COMPANY LAW BOARD
NEW DELHI BENCH
NEW DELHI

CP NO. 96(ND)/2014
CA NO.

PRESENT: CHIEF JUSTICE M. M. KUMAR
CHAIRMAN

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NEW DELHI BENCH OF THE COMPANY LAW BOARD ON 04.02.2016

NAME OF THE COMPANY: M/s. Avigo PE Investments Ltd.
Vs.
M/s. Tecpro Engineers Ltd. & ors.

SECTION OF THE COMPANIES ACT: 397, 398, 399, 402 and 403 of the Companies Act 1956.

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE
1	AJAY K. JAIN, AKSHAT KUMAR	ADVOCATE ADVOCATE	RESPONDENT NO. 3	
2.	ADITYA TIWARI	ADVOCATE	PETITIONER.	
3.	JOYDEEP MAZUMDAR		Resp. 1,2&6.	

ORDER

Avigo PE Investment Ltd filed the instant company petition namely C.P. 96(ND) of 2014 under section 397, 398 & 402 etc of the Companies Act, 1956. Respondents No.1,2 & 6 on the one hand and Respondent No. 3 on the other have filed two applications u/s 8 of the Arbitration and Conciliation Act 1996 alleging that the petition filed by the petitioner-non applicant is a dressed up petition and the matter squarely falls within the exclusive jurisdiction of an Arbitrator. In that regard reliance has been placed on an arbitration clause 19 of Share Subscription cum shareholder's Agreement dated 18.08.2010 (for brevity 'SSSA') entered between the parties. On the prayer made in the applications it has been emphasized that disputes raised in the company petition have already been brought before the Arbitral Tribunal at the instance of petitioner-non applicant and the arbitration is in progress. Therefore no adjudication of the same issues would be permissible in the company petition.

2. Notice of the application was issued. The non applicant – petitioner filed reply opposing the prayer for leaving the disputes to be decided by the Arbitral

Tribunal in terms of clause 19 of 'SSSA' suggesting that disputes concerning oppression and mismanagement under sections 397, 397, 402 & 403 of the Companies Act, 1956 cannot be referred to arbitration. Rejoinder has also been filed.

3. In order to find out the answer to the basic question whether the company petition is a ruse to harass the respondents and whether the petition is dressed up in such a manner as to seek similar relief which is available to the parties before the Arbitrator, it would be necessary to briefly notice the prayers made by the non applicant-petitioner. A declaration has been sought from this Board that actions of the Respondents are oppressive and amount to mismanagement u/s 397, 398 etc. of the Companies Act, 1956, A further prayer has also been made to issue directions and pass order declaring that all resolutions passed in the Board Meeting, General Meeting and AGM after 2013 are illegal and are liable to be set aside and that the Registrar of companies shall not take notice of the fabricated and forged account for financial year 2012-2013 which were to be approved at AGM dated 2.9.2013. The Petitioner also sought direction for declaring that the transfer of share from Respondents No.2 & 4 to Respondent No. 6 is null and void ab initito because it is against the Articles of Association of Respondent No.1-company.

4. The prayers have been made in the background facts stated in various paras of the petition asserting that non applicant- petitioner made an investment of Rs.40,00,00,000/- (Rs forty crores) by subscribing to the equity shares and compulsory convertible preference share of the Respondent No.1 company in accordance with the SSSA dated 18.08.2010 (Annexure P-3). The petitioner has subscribed to 6,25,000 fully paid up equity shares of Rs.10/- each of the Respondent No.1 company for cash at a premium of Rs.310/- per equity shares for an aggregate consideration of Rs.20,00,00,000/-. Thus the petitioner has invested a sum of Rs.40,00,00,000/- . The preference shares were thus convertible at the option of the non applicant-petitioner any time after December 31.12.2012. If he did not exercise option then the preference shares were further compulsorily convertible on the 5th Anniversary of the date of investment (Annexure P-4 & 5). As per the balance sheet for the financial year 2012-2013, the authorized share capital of the company is Rs.3,00,00,000 /- divided into 30,00,000 equity shares of Rs.10/- each. The issued,

subscribed and fully paid share capital of the Respondent No.1 company is Rs. 2,48,50,000/- divided into 24,85,000 equity shares. The shareholding pattern of the parties in the respondent No.1 company is as follows:-

