ACO No. 169 of 2012
APO No. 341 of 2012

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

ABA BUILDERS LIMITED AND OTHERS

-Versus-

SMT ANJULA NAGPAL AND OTHERS

For the Appellants:	Mr S. N. Mookerjee, Sr Adv., Mr Ratnanko Banerji, Adv., Ms Swapna Choubey, Adv.
For the Respondents:	Mr Anil Kumar Seth, Adv., Ms Sarada Hariharan, Adv.

Hearing concluded on: October 3, 2012.

BEFORE

SANJIB BANERJEE , Judge
Date: October 9, 2012.

SANJIB BANERJEE, J. : –

The appellants in this appeal under Section 10F of the Companies Act, 1956 are the respondents in a petition under, inter alia, Sections 397 and 398 of the Act before the Company Law Board (CLB). The first appellant is the concerned company and the other appellants are the persons in apparent control of the first appellant. The appellants claim that though the disputes with the respondents in the proceedings before the CLB have been settled and the respondents' shares in the appellant company transferred to the nominees of the persons in control of the company, the CLB has declined to dismiss the petition complaining of oppression and mismanagement despite the appellants' application therefor.

At the time that this appeal was received on August 10, 2012, the primary legal issue canvassed by the appellants was that the CLB could not have looked beyond the executed terms of settlement to record that there were other disputes between the parties to the settlement that were required to be resolved. The question of law that is of pre-eminence and dislodges the legal issue initially noticed is as to whether proceedings under Sections 397 and 398 of the Act may be continued by the petitioners who have relinquished their shareholding in the subject company during the pendency of the proceedings. To be slightly more precise, the primary question of law, on the facts of the present appeal, is whether a petition under Sections 397 and 398 of the Act comes to an end upon the petitioners therein transferring their shares in the subject company and the transferees not seeking to pursue the matter. The ancillary issue that arises is as to the jurisdiction of a tribunal established by law that does not have the plenary or residuary authority that a regular court possesses.

The respondents herein launched the petition in September, 2010, before the CLB, Kolkata Bench, complaining of their being oppressed as shareholders of the company and mismanagement in the affairs of the company. In March, 2012, the respondents before the CLB, who are the appellants herein, applied for the dismissal of the petition filed before the CLB by taking on record a settlement said to have been executed on September 17, 2011. Two sets of affidavits were filed by the first respondent herein to the appellants' application before the CLB. The parties here have expended considerable effort in seeking either to establish that the disputes qua the company stood resolved by the settlement of September 17, 2011 or that there was no settlement at all; and it appears that since a similar exercise must have been carried out before the CLB previously, the CLB got taken in by the same and chartered a course which may have been both beyond what was necessary and outside the realms of its authority. The appellants, however, insinuate something sinister. They say that their application was adjourned on specious pretexts before the regular member in charge of the

Eastern Region Bench; that the matter remarkably ripened for hearing before a technical member who took charge for a short tenure; and, the inference drawn by the member from the recorded facts is so outlandish that a bit more than mere arbitrariness and unreasonableness has to be attributed to the order impugned. But it is unnecessary to bark up such fruitless tree when the legal question that has arisen can be answered on the basis of a solitary admitted fact.

The respondents held, at the time of the institution of the petition, 12,96,250 equity shares of Rs.10/- each and 2,07,200 preference shares of Rs.10/- each in the company. The appellants claimed in their application for the dismissal of the petition that the entirety of the equity and preference shares held by the respondents herein had been transferred to the nominees of the appellants in control of the company for valuable consideration upon share transfer forms relating thereto being duly executed. Such assertion of the appellants herein in their relevant application is noticed in the second paragraph of the impugned order of July 13, 2012. The disputes between the parties, as evident from the pleadings, have been discussed in the third, fourth, fifth and sixth paragraphs of the order impugned. Since the admitted fact which provides the key to the legal issue that has arisen is evident from the recording of the matters in issue in the CLB order of July 13, 2012, the relevant paragraphs need to be seen:

