

IN THE NATIONAL COMPANY LAW TRIBUNAL : NEW DELHI

SINGLE BENCH

COURT-III

CP-219(ND)/2017

IN THE MATTER OF

1. Deepak Beri,
S/o Shri S.K. Beri,
E-539, Greater Kailash-II,
New Delhi – 110048.

2. Karan Beri,
S/o Shri Deepak Beri,
E-539, Greater Kailash-II,
New Delhi-`110048.

3. Nandita Beri,
D/o Shri Deepak Beri,
E-539, Greater Kailash-II,
New Delhi-11048.

4. Rekhi Beri,
W/o Shri Deepak Beri,
E-539, Greater Kailash-II,
New Delhi-110048.

... PETITIONERS

Versus

1. DB Engineering Private Limited,
A Company incorporated under Companies
Act, 1956 and existing under the Companies
Act, 2013 and having its registered office at
81, Jor Bagh, New Delhi-110003.

2. Atul Beri,
S/o Shri SK Beri,
81, Jor Bagh, New Delhi-110003.
3. S.K. Beri,
81, Jor Bagh, New Delhi-110003.
4. Ramesh Beri,
W/o Shri SK Beri,
81, Jor Bagh, New Delhi-110003.
5. Banaras Marbles and Granites Limited,
A Company incorporated under the Companies
Act, 1956 and existing under the Companies
Act, 2013 and having its registered office at
A-119, Okhla Industrial Area, Phase-II,
New Delhi-110020.

.. **RESPONDENTS**

SECTION :

Under Sections 241 & 242 of the Companies Act, 2013.

Order delivered on 01-12-2017

Coram :

**R. VARADHARAJAN,
Hon'ble Member (Judicial)**

For the Petitioner	: Mr. U.K.Chaudhary, Sr.Advocate Mr. Abhinav Vashisht, Sr.Advocate Mr K.Dutta, Advocate
For the Respondent	: Mr Arun Kathpalia, Sr.Advocate

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Mr Raghavendra M Bajaj, for R-2
Mr Jayant Mehta, Advocate
Ms. Priya Kumar, Advocate for R3 & R4

ORDER

1. This Company Petition is filed under the provisions of Sections 241 and 242 read with Section 213 of the Companies Act, 2013 on 24.08.2017 by the petitioners above named. Even prior to the filing of the above company petition, in terms of Rule 25 of NCLT Rules, 2016 the 3rd respondent above named has entered on caveat vide Diary No.1329 dated 01.08.2017 and the 2nd respondent similarly has also entered on caveat vide Diary No.1330 dated 01.08.2017 in which the 1st petitioner herein has been shown as the Proposed Petitioner and the 2nd and 3rd respondents have been respectively shown as the Caveators along with the request, as is the norm in caveats as are filed under Section 148-A of Civil Procedure Code, 1908, that no order including any ex-parte ad interim order be passed without notice to the caveators.
2. Subsequent to the above filings, the Company Petition came to be listed before this Tribunal first on 29.08.2017 on which date the appearances were duly made on behalf of the petitioners as well as respondents nos.

2 to 4 through their respective counsels and based on their joint request matter was adjourned to 01.09.2017. On 01.09.2017 the Learned Sr.Counsel appearing for the petitioners sought for certain ad interim protection but the same was vehemently opposed by the Ld. Counsels appearing for respondents 2 to 4 on the grounds that the petition itself is not maintainable in view of the embargo placed by the provisions of Arbitration and Conciliation Act, 1996 as amended by the Amendment Act of 2015 and in the circumstances, leave alone any ad interim protection, the petitioners are even precluded from seeking any final reliefs as sought for in the petition. In this connection attention of this Tribunal was drawn to the following provisions of **THE ARBITRATION AND CONCILIATION ACT, 1996**, namely:-

5. Extent of judicial intervention – Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this Part.

35. Finality of arbitral awards – Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

3. When this Tribunal queried, taking into consideration the provisions of Section 8 of the Arbitration and Conciliation Act, 2016 relating to

reference, it was answered by the counsel for respondents that since final award has already been passed the applicability of Section 8 of the said Act will not arise. The Learned Counsels appearing for the respondents in relation to the query, also represented that the very fact that the 2nd and 3rd respondents have entered on caveat and oral representation in itself is to be treated as an application questioning maintainability as demurrer and the necessity for issue of notice to the respondents and hence a formal application is not necessary, as the matter of arbitration as between the parties is evidenced from the typed set of documents as filed by the petitioners themselves. To buttress this line of contention the Learned Sr.Counsel for the respondents draws attention of this Tribunal to certain documents, inter alia, as filed by the petitioners themselves, namely:-

