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APO No.370 of 2011
ACO No.74 of 2011
ACO No.150 of 2011
IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

DHARAM GODHA & ORS.
VERSUS
UNIVERSAL PAPER MILLS LTD. & ORS.

BEFORE:

The Hon'ble JUSTICE SANJIB BANERJEE
Date : 19th April, 2012.

Appearance:
Mr. S. N. Mookerji, Sr. Adv.
Mr. Ratnanko Banerji, Adv.
Mr. Aniruddha Roy, Adv.
Ms. Ranjabati Sen, Adv.
Mr. Siddhartha Sharma, Adv.
Mr. Nirmalya Das Gupta, Adv.
..For the appellants

Mr. S. K. Kapur, Sr. Adv.
Mr. D. Basak, Adv.
Mr. Deepak Jain, Adv.
Mr. D. Sharma, Adv.
..For the respondent no.1.

Mr. Surajit Nath Mitra, Sr. Adv.
Mr. Arindam Mukherjee, Adv.
..For the respondent no.25

The Court : Though this appeal under Section 10F of the Companies Act, 1956 appears to be only another round of skirmish between two opposing groups in a matter pertaining to the control of a company, there are certain other striking features that engage the

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attention beyond the theatre of conflict between the parties. But to begin with, the disputes between the parties require immediate attention before the other aspect of significant public importance may be alluded to.

The appeal is against an order passed by the Principal Bench of the Company Law Board in New Delhi, dismissing proceedings instituted under, inter alia, Sections 397 and 398 of the Companies Act. The appellants were the petitioners before the Company Law Board (CLB) and are distraught at their claim for substantive reliefs failing on a demurrer some four years after the petition was lodged, particularly since the petition had been heard out before a previous chairman of the CLB who demitted office without delivering the judgment thereon. The appellants express their anguish at being debarred from urging their case on merits on the twin grounds that they did not meet the statutory qualification for maintaining the petition and that the proceedings were in abuse of process. They complain that upon the petition having previously progressed to final hearing – which was completed – it was no longer open to the CLB to slam the door on them for their not being able to demonstrate their collective share-holding strength in the first respondent company being in excess of the threshold mark of 10 per cent of its paid-up capital. The appellants insist that even if they were to fail on such score it had to be on a more protracted assessment of their entitlement in the share-holding of the company since they had asserted in the petition

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that they had the statutory requisite holding. The appellants contend that once a statement was made in the petition asserting the requisite percentage of share-holding in the company, the petition could no longer be rejected out of hand on a point of demurrer in such regard without the appellants being permitted to explain the circumstances in which they claimed to meet the statutory benchmark. They submit that when the charge on merits in their petition was that the respondents had oppressed the appellants and had mismanaged the affairs of the company to deny the appellants the shares that they were entitled to in the company, the issue was elevated to one that called for an adjudication on merits and could not be decided on a stray assertion by the beneficiary of the perceived wrong-doing to non-suit the appellants.

As to the other ground that has been found against the appellants, they say that the CLB erred in law in failing to appreciate the scope of the other proceedings involving some or all of the parties herein and the judgment impugned betrays complete ignorance of the principles referred to therein.

The disputes are between the appellant Godha group and the respondent Kala group. Though any reference to facts has to be kept to the barest minimum in the context of the present appeal, a summary may be culled out from the list of dates prepared by the contesting respondents.

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The company, Universal Paper Mills Limited, was incorporated in 1972 and it established a paper mill in Jhargram. In or about 1988-89, the first appellant, Dharam Godha, and his associates and concerns owing allegience to him came to control the company. Within a year of the first appellant coming to the helm of the company, its net-worth turned negative and a reference relating to the company was made to the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. In June, 1997 the company's paper mill was devastated by a fire. A claim was made by the company but it was rejected by the insurance company. The insurance claim was ultimately carried to the National Consumer Disputes Redressal Commission. In 2001, a secured creditor of the company instituted proceedings before the appropriate Debts Recovery Tribunal under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and joint receivers were appointed over the secured assets of the company, including its factory. The first appellant was one of the respondents to the DRT proceedings as a guarantor on behalf of the company. The appellants' primary complaint before the CLB in the proceedings under Sections 397 and 398 of the Act was that the Kala group had wrongfully wrested control of the shares in the company, caused the illegal transfer thereof from the names of the appellants and their associates to the respondents' names and engineered the ostensible alienation of the only valuable asset of the

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company, its paper mill. The paper mill is said to have been sold to the respondent No.25 in the CLB proceedings; such transferee was claimed to be under the exclusive control of the Kala group.

In March, 2004 the appellants or one of them or their associate or associates instituted a suit, CS No.37 of 2004, on the Original Side of this Court complaining of the Kala group having stolen some shares belonging to the Godha group and wrongfully causing the transfer thereof in the Kala group's favour for the purpose of usurping control of the company. On an interlocutory application at the initial stage of the suit, ad interim orders were refused to the plaintiffs. An appeal was filed from the relevant order but the same was ultimately not pursued and withdrawn. CS No.37 of 2004 has since been unconditionally withdrawn on March 5, 2008. But a lot transpired between the time when such suit was instituted and it was unconditionally withdrawn.

