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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: 01.04.2016

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Judgement delivered on: 02.06.2016

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CO.A.(SB) 39/2013

AMAAN SACHDEV & ORS.

..... Appellants

Through: Ms Manmeet Kaur, Mr Yashvardhan
Bandi & Mr Manan Chaddha, Advs.

versus

FAHED ABDULRAHMAN ALI ALKHAMIRI & ORS. Respondents

Through: Mr U.K. Chaudhary, Sr. Advocate with
Mr Naveen Dahiya & Mr Himanshu Vij.,
Advocates.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J

1. This Company Appeal, preferred under section 10F of the Companies Act, 1956, (hereinafter referred to as the 'Companies Act') impugns the order dated 03.07.2013 in Company Petition No. 26 (ND) of 2013 passed by the Company Law Board, Northern Region Branch, New Delhi (hereinafter referred to as the 'CLB'). The impugned order rejected, on merits, the appellants' prayer for an investigation into the Respondent No. 12-company under section 235 of the Companies Act.

2. It was the appellants case before the CLB that Mr. Amaan Sachdev and Mr. Aneel Sachdev held a total of 10,000 equity shares of Rs. 10 each, they held 100% of the total voting power of the Respondent No. 12-company thus the petition under section 235 was maintainable; they claimed to have

noticed several irregularities in the affairs and day-to-day running of the respondent No. 12-company; that the respondents had carried out various E-form filings with the ROC without obtaining proper approval from the Board of Directors and shareholders of the company. These alleged irregularities included:

- i. Holding meetings without the requisite period of notice required by law.
- ii. Increasing the share capital of the company from Rs.1,00,000/- to Rs.1,40,00,000/- through an Extraordinary General Meeting convened without the permission of the appellants, who were shareholders at the time, and thereby reducing the shareholding of the appellants from 100% to 0.73%.
- iii. Appointing respondent Nos. 1 and 2 as directors of the company and not providing an explanatory statement for the same.
- iv. Forcing appellant Nos. 2 and 3 to resign from the Board of Directors without their consent.
- v. Allotting shares of the company to companies based in Kuwait.
- vi. Fraudulently changing the registered address of the company three times.
- vii. Filing irregular balance sheets from 2005 to 2011.

3. The appellants contend that an investigation under section 235 of the Companies Act ought to be carried out to ascertain the truth behind these alleged unscrupulous activities of the respondents. section 235 reads as follows:

“235. Investigation of the affairs of a company.

(1) The Central Government may, where a report has been made by the Registrar under sub- section (6) of section 234, or under sub- section (7) of that section, read with

sub- section (6) thereof, appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct.

(2) Where-

(a) in the case of a company having a share capital, an application has been received from not less than two hundred members or from members holding not less than one- tenth of the total voting power therein, and

(b) in the case of a company having no share capital, an application has been received from not less than one- fifth of persons on the company' s register of members, the Company Law Board may, after giving the parties an opportunity of being heard, by order, declare that the affairs of the company ought to be investigated by an inspector or inspectors, and on such a declaration being made, the Central Government shall appoint one or more competent persons as inspectors to investigate the affairs of the company and to report thereon in such manner as the Central Government may direct.”

4. The appellants therefore filed a petition under section 235 of the Companies Act before the CLB. Vide the impugned order dated 03.07.2013, the CLB reasoned as under:

“6. After going through the contents of the Petition, replies, rejoinders and arguments (oral and written), prima facie, it is clear that the Petitioners were initially the shareholders with 100% voting power in the company. However, the petitioners have alleged that Respondent No.1 has filed E-form with the ROC for the appointment of R-2 as Executive Director, resignation of Petitioner No.2 and 3 from the post of Director; increase in the authorized capital from Rs.1 lakh to Rs.1.40 crores, allotment of shares on various dates, change in the registered office of the company three times and holding of Annual General Meeting at a shorter notice without seeking consent of 100% shareholders. In addition, some errors have been pointed out in the compliance certificates and balance sheets for the years ending 31.3.2005, 31.3.2006,

