NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) No. 03 of 2021

(Under Section 421 of the Companies Act)

(Arising out of Order dated 22.1.2021 passed in C.A.No.6 of 2021 in C.P. No.393 of 2021 the Hon'ble National Company Law Tribunal, Chennai

In the matter of:

1. V.G.Selvaraj
   Son of Late Gnana Thiraviya Nadar,
   131, Sunrise Avenue, Akkarai,
   Chennai 600 119.

....Appellants

2. Mr.V.G.S.Vinodh Raj
   Son of V.G.Selvaraj
   11, 3rd Drive, Seacliff Conclave,
   Akkarai, Chennai 600 119.

3. Mr.V.G.S.Bharath Raj
   Son of V.G.Selvaraj
   131, Sunrise Avenue, Akkarai,
   Chennai 600 119.

V.

1. VGP Housing Pvt.Ltd.
   Having its registered office at
   No.6, Dharmaraja Koil Street,
   Saidapet, Chennai 600 015.

….. Respondents

2. Mr.VGP Babudas
   No.52, V.G.Paneerdas Salai,
   VGP House, Saidapet, Chennai 600 015.

3. Mr.VGP Ravidas
   No.52, V.G.Paneerdas Salai,
   VGP House, Saidapet, Chennai 600 015.

4. Mr.VGP Rajadas
   No.52, V.G.Paneerdas Salai,
   VGP House, Saidapet, Chennai 600 015.

5. Mr.V.G.Santhosam
   Son of Late Gnana Thiraviya nadir,
   Chairman of VGP Housing limited,
   Residing at 52, V G Paneerdas Salai,
   Saidapet, Chennai 600 015.

6. Mr.V G S Rajesh
   Son of Mr. V G Santhosam
   Residing at AM-65, 14th Main Road,
   Shanti Colony, Anna Nagar,
   Chennai 600 040.

7. M/s VGP Golden Beach Resorts Pvt.Ltd.
   Having its registered office at
   No.6, Dharmaraja Koil Street,
   Saidapet, Chennai 600 015
   Represented by its Director
   Mr.V.G.P. Rajadas

8. M/s VGP Marine Kingdom Pvt.Ltd.
   Having its registered office at
   No.6, Dharmaraja Koil Street,
   Saidapet, Chennai 600 015
   Represented by its Director
   Mr.V.G.P. Ravidas

Present:

For Appellants : Mr.Jayant K Mehta, Senior Advocate
Mr.Arun C Mohan, Advocate
Mr.R.Vijaya Suresh, Advocate

For the Respondent No.1 : Mr.R.Murari, Senior Advocate
For the Respondents No.2 to 5 : Mr.T.K.Bhaskar & M/s.Medha Rao, Advocates

For the Respondent No.8 : Mr.S.R.Rajagopal, Advocate
For the Respondent No.7 : Ms.Madhu Neelakantan, Advocate
For the Respondent No.6 : Mr.R.Saravanakumar, Advocate

J U D G E M E NT
(VIRTUAL MODE)

PREFACE:

The 'Appellants/Applicants' have preferred the instant 'Appeal' being dissatisfied with the order dated 23.01.2021 in CA/06/2021 in CP/393/2019 passed by the National Company Law Tribunal, Division Bench – I Chennai.

2. Earlier, the National Company Law Tribunal, Division Bench – I, Chennai while passing the impugned order in CA/06/2021 in CP/393/2019 at paragraph 20 to 27 had observed the following:

20. " Significantly during the course of submissions made by the Learned Senior Counsel for the Applicants/Petitioner it was stressed that the parties before the Tribunal in relation to the main C.P were close relatives, which prompted this Tribunal to suggest for mediation with the parties with a view to resolve the dispute and on consent the Mediator has also been appointed to conduct the mediation who is in the stature of Retired Judge of the Hon'ble High Court of Madras.

21. However, as already stated the delay in the mediation proceedings seems to have led to frustration on the part of the Applicants/Petitioner, which had prompted them to move this Application before this Tribunal, as well as make submissions during the course of arguments in relation to the Committee Meetings proposed to be held on 18.09.2020 as well as on 10.10.2020.

22. However, the submissions of the Learned Counsel for the Respondents to counter the same is that advance notice of the said meetings has been given, the Applicants/Petitioners did not choose to attend the said meetings and hence cannot have any grievance before this Tribunal.

23. Be that as it may, taking into consideration the pendency of the Medication proceedings as well as the overall interests of the parties concerned and that of the 1st Respondent Company, we are of the view that the medication proceedings should be expedited as it is more than a year passing of the order dated 03.01.2020 wherein we had given a time frame to complete the mediation proceedings by the Mediators. It is understandable that the onset of the Covid-19 pandemic had delayed the mediation proceedings.

24. However, since the Mediator has already met the parties in person, by this time the Mediator could have also ascertained the terms of settlement, if any, proposed by the Applicants/ Petitioners and whether the said terms agreeable to the Respondents or not.

25. In the circumstances, it is appropriate for the Mediator in case the Mediator is not comfortable with the mediation proceedings being conducted by physical mode, at the least, to conduct the same, virtually.

26. In the circumstances, we direct the Mediator to re-commence the mediation proceedings at the earliest commencing from 1st February 2-21 and complete the process of mediation by March 15, 2021 after giving advance notice to the parties concerned.

27. The Mediator is at liberty to conduct the proceedings by virtual mode and the other terms as fixed by the order dated 03.01.2020 shall remain intact."

and finally disposed of the 'Application' by observing that Let the Report of the 'Mediator' be made available to it at least by 20th March, 2021 when the Company Petition is posted to await the Report of the 'Mediator' and till then, the parties were directed to implicitly to obey all the orders passed by it from time to time including the order dated 16.04.2019 and any modifications passed by the Tribunal subsequently there on.

Appellants Contentions:

3. The Learned Counsel for the 'Appellants' submits that the seminal issue involved in the instant 'Appeal' is whether the National Company Law Tribunal was justified in passing the impugned order dated 22.01.2021 leaving the valuable properties of the First Respondent/Company unprotected, despite manifest urgency and large scale under valued sales by the Respondents? especially in the light of the 'Arbitral Award' dated 18.03.2021 rendered during the pendency of the present 'Appeal'.