Name of the shareholder	Equity Shares	Preference Shares (No.)	Percentage
Mr. Ajay Kumar Bishnoi	45000		1.81
Mr. Amul Gabrani	45000		1.81
Mr. Arvind Kumar Bishnoi	247000		9.93
Mr. Aditya Garbrani	247000		9.93
Mrs. Goldie Gabrani	545000		21.93
Mrs. Amita Bishnoi	545000		21.93
Atihana Infrastructure Pvt. Ltd.	186000		7.48
Avigo PE Investments Ltd.	625000	500000	25.18

There are at present seven directors namely Mr. Ajay Kumar Bishnoi, Mr. Amul Gabrani, Mr. Arvind Kumar Bishnoi, Mr. Aditya Garbrani, Mr. Suresh Kumar Goenka, Mr. C.V. Narsimhan and Mr. J.P. Singh (Nominee director of the petitioner). The non applicant –petitioner claims to have funded the business of the subsidiary of the Respondent No.1-company namely Tecpro Infra Projects Ltd, Edappally, Ernakulam. As per the terms of agreement dated 18.8.2010 the affairs of the subsidiary were also subjected to the supervision of the Board of the Respondent No.1-Company

5. It is alleged that after 31.03.2013 respondent No. 2 to Respondent No.5 stopped communicating with the non applicant-petitioner and also stopped reverting to the communications sent by him to respondent No.1-company. Respondent No.2 to Respondent No.5 have refrained from providing any information in respect of the financial and operational affairs of the respondent No.1 company to the non applicant- petitioner. It has also been alleged that AGM approving the accounts in respect of financial year 2012-2013 was to be called. However, no notice of any such meeting was given to the non applicant-petitioner. There are further allegations that the Respondent No.1-company fails to convene the meeting of the Board of Directors for the quarter ending June 2013 in accordance with the provisions of the Articles of Association of respondent No.1-company despite notice and reminders. Eventually the legal notice was issued on May 7, 2014 which enlisted the breach of the terms of the 'SSSA' committed by the Respondent No.1 company.

The non applicant-petitioner terminated the 'SSSA' in accordance with the terms of the Clause 15.3 thereof. Accordingly it further exercised the option contemplated under clause 16.1 of the 'SSSA' and sent a request to the respondent to purchase all its equity shares and preference shares of Respondent No.1-company. Likewise rights in accordance with clause 12.3 and 12.6 of the 'SSSA' and Articles 86 & 88 of Articles of Association of the company were exercised. On July 10, 2014 a notice was sent by the non applicant-petitioner for calling a meeting of Board of directors with a proposed agenda of twelve items.

6. The Petitioner has further disclosed the fact that it had filed an application u/s 9 of the Arbitration and Conciliation Act, 1996 for securing interim reliefs against the Respondents. Eventually they have also invoked arbitration clause in SSSA and the matter is now pending in arbitration. However, some crucial averments have been made in paras (a) to (m) of para xxiii of the petition disclosing various acts of mismanagement and oppression. A perusal of paras xxiv to xxvi would reveal suppression of information from non applicant-petitioner in respect of allotment of shares to Respondent No.6 alleging that it violates fiduciary principle. Apart from the violation of fiduciary principle the provision of Article 74 of the Article of Association of Respondent No.1-company has also been alleged to be violated as it casts an obligation on Respondent No.1-company to take written consent of the petitioner in the matter concerning transfer of shares of Respondent No.1-company. It is further alleged that the promoter-directors could not have transferred share to their relatives without approval and meeting of the Board or the shareholders of Respondent No.1-company. Likewise there are violations of the procedure as prescribed by Articles 23 to 35 for transfer of shares. It has also been alleged that quorum of the general meeting of Respondent No.1 company was to be considered complete only when representative of the petitioner was present as provided by Article 53 of Articles of Association and the meeting held on 2.9.2013 fails to fulfill the aforesaid obligation which thus ultra vires the Article of Association. The records concerning aforesaid subsidiary company are also not been showed.

