which are ultra vires. Ina true derivative action the plaintiff shareholder is not acting as a representative of the other shareholders but it is really acting as a representative of the Company. The company obviously cannot take action on its own behalf. It is in these circumstances that the derivative action by some shareholders (even if they are in a minority) becomes necessary to protect the interest of the Company.

- **Ramesh B Desai and others Vs Bipin Vadilal Mehta and others (2006) 5 SCC 638 -** to show that the question of limitation is a mixed question of law and fact, therefore, it cannot be decided at the threshold.
- **The Kerala State Electricity Board, Trivandrum Vs T. P. Kunhaliumma (1976) 4 SCCD 634, Smt. Nuper Mitra and another Vs Basubani Private Limited and others (1999) 2 Cal LT 264 and MSDC Radha Ramanan Vs Shree Bhaarathi Cotton Mills Private Limited & another (2006) 130 Comp Cas 414(CLB)** – To show Article 137 of the Limitation Act would apply to the proceeding.
- **Cyrus Investments Private Limited & anoth3er Vs Tata Sons Limited & others – NCLAT Company Appeals (AT) 133-139 of 2017 by way of order dated 21.09.2017 –** To show that the Tribunal while deciding an application for waiver under proviso to sub section (1) of section 244 to enable the members to apply under Section 241 cannot decide the following issues:
  - (i) Merits of the case
  - (ii) Issues dependent on merit based on claim and counter claim such as:
    - (a) Whether a prima facie case has been made or not
    - (b) Whether it is a case of arbitration
    - (c) Whether allegation relates to/pertain to another company (third party)

(d) Whether the allegations are in the nature of directorial complaint

(e) Whether the applicants conduct disentitled them from seeking relief

(f) Whether the proposed application under section 241 is barred by acquiescence or waiver or estoppel

The learned Senior Counsel for the applicant finally prayed that the requirement for waiver under clause (a) and (b) of section 244 may be issued in the interest of justice taking into consideration the illegal acts of oppression and mismanagement in the affairs of the Company.

10. The learned Senior Counsel for the Respondents has relied upon the following case law in support of his claim:

• **Cyrus Investments Private Limited & another Vs Tata Sons Limited & others – NCLAT Company Appeals (AT) 133-139 of 2017**– To show that the NCLAT laid down the requirements or criterions' for granting a waiver application and the grounds for waiver as laid down are only illustrative and not exhaustive.

• **Esaquire Electronics Vs Netherlands India Communications Enterprises Limited – MANU/NC/0080/2016 and (2017) 1 CompLJ 131 and Abro Technolgies Private Liamited Vs Delhi Warehousing Private Limited and others MANU/NC/0148/2016 & (2017)136 CLA 169** – To show that the present proceedings are barred by limitation.

The learned Senior Counsel for the Respondents has relied upon the above cases and finally prayed to dismiss the application as the application has not made out any case for the waiver of clause (a) and (b) of section 244 of the Act.

11. The learned Practicing Company Secretary appearing for R9 submitted that he was neither a director nor shareholder of the Company. He has tendered his resignation from the Company in February 2013 and rejoined the group in the month of November, 2014. When the BTA was signed on 27.03.2013 and during the said period he was merely serving his notice period. During the period from April 2013 to November, 2014, he was working for Reliance Group in Mumbai. R9 has no role to play in BTA. The applicant has so far not whispered about the R9 in any of the proceedings and talking only about preferential offer, rights issue, withdrawal of Scheme of Demerger and BTA and has not discussed about the ESOP issued to R9. The ESOP Scheme was passed by the shareholders in the EOGM held on 23.01.2009 and it is raised after 8 years which is barred by laches. The applicant while questioning the Resolution 8 which is ESOP Scheme does not mention about the Resolution 7 passed in the meeting held on 23.01.2009 regard to Capitalization of Profits and Issue of Bonus shares. The buyback was done on 28.10.2011 on the valuation