In a subsequent suit being CS No.113 of 2007 filed by the appellants in this Court sometime after the CLB proceedings had been instituted, the grievance made was that a further lot of shares had allegedly been stolen by the Kala group from the appellants and transferred in favour of the Kala group. By then, the Kala group was firmly at the helm of the company, the paper mill had been sold to the respondent No.25 in the CLB proceedings, the claim of the secured creditor

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in the DRT proceedings had been settled and substantial payments had apparently been made to other creditors of the company.

The proceedings under Sections 397 and 398 of the Companies Act were initiated in February, 2007. It was stated in the petition that the original suit instituted by the petitioners before the CLB, CS No.37 of 2004, would be withdrawn since the matters covered by such previous suit had been incorporated in the petition before the CLB. The second suit was filed by the appellants subsequent to the institution of the CLB proceedings and such suit remains pending though its continuation has been arrested since the writs of summons therein were not served on the defendants in the suit within any reasonable time of the institution of the action.

It is necessary to now refer to the proceedings before the Debts Recovery Tribunal (DRT), the National Consumer Disputes Redressal Commission (NCDRC) and the Board for Industrial and Financial Reconstruction (BIFR) since the orders passed in such proceedings weighed with the CLB in passing the impugned order. As noticed above, an initial order was made by the appropriate DRT on the application of a secured creditor that restrained, inter alia, the alienation of the fixed assets of the company. Though the secured creditor's claim was subsequently settled at the behest of the Kala group, the first appellant herein applied before the DRT complaining of its order having been violated

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by the company and its perceived wrongful management in the only meaningful asset of the company, the paper mill, being alienated in favour of the respondent No.25 in the CLB proceedings. On the first appellant's application before the DRT, an order was made on November 30, 2006. The tribunal reasoned that since the object of the order of injunction was to ensure that the claimant in the proceedings was not jeopardised by the sale of the respondent company's assets in the interregnum and since the basis for such injunction was rendered redundant upon the claim being satisfied, the tribunal was not called upon to go into the violation of its order at the behest of a guarantor in the transaction who had not contributed to the settlement of the claim.

In the proceedings arising out of the insurance claim, the NCDRC passed an order on July 27, 2010 which is also of some relevance in the context of the order impugned. The NCDRC found that the company was entitled to a sum of Rs.5 crore in respect of the insurance claim following the fire at its factory. Since there were disputes between the Godha and the Kala groups as to the right to control the company and, consequently, the right to receive such substantial payment, both sets of parties sought to establish the authority to receive the payment on the company's behalf before the NCDRC. It was in such context that the order dated July 27, 2010 was rendered where the commission directed that the insurance amount payable to the company should be kept with the CLB

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"so that its utilization is insured." The NCDRC did not, as it did not fall within the ambit of its authority and was otherwise not warranted in the circumstances, decide on the dispute between the two warring groups claiming exclusive rights to the management of the company. The NCDRC noticed that such issue was pending consideration of the CLB and it required the money to be made available to the CLB for disbursement thereof according to the directions of the CLB.

In the proceedings under the said Act of 1985 before the BIFR, the same dispute as to which of the groups was entitled to be in control of the company was raised. An order was passed by the BIFR on September 5, 2008 where the Board noticed that the company which was the subject of the reference before it had sold its assets, including its factory. The Board observed that the sale of the company's factory had been made prior to an order dated March 8, 2007 issued under Section 22A of the said Act of 1985 to restrain the company from disposing of its assets without the approval of the Board. The Board also observed that upon the sale of the manufacturing facility of the company, it had lost its industrial character and, as a consequence, the company was no longer amenable to the provisions of the said Act of 1985.

The BIFR order of September 5, 2008 was carried in appeal in the name of the company but with the Godha group seeking to espouse the company's cause. The Appellate Authority for Industrial and Financial

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Reconstruction (AAIFR) passed an order on January 14, 2010 which is of some relevance. As usual, the disputes between the two groups as to the control of the company took centrestage in the proceedings before the AAIFR and much of the order dated January 14, 2010 was devoted to such disputes. Paragraphs 20 and 27 of the AAIFR order are of some significance:

> "20. So far as the question of transfer of shares is concerned, allegations of fraudulent transfers, fabrication and forging of documents, violation of provisions of Companies Act, 1956 have been made by the appellant. It has been further argued that the matter relating to these issues is pending before the CLB which is the competent authority for adjudication of these matters. Therefore, we are of the view that it would not be appropriate for us to go into these issues."
>
> "27. Considering the totality of the facts and circumstances of the case and further considering the various arguments raised by the parties, we are of the view that the change of management from the Godha Group to Ashok Kala Group and subsequently M/s. Uniglobal Papers (P.) Ltd. without the permission of the BIFR cannot be recognised and is not binding on the BIFR. The question of transfer of shares is already pending before the CLB, subsequent transfer of property in favour of M/s. Uniglobal (P.) Limited after change of management is also not binding on the BIFR. Consequently, the BIFR can only recognise the management of Godha Group which existed at the time of filing of the reference and formulation of the DRS before the change of management of UPML to Ashok Kala Group and therefore, we are of the view that the management and possession of assets of the UPML should be restored to Godha Group. The amount of Rs.50 lakhs deposited by the Godha Group in an NLA account with OA is to be utilised for the revival of the company and if not, the same shall be refunded to them. We have also observed that the dismissal of reference is not proper after the declaration of the company as a sick industrial company in terms of Section 3(1)(o) of SICA. The reference cannot be de-registered once the company declared as sick. Therefore, under the circumstances, we allow the appeal, set aside the impugned order and remand the case to BIFR to consider the formulation of a fresh or modified DRS within a period of