7. There are allegations of related party transaction which according to Article 91 required prior consent and approval from the Board of Directors of Respondent No.1-company. No approval had ever been taken and a copy of the Annual return

concerning its subsidiary company namely Techpro Systems Ltd. has been placed on record (P-36)

8. On the basis of the aforesaid facts and circumstances the petitioner-non applicant has asserted that there is wholesome mismanagement and oppression.

Arguments: Applicant-Respondents

9. I have heard the learned counsel for the parties at a considerable length and have perused the paper book with their able assistance. Learned counsel for the applicant-respondents has vehemently argued that: -

(a) The company petition is nothing else but a ruse to enforce the contractual obligations emerging from the 'SSSA'. The non applicant-petitioner are not entrepreneur and are rank investors. In fact the non applicant-petitioner wants their investment back. In that regard a reference has been to the order dated 9.9.2014 where the petitioner has expressed his desire to leave the company after receiving an amount of Rs.100 Crores. Learned counsel has further argued that clause 19 of the 'SSSA' concerning arbitration has already been invoked by the non applicant – petitioner and the proceedings are in progress before the learned Arbitrator Former Chief Justice of India Hon'ble Dr. A. S. Anand. It has further been argued that on the ground that there is a breach of SSSA dated 18.8.2010 and violation of the provisions of Companies Act a notice was issued on 7.5.2010 (Annexure P-20) terminating the SSSA. Fundamentally it is a breach of agreement and claim of damages. There is no issue of mismanagement and oppression. Accordingly the matter needs to be left to the Arbitration.

(b) Another argument raised is that the Company Law Board is a creature of a statue which has limited power whereas the arbitrator has wider powers. It was then submitted that a perusal of Annexure-I appended with the 'SSSA' (annexure P-3) would show that Mr. Amul Gabrani, Mr. Ajay Kumar Bishnoi, Mr. Aditya Garbrani and Mr. Arvind Kumar Bishnoi were the promoter directors of the Respondent No.1-company whereas the non applicant-petitioner is merely an investor in the company. It has been submitted that the arbitration agreement is not part of the Articles and Respondent No.1-

company is not bound as per the provisions of section 36 of the Companies Act, 1956.

(c) Learned counsel has then submitted that all disputes raised in the company petition emanate from 'SSSA' which contains clause 19 providing for arbitration, therefore non applicant –petitioner approached Hon'ble Delhi High court by filing an application u/s 9 of Arbitration Act for grant of interim protection being OMP No. 831 of 2014. However no interim protection was given as it is evident from order dated 1.8.2014 passed by Hon'ble Delhi High Court. On its failure to obtain interim protection the present company petition was filed with the allegations of mismanagement and oppression which in fact amounts to forum shopping. It is a malafide petition. It has further been submitted that non applicant – petitioners are not interested in running the affairs of the company which is evident from the interlocutory order dated 9.9.2014 passed by this Board regarding the statement of non applicant-petitioner demanding a sum of Rs. 100 Crores for leaving the company because they are basically investors.

Arguments: Non applicant Petitioner

10 Learned counsel for the non-applicant petitioner has argued that the relief claimed in the petition filed u/s 397, 398 read with sections 402 cannot be granted by an Arbitrator in the arbitration proceedings as the acts of oppression and mismanagement cannot be subject matter of proceeding before Arbitrator. Referring to a number of acts of mismanagement and oppression and ignoring the participation of the petitioner in the affairs of the company it has been urged that such a oppression can be dealt with by the Company Law Board alone in the present proceedings. As an illustration it has been pointed out that applicant-respondent in collusion with each other has transferred equity shares among themselves in contravention of the provisions of Articles of Association of Respondent No.1-company. Moreover no notice for approving the financial statement for the year 2012-2013 was issued to the petitioner who holds 25.15% shareholding in the respondent No.1-company. A number of similar averments have been given in para IIB of the preliminary submissions. It has been maintained that there are false

allegations of a dressed up petition to enforce SSSA which falls within the domain of the Arbitrator in accordance with the provision of arbitration clause 19 of the 'SSSA'.