4. The Learned Counsel for the 'Appellants' contends that the 'Arbitral Award' dated 18.03.2021 is between the same parties and it finds that the Respondents cannot be entrusted with the management of the properties. Also, that the 'Tribunal' failed to pass any protective orders, by exercising its 'inherent powers' and also failed to urgently hear the 'Company Petition'.

5. It is represented on behalf of the 'Appellants' that the impugned order has caused 'Miscarriage of Justice' not only to the 'Appellants' but equally to the First Respondent/Company. Besides this the impugned order, reposes faith in the wrong doers/respondents by expecting them to 'implicitly obey all the orders passed' and this reinforces the continuous oppression of the 'Appellants' and gross mismanagement of the First Respondent/Company.

6. According to the Learned Counsel for the 'Appellants' that the 'Appellants' are the petitioners in pending Company Petition No. 393/2019 and that they had filed the said petition aggrieved by the egregious and continuous acts of 'Oppression" and 'Mismanagement' in respect of the First Respondent/Company.

7. The stand of the 'Appellants' is that the First Respondent/Company is a family company engaged in real estate business and the Respondents out

number the 'Appellants' on its board by 4:1 and by their brute majority on the board, were routinely and brazenly selling the land parcels of the Company at undervalued rates and pocketing illegal gains from such sales.

8. It is the plea of the 'Appellants' that they filed earlier CP No. 32/2016, and they withdrew the same on 02.08.2017 and because of the fact that family settlement had not fructified, the 'Appellants' filed CP No. 393/2019 explaining in paragraphs 10 to 14 the reasons for which they were filing a fresh petition.

9. The Learned Counsel for the 'Appellants' contends that the 'cause of action' for 'Oppression and Mismanagement' is a 'continuous cause of action' and the aspects raised in CP No. 393/2019 are over and beyond – both in terms of acts and their timelines as compared to CP No. 32/2016. Apart from that, it is a contention of the 'Appellants' that the Respondents had no answer to the misdeeds and they take a plea of 'Maintainability' to delay the adjudication of CP No. 393/2019. As a matter of fact, none of them had filed any counter to the main CP No. 393/2019 and only limited 'counters' were filed pertaining to the 'maintainability issue'. In any event, the maintainability of main CP No. 393/2019 is to be determined by the Tribunal.

10. The Learned Counsel for the 'Appellants' submits that the 'Appellants' are not aggrieved by the order dated 16.04.2019 and in fact, the said order correctly records the need to preserve and protect the assets of the First Respondent/Company, but, the Respondents were abusing the said order and continuing to use their brute majority to conduct undervalued sales, with the observer remaining silent and taking no steps to act or even consider any dissent.

11. The Learned Counsel for the 'Appellants' forcefully contends that the 'Observer' appointed by the Tribunal was a 'passive observer' taking no steps to instil any transparency or fairness in the sale process and that the following decisions:

(a) Record of the Meeting dated 12.10.2019 at page 187 (Relevant pages 189, 190, 192., 193). In the Committee meeting held on 12.10.2019, the observer in respect of Agenda-43 has merely agreed to the decisions stating that 'The Members of the Committee with the Respondents being 4 in number decide to go ahead with the sale of the property being the subject matter of the Agenda, while the Petitioners representative being

one member of the Committee dissent for the same (vide page 191 of the Appeal Type set papers)

The observer in respect of Agenda-5 has merely agreed to the decisions stating that "The Members of the Committee with the Respondents being 4 in number decide to go ahead with the prince of Rs. 80 lakhs per ground being fixed for the property which is the subject matter of the Agenda, while the Petitioners representative being one member of the Committee dissent for the same. (vide page 193 of the Appeal Type set Papers)

(b) In the Committee meeting held on 18.09.2020, the Respondent being four number decided to sell 17 properties of the 1st Respondent that are worth approximately more than 200 crores. The Observer, despite knowing fully will that the Appellants were not present for the meeting, agreed to sell all the said properties by merely stating that "The members present deliberated and agreed upon the rates to be fixed for each of the above items of properties as indicated therein. It was felt essential by the Members to explore the sale of the above properties which are remaining as dead stocks for a very long period. The Members also felt the need for revenue generation during the pandemic period by exploring the sale of the said properties, which is in the best interest of the Company (vide page 219 of Appeal Type set Papers)

(c) Record of the Meeting dated 10.10.2020 at page 222 (special pages 226, 227)

will clearly establish that the 'Observer' has neither done any due diligence nor sought for any valuation of the properties that were proposed to be sold in the Agenda.

12. The Learned Counsel for the Appellants points out that there is no basis for any manner of independent verification of the transactions nor any consideration of the issues relating to undervaluation when raised by the 'Appellants' and further that the Respondents through the said 'Committee Meetings' by using their majority are continuing to Oppress and Mismanage the First Respondent Company.

13. The Learned Counsel for the 'Appellants' contends that to ensure that the properties of the First Respondent/Company are not sold at an under value, a 'Sale by public auction' to ensure transparency that the 'sale consideration' flows to the First Respondent/Company and 'Sale' with express permission of

the Tribunal may be directed to be conducted by the Tribunal so that the parties are given time bound auctions to bring better proposals thereby ensuring that the sales are made at the best available rates and that the entire sale consideration flows to the First Respondent/Company. However, the impugned order had failed to direct a transparent, fair sale process or any other practical solution.

14. The Learned Counsel for the Appellants submits that the 'ERP rates' are the 'minimum rates' for a property and this is like a base rate in and auction process but this does not mean that the sale is to be conducted at the base rate and not at the market rate. Indeed, it is the version of the 'Appellants' that the present appeal is filed to seek protection of the properties of the First Respondent/Company in such way that its business is run transparently and honestly and in this regard, its 'Directors' are its 'Trustees' who are bound to in its best interest, as per section 166 of the Companies Act, 2013.