> "3. In the reply to the present application, the petitioner Smt. Anjula Nagpal stated that she had no idea or knowledge of signing a final settlement agreement and signing the share transfer forms. Further, she submitted that as per documents filed by the respondents, the share transfer forms are dated sometimes in May-June 2011 whereas the payments against which the transfers have been shown, have been made in September, 2011. The petitioner has also stated that she has not signed or executed any agreement knowing it to be the final Settlement Agreement. Further, the petitioner has submitted that she signed the agreement dated 17 September, 2011 based on the explanation and representation of the respondents that it was an "Initial Intent of Settlement" and she is suffering from lack of vision and was denied any assistance of her choice to verify the document.
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> "4. The respondents in the rejoinder stated that the petitioner no. 1 has suppressed material facts in filing the replies and has made false and

incorrect statements. Further, the respondent stated that prior to the signing the Terms of Settlement dated 17.09.2011, the petitioners had signed a shareholders' agreement in May, 2011 wherein the consideration for transfer of the shares was also mentioned at ₹ 12,03,47,715/-. The respondent has also stated that the petitioners have received their due consideration for transfer of the shares and are estopped from denying the transfer of settlement. It has been denied that the petitioner had extremely poor vision and other physical problem and was misled into signing some documents with the intention to fraud or cheat the petitioner.

"5. Again in the rejoinder, to the rejoinder of the respondent dated 11th June, 2012, the petitioner has stated that shareholders' agreement bearing the month of May, 2011 was not made available to her at any point of time and the respondents neither filed nor mentioned about this agreement. The said draft agreement was signed as blank agreement and along with that, some blank but signed transfer deeds and share certificates were exchanged with a commitment to make a final agreement in the similar form containing facts and figures after final settlement to exchange properly and legally executed share transfer deeds and the fair value of shares is still to be determined. Apart from this, the petitioner has stated that the copy of the letter purported to have been signed by the petitioner and addressed to the Regional Director, Eastern Region of the MCA and addressed to the Registrar of Companies West Bengal and to the Secretary MCA as filed by the respondents on 28/03/2012 along with the Terms of Settlement dated 17/09/2011 contain imitation of the signature of the Petitioner and that the petitioner has never signed/written/sent any such letter. The **annexure B** to the affidavit is the Forensic Report which indicates forged signature of the petitioner.

"6. In reply to sur-rejoinder affidavit of the petitioner, the respondent has denied and disputed that the shareholders agreement of May, 2011 is a draft agreement or that it is without data or it was to be followed by a final document. Further, the respondents stated that the purported Memorandum of Understanding dated 14th March, 2006 is wholly irrelevant for the instant purpose. The respondents also denied and disputed that the terms of settlement dated 17th September, 2011 is not legally valid or cannot be taken on record. Further, it is also denied and disputed that the document is not signed by the petitioner or that the signature of the petitioner is a false and fraudulent imitation of the signature of the petitioner or that it is an act of forgery or cheating or fraud. It has also been denied and disputed that there was any necessity to file shareholders agreement along with settlement dated 17th September, 2011."

Against such recording of the CLB in the order impugned, the relevant averments in the two affidavits filed by the first respondent herein need to be noticed. To begin with, both affidavits used in opposition to the appellants' application were filed by the first respondent herein on her behalf and not on behalf of the two other petitioners before the CLB. However, there was no conflict of interest between the first petitioner before the CLB and the two other petitioners and the submission on behalf of the first respondent herein, that she controls the two other respondents or is sufficiently empowered to act on their behalf, is accepted. Further, contrary to the impression that one would get from the first respondent's allusion to her failing vision, the first respondent graduated from Delhi University in 1984 and is aged about 46. At paragraph 7 of the first respondent's first affidavit in response to the appellants' relevant application, she claimed that the respondents before the CLB "made the petitioner sign some documents which as explained to the petitioner by the respondents were papers related to an initial intent of settlement, which was to be followed by a Final settlement agreement." A couple of lines further down in the same paragraph, the first respondent stated that she "repeatedly requested the respondents to finally determine the price of the shares held by the petitioner and also to determine the value of the petitioner's 25% share in the profit of the company." At the following paragraph of her first affidavit, the first respondent herein referred, inter alia, to the claim of the appellants herein that share transfer forms had been executed in May and June of 2011 for transferring the shares held by the respondents herein in the company. The ninth paragraph of such first affidavit reveals as follows in its first two sentences:

> "9. The petitioner confirms that she had no idea or knowledge of singing a Final settlement agreement and signing share transfer forms. The petitioner hereby submits that the respondents, taking advantage of her extremely poor vision and other physical problems, mislead her into signing some documents, with the intention to fraud *(sic, defraud)* and cheat the petitioner."

In paragraph 12 of the same affidavit, the first respondent herein claimed that she "signed the agreement dated 17/09/2011 based on the explanation and

representation of the respondents that it was an 'Initial Intent of Settlement' ..."