31.3.2007, 31.3.2008, 31.3.2009, 31.3.2010 and 31.3.2011. All these allegations and irregularities are based on the documents filed by the company with Registrar of Companies and these returns/forms are available within public domain. As such, facts/violations/irregularities have been observed by examination of papers/returns/documents/forms of the company available on the Portal of Ministry of Corporate Affairs. In this context, the observations made in the case of Binod Kumar Kasera Versus Nandlall & Sons Tea Industries (P) Ltd. & Ors. (2010) 153 Comp Cas 184(CLB) [page 210, 211; para 40] are relevant which states that the object of an investigation u/s 235(2) of the Act is to discover something which is not apparently visible to the naked eye and where a petition discloses merely facts which are apparent from the balance sheet of the company, an investigation will not be ordered. In the present Petition, the contraventions and irregularities have already been noticed and stated by the Petitioners in the Petition and these matters have also been taken up with the various law enforcing agencies including SHO, Safdarjung Police Station, New Delhi, SHO Kalkaji Police Station, New Delhi, Economic Offences Wing, New Delhi, Registrar of Companies, Hon'ble Judicial First Class Magistrate Court-I, Kochi and Chief Metropolitan Magistrate, Saket District Court, New Delhi. Under these circumstances, it is inferred that the Petitioners have already observed and collected evidences pertaining to the violations, irregularities and statutory non-compliances. But, as stated by the Respondents, there was some deed of settlement which was signed on 12th July, 2010 and the Respondent Advocate has also stated that the amount of Rs.12.7 crores have been invested by the Kuwait Group Companies from the incorporation while not a single penny has been invested by the Petitioners except Rs.1 lakh paid at the time of incorporation of the Respondent No.12 Company on behalf of AI Futtooh Investments and its associates and the said amount of Rs.1 lakh has already been paid to the Petitioners in the year 2004 itself. However, the main grievances of Petitioners relate to dilution of shareholding of the Petitioners, removal of Petitioner No.2 & 3 from the directorship and appointment of Respondent No.2 as Executive Director and prima facie,

documents/returns/forms pertaining to these controversial matters are available on the Portal of the Ministry of Corporate Affairs and the same can be used for action u/s 397/398 of the Companies Act, 1956. Admittedly, the investigation u/s 235 of the Act is a fact finding process and to order investigation, the power is administrative in nature. But in the instant case, the facts are already known and nothing new is to come out in the process of investigation. This view is also substantiated by the fact that these matters have been filed with various law enforcing agencies including Courts based on the papers/documents available with the petitioners. In view of this, the balance of convenience does not go in favour of the petitioners and hence, the prayer made in the petition for ordering investigation u/s 235 of the Companies Act, 1956 does not stand on merits. As such, the prayer for ordering investigation u/s 235 of the Companies Act, 1956 is hereby rejected.

7. The Company Petition is disposed of accordingly. Interim reliefs, if any, are hereby vacated.

8. No order as to cost.”

5. Aggrieved by this order, the appellants have preferred this appeal.

6. The appellants submit that the entire proceedings on behalf of the respondents before the CLB was without due authority since the special power of attorney on behalf of respondent Nos. 1 and 2, authorizing Mr. Anshuk Pasricha to pursue the matter before the CLB, had not been notarised or apostilled before any agency or the Government of India or of the Indian Consulate in Kuwait. The appellants rely upon the settled principle of law laid down in the case of *Rupak Gupta and Ors. v. Banaras House Pvt. Ltd. and Ors.*, C.P. No. 75(ND)/2012 which held that the sanctity of affidavits must be strictly adhered to. In the written arguments before the CLB (annexed as Annexure P-11 to this appeal) the following objection was taken:

“The Petitioners wish to highlight that this special power of attorney, on the basis of which Shri Anshuk Pasricha

has sworn the affidavit is neither notarise, nor apostilled nor attested as mandatorily required by law and given that the said special power of attorney was executed outside of India it was required to be presented before the consulate of the Indian Government in Kuwait for it to be legally valid. The said special power of attorney does not fulfil any of these requirements and therefore Shri Anshuk Pasricha cannot swear any affidavit before this Hon'ble Bench or for that matter before nay Court till such time that his special power of attorney is executed in accordance with law. For that reason alone, the Short Reply filed on behalf of Respondent No.12 before this Hon'ble Bench taken be taken on record since it suffers from the infirmity that it does not have a legally sworn affidavit. It is the submission of the Petitioners that this Hon'ble Bench may therefore disregard each and every averment made in the said reply and not place any reliance on the same."

