

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) NO. 204 of 2020

&

I.A. No.2178 of 2023

(Arising out of the Order dated 15th September, 2020 passed by the
Learned NCLT (National Company Law Tribunal, Kochi Bench, Kochi, in
I.A. No. 44/KOB/2020 in CP/02/KOB/2020)

IN THE MATTER OF:

1. Indus Motor Company Private Limited

Having its registered office at Box No.923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 1.

2. Mr. Pulikkal Veetil Abdul Wahab,

Indus Motor Company Private Limited,
Post Box No. 923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 2.

3. Mr. Jaber Abdul Wahab,

Indus Motor Company Private Limited,
Post Box No. 923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 3.

4. Mr. Javed Abdul Wahab,

Indus Motor Company Private Limited,
Post Box No. 923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 4.

5. Mr. Ajmal Abdul Wahab,

Indus Motor Company Private Limited,
Post Box No. 923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 5.

6. Mr. Afdhel Abdul Waheb,

Indus Motor Company Private Limited,
Post Box No. 923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 6.

7. Mr. Thomas Kuruvilla,

Indus Motor Company Private Limited,
Post Box No. 923,

Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 7.

8. Mrs. Yasmin Wahab,
Indus Motor Company Private Limited,
Post Box No. 923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 8.

Versus

1. Mr. T.P. Anilkumar
310 NBQ, Bank Street,
Dubai, UAE.

...Respondent No. 1.

2. Mr. T.P. Ajith Kumar,
310, NBQ Building,
Khalid Bin Waleed Road,
Dubai, UAE.

...Respondent No. 2.

3. Mrs. T.P. Sarada,
Ashirwas, Florican Road,
Calicut.

...Respondent No. 3.

4. Mrs. Anju Madhav,
EL-90, Electronic Zone,
MIDC Mahape,
Navi Mumbai – 400710.

...Respondent No. 4.

Present

For Appellants: Mr. Alishan Naqvee, Mr. Rapul Bhatia & Mr. Iman Naqvi, Advocates.

For Respondents: Mr. Jayant Mehta, Sr. Advocate with Mr. Manu Nair, Ms. Medha Sachdev, Ms. Simran Malhotra & Ms. Riya Basu, Advocates.

WITH

COMPANY APPEAL (AT) NO. 87 of 2020

&

I.A. No. 1146/2021

(Arising out of the Order dated 05th June, 2020 passed by the Learned NCLT (National Company Law Tribunal, Kochi Bench, Ernakulam, in I.A. No. 64/KOB/2020 in CP/02/KOB/2020)

IN THE MATTER OF:

1. Indus Motor Company Private Limited

Having its registered office at Box No.923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 1.

2. Mr. Pulikkal Veetil Abdul Wahab,
Indus Motor Company Private Limited,
Post Box No. 923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 2.

3. Mr. Jaber Abdul Wahab,
Indus Motor Company Private Limited,
Post Box No. 923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 3.

4. Mr. Javed Abdul Wahab,
Indus Motor Company Private Limited,
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5. Mr. Ajmal Abdul Wahab,
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Calicut – 673005.

...Appellant No. 5.

6. Mr. Afdhel Abdul Wahab,
Indus Motor Company Private Limited,
Post Box No. 923,
Indus House, Chakkorathukulam,
Calicut – 673005.

...Appellant No. 6.

7. Mr. Thomas Kuruvilla,
Indus Motor Company Private Limited,
Post Box No. 923,
Indus House, Chakkorathukulam,
Calicut – 673005.

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8. Mrs. Yasmin Wahab,
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...Respondent No. 3.

4. Mrs. Anju Madhav,
EL-90, Electronic Zone,
MIDC Mahape,
Navi Mumbai – 400710.

...Respondent No. 4.

Present

For Appellants: **Dr. UK Chaudhary, Sr. Advocate with Mr. Rapul Bhatia, Mr. Iman Naqvi & Mr. Masumyer Singh, Advocates.**

For Respondents: **Mr. Manu Nair, Ms. Medha Sachdev, Ms. Simran Malhotra & Ms. Riya Basu, Advocates.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

Comp. App. (AT) No.204/2020

1. Aggrieved by the Impugned Order dated 15.09.2020, passed in I.A.44/KOB/2020 in CP/02/KOB/2020 whereby and where under the NCLT (National Company Law Tribunal, Kochi Bench, Kochi) has dismissed the Application filed by the Applicant/Appellant/`M/s. Indus Motor Company Private Limited', for referring the matter to an Arbitral Tribunal, the Appellants preferred this Appeal under Section 421 of the Companies Act, 2013 (hereinafter referred to as `The Act'). The NCLT, while dismissing I.A. No.44/2020 has observed as follows:

“43. In this case, the CP is filed for oppression and mismanagement in the Company. In addition to that serious fraud has also been alleged by the petitioners.

Since those questions cannot be considered by an Arbitral Tribunal, the relief prayed for reference to an Arbitral Tribunal cannot be accepted.

44. In my opinion, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the CP or in some cases bifurcation of the CP between the parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation on the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before the judicial authority is not allowed. Such bifurcation of a suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by this Tribunal would inevitably delay the proceedings. The whole purpose of speedy disposal of the dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.”

2. Submissions of the Learned Sr. Counsel appearing on behalf of the

Appellants:

- It is submitted by the Learned Sr. Counsel that the Respondents/the minority Shareholders of the first Appellant Company filed a Company Petition bearing C.P.02/KOB/2020 before the NCLT seeking various reliefs. In the said Company Petition, the Appellants have filed an Application bearing I.A.44/2020 under Section 8 of the Arbitration and Conciliation Act, 1996, seeking a direction to refer all disputes *inter se* the Appellants and Respondents to Arbitration in terms of the ‘Arbitration Clause’ as contained in Clause 18 of the Memorandum of Understanding (‘MoU’) dated 31.03.2007 and accordingly dismiss the Company Petition as the Impugned Order was passed without taking

into consideration that this MoU covers all the issues raised in the Company Petition.

