NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
SPECIAL BENCH (COURT-III)

Company Petition No. 102/241/242/ND/2019

IN THE MATTER OF:

Mr. Anil Agrawal
S/0 Baij Nath Agrawal
R/o Flat No. F-1201,
Prateek Stylome, Ghaziabad- 04/8,
Noida, Uttar Pradesh- 201303 **... Applicant**

Versus

1. OMEGA ICEHILL PRIVATE LIMITED
Through Its Key Managerial Personnel
Having Registered Office At:
39, First Floor, Raghu Shree Market,
Ajmeri Gate Delhi-110006 **... Respondent No. 1**

2. Mr. Herman Johan Oonk
Director And Chairperson,
Omega Icehill Pvt. Ltd.
Bastinglaan 20, Enschede,
Netherlands-7548 AN **... Respondent No. 2**

3. Mr. Harm Jan Oonk
Director, Omega Icehill Pvt. Ltd.
R/o Topaasstraat 20, Enschede,
Netherlands-7548 AN **... Respondent No. 3**

4. Mr. Tushar Kant Jindal
Director, Omega Icehill Pvt. Ltd.
15/100, Shubhanchal Friends Colony,
D.M. Road, Bulandsharhr
Uttar Pradesh-203001 **... Respondent No. 4**

Order Delivered on: 11.04.2023

SECTION: 241-242 of Companies Act, 2013

CORAM :

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. ATUL CHATURVEDI, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Mr. Rohit Sharma, Mr. Ashok Kumar,
Mr. Nikhil Purohit, Advocates.

For the Respondent **:** Dr. U.K. Chaudhary, Sr. Adv., Adv. Kavita Sarin, Adv. Rajat Gava

ORDER

PER: SHRI. ASHOK KUMAR BHARDWAJ, MEMBER (J)

As has been captioned in the petition i.e., Company Petition No. 102/241/242(ND)/2019, the Respondent No.1 (hereinafter referred to as Company) was incorporated as a Private Ltd. Company in the name of Omega Icehills Pvt. Ltd. under the Companies Act, 1956. The certificate of incorporation was issued by the Registrar of Companies, Delhi and Haryana. The company was formed as a joint venture (JV) between Omega Engineering Holding BV (Omega Group) and an Indian partnership firm called Friends Refrigeration and Associates (FRA). The Petitioner, Mr. Herman Johan Oonk, Mr. Harm Jan Oonk and Mr. Tushar Kant Jindal i.e., the Respondent Nos. 2, 3 and 4 herein are Directors of the Respondent No. 1. The Petitioner is one of the first directors and promoters of the company. When it is the Petitioner who was instrumental in bringing the Respondent No. 1 into existence and turning it into a profitable entity, the Respondent Nos. 2, 3 and 4 conspired to divest him from his control over the management of the Respondent No.1 by passing a Board Resolution on 06.05.2019 and 14.05.2019. Both the Board Resolutions are unlawful and are result of conspiracy hatched by Respondent Nos. 2, 3 and 4 against the Petitioner.

2. The Respondent No.1 was formed as Joint Venture Company by Omega Engineering Holding BV (Omega Group), located at PO Box 10013, 7504, Pam

Enschede, Netherlands and Friends Refrigeration Associates (FRA), a partnership firm located at Siyana Road, Bulandshahar (India). Initially, the Omega Group and FRA entered into a Memorandum of Understanding (MoU) dated 01.09.2009 at Enschede (Netherlands), laying down the broad terms of the understanding between them qua the formation of the Joint Venture Company. Pursuant to the MoU (ibid), a Joint Venture Agreement (JVA) dated 20.01.2010 was entered into between Omega Group, FRA and Respondent No. 1. The Omega Group was in the business of manufacturing and trading of product like Laser Welded Pillow Plates, Laser Welding Machines and All Engineering Products like Ice Banks, Flake Ice Machines etc. The FRM was in the business of fabrication, export and trading of refrigeration and all related engineering products like cooling coils, IBTs used in ice production under the brand name of 'IceHill'.

3. The Respondent No. 1 (Company) was incorporated as a Joint Venture with the main object to carry on the business of manufacturing, fabrication, export and trading of laser welded pillow plates and all engineering products like Ice banks, Flake Ice machines, falling film chillers etc. used in ice production for South Asia. In terms of the JVA dated 20.01.2010, the Omega Group was represented by Respondent Nos. 2 and 3 and FRA is represented by the Applicant and Respondent No. 4. As espoused by the Ld. Counsel for the Petitioner emphatically, in terms of Clause 8 of the JVA, it was the Petitioner who was to remain as Managing Director of the JVC (Respondent No. 1) and was responsible to manage its operations. Initially, Omega Group and FRA had the holding to the extent of 50% each in the Respondent No. 1.