Annexure P-16 -	Agreement to refer the matter to Arbitration dated 20.01.2016
Annexure P-18 -	Copy of the Memorandum of Understanding dated 17.02.2016
Annexure P-20 -	Minutes of meeting signed by the Arbitrator and Respondent No.3 and termed as "Regarding Settlement between Deepak and Atul Beri' dated 14.03.2016

Annexure P-21	-	DOA dated 30.04.2016
Annexure P-25	-	Award dated 02.08.2016
Annexure P-26	-	OMP (I) No.326/2016
Annexure P-27	-	Order dated 19.08.2016 passed by Hon'ble High Court of Delhi
Annexure P-30	-	Order dated 28.11.2016 passed by Hon'ble High Court of Delhi
Annexure P-31	-	I.A.No.13/2017 as filed before the Hon'ble High Court of Delhi
Annexure P-32	-	Order dated 03.01.2017 passed by Hon'ble High Court of Delhi
Annexure P-33	-	I.A.No.3326/2017 as filed before the Hon'ble High Court of Delhi
Annexure P-34	-	Order dated 14.03.2017 passed by Hon'ble High Court of Delhi

4. Before proceeding further, a brief repast of facts will be in order to fathom the intricacies of rival contentions and the rationale for this Tribunal to come to the conclusion as has been done in view of the given facts and circumstances of the case. Since on behalf of the respondents no pleadings have been filed despite advance notice based on their claim

of demurrer, this Tribunal perforce relies on the averments as contained in the petition for the above purpose:

i) Respondent No.1 Company it is stated by the Petitioner was incorporated on 31.12.1986 under the provisions of Companies Act, 1956 for the purpose of carrying out business as detailed in the main objects clause of the Memorandum of Association of the First Respondent Company. The registered office of the Company it is stated to be situated at 81, Jor Bagh, New Delhi-110003 and that the following are the shareholding percentages of the respondents 2 to 4 in the 1st respondent Company:

Respondent No.2	30.60%
Respondent No.3	33.22%
Respondent No.4	5.50%
Total	69.32%

while the Petitioners shareholding strength percentage wise is to the extent of 30.60%. The Petitioner has also disclosed that while the Respondent No.2 is the younger brother of Petitioner No.1 and that Respondents No.3 and 4 are the parents of the brothers.

ii) In relation to Respondent No.5, it is stated that while the Petitioner's family hold 33.80%, Respondents No. 2-3 along with their family hold 33.33% each of the paid-up equity share capital of the Company. It is also stated that Respondent No.5 was incorporated on 18.12.1992 and the Company was acquired in the month of September, 2014 where after Petitioner No.1 along with Respondents 2 and 3 became Directors of the Company.

iii) While the authorized capital of the 1st respondent Company is stated to be Rs.5.00 crores, the paid up capital it is averred is to the extent of Rs.3,00,06,500/- held by the family of Beri's exclusively comprising of Petitioners and Respondent No.2 along with their respective individual branches together with respondents 3 and 4, their parents. Taking into consideration the share holding pattern, it is averred that Respondent No.1 is a closely held family Company run on the basis of a quasi-partnership. In the Petition, it is evident that while the Petitioner was appointed a Director in the year 2002, Respondent No.2 and 4 it is averred had been appointed as directors in the year 1986 while Respondent No.3 was appointed in the year 2015. Even though the Petition traces the history of the Beri family from the year 1951, it may not be relevant for the present. While Petitioner No.1 it is averred joined the family business after obtaining a Commerce Degree in the year 1980 and that Respondent No.2 obtained a degree in Engineering and joined the family business in the year 1986 at around which time the Respondent No.1 Company came to be incorporated.

