IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Petition No. - 09/271/PB/2021

IN THE MATTER OF:

CHOWDHRY RUBBER & CHEMICAL PVT. LTD.
Having its registered office at:
19/310, Shahzada Bagh,
Daya Basti, Old Rohtak Road ... **Petitioner**

Versus

1. **LA-MED HEALTHCARE PRIVATE LIMITED**
   Registered Office at
   253-A-3/A, 2nd Floor,
   Village Shahpur Jat
   New Delhi – 110049 **...Respondent No. 1**

2. **LAKHANI RUBBER UDYOG PVT. LTD.**
   Registered office
   Plot No. 131, sector 24,
   Faridabad (Haryana) **...Respondent No. 2**

3. **LAKHANI INDIA LIMITED**
   Registered office
   Plot No. 131, sector 24,
   Faridabad - 121005 (Haryana) **...Respondent No. 3**

4. **SH. PARMESHWAR DAYAL LAKHANI**
   R/o N-15, 3rd floor,
   Panchsheel Park, Malviya Nagar,
   New Delhi

   Also at:-
   D-889, First Floor
   New Friends Colony
   New Delhi **...Respondent No. 4**

5. **SMT. SUMAN LAKHANI**
R/o N-15, 3rd Floor,
Panchsheel Park, Malviya Nagar,
New Delhi

Also at:-
D-889, First Floor
New Friends Colony
New Delhi **...Respondent No. 5**

6. **SH. MAYANK LAKHANI**
Director,
La-Med Healthcare Pvt. Ltd.
Registered office at:
253-A-3/A, 2nd Floor,
Village Shahpur Jat,
New Delhi – 110049

Also at:

D-889, First Floor
New Friends Colony,
New Delhi **...Respondent No. 6**

7. MS. NEHA LAKHANI,
D/o Sh. Parmeshwar Dayal Lakhani,
R/o N-15, 3rd Floor,
Panchsheel Park, Malviya Nagar
New Delhi

Also at:-

D-889, First Floor
New Friends Colony
New Delhi **...Respondent No. 7**

8. REGISTRAR OF COMPANIES, DELHI
4th Floor, IFCI Tower,
61, Nehru Place,
New Delhi – 110019 **...Respondent No. 8**

Order under Section 213 and 271 of the Companies Act 2013

Order Pronounced on: 16.07.2024

CORAM:

CHIEF JUSTICE (RETD.) RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SHRI AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

Appearance:

For the petitioner : Adv. Jaya Goyal

For the respondents : Sr. Adv. P. Nagesh, Adv. Sumer Singh Boparai, Adv. Sidhant Saraswat, Adv. Akshay Sharma, Adv. Jyoti Khurana

ORDER

1. The Petitioner is a Company incorporated under Companies Act 1956, having registered office at 19/310/40, Old Rohtak Road, Shehzada Bagh Nr. Daya Basti Railway Station, New Delhi, New Delhi, 110035.
2. The Respondent No. 1, La-Med Healthcare Pvt. Ltd. is a Company incorporated under Companies Act 1956, having registered office at 253-A/3A, 2nd Floor Village Shahpur Jat, South Delhi, New Delhi - 110049. The Respondent No. 2, Lakhani Rubber Udyog Pvt. Ltd. and Respondent No. 3, Lakhani India Limited are companies incorporated under Companies Act 1956, having common registered office at Plot No. 131, Sector – 24, Faridabad, Haryana, India, 121005. The Respondent No. 3, Lakhani India as per its master data, is currently under Liquidation. Respondent No. 1, 2 and 3 are collectively referred to as **Respondent Companies**.
3. Respondent No. 4, Mr. Parmeshwar Dayal Lakhani and Respondent No. 5, Mrs. Suman Lakhani wife of Respondent No. 4 are ex-directors

of the Respondent No. 3, Lakhani India Limited. Respondent No. 6, Mr. Mayank Lakhani son of Respondent No. 4 and 5 is one of the current directors of the Respondent No. 1, La-Med Healthcare Private Limited. Respondent No. 7, Ms. Neha Lakhani is stated to be the daughter of the Respondent No. 4 and 5 and is not a director in any of the Responder Companies.