7. The learned counsel for the appellants submits that the impugned order has not even referred to this objection which is most preliminary in nature as it discusses the issue of authorization of a person to pursue the case before the CLB. In effect, the contention is that in the absence of due authorization before a notified Government officer, such representation on behalf of the company would be *non est* in the eyes of law.

8. In reply, the respondents contend that this is a curable technical defect. The learned counsel for the respondents refers to the judgments of the Supreme Court in *Union Bank of India v. Naresh Kumar and Ors.*, (1996) 6 SCC 660 and this Court in *Mahesh Nathani v. Sir Edward Dunlop Hospitals India Limited*, 2005 (82) DRJ 136 which have held that defects relating to authorization of power of attorneys can be cured and ratified even at the appellate stage. *Mahesh Nathani (supra)* held:

"22. It is thus clear that the petitioner has confirmed that Mr. Gulati was appointed his attorney by executing attorneys dated 16th July, 1997 and 27th December, 1997. Further, in this

power of attorney dated 18th October, 2004, action of Mr. Gulati having instituted this very company petition is specifically approved and ratified. Thus not only power of attorney on a valid stamp paper as per Indian Law is produced, there is a specific authorisation for instituting present proceedings as well. Therefore, the objection of the respondent that there is no specific authorisation to file a company petition is ill founded and reliance on the judgment of this court in the case of J.S. Bhalla v. G.J. Bhawnani 23(1983) DLT 125 or in the case of Shantilal Khushalda and Bros. Pvt. Ltd. v. Smt. Chandanbala Sughir Shah and Anr. (Vol.77) 1993 Company Cases 253 (Bombay) shall also be of no avail. If the earlier power of attorney was not stamped as per Indian Law, it was a mere irregularity which could be cured. The Supreme Court in the case of United Bank of India v. Naresh Kumar and Ors. (1996) 6 SCC 660 went to the extent of holding that such ratification can be proved even at Appellate stage. Therefore, I do not find any force in this preliminary submission of the respondent.”

9. The respondents further contend that the acts of Mr. Anshuk Pasricha have accordingly been ratified by a Board Resolution dated 13.04.2015. The Court finds that in view of the preceding discussion of the law on curability of the defect and the subsequent ratification of the acts of and authority in favour of Mr. Pasricha by the company, the preliminary objection of the appellants is untenable and is therefore rejected.

10. The learned Senior Advocate for the respondents has raised a preliminary objection that this petition is not maintainable because the appellants have also filed C.P. No. 133/2013 before the CLB through which they have availed the proper remedy under sections 397 and 398 of the Act. He contends that the prayers in C.P. No. 133/2013 are of wider amplitude and encompass even the prayers of the present petition, rendering the present petition redundant and since the matter is sub-judice before the CLB; (ii) the appellants cannot pursue two separate proceedings for the same cause of action as it amounts to forum shopping; and (iii) therefore, the present petition is infructuous and deserves to be dismissed. He further submits that

the factual finding of the CLB does not amount to a judgment within the ambit of Clause 15 of the Letters Patent, 1865 and as such cannot be appealed by an aggrieved party. He relies on the case law laid down by the Calcutta High Court in *Mayank Kocher v. Transport & Handling Equipments MFG. Co. P. Ltd*, (2008) 143 Comp Cas 601 (CLB). While discussing section 235 of the Act, the order records that:

“Under this Section directing an investigation is only analogous to the issue of a fact finding commission by a civil court for looking into accounts or making an investigation and does not amount to a judgment within Clause 15 of the Letters Patent, so as to enable an aggrieved party to appeal.”

