IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH (COURT– I) CHENNAI

ATTENDANCE CUM ORDER SHEET OF THE HEARING
HELD ON **07.10.2026** THROUGH VIDEO CONFERENCE

CORAM: HON'BLE SHRI SANJIV JAIN, MEMBER (JUDICIAL)
HON'BLE SHRI VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

IN THE MATTER OF : G.S Rajesh
Vs
Mars Consortium Infra Pvt Ltd

MAIN PETITION NUMBER : TCP/109/2016

(IA/MA) APPLICATION NUMBERS

CA/1/2013; IA/450/2019 IN CP/93/2012

ORDER

TCP/109/2016
CA/1/2013
IA/450/2019 in CP/93/2012

Present: Mr. Dwarakanath, Ld. Counsel for the Petitioner.
Mr. A.M.Sridharan, Ld. Counsel for the Respondent.

Vide common order pronounced in the open Court, the petition and the applications are dismissed.

File be consigned to records.

-sd-
[VENKATARAMAN SUBRAMANIAM]
MEMBER (TECHNICAL)

-sd-
[SANJIV JAIN]
MEMBER (JUDICIAL)

MS

Date: 07.10.2026

IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI

TCP No. 109 of 2016

(Filed under Sections 397 & 398 read with Sections 402 & 403 of the Companies Act, 1956)

In the matter of MARS CONSORTIUM INFRA PRIVATE LIMITED

G.S.Rajesh
D-5, 1st Block, Prime Terrace Apartments,
Dr. Muthulakshmi Salai (L.B.Road),
Thiruvanmiyur, Chennai – 600 041 **... Petitioner**

Vs

1. Mars Consortium Infra Private Limited,
9, Shanthi Street, D.Seethapathy Nagar,
Velachery, Chennai – 600 042

2. Maran Mani,
9, Shanthi Street, D.Seethapathy Nagar,
Velachery, Chennai – 600 042

… Respondents

Along with

CA/1/2013 IN TCP No. 109 of 2016

(Filed under Sections 543-545 read with Section 403 and Schedule XI of the Companies Act, 1956 and Regulation 44 of the Company Law Board Regulations 1991)

In the matter of ***MARS CONSORTIUM INFRA PRIVATE LIMITED***

Maran Mani,
9, Shanthi Street, D.Seethapathy Nagar,
Velachery, Chennai – 600 042

... Applicant/ 2nd Respondent

Vs

1. **G.S.Rajesh**
D-5, 1st Block, Prime Terrace Apartments,
Dr. Muthulakshmi Salai (L.B.Road),
Thiruvanmiyur, Chennai – 600 041

… Respondent/Petitioner

2. Mars Consortium Infra Private Limited,
9, Shanthi Street, D.Seethapathy Nagar,
Velachery, Chennai – 600 042

… Respondent/Respondent

Along with

IA/450/2019 IN TCP No. 109 of 2016

(Filed under Section 24(4) of the Companies Act, 1956 and Regulation 44 of the Company Law Board Regulations 1991)

In the matter of ***MARS CONSORTIUM INFRA PRIVATE LIMITED***

G.S.Rajesh
D-5, 1st Block, Prime Terrace Apartments,
Dr. Muthulakshmi Salai (L.B.Road),
Thiruvanmiyur, Chennai – 600 041

... Applicant/Petitioner

Vs

1. **Mars Consortium Infra Private Limited,**
9, Shanthi Street, D.Seethapathy Nagar,
Velachery, Chennai – 600 042

2. Maran Mani,
9, Shanthi Street, D.Seethapathy Nagar,
Velachery, Chennai – 600 042

… Respondents/Respondents

Present:

For Petitioner*: Shubharanjani Ananth, Advocate*

For Respondents*: A.M.Sridharan, Advocate for R2*

CORAM

SANJIV JAIN, MEMBER (JUDICIAL)

VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

Order Pronounced on 07th October, 2026

O R D E R

(Hearing conducted through hybrid mode)

The Petition TCP/109/2016 has been filed by G.S. Rajesh (Petitioner)under Sections 397 & 398 read with Sections 402 & 403 of the Companies Act, 1956 seeking the following reliefs:

a) To direct the 2nd Respondent to purchase the shares of the Petitioner in the Respondent Company at the value arrived at by the independent valuer appointed by this Bench and return all the other sums contributed by the Petitioner to the 1st Respondent Company by way of loans etc.

b) To direct the 2nd Respondent to repay the 1st Respondent all unauthorised/unexplained withdrawals from the 1st Respondent bank accounts as well as any funds found by the independent auditor to be diverted/ siphoned off by the 2nd Respondent after investigation. Direct the 2nd Respondent to repay the 1st Respondent costs for usage of the 1st Respondent's vehicles for use other than for the 1st Respondent Company's purposes at the rate of Rs. 100 per KM for the distance travelled by the vehicles from the period March 2012 till date. Direct the 2nd Respondent to personally settle any/ all creditors' claims in case the funds available with 1st Respondent are insufficient to meet the same.

c) To Surcharge the 2nd Respondent to the extent of losses caused to the Company due to breach of his fiduciary duty and for various acts of misappropriation and fraud as detailed in the Petition.

d) Pass such further or other orders as this Bench may deem fit and proper in the circumstances of the case and render justice.