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> 3 months from the date of communication of this order and, thereafter, proceed further to finalise the DRS in accordance with the law."

The AAIFR took a view, based on a judgment of the Delhi High Court, that once a reference relating to a sick company had been taken up by the BIFR, no change in its management could be brought about without the leave or knowledge of the BIFR. The AAIFR, thus, did not recognise the transfer of the management of the company to the Kala group, accepted that the Godha group was entitled to the management of the company and gave further directions for the revival of the manufacturing unit of the sick industrial company by brushing aside the suggestion that the factory of the company had been transferred in the interregnum to an apparent outsider.

Two sets of proceedings arose from the AAIFR order of January 14, 2010. The Godha group instituted proceedings under Article 226 of the Constitution of India before the Delhi High Court complaining of the AAIFR having failed to pass further orders as sought. No meaningful order was passed on such petition and it is unclear whether it remains pending. The Kala group carried the AAIFR order to this Court by way of a writ petition complaining of the impropriety thereof. On the writ petition filed in this Court, an ad interim order was passed requiring status quo to be maintained or, in other words, the management of the company to remain with the Kala group. Such order was carried in appeal. The Appellate

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Court retained the Trial Court order but made some key observations while disposing of the appeal by an order dated March 2, 2010. The Appellate Court noticed that the Kala group was in management of the company since or about 2001-02 and in the appropriate proceedings before the CLB, no adverse finding had been rendered against the Kala group till such date. The Appellate Court also noticed a deed of assignment of December 8, 2006 under which the factory of the company stood transferred to the respondent No.25 in the CLB proceedings. Paragraphs 18 to 20 of the appellate order are of immense significance not only in the context of the impugned order but also in the manner in which such order has been given a twist by the CLB in the judgment and order under appeal:

> "18. Since the proceedings before the Company Law Board are still pending it will be open to the parties to prove *(before)* the Company Law Board and upon conclusion of such proceedings to move the learned Single Judge for final hearing of the writ petition.
>
> "19. For the reasons aforesaid, we do not find any merit in this appeal. The appeal is, therefore, dismissed.
>
> "20. It is clarified we may not be treated to have expressed any opinion on the controversies which are the subject matter of proceedings before the Company Law Board. Neither this judgment nor pendency of the writ petition before the learned Single Judge shall preclude the Company Law Board from hearing and deciding C.P. No.201 of 2007."

It is, thus, evident that the NCDRC did not address the question of which of the two groups was entitled to be in the management of the company or entitled to receive the insurance claim since it noticed that the issue was pending before the CLB. In any event, the ordinary

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scope of the jurisdiction exercised by the NCDRC would not have permitted it to address the dispute as to the right to the management of a company in all completeness. Similarly, the appellate authority under the said Act of 1985 also observed that the issue as to the appropriate group's entitlement to be in the management of the company was pending before the CLB. However, the AAIFR felt that it was within the scope of its authority under the said Act of 1985 to undo what had been done in derogation of the statute. It was in such circumstances that it refused to recognise the change in management in the company effected during the pendency of the reference before the BIFR and, rather than reinstating the Godha group, the AAIFR recognised that only the Godha group could be legally in control of the management of the company. The AAIFR also understood it to be within its domain to undo a transaction of alienation of the company's manufacturing facility during the pendency of a reference under the said Act of 1985.

It must also be appreciated that though there is an ad interim order passed in proceedings under Article 226 of the Constitution of India arising out of the AAIFR order of January 14, 2010, the AAIFR order has not been altogether obliterated nor has the appellate order of March 2, 2010 to be seen as a complete substitute for the AAIFR order. The position is to be decided only after the writ petition is conclusively disposed of. It is only an ad interim order that governs the field.