15. The Learned Counsel for the 'Appellants' contends that the 'Tribunal' in terms of sections 241 and 242 of the Companies Act, 2013 is to act in the best interest of the Company and in the present case it had failed to act thereby committed a serious error of jurisdiction.

Appellants Decisions:

16. The Learned Counsel for the 'Appellants' refers to the decision of Hon'ble Supreme Court, in Tin Plate Dealers Association Private Limited and others V Satish Chandra Sanwalka and others reported in (2016) 10 SCC Page 1 wherein at paragraph 39 it is observed as under:

"The question whether a single act of oppression would enable the CLB to intervene or oppression must be the cumulative result of continuous acts should not require any debate in the facts of the present case which demonstrate a series of unacceptable decisions and actions on the part of the part of the Gupta Group. In the last resort, satisfaction that oppression has been committed has to be reached in the facts of each case."

17. The Learned Counsel for the 'Appellants' cites the decision of the Hon'ble Supreme Court in Dale & Carrington Invt. (P) Ltd and another V P.K.Prathapan and others reported in (2005) 1 SCC Page 212 at spl. pages 215 and 216 whereby and whereunder it is observed and held as follows:

"A company is a juristic person and it- acts through its Directors who are collectively referred to as the Board of Directors. An individual Director has no power to act on behalf of a company of which he is a Director unless by some resolution of the Board of Directors of the company power is given to him/her. Whatever decisions are taken regarding running the affairs of the company, are taken by the Board of Directors. The Directors of companies have been variously described as agents, trustees or representatives, but one thing is certain that the Directors act on behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised for the benefit of the company. They are agents of the company to the extent they have been authorised to perform certain acts on behalf of the company. In a limited sense they are also trustees for the shareholders of the company. To the extent the power of the Directors are delineated in the Memorandum and Articles of Association of the company, the Directors are bound to act accordingly. As agents of the company they must act within the scope of their authority arid must disclose that they are acting on behalf of the company. The fiduciary capacity within which the Directors have to act enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill arid due diligence and in the interest of the company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all important matters relating to the company.(Para 11)

Courts in the Commonwealth countries including England and Australia have emphasised that the duty of the Directors does not stop at the "to act bona fide" requirement. They have evolved a doctrine called the "proper-purpose doctrine" regarding the duties of company directors. When the power to issue shares is used merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the company, the same cannot be upheld. It will be seen from the judgment in *Needle Industries*. (1081) 3 SCC 333, and *Tea Brokers*, (1998) 5 Comp I.J 463, that the courts in India have applied the same tests while testing exercise of powers by Directors of companies as in other Common wealth countries."

(Paras 21. 19. 20 and 28)

18. The Learned Counsel for the 'Appellant' seeks in aid of the decision of the Hon'ble Supreme Court in Vurimi Pullarao v Vemari Vyankata Radharani reported in 2020 (14) SCC Page 110 at Special Page 113 wherein at Paragraphs 15 to 17, 20, 21 and 24 it is observed and held as under:

"The plaintiff who is entitled to assert a claim for relief on the basis of a cause of action must include the whole of the claim. A plaintiff who omits to sue in respect of or intentionally relinquishes any portion of the claim, shall not afterwards be entitled to sue in respect off the portion omitted or relinquished. This is the mandate of Order 2 Rule 2(2). Order 2 Rule 2(3) stipulates that a person who is entitled to OC nan one relief in respect of the same cause of action may sue for all or any of such reliefs. However, a plaintiff who omits to sue for all the reliefs, without the Leave of the court, shall not afterwards sue for any relief so omitted. The leave of the court will obviate the consequence which arises under Order 2 Rule 2(3). In the absence of leave being sought and granted, a plaintiff who has omitted to sue for any of the reliefs to which they were entitled to sue in respect of the sae cause b O action would be barred from subsequently suing for the relief which has been Omitted in the first instance. The grant of leave obviates the consequence under C Order 2 Rule 2(3). But equally, it is necessary to note that Order 2 Rule 2(2) does not postulate the grant of leave. In other words, a plaintiff who has omitted to sue or has intentionally relinquished any portion of the claim within the meaning of Order 2 Rule 2(2), shall not afterwards be entitled to sue in respect of the portion so omitted or relinquished. (para 15)

The requirements for attracting Order 2 Rule 2 CPC can be summarised as under:

(i) The correct test in cases falling under Order 2 Rule 2, is whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit. In order to attract the applicability of the bar enunciated under Order 2 Rule 2, the cause of action on which the subsequent claim is founded ought to have arisen to the plaintiff when enforcement of the first claim was sought before the court.

(ii) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(iii) If the evidence to support the two claims is different, then the causes of action are also different.

(iv) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(v) The cause of action has no relation whatever to the defence that may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the

plaintiff asks the court to arrive at a conclusion in his favour. (Paras 16 and 17)

Mohd. Khalil Khan v. Mahbub Ali Mian. 1948 SCC OnLine PC 44: (1947-48) 75 IA 121. relied on

In the present case, the earlier suit for injunction was instituted plaint of which contained a recital of the agreement to sell dated 26-10-1995; he price fixed for the bargain between the parties; the payment of earnest money; the handing over of possession; the demand for performance and the failure of the defendant to perform the contract. The plaintiff also asserted that she was going to institute a suit for specific performance of the agreement dated 26-10-1995. Under the agreement dated 26-10-1995, time for completion of the sale was reserved until 25-10-1996. Notice of performance was issued on 11-10-1996 to which the defendant had replied on 13-10-1996. The cause of action for the suit for specific performance had arisen when the plaintiff had notice of the denial by the defendant to perform the contract. On 30-10-1996, when the suit for injunction was instituted, the plaintiff was entitled to sue for specific performance. There was a complete identity of the cause of action between the earlier suit and the cause of action for the subsequent suit. However, the plaintiff omitted to sue for specific performance. This is a relief for which the plaintiff was entitled to sue when the earlier suit for injunction was instituted. Having omitted the claim for relief without the leave of the court, the bar under Order 2 Rule 2(3) would stand attracted. (Para 20)