At the time of its incorporation, the total equity shares qua Respondent No. 1 were 20,000, out of which each of the Petitioner and Respondent No. 4 had held the equity shares, 5,000 each. The remaining 10,000 equity shares were held by the Omega Group. In the year 2011, the partnership firm FRA was dissolved by mutual consent of the partners vide a Deed of Dissolution dated 16.07.2011 (mentioned as 16.17.2011 in para (l) of the petition). In terms of the settlement deed dated 16.07.2011 the firm (FRA) was merged into a private limited company namely "Kurinji Metals Pvt. Ltd." Ergo, all the assets and liabilities of FRA were taken over by the Kurinji Metals Pvt. Ltd. The Respondent No. 4 is one of the two directors of Kurinji Metals Pvt. Ltd. As the Omega Group was losing its interest, it decided to exit the joint venture and a settlement agreement dated 15.10.2015 was entered between Omega Group represented by Respondent Nos. 2 and 3 on one side and the Applicant, Mr. Anil Agarwal, Mr. Rabindra Agarwal and Respondent No. 1 Company on the other side. Mr. Rabindra Agarwal was also one of the shareholders in the Respondent No. 1 Company. In terms of the settlement agreement, the Omega Group had agreed to sell all its share i.e. 6,503,109 representing 56.03% shareholding in Respondent No. 1 Company, together to the Petitioner and Mr. Rabindra Agarwal at an agreed price of Euro 2,25,000/-. While arranging funds for Respondent No. 1 despite there being non-cooperation by Respondent Nos. 2 and 3, the Petitioner also did not draw his full salary as Managing Director of the company, during the lean period of the Respondent No. 1 Company. On account of the persistent efforts of the Petitioner, the Respondent No. 1 started generating profit and for the first time during the financial year 2015-2016, the financial report of the company could reflect

positive revenue. In view of positive change in the business performance of Respondent No. 1 Company, Omega Group decided not to exit the joint venture, thus the settlement agreement dated 15.10.2015 (supra) was not honoured by the Omega Group and the joint venture continued. Thereafter, the Respondent No. 3 sent an email dated 04.04.2019 to the Petitioner, asking him to convene a meeting of the Board of Directors on 06.05.2019. On 22.04.2019, the Respondent No. 3 indicated broad agenda points for the Board meeting dated 06.05.2019. The agenda points were concerned only with general business of the Respondent No. 1 and there was no mention in the agenda regarding removal of the Petitioner from the post of Managing Director. On 24.04.2019, the Petitioner circulated the agenda for the Board meeting dated 06.05.2019. However, during the meeting dated 06.05.2019, the Respondent Nos. 3 and 4 came with a lawyer and espoused that the business was not to be transacted as per agenda and referred to an email dated 06.05.2019 generated at 1:29 p.m. in terms of which an urgent meeting of the Board was called at 1:30 p.m. The agenda attached with the email proposed the removal of the Petitioner from the post of Managing Director. The Petitioner walked out of the Board meeting, but with the semblance that a resolution for his removal was passed by Respondent Nos. 3 and 4 as members of the Board. Subsequently, the Respondent No. 3 sent another email dated 06.05.2019 at 11:57 p.m. convening a Board meeting on 14.05.2019. The notice and agenda attached to the email proposed the removal of the Petitioner from the post of Managing Director of Respondent No. 1 Company. The Petitioner herein did not attend the Board meeting dated 14.05.2019. On said date, by way of an email sent by Respondent No. 3 the

Petitioner received a copy of the Minutes of the Board Meeting held on 14.05.2019, which contained the missive regarding removal of Petitioner from the post of Manging Director of the Respondent No. 1 Company. In the meeting dated 14.05.2019, the Board also passed a Resolution by circulation, removing the name of the Petitioners as authorised signatory qua various banks accounts of Respondent No. 1 Company. In the captioned petition, the Petitioner has questioned the Resolution dated 06.05.2019 and 14.05.2019 on the grounds inter alia:- (i) the justification mentioned in email dated 14.05.2019, for removal of the Petitioner from the post of Managing Director of Respondent No. 1 is totally unlawful and bald; (ii) the affairs of the Respondent No. 1 Company are being conducted in a manner prejudicial and oppressive to the Petitioner as well as to the interest of Respondent No. 1 Company; (iii) the Resolutions dated 06.05.2019 and14.05.2019 were passed in complete contravention of Clause 11.1 read with Clause 8.1 of the Joint Venture Agreement dated 20.01.2010; (iv) in terms of Clause 11.1 of the Agreement dated 20.01.2010 no action could be taken by the Respondent No. 1 Company at the meeting of the Board representative or otherwise qua the listed 'reserved matters' without the approval of both the parties or without the unanimous vote of the representatives of the Omega Group, FRA and the Respondent No. 1 Company. Making any change to deed of JVC, whether by alteration or substitution is mentioned as one of the reserved matters under entry (iv) of Clause 11.1; (v) in terms of Clause 8.1 of the JVA the Petitioner could not have been removed from the position of Managing Director of the Respondent No. 1 Company in the manner the same has been done; (vi) the removal of the Petitioner from the post of Managing Director amounts to