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CP No. 201 of 2007 had been taken up for final hearing in the year 2009 and judgment reserved at the conclusion of the hearing. It transpires, however, that the then Chairman or officiating Chairman of the CLB demitted office without delivering the final judgment. In course of the CLB proceedings, upon the sum of Rs.5 crore being deposited with the CLB following the NCDRC direction, there were some clashes between the rival factions as to the manner of utilisation of the money. Appeals from apparently innocuous orders passed by the CLB in such regard were also carried to this Court under Section 10F of the Companies Act. Ultimately, in one of the several appeals, this Court directed the Sections 397 and 398 proceedings to be finally disposed of and a block of dates was assigned by the CLB in April of 2011 for such purpose. Just prior to the final hearing of the CP No.201 of 2007 being taken up finally, the first respondent before the CLB filed an application in the nature of demurrer seeking dismissal of the petition without the merits thereof being looked into. In the words of the CLB in the opening paragraph of the impugned judgment, such application was founded "on the principles of O.VII Rule 11 of the CPC, res judicata, constructive res judicata, estoppel, acquiescence, O.II Rule 2 of the CPC, suppression of material facts etc." The CLB recognised that such matters as had been referred to by it in its description of the demurrer application, including matters as to estoppel, acquiescence and suppression of material facts, could be taken up and dealt with without

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any assessment of facts or any investigation into the allegations levelled in the petition before it. The appellants say that in the very approach adopted by the CLB, it is evident that it failed to appreciate the scope of the application or the tools that were necessary for the assessment thereof. The appellants insist that the judgment impugned is perverse in its every sentence and betrays an abject inability on the part of the relevant member of the CLB in adjudicating a matter of the particular type.

One further matter needs to be referred to before returning to the judgment and order impugned and the manner in which the CLB proceeded to evaluate the preliminary challenge. Upon the application of the first respondent before the CLB for rejection of the company petition being filed some four years after it had been instituted and after the matter had once been heard out on merits but the judgment not delivered for no fault of the parties, the CLB opined that the application would be taken up along with the hearing of the company petition on merits. The Kala group rushed to this Court from such order, convinced this Court that serious questions of law arose in such appeal and obtained an order that the application in the nature of demurrer had to be considered first by the CLB. The present appellants did not relent, but carried the Section 10F order by way of a special leave petition to the Supreme Court. The special leave petition was not entertained and was summarily dismissed but the Supreme Court observed, in the order dated May 4, 2011, as follows:

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> "However, we direct the Company Law Board to expeditiously hear and dispose of pending Company Petition No.201 of 2007, preferably by 30th June 2011."

Whatever may have been the effect of the order passed by this Court under Section 10F of the Companies Act for the demurrer application to be heard out first, it is evident that the entire proceedings were directed by the Supreme Court to be disposed of by June 30, 2011. The CLB, however, considered only the demurrer application and rendered judgment thereon on June 30, 2011, the very last date of the deadline set by the Supreme Court.

The appellants suggest that the CLB misdirected itself and it is apparent from the face of the order impugned that the principles as to *res judicata,* issue estoppel and abuse of process were either foreign to the concerned member of the CLB or the considerations relevant for assessing the applicability of such principles were unknown to such member. The appellants refer to the inherent inconsistency in the impugned order in that it finds the appellants guilty of abuse of process and multifariousness and yet permits the appellants to launch similar proceedings at a later date. The appellants refer to the computer-age judicial malaise of copy-paste that is evident in several paragraphs of the impugned judgment and suggest that at least four paragraphs from a previous judgment rendered by the same member that had been set aside by the Delhi High Court in

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appeal have been verbatim pasted on a matter of law and included as part of the impugned judgment.

In the first 16 paragraphs of the impugned judgment, the CLB has noticed the genesis of the disputes between the parties and the tussle over the control of the company and the spilling over of such fight in the different jurisdictions that has already been referred to hereinabove. Paragraphs 17 to 27 of the impugned order deal with the submissions of the parties and appear to bear a close resemblance to the written submissions filed by the two sets of parties that have been disclosed in the present appeal. The judicial or quasi-judicial exercise in the judgment begins in right earnest only from paragraph 28 thereof. But before referring to paragraphs 28 to 31 of the impugned judgment, it must be mentioned that most of paragraphs 32 to 34 of the impugned judgment appear to have been physically lifted – the copy and paste disease – from a previous decision of the same member of the CLB in a judgment rendered on November 24, 2010 in *Chiranjit Khanna vs. Khanna Paper Mills Limited,* CP No.61 of 2007. Such order of November 24, 2010 was taken up on appeal under Section 10F of the Act before the Delhi High Court. The High Court, by its judgment of April 20, 2011, set aside the judgment and order of the CLB. The substance of the High Court opinion was that a question of eligibility under Section 399 of the Companies Act would be, in most circumstances, a mixed question of fact and law. In other words, when a

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Section 397 or Section 398 petitioner before the CLB asserts its requisite qualification under Section 399 of the Act, unless such assertion is clearly demurrable on a point of law, in the sense that such assertion is utterly unsustainable in any circumstances, the assessment of the qualification, and the consequent right of the party to institute the proceedings for oppression and mismanagement as a shareholder of the company, has to be based on an investigation into the facts pleaded in support of the qualification. Notwithstanding the view taken by the concerned member of the CLB in the *Khanna* case having been set aside, the legal basis of such overruled order has been reiterated without any application of mind in the judgment impugned in the present proceedings.