4. Respondent No. 8 herein is Registrar of Companies, Delhi (**ROC Delhi**).
5. This petition has been filed on 06.01.2021 by the Petitioners under Section 271(e) read with Section 206, 207, 208, 209, 210, 213, 216, 219, 221 and 447 of the Companies Act, 2013 seeking following reliefs:

> *In view of the facts and circumstances and submissions made above, it is respectfully prayed that this Hon'ble Court may be pleased to:*
>
> a. *pass orders directing the Respondent No. 8 to carryout investigation into the formation and the affairs of Respondent No.1 and to report thereon to this Hon'ble Tribunal;*
> b. *pass an order for freezing of assets/accounts of Respondent No.1 till the final disposal of the present petition;*
> d. *Pass orders for winding up of the Respondent No. 1 as it is just and equitable and in public interest;*
> e. *Pass any other and further order, which this Hon'ble Tribunal may deem fit and proper in the interest of justice.*

(Note:- Prayer d. & e. are mistyped; should have been c. and d.)

6. SUBMISSIONS BY THE PETITIONER:

6.1 Respondent No. 1, 2 and 3 are part of various Lakhani Group Companies, held and managed under shareholding and directorship of Respondent No. 4, 5 and 6. Respondent No. 1 –3 are being run like family business. Various entries can be seen, showing loan being given inter se among family members in lieu of shareholding in their group companies without consideration. All these transfer of shareholding, being bogus and sham have been made to appear in balance sheet of the Respondent No. 1, 2 and 3, in order to avoid outstanding liabilities of their creditors.

6.2 Respondent No. 2 is under Liquidation pursuant to order passed by the Hon'ble Punjab Haryana High Court. Respondent No. 3 is also

under Liquidation. The Respondent No. 2 and 3 have illegally and surreptitiously transferred their funds to their sister concern, the Respondent No. 1, to avoid the lawful dues of their creditors.

6.3 That the Respondent No. 2 had business dealing with the petitioner. The Respondent No. 1 approached the petitioner and placed Purchase Orders for supply of Rubber Chemicals, Synthetic Rubber, Eva, Carbon, Colour/pigments etc. Immediately upon receipt of the said purchase orders, trusting and believing their assurances, the petitioner delivered the aforesaid goods vide various Bills on credit basis as per the market practice.

6.4 Respondent No. 2 was under an obligation to make payment as per invoices within 15 days from receipt of aforesaid goods. Respondent No. 2 has accepted goods without demur or objections.

6.5 The Respondent No. 2 have made payment from time to time and balance due was INR 3,25,18,425/- (Rupees Three Crores, Twenty-Five Lacs, Eighteen Thousand, Four Hundred and Twenty-Five only). Against the said balance due, the Respondent No. 2 issued various cheques total amounting to INR 2.5 crores in favor of the Petitioner and also assured of balance payment.

6.6 Respondent No. 2 had also issued C-Form for the amount of INR 3,45,97,665.08.

6.7 On presentation all the cheques got dishonored and Petitioner apprised the same to Respondent No. 2. Upon direction from Respondent No. 2, Petitioner presented cheques again, however the said cheques were again returned unpaid by the Respondent No. 2's banker. Petitioner has filled various complaints under section 138 of the Negotiable Instruments Act against Respondent No. 2, 4 and 5.

6.8 During enquiry, the Petitioner came to know about Respondent No. 1.

6.9 The Respondent No. 1 has taken loans from its Directors, Associate Concerns, and KMPs which has risen to INR 1,09,95,858/- in the last balance sheet. Various fraudulent activities have been made to transfer the funds from other companies of Respondent No. 4 and 5

to Respondent No. 1 to defraud the creditors.