- All parties in the Company Petition excluding the seventh Appellant, who is an employee of the first Appellant Company, do not dispute the ‘content’ or the ‘validity of the MoU’. The seventh Appellant being the Chief Executive Officer (‘CEO’) of the Company is neither a necessary nor a proper party to the dispute. The Hon’ble Madras High Court in the matter of **‘Sundaram Brake Linings Ltd.’ Vs. ‘Kotak Mahindra Bank & Ors.’**¹ has held that in a Civil Suit, the Plaintiff ‘*is dominus litus*’ and he may cite anyone as the party as the time of its institution. Such a privilege granted to a Plaintiff cannot be misused as a gate pass to avoid an Arbitration Agreement.
- It is submitted that the Arbitral Tribunal is competent to rule on its own jurisdiction and that there is no sufficient cause to divest the Arbitral Tribunal of its powers. The Company Petition is nothing but a well disguised dressed up Petition and most of the allegations raised in the Company Petition are ‘barred by Limitation’. The Respondent have selectively picked up information from the Financial Statements of the first Appellant Company for a period of 10 years with baseless and false ‘Claims’ only to give it a colour of a Petition under Sections 241 and 242 of the Act. It is contended that the Respondents seek relief in the nature of monetary compensation and indemnification, which are arbitral in nature. The Respondents have crystallised their ‘Claim’ by quantifying losses to the tune of Rs.62,88,86,800/-.

¹ (2010) 4 CompLJ 345 (Mad)

- The Impugned Order is a non-Speaking Order as it refers to allegations of fraud, which is liable for punishment under Section 477 of the Act, without even identifying the instances of the alleged fraud. The Respondents are in breach of various Clauses of the MoU and therefore the Appellants have made a reference for Arbitration. It is submitted that in the event two parallel Proceedings continue, the same will lead to bifurcation of the causes with overlapping facts and contentions, thereby leading to multiplicity of proceedings and a strong likelihood of conflicting findings on the facts by the respective Tribunals.
- It is submitted that the Appellants have challenged the Order dated 05.06.2020 before this Tribunal, vide Company Appeal (AT) No.87/2020 and by Order dated 14.07.2020, the Operation of the Order dated 05.06.2020 was stayed. While this Tribunal allowed the proceedings before the NCLT to continue, it would have been in the fitness of things not to have dealt with the Section 8 Application pending the Appeal.
- The Learned Sr. Counsel, drew our attention to the various allegations raised by the Respondents, and the respective Clauses in the MoU, which is detailed as hereunder:

S. No.	<i>Allegation in the Company</i>	<i>Clause of the MoU of 2007</i>
1.	<i>Unauthorized granting of interest-free loans to Appellant No. 2 and his relatives.</i>	<i>Clause 8 (interest expense) read with Clauses 7 (cash collaterals) and 9 (non-cash collaterals govern the contours of the dispute, the Respondents herein failed to tender collaterals/working capital) – No interest free loan was given.</i>
2.	<i>Related party transactions.</i>	<i>Clause 7 (cash collaterals) and 9 (non-cash collaterals). All related</i>

		<i>party transactions are in due compliance of law.</i>
3.	<i>Diversion/siphoning off funds/profits of the Appellant company.</i>	<i>Clauses 7, 9, 11 and 15. The alleged transactions were part of business and management of the Appellant company, as stipulated by the MoU of 2007 including the above clauses.</i>
4.	<i>Conducting of board meetings/general meetings of the Appellant Company without notice to the Respondents herein.</i>	<i>Clause 12 prescribes internal management of the Appellant Company. Clause 10 governs management fee.</i>
5.	<i>Failure to appoint an internal auditor and whole-time company secretary for the Appellant Company.</i>	<i>Clause 12 prescribes internal management of the Appellant Company. Any dispute in relation to this is subject to arbitration.</i>
6.	<i>Usurping of the shares of Mr. P.A. Hamza and Mrs. Fareeda Hamza.</i>	<i>Clause 3 (reorganization of shareholding) read with preamble and Clause 1 (preamble to be an integral part of the MoU). Clause 16 refers to approval of share transfer.</i>

- It is submitted that the Respondents knowing that the allegations made by them are subject to adjudication by the Arbitration, have yet filed this Company Petition under Sections 241 & 242 of the Act. The second Appellant had invoked the Arbitration Clause under the MoU vide Notice dated 06.06.2020 and thereafter filed a Petition under Section 11 of the Arbitration and Conciliation Act, 1996 before the Hon'ble Kerala High Court seeking appointment of Arbitrator. The second Respondent challenged the said Petition and the objections of the Respondent to the Section 11 Petition are similar to the allegations made by the family group in the Company Petition before the NCLT. The Arbitration Petition AR No.59/2020 was allowed by the Hon'ble Kerala High Court vide Order dated 10.01.2023 appointing Mr. PS Sunil Advocate as the sole Arbitrator. It is submitted that the Appellants have

filed a Caveat before the Hon'ble Supreme Court in relation to the Order dated 10.01.2023 of the Hon'ble Kerala High Court and that the Respondents have filed an SLP against the same Order.

- Learned Counsel filed Supplementary Written Submissions stating that the Hon'ble Kerala High Court has dismissed the Review Petition, filed by one P.A. Hamza being RP No.203/2023 vide Order dated 23.01.2023. The Review Petitioner Ms. PA Hamza was a party to the Arbitration Petition filed before the Kerala High Court being AR 59/2020 and had also sought his impleadment in the CP/02/KOB/2020. It is also brought to our Notice that the Hon'ble Supreme Court vide Order dated 28.02.2023 had issued Notice in the SLP (C) No.3515/2023 filed by the Respondents herein against the Order dated 10.01.2023 passed by the Hon'ble Kerala High Court and stayed the 'Operation' for the stayed Order till the next date of hearing.
- Learned Sr. Counsel, Mr. Vasishth contended that the prayer in the main Company Petition is with respect to siphoning of the money and loss of profit, which prayer cannot be granted by NCLT under the Act but only by Arbitration.
- Learned Sr. Counsel for the Appellant placed reliance on the following Judgements, in support of his contention that disputes of this nature can be referred to Arbitration; that the Section 8 of the Arbitration and Conciliation Act, 1996 is obligatory in nature; that mere allegation or fraud is not sufficient, and that non-signatories can also be parties to an Arbitration Agreement. He also drew our attention to the Judgements of the Hon'ble Apex Court wherein it is stated that any isolated incident cannot be termed as 'Operation and Mismanagement':