done by SEBI authorized merchant banker and auditors of the Company. The buyback was done on 28.10.2011 and raising the same now by the applicant is not only strange and absurd. The representative of the applicant has attended the AGM held on 26.12.2012 and approved the accounts. Therefore, it is now a concluded transaction and the applicant was also a party to the approval. The claim of the applicant that the 9th Respondent has confirmed the value of the shares as Rs. 200 to 250 is not correct. The R9 has no idea of this industry and its practices and valuation methods. The applicant raises the issues of allotment and buy back after 6 to 7 years after the buyback only shows that the applicant lacks knowledge in the software industry and its cheap attitude. The R9 has been included in the application with a malafide intent and there no cause of action being shown how the acts of 9th Respondent and the remuneration paid to him is harmful, burdensome and oppressive to the miniscule minority shareholder. The Practicing Company Secretary finally prayed to delete his name from the array of parties.

12. The learned Counsel for the 6th to 8th Respondents has filed a written submission whereby adopting the counter statement of the R1 Company and the R5.

13. Heard all the parties. Perused the pleadings and the written submissions filed by the parties. After the due perusal of the pleadings and hearing the submissions on behalf of the parties, the only question arises before me is as to whether the applicant has made out his case successfully seeking waiver of clause (a) and (b) of Section 244 of the Act, 2013.

14. Before going in to the merits or otherwise of the application, I wish to refer the proviso part of section 244(1) of the Act, 2013 which reads as follows:-

" ***Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) as to enable the members to apply under section 241"***

15. There is no ambiguity in the above provision for waiver of the requirements specified, however, the waiver could be granted only to the members. There is no doubt that the applicant herein is a member of the Company and therefore he is entitled to file the application. It is also the intention of the legislature that merely every member could file an application seeking waiver of the requirement, but it is duty of the Tribunal to weigh such pleadings made in the application seeking waiver for the requirement. It is also duty of the Tribunal to find out whether the applicant has

made out a case for waiver or not. On the above principle I intend to discuss the following;

16. According to the learned Counsel for the applicant the perpetrated and illegal actions of offering preferential shares to the R2 & R3, offering shares under rights issue to the R2 & R4 and offering shares under rights issue to the applicant without obtaining the RBI's approval and subsequent cancellation of the same, all were done when the company was having sufficient reserves and surplus and the same could have been used for the purpose of expansion and growth plans of the Company, transfer of shares from the 4th Respondent to employees of the Company in order to deprive the applicant from taking action under section 397 and 398 of the Act, 1956, filing of Scheme of Demerger before the Hon'ble High Court to transfer the business to the 5th Respondent and offering CRPS to the applicant in the said scheme and subsequent withdrawal of the same on the objections of the applicant, entering into BTA with 5th Respondent within few days of withdrawing the scheme before the Hon'ble High Court and transferring the only profitable business of the Company to the 5th Respondent and finally amending the object clause of the Company in order to commence a new business, all are acts of oppressions and mismanagement. Besides all, the 9th Respondent

has been allotted shares under ESOP Scheme @Rs. 53.25 per share on 28.10.2011 under an alleged employee stock option scheme and on the same day the Board of Directors has passed another resolution approving buy-back of these very same shares @ Rs. 66/- per share by which the 9th Respondent profited by a sum of Rs. 1,08,37,500/- also amounts to mismanagement in the affairs of the Company.

17. According to the learned Senior Counsel for the Respondents, the proposal to allot shares under preferential allotment and rights issue were taken for the purpose of expansion and growth plans of the Company and on the objection raised by the applicant the proposals were withdrawn which shows the bonafide of the Respondents. The ESOP scheme is mostly followed in all the software companies and therefore there is no illegality in transfer of shares to the employees. The Scheme of Demerger was filed after getting the approval of the shareholders and it was withdrawn only for the future benefits of the Company. The BTA has also been entered into with 5th Respondent as per the provisions of the Act, 1956 and the consent of shareholders is not needed to enter into such BTA. The application has been filed belatedly and is struck by delay and laches and it is also barred by limitation.

18. It is on record that the company was having sufficient reserves and surplus besides considerable amount in the bank account according to the balance sheet as at 31.03.2010 and 31.03.2011 and it has not been explained clearly by the Respondent that why the amounts are not used for the purpose of expansion and growth plan of the Company instead of making preferential allotment to the 2nd and 3rd Respondent and offering the shares to the 2nd and 4th Respondent under rights issue. The Respondents have also not explained a valid question of the applicant that why the shares have been again offered when Respondents have stated that the earlier proposals of allotment of shares were withdrawn due to the objection of the applicant.