iv) While it is averred in broad terms, inter alia, that Petitioner No.1 was involved in the establishment and development of Respondent No.1 Company and in relation to obtaining finance and also carrying out marketing, sales and administrative functions of the business of the First Respondent Company, Respondent No. 2 it is averred was engaged in the manufacturing activities of Respondent No.1 Company including purchase of materials and consumables and in relation to compliance with statutory provisions amongst other functions as detailed in the Petition.

v) It is also averred that Respondent No.1 Company was jointly managed till about late 2014 and due to certain illness of Respondent

No.2 it is stated that he was not able to attend to his duties and subsequent to his recovery, Respondent No.2 sought to take control of Respondent No.1 Company to the exclusion of Petitioner due to which dispute arose between Petitioner No.1 on the one hand and Respondent No.2 on the other not only in relation to First Respondent company but also in relation to group/family business entities jointly owned and controlled by the family including Respondent No.5 and as a consequence due to disputes which lead to loss of trust between the parties and in the circumstances joint operation of the bank accounts was resolved between the parties and in the year 2015 security apparatus was also sought to be changed by the 2nd respondent to the exclusion of petitioner no.1.

vi) While so, father of Petitioner No.1 and Respondent No.2 was sought to be inducted into the Board on 21.2.2015 with a view to act as a stabilizing factor between the brothers and it was also decided that the dispute as between the brothers should be resolved through negotiations and based on these negotiations it was decided that the parties will part ways and set up their own individual entities and as a result of which Petitioner No.1 set up two Limited Liability Partnerships (LLPs) by the name of DB Engineering as well as Atlas Knives. Since the disputes remained unresolved, it was decided that the disputes should be referred to arbitration for full and final settlement in relation to which Annexure P-16 titled as "Agreement to refer the matter to Arbitration" dated 22.1.2016 was executed and in terms of the said Agreement one Mr. Manoj Nagrath, Chartered Accountant was appointed as the Arbitrator as agreed to between Petitioner No.1, Respondent No.2 and Respondent No.3. In the meanwhile after detailed negotiations, it is averred that the parties

were able to arrive at an understanding and on 17.2.2016 an MOU was executed being Annexure- P-18.

vii) However, upon entering into the MOU, the attitude of Respondent No.2 changed and it is averred that he started to act against the spirit of MOU and to the detriment of Petitioner No.1 which gave rise to the arbitration and Respondent No.3 namely the father tried to chart out future course of action and in terms of the arrangement for the division of assets in terms of the MOU along with the arbitrator. Pursuant to the same, a Deed of Arrangement (DOA) dated 30.4.2016 being Annexure – P-21 was also executed between the parties with a view to facilitate final division of the businesses and assets between the parties. However, in view of impediment created by Respondent No.2 during the pendency of arbitration proceedings, Petitioner No.1 had approached the Arbitrator to pass an interim award or in the alternative final award in terms of the MOU and DOA which culminated in the named Arbitrator passing an award on 2.8.2016 directing the division of businesses and assets of the family including Respondent No.1 Company in terms of the MOU and the DOA as referred to above.

viii) Despite the award, it is averred by the petitioners, as the Respondents failed to abide by its terms, on 10.8.2016, Petitioner No.1 to safeguard his interests and those of the Company was constrained to file a Petition bearing No. OMP(I) No.326/2016 dated 10.8.2016 before the Hon'ble High Court of Delhi under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as Arbitration Act) as amended for directions. On the other hand it is averred that the award passed by the Arbitrator has been assailed by the other Respondents before the Hon'ble High Court of Delhi and that while Respondent No. 3 and 4 have filed a petition under Section

34 of the Arbitration Act in OMP No.382/2016 and that Respondent No. 2 has individually filed another petition under Section 34 of the Arbitration Act in OMP 396/2016.