11. Refuting this, the learned counsel for the appellants argues that an appeal under section 10F of the Companies Act is maintainable even if the order is judicial, quasi-judicial or administrative in nature; that in the case of *R.P. Khosla v. Connaught Plaza Restaurant Pvt. Ltd. & Ors.*, (2014) 184 Comp Cas 305 it was held that even assuming the orders of the CLB were administrative in nature, the language of section 10F is wide enough to cover even these administrative decisions.

12. The appellants contend that not ordering an investigation despite a preliminary observation of irregularities in the running of the company cannot be maintained. The Court however notes that the CLB has not made any adverse observations against the affairs of the Company except for recording the allegations of the appellant and instead it has observed that Section 235 cannot be used to initiate investigations merely on the allegations of a shareholder nor would an application be maintainable unless it met the requirement of Section 235 of the Act

13. He further contends that the impugned order erred in not appreciating the real intent behind the section 235, under which the investigation is to be

of a very preliminary nature and is only meant to shed light on the affairs of the company, and the CLB cannot substitute its own opinion for that which may be brought out from an investigation. He further contends that an investigations under section 235 is neither criminal in nature nor is it to be conducted by police; that the requirement of a minimum shareholding under section 235 has to be read liberally and cannot be a bar to the present proceedings because a similar requirement is stipulated under section 399 of the Act with respect to applications under section 397 and 398. He contends that this principle should be liberally interpreted and extended to also apply to investigations under section 235; that as the question of the voting power being reduced to below 10% constitutes the cause of action for this petition under section 235 of the Act, the same should be investigated to reveal the true state of affairs of the company. He submits that, as was held in *Citicorp International Finance Corporation case (supra)*, an “(a)n order to investigate under Section 235 of the Act, in any case cannot prejudice the respondents” because the direction of holding an investigation under this section is similar to the appointment of a fact finding commission. He relies upon the judgement in *Shri Kishan Khariwal vs. The Ganga Nagar Industries Ltd. & Ors.*, [2004] 118 Comp Cas 626 which held that where the dispute related to reduction of shareholding to less than 10%, the same would not be a bar under section 399. It held:

“This Board has always taken the view that if the shareholding of the petitioners is reduced below 10% of account of further issue of shares and if the issue of further shares is also challenged in the petition, then, the petition will not be dismissed as not maintainable in terms of Section 399. Instead, the allegation relating to the issue of further shares would be examined first as to whether the same is an oppressive act and if it is found to be so, then only other allegations in the petition would be examined.”

14. The appellants contend that the money which was received by them under Foreign Direct Investment was only a loan from the companies M/s Al Futtooh Investment Company, M/s Hamoor International Trading and M/s Kuwait Investment Projects Company. The appellants refer to the Foreign Inward Remittance Certificates (FIRCs) which would indicate that the money came into the country in the form of borrowings from the abovementioned Kuwaiti companies. They submit that the respondents have failed to produce any documentary evidence to show any connection between respondent Nos. 1 and 2 with the three abovementioned Kuwaiti companies and that this raises certain doubts regarding the correlation between these entities.

15. The respondents refute this claims and contentions of the appellants. They argue that the appellants, who are in fact legal professionals, incorporated the respondent No.12-company on behalf of respondent Nos.1 and 2; that the appellants have been paid for their legal services and the money, which the petitioners claim to have received in the form of a loan, was actually Foreign Direct Investment against equity in the respondent No.12-company. The respondents place reliance upon the Foreign Inward Remittance Certificates (FIRC), which show the contribution made by the respondents.