6.10 The Respondent No. 6, Mr. Mayank Lakhani has drawn salary of INR 90 Lacs which was raised to INR 1.2 cr. till 2019, while another director, Mr. Sunil is drawing salary of meagre amount of INR 8,64,000/-. These entries reveal that the Respondent No. 6, Mr. Mayank Lakhani has become the sole beneficiary of the Respondent No. 1.

6.11 All the facts clearly show that business of Respondent No. 1, 2 and 3 are being conducted with the intent to defraud and cheat creditors. A huge amount of INR 3,25,18,425/- of the Petitioner is due against the Respondent No. 2 company and their Directors.

6.12 That the persons concerned in the formation of the company and the management of its affairs, i.e. the Respondents are guilty of fraud, cheating, and misleading the public in general. After purchasing the goods from the various companies, the Respondent No.1 earned huge profits on them and to avoid the legitimate dues of creditors including the petitioner, the Respondent No. 2 company is alleging that they are running under losses and on the other hand, the sister concern i.e., the Respondent No. 1 is earning profits in crores, which shows that Respondent No. 1, 2 and 3 are acting hand in glove with each other to avoid legitimate dues of their creditors.

6.13 The Respondent No. 1 has been formed only with the view to subvert the assets of Respondent No. 2 & 3 to it and they are taking advantage of 'Corporate Veil'.

6.14 Further, as per Report published in media, SEBI had imposed a total penalty of INR 4 lacs on Smt. Suman Lakhani and Sh. Mayank Lakhani for disclosure lapses as they had violated the provisions of PIT (Prohibition of Insider Trading) and SAST (Substantial Acquisition of shares and Takeover) Regulations. In August 2014, Mayank Lakhani i.e., Respondent No. 6 had transferred his entire shareholding of over 63.68 lacs shares to Respondent No. 5, Suman Lakhani through off-market, which constituted inter-se transfer of shares amongst two promoters, which triggered disclosure

requirements.

6.15 Relief has been sought only against the Respondent No. 1 while rest of the Respondents have been impleaded as proper parties.

6.16 In view of the facts, Petitioners have filed this Petition *inter alia* seeking directions from this Hon'ble Court to call for records of Respondent No. 1 to investigate the affairs of the Respondent No. 1 Company.

7. **SUBMISSIONS BY THE RESPONDENT NO. 1:**

7.1 Petitioner has no business relationship with Respondent No. 1 & 6 and has no interest in affairs of the Respondent No.1. Thus, Petitioner has no locus to seek investigation into the affairs of the Respondent No. 1 and file this Petition qua Respondent No. 1 and 6.

7.2 Petitioner is the alleged creditor of the Respondent No. 2, who is undergoing Liquidation pursuant to admission order dated 24.08.2015 passed by the Hon'ble Punjab & Haryana High Court in Company Petition No. 160 of 2013. Petitioner had initially failed to file its claim before the official liquidator within time, however, later, delay was condoned and Petitioner was permitted by the Hon'ble Punjab & Haryana High Court to file a belated claim. Thus, an appropriate forum for redressal of grievances, if any of the Petitioner is the Hon'ble Punjab & Haryana High Court.

7.3 Preferential transactions (as alleged by the Petitioner), if any, is a subject matter of jurisdiction which lies with Hon'ble Punjab & Haryana High Court in liquidation proceedings. Petitioner is within his rights to move before the Hon'ble Punjab & Haryana High Court for action against any preferential transaction made by the Respondent No. 2.

7.4 This Tribunal is not an appropriate forum to adjudicate upon the alleged irregularities committed by the Respondent No. 2. Petitioner is hereby indulging in forum shopping and has not approached this Tribunal with bona fide intentions.

7.5 For the alleged default committed by the Respondent No 2,

petitioner has also pursued remedies including filing of multiple complaints under section 138 of the Negotiable Instrument Act 1881. Petitioner by filing the instant Petition is abusing the process of law.

7.6 Prayer (a) seeking directions from this tribunal to the Respondent No. 8 i.e., ROC "*to carryout investigation into formation and the affairs of the Respondent No. 1 and to report thereon to this Hon'ble Tribunal*", is not maintainable as this Tribunal does not have any power under the Companies Act 2013 to issue such directions to the ROC.