ix) On 19.8.2016 it is averred that the Hon'ble High Court of Delhi passed an order in common in OMP.382/2016 and OMP(1) 326/2016. However, in defiance of the said common order passed by the Hon'ble High Court of Delhi, Respondents have acted in contravention of the final award of the Arbitrator and the order of the Hon'ble High Court of Delhi which prompted the Petitioner to file a Contempt Petition and seeking restoration of the funds misappropriated. While so, since Respondents No. 2 to 4 had also opened new bank accounts in the name of the company, Petitioner No. 1 was constrained to file application 13/2017 in OMP 326/2016 before the Hon'ble High Court of Delhi seeking relief and the Hon'ble High Court on 3.1.2017 took note of the conduct of Respondents and was also pleased to appoint Court Commissioner and Chartered Accountant to inspect the premises of the 1st respondent Company and also prepare an inventory. This lead to the Respondent No. 2 to move machineries, stocks and work in progress to units which were not under inspection which once again made the Petitioner to file an application in OMP No.3266/2017 before the Hon'ble High Court of Delhi and the Hon'ble High Court was pleased to issue order dated 14.3.2017 directing the Court Commissioner to re-inspect the premises in question and to file supplementary report. On 15.5.2017 a final report was filed by the Court Commissioner wherein the various acts of mismanagement including removal of plant and machinery by Respondent No. 2 as well as other acts of Respondent No 2 have been reported.

x) While so, the Petitioners have approached this Tribunal under Section 241 of the Companies Act, 2013 seeking for reliefs in terms of Section 242 of the said Act in relation to the oppression perpetrated by the Respondents and the acts of mismanagement committed by the Respondents in relation to the First Respondent Company.

5. Taking into consideration the above facts, the petitioners submit that the 2nd respondent is neither honouring the terms of memorandum of understanding dated 17.02.2016 (Annexure P - 18) nor giving effect to the award passed by the Arbitrator dated 02.08.2016 (Annexure P - 25), pursuant to the agreement to refer the matter to arbitration dated 20.01.2016 (Annexure P – 16). On the other hand it is brought to the notice of this Tribunal that the award being Annexure P-25 is under challenge by way of a petition filed by Respondents 3 & 4 herein, even though not being a party to the arbitration agreement, before the Hon'ble High Court of Delhi for setting aside the award dated 02.08.2016 in O.M.P.(COMM) 382/2016 under Section 34 of the Arbitration and Conciliation Act, 1996. Similarly, the award dated 02.08.2016 is challenged also by the 2nd respondent herein vide O.M.P.(COMM) 396/2016 under Section 34 of the Arbitration and Conciliation Act, 1996.

6. However, the 1st petitioner it is seen has filed under Section 9 of Arbitration and Conciliation Act, 1996 in O.M.P (I) (COMM)-326/16 which is annexed along with the typed set of documents filed along with this petition as Annexure P-26, inter alia seeking as against the 2nd respondent herein from acting in derogation of the terms of the Memorandum of Understanding annexed as Annexure P-18, Deed of Arrangement annexed as Annexure P-21 and the Final Award passed by the Arbitrator dated 02.08.2016 annexed as Annexure P-25, all annexed along with typed set of documents filed along with the petition. Reproduction of the prayers sought in the said Section 9 application before the Hon'ble High Court at Delhi by the 1st petitioner will be in order and which are as follows:-

(a) Pass an order restraining the Respondent from acting in derogation of the terms of the Memorandum of Understanding, the Deed of Arrangement and the Award and direct the Respondent to immediately take necessary steps to ensure smooth functioning of all units including but not limited to signing the cheques for payment of salaries, outstanding

electricity bills, vendor bills and other statutory dues.

- (b) Direct the Respondent to provide access to the Petitioner to the Books of Accounts, ERP Systems, Bank Accounts, Stock Registers, including unhindered access to the manufacturing Unit No.64 NOIDA, Uttar Pradesh.
- (c) Pass an order appointing a receiver to take charge of the books of accounts, operations of the bank accounts, stock registers, ERP software systems, email addresses, domain names belonging to DB Engineering Pvt. Ltd., S.K.Beri & Brothers, DB Engineering Co. and Banaras Marbles and Granites Ltd. and further to discharge such functions so as to ensure the smooth functioning of the said companies/firms including but not limited to payment of salaries and dues, payments to vendors, payment of electricity and statutory dues, inventorizing the current stock, and manufacturing /dispatching/processing orders in a timely manner.
- (d) Pass an order directing the Respondent to disclose on affidavit the orders placed on DB Engineering Pvt. Ltd., S.K.Beri & Brothers, DB Engineering Co. and Banaras Marbles and Granites Ltd. and also to disclose the details of the unsold stock lying at the disposal of the aforesaid companies/firms.



