

(2012) 07 DEL CK 0086

In the Delhi High Court

Case No : Company Appeal No. 4 of 2002 and Company Petition No. 160 of 2004

Prakash Nath and Ors

APPELLANT

Vs

M/s. Ashoka Manufacturing Co. Pvt. Ltd. and Ors
 M/s.
Ashoka Manufacturing Co. Pvt. Ltd. and Ors Vs Manu Machine
Tech Pvt. Ltd.

RESPONDENT

Date of Decision : 13-07-2012

Acts Referred:

Companies Act, 1956 — Section 397, 398, 402

Citation : (2012) 8 AD 37 : (2012) 173 CompCas 332

Hon'ble Judges : A.K. Sikri, Acting C.J.

Bench : Single Bench

Advocate : Pinky Anand with Ms. Natasha Sahrawat, for the Appellant; Krishna Kumar, with Mr. kaustubh Shukla, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, Acting Chief Justice

1. The aforesaid company appeal as well as the company petition are interconnected. The parties in both the proceedings are common. In fact, in CP No. 14/1997 filed by Mr. Prakash Nath and others before the Company Law Board, orders dated 30.5.2002 were passed directing re-drawl of the balance sheet of M/s. Ashok Manufacturing Co. Pvt. Ltd. Mr. Prakash Nath and others filed appeal CA No. 4/2002 challenging that judgment. According to M/s. Ashok Manufacturing Co. Ltd., on re-drawl of the balance sheet as per the directions of the Company Law Board, a sum of Rs. 56,53,834.50p. is payable, apart from interest, by M/s. Manu Machine Tech Pvt. Ltd. On that basis, Co.P. No. 160/2004 is filed for winding up of M/s. Manu Machine Tech Pvt. Ltd. Since foundation of the company petition is the order passed by the Company Law Board, it would be proper to deal with the company appeal in the first instance.

2. Brief facts leading to the disputes between the parties are recapitulated below.

3. M/s. Ashok Manufacturing Co. Pvt. Ltd. (hereinafter referred to as the "Company") consisted of two units, namely, Division-A and Division-B, which carried on business of manufacture of machines, stainless steel, pressings and parts. A settlement dated 29.8.1992 was arrived at between the two groups managing the Company. As per this, the aforesaid two divisions came under two different managements. Division-A came to be managed by Mr. Achal Nath and his group, while Division-B came under the control of Mr. Prakash Nath and his group. This settlement also provided that the Division-B would be required to take the bank liabilities to the extent of `32,31,633/- and also make available various machineries which were in their possession and custody to the Division-A. According to Mr. Prakash Nath and his group, the other group controlling Division-A did not implement and/or carry out the obligations fully, though at the same time both the groups were managing their two divisions independent of each other. Since differences arose between the two groups, Mr. Prakash Nath and three others filed a company petition u/s 397 and 398 of the Companies Act before the Company Law Board, New Delhi, inter alia, seeking formal division of the two groups and implementation of the settlement fully.

4. We may also note that the Company was originally incorporated in Lahore in 1939 and the registered office was transferred to Delhi in 1967. Both the groups are family members of two brothers, who initially incorporated the aforesaid company. Mr. Prakash Nath is one of the brothers and Mr. Achal Nath is the son of the other brother Shri Ashok Nath. On 8.4.1990, a family settlement was arrived at as per which the division of the business took place and finally agreement dated 29.8.1992 was entered into dividing the company into "A" & "B" divisions with effect from 30.11.1992. The balance sheet was also prepared on 30.11.1992 to identify the assets and liabilities as on that date.

5. Having regard to the fact that there had already been a family settlement, as per which the company was divided into two divisions which were being managed by the two groups ever since then independently and the matter only related to finalization of accounts and incorporation of Division-B as an independent company, the Company Law Board gave a suggestion during the course of hearing on 9.12.1997 that once the liability of the company is divided, dispute could be settled by appointing Chartered Accountants to examine the books of accounts to identify the various items of liabilities shown in the books of accounts as on the date of division. This suggestion was accepted by both the parties which led to passing of the following orders dated 9.12.1997 appointing M/s. V. Shankara Iyer & Co., Chartered Accountants, to examine the books of accounts and give their recommendations on apportionment of liabilities between the two divisions. The said order reads as under :-