Virgo Industries (Eng.) (P)Lid. v. Venturetech Solutions (P) Lid. (2013) 1 SCC 625: (2013) 1 SCC (Civ) 679: Pramod Kumar v. Zalak Singh. (2019) 6 SCC 621 (2019) 3 SCC (Civ) 370. relied on

But the case of the plaintiff in appeal is that in order that the bar under Order 2 Rule 2 be attracted, it is necessary that the plaint in the earlier suit must be proved in evidence. In the present case it was submitted that this was not done. The first appellate court, in the judgment which it delivered upon remand took note of the fact that the defendant had by its application at Ext. 117 prayed for summoning the original record of the earlier suit for injunction for proving the plaint. The plaintiff opposed that plea with the assertion that a certified copy of the document could be placed on record instead of summoning the original record. The d trial court in the subsequent suit for specific performance, accordingly rejected the application on the ground that since the certified copy was filed on the record, it was unnecessary to call for the original record. The

defendant had moved another application in the nature of a notice to admit the certified copy of plaint in the earlier suit. This came to be allowed by the trial court. The first appellate court noted that there was no objection from the plaintiff whereupon the certified copy of the plaint was marked as Ext. 137. In this background, the first appellate court was clearly justified in coming to the conclusion that this is not a case where the plaintiff was deprived of an opportunity to explain the pleadings in the earlier suit. The finding that there was no prejudice lo the plaintiff cannot be faulted. The parties were all along aware of the pleadings, the nature of the objection to the maintainability of the subsequent suit on the ground of the bar under Order 2 Rule 2 and the fact that the plaint in the earlier suit was brought on the record. Indeed, it was at the behest of the plaintiff that a certified copy of the plaint in the earlier suit was allowed to be brought on the record and marked as Ext. 137. On facts, the bar under Order 2 Rule 2 is attracted." (Para 24)

19. The Learned Counsel for the 'Appellant' adverts to the Hon'ble Supreme Court in Vallabh das V Dr. Madan Lal and others reported in 1970 (1) SCC at Pages 761 & 762 wherein it is held as under:

"The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr. Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit, the plaintiff is seeking possession of the suit properties from a trespasser. In the first case, his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transaction which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr. Madan Lal came up for decision. But that adoption was not the cause of action in the present suit. It was merely an antecedent even which conferred certain rights on him. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter into the two suits. As observed in Rakhma Bai v. Mahadeo Narayan, the expression "subject-matter" in Order XXIII, Rule 1 Code of Civil Procedure, means the series of acts or transaction alleged to exist giving rise to

the relief claimed by him. We accept as correct the observations of Wallis, C. J., in Singa Reddi v. Subba Reddi, that where the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit."

20. The Learned Counsel for 'Appellant' points out the decision of Hon'ble Supreme Court Pramod Kumar and another V Zalak Singh and others 2019 (6) SCC Page 621 at Spl. Pages 622 and 623 wherein at paragraphs 28, 30, 44, 39 and 31 it is observed as under:

"Order 2 Rule 2(1) provides that a plaintiff is to include the whole of the claim, which he is entitled to make, in respect of the cause of action. However, in respect of omission to include a part of the claim or relinquishing a part of the claim flowing from a cause of action, the result is that the plaintiff is totally barred from instituting a suit later in respect of the claim so omitted or relinquished. However, if different reliefs could be sought for in one suit arising out of a cause of action, if leave is obtained from the court, then a second suit, for a different relief than one claimed (Paras 28 and 30) in the earlier suit, can be prayed for.

(Paras 28 and 30)

While law does not compel a litigant to combine one or more causes of action in a suit in view of Order 2 Rule 3 CPC it is open to a plaintiff, if he so wishes, to combine more than one cause of action against same parties in one suit. But the embargo in Order 2 Rule 2 will arise only if the claim, which is omitted or relinquished and the reliefs which are omitted and not claimed, arise from one cause of action. If there is more than one cause of action, Order 2 Rule 2 will not apply. (Para 44)

Cause of action is the bundle of facts, which if traversed, must be proved. However, if also means the media through which the plaintiff seeks to persuade the court to grant him relief. It could, therefore, be said to be the factual and legal basis or premise upon which the court is invited by the plaintiff to decide the case in his favour. It is also clear that the cause of action, in both the suits, a must be identical. In order that it be identical, what matters, is the substance of the matter." (Paras 39 and 31)

21. The Learned Counsel for the 'Appellant' relies on the decision of the Hon'ble Supreme Court reported in N.R. Narayanswamy V B.Francis Jagan 2001(6) SCC at pages 473 & 474 wherein at Paragraphs 8 & 10 it is observed as under:

"It is apparent from Section 45 of the Karnataka Rent Act that fresh application under the Rent Act could be summarily rejected only if (i) the proceedings are between the same parties or under whom they or any of them claim, and (ii) substantially the same issues as have been finally decided in a former proceeding under the Act arc raised. Thus, the section as such, i1ncorporates principles of res judicata. In the present case it would have no application as the previous proceedings for taking possession of the premises were not pressed and stood disposed of without deciding any issue. (Para 8)

Rule 1, sub-rule (4) of Order 23 CPC would have no application in a proceeding initiated for recovering the suit premises on the ground of bona fide requirement which is a recurring cause. Order 23 Rule 1(4)*(b)* precludes the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim which the plaintiff has withdrawn. In a suit for eviction of a tenant under the Rent Act on the ground of bona fide requirement even though the premises remain the same, the subject-matter which is the cause of action may be different. The ground for eviction in the subsequent proceedings is based upon requirement on the date of the said suit even though it relates to the same property." (Para 10)

Submissions of Respondents No. 1 to 5:

23. The Learned Counsel for the Respondents No. 1 to 5 contends that the present 'Appeal' is projected by the 'Appellants' for the purpose of setting aside the impugned order dated 22.021.2021 in CA No. 6/2021 in CP No. 393/2019 passed by the National Company Law Tribunal, Chennai and primarily to seek an 'interim stay' on the disposal of the properties of the First Respondent/Company which is its sole and primary business.