7.7 Further so far as prayer (b) seeking an "*order for freezing of assets/accounts of Respondent No. 1 till final disposal of the present Petition*" under section 221 is concerned, the same can be allowed only in aid of investigation being carried out by the Inspector under the provisions of the Companies Act. Locus to seek such an order can arise only subsequent to an order of inquiry / investigation and that too can be sought upon reference from the Central Government. No stranger can resort to section 221 of the Companies Act.

7.8 Furthermore, prayer (c) '*for winding up of Respondent No. 1*' under section 271 is also not maintainable as, only persons having locus under section 272 can file petition under section 271. The Petitioner does not fall within the category mentioned in section 272.

7.9 Recovery against Respondent No. 2 is already pending and the Petitioner is attempting to unnecessarily rope in Respondent No. 1 by way of this instant Petition. There is no remedy under the Companies Act available in favor of the Petitioner against Respondent No. 1.

7.10 In any case, investigation can be ordered only on *prima facie* case made against the Company. Further, series of precedents mandate that no investigation can be ordered on the basis of information and data available publicly on the MCA portal.

7.11 Allegations made are vague and not supported by any evidence / documentary proof. Whatsoever documents have been relied upon are already available in records of the Respondent No. 8 i.e., ROC. There is no *prima facie* case warranting an investigation to be ordered by this Tribunal in terms of section 213 of the Code.

7.12 If there is any malfeasance in transaction made by the Respondent No. 2, Official Liquidator has power to take appropriate actions.

7.13 Respondent No. 1 is financially sound company and order of Liquidation would cause grave consequences and would be contrary to the principles of just and equity. The Petition lacks merit and substance and none of the prayer can be allowed.

8. **ANALYSIS AND FINDINGS**

8.1 We are inclined to first discuss the prayer (a) of the Petition.

8.2 The very first prayer in the Petition seeks "*order directing the Respondent No. 8 to carryout investigation into the formation and the affairs of Respondent No.1 and to report thereon to this Hon'ble Tribunal.* Respondent No. 8 is the ROC.

8.3 We see that the Petitioner has failed to quote any provision under the Companies Act 2013, whereby this Tribunal can issue any directions to the ROC to enquire into formation and affairs of any Company.

8.4 Investigation into affairs of the Company is governed by Chapter XIV of the Companies Act 2013 "*Inspection, Inquiry & Investigation*" covering sections from 206 to 229. Perusal of section 206 – 211 falling under this chapter, makes it clear that ROC, the Respondent No. 8 herein can at best 'call for information' on its own and/or 'conduct inquiry' upon directions received from the Central Government. ROC is under an obligation to submit Report to the Central Government, pursuant to inquiry conducted. Further, *inter alia* upon receipt of report from ROC, if Central Government opines for conduct of investigation, the Central Government shall make an order

directing an investigation into affairs of the Company to be conducted by inspector(s) appointed for the purpose.

8.5 Our attention is caught to language employed in section 210 "*Investigation into affairs of Company*", which states under sub section 2

> *Where an order is passed by a court or the Tribunal in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of that company.*

The said sub section has to be read in conjunction with section 213, which reads as follows:

> *213.* ***Investigation into company's affairs in other cases.—The Tribunal may,—***
>
> *(a) on an application made by—*
>
> *(i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or*
>
> *(ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital,*
>
> *and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or*
>
> *(b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that—*
>
> *(i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;*
>
> *(ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or*
>
> *(iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company,*

order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct:

Provided that if after investigation it is proved that—

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,

then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.

8.6 Perusal of both the provisions make it succinctly clear that both the Central Government and this Tribunal has the power to order for investigation while it is the Central Government who can appoint inspector(s) to conduct investigation. Thus role of the ROC, Respondent No. 8 herein to conduct, participate or assist in investigation in any manner would arise only if the Central Government so directs specifically.