When the matter was heard it was brought to our notice that, there had already been a family settlement between the parties according to which the assets of the company have already been divided into Division A and Division B and taken over by the respective parties. The only disputed issues relates to the

apportionment of liability of the company which has to be apportioned between Division A and Division B. The counsel for the parties have agreed that the liability that is shown in the books of accounts on the date of division would be examined by a Chartered Accountant and on the basis of the findings given by him, the same will be apportioned between Division A and Division B. They have sought our directions in regard to the appointment of a Chartered Accountant. We hereby appoint M/s. Shankar Iyer & Co., Chartered Accountants to examine the books of accounts to identify the various items of liabilities shown in the books of accounts as on the date of division of the company and give their recommendations on apportionment of these liabilities between the two divisions...

6. The said Chartered Accountants gave their report, but it was not acceptable to both the parties who raised different nature of objections thereto. The Company Law Board thereafter heard the arguments and passed the impugned orders. In its impugned judgment, the Company Law Board found as under :-

(a) Allegation of the respondents herein, petitioner in the said petition, that late Shri Ashok Nath of Division-A had diverted the funds of the company to ABRO and ABI were not substantiated. (b) The contention of the respondent herein that as per the family settlement the resources of all the three companies, namely, M/s. Ashok Manufacturing, ABRO and ABI were to be pooled together and division was to take place accordingly, which was not done, hence this contention was no more open to the petitioners having regard to the orders dated 9.12.1997.

(c) The only issue which was to be determined was the quantum of liabilities to be apportioned as per the books of accounts of the company on the date of division of the company for which M/s. V. Shankar Iyer & Co., Chartered Accountants, were appointed. In this behalf, the Company Law Board passed the following order :-

Since the company had already been divided and that the two groups are managing the affairs of the divisions independently for nearly 10 years, it would be more appropriate to formalize the division of the company especially when we find that both the divisions are independently maintaining separate accounts which are consolidated for the purpose of preparation of the annual accounts of the company. Therefore, in exercise of our power u/s 402 of the Act, we direct as follows. The petitioner will incorporate a new company in respect of Division B within a period of 3 months. All assets and liabilities of Division B as on date shall be taken over by the new company. The existing company will consist of Division A along with its assets and liabilities. All the assets acquired and liabilities incurred by or attributable to Division B with effect from 30.11.1992 shall be with the new company and the assets acquired and liabilities incurred by or attributable to Division A shall be with the company. As far as the apportionment of the unapportioned liabilities as on 30.11.92 between the two divisions is concerned, since this issue is pending for long inspite of intervention of third parties viz. Shri Sud and M/s. Shankar Iyer & Co., we direct, even if it is to cause

some prejudice to one of the groups, that these liabilities on that should be divided equally between the two divisions as the shareholding of each group is equal. Likewise, undivided assets also will be divided equally. If either of the divisions had incurred any expenditure on behalf of other Division or cleared any liability of the other division after 30.11.92, adjustment should be made. In view the directions in regard to the liabilities, Group A need not have the apprehension that it may have to shoulder the liabilities of Division B with apprehension is found to be their main objection for formal division of the company. The statutory auditor of the company will recast the accounts of both the Division in terms of the above directions within a period of 3 months to enable the parties to part way. Once the new company is incorporated, the share capital of the 4th respondent company will be reduced by 50%.

7. Before recording the submissions of the counsel for the appellant, challenging the aforesaid order, I must point out that disposal of these matters have been unduly delayed. The judgments were reserved on two occasions earlier. After it was reserved for the first time, while dictating the judgment, it transpired that on certain issues some clarifications were needed. It was primarily for the reason as would be stated hereinafter at the appropriate stage some of the aspects on which oral submissions were made are not found in the impugned orders passed by the learned Company Judge. The matter therefore listed for direction/further arguments. By that time, roster changed and therefore this case could be taken up only on Fridays. Many times case could not be taken up for hearing because of paucity of time and on many occasions because of non-availability of one counsel or the other. Though at that stage I could have released the matter and sent to the Regular Bench, however, this Court found itself morally bound to decide as arguments were heard earlier and judgment reserved. Therefore, it would not have been proper to send the case to another Court for fresh argument altogether. Even the counsel for both the parties wanted this Court to proceed with the matter.