16. The learned Senior Advocate submits that, in any case, the appellants do not qualify the threshold criteria of holding a minimum of one-tenth of the total voting power in the respondent-No.12 company, as required under section 235(2) of the Act; that it is an admitted fact that the shareholding of the appellants is only 0.73% and that this is, therefore, fatal to their case. He submits that the meaning of 10 per cent of voting power has been considered in *Smt. Chandra Prabha and Another v. Hotel Shweta (P) Ltd. & Others* (1995) 4 Comp LJ 540 (CLB) which held as under:

“13. The petitioners have filed the petition under Section 235 read with Section 237(b) of the Act. As per Section 235(2) of the Companies Act, 1956, an application for a declaration for investigation has to meet the minimum qualification, namely, that it should be from not less than 200 members or from members holding not less than one tenth of the total power. According to the petitioners, the total paid up capital was Rs.50.52 lakhs and their holding was within the limits. The respondents, however, contend that, on the date of petition, the paid up capital was Rs.75 lakhs. From a scrutiny of Form No. 2 within regard to the additional paid up capital was Rs. 75 lakhs. From a scrutiny of Form No. 2 with regard to the additional allotment of Rs.24.48 lakhs, it was found that the allotment was stated to have been made on 28.2.92/demand draft was also obtained towards filing fee on 4.3.92, but the actual filing appeared to have been done with Registrar of Companies after the petition was filed. However, in view of the demand draft being dated March, 1992, which showed the contemporaneity of the allotment, and in view of the audited balance sheet for the year ended 31.03.1992 reflecting the paid up capital as Rs.75 lakhs, the voting strength was determined by reckoning the paid up capital of Rs.75 lakhs. As such, on the date of filing of the petition, i.e., 17 November, 1992, the petitioners held less than one-tenth of the total voting power and so could not maintain this application under section 235 of the Act. We, however, in view of the circumstances as set out in the petition and the various pleadings ast(sic) the facts, having regard to the provisions of Section 237(b) of the Act, the various circumstances set out in the pleadings were considered as ‘information’ for examining whether there was justification for forming an opinion, with regard to investigation under that section.”

17. Likewise in *In Re: Shree Rama Multi Tech Ltd.* [2005] 63 SCL 154 (CLB), the CLB relied upon the judgment in *Smt. Chandra Prabha and Another v. Hotel Shweta (P) Ltd. & Others* (supra) and held as under:

“I have gone through the pleadings and heard learned counsel for both the parties and it is observed that the petitioner has not fulfilled the conditions laid down for filing petitions under Section 235 as the present petition under Section 235 has not been filed by 200 members or from members holding not less than one tenth of the total voting power. Accordingly, the company petition No.

46/2003 is not maintainable under Section 235(2) and the same is dismissed being not maintainable.”

18. The learned senior advocate argues that the scope of Section 235 and Section 397 and 398 of the Act are different. He submits that legislative intent behind section 235 is ambiguous, the requirement is that the applicant should have at least 1/10 of the voting power. He relied upon the ratio of *Mayank Kocher vs. Transport & Handling Equipments Mfg. Co. Pvt. Ltd*, which held:

“8. By the impugned order the Company Law Board held that the nature of investigation that the petitioner before it had sought could be more meaningfully conducted in proceedings under Section 111 or under Sections 397 and 398 of the Act. What the Company Law Board implied was that there would be a logical consequence of such investigation if ordered in the course of Section 111 or Sections 397 and 398 proceedings in that upon investigation and the result thereof, the petitioner's right to relief could be assessed.

9. It is beyond question that an investigation under Section 237 can be directed upon subjective satisfaction of the existence of circumstances enumerated in Section 237. If, however, it is shown or the Company Law Board is otherwise satisfied that such circumstances do not exist or that the facts and allegations are such that it is impossible to form an opinion as to the existence of such circumstances, an investigation is not called for.....”