- (e) Pass an order restraining the Respondent from opening any new bank accounts in the name of DB Engineering Pvt., S.K.Beri & Brothers, DB Engineering Co. and Banaras Marbles and Granites Ltd.
- (f) Pass an order directing the Respondent to grant access to the Petitioner.
- (g) Pass such other orders as this Hon'ble Court deems fit and proper in the facts and circumstances of the present case.
- (h) Pass ad-interim, ex-parte orders in favour of the petitioner and against the defendant in terms of the prayers above.

7. It is the contention of the respondents that in view of the above O.M.P (I) (COMM) filed before the Hon'ble High Court which also includes reliefs sought for predominantly in relation to the affairs of the 1st respondent company seeking inter alia, the appointment of receiver and that the petitioners having elected to obtain relief from the said judicial forum after passing of award and also having succeeded in getting interim reliefs as evidenced vide order dated 19.08.2016 annexed as Annexure P-27 and subsequent orders including that of appointment of Court Commissioner

and a Chartered Accountant, the petitioners in relation to the affairs of the 1st respondent company and other respondents cannot now invoke the equitable jurisdiction of this Tribunal under the provisions of Section 241 and 242 of the Companies Act, 2013 seeking for reliefs which amounts to forum shopping which according to counsel for 2nd respondent should be dissuaded at the threshold itself. It is also projected that the business entities are family controlled, whether they are incorporated like the 1st respondent company or not, and when disputes arose since the parties have resorted to resolution firstly through mediation and failing which arbitration and the same having also culminated in an Award being passed though under challenge, the petitioners are estopped from approaching this Tribunal for reliefs in relation to the matters covered under the Award. Learned Counsel for 2nd respondent in order to fortify the contention that multiple remedies cannot be availed at the same time has placed reliance on DCM Shriram Industries Ltd v. HB Stock Holdings Ltd., (2014) 8 HCC (Del) 744: 2014 SCC OnLine Del 1572 as well as has cited Sardar Iqbal Singh & Another vs. Sardar Gurbaksh Singh & others (2000) 100 Company Cases 504 and in relation to bar to judicial intervention as provided for under Section 5 of

the Arbitration and Conciliation Act, 1996 on Chatterjee Petrochem Co. vs. Halidya Petrochemicals Ltd. (2014) 14 SCC 574 and similar cases of the same vein.

8. Learned Counsel for the Petitioners who in the first place moved the motion and sought for ad interim directions for the grant of status quo in relation to assets, management and shareholding and as well as for right to inspect the books of accounts and statutory records, contended that the petition as filed by the petitioners against the respondents is maintainable taking into consideration the reliefs which can be provided only by this Tribunal in relation to the affairs of a company under the provisions of Section 241 and 242 of the Companies Act, 2013 which are wide and untrammelled and which no other court is empowered to grant as repeatedly held by the courts, including the Hon'ble Supreme Court in several of its decisions while construing the erstwhile provisions of Section 397 and 398 of the Companies Act, 1956, including the oft quoted case of Needle Industries Ltd. Reliance is also placed by Learned Counsel for the Petitioners on the following case laws to support his argument that an arbitrator does not enjoy all those powers which are vested in this

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Tribunal, namely NCLT under the provisions of Sections 241 to 244 of the Companies Act, 2013:-

- i) Mr Christians Muller & Ors -vs- M/s. A & C Braid and Rope Company Pvt.Ltd & Ors reported in 2015 SCC OnLine CLB 267;
- ii) M/s. Avigo PE Investments Ltd -vs- M/s.Tecpro Engineers Ltd & Ors reported in 2016 SCC OnLine CLB 18;
- iii) Ms. Punita Khatter -vs- M/s. Explorers Travels and Tours Private Limited & Ors reported in 2016 SCC OnLine NCLT 92
- iv) Sudarshan Chopra and Ors – vs- Company Law Board and Ors 2004(2) Arb LR 241 (P&H) (DB)
- v) DCM Shriram Industries Ltd v. HB Stock Holdings Ltd., (2014) 8 HCC (Del) 744: 2014 SCC OnLine Del 1572