8. Counsels for the parties filed their written submissions and the order was reserved again. However, it was again found that there was few sets of written argument/synopsis submitted by counsel for both the parties which were causing certain confusion. The matter was listed again and the learned counsels for the parties were directed to file one set of consolidated written argument. The appellant filed written arguments on 29.4.2010. The respondent counsels took some time and filed the written arguments on 24.5.2011. Thereafter, counsel for the respondent wanted to make oral submission as well and for this purpose the case was again adjourned number of times. Ultimately, statement was made on 16.3.2012 that no further arguments are to be heard and the judgments were reserved on that day. I deemed it proper to state this position to make the record straight.

9. Learned Senior Counsel for the plaintiff has argued that after differences and disputes had arisen between the two groups of the family, it resulted in family

settlement which was arrived at on 8.4.1990. Since the AMC was the parent company and two other companies namely ABRO and ABI had come up with the aid and diversion of funds of AMC, the family settlement dated 8.4.1990 specifically dealt with the division of three companies between two groups equally by pooling all the three companies together. It was further pointed out that by document dated 8.2.1992, balance sheets of AMC, ABI and ABRO were to be finalized to implement the family settlement dated 8.4.1990. However, the balance sheet of ABRO was not finalized and further time was sought to finalize the balance sheet of ABRO. Further, the minutes of meeting dated 14.10.1992 shows that diversion of ABRO was yet to be accounted for. Learned Senior Counsel accepts that financial arrangement of AMC was made as per which it was physically divided into two divisions i.e. Division A and Division B and the operation of the bank account were divided between the two Divisions. However, the grievance is that assets and liabilities of AMC and ABI were accounted for on 27.1.1994, the pooling in of ABRO was never effected as per the family settlement dated 8.4.1990 and the following terms and conditions of the family settlement have not been implemented today:

a. Diversion of Funds

Diversion of funds to ABRO from AMC is 9 crores between 1976 to Nov 1992 with interest on account of profit margin and approx ` 5 Crore between 1976 to Nov 1992 on account of net saving of income Tax to be accounted for: the claim of appellants share is half of total diversion i.e. 6.5 crores tentatively ascertained by appellants to be ` 6.5 crores.

b. Tenancy Rights

i. As per family settlement dated 8.4.1990, ` 30 lacs value was to be taken for tenancy rights of AMC/ABI corporate office at 12 Scindia House, Connaught Place, New Delhi (Clause 2 (h)) The said premises are exclusively under use and occupation of AN group till date. It is argued that one of the valuable assets of AMC is tenancy rights of No.1, Canal Road which was defacto divided but dejure partition has not been affected. LD. CLB has grossly failed to direct formal division of tenancy rights over land and property bearing No.1, Canal Road, Delhi 110009 even though entire assets, land, building, plant and machinery, personnel and products etc have been physically divided by the parties and duly appreciated by Id. CLB.

c. Compensation for Logo and Name of ABI

1.25 lacs was agreed to be paid by AN group to PN group on account of logo and name of ABI which has not been implemented till date as is clear from the minutes of the meeting dated 21.11.1992.

d. Shareholding and Consequential Benefits in ABI.

PN Group had 25% shareholding in ABI. As per family settlement this 25% shareholding of ABI was to be enhanced to 49% and necessary implementation

was to follow. No monetary benefits have been given to PN group from ABI since the date of family settlement. No dividends on share or bonus share or share capital have been refunded. Personal deposit of ` 5 lacs of PN group has not been refunded till date. Mrs. Lily Prakash Nath was director in ABI; however she has not been allowed to participate in company affairs. The same has not been done till date.

e. Pooling of ABRO for Division.

Appellants have specifically prayed to give total effect to implementation of the family settlement 8.4.1990 before CLB vide prayer (b) that the court direct respondent no.1,2 and 3 to implement with immediate effect the family settlement and bring about legal separation of Divisions A and B to form into separate legal entities and also prayer (f) which reads as "direct the Respondent to hand over 50% of assets in control of Respondent No.5 company ABRO also to the Petitioners in terms of family settlement and the various decisions agreed to between the respondents and the Petitioners.

It is abundantly clear from above that respondents did not implement the family settlement dated 8.4.1990 in its totality. ABRO was not pooled in for division in the common kitty ever. The tenancy rights were not divided between the parties. Compensations on account of goodwill and name were not paid by the respondents. Petitioners have not been given benefits of their 49% shareholdings in ABI.