The document of September 17, 2011 provides as follows:

> "1. The petitioners have already settled al (sic, all) their disputes in Company Petition No. 777 of 2010 with the respondents.
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> 2. The petitioners no longer want to pursue the instant Company Petition No. 777 of 2010 and have agreed with the respondent company that the instant petition should be disposed of in view of settlement.
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> 3. The petitioners have sold and transferred their share held in the company pursuant to an agreement between the Petitioners and the Respondent, to the respondents and their nominees and the Petitioners do not intend to claim any further right as shareholders or otherwise in the company with the filing of this Terms of Settlement. On the above terms it is agreed that the petition should be disposed of.
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> The Terms of Settlement is being signed by all the parties to C.P. No. 777 of 2010."

Copies of the share certificates and share transfer forms were appended to the appellants' relevant application and the contents thereof have not been denied in either affidavit filed by the first respondent herein before the CLB. There are four transfer forms relating to the shares held by the first respondent herein which have all been witnessed by her husband's signature. The other share transfer forms apparently bear the signature of a common director in the two other respondents, but, remarkably, records the husband of the first respondent herein as the witness thereto. It was not the petitioner alone with her "extremely poor vision and other physical problems" who signed the documents of transfer. There were two other signatories to the documents who are not said to have had failing vision or poor health. These facts, apparent from the documents, were all there for the CLB to see.

In a remarkable change of tack, the first respondent herein claimed in the second affidavit, at paragraph 8 thereof, that she "never signed" the terms of settlement of September 17, 2011. But she admitted that in May, 2011 she

signed “a blank agreement” and that simultaneously “some blank but signed transfer deeds and share certificates were also exchanged” but asserted that the fair value of the shares was left to be determined.

In the order impugned, the contradictions in the findings recorded at paragraph 9 are all too glaring, particularly in the sixth clause thereunder. The CLB directed the consideration of Rs.12,03,47,715 received by the respondents herein to be deposited with the CLB along with the relevant share certificates for a valuer to be subsequently appointed to assess the worth of the shares. That the consideration in excess of Rs.12 crore was deposited in the bank accounts of the respondents herein in September, 2011 was noticed by the CLB, but no inference was drawn from such fact. But, again, it is unprofitable to get side-tracked by referring to matters of minute detail which may not be of any significance in the backdrop of the primary legal issue. It is equally useless to refer to the letters issued by the first respondent herein to the relevant registrar of companies, the regional director of the ministry of corporate affairs and to the ministry confirming that she had no further complaint relating to the company as she had sold her shares therein, since the first respondent has questioned her signature on such letters in her second affidavit filed before the CLB.

In the CLB’s eye for the minutae, as apparent from the order impugned, the CLB may have lost sight of the scope of the proceedings before it. A petition complaining of oppression may be carried under Section 397 of the Act by any member of the concerned company, subject to the numerical qualification as stipulated in Section 399 of the Act. Similarly, a petition complaining of mismanagement of the affairs of a company may be brought under Section 398 of the Act by any member of the company, again subject to the arithmetic in Section 399 of the Act. The requisite share qualification to maintain a petition either under Section 397 or under Section 398 of the Act as recognised in Section 399 thereof is relevant at the institution of a petition under either provision. Just as a civil suit carried to a court on the basis of the situs of a defendant thereto at the

time of the institution thereof may be continued in the same court notwithstanding the defendant thereto having moved beyond the jurisdiction of that court, the threshold numerical qualification under Section 399 of the Act is to be looked into only at the time of the filing of the petition under Section 397 or Section 398 of the Act. If some of the petitioners pull out of the proceedings instituted under Section 397 or 398 of the Act, or some of the supporters of the petitioners who helped the petitioners obtain the numerical qualification withdraw support after the institution of the petition, the progress of the petition cannot be halted on such count; though the quality of the final relief that may be granted therein may be influenced by the shareholding strength of the continuing complainants. But where all the petitioners to a petition under either Section 397 or Section 398 of the Act cease to be shareholders of the concerned company, the petition is over; unless an overwhelming matter of public importance or public policy impels the CLB to pursue the petition on its own. For such a rare case, exceptional circumstances must exist and, more importantly, such circumstances must be cited by the CLB to proceed with the enquiry into the affairs of the concerned company. A complaint under Section 397 or Section 398 of the Act is personal to a complaining member; not necessarily in the member being oppressed or in the member being directly prejudiced by the acts complained of, but even in the member being affected by the wrongs alleged only as a constituent of the company. When the entire lot of the complainants in proceedings under either Section 397 or Section 398 of the Act transfer their shares in the company during the pendency of the proceedings, the complaint becomes irrelevant unless – and it is possible only in some cases – the transferees of the shares seek to espouse the cause on the ground that the acts complained of were intrinsic to the shares and transcended the personality of the shareholders.