Upon considering the brief facts pertaining to the disputes between the two sets of parties and the several proceedings referred to hereinabove, the CLB rendered its substantive findings at paragraphs 28 and 29 of the report that need to be reflected herein in some detail, if only to demonstrate how every sentence and the next therein cannot be supported on the basis of elementary legal principles and the most rudimentary judicial acumen :

> "28. When C.A. No. 210/11 was mentioned on 13.04.2011 the date on which the matter was fixed for final hearing, on the statement of the counsel that the C.P. had earlier been heard on merits by the then Chairman, this Bench proceeded to hear the C.A. No. 210/11 along with C.P. on merits. Pursuant to Hon'ble Calcutta High Court's order, C.A. No. 210/11 has been

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heard first. Considering the rival submissions and the case laws cited by the parties on applicability of the principles of Order VII Rule 11, res judicata, constructive res judicata, issue estoppel, acquiescence, Order II Rule 2, it is noted that except that the Pradip Kumar Sengupta's case (Supra) is no longer good law, the judgment has been set aside by the Hon'ble Calcutta High Court, there is no quarrel as to what the ingredients of res judicata and issue estoppel as explained in detail in the case of Mc Lkenney (Supra) are, and as to what constitutes constructive res judicata and what needs to be seen for applicability of Order VII Rule 11, and Order II Rule 2 of the CPC. On the Touchstone of these principles, when the facts of the instant C.P. as argued, are tested, it is found that the Applicant's contention that the three issues raised in the C.P. as per the pleadings and the reliefs sought pertain to transfer of shareholding, change of management and sale of assets, which issues have been raised, pleadings considered and reliefs dealt with in the Judgment and Order dated 14.01.2010 by Hon'ble AAIFR in Appeal No. 190 of 2008 read with orders passed by Hon'ble Calcutta High Court, affirmed till the Hon'ble Supreme Court of India and Hon'ble Delhi High Court remains uncontroverted. DRT's Judgment and Order dated 30.11.2006 dismissing an application on behalf of P-1, seeking restraint orders on sale of assets has attained finality as no appeal was preferred against that order. NCDRC's Judgment and Orders have been upheld till Hon'ble Supreme Court. What the Respondents/ Petitioners have contended is that these fora are not the Competent Courts to deal with the acts giving rise to oppression of the members and mismanagement of the affairs of the R-1 Company which issues, the CLB alone is the Competent Court to consider and adjudicate upon (though the Applicant has drawn my attention to certain averments in suit and these other proceedings wherein the Respondents/ Petitioners have pleaded otherwise). Much has been argued about the Competent Forum. However, there is no dispute that CLB has the jurisdiction qua the issues in challenge in the C.P. But the Respondents/ Petitioners being dominus litus have made their election – they have chosen their fora and have been pursuing and insisting on the same reliefs which are

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sought in the C.P. on the same cause of action challenging all the issues. In 2004 suit they challenge one issue, they fail to get relief, try their luck by filing Company Petition No. 201/2007, but decide not to mention the C.P. for 10 months and file another suit in 2007 challenging the remaining issues, do not disclose filing of Suit of 2007 to the CLB when they inform withdrawing of Suit of 2004 requesting CLB to proceed with the matter, Suit of 2007 is filed prior to mentioning of the C.P. No. 201/07. CLB is not informed, nor do they inform the Hon'ble High Court at Calcutta that there is a prior Suit pending. It is not a case of prior suit(s) alone. There are parallel proceedings. There are other proceedings as well. All proceedings have not been disclosed. If this is not abuse of the process of the court, what else is abuse of the process of the Court? What if the CLB had disposed of the C.P. during the pendency of the self same grounds in other proceeding arriving at conflicting decisions. Can this be permitted is a question rightly posed by the Applicant. And can the issues be still decided by the CLB in a manner different from what has been decided by the BIFR/ AAIFR and NCDRC ? W.P.(C) No. 530 of 2010 challenging AAIFR's order dated 14.1.2010 in so far as issue qua transfer of shareholding is to be tried before the CLB, evidences abandonment of cause of action. Before the Hon'ble High Court in W.P. 3085/2010 it has already been pointed out that all issues raised before the AAIFR are sub-judice in C.P. AAIFR had directed restoration of assets to Godha Group but such order was stayed by Calcutta High Court in W.P. 3085/10, an appeal from that order had been dismissed by Double Bench on 2.3.2010. Principles of rs judicata, constructive res judicata and issue estoppel apply.

"29. It has been rightly contended by the Applicant Company that the petitioners are pursuing parallel proceedings, the respondents/ petitioners are guilty of forum shopping by filing multiple petitions before different for a based on the same cause of action. These proceedings are being actively pursued by the Respondents/ Petitioners. The present Petition is, therefore, hit by Res-judicata and also by the "Doctrine of Comity of Judgments" that is likely to result in conflicting