24. Advancing his arguments, the Learned Counsel for the Respondents No. 1 to 5 submits that the present 'Appeal' is an 'infructuous' one because of the fact that pursuant to the impugned order and the direction issued to recommence the mediation proceedings, the parties (including the 'Appellants') had participated in the mediation proceedings and are cooperating in regard to the First Respondent/Company being valued by M/s. Brahmayya & Company.

25. The Learned Counsel for the Respondents No. 1 to 5 points out that in the present main appeal at paragraph 13, the 'Appellants' had averred that 'Both parties agreed that disputes can be resolved through mediation' and as such, the prayer for 'urgent hearing of the Company Petition and the consequent appeal to set aside the impugned order dated 22.01.2021 in CA No. 6/2021 in CP No. 393/2019 on the file of the National Company Law Tribunal, Chennai is not only 'redundant' but also an 'infructuous' one.

26. The other contention of the Learned Counsel for the Respondents No. 1 to 5 is that the 'Appellants' had not appeared before the Tribunal on 19.03.2021 when the main company petition No. 393/2019 was listed and allowed the matter to get adjourned to 05.05.2021. Also that, it is projected on the side of the Respondent No. 1 to 5 that the endeavour of the 'Appellants' to handicap the functioning of the First Respondent/Company by means of the present 'Appeal', while simultaneously reaping the benefits of a successful mediation is in violation of Rule 29 of the Companies (Mediation and Conciliation) Rules, 2016 is nothing but an abuse of process of court and must not be entertained.

27. The Learned Counsel for the Respondent Nos. 1to 5 comes out with a plea that the 'Appellants' submissions were limited to seek an 'injunction' on the sale of the First Respondent/Company's properties and the said attempt not only fails to have any correlation with the ambit of 'Appeal' but it is also covered by the consent of the 'Tribunal' dated 16.04.2019, which had attained 'Finality'.

28. The Learned Counsel for the Respondents No. 1 to 5 contends that in the consent order a Five member 'Committee' was constituted in proportion to the shareholding of the family/parties, the said Committee is to discuss and decide the minimum price of the lands to be sold, based on the prevailing market rates, any differences in opinion in respect of 'ERP' rates is to be resolved by the 'Observer' amicably, for the plots books and sold, the 'Sale Reports ' are to be submitted to the 'Committee' on a periodical basis. In short, the 'mechanism' spelt out in the 'consent order' was followed and complied with scrupulously by the parties.

29. The Learned Counsel for the Respondents forcefully submits that the 'Price Fixation' was decided unanimously and as such, the 'issue' of 'Observer' resolving any dispute does not arise. In regard to the purported grievances of the 'Appellants' in regard to 'Uthandi Land' and 'VGP Golden Beach' are concerned, a glance of the 'Observer's Report' would exhibit that the price

fixation was discussed in at least three committee meetings viz; on 28.08.2019, 09.09.2019 and 12.10.2019 respectively. Moreover, the 'Appellants' were provided with sufficient opportunity to bring in an 'Prospective Buyers' at the price quoted by the 'Appellants', the Committee decided to go ahead with the Respondents prices in the interest of the First Respondent/Company and that, in terms of the 'Consent Order' the 'reporting of sales' took place, of course in a timely fashion. Hence, the contra allegations made by the 'Appellants' are an incorrect one.

30. The Learned Counsel for the Respondents 1 to 5 points out that in the 'Observer's' report dated 09.09.2019 the aspect of decisions being made for the sale of properties, there was a reference to the enough opportunities being provided to the 'Appellants'. Added further, the Learned Counsel for Respondent 1 to 5 refers to the decision of in Subash Mohan Dev v Santhosh Mohan Dev reported in (2001) 2 GLR 6 wherein it was inter alia observed and held that 'an order passed on the consent of the parties ought not be interfered with' and the 'Appellants' make a vain bid to alter the same through the present 'Appeal' thereby circumventing the ingredients of section 421 (2) of the Companies Act, 2013.

31. The Learned Counsel for Respondent No. 1 to 5 contends that the Respondents have raised serious issues concerning the maintainability of main Company Petition No. 393/2019 which is pending before the Tribunal and that the Company Petition is barred by the principles analogous to Order XXIII Rule 1(3) of the Civil Procedure Code.

32. Besides this, the 'Appellants' made misrepresentations in the Company Petition' to state that earlier CP No. 32/2016 was withdrawn with liberty to file fresh proceedings and when the Respondents pointed out that no such liberty was granted, the 'Appellants' were constrained to file an unnumbered application to remedy the same and a plea was taken that the misrepresentation was allegedly a mere mistake.

33. The Learned Counsel for the Respondents 1 to 5 brings to the notice of this 'Tribunal' that the 'Appellants' are attempting to travel beyond the purview of the 'Appeal' by seeking an injunction on the sale of properties and to lend support to the contentions, the Learned Counsel for the Respondent 1 to 5 relies on the decision of Hon'ble Supreme Court in Tata Consultancy Services v Sirus Mistry reported in (2021) SCC online SC 2 (vide paragraphs 17.9 and 17.15)

wherein when the relief is not even sought before the 'Tribunal' such a reliefs cannot not be granted by the 'Appellate Tribunal'.

34. The Learned Counsel for Respondents No. 1 to 5 submits that for the first time the 'Appellants' have raised the concerns pertaining to the conduct of the 'Observer' and in fact, they are made to make out a case for the grant of interim reliefs. As matter of fact, no such allegations were raised against the 'Observer' before the 'Tribunal' although it took charge on 12.06.2019. In reality, paragraph 18 of the impugned order rightly observes that the 'Appellants' were given adequate opportunities to provide bonafide purchasers in respect of the properties being sold by the First Respondent/Company. In short, it is the version of the Respondents No. 1 to 5 that without providing an opportunity to address the allegations against the 'Observer', no aspertions can be caused against him.

35. The Learned Counsel for the Respondents No. 1 to 5 refers to the decision of the Hon'ble Supreme Court in Ratnagiri Gas and Power Private Limited v RDS Projects Ltd & others reported (2013) 1 SCC 524 at paragraph 27 where it was observed that in the absence of the person against whom the allegations are made as a party in his/her individual capacity no findings may be entertained against them.