Conclusion:

11 Having heard the learned counsel for the parties and after perusing the record it would be first necessary to find out the law concerning the issue raised before me. A short question of law which emerges for determination in this application filed under section 8 of the Arbitration Act is:

> 'Whether the dispute raised in a properly filed petition under sections 397, 398, 402 and 403 of the Companies Act can be referred to arbitration in accordance with the agreement between the parties'

12 The proposition of law raised in this case is no longer *res-integra*. It would however be profitable to peruse sections 397, 398, 402 and 403 of the Companies Act so as to understand the nature of power enjoyed by the Company Law Board and the same is as follows:-

> 397. Application to Company Law Board for relief in cases of oppression:-
> (1) Any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Company Law Board for an order under this section, provided such members have a right so to apply by virtue of section 399.
> (2) If, on any application under sub-section (1), the court is of opinion-
> (a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; 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 Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.
> 398. Application to Company Law Board for relief in cases of mismanagement:-
> (1) Any members of a company who complain-
> (a) 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
> (b) that a 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 its Board of directors, or of its managing agent or secretaries and treasurers or manager, or in the constitution or control of the firm or body corporate acting as its managing

agent or secretaries and treasurers, 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 public interest or] in a manner prejudicial to the interests of the company; may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub- section (1), the Company Law Board is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Company Law Board may, with view to bringing to an end or preventing the matters complained or apprehended, make such order as it thinks fit.

402. Powers of Company Law Board on application under section 397 or 398. Without prejudice to the generality of the powers of the Company Law Board under section 397 or 398, any order under either section may provide for-

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

(b) the purchase of the 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) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely:-

(i) the managing director,

(ii) any other director,

(iii) the managing agent,

(iv) the secretaries and treasurers, and

(v) the manager, upon such terms and conditions as may, in the opinion of the [1] Company Law Board be just and equitable in all the circumstances of the case;

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) 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 section 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(g) any other matter for which in the opinion of the Company Law Board it is just and equitable that provision should be made.

403. Interim order by Company Law Board. Pending the making by it of a final order under section 397 or 398, as the case may be, Company Law Board 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.

13. A bare perusal of aforesaid provision would reveal that Company Law Board enjoys wide powers to adopt correctional mechanism where the affairs of the company are being conducted in a manner prejudicial to the interest of the General Public or in a manner oppressive to any Member(s) and/or shareholders of the company. A close scrutiny of section 402 would show that Company Law Board is clothed with wide powers of regulating the affairs of the company and it is competent to terminate, set-aside or modify any agreement arrive at between the company on the one hand and any of the person like Managing Director and the other Director or the Manager on the other on such terms and conditions as may appear to be just and equitable in the circumstances of that case. It has also wide power to issue interim order. It is thus evident that the nature of powers enjoyed by the Company Law Board is alien to the powers of an Arbitrator.

14. Their lordship of the Hon'ble Supreme Court has held in categorical terms in the case of Cosmosteels Private Ltd v Jairam Das Gupta & Ors [1978] 48 Comp Case 312 that the scheme of s. 397, 398 & 402 constitute a complete code in itself which is aimed at granting relief to a complainant who is victim of 'mismanagement' or 'oppression' including minority shareholders. It has further been held by Hon'ble Supreme Court in the case of Haryana Telecom Ltd. (Supra) that the relief of winding up would not be covered by s. 8 of Arbitration Act and an Arbitrator appointed by the consent of the parties for that purpose would not be competent to do so. Some pertinent observations made by Hon'ble Supreme Court reads as under:-

> '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 A to the arbitration and, therefore, the High Court, in our opinion was right in rejecting the application.'

16. Similar view has been expressed by Delhi High Court in the case of O.P. Gupta v. Sfflv General Finance (P) Ltd. & Ors. [1977] 47 Comp Case 279. It has been held that no Arbitrator can possibly give relief to an aggrieved party which is postulated by s. 397 and 398 and he would be unable to pass any order u/s 402 and 403 of the Companies Act. It has further been held in the context of s. 9(b) of the Companies Act that any provision in any memorandum, article or agreement to the extent of repugnancy to the Companies Act would be void. In the present case learned counsel for the applicant-respondent placed reliance on Article 18 of the JV Agreement which appears to be repugnant to the provision of section 397 & 398 of the Companies Act when the ratio of the judgment is applied to the facts of the case in hand. The Delhi High Court went on to observe that such an article providing for arbitration would be void. It has been suggested that a repugnancy of such a nature can be resolved by holding that such an article is wholly void when tested on the touch stone of section 9(b) of the Companies Act or that by declaring that the articles does not apply when the proceedings under sections 397 and 398 are initiated before the Company Law Board. In any case article 18 cannot operate for the purposes of staying the proceedings in a properly instituted petition u/s 397 & 398 read with 402 & 403 of the Companies Act. Similar view has been expressed in the case of Surindra Kumar Dhawan v. R. Vir & Ors. 47 comp case 276 and Manavendra Chitnis & Another v Leela Chitnis Studios P. Ltd. 58 Comp Caes 113.