8.7 Furthermore, when the Companies Act 2013 specifically provides for investigation into affairs of the Company to be conducted by Inspector(s) appointed by the Central Government, the occasion to divert is not made out even under inherent powers of this Tribunal and this prayer sought by the Petitioner is not maintainable.

8.8 We are also inclined to discuss the question whether the petitioner has made out a prima facie case on merit in favor of investigation into affairs of the Respondent No. 1.

8.9 We see that since the Applicant herein is not the member of the

Respondent No. 1, is not qualified to seek investigation under clause (a) of section 213. We can at best test the merit of the Applicant's case under clause (b) of section 213 which apparently gives right to '*any other person'* to file an Application to seek an order of investigation which demonstrates such '*circumstances suggesting'* such events provided under 213(b) and as quoted above and not repeated here for the sake of brevity.

8.10 On perusal of section 213, we are of the view that vast power has been conferred upon this Tribunal to form an opinion on requirement of investigation into affairs of the Company, which undoubtedly is a subjective process and we are constrained to exercise such power very wisely and not in arbitrary fashion as no power even if appearing to be open ended (as is the present case under section 213(b)) can be absolute and unfettered. There always have to be read some inherent limitations on exercise of such open ended power and the power has to be exercised reasonably.

8.11 We are also cognizant of the law developed by the Hon'ble Supreme Court in the matters titled as ***Barium Chemicals Ltd. and Anr. vs Company Law Board and Ors.*** 1966 SCC OnLine SC 53; and ***Rohtas Industries vs. S. D. Agarwal and Ors.*** (1969) 1 Supreme Court Cases 325, whereby the Hon'ble Supreme Court had set aside the order directing investigation into affairs of the Company. What transpires from the law developed in these matters is that directing the investigation into affairs of the Company has grave consequences on business and reputation of the Company and thus cannot be perceived a casual matter. Since power of this Tribunal to form an opinion on requirement of investigation into affairs of the Company is a subjective process, this Tribunal nonetheless must be satisfied with the existence of circumstances which must prima facie suggest the events as enumerated in section 213. To put it precisely, formation of opinion is a subjective process but not

the existence of relevant circumstances suggesting the matters enumerated in section 213(b), which must on perusal of pleadings and documents show up to be prima facie in existence. There has to be some kind of definiteness in pleadings and record to show the existence of circumstances suggesting the matters enumerated under section 213(b) as complained of. The pleadings must not be vague / unsupported with requisite documents.

8.12 Further, while forming opinion under section 213(b), reliance needs to be placed only on relevant information and not extraneous information.

8.13 We find it relevant to extract some excerpts of the judgment laid by the Hon'ble Supreme Court in ***Barium Chemicals*** (Supra):

Observation by M. Hidayatullah, J.

> *28. No jurisdiction, outside the section which empowers the initiation of investigation, can be exercised. An action, not based on circumstances suggesting an inference of the enumerated kind will not be valid. In other words, the enumeration of the inferences which may be drawn from the circumstances, postulates the absence of a general discretion to go on a fishing expedition to find evidence. No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out. As my brother Shelat has put it trenchantly:*
>
> > *"It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on circumstances which it thinks exist…."*
>
> *Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. The conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose,*

fraud or misconduct or the withholding of information of a particular kind.

32. The first circumstance is “delay, bungling and faulty planning” resulting in “double expenditure” for which the collaborators had put the responsibility on the second appellant. None of these shows an intent to defraud by which phrase is meant something to induce another to act to his disadvantage. The circumstances mentioned show mismanagement and inefficiency which is not the same thing as fraud or misconduct. The second and the third circumstance merely establish that there was loss in making this project work and that a part of capital had been lost. This was admitted by the appellants who pointed out that after considerable negotiations they induced Lord Poole, the President of the collaborating firm, to invest a further sum of £ 2,50,000. This shows that the appellants were in a position to dictate to the collaborating company which they would not have been able to do if they were guilty of fraudulent conduct. The last circumstance does not also bear upon the subject of fraud and acts done with intent to defraud. That some directors have resigned does not establish fraud or misconduct. There may be other reasons for the resignation.