36. The Learned Counsel for the Respondents No. 1 to 5 contends that no reliance can be placed on an 'Arbitral Award' dated 18.03.2021unrelated to the Companies to assail the order of the 'Tribunal passed earlier in point of time. That apart, the correctness or otherwise of the impugned order of the 'Tribunal' cannot be challenged based on the documents, that was not there before the 'Tribunal'. In any event, it is the stand of the Respondents No. 1 to 5 that the 'Arbitral Award' dated 18.03.2021 is contested by the Respondents and OP No. 310/311/312/313 of 2021 are pending adjudication before the Hon'ble Madras High Court.

37. The Learned Counsel for the Respondent No. 1 to 5 submits that the 'Appellants' are aware that since the date of 'consent order' there is no requirement of a unanimous vote in regard to the decision being taken in the 'observer meetings'. Further, the 'mechanism' in terms of the consent order was to facilitate transparency in the affairs of the First Respondent/Company. In regard to the current observer is concerned, the said observer has held his position for more than a year and baseless allegations against his capabilities have been caused by the 'Appellants' upon him and the said allegations lack

bonafides and is only an attempt to impede the business of the First Respondent/Company.

38. The Learned Counsel for Respondent No. 1 to 5 contends that MA No. 1142 of 2019 filed by the 'Appellants' is before the 'Tribunal', wherein the Respondents had filed their counter wherein the malafides on the part of the 'Appellants' were brought to the attention of the Tribunal and that the 'Appellants' had opted to mediate their disputes and thereby abandoned said application.

39. Moreover, any restraint in respect of the sale of the properties will cause prejudice and irrepairable harm to the interest of the First Respondent/Company, its stakeholders (including 600 employees, and their families as well as other third party purchasers) especially because of effect of Covid 19 pandemic.

40. The Learned Counsel for the First Respondent projects a plea that pending adjudication on 'serious issues of maintainability' no interim reliefs of the like claimed by the 'Appellants' in the instant appeal can be granted and in this regard, places reliance on the judgment of this Tribunal in Solitaire Capital India and another Vs Vipul SEZ Developers Private Limited & ors, Comp App (AT) No. 268 /2019 (vide para no. 8).

8th Respondent's Submissions:

41. The Learned Counsel for the 8th Respondent contends that the submissions of the 'Appellants' on the merits of the Company Petition and seeking for 'interim orders' were negative by the 'Tribunal' and indeed, the 'scope' of the present 'Appeal' is limited to the extend that the validity of the order in dismissing the application filed for advancing the Hearing.

42. The Learned Counsel for the 8th the Respondents points out that no submission can be advances on merits by the 'Appellants', in the light of the fact that the 'maintainability' has been raised and a 'Mediator' was appointed on the 'Consent of the Parties' and the 'Report' is awaited.

43. The Learned Counsel for the 8th Respondent cites the decision of Hon'ble Supreme Court in the matter of Vidya Drolia and others Vs Durga Trading Corporation reported in 2020 SCC Online SC 1018 wherein the issue in regard to the non-Arbitrability and subject matter of dispute not capable of

being resolved through 'Arbitration' was considered at paragraph 63 wherein it is observed as under:

63. "Applying the above principles to determine no-arbitrability, it is apparent that insolvency or intracompany disputes have to be addressed by a centralized forum, be the Court or a Special Forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions in rem".

Appraisal

44. At the outset, this Tribunal points out that the Appellants/ Applicants in C.A.6 of 2021 in C.P.No.393 of 2019 on the file of National Company Law Tribunal, Chennai Bench had among other things averred that the Respondents, using their majority in Number were unilaterally conducting 'Committee Meetings' without any prior notice to them, as specified in the interim order dated 16.04.2019. Also that, the Appellants/Applicants came to know that the Respondents were trying to sell several properties belonging to the 1st Respondent/Company that are worth several crores, without their consent. In fact, the Respondents, in the guise of 'Committee Meetings' were unilaterally fixing rates for land sites of the 1st Respondent and were purporting to sell land parcels of the 1st Respondent using their majority in number.

45. The real grievance of the Appellants/Applicants is that the main Company Petition No.393 of 2019 on the file of National Company Law Tribunal, Chennai Bench is not taken up urgently, the Respondents, using their majority in number would dispose of all the properties of the 1st Respondent/Company, resulting in grave prejudice to the interest of the 1st Respondent/Company and therefore, they had filed the C.A.No.6 of 2021 in C.P.No.393 of 2019 seeking urgent listing of the main Company Petition for 'Arguments'.

46. The Respondents No.1 to 4 before the Tribunal, had filed a Counter Affidavit interalia stating that keeping in mind the business of the 1st Respondent/Company, the Tribunal passed an Order dated 16.04.2019, wherein a Five Member Committee was constituted, the representation of which is proportionate to the shareholding of the parties to the Company Petition and the Appellants/Applicants and the Respondents were to meet in the presence of an observer viz., Mr.Om Prakash Ellanty, (Learned Senior Counsel), to discuss among other things and finalise the rates for the properties to be sold and the said Committee is functioning in accordance with the order dated 16.04.2019

ever since, including in respect of the committee meetings that took place on 18.09.2020 and 10.10.2020 respectively. As a matter of fact, the Appellants/ Applicants were given notice of the meetings dated 18.09.2020 and 1 0.10.2020, but they had not attended the same. In short, the Appellants/Applicants were aware of the decisions in respect of the properties being sold considering the fact that they were the subject of committee meetings, which they had not chosen to attend.

47. That apart, in the Counter the Respondents No.1 to 4 had stated that earlier observer Mr.Sankaranarayanan (Learned Senior Counsel) had stepped down because of baseless and false accusations levelled against him by the 2nd Appellant/Applicant, again, the Appellants have resorted to casting baseless aspersions against the present observer with a view to stall the committee meetings. Their aim is to stall the business of the 1st Respondent/Company and to disrupt the Company Meetings.