15. The aforesaid judgments rendered by Hon'ble Supreme Court and Delhi High Court have been followed and applied by a Division Bench of the Punjab & Haryana High Court in the case of Sudarshan Chopra (Supra). The view of the Division Bench stands concluded in the following para which reads thus:-

> "61. As already noted above, the relief that has been sought by Group B cannot be granted by an Arbitrator and is available only under the provisions of Sections 397 and 398 read with Sections 402 and 403 from the Company Law Board. Moreover, the statutory jurisdiction of the Company Law Board and the right of appeal against its orders cannot be ousted even by consent of parties. In this view of the matter, Mr. Aggarwal's argument based on the analogy of the Specific Relief Act and the Partnership Act and the judgments relied upon by him can have absolutely no applicability".

16. An elaborate and comprehensive analysis of the aforesaid provisions has been made by Bombay High Court in the case of Rakesh Malhotra (Supra). Banking on the view taken by Hon'ble Supreme Court in case of Booz-Allen & Hamilton Inc v SBI Home Finance Ltd. & Ors [2011] 5 SCC 532, the question examined by the learned single judge of Bombay High Court is whether the disputes are capable of settlement by arbitration or by their nature fall within the domain of a public fora. A distinction

has thus been drawn opining that an arbitrator is a private person to settle the disputes whereas courts like Company Law Board are a public fora. Another aspect highlighted by the Bombay High Court again based on the judgment rendered in the case of Booz Allen & Hamilton Inc. (supra) is distinction in law between *right in rem* and the *right in personam.* The following pertinent paras from the judgment of Hon'ble Supreme Court have direct bearing on the issue before this Board which are 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.
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> 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.
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> 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. ..."

17. Thus Bombay High Court in Rakesh Malhotra's Case (supra) apparently followed the rationale of public and private fora. Keeping in view the nature of rights involved for adjudication in a petition filed under sections 397 and 398 of the Companies Act such disputes touch upon the larger public interest and status of a company. The right are determined by the judicial forum which results into a

judgement in rem. These factors bring the disputes out of the purview of arbitrability.

18. The High Court further held that the types of reliefs which an 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 an Arbitrator cannot impose a fine or a term of imprisonment, convict a person for contempt or issue a writ of subpoena. It cannot also make an award which is binding on third party or affects the public at large. An Arbitrator would not enjoy any 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.

19. The Bombay High Court also placed reliance on its earlier judgment rendered in the case of Bennet Coleman and Co. v. Union of India and Ors. (1977) 47 Comp cas 92. With regard to the jurisdiction of the Company Law Board for issuing various orders u/s 402 it has been held that u/s 402 the powers of the Company Law Board are wide enough to resort to non-corporate management and to supplant corporate management in a whole or in part. The Company Law Board is clothed with the powers for the regulation of the company's future affairs keeping in view the previous oppression and mismanagement. The Hon'ble Supreme Court has concluded that no purpose would be served by making reference to Arbitrator because it was difficult to see that a narrowly tailored arbitral proceedings would be sufficient in face of Company Law Board plenary and expansive powers which are sufficient to redress and grant the far-reaching reliefs u/s. 397 and 398

20. The other proposition of law culled out from the judgment of the Hon'ble Supreme Court in Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya (2003) 5 SCC 531 is that a bifurcation of a cause of action is impermissible procedure beyond the contemplation of the Arbitration Act. Accordingly it has been held that where the petition u/s 397 and 398 of the Companies Act has been filed by seeking reliefs some of which invite a *judgment in rem* and other are *in personam* then it is not possible or permissible to sever one from the other and disassemble such a petition. The basis rationale has been adopted by Bombay High Court in para 124(a) which is as under:-

"124 (a) As to whether the disputes in a petition properly brought under Sections 397 and 398 read with Section 402 of the Companies Act, 1956 can be referred to arbitration, the answer is no, subject to the caveat that I have noted regarding a mala fide, vexatious or oppressive petition and one that is merely 'dressing up' to avoid an arbitration clause."