- *'Aruna Oswal' Vs. 'Pankaj Oswal & Ors.'*².
- *'Kim Bellrose' Vs. 'Jubey M. Devasia'*³.
- *'Rishima SA Investments LLC' Vs. 'Shristi Infrastructure Development Corporation Ltd. & Anr.'*⁴.
- *'Grass Lands Agro' Vs. 'R.S. Mohammed Saleem'*⁵.
- *'Sidharth Gupta' Vs. 'Getit Infoservices Pvt. Ltd.'*⁶.
- *'Deccan Paper Mills Co. Ltd.' Vs. 'Regency Mahavir Properties'*⁷.
- *'Ameet Lalchand' Vs. 'Rishabh Enterprise'*⁸.
- *'Hema Khattar' Vs. 'Shiv Khera'*⁹.
- *'Sundaram Finance Ltd.' Vs. 'T. Thankam'*¹⁰.
- *'P. Anand Gajapathi Raju' Vs. 'P.V.G. Raju (Dead) and Ors.'*¹¹.
- *'Avitel Post Studios Ltd. & Ors.' Vs. 'HSBC PI Holdings (Mauritius) Ltd.'*¹².
- *'Sukanya Holdings (P) Ltd.' Vs. 'Jayesh H. Pandya'*¹³.
- *'Bialetti Industries S.P.A.' Vs. 'Rachit Suresh Gangar'*¹⁴.
- *'Inspire Educational Services Pvt. Ltd.' Vs. 'Triumphant Institute of Management Education Pvt. Ltd.'*¹⁵.
- *'A. Ayyasamy' Vs. 'A. Paramasivam & Ors.'*¹⁶.
- *'Rashid Raza' Vs. 'Sadaf Akhtar'*¹⁷.
- *'Vidya Drolia & Ors.' Vs. 'Durga Trading Corp.'*¹⁸.
- *'N.N. Global Mercantile Pvt. Ltd.' Vs. 'Indo Unique Flame Ltd.'*¹⁹.
- *'Chloro Controls Ind.' Vs. 'Severn Trent Water Purification'*²⁰.

² (2020) 8 SCC 79

³ 2018 SCC OnLine NCLT 4159

⁴ 2017 SCC OnLine NCLT 12082

⁵ 2017 SCC OnLine NCLT 954

⁶ 2016 SCC OnLine CLB 10

⁷ (2020) SCC OnLine SC 655

⁸ (2018) 15 SCC 678

⁹ (2017) 7 SCC 716

¹⁰ (2015) 14 SCC 444

¹¹ (2000) 4 SCC 539

¹² (2020) SCC OnLine SC 656

¹³ (2003) 5 SCC 531

¹⁴ 2012 SCC OnLine CLB 133

¹⁵ 2013 SCC OnLine CLB 9

¹⁶ (2016) 10 SCC 386

¹⁷ (2019) 8 SCC 710

¹⁸ (2020) SCC OnLine SC 1018

¹⁹ 2021 SCC OnLine SC 13.

²⁰ (2013) 1 SCC 641

- *'Kotak Mahindra Bank' Vs. 'Sundaram Brake Lining Ltd.'*²¹.
- *'Sangramsingh P. Gaekwad' Vs. 'Shantadevi P. Gaekwad'*²².
- *'Needle Industries (India) Ltd.' Vs. 'Needle Industries Newey (India) Holding Ltd.'*²³.
- *'Shanti Prasad Jain' Vs. 'Kalinga Tubes Ltd.'*²⁴.
- *'V.M. Rao' Vs. 'Rajeswari Ramakrishnan'*²⁵.
- *'V.J. Thomas Vettom' Vs. 'Kuttanad Rubber Co. Ltd.'*²⁶.

3. Submissions of the Learned Sr. Counsel, Mr Jayant Mehta appearing on behalf of the Respondents:

- It is submitted by the Learned Sr. Counsel, Mr. Mehta that Respondents 3 to 6 are Executive Directors and not parties to the MoU containing the Arbitration Agreement. Some parties to the Arbitration Agreement are not parties in the main Company Petition. The first Respondent is the CEO of M/s. Indus Motor Company Private Limited and is not a party to the MoU. A 'Party' as defined under the Arbitration and Conciliation Act, 1996 is necessarily to be a 'Party' to the Agreement. If a person is not a 'Party' to the Agreement, an Arbitration cannot lie with respect to that 'Party'.
- It is submitted by the Learned Sr. Counsel that the Prayers sought for in the Company Petition cannot be granted by an Arbitral Tribunal as an Arbitral Tribunal cannot act outside the contract. Moreover, the Section 8 Petition ought to be initiated at the first instance and not after the filing of the Company Petition. The proceedings under Sections 241 & 242 of the Act, being statutory remedies against 'Oppression and

²¹ 2008 SCC OnLine Mad 519

²² (2005) 11 SCC 314

²³ (1981) 2 SCC 333

²⁴ (1965) 2 SCR 720

²⁵ 1985 SCC OnLine Mad 151

²⁶ 1982 SCC OnLine Ker 261

Mismanagement’, are non-arbitral and the reliefs sought by the Respondents are incapable of being awarded by an Arbitral Tribunal being the exclusive domain of the NCLT under the Companies Act, 2013. Learned Sr. Counsel, placed reliance on the Judgement of this Tribunal in **‘Dhananjay Mishra’ Vs. ‘Dynatron Services Private Limited and Ors.’**²⁷, in which this Tribunal held that only NCLT and NCLAT have been empowered under Section 242(2) of the Act to make Orders as they deemed fit for the purpose of bringing an end to matters in relation to ‘Oppression and Mismanagement’. An Arbitrator will not have jurisdiction to pass any Order that falls within the exclusive domain of these Tribunals.

- Allegations of ‘Oppression and Mismanagement’, fall outside the purview of an Arbitration Agreement, a *sine qua non* for an Arbitration Proceeding. No Arbitration Proceeding can vest an Arbitral Tribunal with the powers to grant the kind of reliefs against ‘Oppression and Mismanagement’ that these Tribunals may provide. In support of his submissions, Learned Counsel placed reliance on the following Judgements:

- ‘Rakesh Malhotra & Ors.’ Vs. ‘Rajinder Malhotra & Ors.’²⁸.
- ‘Haryana Telecom Ltd.’ Vs. ‘Sterlite Industries (India) Ltd.’²⁹.
- ‘Sudarshan Chopra & Ors.’ Vs. ‘Company Law Board & Ors.’³⁰.
- ‘Sporting Pastime India Limited & Ors.’ Vs. ‘Kasthuri & Sons. Limited’³¹.
- ‘Bennett Coleman & Co.’ Vs. ‘Union of India & Ors.’³².