10. Learned Senior Counsel further argued that the subject matter of the present appeal is limited only to strict implementation of family settlement dated 8.4.1990 and various minutes of meeting dated 24.11.1992 and this fact was accepted by the CLB but the CLB implemented it partially. It is also argued that CLB wrongly implemented the consent order dated 9.12.1997 and the consent order had a limited operation qua AMC as a company alone. According to her, the diversion of ABI and ABRO had to be accounted for. Questioning the report of the auditors namely Shankar Ayer's report which was based on order dated 9.12.1997, submission was that it did not take into account the diversion and therefore, was not acceptable to both the parties. Even CLB itself had rejected this report vide order dated 24.12.2001. Predicated on this it is sought to be argued that all issues were reopened by the CLB itself Submission of learned Senior Counsel was that CLB in its operative portion of the judgment dated 30th may 2002 directed that "the statutory auditor of the company will recast the accounts of both the divisions in terms of above directions within a period of 3 months to enable the parties to part way". Statutory auditor of the company has not recast the balance sheets of two divisions till date.

11. It was also submitted that the alleged recovery of amount due from respective groups pursuant to recasting of balance sheet or reconciliation of accounts inter-se between two groups is not subject matter of present appeal. CLB has not ascertained the liabilities. Hence this issue cannot be agitated before

this appellate court. However, without prejudice to the rights and contentions of the appellants, as per the balance sheet of Division A for the financial year 2002-03 filed with ROC, nothing is due or payable to Division A by Division B. Note 8 of the said balance sheet reads as follows:-

Claims are recorded in the books on receipt basis. Further there is no outstanding claims as on date of the balance sheet.

12. Submission is that, on the contrary, an amount of `4.25 lacs is due and payable by Division A to Division B as per recast balance sheet as on 15.6.2004 by the appellants Division B. In order to give legal flavour to the aforesaid submission, Ms. Pinky Anand, submitted that in a petition u/s and 398 of the Companies Act, appropriate directions can be issued to enforce and implement the family settlement. In support reliance is placed on the following judgments:-

(i) Ms Pushpa Prabhudas Vora and ors. Vs. Voras Exclusive Tools Pvt. Ltd. [2000 (101) Com Cas 300]

(ii) Trackparts of India Ltd. and Ors v. KN Bhargav and Ors & Smt. Radhika Bhargava and ors. Vs. KN Bhargava and ors. [(2000) 4 Comp LJ 310 (All)]

(iii) Sishunath Ranjan Dutta and Anr. Vs. Bhola Nath paper House Ltd. 1983 53 Comp cases 883.

(iv) S. James Fredrick and Anr. Vs. Mrs Minnie R. Fredrick and Ors. [2000 (101) Comp Cas 294]

(v) KN Bhargava and Ors. V. Trackparts of India Ltd. and Ors [2001 (104) Comp Cas 611]

13. She also submitted that in the case of Hansa Industries Pvt. Ltd and others Vs. Kidarsons industries Pvt. Ltd. (C. Appeal (civil) 1682/1999, decided on 13.10.2006) it was held that the family arrangements are governed by special equity peculiar to themselves and would be enforced if honestly made. "The principles which apply to the case or ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend." On tenancy rights the learned counsel relied upon the judgment in Kailash Financiers (Calcutta) Pvt. Ltd. (1982 Tax LR 2439).

14. Mr. Kishan Kumar, learned counsel appearing for the respondent on the other hand submitted that it was not open to the appellant to challenge the order dated 30.5.2002 passed by the CLB as the appellant itself had acted upon the said order by taking various steps pursuant thereto which are as under:-

(i) The appellants in company appeal no.4/2002 set up a company by the name

of Manu Machine Tech Pvt. Ltd. (refer affidavit filed on 15th July, 2003 in Company Petition No. 314/2000)

(ii) Again pursuant to the said order the statutory auditor after into consideration all the facts, came to a specific finding that Prakash Nath group namely Group B, would require to pay an amount of ` 99,14,286/- as on 30th June, 2003. The said certificate was sent to the company by the statutory auditor alongwith the certificate giving the details.