19. The learned Senior Advocate discerns between the language of section 235 and section 399 of the Companies Act and asserts that the legislative intent behind these sections is unambiguous, insofar as section 235 requires an application for investigation to be received from members holding not less than “*one-tenth of the total voting power*” in the company whereas Section 399 requires an application from members holding not less than “*one-tenth of the issued share capital*” of the company. To support his proposition he relies upon the ratio of *Mayank Kocher vs. Transport & Handling Equipments Mfg. Co. Pvt. Ltd (supra)* which held:

8. *The said prayers apart from being prayers, which could be prayed for only in a petition under Section 111 of the Act of 1956 clearly reveal along with other averments made in the petition that the petitioner is not a shareholder and is, therefore, not entitled to maintain the petition. Since as on date (or as on date of filing of the company petition), he is not a member of the respondent-company, he, therefore, has no locus standi to inspect and take copies of the documents of the respondent-company. Reliance is placed on the judgment of the hon'ble Delhi High Court in the case of V.V. Purie v. E.M.C. Steel Ltd. [1980] 50 Co. Cas 127, wherein it is held that a person having no manner of interest or concern in the company as a shareholder, creditor or otherwise, has no locus standi to prefer an application to the court for an order under Section 237(a)(ii) of the Companies Act, 1956, declaring that the affairs of a company ought to be investigated by an inspector appointed by the Central Government. The judgment further lays down that (headnote):*

Though Section 237 is couched in very wide language, the basic limitation that the courts will not entertain action on behalf of private persons to enforce the observance of public rights and duties unless they have a personal interest in the matter and unless their rights and interests are in some way affected, is implicit in the interpretation of the section.

20. The learned Senior Advocate for the respondent submits that the Calcutta High Court was of the opinion that any report under Section 235 is more in the nature of an investigative report; it is a matter of finding facts and is not a judicial order, and therefore the analogy to this appeal would not lie in the present case. He contended that the proper and effective remedy for the appellants would lie under Section 397 and 398 of the Act. He also contended that the appellants are concealing the fact that the parties had signed a deed of settlement on 12.07.2010. He states that the appellants have no right to pray for an investigation to be carried out under Section 235 of the Act since they have not approached this Court with clean hands.

21. In rebuttal, the learned counsel for the appellants cites the judgment of *Rohtas Industries v. S.D. Agarwal and Ors.*, (1969) 139 Comp Cas 781 (SC),

wherein the Hon'ble Supreme Court set aside a impugned order of the High Court and held that in cases of allegations of fraud on the part of the directors of a company, an investigation must be carried out if there is *prima facie* evidence of any intent to defraud, fraudulent or unlawful activities, or instances of misconduct. The judgment observes as under:

“39. Coming back to Section 237(b), in finding out its true scope, we have to bear in mind that that section is a part of the scheme referred to earlier and therefore the said provisions takes its colour from Sections 235 and 236. In finding out the legislative intent we cannot ignore the requirements of those sections. In interpreting Section 237(b) we cannot ignore the adverse effect of the investigation on the company. Finally, we must also remember that the section in question is an inroad on the powers of the company to carry on its trade or business and thereby an infraction of the fundamental right guaranteed to its shareholders under Article 19(1)(g) and its validity cannot be upheld unless it is considered that the power in question is a reasonable restriction in the interest of the general public.”

22. The appellants further rely upon the dicta of *Raghunath Swarup Mathur v. Har Swarup Mathur & Ors.*, (1970) 40 Comp Cas 282 (All), wherein it was held that in appropriate cases, a probe under Sections 235 to 237 may be a necessary prelude to proceedings under Sections 397 to 399 of the Act. It reads as under:

“28. Before concluding, I may indicate a procedure which could, in appropriate cases, be held to be a necessary prelude to proceedings under Sections 397 and 398. Sections 235 to 237 of the Act empower the Central Government to appoint one or more inspectors to investigate the affairs of a company and to submit a report, which is made legally admissible evidence, by Section 246 of the Act, in proceedings before a court of law. Such a report could provide the basis of action by the Central Government against a company under either Section 397 or Section 398 of the Act, as laid down by Section 243 of the Act, or, for recovery of damages in respect of any fraud, misfeasance, or other misconduct in the management of the company's affairs, where this is necessary

in public interest, as provided by Section 244 of the Act. It could, therefore, be urged, in cases where a detailed inquiry into the conduct of the affairs of a company is called for, that a petition under either Section 397 or Section 398 of the Act, without applying for such an inquiry, under Section 236 of the Act, is premature.”