modification of JVC deed, which is not permissible unless done in the manner specified in Clause 11.1. Since the procedure referred to in Clause 11.1 of the JVC was not adhered to in doing so, the removal of the Petitioner from the post of Managing Director in terms of the Resolutions dated 06.05.219 and 14.05.2019 is bad in law and liable to be set aside; (vii) the impugned Resolutions dated 06.05.2019 and 14.05.2019 are also in complete violation of Article of Association of Respondent No. 1 Company, in terms of which, the right to appoint Managing Director of the company rests with the controlling shareholders. Since, appointment of the Managing Director could be by the controlling shareholders, its removal can also be by the controlling shareholders and not otherwise; (viii) in terms of the provisions of Clause 16 of the General Clauses Act 1860, the power to appoint includes power to dismiss and suspend. Thus, when the appointment of Managing Director could be made by the majority shareholders, his removal could not have been by the Board of Directors; (ix) in terms of the principle enunciated by Hon'ble Supreme Court in M/S Heckett Engineering Company Vs. Their Workmen, (1977) 4 SCC page 377 the power to terminate service is a necessary adjunct of the power to appoint and is exercise as an incident or consequence of that power; (x) the meetings of the Board dated 06.05.2019 and 14.05.2019 were held in complete contravention of the provisions of Companies Act 2013. As per Section 173(3) of the Companies Act 2013, a meeting of the Board shall be called by giving not less than 07 days' notice in writing to every director, while in the present case the notice for urgent meeting of the Board dated 06.05.2019 scheduled to be held at 1:30 p.m. was circulated vide email sent at 1:29 p.m. on same date. The subsequent notice sent on 06.05.2019 for the

meeting dated 14.05.2019 could not have been treated as a valid notice, as the business sought to be transacted on 14.05.2019 was the one sought to be transacted at the meeting dated 06.05.2019; (xi) the impugned circular dated 14.05.2019, relating to withdrawal of powers to operate bank account of Respondent No. 1 from the Petitioner had been passed in pursuance of a conspiracy of the majority shareholders i.e. Omega Group represented by Respondent Nos. 2 to 4 to take control of the company and render Petitioner as insignificant in the company; (xii) the impugned Resolutions are unfair attempt on the part of majority shareholders to remove the Petitioner from the post of Managing Director which is unfairly prejudicial, wrong, illegal and harsh to the Petitioner/minority shareholder;(xiii) the allegations of lack of performance of the company for the past several years, loss of confidence of shareholders of the company in Petitioner, espoused for removal of the Petitioner are untrue; (xiv) the Petitioner is the only person who reposed faith in the business of Respondent No. 1 Company, even when it was making losses in its initial year and the Omega Group which at one point of time resolved to exit the Respondent No. 1 by executing the settlement agreement dated 15.10.2015 has now become dishonest and is attempting to rest the Respondent No. 1 Company; (xv) the coram of the Board meeting dated 14.05.2019 was not in consonance with Clause 9.1 of the JVA dated 20.01.2010. In terms of the Clause, the meeting of the Board should be attended at least by three Directors i.e., one Representative of each of the parties.

4. Having espoused the facts and grounds as above, the Ld. Counsel for the Petitioner buttressed the reliefs sought in the petition, which reads thus: -

> *"a) Set aside the unlawful Board Resolution dated 14.05.2019 withdrawing all powers, privileges and rights of the Applicant as Managing Director and terminating his appointment as Managing Director of Respondent No. 1 Company; AND*
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> *(b) Set aside the unlawful circular resolution No. 1, 2, 3, 4 and 5 of 2019 dated 14.05.2019 purporting to remove the name of, Applicant as authorised signatory from the various Bank Accounts of Respondent No. 1 Company; AND*
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> *c) Set aside the unlawful Board Resolution dated 06.05.2019, seeking to remove the applicant from the post of Managing Director of Respondent No. 1; AND*
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> *(d) Restrain Respondent No. 2, 3 and 4 from interfering with the Applicant's functioning as Managing Director and authorised signatory of Respondent No. 1 Company; AND/OR*
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> *(e) Pass such other order(s) as may deem fit and necessary in the interest of justice."*

5. Rebutting the pleas put forth on behalf of the Petitioner, Mr. U.K. Choudhary, Ld. Senior Counsel appeared for the Respondents espoused thus:-