(iii) The said fact was also duly incorporated in the balance sheet as on 31st march, 2003 by way of a note which read as under:

The amount has thereafter been incorporated in the balance sheet year after year and the balance sheet as on 30th march, 2006 again specifically records as under:

20. The effect to the ruling of the "Company Law Board order dated 27.03.2002 has been given w.e.f 31st march, 2005 at the directions of the Board of Directors. Consequently, the assets and liabilities of Div. "B" have been removed the Balance Sheet and allocated to Manu Machines Tech (P) Ltd. An amount of ` 99,14,286/- has been shown as amount recoverable from Division B in the Balance Sheet as 31st march, 2005. The amount recoverable from Manu Machine Tech (P) Ltd. has been contested in the High Court and the matter is still pending.

15. Learned counsel further argued that the Auditors report submitted alongwith the Balance Sheet dated 5th September 2006 also specifically mentions and reiterates the fact that the amount of ` 99,14,286/- is recoverable from Division B namely from M/s Manu Machine Tech Pvt. Ltd. The relevant extracts read as under:-

3. The effect to the ruling of Company Law Board Order dated 27.03.2002 has been removed from the Balance Sheet and liabilities of Division "B" have been removed from the Balance Sheet and allocated to M/s Manu machine Tech. (P) Ltd. An amount of ` 99,14,286 has been shown as amount recoverable from Division "B" in the balance Sheet as at 31st March, 2006 effect of all adjustment have been made through the General Reserve Account. The previous year figures have also been rearranged to give the above effects. The amount recoverable from Division "B" (M/s Manu Machine Tech Pvt. Ltd.) has been contested in the Hon"ble Delhi High Court and the matter is still pending.

The Balance Sheet for the year 2003, 2004, 2005 and 2006 are already part of the records. The said details by way of note is also being mentioned in the Balance Sheet from year to year and have been mentioned for the year ending 2007, 2008, 2009 and 2010. In view of the aforesaid the only thing that was required to be done was that the Prakash Nath Group i.e Division B was/ is still required to pay the total amount working out of `1,23,05,063/- as on 31.12.2010 as per the auditors certificate attached and interest @ 18% is due ` 1,66,11,835/- till 31.12.2010. In spite of the aforesaid specific order "Prakash

Nath group has not only failed to make the payment but have also clandestinely removed assets of the company from the Division B and disposed it off. In this process the appellant group has not only over reached the orders of this Hon''ble Court but has also committed contempt and fraud for which they are liable. The respondent Company has also shown from the records that Mr. Prakash Nath and his group are liable to be proceeded for misfeasance and appropriate directions to be given for ascertaining the extent of loss the company has suffered and further directions to be given for Mr. Prakash Nath & his group to make good the same to the company.

16. Refuting the contentions of the appellant, it was submitted that these false and frivolous issues were raised only to prevent to payment of legitimate dues of the respondent. In this behalf, submission of the respondent proceeded in the following manner:-

That Balance Sheet of 30th March, 2003 does not show the figure of outstanding. This is incorrect as the same had been referred in the note and the reason also given as to why the said amount has not been incorporated. It may be pertinent to note that in the event the amount is said to be included in the body of the Balance Sheet as amount accrued, the company would have had to pay tax on the said amount even though the same had not been received. Further in view of the pendency of the proceedings and the appeal before this Court the said amount was considered appropriate to be mentioned in the form of a note. The issues relating to matters prior to 3.11.1992 are being raised/ reagitated. This is not only improper, but a deliberate attempt to prevent respondent company from getting its dues. A mere perusal of the petition before the Company Law Board would show that this was not an issue raised in the petitioner and cannot from the subject matter of the present appeal. Further, the records placed before the Court would clearly shows that the parties have agreed to a settlement by way of various documents executed from time to time and in the presence of an Arbitrator and that the only action for compliance was the payment of liabilities by Group B which was also agreed by way of execution of documents on 30.11.1992 to be ` 32,31,635/-. Reference could be made to the document dated 27.11.1994 duly signed by Mr. Prakash Nath wherein it had been agreed that the Division B would pay the liability of ` 32,31,635/- to the Bank. After the execution of the said document no other issue remain outstanding for determination by the Arbitrator and only the implementation of separation of the physically units were to take place. In the written submissions dated 29.4.2010, the whole of the issues which were before the Arbitrator and which were resolved and the partially implemented, have now sought to be raised again and sought to be reagitated. These issues cannot be made the subject matter of the appeal as they were not the subject matter of the Company Law Board Petition u/s 397 and 398 originally. Reference could be made to the petition itself. Reference could also be made to the reply filed by the respondents, recording the actions taken and the actions required to be taken as admitted by the parties. Also the issues pertaining to the directions given by the Arbitrator are subject matter of