23. The learned counsel for the appellant submits that, in the present case, the benefit of ordering an investigation under section 235 would bring clarity to the dubious position of the company as well as the *prima facie* irregular filings done by it. The appellants finally rely on the dicta in *J.P. Srivastava & Sons (P) Ltd. and Ors. v. Gwalior Sugar Co. Ltd.*, (2005) 1 SCC 172, to contend that the legislative intent behind restricting the filing of petitions under Sections 235 and 397 is to prevent frivolous litigation. They argue that the requisite shareholding for filing petitions shall not be permitted to be used as a protective shield by wrongdoers who mismanage and play frauds on companies. According to the appellants, what is required is that there must be enough material on record so as to raise a doubt regarding instances of foul play in the management of the affairs of the company and that, as also observed by the CLB, this is present within these set of facts.

24. Having considered the aforestated contentions, the Court is of the view that the present appeal oversteps its statutory applicability. What is undisputed is that the appellant fails to meet the threshold of 10% share of the total voting power as is necessary under section 235 of the Act. Therefore, that is his first impediment in directing an investigation and the application under section 235 as well as this appeal would not be maintainable. Furthermore, in section 397 and 398 of the Act, which deals with application for relief in cases of oppression and mismanagement respectively, required the applicant to have at least 10% of the issued share capital. It is only in applications under Section 397 and 398 of the Act, where the challenge in such applications is to reduction of the issues share capital itself, through

oppression or mismanagement then the threshold of 10% would not be applicable.

25. The Court would note that *Mayank Kocher* (supra) discusses the *Barium Chemicals Ltd. V. Company Law Board* [1966] 36 Comp Cas 639 (SC) and another judgment, *Shankar Sundaram v. Amalgamations Ltd.* [2002] 111 Comp Case 252 (Mad), rendered by a Single Judge of the Madras High Court, and agrees with the latter that notwithstanding S.237, the CLB had the power to investigate under Section 397/398 of the Act. It went on to hold that an investigation under S. 237 can be directed upon the subjective satisfaction of the existence of circumstances as enumerated in the said section. This means that if the CLB comes to the conclusion that circumstances as mentioned in S237 do not exist, or that it is not possible to form such an opinion of the existence of such circumstances on the basis of available facts and allegations made by the applicant, then no investigation will be warranted.

26. The present impugned order has taken into consideration the facts taken on record as well as the allegations of wrongdoing made by the respondents regarding digital signatures, reduction in shareholding and voting rights of the petitioners, their removal from directorship from the company, infusion of share capital and change of registered office of the company twice. All this information has been made available through filing before the Registrar of Companies from the years 2005 onwards and the impugned order takes into consideration the same and concluded that nothing new could come out in the process of investigation. Therefore it formed the opinion that the circumstances mentioned in S. 237 did not exist so as to trigger any investigation. The Court finds that in the circumstances the CLB had taken into the available facts on record and the conclusion arrived at cannot be faulted.

27. The impugned order has relied upon the judgment of the Kerala HC in *Mrs U.A. Sumathy and Anr. v. Dig Vijay Chit Fund (P) Ltd.*, 1983 53 CompCas 493 (Ker) which held that section 235 does not lay down what precise circumstances are to be proved so as to trigger an investigation but in the least the materials on record to be examined must be such as to satisfy the court that a deeper probe into the company affairs are desirable in the interest of the companys' itself. The impugned order also relied upon the ratio in *Binod Kumar Kasera vs Nandlall & Sons Tea Industries (P) Ltd. & Ors.* (2010) 153 Comp. Cas. 184 (CLB), which held that where the facts are disclosed on the basis of the records, like the balance sheet of the company, an investigation would not be ordered. Hence, there must exist at least a prima facie evidence that the affairs of the company are being run in a fraudulent and unlawful way so as to defraud its creditors or is contrary to the interest of the company itself which would lead to the conclusion that an investigation would be necessary. Mere allegation of a disgruntled shareholder would not be a sufficient ground to order an investigation.