48. The Respondents No.1 to 4 in their 'interim counter' to the main Company Petition had dealt with the maintainability of the main Company Petition, which is to be dealt with, before hearing the matter on merits. After that, the Tribunal had referred the matter to 'Mediation'. Because of the pandemic, the sale of the properties which were the subject matter of the meetings dated 18.09.2020 and 10.10.2020 respectively, is the only source of revenue for the 1st Respondent/Company.

49. It comes to be known that the Appellants/Petitioners in main Company Petition No.393 of 2019 (filed under Sections 241 and 242 of the Companies Act, 2013) on the file of the National Company Law Tribunal, Chennai Bench had prayed for (i) a declaration that actions of the 2nd, 3rd and 4th Respondents were oppressive to the interest of the Petitioner in his capacity as a shareholder of the 1st Respondent Company (ii) to appoint Chairman /Administrator to regulate the conduct of the affairs of the 1st Respondent /Company. (iii) to direct the Respondents 2 to 4 to contribute to the loss suffered by the1st Respondent/Company and appoint an independent Chartered Accountant to carry out a fair valuation of the Company and determine the value of the Petitioner's share in the Company after conducting 'Forensic Audit of Books' of the Company. (iv) to pass an order of Division of undertaking of the Company comprising of Real Estate and amusement park in the ratio of valuation determined by Independent Chartered Accountant in favour of each

of the families, also the Appellants/Petitioners had prayed for the interim reliefs in the main Company Petition.

50. An order on Section 241 Petition under the Companies Act, 2013 seeks reliefs with a view to end the matters complained of in the petition. Section 242 of the Companies Act, 2013 vests in the 'Tribunal' very wide powers for granting a suitable relief to the concerned Petitioner(s). Section 242(1) of the Act gives the 'Tribunal' an unfettered power to make such Order as it thinks fit, with a view to bringing to an end the matters complained of. Section 242(2) of the Companies Act, 2013 showers certain specific powers. Section 242(4) of the Companies Act is similar to the ingredients of Section 403 of the Companies Act, 1956. It is to be pointed out that allegations of oppression and mismanagement concerning mixed question of law and fact could not be decided at the Interim Stage.

51. The term 'Oppression' is any act exercised in a manner harsh, wrongful and burdensome manner. The 'Phrase' 'Affairs of Company' are being conducted 'points out a continuous wrong', the proceedings are meant to be in public interest of the Company or in the commercial interest of the company. The Tribunal can take preventive and a curative action for regulating the conduct of the Company's affairs in future and to bring to an end the matters complained of. It is to be pointed out that unfair utilisation of powers and impairment of confidence in probity with which the company's affairs have to be conducted, (in contra distinction) as distinguished from just resentment on the minority's part are the vital facts that are to be kept in mind by the 'Tribunal'.

52. In so far as, the 'consent order' is concerned, the 'consent' is given by the parties after great deal of deliberations and securing the legal advice to an order of a 'Tribunal' which has been completed and perfected, etc. As such, the 'consent order' ought not to be annulled or recalled or revoked in an 'simpliciter' fashion as opined by this Tribunal.

53. It cannot be gainsaid that applying the standards of 'fairness' the 'Tribunal', is to determine the main case on merits. While passing orders, the Company's interest and other equitable considerations are to be taken into account by the 'Tribunal'. Undoubtedly, the 'Tribunal' cannot interfere with the day to-day affairs of a Company and a wisdom of shareholders. Added further, one cannot ignore a prime fact that no 'Arbitrator' can give relief to a 'Petition' under Section 241 or 242 of the Companies Act, 2013.

54. It must be borne in mind that the 'Tribunal' has a discretionary power to decide a 'Preliminary Issue' even at the stage of final hearing. Of course, the maintainability of the Petition is to be scrutinised and decided on the date of filing of Petition and its validity is to be judged on the facts as they were at the time of presentation.

55. It is relevantly pointed out that Section 11 of the Civil Procedure Code, bars 'Subsequent suit'. Whereas Order 23 Rule 1(3) of the Civil Procedure Code bars 'remedy'. It is to be remembered that Order 23 Rule 1 of the Civil Procedure Code bars 'remedy' but does not extinguish the right. Whether the second Petition is 'void abinitio' is to be seen by the 'Tribunal'.

56. Section 442 of the Companies Act, 2019 does not provide for a party to apply to the 'Tribunal' merely to refer the matter for 'Mediation'. However, this power can be exercised only there is a proceeding before the 'Central Government', 'Tribunal' or the 'Appellate Tribunal'. A 'Mediator' acts as a 'Facilitator' and an 'Award of Mediation' is a settlement without admitting liability.

57. A matter is referred to 'Mediation' by means of an Application at the instance of any of the parties to the Proceedings or by suo moto reference made by the 'Central Government', 'Tribunal' or the 'Appellate Tribunal' before which any Proceedings is pending. In Law, 'Mediation' is an 'Alternate Dispute Resolution'. At any stage of the Proceedings before the Central Government or Appellate Tribunal or the Tribunal any of the parties may apply for appointment of a 'Mediator' for considering any matter relating to such Proceedings. Any person affected, may file objection before the 'Central Government', 'Tribunal' or the 'Appellate Tribunal', as the case may be.

58. On behalf of the 'Appellants' a reference is made to an 'Arbitral Award' dated 18.03.2021 in regard to the resolving of the parties dispute concerning the dissolution of partnership firms and for consequent division of all the assets held inter se the parties viz. M/s.V.G.P. Panneerdas & Company, M/s. VGP Investments and VGP Beach Housing arising out of Partnership Deeds dated 27.08.1993 and 01.01.1994 respectively.

59. According to the 'Appellants', the Arbitral Tribunal in its award held that "the Respondents 1 to 4 have full control over all the resources which they enjoy without sharing with others. They have falsely denied all the books of accounts as having been lost and the data in computers computed. They cannot

be trusted with management of properties during the process of liquidation of assets and before distribution and appointed a receiver to take possession of assets of partnerships." and that observations were made about the 'malicious intent' and 'mismanagement' done by the Respondents 2 to 5. Therefore, the 'Arbitral Award' is to be taken on record by this 'Tribunal'.