²⁷ Comp. App. (AT) 398/2018

²⁸ MANU/MH/1309/2014

²⁹ MANU/SC/0401/1999

³⁰ MANU/PH/0021/2004

³¹ MANU/TN/2099/2006

³² MANU/MH/0054/1977

- *'Dhananjay Mishra' Vs. 'Dynatron Services Private Limited & Ors.'*³³.
- *'A. Ayyasamy' Vs. 'A Paramasivam & Ors.'*³⁴.
- *'Rashid Raza' Vs. 'Safad Aktar'*³⁵.
- *'Avitel Post Studioz Limited & Ors.' Vs. 'HSBC PI Holdings Mauritius Limited and Ors.'*³⁶.
- *'Sukanya Holdings Pvt. Ltd.' Vs. 'Jayesh H. Pandya & Ors.'*³⁷.
- *'Indore Development Authority' Vs. 'Manohar Lal & Ors. Etc.'*³⁸.
- *'Hemant Kumar' Vs. 'State of Himachal Pradesh & Ors.'*³⁹.
- *'Calcom Cement India Limited & Anr.' Vs. 'Binod Kumar Bawari & Ors.'*⁴⁰.
- *'P. Anand Gajapathi Raju & Ors.' Vs. 'P.V.G Raju (Dead) & Ors.'*⁴¹.
- *'Emaar MGF Land Limited' Vs. 'Aftab Singh'*⁴².
- *'Booz Allen Hamilton Inc.' Vs. 'SBI Home Finance & Ors.'*⁴³.
- *'Vidya Drolia & Ors.' Vs. 'Durga Trading Corporation & Ors.'*⁴⁴.
- It is submitted that complicated questions of fraud which go into the root of the matter are incapable of being arbitrated. It is submitted that at the stage of considering an Application under Section 8 of the Arbitration and Conciliation Act, 1996, it is trite that the Court would consider the averments in the Company Petition only. The Court does not take into consideration any objections or counters to the said averments as Section 8, by its very nature, has to be filed before the

³³ Comp. App. (AT) No.389/2019

³⁴ MANU/SC/1179/2016

³⁵ MANU/SC/1249/2019

³⁶ MANU/SC/0601/2020

³⁷ MANU/SC/0310/2003

³⁸ SLP (C) No.9036-9038/2016

³⁹ 2020 SCC OnLine HP 1707

⁴⁰ 2016 Indlaw GUW 632

⁴¹ 2000 (2) Arb. LR 204 (SC)

⁴² MANU/SC/1458/2018

⁴³ (2011) 5 SCC 532

⁴⁴ MANU/SC/0939/2020

first statement of the defence. The allegations of fraud cannot be decided without a statement of defence i.e., at the Section 8 stage.

- It is submitted that the argument of the Appellants that there is no finding of fraud is misconceived as there is no statement of defence on record to render any finding at the time of considering a Section 8 Application.
- It is submitted that the bifurcation of proceedings based on part of subject matter or a few parties to the Legal Proceedings being party to the Arbitral Proceeding, is impermissible in law.
- It is submitted that the NCLT has applied their mind *in toto* to the matter holistically and rendered the Judgement on tangible legal grounds and it cannot be said that it is a non-Speaking Order and hence seek dismissal of the Appeal.
- The Learned Counsel for the Respondents 1 to 4 filed Supplementary Written Submissions stating that vide Order dated 28.02.2023, the Hon'ble Supreme Court has issued Notice in the SLP and granted stay on the Judgement dated 10.01.2023 passed by the Hon'ble Kerala High Court till the next date of hearing, but clarify that proceedings pending before NCLT Kochi for the adjudication of the Company Petition filed by the Respondents against the Appellants can continue. The Judgement passed by the Hon'ble Kerala High court under Section 11 of the Arbitration and Reconciliation Act, 1996, has no bearing on the controversy pending adjudication before this Tribunal. Parties to the Company Petition are different from the parties to the 2007 MoU. The first Appellant i.e., the Company and Appellants 3 to 7 are not parties

to the 2007 MoU. Hence, the stay granted by the Hon'ble Supreme Court in SLP (C) 3515/2020 has no bearing on the present proceedings.

Assessment:

4. The Hon'ble Supreme Court in the matter of '**Ajit Nair**' Vs. '**Pullikkal Veetil Abdul Wahab & Ors**'⁴⁵, dated 24.04.2023, has passed the following Orders:

"IA No. 65875/2023

In our order dated 28.02.2023, while issuing notice and staying the operation of the impugned judgment/order dated 10.01.2023 passed by the High Court, we had clarified that we had not stayed the proceedings pending before the National Company Law Tribunal (NCLT). In other words, the NCLT or the National Company Law Appellate Tribunal (NCLAT), if they so desire, and deem appropriate can proceed with the matter/appeal.

We make it clear that we have not expressed any opinion either way.

The application is accordingly disposed of."

5. This Tribunal heard the Parties on 19.07.2023 in *Comp. App. (AT) Nos. 87/2020 & 204/2020*. It is the case of the Learned Counsel for the Appellant that since the Hon'ble Supreme Court has stayed the Order of the Hon'ble Kerala High Court in AR 59/2020 and therefore this matter ought to be adjourned sine die, is untenable in the light of the Order of the Hon'ble Apex Court in *I.A. No.65875/2023* clarifying that this Tribunal can proceed with the Appeal.

6. The main issues which arise for consideration in this Appeal are:

⁴⁵ SLP (C) No.3515/2023

- Whether the issues raised in the Company Petition with respect to allegations of 'Oppression and Mismanagement' can be decided in an Arbitration Proceeding;
 - Whether the 'Acts' complained of in the Company Petition can be adjudicated by an Arbitrator while deciding the issues raised, and the reliefs prayed for in the Petition;
- 7.** For better understanding of the case, it is relevant to reproduce the reliefs prayed for in the main Company Petition, which are hereunder:

- a) A direct and independent forensic audit into affairs of the Company from the F.Y. 2011-2012 till the F.Y. 2018-2019 by an independent auditor appointed by the Hon'ble Tribunal preferably from one of the big four auditing firms;
- b) Direct the investigation into affairs of the Company by an inspector appointed by the Central Government;
- c) Declare that the Executive Management of the Company have mismanaged the affairs of the Respondent No. 1 Company in a manner prejudicial to public interest and interests of the Company and have acted oppressively;
- d) Direct Majority Shareholders to recompense the Company for all losses suffered by the Company along with an interest calculated thereon at the rate of 12% (twelve percent), as a consequence of the fraudulent, unlawful and wrongful acts or omission of the Majority Shareholders, under Section 242 (2) of the Companies Act, 2013;
- e) In alternative, order reduction in the share capital of the Company to the extent of the shareholding of the Majority Shareholders under Section 242(2)(c) of the Companies Act, 2013;
- f) Disqualification of Majority Shareholders as promoters of the Company and/or from voting in the Company as shareholders of the Company;

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- g) Direct recovery of undue gains made by the Executive Management of the Company, including the management fee paid to the Executive Management of the along with an interest calculated thereon at the rate of 12% (twelve percent) and payment thereof to the Company under Section 242 (2) (i) of the Companies Act, 2013 ;
- h) Remove Majority Shareholders as director of the Company under Section 242 (2) (h) of the Companies Act, 2013 ;
- i) Direct the Respondent No. 2 to offer the 6.4% shares of the Company not purchased by Mr. P.A. Hamza and currently in the custody of Respondent No. 2 to be purchased by the other shareholders of the Company at the exercise price of Rs. 137.23 (Rupees One Hundred Thirty Seven point Two Three);
- j) Direct the Respondent No. 2 to transfer the amount of dividend received by him in relation to the 6.4% equity shares of the Company not purchased by Mr. P.A. Hamza to Respondent No. 1 along with an interest calculated thereon at the rate of 12% (twelve percent).
- k) Direct enquiry into the conduct of the Majority Shareholders and order to repay or restore the money or property or any part thereof by the said Respondents, with interest at such rate as the Hon'ble Bench considers just and proper, or to contribute such sum to the assets of the Respondent No. 1 by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Hon'ble Bench considers just and proper.