> a) The memorandum of understanding dated 01.09.2009, was executed between Omega Engineering Holding BV through its then Director, Late Mr. Herman J. Oonk (Respondent No. 2) and another entity namely Friends Refrigeration Manufacturers through its Proprietor, Mr. Tushar Kant Jindal (Respondent No. 4) to Form-A Joint

Venture Company i.e., the Respondent No. 1 and the Petitioner was neither a party to the MoU nor the beneficiary of the same. On 09.10.2009, a deed of partnership was executed by the name Friends Refrigeration and Associates (FRA) with 4 partners namely, Mr. Tushar Kant Jindal, Mr. Madan Lal Jindal, Mrs. Poonam Agrawal and M/s Mangalam Power Systems Pvt. Ltd. The Petitioner was not party or signatory even to the said deed. Pursuant to the MoU dated 01.09.2009, a Joint Venture Agreement (JVA) dated 20.01.2010, was executed between the Omega Group, FRA and Respondent No. 1 Company. The JVA was never executed by the Petitioner in his personal capacity. He merely executed the JVA as a Signatory of the Respondent No. 1. No right including the right to act as Managing Director of the Respondent No. 1 in perpetuity can be claimed by the Petitioner under the JVA.

b) One of the essential terms of JVA was that the Omega Group and the FRA shall at all time hold 50% each in the Respondent No. 1. Nevertheless, the shareholding pattern which was to be retained between Omega Group and FRA got altered during 2011-15 due to investment requirements. The required investment was not brought by the Petitioner. Instead, it was the Omega Group and the Family of the Respondent No. 4 who brought the required investment while acting in the best interest of the Respondent No. 1. FRA, which was party to JVA initially was dissolved in terms of the dissolution deed dated 16.07.2011. After dissolution of FRA in 2011, M/s. Kurinji Metals Pvt. Ltd. was induced as a Shareholder of Respondent No. 1. However, no

deed of adherence was signed by M/s Kurinji Metals Pvt. Ltd. to be bound by JVA. Neither, Omega Group nor Respondents have signed any document such as an addendum or deed of adherence to the JVA, after dissolution of FRA endorsing any right of FRA under the JVA in favour of M/s Kurinji Metals Pvt. Ltd.

c) In March, 2019, Omega Group held 53% shares in Respondent No. 1, with Omega Laser Products BV holding 33.76% shares and Omega Thermo Products BV holding 14.19% shares. 30.42% shares were held by Kurinji Metals Pvt. Ltd. and the remaining 15.49% shares were held by 50 participants including the Petitioner whose shareholding is 0.4%. Thus, the JVA could loose its significance completely and no right can be claimed by the Petitioner on the basis of the same.

d) The right as claimed by the Petitioner under JVA are not adopted by the Respondent No. 1 Company in its Article of Association, thus is not binding upon the Respondent No. 1. The AoA cannot confer any right on the Petitioner to be appointed as Managing Director.

e) A bare perusal of the provision of the JVA (Clauses 2.1 and 2.2, 3.3, 7.3 and 8.1) would demonstrate that the nomination of the Petitioner as the Managing Director was subject to mutual agreement between the parties. The Clause 9.1 of the agreement provides that the JV Company was to be managed by its Board of Directors.

f) The Article 38 of the Article of Association, which is binding upon Respondent No. 1 and its shareholders.

g) Section 6 of the Companies Act, 2013 overrides any provision contrary to the provision of Companies Act contained in Memorandum of Association or Articles of Association or any agreement or resolution passed. Thus, the provisions of Section 196(2) of the Act will prevail over Clause 8.1 of the JVA.

h) The complain espoused by the Petitioner in the captioned petition is a Directorial one, emanating from withdrawal of Petitioners power and privileges as Managing Director. To invoke Section 241-242, it is necessary for Petitioner to establish that the alleged effect oppression has affected him as a Member of the Company and allegation in any other capacity viz. as a Director or a Creditor is outside the purview of the provisions of Section 241-242 of the Companies Act, 2013. The Petitioner has not even averred much less proved any Acts in continuity leading to any operation as defined under Section 241 of the Act. It is stair decisis that the oppression complained of must affect a person in his capacity or character as a Member of the Company. The allegations in nature of Directorial Complaints are outside the purview of Section 241-242 of the Act.

i) The Board Meeting dated 06.05.2019, to consider the agenda circulated on 22.04.2019 was already going on, when the agenda for the 2nd Board Meeting for the same day i.e., 06.05.2019 was circulated at short notice. The said Board Meeting was convened to conduct the business stated therein after apprising the Petitioner of the aforesaid agenda and affording him a reasonable opportunity to address the

board in this regard. However, the Petitioner upon realising that he was about to loss his power and privileges as Managing Director walked out of the meeting. Thus, the Directors present at the 2nd Board Meeting dated 06.05.2019 scheduled at 01:30 p.m. closed the same forthwith without deliberating any further on the agenda. Additionally, Respondent No. 3 issued another notice through email dated 06.05.2019, proposing the Board meeting for 14.05.2019. Despite sufficient notice of the said board meeting, the Petitioner refused to attend the same. However, the meeting was conducted as per the schedule and a Board Resolution dated 14.05.2019 was passed withdrawing all rights, privileges and powers enjoyed by the Petitioner in the capacity of Managing Director.