In the present case, technically, there was no denial on behalf of the second and third respondents herein as to the transfer of the shares held by them in the company. Even if the respondents' stand before the CLB is regarded

more charitably, the factum of the execution of the share transfer forms by the respondents was not in dispute. What was in dispute was the adequacy of the consideration therefor. Such dispute was irrelevant in the context of the proceedings under Section 397 and Section 398 of the Act and as to whether the petition could have been continued. As is further apparent from the order impugned, the CLB was minded to right the perceived wrong and ensure that adequate consideration was received by the respondents herein for the concluded transfer of their shares in the company. There is error apparent on the face of the impugned order in the manner of exercise of authority by the CLB. It is one thing for the CLB to bring to an end the matters complained of in proceedings under Section 397 or Section 398 of the Act by enquiring into the valuation of the petitioners' shares prior to the transfer thereof; but it is a completely different kettle of fish to embark on such enquiry ex post facto after the transfer is completed. Indeed, such a course of action appears to be beyond jurisdiction, given the context of a complaint under either Section 397 or Section 398 of the Act. When the petitioners in such a matter denude themselves as shareholders of the company, the cause they originally espoused becomes irrelevant to them; they divest themselves of the right to pursue the complaint; and, in the absence of any other shareholder donning the mantle of carrying the proceedings, the matter has to end. It is true that petitions under Sections 397 and 398 of the Act have traditionally been regarded as representative actions: the object of the actions and the purpose of the orders passed therein are considered to be for the benefit of the company and, as such, in the interest of the shareholders of the concerned company. But ever since the jurisdiction of High Courts in such matters has been vested in the CLB pursuant to the Amendment that came into effect at the end of May, 1991, petitions under Sections 397 and 398 of the Act are not known to be advertised; and copies of the petitions are no longer routinely forwarded to the Central Government, though the Central Government still has the right to intervene and be heard. Apart from the fact that neither set of parties has referred to the petition before the CLB having been advertised, the order impugned did not decline to record the settlement on the ground that the

matter had partaken a representative character. Indeed, none other than the respondents herein objected to the discontinuation of the proceedings. And, since the respondents herein had snapped their ties with the company upon transferring the shares held by them in the company, there was no ground for the CLB to allow the petition to linger. In any event, it is evident from the order impugned that the CLB did not consider it necessary to continue the petition because of any public interest or matter of public policy being involved. The CLB merely wanted the petition to remain on its board to assess the fair valuation of the shares of the petitioners before it in the company which had already been transferred. Such exercise – to ascertain the true worth of the shares already transferred – was of no consequence to the company and could not have been for the company's benefit and, as such, appears to have been extraneous to the purpose of the proceedings.

Unfortunately, this court has failed to engage the respondents' attention on such aspect of the matter despite several reminders in course of the hearing. Instead, the respondents have veered off course to emphasise on single-line orders of adjournment to impress that the settlement had never been worked out. But the settlement or the adequacy of the consideration for the transfer of shares is not germane to the issue. Once it was admitted that the share transfer forms were signed and the share certificates made over, the character of the respondents as members of the company was lost and the alleged or perceived inadequacy of consideration would be a matter outside the scope of the proceedings under Section 397 and Section 398 of the Act.

The respondents have referred to the line of authorities that suggests that the recording of what transpired before a judicial forum would be sacrosanct and not open to question in appeal. Nothing turns on such proposition, even though the appellants seek to demonstrate that there were more orders of adjournment which reflected that the settlement was in course of implementation rather than the settlement being under negotiation. The decisions relied upon by the