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l) Direct the Executive Management of the Company to make a public announcement to the effect that the Company is an independent entity and is not a part of Bridgeway/Peeves Group.

m) Direct Respondent Nos. 2 to 8 to compensate the Company for damages incurred by it due to the unauthorised use of the registered trademark of the Company by companies belonging to the Bridgeway/Peeves Group.

n) The Board of Directors of the Company be superseded and an Administrator and/or Special Officer be appointed to take charge over the management and affairs of the Company and of all books, papers, records and documents of the Company as well as its assets and properties; or

Alternatively, a Committee be constituted by this Hon'ble Board consisting of the representatives of the petitioners to function as such Administrator and/or Special Officer for management and control of the affairs of the Company on such terms and conditions as to this Hon'ble Bench may deem fit and proper;

o) To restrain the Respondents 2 to 8 from permanently dealing with the properties of Respondent No. 1 in any manner whatsoever.

p) Declare that the Respondents 2 to 8 are jointly or severally liable for all damages / losses caused to the Respondent No. 1 by way of diverting and siphoning off funds through the Respondents 2 to 6 and Respondent No. 8, as determined by the independent auditor appointed by this Hon'ble Bench.

q) To direct the Respondents to strictly comply with the Memorandum and Articles of Association of the Company



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and not to pass any resolution, either in a board meeting or general body meeting or by way of a circular resolution, ultra vires the Memorandum and Articles of Association of the Company.

- r) Declare that the Majority Shareholders had indulged in fraudulent activities as listed out under Sections 337 to 339 of the Act and accordingly penalize the said Respondents for such fraudulent activities as provided in the sections.
- s) Pass such other and further orders, as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

8. The aforementioned reliefs have been prayed for apart from interim reliefs seeking appointment of an Administrator and also a Forensic Audit to be conducted etc.

9. It is the case of the Appellants that the MoU of 2007 specifies the understanding between the Shareholders and the Appellant Company and defines the Company's share capital, the Shareholder's funds, accumulated earnings/losses, the Shareholders liabilities etc. It is submitted by the Appellants that the allegations of the Respondent herein made in the Company Petition are squarely covered by MoU of 2007 and therefore any disputes arising out of these issues, covered under the MoU, must necessarily be referred to Arbitration. It is submitted that no fraud is committed by the Appellants; that a single transaction does not amount to 'Oppression and Mismanagement'; that the Appellants are majority Shareholders and there

was no authorised use of any resources; that the second Appellant had invoked the Arbitration Clause under the MoU vide Notice dated 06.06.2020 and subsequently filed a Petition under Section 11 of the Arbitration and Conciliation Act, 1996, before the Hon'ble Kerala High Court seeking an appointment of an Arbitrator and the second Respondent has challenged the said Petition raising objections which are similar to the allegations made in the Company Petition filed before the NCLT. This Arbitration Petition AR No.59/2020 has been allowed by the Hon'ble Kerala High Court vide Order dated 10.01.2023 and the sole Arbitrator, Mr. Sunil Advocate has been appointed, subsequent to which, the Respondents have filed Caveat before the Hon'ble Apex Court.

10. For ease of reference, Sections 241 & 242 of the Act are reproduced as hereunder:

“241. (1) *Any member of a company who complains that—*

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

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member

has a right to apply under section 244, for an order under this Chapter.

(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

242. *(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.

(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.

(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.*

(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."*

11. The Judgements relied upon by the Learned Counsel for the Appellant with respect to disputes which can be referred to Arbitration cannot be directly made applicable to the facts of this case keeping in view the reliefs sought for in the aforementioned para 7 and the ratio of the Hon'ble Apex Court in

‘Booz Allen & Hamilton Inc.’ Vs. ‘SBI Home Finance Ltd. & Ors.’⁴⁶,

wherein it is held as follows:

“34. The term “arbitrability” has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:

(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the “excepted matters” excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be “arbitrable” if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.

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

⁴⁶ (2011) 5 SCC 532

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 relating 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 relate 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 judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment 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 of 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”.

40. Russell on Arbitration (22nd Edn.) observed thus (p. 28, Para 2.007):

“Not all matters are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an Arbitral Tribunal is empowered to give.”

The subsequent edition of Russell (23rd Edn., p. 470, Para 8.043) merely observes that English law does recognise that there are matters which cannot be decided by means of arbitration.

41. Mustill and Boyd in their Law and Practice of Commercial Arbitration in England (2nd Edn., 1989), have observed thus:

“In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award. No doubt for this reason, English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. ...

Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the State. For example, he cannot impose a fine or a term of imprisonment,

commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order....”

Mustill and Boyd in their 2001 Companion Volume to the 2nd Edn. of Commercial Arbitration, observe thus (p. 73):

“Many commentaries treat it as axiomatic that ‘real’ rights, that is, rights which are valid as against the whole world, cannot be the subject of private arbitration, although some acknowledge that subordinate rights in personam derived from the real rights may be ruled upon by arbitrators. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not ... An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no one else has mandated him to make such a decision, and a decision which attempted to do so would be useless.”

42. The distinction between disputes which are capable of being decided by arbitration, and those which are not, is brought out in three decisions of this Court. In Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. [(1999) 5 SCC 688] this Court held: (SCC pp. 689-90, paras 4-5)

“4. Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.

5. The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to

order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the company. That could obviously not be referred to arbitration and, therefore, the High Court, in our opinion was right in rejecting the application.”

(Emphasis Supplied)

12. In the instant case, the disputes raised by the Respondents in the Company Petition are with reference to alleged acts of ‘Oppression and Mismanagement’. Without delving deep into the merits of the matter and also the technical objections raised regarding signatory to the Arbitration Agreement etc., we would only touch upon the issues as to whether the reliefs prayed for in the main Company Petition can be adjudicated by an Arbitrator.