j) The Petitioner, who despite being a Director of Respondent No. 1 and having fiduciary duty towards it has disentitled himself to be granted any equitable relief under the present petition for the following reasons:

i) deliberately dragging Respondent No. 1 into CIRP

ii) intending to compete with the business of R-1 Company;

iii) not signing the Non-Compete Agreement.

iv) continuing to indulge in nefarious activities against the interest of the Respondent No. 1

k) Even after removal of the Petitioner as Managing Director, the Respondent No. 1 Company is making profit.

6. We have heard the Counsel for the parties and perused the record. Section 241-246 of the Companies Act, 2013 lays down the provisions qua oppression and mismanagement in a Company. The roots of Corporate Democracy are there in the concept of majority domain. The Rule has its enunciation in Foss V Harbottle according to which the individual shareholders has no cause of action in law for any wrong doing by the Corporation and the action in this regard need to be brought either by the Corporation itself or in a derivative manner. While the majority rule is the common norm it often overshadows minority rights. The object is to strike a balance between the interest of the small/individual shareholders and the effective control of the Company. The term 'Oppression' is not sufficiently amplified in the Companies Act, 2013. Nevertheless, the same is construed as a conduct involving a visible departure from the standards of fair dealing and a violation of condition that require fairness especially with regard to the right of shareholders. The term 'Mismanagement' can be described as conducting company affairs in a prejudicial or dishonest manner. When, a petition under Section 241-242 of the Companies Act comes under consideration before this Tribunal, it may pass specific orders inter alia for: -

a) Regulation of the conduct of the affairs of the company

b) Purchase of shares/interest of the members by other members.

c) Purchase of shares by the Company and consequent reduction in capital.

d) Restriction on transfer/allotment of shares.

e) Termination or setting aside of agreements between company and MD, any other director or manager, as the tribunal may think fit.

f) Termination of any other agreements between the company and any other person other than those referred to above. The agreement shall be terminated only after due notice and after obtaining the consent of the concerned party.

g) Setting aside of transfer/delivery/payment/execution or any act related to property made either by or against the company within 3 months before the date of the application under this section which if done by or against the individual be deemed to be a fraudulent preference.

h) Removal of MD/Director/Manager of the company and the manner of appointment subsequent to the order.

i) Recovery of undue gain from MD/Director/Manager and utilisation of the funds by transferring to investor education and protection fund or repayment to the victims who can be identified.

j) Appointment of directors who are required to report to the Tribunal. The imposition of cost and such other order which in the opinion is just and equitable etc.

7. Sans irrelevant facts, in view of the rival submissions put forth by the Ld. Counsels for the parties, following issues arises before us to be determined: -

I. Whether the Joint Venture Agreement dated 21.01.2010, survived as on 06.05.2019 or 14.05.2019.

II. Whether the Joint Venture Agreement or Article of Association can have overriding effect over the provisions of Companies Act, 2013.

III. Whether only majority shareholders could remove the Petitioner from the position held by him as Managing Director of Respondent.

IV. Whether this Tribunal can go into the issue of removal of the Petitioner as Managing Director.

V. Whether there was any violation of Section 173 (3) of the Companies Act, 2013.

VI. Whether there is any oppression or mismanagement qua the affairs of the Respondent No. 1 Company.

8. As far as the first issue is concerned, apparently there was an MoU dated 01.09.2009, signed between Omega Engineering Holding BV (Omega Group) and Friends Refrigeration Manufacturers, signed by the Respondent No. 2 and Respondent No. 4 as representatives of the Omega Engineering Holding BV and Friends Refrigeration Manufacturers. With reference to the MoU (ibid), an agreement dated 20.01.2010 was entered into. Apparently, the agreement was a tripartite instrument and the Petitioner herein was party to the same. Indubitably, the Clause 8.1 of the agreement provided that the Petitioner herein would be the Managing Director of the Respondent No. 1 Company. No one can dispute that Clause 11.1 specifically provided that no action should be taken by JVC whether at the meeting of the Board of Representatives or otherwise in respect of the reserved matters, without written approval of both parties or without the unanimous vote of the Omega Group Representative, FRA and QIPL in case of board meeting. Indubitably, any change to the JVC, deed of JVC, whether by way of alteration or substitution was one of the reserved matters, in terms of Clause 11.1 (4) of the JVA dated 20.01.2010. Nevertheless, the Clause 11.1 was qualified with the condition that either party should continue representing not less than 50% of the capital of JVC. Thus, in the event of there being any variation in representation of the share capital of the parties, the Clause 11.1 could become inoperative. Also, the Clause 36 of the agreement provided for the

circumstances in which the same (agreement) could cease to be effective. One of such condition was ceasing to hold any share by either of the parties. It would not be out of context to reproduce Clause 36 of the agreement here under:

"***36. <u>Effectiveness, Termination and its consequences.</u>***

36.1 This Agreement shall be effective and binding on the Parties, in accordance with its terms from the Effective Date, and shall remain in effect till such time as:

(i) Omega Group, FRA and OIPL agree in writing to terminate this Agreement, in which case the termination shall be effected in such manner as may be agreed; or

(ii) Either of the Parties (either by themselves or through Affiliates), cease to hold any Shares;

(iii) an order for winding up of the JVC being passed by an appropriate court except for the purpose of amalgamation or reconstruction;

(iv) an order for winding up of either Party being passed by an appropriate court except for the purpose of amalgamation or reconstruction.

36.2 Termination of this Agreement (other than pursuant to clause 36.1 (i) and clause 36.1 (iii)) shall not release any Party hereto from any liability or obligation in respect of any matters, undertakings or conditions which shall not have been done, observed or performed by that Party prior to such termination or which, at the said time has already accrued to the other Party. Nothing herein shall affect, or be construed. to operate as a waiver of, the right of the Party) hereto aggrieved by any breach of this Agreement, to compensation ·for any injury or damages resulting there from which has occurred either before or after such termination or shall affect the terms of clauses 13 or 17 or 29 of this

Agreement. The Parties agree that provisions contained in this Agreement which are required to give effect to clauses which shall survive termination shall also survive termination of this Agreement only to such extent that they are required to give effect to any of the clauses which shall survive the termination hereof."

9. It is matter of record and has not been denied by either of the parties that in terms of the dissolution dated 16.07.2011, the partnership firm in the name and style of M/s Friends Refrigeration and Associates was dissolved. Mrs. Poonam Agrawal, the wife of the Petitioner herein signed the dissolution deed. Thus, when with effect from the date of execution and dissolution deed, the Friends Refrigeration and Associates, which was one of the party to the Joint Venture Agreement dated 20.01.2010 ceased to exist, there was no question of its having 50% capital of JVC. Not only this, in the wake of non-existence of the FRA (Friends Refrigeration and Associate), one of the signatories of JVA dated 20.01.2010, the agreement itself became non est. Ergo, not only Clause 8 and 11 of the JVA but the entire JVA had become otiose and no claim can be founded on the terms and conditions thereof.

10. Though, in the backdrop of the dissolution deed dated 26.11.2011 and in-operation of JVA, the Petitioner could not have claimed any right to continue as Managing Director at the strength of JVA, but he also raised the plea of Clause 52 of AoA. As far as the said plea is concerned, in terms of provisions of Section 6 of the Companies Act, 2013, the provisions of the Act have effect notwithstanding anything to the contrary contained in the Memorandum or Articles of Company or in any agreement executed by it or any resolution passed by the Company in General Meeting or by its Board of

Directors, whether the same is registered, executed or passed as the case may be before or after the commencement of the Act. The Section 6 reads thus:

> "***Act to override memorandum, articles, etc.***
>
> *6. Save as otherwise expressly provided in this Act-*
>
> *a) the provisions contained in the memorandum notwithstanding anything to the contrary contained in the memorandum or articles of a commencement or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and*
>
> *b) any provision contained in the memorandum, articles, agreements or resolution shall, to the extend to which its is repugnant to the provisions of this Act, become or be void, as the case may be."*

11. In terms of the provisions of Section 196(4) of the Companies Act, 2013, a Managing Director is appointed by the Board of Directors at the meeting which is subject to approval by Resolution at the next general meeting of the Company. In view of the provision of Section 6 of the Companies Act, 2013, any provision contrary to Section 196(4) of the Companies Act, made either in any agreement or Article of Association would be non-est. It is not the plea espoused by the Petitioner that the decision taken in the Board Meeting dated 14.05.2019 was not approved in any subsequent general meeting. The only plea espoused by him is that there being provision in JVA and AoA of the Respondent No. 1 Company providing for appointment of Managing Director by majority shareholders, the Board of Directors could not have removed him. In the wake of the provision of Section 6 and 196(4) of the Companies Act, 2013, the plea cannot be countenance and is liable to be rejecting. Even