9. This Tribunal even though is in concord with the representation of the Learned Senior Counsel for 2nd respondent to the effect that an application under Section 8 of the Arbitration & Conciliation Act, 1996 may not be warranted as already a final award has been passed and that there is nothing to be referred to an Arbitrator, however is not in concord with the submission that mere filing of caveat by the 2nd respondent in itself to be treated as a 'demurrer' and hence this Tribunal should consider whether notice in itself is necessary to be given calling upon the respondents to put forth their stand by way of pleadings or any representations whatsoever, including objections relating to

maintainability backed by affidavits. Can such an argument be accepted? This Tribunal is afraid it cannot for the simple reason that the purpose of caveat is not to consider the maintainability of a petition but prior to considering any grant of ad interim or interim directions, to put the caveator on notice and affording an opportunity to hear the caveator before grant of such directions as sought for by the petitioner/applicant or not. Perusal of Rule 25 of National Company Law Tribunal Rules, 2016 makes this position amply clear which is reproduced hereunder for ready reference:-

25 (1) Any person may lodge caveat in triplicate in any appeal or petition or application that may be instituted before this Tribunal by paying the prescribed fee after forwarding a copy by registered post or serving the same on the expected petitioner or appellant and the caveat shall be in the Form No. NCLT 3C and contain such details and particulars or orders or directions, details of authority against whose orders or directions the appeal or petition or application is being instituted by the expected appellant or petitioner or applicant which full address for service on other side, so that the appeal or petition or application could be served before the appeal or petition or interim application is taken up.

Provided that the Tribunal may pass interim orders in case of urgency.

(2) The caveat shall remain valid for a period of ninety days from the date of its filing.

10. Courts have, while interpreting the provisions of Section 148-A of CPC, 1908 as amended in relation to caveats analogous to the one contemplated under Rule 25 of NCLT Rules, 2016 have consistently held that a caveat is nothing but a formal notice, which literally is not different from a caution. It does not create any obligation upon the Court to desist from making any order in the proceeding before it unless the caveat is decided. All that a Court is expected to do on the face of caveat is to beware and to hear the caveat before a decision is taken. A caveator does not get a right to defeat the proceedings at the threshold or to insist that he must be heard on merits of the case before any interim order is passed. Thus keeping in view the established position of law in relation to caveats, this Tribunal is not in a position to appreciate the efforts of the caveator, namely the 2nd respondent in trying to defeat the proceedings at the threshold, particularly where the jurisdiction is in the nature of equitable jurisdiction as enjoined upon this Tribunal to follow the principles of natural justice and is not framed in rigidity as compared to the civil 'Courts' governed by Civil Procedure Code. In other words the jurisdiction enjoined upon this Tribunal particularly under the provisions presently



invoked, this Tribunal is not required to exercise its jurisdiction with a "cut and dry" approach nor is it confined to a rigid exercise warranting a geometric precision to the pleadings or for that matter to the reliefs which are sought for and can be granted as repeatedly held by the courts while considering the erstwhile provisions of Sections 397 and 398 read with Sections 402 or 403 of Companies Act, 1956. Further in relation to grant of relief under these provisions it has gone to the extent of laying down that reliefs can be suitably moulded even if not prayed for in order to render justice, taking into consideration the facts and circumstances of the case and the exigencies of the situation in the interest of the company and its shareholders and in public interest.

11. This is evident from the perusal of the provisions of Companies Act, 2013 as rightly pointed out by the Ld.Sr Counsel for the petitioners wherein this Tribunal enjoys wide powers in relation to regulating the affairs of a company in a petition filed under Section 241 of the Companies Act, 2013 and as provided under Section 242 of the Companies Act, 2013 which are reproduced hereunder:-



242. **Powers of Tribunal.**

(1) If, on any application made under section 241, the Tribunal is of the opinion—

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

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up,

the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit. (italics supplied)

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

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

(b) the purchase of shares or interests of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(d) restrictions on the transfer or allotment of the shares of the company;

(e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;

(f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e):

Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

(g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

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

(i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;

(j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h);

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

(l) imposition of costs as may be deemed fit by the Tribunal;

(m) *any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.* (italics supplied)

(3) A certified copy of the order of the Tribunal under sub-section (1) shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.

(4) *The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.* (italics supplied)

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(5) Where an order of the Tribunal under sub-section (1) makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

(6) Subject to the provisions of sub-section (1), the alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.