13. It is seen from Sections 241 & 242 of the Act that the power to Order ‘winding up of a Company’ is contained under the Act and is conferred on the Court and Arbitrator, notwithstanding any Agreement, which in the instant case, is the 2007 MoU, entered into between the parties, shall have no jurisdiction to Order the winding up of a Company. The Arbitrator cannot possibly give those reliefs prayed for in this Company Petition, and would be in a position to adjudicate only a few of the reliefs mentioned in para 7, but will not be able to pass any Order as provided for under Sections 241 & 242 of the Act. Merely because there is an ‘Arbitration Clause’ in an Agreement, the jurisdiction of NCLT & NCLAT under Sections 241 & 242 of the Act cannot be shackled.

14. At this juncture, we find it relevant to place reliance on the Judgement of this Tribunal in the matter of '**Dhananjay Mishra**' (*Supra*) in which case an 'issue' was framed by this Tribunal 'the sole issue arising for consideration in this Appeal is whether the issues raised in the Company Petition qua allegations of 'Oppression and Mismanagement' are arbitrable'. Then this Tribunal has concluded as follows:

"8. The dictum of Hon'ble Apex Court is loud and clear. The judicial authority which includes the National Company Law Tribunal which is seized of the Company Petition under Section 241-244 r/w 246 of the Companies Act, 2013 would be bound to refer the parties to arbitration of the matter brought before it in accordance with the arbitration agreement provided that the arbitrator is competent or empowered to decide such dispute. Be it seen that the claim in the Company Petition pending adjudication before the Tribunal relates to matters arising out of the two Memorandums of Understanding. Disputes raised by the Respondent No. 1 in the Company Petition are in regard to alleged acts of oppression and mismanagement. It is alleged by Respondent No. 1 in the Company Petition that the Appellant has neither transferred the assets of 'Yeoman Marine Services Pvt. Ltd' to the newly formed company as provided in Second MOU nor conducted the business in accordance with the First MOU but has also allotted 51 per cent equity shares in the Company to himself and his wife thereby assuming complete management control to the exclusion of Respondent No. 1 seriously prejudicing its interests. From the relief clause in the Company Petition, it emerges that Respondent No. 1 seeks relief under Section 241 to 244 r/w 246 of the Companies Act, 2013 to bring an end to the acts of oppression and mismanagement perpetrated by the Appellant besides directing joint management and control of the company by Respondent No.1 and the Appellant. Petitioner (Respondent No. 1) also sought the relief of induction of two Nominee Directors on the Board of Directors besides other allied and connected reliefs in addition to carrying out of independent audit through an independent Auditor. The allegations in the Company Petition and the nature of relief claimed therein leaves no room for doubt that the Company Petition raises vital issues pertaining to exclusive jurisdiction of the Tribunal. Relief claimed in the backdrop of allegations

of oppression and mismanagement would depend on the finding that the affairs of the Company have been conducted in a manner prejudicial or oppressive to the Petitioner (Respondent No. 1 herein) and that to windup the Company would unfairly prejudice Petitioner though otherwise the facts 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, empowered under Section 242 (2) of Companies Act, 2013 may, with a view to bring to an end the matters complained of, make such order as it thinks fit. On a plain reading of Section 242, it is manifestly clear that the facts should justify the making of a winding up order on just and equitable grounds. Admittedly, Arbitrator would have no jurisdiction to pass a winding up order on the ground that it is just and equitable which falls within the exclusive domain of the Tribunal under Section 271(e). That apart acts of non-service of notice of meetings, financial discrepancies and non-appointment of Directors being matters specifically dealt with under Companies Act and falling within the domain of the Tribunal to consider grant of relief under Section 242 of Companies Act render the dispute non-arbitrable though it cannot be disputed as a broad proposition that the dispute arising out of breach of contractual obligations referable to the MOUs or otherwise would be arbitrable. It is also indisputable that the statutory powers and plenary jurisdiction vested in the Tribunal renders it the appropriate forum to deliver result-oriented justice. Admittedly, the statutory jurisdiction vested in the Tribunal cannot be exercised by the Arbitrator. Given the nature of allegations in the Company Petition in the context of reliefs that survive for consideration there is no escape from the conclusion that the dispute raised in the Company Petition and sought to be referred for arbitration is non-arbitrable. No exception in this regard can be taken to the view adopted by the Tribunal.”

(Emphasis Supplied)

15. The extant controversy in this Appeal is regarding the arbitrability of the grievances raised in the Company Petition. It is the case of the Appellant that the Company Petition is nothing but a well disguised and a ‘dressed up’ Petition only to give it a colour of a Petition under Sections 241 and 242 of the Act. It was vehemently argued that mere allegations of fraud will not make

a dispute fall outside the ambit of an Arbitration Clause and that all disputes arising out of the breach of Clauses of the 2007 MoU should be referred to and decided by Arbitration and that there should not be any bifurcation. A bare reading of the reliefs sought for in the Company Petition shows that the 'Acts' complained of in the Company Petition include misutilization of funds, non-service of Notice on minority shareholder, conducting related party transactions without Board approval, diversion of funds, unauthorised use of intellectual property and are not limited to any monetary compensation or assessment of damages but includes specific grievances based on which a direction was sought, for appointment of Forensic Auditor, appointment of an Inspector of the Central Government for investigation into the affairs of Appellant – I Company and declaration of 'Oppression and Mismanagement' of the Appellant – I Company apart from removal of specific Directors and Shareholder, which reliefs can be granted by NCLT under Section 242 of the Act. Therefore, the contention of the Learned Counsel for the Appellant that the reliefs sought for are limited to monetary compensation and assessment of damages and are solely arising out of breach of Clauses of MoU 2007, is unsustainable.