otherwise also, an agreement including the JVA could not have created any independent right to hold the post of Managing Director in favour of the Petitioner, perpetually. In Akkadian Housing & Infrastructure (P.) Ltd. and Ors. Vs. Pantheon Infrastructure (P.) Ltd. and Ors. (CP No. 106 of 2005 etc.) decided on 08.01.2009, it could be viewed by the CLB (Principal Bench) that a private agreement can neither be sought to be enforced nor its breach could give cause of action to file a petition under Section 397-398. Also, in Chatterjee Petrochem India Private Limited Vs. Haldia Petrochemicals Limited and Others (Civil Appeal Nos. 5416-19 of 2008 with Nos. 5420 and 5437-40 of 2008) decided on 30.09.2011 (2011) 10 SCC, Hon'ble Supreme Court viewed that a petition for the purpose of enforcing right under private contracts would not be maintainable under Section 397 of Companies Act, 1956. A similar view was taken by the Company Law Board, Principal Bench, New Delhi in B.M Jain & Sons Co. (P.) Ltd. Vs. Bombay Cable Car Co. (P.) Ltd. (C.P. No. 63 of 1998) decided on 08.12.2000, wherein the CLB found it as an established principle of law that in an 397-398 petition, it is the shareholders right that could be agitated and the provision cannot be invoked for the purpose of enforcing private agreements.

12. Referring to Clause 16 of the General Clauses Act and the Judgement of Hon'ble Supreme Court in M/s Heckett Engineering Company Vs. Their Workmen, (1977) 4 SCC page 377, the Ld. Counsel for the Petitioner espoused that the power to terminate service is a necessary adjunct of power to appoint and is an exercise incident or consequence of that power. We are afraid that the plea espoused by the Ld. Counsel is relevant to the facts of the present

case. In Collector of Central Excise vs. M/s Alnoori Tobacco Products decided on 21.07.2004, Hon'ble Supreme Court ruled that the Court should not place reliance on decision, without discussing as to how the factual situation fits in with the factual situation of the decision on which reliance is placed. In the present case, the Petitioner has placed reliance upon an agreement between a group of companies and partnership. Subsequently, on 16.07.2011, the partnership dissolved, thus, the agreement turned otiose. In the proceedings under Section 241-242 of the Companies Act, the grievance qua violation of an agreement cannot be raised. It is not the case of the Petitioner that he was appointed by a particular authority, which alone could remove him. His entire claim is founded on an agreement, a party to which in itself turned non-existent, rendering the agreement inoperative. Thus, the plea of removal by an authority different from the appointing authority espoused by the Petitioner cannot be sustained in the present matter and is rejected. The third issued stands nixed accordingly.

13. The fourth issue i.e., whether this Tribunal can go into the issue of removal of Petitioner as Managing Director or not is no longer res integra and could be settled by Hon'ble Supreme Court way back in the year 2001, in Hanuman Prasad Bagri and Others Vs. Bagress Cereals Pvt. Ltd. and Others (SLP (C) No. 17137 of 2000) decided on 27.03.2001, (2001 SCC Online SC 585). In the said case Hon'ble Supreme Court ruled that the remedy against termination of Directorship is by way of Company Suit and a Director even if illegally terminated cannot bring his grievance of termination by filing a petition under Section 397-398 of the Companies Act, 1956. As recently as

on March, 26, 2021, in Tata Consultancy Services Limited vs. Cyrus Investment Private Limited and Others (2021) 9 SCC page 449, Hon'ble Supreme Court ruled thus:

> *"132. In any event the removal of a person from the post of Executive Chairman cannot be termed as oppressive or prejudicial. The original cause of action for the complainant companies to approach NCLT was the removal of CPM from the post of Executive Chairman. Though the complainant companies padded up their actual grievance with various historical facts to make a deceptive appearance, the causa proxima for the complaint was the removal of CPM from the office of Executive Chairman. His removal from Directorship happened subsequent to the filing of the original complaint and that too for valid and justifiable reasons and hence NCLAT could not have laboured so much on the removal of CPM, for granting relief under Sections 241 and 242.*
>
> *XXXXXX*
>
> *164. The following words at the end of sub-section (1) of 242 "the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit" cannot be interpreted as conferring on the Tribunal any implied power of directing reinstatement of a director or other officer of the company who has been removed from such office. These words can only be interpreted to mean as conferring the power to make such order as the Tribunal thinks fit, where the power to make such an order is not specifically conferred but is found necessary to remove any doubts and give effect to an order for which the power is specifically conferred. For instance, sub-section (2) of Section 242 confers the power to make an order directing several actions. The words by which sub-section (1) of Section 242 ends, supra can be held to mean the power to make such orders to bring an end, matters for which directions are given under sub-section (2) of Section 242.*

165. The architecture of Sections 241 and 242 does not permit the Tribunal to read into the Sections, a power to make an order (for reinstatement) which is barred by law vide Section 14 of the Specific Relief Act, 1963 with or without the amendment in 2018. Tribunal cannot make an order enforcing a contract which is dependent on personal qualifications such as those mentioned in Section 149(6) of the Companies Act, 2013. Moreover, it has been held in the case of Vaish Degree College (supra) that the general rule is that a contract of personal services is not specifically enforceable unless a person who is removed from service is:

a) a public servant who has been dismissed from service in contravention of provisions of Article 311 of the Constitution of India;

b) dismissed under Industrial Law seeking reinstatement by Labour or Industrial Tribunal; and

c) terminated in breach of a mandatory obligation imposed by statute by a statutory body."