28. The appellants have sought an investigation regarding the irregularities mentioned in paragraph 2 hereinabove, which relate primarily to documents already on record. It is the effect of these documents which would be examined in the proceedings under Section 397 and 398, which, incidentally, have already been preferred by the appellant. The impugned order has rightly analysed as in the context of the facts of the case that the appellant, who initially had 100% voting power in the company were subsequently allegedly removed/ displaced from the said voting power by respondent no.1 appointing its two executive directors accepting resignation of appellant no. 2 and 3 from the post of Director; increase in the authorized capital from Rs. 1 lac to Rs. 1.40 crores; allotment of shares on various dates, change in the registered office of the company thrice over; holding of AGM at shorter

notices without consent of 100% of the shareholders; the information was already available and has been obtained by the appellants through an e-filing of the E-form before the Registrar of Companies. Other allegations against the company relate to compliance certificates and Balance Sheets for the year ending 31.03.2005, 31.03.2006, 31.03.2007, 31.03.2008, 31.03.2009, 31.03.2010 and 31.03.2011, and this information has been gleaned from the documents and returns and forms filed with the ROC, which are available in the public domain. Therefore, the effect of the aforesaid documents would have to be, at best, examined by the proceedings under Section 397 and 398 of the Act. The objective of investigation under section 235 of the Act is to unearth and find out the new material or data. Since no further information beyond the aforesaid documents pertaining to the company is likely to be obtained, the impugned order rightly rejected the application. It also recorded that regarding other violations, complaints have already been filed before the law enforcing agencies, including, SHO, Safdarjung Police Station, New Delhi, SHO Kalkaji Police Station, New Delhi, Economic Offences Wing, New Delhi, Registrar of Companies, First Class Magistrate Court-I, Kochi and Chief Metropolitan Magistrate, Saket District Court, New Delhi.

29. The CLB rightly relied upon the observations in the case of *Binod Kumar Kasera (supra)*, which held that object of investigation under section 235(2) of the Act is to discover something which is not apparently visible to the naked eye and where a petition discloses merely facts which are apparent from the Balance Sheet of the company, an investigation will not be ordered. The appellants have already approached the relevant authorities for relief. section 235 cannot be an exercise of roving inquiry, nor could it be invoked by any person, who does not meet the threshold of 10% voting power because the repercussions of an investigation would have wide ramifications,

it could cast a shadow upon the functioning of the company, affecting its stature, goodwill and value of market shares, as may be. The decisions relied upon by the parties do not show that the requirement of 10% of the voting power under section 235 has been either read down or diluted. Instead, they show that the requirement of 10% issued share capital under section 399 may not be insisted upon where such reduction by way of oppression or mismanagement itself is disputed. The impugned order has rightly referred to the ratio in *Hariganga Cement Ltd. Vs Company Law Board & Anr.* (1988) Bom 603, which held that the power of the Company Law Board under section 237(b) of the Companies Act, being wide in nature and scope, the discussion to use the same should be exercised with immense circumspection and in a judicious manner. Such discretionary power would have to be exercised in a reasonable manner and not in the absence of circumstances not warranting investigation, into the affairs of the company.

30. The impugned order has recorded that, according to the respondents, there was some deed of settlement signed on 12.07.2010 and that the respondents had invested an amount of Rs. 12.7 crores whereas the appellants had made investment of only Rs. 1 lakh at the time of incorporation of the said company, which amount has already been paid back to him by the investors' group of companies. Any investigation under Rule 235 of the Act would be a fact finding process and such power would be administrative in nature. However, since the facts were already known to the parties, through the statutory filings of the company, no further information would come out from the investigation. Indeed the said information has already been placed before the various law enforcing agencies by the appellants for them to carry out their respective necessary action. Evidently, the impugned order takes into account all the relevant facts and has come to the conclusion that the circumstances under Section 237 do not exist to warrant an investigation.

31. In these circumstances, this court does not find any reason to differ or interfere with the impugned order. The appeal is without merit and is, accordingly, dismissed.

NAJMI WAZIRI, J.

JUNE 02, 2016