(7) A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.

(8) If a company contravenes the provisions of sub-section (5), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

12. Taking into consideration the nature of the provisions of Sections 241 to 244 of Companies Act, 2013 and the delineation of scope of caveats as in the previous paragraph, this Tribunal has great reservation in relation to accepting the plea of demurrer too as sought to be projected by the Learned counsels appearing for the respondents. Can the width of the

jurisdiction of this Tribunal and the powers that can be exercised under Sections 241 to 244 of the Companies Act, 2013 be bottled up or restrained vis-à-vis the narrow confines of a private dispute and by the applicability of the Arbitration and Conciliation Act, 1996. Time and again it has been held including in those cases cited by the Learned Counsel for the Petitioners that it cannot be, in view of Arbitration Tribunal being a private fora restricted to resolve the dispute of a private nature that too referred to it by the parties as compared to this Tribunal being a public fora vested with wide powers including that of winding up of the company if situation warrants.

13. The above position has been succinctly elucidated in paragraphs 35 to 39 of the judgement rendered by the Hon'ble Supreme Court in the case of Booz-Allen & Hamilton Inc v. SBI Home Finance Limited reported in (2011) 5 SCC 532 and also extracted in the case of Christians Muller case referred to in the earlier paragraph 8 and which reads as under:-

“35. The arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle

capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relation to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relation to actions in rem. A *right in rem* is a right exercisable against the world at large, as

contrasted from a *right in personam* which is an interest protected solely against specific individuals. *Actions in personam* refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a *judgement in personam* refers to a judgement against a person as distinguished from a judgement against a thing, right or status and a judgement in rem refers to a judgement that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary).

38. Generally and traditionally all disputes relating to *rights in personam* are considered to be amenable to arbitration and all disputes relating to *rights in rem* are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate *rights in personam* arising from *rights in rem* have always been considered to be arbitrable.

39. The Act does not specifically exclude any category or disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."

Reference to the above judgement of the Hon'ble Supreme Court makes it clear that under Section 34 of the Arbitration Act where an award is under challenge it is for the court in which such an application has been preferred to decide whether the subject matter of the dispute is or not capable of settlement by arbitration under the law for the time being in force. From the facts narrated in paragraphs infra it is evident that the final award passed by the Arbitral Tribunal has been challenged by both the 2nd respondent as well as 3rd and 4th respondents. Further subsequent to passing of award on 02.08.2016, the 1st petitioner herein has also chosen to seek the intervention of the Hon'ble High Court of Delhi. Pursuant to Section 9 petition in OMP (I) 326/2016 preferred earlier under Arbitration Act by petitioner No.1 and pending disposal the 1st petitioner has also preferred for directions in the said OMP, I.A.No.13 of 2017 followed by I.A.No.3326 of 2017 inter-alia seeking for the appointment of receiver virtually seeking for regulation of the affairs of the 1st respondent company which is manifest from the prayers made and reproduced below:-

- (a) Pass an order appointing a receiver to take charge of the all assets including its factory premises, books of accounts, operations of

the bank accounts, Plant & Machinery, raw materials, stores, steel, finished and semi finished orders, tools, fixtures, stock registers, ERP software systems, email addresses, domain names belonging to DB Engineering Pvt. Ltd., and Banaras Marbles and Granites Ltd. and further to discharge such functions so as to ensure the smooth functioning of the said companies/firms including but not limited to payment of salaries and dues, payment of electricity and statutory dues, inventorizing the current stock, and manufacturing /dispatching/processing orders in a timely manner, under the supervisions of this Hon'ble Court.

- (b) Pass an order directing the Respondent to disclose on affidavit the orders placed on DBE and Banaras and also to disclose the details Plant & Machinery, raw materials, stores, steel, finished and semi finished orders, tools, fixtures, sales figures as well as the unsold stock lying at the disposal of the aforesaid companies/firms.
- (c) Pass an order directing a forensic audit of the books of accounts of DB Engineering Pvt. Ltd. and Banaras Marbles and Granites Ltd. to identify the siphoning off caused by the Respondent in the aforesaid entities and also to identify the status of the stocks, steel, receivables, orders, books of accounts, plant

& machinery etc. and to submit a report to this Hon'ble Court.