In view of the aforementioned Judgement of Hon'ble Supreme Court, in a petition filed under Section 241-242 we cannot go into the issue of removal of the Petitioner as Managing Director of the Respondent No. 1 Company. It is different issue that in such cases where we find the allegation of oppression and mismanagement substantiated, we may order for removal of Managing Director or appointment of a suitable person to the post. In the present case, the Petitioner substantially raised the issue of his removal, alleging violation of JVA and Article of Association.

14. The Petitioner also raised the plea of violation of Section 173 (3) of the Companies Act, 2013. Admittedly, the notice of the Board Meeting 14.05.2019 was given on 06.05.2019. Thus, it is not so that there was no notice of less

than 7 days for the Board Meeting. Even otherwise also, it is the case of Petitioner himself that on 06.05.2019, he walked out of the meeting, when it came to discussion regarding his removal as Managing Director of Respondent No. 1 Company. It is also, his own case that he did not attend also the Board Meeting dated 14.05.2019. Could the Petitioner have any moral to this effect, there was nothing to prevent him from remaining present in the Board Meeting dated 06.05.2019 and 14.05.2019 to put forth his version of factual and legal position in the meeting. The decision of the Petitioner to avoid the Board Meeting cannot be held in his favour. In any case, the Board Meeting dated 14.05.2019 was held with sufficient notice, as per statutory requirement and cannot be found vitiated. The fifth issue stands decided accordingly.

15. It is not gainsaid that certain dispute is there between the Petitioner and the Respondents. When, the grievance espoused by the Petitioner is that after his removal, the Respondent No. 1 Company is not making such profit as it had been making during his tenure as Managing Director, the Respondents also alleged that the Petitioner dragged the Respondent No. 1 to CIRP and he intents to compete the business of R-1 Company. The Respondents have also alleged that the Petitioner is refusing to sign non-compete agreement and is continuing indulging in nefarious activities against the Respondent No. 1. While concluding his submissions, Ld. Counsels for the Petitioner urged that the Respondent No. 2 & 3 being foreign nationals are oppressing the Directors who are Indian Nationals and the Petitioner would be willing to sell his shares in the Respondent No. 1 Company to the

Respondents on Fair Market Value to wash off his hands from any sort of association with the Respondents.

16. In view of the aforementioned discussion and findings, we are of the considered view that the removal of the Petitioner as Managing Director of the Respondent No. 1 Company cannot be interfered with in the present proceedings. Thus, the prayer to quash the Resolutions dated 06.05.2019 and 14.05.2019 passed by the Board of Directors of Respondent No. 1 is nixed and rejected. Nevertheless, in view of the rival complaints against each other by the Petitioner and the Respondents, which is having adversarial impact on management and business of the Respondent No. 1 Company and tantamount to mismanagement of its affairs, Mrs. Rashmi Chopra an Arbitrator with Delhi International Arbitration Centre (email id: chopra_rashmi@yahoo.co.in, Mobile No. 9810311218) is appointed as Mediator to resolve the squabble/dispute/controversy between the Petitioner and the Respondents. The duration of mediation would be three months, further extendable by another three months. The fees of the Mediator would be Rs.75,000/- per session + expenses on actual basis. The fees of the Mediator would be paid by the Respondent No. 1. The Mediator would endeavour to ensure that the Petitioner and the Respondents work smoothly in tandem as per the provisions of the Companies Act and other extent rules and instructions, in the interest of Respondent No. 1 Company, its shareholders as also in public interest. In the event, the Petitioner and Respondent are unable to go along, the Mediator would facilitate them in Transferring of Shares of the Petitioner qua Respondent No. 1 with the

consent of the Respondents on Fair Market Value. For proper valuation, the Mediator may take the services of a registered valuer with the consent of the parties. The fees of the valuer would be payable by the Petitioner and the Respondent equally. The parties shall appear before mediation on 15.04.2023 at the venue to be decided by the Mediator. The Mediator shall file its report before this Tribunal after 3 or 6 months as the case may be. In the event of their being any dispute surviving even after mediation, it would be open to Petitioner to raise his grievance in accordance with law, if so advised. The Petition stands disposed of.

Sd/-
(ATUL CHATURVEDI)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)