23. It is pertinent to mention that against the judgment of Bombay High Court in the case of Rakesh Malhotra (Supra) a Special leave to appeal bearing No.(c) 24572-24579/2014 has been filed. Leave has been granted by Hon'ble Supreme Court on 10.9.2014 and it has expressly been stated that 'No stay. The matter may proceed before the Company Law Board in accordance with law.'

21 I have prefaced this judgment with legal principles emerging on the issue raised before this Court. These principles were also applied by this court in the another case namely M/s Christianus Muller & ors v. M/s A & C Brain and Rope Company Pvt. Ltd. Ors. (CP No.109(ND)/2014, CA No. 170/C.1/2014 decided on 5.10.2015). It would now be appropriate to closely examine various paragraphs of the petition and the averments made therein to find out as to whether this is a dressed up petition.

22. It has remained undisputed that the petitioner holds 6,25,000 fully paid up equity shares of Rs.10 lacs and 500,000 preference shares. The total percentage of its shareholding works out to be 25.18%. The Petitioner enjoys the privilege of nominating one director on the Board which comprise of total seven members.

23 There is a list of wholesome violation of various Articles of Association which indicate that the matter falls prima facie within the parameter laid down by the provisions of sections 397 and 398 of the Act which of course is subject to the reply to be filed by respondents. A number of such allegations concerning oppression and mismanagement have been culled out in paras 5, 6 and 7 of this judgment and with a view to avoid repetition the same are not being restated here. However it is suffice to say that serious allegations have been leveled with regard to transfer of share belonging to Respondent No. 2 and 4 to Respondent No.6 and those of Respondents No. 3 & 5 to Respondent No. 7. Prime facie such transfers as per allegations violate Article 74 and the provisions of Companies Act, 2013. Even the principle laid down in the judgment of Hon'ble Supreme Court in the case of Dale & Carrington v P.K. Prathapan (2005) 1 SCC 212. Obviously all these matters would be

alien to the area of jurisdiction of the arbitrator and have to be adjudicated by this Board.

24 There are pre-emptive rights of the Petitioner for receipt of share before transferring it to any outsider by virtue of provisions made in Article 22 of the Articles of Association and the procedure laid down in Articles 23 to 35. The Annual General Meeting as per averments appears to be held on 2.9.2013 in violation of Article 53 of the Articles of Association as the quorum without the presence of petitioner's nominee could not be considered complete and a clear notice of 21 days in terms of Article 52 was required to be given. There are further allegations that related party transactions have not been disclosed violating the terms of Article 91 and the provisions of the Companies Act 2013. Instances have been quoted that a business advance of INR 41,3,51,336/- was extended by Respondent No.1 company to Techpro Systems Ltd. and no disclosure at any stage was made about the related party transactions. The meetings of the company are not being held in accordance with the Article 66 and there is investment made by Respondent No.1 company in subsidiary company amounting to 14 crores which constitutes 99.9% of the paid up share capital of the subsidiary company. The aforesaid steps have been taken without any written consent of the petitioner in terms of Article 74 and the business plan/annual budget as provided by Article 82. At this stage it cannot be said that affairs of the Respondent No.1 Company are being conducted in a just and fair manner nor it could be concluded that it is not so. The only question for examination of this court is whether the present petition is a dressed up petition or it is properly drafted petition u/s 397 and 398 read with section 402 of the Companies Act. The present petition alleges various acts of oppression and mismanagement which could be probed only by this Board and would not fall within the jurisdiction of an arbitrator appointed by the parties.

25 There are allegations of violating Article 66 as the meeting for the quarter ending on June 2013, September 2014, December 2013, March 2014 and June 2014 had not been called despite issuance of requisition by the petitioner for convening meeting of Board of Directors. There are further allegations of violating provisions of Articles 72, 74 and 86. In terms of Article 86 of the Articles of Association

obligations are cast upon Respondent No.1 company and its subsidiaries to provide the petitioner the following information :-

1. Audited consolidated annual financial statement within 120(one hundred twenty) days after the end of financial years,
2. Consolidated semi annual financial statements within 60 (sixty) days after the expiry of every six monthly period in a financial year certified by the managing director/ director of the company.
3. Consolidated quarterly financial statement within 45(forty five) days of expiry of each quarter of financial year certified by the managing director/ director of the company.
4. An annual budget for the next year, within 30 (thirty) days prior to the end of each financial year,
5. Any additional information as reasonable requested by the petitioner.