19. It is also a fact that the 9th Respondent was offered shares @ Rs.53.25 per share on 28.10.2011 under an employee stock option scheme and on the same day the Board of Directors has passed another resolution approving buy-back of these very same shares @ Rs. 66/- per share by which the 9th Respondent was profited by a sum of Rs. 1,08,37,500/- and while submitting that offering shares to the employees are practiced in most of the software companies, the Respondents failed to explain why the decision of buy back of shares has been taken on the same board meeting. There is also no explanation on the part of the Respondents for the

profit made by the 9th Respondent and why such decision has been taken by the board of directors for the benefit of the 9th Respondent. The 9th Respondent has also stated that the practice of ESOP scheme is practiced in most of the software companies, whereas he has also failed to explain the profit made by him by the decision of the board directors to buy back the shares allotted to him.

20. It is also a fact that the Company has filed Scheme of Demerger before the Hon'ble High Court for the purpose of transferring the only profitable business of the Company to the 5th Respondent and it was withdrawn subsequently. Though the contention of the applicant is that the said scheme was withdrawn due to its objection, but the contention of the Respondent was that the scheme was withdrawn due to the future benefits of the Company and also to avail Tax holiday. The action of the Company entering into the BTA with the 5th Respondent after few days of withdrawing of the Scheme shows the malafide intention of the Respondents. It is also on record that such transfer of profitable business was made for a very meagre amount when it is compared with the net worth and turnover of the Company. The Respondents failed to submit the valid reason for entering into such BTA with the 5th Respondent. By the way of BTA, the

Respondents have done an act indirectly which they have not been able to do directly.

21. The learned Counsel for the applicant relied upon case laws for the purpose of showing that the issues raised in the application are question of law mixed with facts and it cannot be decided at the threshold and the Articles 137 is also applicable to the present proceedings. The learned Senior Counsel for the applicant has also relied upon the judgment made by the NCLAT in an appeal filed in the matter of Cyrus Investments Private Limited & another Vs Tata Sons Limited & others wherein it is held by the Hon'ble NCLAT that the Tribunal while deciding an application for waiver under proviso to sub section (1) of section 244 to enable the members to apply under Section 241 inter-alia cannot decide the Merits of the case and whether a prima facie case has been made or not. The case laws relied upon by the Senior Counsel for the applicant squarely applies to the facts of the present application. The learned Senior Counsel for the Respondents while relying upon the same order made by the NCLAT has submitted that the NCLAT laid down the requirements or criterions' for granting a waiver application and the grounds for waiver as laid down are only illustrative and not exhaustive. Further he has relied on the other case laws to state

that the present application is barred by limitation. The case laws relied by the Senior Counsel for the Respondents are not helpful for deciding the present case and it is not applicable to the facts of the present application.

22. Moreover, the learned senior counsel for the applicant has also submitted that the writ petition preferred by the respondents against the order of MCA is based on technicalities and not on the merits of the case.

23. In view of my above observations, I have no hesitation to state that the applicant has made out a case seeking waiver of clause (a) and (b) of section 244 for the purpose of filing a petition under section 241 of the Act, 2013 in the matter of the Company. Further by allowing the application, the Respondents will be getting an opportunity to file their detailed counter on the petition filed under section 241 of the Act and it is independent of the present application. Therefore, I am inclined to allow the application.

24. Before concluding the matter, it is necessary to mention herein that the legislature has, no doubt, fixed a minimum criteria in section 244 for making an application under section 241 of the Companies Act, 2013, however, at the same time it has also entrusted the tribunal with the power to waive the criteria of

minimum requirement for doing substantial justice. However, the same power should be used very carefully and on exceptional basis. I am of the opinion that this case is one of the exceptional cases where such power should be used to grant waiver in the interest of justice.

25. The instant application is disposed of accordingly.

K. Anantha Padmanabha Swamy

Member (J)

RLS