- (d) Pass an order restraining the Respondent from operating the account bearing No. CBCA/1/209 and CBCA/1/211 maintained with Corporate Bank, Kasna Branch, Greater NOIDA contrary to the Award and the Orders passed by this Hon'ble Court and from opening any new bank accounts in the name of DB Engineering Pvt. Ltd., and Banaras marbles and Granites Ltd. and to disclose on affidavit all accounts pertaining to the said entities.
- (e) Pass an order directing the Respondent to restitute the monies so illegally transferred from the account bearing No. CBCA/1/209 maintained with Corporate Bank, Kasna Branch, Greater NOIDA and repatriate the same back in the said account or in the alternate deposit the said amounts before this Hon'ble Court.
- (f) Pass such other orders as this Hon'ble Court deems fit and proper in the facts and circumstances of the present case.

Pursuant to filing of the above I.A.No.13 of 2017 and I.A.No.3326 of 2017, the Hon'ble High Court has also been pleased to pass interim directions, inter alia in relation to the 1st respondent company as

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particularly evident from the orders dated 03.01.2017 and 14.03.2017 and subsequent orders passed by it. The parties in this regard also represent that in relation to OMP (I) No.326 of 2016, OMP No.382 of 2016 and OMP No.396 of 2016 the parties have been heard and orders reserved as evident from the record of proceedings dated 03.07.2017.

14. It is evident from the prayers made in the application filed in OMP.326/16 by the 1st petitioner, that by seeking appointment of a Receiver in relation to the assets and properties of the 1st respondent company the affairs of the 1st respondent company are sought to be brought under the 'Custodia Legis' of the Hon'ble High Court of Delhi. The Hon'ble High Court of Delhi as already noted has also been pleased to appoint a court commissioner as well as a Chartered Accountant directing them to ascertain the availability of assets as well as to ascertain the financial aspects of the 1st respondent company and in the circumstances to pass any orders in relation to the assets or in relation to books of accounts of the 1st respondent company may not be appropriate as it will lead only to a conflict of orders in relation to the affairs of the 1st respondent company, despite the facts averred by the petitioners remains unchallenged before this Tribunal in view of the plea of demurrer taken by the respondents

based on Arbitration Act. As already seen the equitable jurisdiction under the provisions of Section 241 and 242 of the Act are wide and untrammelled and this Tribunal being a public fora has the jurisdiction to entertain the petition filed in relation to the affairs of the 1st respondent company as well as to regulate the affairs of the 1st respondent till the disposal of the petition and if necessary even to wind up the 1st respondent company if circumstances warrant as the jurisdiction in relation to winding up has also been solely vested with this Tribunal on and from 15.12.2016 including on the ground that if the Tribunal is of the opinion that it is just and equitable that the company should be wound up which jurisdiction was vested with the High Courts prior to 15.12.2016.

15. However in view of the peculiar circumstances of the case and as already stated in order to avoid conflict of orders that may be passed in relation to the same subject matter, namely the affairs of the 1st respondent company and also the question of the award as well as the question whether the subject matter of the dispute as between the parties are capable of arbitration in view, interalia, of certain parties herein are represented as not being parties to the arbitration are all pending orders before the Hon'ble High Court of Delhi, this Tribunal is desisting from



passing any interim orders. On the other hand in relation to jurisdiction as to maintainability of the petition, this Tribunal in view of the exclusive jurisdiction vested in it under the provisions of Section 241 and 242 of Companies Act, 2013 can entertain the petition as long as the petitioners are able to satisfy this Tribunal that they comply with the provisions of Section 244 of the Companies Act, 2013 regarding qualifying standards prescribed thereunder which in any case in this petition is not in dispute and further the 1st respondent company being amenable to the territorial jurisdiction of this Tribunal. In the circumstances on a plea of demurrer the respondents cannot avoid from answering to the allegations as contained in the petition and will be required to answer the same by filing a reply for which purpose 6 weeks time is granted with an advance copy of the reply to be made available to the Counsel for Petitioners and the Petitioners to file their rejoinder within a period of 3 weeks thereafter.

Post the CP for hearing on 15.02.2017.

Sd-
01/02/17
(R. VARADHARAJAN)
MEMBER (JUDICIAL)