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decision by the independent judicial authorities. Civil Suit No. 113 of 2007 wherein sale of assets has been challenged is hit by the principles of O.II Rule 2 of the CPC. Suit was got restored on 23.7.2010, pursuing the matter before the Hon'ble High Court abandoning the cause of action before the CLB. In this matter the doctrine of Election applies as the petitioners have already made their election of fora. The "doctrine of election" is a branch of "rule of estoppel", in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both." Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election. The two Civil Suits prior to mentioning of the C.P. No. 201/2007 contain the challenge of all issues which have been agitated in the C.P. Suits (now Suit No. 113/07 only since Suit No. 37/04 stands withdrawn without liberty to file a fresh suit, in any case a fresh suit has also been instituted) are prior in time. Continuation of the Suit and agitating of the issues before different fora including the AAIFR of the same issue which are in the C.P. has not been discontinued by withdrawing those proceedings. The Respondents/ Petitioners have pursued and are pursuing parallel proceedings before BIFR/ AAIFR, Civil Suits in Hon'ble High Court, DRT, NCDRC, Writ Petitions for the same cause of action, seeking same reliefs, calling upon every Court to adjudicate upon same issues. There is multiplicity of proceedings which would result in conflicting orders gravely impairing the sanctity of orders by different fora. Whenever there are parallel proceedings before concurrent judicial authorities, one proceedings is stayed in order to avoid conflicting orders, but there is no bar on instituting such proceedings except where such proceedings are instituted with a view to abuse the process of Courts. This is clearly an abuse of the process of the Court as rightly contended by R-25. Abuse of process does not depend upon success or failure, it depends upon the act and intention of the litigant."

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The CLB paid lip service to the principles of *res judicata* (curiously written as *'rs judicata'* in at least one place), constructive *res judicata* and issue estoppel without attempting to assess how such principles were applicable to the facts of the matter before it. It is elementary that the applicability of the doctrine of *res judicata* or the principle of issue estoppel would depend on several factors, including the scope of the previous proceedings, the finality of the decision on the matters in issue in the previous proceedings, the ambit of authority of the judicial or quasi-judicial forum in the previous proceedings, the nature of the parties involved in the previous proceedings and like matters. Apart from the fact that nothing has been decided in the two suits instituted by the appellants before this Court or in the NCDRC order requiring the money to be transmitted to the CLB or in the AAIFR order as it stands modified today by the March 2, 2010 judgment of a Division Bench of this Court or the DRT proceedings, on the face of the relevant orders, it is equally uncomplicated to appreciate that the issues that arose upon the allegations made in the company petition before the CLB and the denial thereof could not have been adjudicated upon by any of the other fora in the previously instituted – and some not concluded – proceedings where the two groups of parties were, among others, either parties or had been heard. The impugned judgment does not reveal that any effort was expended by the CLB in assessing the applicability of the principles or the

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maxims. There is only an omnibus subjective satisfcation recorded that it was the opinion or the perception of the member of the CLB that one or more of the doctrines or principles referred to in the judgment would be applicable and the plea carried to the CLB by the appellants herein would fail at such high altar. One would search the impugned judgment in vain to gauge as to which principle would apply for what factual reason and to what degree. The impugned judgment proceeds on the footing that a brief outline of the disputes between the parties and the reference to a few legal doctrines was sufficient exercise of the judicial function that the CLB was called upon to perform.

There are sentences in paragraphs 28 and 29 of the judgment impugned that betray, unfortunately, a complete ignorance of the member as to the matters that were being considered, if the other sinister insinuation made by the appellants is to be disregarded. There is a line in paragraph 28 where the member says, "(*t*)here is no quarrel as to what the ingredients of res judicata and issue estoppel... are ..." However, the member does not elaborate on the ingredients of such legal principles.

If the NCDRC did not decide the issue as to which group was entitled to the management of the company, if the AAIFR order as it now stands modified by the appellate order of March 2, 2010 has expressly left the CLB free to decide all matters before it and if the DRT order refused to go into Godha's allegation that the only meaningful asset of the company

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had been alienated despite the DRT injunction thereon, it is baffling that the CLB abdicated an authority vested in it by law in referring to some doctrines without the least indication of any comprehension thereof and throwing out a matter that it was statutorily obliged to consider.

There is a further line in paragraph 28 of the impugned judgment to the effect that "*(t)*here are parallel proceedings . . ." The CLB found that the two suits filed by the appellants herein in this Court and the matter before the CLB were parallel proceedings. It is true that the expression 'parallel proceedings' is used loosely in legal parlance, but parallel proceedings in the true sense of the expression would imply that the matters directly and substantially in issue in the two sets of proceedings are identical or so nearly resembling each other as are incapable of any distinction. To undertake an exercise to ascertain whether two sets of proceedings are parallel or not, the pleadings in the two sets of proceedings are required to be referred to, the issues that arise in the two sets of proceedings are required to be looked into and, thereafter, a conclusion drawn as to whether a decision on the one would render meaningless the continuation of the other. There is no attempt at such assessment by the CLB in the impugned order. In the middle of some other matter and some other context a line surfaces in the impugned judgment with all the profundity that the CLB could muster that the several

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proceedings were parallel proceedings. There is nothing before and little else later to justify the conclusion that the two suits instituted in this Court and the petition before the CLB were parallel proceedings. Assuming that the two suits filed by the appellants in this Court and the CLB petition were parallel proceedings, it mattered little in the context. No decision – far less any final pronouncement - had been rendered on the merits or otherwise in the two suits. The principle embodied in Order II Rule 2 of the Code would not apply since the scope of the several proceedings were dissimilar; yet the CLB found the proceedings to be parallel and non-suited the appellants.