Arbitration and could not be raised in the petition u/s 397 and 398 or in appeal before this Court, to seek further directions with regard to the Award passed in the said proceedings. Tenancy: This issue was never raised before the Company Law Board. The Land in possession of the respondent Company belongs to the individuals and the respondent company is only a tenant. The division in the units does not give any right to dispose of any part of the land as both the divisions and the company has no title or right to the said land. The Prakash Nath Group however, is clandestinely and illegally seeking to transfer the rights of the land held by Division B earlier. Transfer of such right would be void ab initio. At the end it was submitted that the appellant was liable to pay a sum of `99,14,286 as on 30th June, 2003 which amount had still not been paid and, therefore, the company petition filed by the respondent herein be admitted.

17. From the arguments of the appellant, recapitulated above, it becomes clear that the whole thrust is upon the family settlement entered into between the groups and the grievance made is that CLB has not given complete effect to this settlement while deciding the petition of the appellant herein u/s 397 & 398 of the Companies Act. In the process the appellant are also trying to raise the alleged pending issues in respect of other companies which were the subject matter of family settlement. The argument is that the Company Law Board had the inherent power to do the justice in the interest of company and the shareholders and principle of partnership could be applied in resolving the disputes between the family members. However, we have to keep in mind that the company petition filed by the appellant was only in respect of M/s Ashoka Manufacturing Pvt. Ltd. Other Two companies are/were the part of the family settlement, could not be part of the said company petition. These companies are separate entities in the eyes of law. While dealing with the aforesaid company i.e. M/s Ashok manufacturing Pvt. Ltd. which was brought before the Company law Board, the CLB could not venture into the affairs of other company particularly ABRO and ABI. Furthermore, reading of the developments which took place before the CLB after the filing of the Company petition and the manner the matter was heard from time to time would show that the parties were agreed to resolve their disputes which were required to be determined and the order dated 9.12.1997 was passed by the CLB. As per this order, the assets of the company in question had already been divided between the parties into Division "A" and Division "B" and taken over by the respective parties (pertinently, this is the position accepted throughout even in these proceedings). This order further records that the only dispute relates to the "apportionment of liability of the company which has to be apportioned between Division "A" and Division "B". This order really clinches the issue and clearly spells out the position which was taken by both the parties as on that day. They had accepted that the assets had been divided and only liabilities were to be apportioned between the two groups. In order to ascertain the liabilities and to arrive at the apportionment thereof, both the parties also agreed that this aspect could be examined by the Chartered Accountants. The agreement was also to the effect that liability as on date of

division was to be examined by the Chartered Accountants. The matter thereafter which remains to be settled was the extent of liability and apportionment there of between the two groups. For this purpose M/s Shankara Iyer & Co., Chartered Accountants were appointed to examine the books of accounts to identify the various items of liabilities shown in the books of accounts as on the date of the division of the company and give their recommendation on apportionment of these liabilities between these two divisions. The learned CLB recorded that keeping in mind this statutory aspect, the CLB recorded that when the parties themselves had agreed and confined the issue which remained to be settled to the apportionment of the liability, the issue whether a family agreement between the shareholders could be implemented through a petition u/s 397/398 of the Companies Act had become redundant. For this reason, the CLB did not examine the same.

18. I find myself in agreement with the aforesaid approach of the CLB and there is hardly any reason to turn around and take somersault by bringing the grievances relating to ABRO and ABI alleging that the funds of the company had been diverted to these two companies. That part, the CLB also recorded that the appellant could not substantiate the allegations about the diversion of funds. Paras 20 and 21 of the impugned order record the same in the following manner:-