16. Discussing the powers of the Courts/Tribunals under Section 397 & 398 of the Companies Act, 1956, at length, the Hon'ble Supreme Court in '**Bennett Coleman and Co.' Vs. 'Union of India & Ors.'**⁴⁷, observed as follows:

"16. In our view, the submissions made by Mr. Sen on the point of legality or otherwise of the impugned orders will have to be appreciated in the context of the principal question as to what are the powers of the court when it is acting in proceedings instituted under

⁴⁷ MANU/MH/0054/1977

section 397 and 298 read with section 402 of the Companies Act. The questions whether a board of directors of the type indicted in the impugned order could be reconstituted by the court or not and whether the court had power to frame an article inconsistent with the provisions of section 255 of the Act or not must in the ultimate analysis depend upon the true ambit of the powers of the court under section 397 or 398 read with section 402, for, if these sections confer upon the court jurisdiction and powers of the widest amplitude to pass appropriate orders which the circumstances of the case may require, it would be difficult to accept Mr. Sen's submissions that the impugned orders and directions are liable to be set aside on the basis that the reconstituted board or modified article 95 was not in consonance with section 255 of the Act. To correctly appreciate the ambit of the court's jurisdiction and the amplitude of the court's powers under section 397 and 398 read with section 402 of the Companies Act, 1956, it will be necessary to consider the entire scheme of the Act pertaining to corporate management of companies. At the outset, it may be stated that all these concerned provisions occur in Part VI of the Act which deals with the management and administration of companies. It may further be pointed out that in this part there are eight chapters. Chapter I contains general provisions with regard to corporate management and administration of the companies such as registered office, registers of members and debenture-holders, annual returns, meetings and proceedings, accounts, audit, investigation, etc.; Chapter II, which includes section 255, deals with directors, their qualification, disqualification and remuneration, meetings of the board, board's powers, procedure where directors are interested, etc.; Chapter III deals with managing agents, their appointment, remuneration, restrictions on their powers, etc.; Chapter IV deals with secretaries and treasurers; Chapter IV-A deals with powers of the Central Government to remove managerial personnel from office on the recommendation of the Tribunal; Chapter V deals with arbitration, compromises, arrangements and reconstructions; Chapter VI, which includes sections 397 to 409, deals with prevention of oppression and mismanagement; Chapter VII deals with constitution and powers of advisory committee and Chapter VIII contains miscellaneous provisions. It will thus be seen that section 255 on which substantially the entire argument of Mr. Sen is based is to be found in Chapter II which deals with directors and the constitution of the board, through which agency the corporate management of the affairs of a

company is usually undertaken, while Chapter VI, which contains material provisions from sections 397 to 409, deals with matters, pertaining to prevention of oppression and mismanagement arising out of corporate management. In other words, it is very clear that Chapter II which includes section 255 deals with corporate management of a company through directors in normal circumstances, while Chapter VI deals with emergent situations or extraordinary circumstances where the normal corporate management has failed and has run into oppression or mismanagement and steps are required to be taken to prevent oppression and/or mismanagement in the conduct of the affairs of a company. It is in view of this scheme which is very apparent on a fair reading of the arrangement of chapter and the sections contained in each chapter which are all grouped under Part VI of the Act that the question will have to be answered as to whether the powers of the court under Chapter VI (which includes sections 397, 398 and 402) should be read as subject to the provisions contained in the other chapters which deal with normal corporate management of a company and, in our view, in the context of this scheme having regard to the object that is sought to be achieved by sections 397 and 398 read with section 402, the powers of the court thereunder cannot be so read. Further, an analysis of the sections contained in Chapter VI of Part VI of the Act will also indicate that the powers of the court under section 397 or 398 read with section 402 cannot be read as being subject to the other provisions contained in sections dealing with usual corporate management of a company in normal circumstances. As stated earlier, Chapter VI deals with the prevention of oppression and mismanagement and the provisions therein have been divided under two heads - under head A powers have been conferred upon the court to deal with cases of oppression and mismanagement in a company falling under section 397 and 398 of the Act while under head B similar powers have been given to the Central Government to deal with cases of oppression and mismanagement in a company but it will be clear that some limitation have been placed on the Government's powers while there are no limitations or restrictions on the court's powers to pass orders that may be required for bringing to an end the oppression or mismanagement complained of and to prevent further oppression or mismanagement in future or to see that the affairs of the company are not being conducted in a manner prejudicial to public interest. In other words, whenever the legislature wanted to do so it has made a distinction between

powers conferred on the Government (vide section 408) and powers conferred on the court (vide section 402) while dealing with similar emergent situations or extraordinary circumstances arising in the management of a company and in the case of the Government it has placed restrictions or limitations on the Government's powers but no restrictions or limitations of anything have been prescribed on the court's powers; if the legislature had desired that the court's powers while acting under section 397 or 398 read with section 402 should be exercised subject to or in consonance with the other provisions of the Act it would have said so. Moreover, the topics or subjects dealt with by sections 397 and 398 are such that it becomes impossible to read any such restriction or limitation on the powers of the court acting under section 402. Under section 397 read with section 402 power has been conferred on the court "to make such orders as it thinks fit" if it comes to the conclusion that the affairs of a company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members and 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 "with a view to bringing to an end the matters complained of". Similarly, under section 398 read with section 402 power has been conferred upon the court "to make such orders as it thinks fit" if it comes to the conclusion that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company or that a material change has taken place in the management or control of the company by reason of which it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company, "with a view to bringing to an end or preventing the matters complained of or apprehended". Both the wide nature of the power conferred on the court and the object or object sought to be achieved by the exercise of such power are clearly indicated in sections 397 and 398. Without prejudice to the generality of the powers conferred on the court under these sections, section 402 proceeds to indicate what type of orders the court could pass and clauses (a) to (g) are clearly illustrative and not exhaustive of the type of such orders. Clauses (a) and (g) indicate the widest amplitude of the court's power : under clause (a) the court's order may provide for the regulation of the

conduct of the company's affairs in future and under clause (g) the court's order may provide for any other matter for which in the opinion of the court it is just and equitable that provision should be made. An examination of the aforesaid section clearly brings out two aspects, first, the very wide nature of the power conferred on the court, and, secondly, the object that is sought to be achieved by the exercise of such power with the result that the only limitation that could be impliedly read on the exercise of the power would be that nexus must exist between the order that may be passed thereunder the object sought to be achieved by these sections and beyond this limitation which arises by necessary implication it is difficult to read any other restriction or limitation on the exercise of the court's power. We are, therefore, unable to accept Mr. Sen's contention that the court's powers under section 398 read with section 402 should be read as subject to the other provision of the Act dealing with normal corporate management or that the court's orders and directions issued thereunder must be in consonance with the other provisions of the Act."