There is a further line at the end of paragraph 28 of the impugned judgment that reflects the CLB's understanding of the appellate order of March 2, 2010. In the writ petition instituted in this Court, the order of AAIFR was stayed and an appeal from the order staying the AAIFR decision was dismissed. There is no reference in the impugned judgment to paragraphs 18 to 20 of the appellate order of March 2, 2010 that has been quoted hereinabove. It probably went beyond the CLB that by the express direction contained in a Division Bench order of the Appellate Court in the relevant company petition, the CLB had been directed to consider CP No.201 of 2007 unfettered by the observations or the directions in the order passed in the writ proceedings and unconstrained

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by the pendency thereof. This appears to have been completely lost on the CLB.

In the opening sentence of paragraph 29 of the impugned judgment, the CLB has found the appellants guilty of "forum shopping by filing multiple petitions before different for a based on the same cause of action." If such unintelligible sentence is accepted at face value and the English therein is disregarded, it appears that the CLB found that the appellants had approached divers fora by way of several proceedings for the same cause. The NCRDC proceedings were instituted by the company following the rejection of an insurance claim. The tussle as to the entitlement of either group to the management of the company was not integral to the matter before the NCDRC nor had such proceedings been instituted by the appellants herein for the purpose of asserting or establishing their control over the company. The DRT proceedings had not been launched by the appellants. If the CLB had condescended to see the 1993 Act, it may have dawned on it that proceedings before the Debts Recovery Tribunal can be instituted only by such banks and financial institutions as are accorded the privilege by the said Act of 1993. The reference to the BIFR was not made by the appellants for the purpose of trying to wrest control of the company; it is a statutory obligation under Section 15 of the 1985 Act to report and refer an industrial company to the Board set up by the said Act of 1985 upon the net-worth of such company

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turning negative or it otherwise becoming a sick industrial company within the Section 3(1)(o) of the Act. It is true that the two suits were instituted by the appellants herein, alleging theft of the shares and the wrongful usurpation of control of the company by the Kala group. But the scope of a suit and of similar allegations carried by way of a petition under Sections 397 and 398 are so utterly different that it is insulting for a High Court to enlist them in an appeal from an order passed by the CLB under Section 10F of the Act. The extent of the authority of the CLB qua the company which is the subject-matter of the proceedings under Sections 397 and 398 of the Act is more expansive than the jurisdiction of a civil court in a suit. In proceedings under Sections 397 and 398 of the Act, the interest of the company is paramount; illegal steps taken in the interest of the company may be condoned and the exercise of legal rights is subject to equitable considerations. There are judgments legion on such aspect and only two – those reported at AIR 1965 Guj 96 and AIR 1982 Cal 94 – need be mentioned in such context.

The several proceedings that the CLB noticed as being parallel to the one that was launched before its were, in fact, of different and varying imports and certainly not of similar or identical scope as that of the matter pending before the CLB. The orders passed in the proceedings before the NCDRC, the DRT, the AAIFR or the writ petitions arising out of order passed by the AAIFR did not decide any matter which was or could

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have been or ought to have been in issue in CP No.201 of 2007. Indeed, the relevant orders as referred to above would show how the other authorities skirted the main issue between the two warring groups, if only in deference to the fact that such issue was pending consideration before the CLB.

At paragraph 30 of the report, the CLB drew from the wealth of reasons reflected in paragraphs 28 and 29 of the judgment to conclude that it was "not a case of merely parallel proceedings or prior suits wherein subsequent suits/proceedings can be kept in abeyance . . . a litigant cannot try his luck everywhere and all the time. There is suppression of material facts and abuse of process of law . . . such an abuse has to be put to an end." The sentiment expressed is most profound, the words are wisely said and there can be no manner of doubt that upon a litigant being found to indulge in multifariousness and abuse of the judicial or quasi-judicial process, the harshest of consequences should visit such litigant. The question is whether the judicial or quasi-judicial emotion reflected in the passage of 30 of the judgment matched the facts of the matter that was before the CLB. A judicial view has to be expressed on a set of facts by referring to the facts and applying the legal principles thereto; a judicial sermon with no relevance in, or reference to, the facts would be like the six blind men touching an elephant in its different parts to draw their varying conclusions on the make-up of the animal.

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It is evident from the impugned judgment that apart from the narration of some basic features of the matter, the CLB was so engrossed with the allegation that the petitioners had abused its process and had indulged in multifariousness, that it presumed that it was so and restricted the exercise of its judicial exercise to finding a few legal cliches to hang the appellants therefrom. It does not appear that the image of the case that the CLB saw bore any resemblance to the matter that the petitioners before it carried to the forum.