33. In the other part of the affidavit the Chairman has merely repeated Section 237(b) but has not stated how he came to the conclusion and on what material. In other words, he has not disclosed anything from which it can be said that the inference which he has drawn that the Company was being conducted with intent to defraud its creditors, members and other persons or persons concerned in the management of the affairs of the Company were guilty of fraud, misfeasance and misconduct towards the company and its members was based on circumstances present before him. In fact, para 16 is no more than a mechanical repetition of the words of the section.

34…..In my opinion, therefore, the action has not been proved to be justified. No doubt, the section confers a discretion but it sets its own limits upon the discretion by stating clearly what must be looked for in the shape of evidence before the drastic act of investigation into the affairs of a company can be taken. The affidavits which were filed in answer to the petition do not disclose even the prima facie existence of these circumstances. On the other hand, they emphasise only that there was mis-management and losses which necessitated a “deeper probe”. In other words, the act of the Chairman was in the nature of a

fishing expedition and not after satisfaction that the affairs of the Company were being carried on even prima facie with the intent to defraud or that the persons incharge were guilty of fraud or other mis-conduct.

Observation by R.S. Bachawat, J.

41……Briefly put, those circumstances are delay, bungling and faulty planning by the management resulting in double expenditure, huge losses, sharp fall in the price of the Company's shares and the resignation of some of the directors on account of differences in opinion with the managing director. I think that these circumstances, without more, cannot reasonably suggest that the business of the company was being conducted to defraud the creditors, members and other persons or that the management was guilty of fraud towards the company and its members. No reasonable person who had given proper consideration to these circumstances could have formed the opinion that they suggested any fraud as mentioned in the order dated May 19, 1965. Had the Chairman applied his mind to the relevant facts, he could not have formed this opinion. I am, therefore, inclined to think that he formed the opinion without applying his mind to the facts. An opinion so formed by him is in excess of his powers and cannot support an order under Section 237(b).

Observation by J.M. Shelat, J.

31. ….If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "circumstances suggesting". But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three sub-clauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded.…

There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in sub-clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

34….Delay, bungling and faulty planning of the project entailing double expenditure, continuous losses resulting in ⅓rd of the share capital being wiped out, shares being quoted at half their face value and severance of their connection by some eminent persons cannot by themselves suggest an intent to defraud or fraudulent management.

Further, the Hon'ble Supreme Court in the matter of *Rohtas Industries* (Supra) had observed and held as follows:

Observation by K.S. Hegde, J.

4… From the provisions contained in sections 235 and 236, it is clear that the legislature considered that investigations into the affairs of a company is a very serious matter and it should not/ be ordered except on good grounds. It is true that the investigation under Section 237(b) is of a fact-finding nature.

…

11… Finally we must also remember that the section in question is an inroad on the powers of the company to carry on its trade or business and thereby an infraction of the fundamental right guaranteed to its shareholders under Article 19(1)(g) and its validity cannot be upheld unless it is considered that the power in question is a reasonable restriction in the interest of the general public…

12… Admittedly the only relevant material on the basis of which the impugned order can be said to have been made is the transaction of sale of preference shares of Albion Plywoods Ltd. At the time when the Government made the impugned order, it did not know the market quotation for the ordinary share of that company as on the date of the sale of those shares or immediately before that date. They did not care to find out that information. Hence there was no material before them showing

that they were sold for inadequate consideration.... If the Government had any suspicion about that transaction it should have probed into the matter further before directing any investigation. We are convinced that the precipitate action taken by the Government was not justified on the basis on the material before it. The opinion formed by the Government was a wholly irrational opinion.

Observation by R.S. Bachawat, J.

5. If it is established that there were no materials upon which the authority could form the requisite opinion the court may infer that the authority did not apply its mind to the relevant facts. The requisite opinion is then lacking and the condition precedent to the exercise of the power under Section 237(b) is not fulfilled.