(Emphasis Supplied)

17. At this juncture, we do not find it apposite to adjudicate as to whether the Parties to the Company Petition are different from the Parties to the 2007 MoU. We are of the earnest view that our observations are only with respect to as to whether the relief sought for in the Company Petition are arbitrable. The Hon'ble Supreme Court in a catena of Judgement specifically in '**Booz – Allen and Hamilton Inc.**' (**Supra**), has set down certain examples of non-arbitrable disputes such as:

"29. Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration "subject to the dispute being governed by the arbitration agreement" unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. In Booz-Allen and Hamilton Inc. v. SBI Home Finance Ltd. MANU/SC/0533/2011 : (2011) 5 SCC 532, this Court held that adjudication certain categories of proceedings reserved by the legislature exclusively for public fora as a matter of

public policy. Certain other categories of cases, though not exclusively reserved for adjudication by courts and tribunals may by necessary implication stand excluded from the purview of private fora. This Court set down certain examples of non-arbitrable disputes such as:

- (i) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences,*
- (ii) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody, (iii) Matters of guardianship;*
- (iv) Insolvency and winding up;*
- (v) Testamentary matters, such as the grant of probate, letters administration and succession certificates; and*
- (vi) Eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.*

This Court held that this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest Protected against specified individuals. All disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals. The enforcement of a mortgage has been held to be a right in rem for which proceedings in arbitration would not be maintainable. In Vimal Kishore Shah v. Jayesh Dinesh Shah MANU/SC/0913/2016, this Court added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen, namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act.”

(Emphasis Supplied)

18. An Action in persona refers to action determining the rights and interests of the parties themselves in the subject matter of the case, traditionally, all disputes relating to rights in persona are considered to be amenable to Arbitration and all disputes relating to rights in *rem* are

adjudicated by Courts and Tribunals, though however not a completely rigid rule.

19. NCLT observed that there were substantial allegations of fraud and has dismissed the Petition seeking to refer the matter to Arbitration, holding that the relief sought for cannot be bifurcated and that the case involves complex questions of law and facts which require a deeper examination of the matter. The Hon'ble Apex Court in a catena of Judgements has held that certain categories of cases stand excluded from the purview of private Arbitration, which includes '*Insolvency and winding-up Petitions*'. When the matter relates to allegations of fraud, such a situation can only be settled in a Court through detailed evidence to be adduced by both parties. We reiterate that we have not made any observations regarding the 'existence of fraud' but have only stated that *any allegations* of a serious fraud which requires detailed evidence cannot be rendered 'Arbitrable'. We agree with the findings of the NCLT that the reliefs cannot be bifurcated keeping in view the facts of the attendant case on hand. The contention of the Learned Sr. Counsel for the Appellant that the Prayers sought for in the Company Petition are solely monetary in nature, is untenable keeping in view that the Prayers are not *limited* to only monetary reliefs, but the Petitioners have also sought for a direction to a Forensic Auditor appointment of an Inspector of the Central Government to investigate into the affairs of the Appellant Company. The reliefs prayed for include a finding of 'Oppression and Mismanagement', removal of specific Directors and Shareholders, apart from other reliefs which can only be granted by the Tribunal under Section 242 of the Act.

20. The language used in Section 8 of the Arbitration and Conciliation Act, 1996, is '*in a matter which is a subject matter of an Arbitration Agreement*', the

Court is required to refer the Parties to Arbitration. However, the facts in the attendant case shows that not all the reliefs sought for are Arbitrable or are in breach of the terms of the MoU 2007. Therefore, any bifurcation of the issues some to be decided by an Arbitral Tribunal and the rest by NCLT, would frustrate the entire procedure and would lead to the possibility of conflicting Judgements.

21. Keeping in view the aforementioned ratio of the Judgements of the Hon'ble Apex Court, this Tribunal is of the earnest view that an Arbitrator is a creature of a contract and jurisdiction of NCLT cannot be divested in these facts of the matter. Therefore, we hold that the reliefs prayed for in the Company Petition could only be adjudicated by a Court/Tribunal of competent jurisdiction, which in the present case is the NCLT/NCLAT under Sections 241 & 242 of the Act. At the cost of repetition, we did not express any view on the merits of the matter and NCLT shall proceed uninfluenced by any observations in this Appeal.

22. Therefore, we do not find any illegality or infirmity in the Order passed by the NCLT (National Company Law Tribunal, Kochi Bench, Kochi) and hence this Appeal is accordingly dismissed. No costs.

23. The connected pending Interlocutory Applications, if any, are Closed.

Company Appeal (AT) No.87/2020:

24. Aggrieved by the Impugned Order dated 05.06.2020 passed by the NCLT (National Company Law Tribunal, Kochi Bench, Ernakulam) in I.A. No.64/KOB/2020 in CP/02/KOB/2020, the Appellant preferred this Appeal, dissatisfied by the directions given by the NCLT at the interim stage which read as follows:

“I. While considering the present situation to meet the ends of justice, this Tribunal allows the appointment of an Independent Forensic Auditor to complete the auditing work within 60 days from the date of appointment of auditor by this Bench.

II. It is also directed to constitute an audit committee consisting of two directors from the Petitioner’s side and two from the Respondent’s side other than Respondent No.2 for helping and co-operating in completing the independent audit.

III. The cost of the forensic auditor should be borne by both parties equally. It is also directed both the parties to suggest the list of persons to perform as an Independent Forensic Auditor before 19.06.2020.”

25. It is submitted that the Impugned Order grants relief which are in derogation of the powers conferred under Section 242(4) of the Act and violates the principle of natural justice.

26. It is the case of the Appellant that since an Application was moved under Section 8 of the Arbitration and Conciliation Act, 1990, I.A. No.44/KOB/2020, NCLT ought to have directed the party to get their disputes resolved through Arbitration as per MoU dated 31.03.2007. Without delving deep into the merits of the matter, keeping in view the factual matrix together with the observations of this Tribunal in *Comp. App. (AT) No.204/2020*, we are of the considered view that NCLT was justified in granting the interim reliefs keeping in view the Report of the Advocate Commissioner and the fact that the Petition was filed under Sections 241 & 242 of the Act. Further, the Appellants had filed an interim Counter to the Company Petition dated 03.06.2020; though Orders were reserved by NCLT as the Appellant has prayed for some more time to file the Counter to the Company Petition, an opportunity was given to the Appellants herein to file it before 05.06.2020; finally on 03.06.2020, the Appellant filed their interim Counter and also

moved an Application dated 13.05.2020 under Rule 11 of the NCLT Rules, 2016, requesting the Tribunal to conduct a virtual hearing. We are of the considered view that sufficient opportunity was given by the NCLT to the Appellant herein and there is complete adherence to Principles of Natural Justice by the NCLT, specifically having regard to the fact that there was a direction to file a Counter to the Company Petition in the Interim Orders dated 17.01.2020 and 17.02.2020.

27. Keeping in view that the NCLT has passed an Order directing for the aforementioned interim reliefs, which powers are within its jurisdiction, we do not find any illegality or infirmity in the Impugned Order dated 05.06.2020, hence this Appeal is also dismissed. No costs.

28. The connected pending Interlocutory Applications, if any, are Closed.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

**Principal Bench,
New Delhi
31st July, 2023**

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