At paragraph 31 of the impugned judgment, the CLB has proceeded to consider the question of the eligibility of the petitioners under Section 399 of the Companies Act. In the previous paragraphs the CLB had noticed the submission on behalf of the appellants that the question of the maintainability of the proceedings under Section 399 had, per force, to be considered only on the basis of the averments in the petition. The opening paragraph of the impugned judgment records that only the demurrer application had been taken up and not the main petition. In such circumstances, the only relevant material that ought to have weighed with the CLB in course of the demurrer application was whether the petitioners had asserted in the petition that they had the requisite qualification under Section 399 of the Act. Of course, if such assertion was demonstrably false on any legal premise, the CLB was well within its authority to treat it as a point of demurrer. If, however, there was the slightest assessment

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necessary on facts, the matter ought to have been postponed for adjudication on merits and was incapable of being considered as part of a plea of demurrer. It does not appear from paragraph 31 of the impugned judgment that such considerations crossed the mind of the relevant member. It must also be remembered, in the context, that paragraphs 32 to 34 which appear to deal with the legal aspects of the objection as to the share qualification under Section 399 of the Act, have been physically lifted from a previous judgment of the same member which had long been set aside in appeal.

At paragraph 34 of the impugned judgment, the CLB has expressed a view that it could not keep its eyes shut to the averments made in the previous suit filed by the petitioners before the CLB. Three paragraphs from the plaint in CS No.37 of 2004 have been quoted in the judgment and the conclusion thereafter is that the petitioners before the CLB made "false, incorrect, incomplete and contradictory statements . . .on oath."

It may be presumed for the sake of argument that the allegations in the plaint relating to CS No.37 of 2004 were false. But that would not, by itself, permit a judicial or a quasi-judicial authority in seisin of any subsequent proceedings to dismiss the subsequent action. In any event, there was no finding rendered by the Court in CS No.37 of 2004 as to the veracity of the allegations contained in the plaint relating thereto.

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Such suit was unconditionally withdrawn by the petitioners before the CLB subsequent to the petition before the CLB having been filed and in accordance with the indication in the petition therein that the previous suit would be withdrawn.

The matter can be viewed from another perspective. The CLB may have proceeded on the basis that the first allegation made by a litigant on a particular matter had to be taken as correct. In such event, the allegations contained in the petition before the CLB, to the extent they were at variance with the contents of the plaint in CS No.37 of 2004 could be regarded to be false or untrue. But that would not entitle the CLB, despite its surmise, to dismiss the action before it before allowing the party which had made the false allegations an opportunity to establish the veracity thereof. The scope of the limited nature of assessment or adjudication that is conducted on a demurrer application appears to have been lost altogether on the CLB rendering the impugned judgment.

It is evident from paragraph 28 of the impugned judgment that the CLB was of the view that the petition before it was hit by the principles of *res judicata*, constructive *res judicata* or issue estoppel and, as such, could not progress. Despite rendering such finding, upon taking up the question as to whether the petitioners before the CLB had the requisite numerical qualification under Section 399 of the Act, the CLB felt that a composite claim for rectification of the share register and oppression and

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mismanagement should not have been made and permitted the appellants to carry their grievance as to their shares being stolen by the other group by way of a fresh petition for such purpose. If, according to the CLB, the issues that arose or were likely to arise in the company petition had already been conclusively decided in previous proceedings for the principles of *res judicata* or constructive *res judicata* or issue estoppel to apply, it flies in the face of reason and logic that the CLB would still grant permission or leave to the petitioners before it to resurrect a matter that had already been previously concluded against them.

The impugned judgment betrays a total non-application of mind and worse. The CLB was not aware of the tools that were available to it or the tools that were necessary for the assessment. Both the method and methodology appear to be awry. It is here that the larger question indicated in the opening paragraph of this judgment arises. Many eminent lawyers have spent their entire professional careers trying to fathom the width of the spectrum that is indicated in the "just and equitable" clause that figures in Section 397 of the Act. Proceedings under Sections 397 and 398 of the Companies Act are an alternative to winding-up and are founded on the principles of justice and equity. The outsourcing of judicial work which has become the fashion of the day has resulted in several classes of matters that were previously before the Court now being parked with tribunals manned by bureaucrats or non-judicial members with no legal

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training or acumen. What is evident from the impugned judgment is bound to follow if matters as to justice and equity that many have spent their lives without fully comprehending are left to tribunals manned by the uninitiated to pronounce upon; justice then becomes the casualty and inequity the order of the day.

The order impugned and the judgment in support thereof are set aside. If the observations here appear to be harsh to the CLB or the concerned member it is because the facts warrant it. There seems to be an obvious systemic flaw that needs to be addressed immediately.

The respondent no.1 will pay costs assessed at 3000 GM to the appellants. The matter will now be heard by the CLB afresh and it will be open to the CLB to arrive at the same conclusion as in the impugned order on the objection pertaining to the appellants' share qualification but with cogent reasons in support thereof. At any rate, the matter should not be taken up by the member who had rendered the judgment and order impugned in the present proceedings. It is desirable that since the Eastern Region Bench of the CLB is now fully functional and the matter pertains to the eastern region, that the Company Law Board makes it convenient for the Eastern Region Bench to take up and dispose of CP No.201 of 2007 as expeditiously as possible in accordance with law.

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APO No.370 of 2011 succeeds. ACO No.74 of 2011 and ACO No.150 of 2011 stand disposed of.

Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(SANJIB BANERJEE, J.)

bp/kc/sg/sd.