respondents reported at (1982) 2 SCC 463 (*State of Maharashtra v. Ramdas Shrinivas Nayak*); (2007) 5 SCC 359 (*Jagvir Singh v. State (Delhi Admn)*); and, (2010) 10 SCC 408 (*State of Assam v. Union of India*), in such circumstances, do not call for any elaborate discussion. The judgment reported at (1975) 1 SCC 199 (*The Godhra Electricity Co. Ltd v. The State of Gujarat*) for the proposition that the conduct of the parties reveal their understanding of their agreement is of no relevance in the present context, particularly since the terms of settlement of September 17, 2011 recorded both a resolution of all disputes and the transfer of shares, even if the second clause therein – of the petitioners in the CLB proceedings abandoning the petition – is disregarded. Two judgments reported at (1999) 1 SCC 1 (*Rickmers Verwaltung Gimb H v. Indian Oil Corporation Limited*) and AIR 1936 PC 760 (*Tyagaraja Mudaliyar v. Vedathanni*) on consensus *ad idem* are equally inapposite. The first of the cases dealt with the matter of incorporation of an arbitration agreement by implication in a subsequent contract. The other case recorded an exception to the rule as to the impermissibility of parole evidence in respect of a written agreement.

The final line of cases cited by the respondents, that an admission may be explained away, is somewhat closer to the matters in issue; but in the absence of necessary pleadings to invoke the principle, the two judgments cited on such aspect reported at (2010) 1 SCC 562 (*Geo-group Communications INC v. IOL Broadband Limited*) and (2005) 5 SCC 784 (*Divisional Manager, United India Insurance Co. Ltd v. Samir Chandra Chaudhary*) cannot bring any cheer to the respondents. The respondents concede that the first respondent herein had admitted in her first affidavit before the CLB that she had signed the memorandum of settlement of September 17, 2011. Indeed, even without such concession, that is apparent from the first affidavit itself. If the admission on such score in the first affidavit were to be effectively resiled from, the circumstances as to how the admission was initially made had to be adverted to and elaborated on in the first respondent's second affidavit filed before the CLB. There is nothing in the second affidavit by way of even a line of explanation as to

what compelled the first respondent to admit her signature and her execution of the memorandum of settlement of September 17, 2011 or the changed circumstances under which she wished to retract therefrom. A principle of law has to be applied to facts and merely because the principle exists would not permit the first respondent – or the other respondents riding piggy-back on the first respondent – to wriggle out of an unequivocal admission as to a state of things without any assertion in such regard. Since the petitioners before the CLB were no longer members of the company when the relevant application seeking dismissal of the petition fell for the consideration of the CLB, irrespective of whether the petitioners had been cheated in pennies or in millions in the transaction, the CLB ought to have focussed on the primary issue before it as to the permissibility of the continuation of the petition and not traversed beyond jurisdiction to ensure that the petitioners before it got their rightful due. The CLB should have appreciated that the petition under Sections 397 and 398 of the Act could no longer be prosecuted and ought to have left the petitioners before it free to canvass their grievance as to the inadequacy of the consideration before the appropriate forum. Even a tribunal of the magnitude of jurisdiction that the CLB possesses – never mind the frivolous manner in which such tribunal is sometimes manned – does not exercise plenary powers to right every perceived wrong and has to exercise its authority within the bounds of its jurisdiction.

Upon the admitted execution of the share transfer forms and the handing over of the share certificates, and the subsequent registration of the transfer thereof, the respondents herein ceased to be shareholders of the company on the transfer being effected and could no longer pursue the proceedings under Section 397 and Section 398 of the Act whether on merits or for the oblique purpose of extracting further money for the sale of the shares or even for obtaining their rightful due therefor. The appeal, APO No. 341 of 2012, succeeds. The order impugned dated July 13, 2012 is set aside and the appellants' application before the CLB, CA No. 201 of 2012, is allowed by dismissing the respondents' petition before the CLB, CP No. 777 of 2010. If the share certificates have been deposited

by the appellants or their nominees with the CLB pursuant to the direction contained in the order impugned, they shall be immediately returned to the named holders thereof. If the sum of Rs.12,03,47,715 has been deposited by the respondents with the CLB, the respondents will be entitled to refund of the same immediately together with any accrued interest thereon. The stay petition, ACO No. 169 of 2012, stands disposed of.

Nothing in this order should be construed as any pronouncement on the adequacy or inadequacy of the share transaction and this order will not preclude any party from pursuing any remedy in such regard before the appropriate forum.

Though the respondents are liable for the costs in course of the relevant application before the CLB and in the present appeal, they are excused therefrom since their contention as to the inadequacy of the consideration may not have been completely unfounded.

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

(Sanjib Banerjee, J.)

Later :

The respondents seek a stay of the operation of this order which is declined.

(Sanjib Banerjee, J.)