Therefore in accordance with the aforementioned article 86, since March 2013, the respondents were supposed to provide the following to the petitioner:-

1. An audit annual financial statement at the end of the financial year 2012-13 and March 2014
2. Consolidated semi annual financial statements for the period ending September 2013 and march 2014
3. Quarterly consolidated financial statements for the period ending March 2013, June 2013, September 2013, December 2013, March 2014 and June 2014.
4. Annual budget by March 1, 2013 for the financial year 2013-14 and by March 1,2014 for the financial year 2014-15.

26 Even inspection of the books, records and other documents of Respondent No.1-company has been denied resulting in violation of Article 79. The non applicant-petitioner has filed various objections to the balance sheet for the financial year 2011-2012 and 2012-2013. There are a number other allegations leveled against Respondents which would not fall within the jurisdiction of an Arbitrator. Therefore jurisdiction of this Board to adjudicate those issues cannot be overtaken by a private forum appointed by parties styled as 'Arbitrator'.

27 It is true that some of the allegations made in the petitition relate to breach of the terms of SSSA but it would not necessarily leads to the conclusion that it is a dressed up petition when we examined the allegations in the light of the principles laid down by the courts (supra). On a close examination of the provisions of section 397, 398 and 402 of the Act it must be said that Company Law Board has wide power to adopt correctional mechanism when the affairs of the company are being conducted in a manner prejudicial to the interest of general public or in a manner oppressive to any Member and /or shareholders. The Company Law Board is also clothed with wide powers of regulating the affairs of the company in a manner so as to sub-serve the public interest and put an end to oppression of an individual member. It has already been observed that the scheme of sections 397, 398 & 402 constitutes a complete court in-itself and no Arbitrator can possibly give relief to an aggrieved party like the petitioner in terms of section 402 and 403 of the Companies Act,. (see. Cosmosteels Private Ltd. and O.P. Gupta judgement (supra).

28 In Rakesh Malhotra (supra) it has also been pointed out that the judgment in a petition like the one in hand would be *judgment in rem* as against the *judgment of personam*. The Arbitral Tribunal are necessarily private forum voluntarily chosen by the parties and therefore the remedy in present proceedings is a public law remedy whereas the remedy of arbitration is in the area of private law. These principles when apply to the facts of the present case do not leave any manner of doubt that the petition in hand is not a dressed up petition and application filed under section 8 by the applicant-respondent is not acceptable.

29 The arguments that there are averments which clearly indicate breach of terms of SSSA and claim for damage should have been made before the arbitrator have not impressed me because there are a number of allegations concerning mismanagement and oppression of the petitioner as already set out in this judgment. A perusal of the various sub paras of para xxiii would reveal prima facie wholesome violation of various Articles of the 'Articles of Association'. In such a situation Hon'ble Bombay High Court in the case of Rakesh Malhotra (supra) following the view taken by Hon'ble Supreme Court in Sukanya Holdings (P) Ltd.(supra) has held that bifurcation of a cause of action is impermissible. Therefore in cases filed u/s 397 and 398 of the Companies Act seeking some of the reliefs

which invite a *judgment in rem* and some other which invite judgment *in personam* would not permit severe one cause of action from the other and disassemble such a petition. Therefore aforesaid arguments fails and is rejected.

30 As a sequel to above discussion application filed u/s 8 of the Arbitration and conciliation Act 1996 is dismissed. The respondent may file reply to the main petition within a period of four weeks and rejoinder if any be filed within two weeks thereafter.

31. The matter be listed for hearing on 13.5.2016 at 2.30PM

(CHIEF JUSTICE M.M. KUMAR)
CHAIRMAN

Pronounced on 18/3/2016
(Vidya Shastri)

प्रमाणित सत्य प्रतिलिपि
CERTIFIED TRUE COPY

Vikram Singh 18/3/2016