20. In the background of this order we have to examine the allegation of the petitioners. Their main grievance is that late Ashok Nath of Division A had diverted the funds of the company to ABRO and ABI. As far as ABRO is concerned, the petitioners have not furnished the manner and mode of the alleged diversion. Since the company was procuring electronic parts from ABRO, the only manner by which the funds could have been diverted is by paying excessive prices for these electronic parts. No details have been given in this regard. The petitioners, it appears, seem to have raised this allegation purely based on the comparative percentage of profits of the company and that of ABRO. Another allegation is that ABRO had no assets or resources of its own and that the resources of the company were being utilized by ABRO and this has been denied by the respondents. Since ABRO is a limited company, the petitioners could have produced the Balance Sheets and Profit Loss Accounts of the company, from which we could have found out whether ABRO had its own resources. We note that even the respondents have not produced these documents. Further, the period of alleged diversion was between 1972-1990, that is over a period of 15 years during which period, the 1st petitioner was on the Board of the company. Therefore, in view of absence of proper material to substantiate this allegation of diversion, and the 1st petitioner was a director of the company during the relevant period, we cannot hold that the respondent shareholders had acted in a manner prejudicial to the interests of the company in its dealing with ABRO or that funds had been diverted to ABRO. As far as ABI is concerned, we find that the petitioners are also substantial shareholders in this company with one of them on the Board and that the 1st petitioner had signed the applications for getting approval of the CLB for payment of commission to

ABI. A party to a decision can never allege mismanagement, that too, after a period of a decade. Therefore, we do not find any merit in the stand of the petitioners that by paying commissions to ABI, the respondent shareholders had acted against the interest of the company. In regard to allegation that ABI was suing, the resources of the company is concerned, we reiterate our observation in regard to ABRO in this respect.

19. It is difficult to accept the contention that since report of the Chartered Account was not accepted by the parties and the Board also refused to act thereupon, the order dated 9.12.1997 did not lose its force. The Chartered Accountants were called upon to look into and examine the books of accounts to identify the liabilities as on date of division of the company and give their recommendations on apportionment of these liabilities between the two divisions. If the Chartered Accountant could not perform this task satisfactorily, that would not mean that the appellant became entitled to back out from the statement made on 9.12.1997 namely in so far as the assets of the company are concerned, they had been divided between the parties and only dispute related to the apportionment of the liabilities.

20. In the aforesaid backdrop when the report of the Chartered Accountants was not acceptable having regard to the fact that the matter was between the two groups of family and was pending since long, the CLB thought it equitable to direct equal distribution of the liabilities between the two divisions as on the date of division of the company into two groups more so, when the shareholding of each group was also equal. The direction was accordingly given to the statutory auditor of the company to recast the accounts of both the Divisions and for incorporation of new company to formalized the aforesaid division in two groups.

21. Having regard to the above, most of the arguments of the appellant relating to diversion of the funds to ABRO became redundant and meaningless. Still some comments are needed. As far as diversion of funds is concerned, the appellants are holding that this diversion occurred between 1976 to November, 1992 and has to be accounted for. The plea is *ex facie* farfetched, as obviously from 1976 till the date of family settlement, both the groups were incharge of the affairs of the company who were running the company jointly. No objection of any nature was made at that time and on the basis of same allegation, without any cogent prove to support the said allegations, the appellants want reopening of all those accounts for all these years which is an impossible and unattainable task. Similar would be the position in respect of claim for possession of logo and name of ABI, shareholding and consequential benefits in ABI pooling of ABRO for division and tenancy rights. The respondents appear to be correct that the appellants are trying to raise the issues relating prior to 30.11.1992 some of which were even the subject matter of the arbitration between the parties. Since these matter relate to other two companies, it would be more appropriate for the appellant to raise those disputes, if still permissible under the law by separate proceedings in accordance with law.

22. Insofar as tenancy rights are concerned, the stand taken by the respondent is that land in possession of the respondent company belongs to individuals and the company is only a tenant. The Division of unit does not give any right to dispose the land. In any case this is a question which can be determined in a separate civil proceedings and opportunity to that effect is granted to the appellant.

23. As a consequence, Company Appeal is hereby dismissed.

CO. PET. 160/2004

As pointed out above, in the beginning of this order, according to the petitioner M/s. Ashok Manufacturing Co. Ltd., on re-drawl of the balance sheet as per the directions of the Company Law Board, a sum of Rs.56,53,834.50p. is payable, by M/s. Manu Machine Tech Pvt. Ltd. apart from interest. Since the appeals stand dismissed, this company petition be listed for hearing before the Regular Bench on July 30, 2012.