...

12. Several things are to be noticed in this connection. No complaint with regard to the impropriety of the sale of the preference shares held by Rohtas Industries Ltd. was made to the Central Government by any of its creditors or members. There was no material before the Central Government suggesting that M/s Bagla & Co., held the preference shares as benamidars of Sahu Jains or their friends. On May 30, 1960 Bagla & Co., continued to hold 32000 ordinary shares in Albion Plywoods Ltd. It is not suggested that the market price of preference shares on May 6, 1960 was more than Rs 100. The market price of the ordinary shares fluctuated between Rs 14 and Rs 17 between May 13 and June 17, 1960. But there was no material showing that the huge block of 50,000 ordinary shares issuable on conversion of 5000 preference shares could be sold in the market for more than Rs 10 per share. No attempt was made to find out the market price of ordinary shares on May 6, 1960. It now transpires that on that date the price was Rs 11. The charge that the sale of the preference shares was fraudulent or improper was not communicated to the Rohtas Industries Ltd., nor were they asked to give their explanation on the subject.

8.14 From the aforesaid excerpt of the judgement it is clear that there must be sufficient and adequate information placed for this tribunal to decide the question on prima facie existence of relevant circumstances.

8.15 Now applying the aforesaid principle, we move on to discussion on facts and record presented before us for to order investigation into

Respondent No. 1 Company.

8.16 Petitioner has inter alia relied upon following documents to plead that the affairs of Respondent No. 1 is being conducted to defraud creditors:

a. Copy of Invoices raised by the Petitioner against supply made to Respondent No. 2;
b. Copy of Form – C issued by Respondent No. 2 to the Petitioner;
c. Master data of Respondent Companies
d. Chart incorporating details of first directors and subsequent directors of Respondent No. 1
e. Chart showing transfer of Equity shares and Preference shares by Respondent No. 4, 5 and 7 in favor of Respondent No. 6
f. Chart showing unsecured loans of Respondent No. 1
g. Chart showing salary drawn by the Respondent No. 6 i.e., Mr. Mayank Lakhani in Respondent No. 1 Company;
h. List of Companies of Lakhani Group
i. Copies of Media Report.

8.17 It is not the case of the Petitioner that any illegalities have been committed by the Respondent No. 1. None of provision of law specifically is stated to violated. It is also not the case the Respondent No. 1 has been incurring losses to the detriment of their members. Instead the Petitioner has admitted that the Respondent No. 1 is a profit making Company. Even otherwise it is nowhere shown how the interest of members is adversely affected.

8.18 It has not been alleged specifically that business of Respondent No. 1 has been conducted to defraud the creditors of the Respondent No. 1 or if yes then how and manner is absent from the pleadings. We also in later part of this order discussed that the Petitioner cannot be termed as creditor of the Respondent No. 1 Company. Furthermore, no case or incident has been cited by the Petitioner to show that business of the Respondent No. 1

detriments the public interest.

8.19 We observe that concern of the Petitioner seems to be that Respondent No. 16, Mr. Mayank Lakhani has become sole beneficiary of the Company and its profits and is drawing a high salary. We on this aspect note that Respondent No. 1 is a private limited company and admittedly forms a part of closely held family companies. When it has not been shown to us that interest of member, creditor or public is adversely affected or otherwise conduct of business is oppressive to shareholder(s), this Tribunal cannot go into internal private affairs of private company, more so when there is no illegality has either been specified or prima facie shown.

8.20 Even otherwise these documents are insufficient for us to take any view on merits of the matter. Petitioner has raised a mere bald allegations of fraudulent conduct without showing any manner of alleged fraudulent conduct or any substance in support. So far as dues against Respondent No. 2 is concerned, the same is irrelevant and extraneous for us to take a view with respect to affairs of Respondent No. 1 under the purported management of Respondent No. 6 and no reliance can be placed upon the same in view of legal principles evolved and discussed above.