60. Conversely, it is the submission of Learned Counsels for the Respondents 1 to 5 that no reliance can be placed on an 'Arbitral Award' dated 18.03.2021 unrelated to the Companies to challenge the Impugned Order of the 'Tribunal' dated 22.01.2021 in CA/06/2021 in CP/393/2019 passed at earlier point of time. Further, the said 'Arbitral Award' is contested by the 'Respondents' before the Hon'ble High Court of Madras in O.P.No.310/311/312/313 of 2021. Moreover, it is the plea of the 'Respondents' that in the Award the 'Appellants' were found guilty of mis-conduct (vide Paragraph 144) and this aspect was conveniently ignored by the 'Appellants'.

61. Considering the fact, that the 'Arbitral Award' dated 18.03.2021 is contested by the 'Respondents' (in the present 'Company Appeal') before the Hon'ble High Court of Madras in O.P.No.310/311/312/313 of 2021, the same is pending for determination.

62. In so far as the allegations made against the 'Observer' is concerned, since he is not a party to the 'Proceeding' in his personal/individual status, this 'Tribunal' is not expressing any opinion in this regard, in the present 'Appeal'.

63. In determining an Application/Petition under Section 241, 242 of the Companies Act, 2013, the 'Tribunal' is to keep in mind the principle of 'particularity' and 'proof'. No doubt, the object of exercise of power under Section 241 of the Companies Act is either to prevent a 'Winding up of Company' or to remove the continuance of harm or reasonable probability of injury to the 'interests of Company' or to the wider injury of 'public interests'.

64. Admittedly the main Company Petition C.P.393 of 2019 before the National Company Law Tribunal, Chennai Bench was filed on 14.03.2019. The 'Respondents' have raised issues in regard to the maintainability of the main Company Petition No.393/2019 on the file of the 'Tribunal' and the same is pending for 'Adjudication'. In fact, the plea of bar of the C.P.393 of 2019 (2nd Petition) being filed after the earlier C.P.32 of 2017 filed by the 1st Appellant as 1st Petitioner was withdrawn on 02.08.2017, with no liberty being granted by the 'Tribunal' to file fresh Petition, is taken by the Respondents 1 to 4 in their 'Interim Counter' filed in pending C.P.393 of 2019. It is not in dispute that an unnumbered Application dated 15.04.2019 seeking to rectify the error committed by the 'Petitioners' therein is pending before the 'Tribunal'.

65. The 'Tribunal' passed an Interim Order on 16.04.2019 in main Company Petition No.393/2019 to the effect that keeping in view the interest of the R1 Company both the parties had agreed for setting up of 'five member committee' headed by one 'Observer' and constituted a 'five member committee' comprising three representatives being appointed by the Respondent Nos.2, 3 and 4, one by the Respondent Nos.5 and 6 ; one by the 1st Petitioner and Mr.R. Shankaranarayanan, Senior Advocate was appointed as an 'Observer' and further it was mentioned that the Committee shall have the mandate to decide ERP rates as per the market value, prevailing in the area where the properties are situated, etc.

66. Also the 'Tribunal' in the Interim Order dated 16.04.2019 in the main Company Petition No.393/2019 had proceeded to observe that in case, any issue arises with regard to fixing ERP rates on which there is difference of opinion among the members, the same will be resolved by the 'Observer' amicably and it was made clear that all the pending booking shall also be subject to the ERP rates fixed by the 'Committee' and procedure mentioned.

Disposition

On a careful consideration of contentions projected on either side, this 'Tribunal' on going through the contents of averments made in C.A.No.6 of 2021 in C.P.No.393 of 2019 on the file of the National Company Law Tribunal, Chennai Bench wherein it was mentioned interalia that the 'Respondents' in the guise of 'Committee Meetings' are unilaterally fixing rates for land sites of the 1st Respondent and are purporting to sell land parcels of the 1st Respondent using their majority in number, if all the properties of the 1st Respondent are disposed of by the Respondents using their majority in number and hence the main Company Petition C.P.No.393 of 2019 pending on the file of the National Company Law Tribunal, Division Bench-1, Chennai is to be listed for Arguments and the averments made in C.A.No.6 of 2021 by the Appellants/Petitioners are repudiated by the 'Respondents'. This 'Tribunal' keeping in mind of the ingredients of Section 241 and 242 of the Companies Act, 2013 comes to a resultant conclusion that to achieve the object(s) for which the aforesaid provisions are enacted, without expressing any opinion on the merits of the matter, also not delving deep because of the fact that allegations of 'Oppression and Mismanagement' concerning mixed question of Law and fact cannot be decided at the 'interim', stage by applying the yardstick of fairness directs the National Company Law Tribunal, Division Bench-1, Chennai to take up the main Company Petition No.393 of 2019 together with pending applications if any, 'for Hearing', (since the said Petition was filed on 14.03.2019) by requiring the Respondents' concerned to file Counter(s) to the main Company Petition and to

dispose of the same on merits (including dealing with the aspect of maintainability issue/point), of course, after providing adequate opportunities to respective sides by adhering to the 'Principles of Natural Justice' in accordance with Law and in the manner known to Law at an early date. Liberty is granted to the respective parties to raise all factual and legal issues before the 'Tribunal' in the main Company Petition.

Before parting with the case, this 'Tribunal' makes it explicitly clear that if the present 'Observer' (who is to resolve the difference of opinion among the members) is not resolving the difference of opinion among the members (as per the Interim Order dated 16.04.2019) in regard to fixing of ERP rates amicably, then, the National Company Law Tribunal, Chennai in C.P.393/2019 without any haziness, shall fix the ERP rates (as per the market value, prevailing in the area where the properties are situated) in regard to the sale of plots in future, by passing appropriate orders taking into account the paramount interests of the 1st Respondent Company.

With the aforesaid observations and directions, the present Company Appeal No.(AT)(CH) No.03 of 2021 stands disposed of. No Costs. I.A.No.08/2021 is closed.

[Justice Venugopal M]
Member (Judicial)

05-May, 2021

[V.P. Singh]
Member (Technical)

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