8.21 So far as second prayer seeking *an order for freezing of assets/accounts of Respondent No.1 till the final disposal of the present petition,* is concerned the same is interim in nature and does not lie at this stage when the matter is being disposed of by this final order. Hence this prayer is rendered infructuous at this stage.

8.22 Moving on to third prayer seeking winding up of the Respondent No. 1 company, we are inclined to test the same on the question of maintainability. We see that the grounds under which a Company could be wound up gets widened with *inter alia* a ground provided under section 271 that it is "*Just & Equitable*" that the Company be wound up. Notwithstanding this, we observe that section 272

provides as to who can file a petition for winding up. Section 272 states:

> *Subject to the provisions of this section, a petition to the Tribunal for the winding up of a company shall be presented by—*
> *(a) the company;*
> *(b) any contributory or contributories;*
> *(c) all or any of the persons specified in clauses (a) and (b);*
> *(d) the Registrar;*
> *(e) any person authorised by the Central Government in that behalf; or*
> *(f) in a case falling under clause (b) of section 271, by the Central Government or a State Government.*

8.23 It is interesting to see that before enactment of the Insolvency & Bankruptcy Code 2016 (**IBC**) creditor(s) also had a right to initiate a Petition for the winding up, which was taken away by Eleventh Schedule of the IBC read with its section 255, which is a part of Transitional Provisions of IBC, as the Creditors received right to initiate insolvency process under the IBC itself. Hence, there is no iota of doubt that creditor(s) so far as Companies Act 2013 is concerned, do not have a right to file a Petition for Winding Up of the Company.

8.24 Without prejudice to our aforesaid view that Creditors have no right to file a petition seeking the order of winding-up under the Companies Act, we are also inclined to discuss that can the petitioner be even termed as creditor to the Respondent No. 1 Company.

8.25 We note that the 'Creditor' is not defined under the Companies Act 2013. However, it is relevant to look into definition under the IBC as Creditor's right in question was shifted to the said legislation. Section 3(10) of the IBC defines 'Creditor',

> *"**creditor**" means any person to whom a **debt** is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder*

Further 'Debt' is defined under section 3(11) of the IBC as,
*"**debt**" means a **liability or obligation in respect of a claim** which is due from any person and includes a financial debt and*

operational debt

Further 'claim' is defined under section 3(11) of the IBC as,
*"**claim**" means –*
*(a) a **right to payment,** whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;*
*(b) **right to remedy for breach of contract** under any law for the time being in force, **if such breach gives rise to a right to payment**, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured*

8.26 Admittedly in the present case, the Petitioner had no transaction with the Respondent No. 1 Company. Admittedly the debt, if any was owned against the Respondent No. 2 Company. The Petitioner has failed to produce any document as regards the transaction(s) with the Respondent No. 2, which would show that the Petitioner had any right to payment / make claim against the Respondent No. 1 under some contractual arrangement or otherwise. When there is no claim / right against the Respondent No. 1 as regards the transactions between the Petitioner and the Respondent No. 2, there can be no 'debt' subsisting in favor of the Petitioner against the Respondent No. 1. Thus, the only conclusion which ensues is that the Petitioner cannot be called a creditor of Respondent No. 1 Company.

8.27 In view of the above analysis, we are of the view that the Petitioner is not a creditor of the Respondent No. 1 Company, and even if otherwise is assumed, the Petitioner does not fall in any of the category given under section 272 of the Companies Act 2013 and has no right to file Petition seeking initiation of Winding Up of the Respondent No. 1 Company.

8.28 For the aforesaid reasons, we are inclined to dismiss CP-09(PB)/2021.

9. **ORDER**

9.1 Company Petition bearing **CP-09/271/PB/2021** is **DISMISSED**, as **NOT MAINTAINABLE**. All pending IAs if any are also disposed of.

No order as to Cost.

Let copy of the order be served to the parties.

File be consigned to Record Storage (Current).

Sd/-
RAMALINGAM SUDHAKAR
PRESIDENT

Sd/-
AVINASH K. SRIVASTAVA
MEMBER (TECHNICAL)