CA/1/2013

The application **CA/1/2013** has been filed by the Respondent Maran Mani under Sections 543-545 read with Section 403 and Schedule XI of the Companies Act, 1956 and Regulation 44 of the Company Law Board Regulations 1991 seeking the following reliefs:

a) *This Board may be pleased to initiate Surcharge proceedings against the 1st Respondent herein in accordance with Sec 543-545 read with Schedule XI of the Companies Act and thus render justice.*

b) *This Board may be pleased to appoint an independent/third party auditor in terms of prayer (a) hereinabove to ascertain the amounts illegally withdrawn by the 1st Respondent from the coffers of the 2nd Respondent Company and find out the amount payable by the 1st respondent to the 2nd respondent company, for losses caused to the 2nd respondent company and thus render justice.*

IA/450/2019

The application **IA/450/2019** has been filed by the Petitioner G.S. Rajesh under Section 24(4) of the Companies Act, 1956 and Regulation

44 of the Company Law Board Regulations 1991 seeking the following reliefs:

a) *To hold the second respondent guilty of misfeasance and malfeasance and direct him to provide restitution and punish him accordingly.*

b) *To initiate and conduct surcharge proceedings against the second respondent and the second respondent may be directed to pay a sum of Rs. 7,69,60,500 (Rupees Seven Crores Sixty Nine Lakhs Sixty Thousand And Five Hundred) along with interest thereon at the rate of 18% p.a. from the date they became due till the date of actual payment.*

c) *pass such further or other orders as deem fit and proper in the circumstances of the case and thus render justice.*

I. SUBMISSIONS OF THE PETITIONER:

2. It is submitted that the Company was, in substance, a quasi-partnership between the Petitioner and the 2nd Respondent, two persons known to each other, who reposed mutual trust and confidence in each other and shared the equity of the Company equally. The venture was floated to give effect to sand-removal rights originating from the representation made by the Petitioner, through Prim and Proper Enterprises Private Limited (P&P), to the Public Works Department, and the Company was the executing arm of that business.

3. Being occupied with the affairs of P&P and his other business interests, the Petitioner entrusted the day-to-day operations of the

Company to the 2nd Respondent, who signed the documents, operated the bank accounts and dealt with the customers, and who, in consideration thereof, was paid a higher monthly remuneration than the Petitioner. It is alleged that this entrustment was founded on trust, but was abused by the 2nd Respondent.

4. It is stated that the Company operated three bank accounts — a Current Account with Axis Bank, a Current Account with State Bank of India, OMR Branch, and a Cash Credit (O.D.) account with State Bank of India, Ambattur (sanctioned to a limit of Rs. 90 lakhs on 18.07.2011 against hypothecation of stocks and book debts and mortgage of immovable property, with Petitioner standing as personal guarantor). 2nd Respondent was permitted, out of trust, to be the sole signatory to all three accounts, but functioned with no transparency and repeatedly declined to allow the Petitioner to inspect the books or the bank statements.

5. It is stated that the Petitioner became suspicious when he learnt from the Ambattur branch that a cheque of the Company had been dishonoured for want of funds — a state of affairs which could not have arisen given that the Company's receivables always exceeded its outgoings. On insisting upon transparency, the Petitioner was, after considerable pressure, made a joint signatory of SBI, OMR account alone. On obtaining and examining the bank statements, he found that although the Company's supplies to GEL should have generated revenue of not less than Rs. 4.26 crores, the balances were persistently

inadequate, pointing to systematic siphoning by the 2nd Respondent through cash withdrawals and transfers.

6. It is stated that several of the sums withdrawn by the 2nd Respondent were re-deposited by him into the Company so as to project that he was infusing his own funds, whereas he was in truth returning the Company's own moneys. Further, the 2nd Respondent floated a sole proprietorship, M/s Rolls Transport, engaged in the very business of transport of sand, into which the inflows of the Company were diverted; three trucks purchased by the Company on a term loan in March 2012 were used by the 2nd Respondent for the business of M/s Rolls. The 2nd Respondent was unable to produce the log books when confronted. When the Petitioner questioned this misuse, the 2nd Respondent assaulted him in the Company's office on 19.06.2012.

7. It is stated that the 2nd Respondent failed to finalise the accounts of the Company. The statutory auditor, instead auditing the accounts, offered to arbitrate the disputes and produced an entirely different balance sheet at the instance of the 2nd Respondent. The Petitioner accordingly terminated the statutory auditor's services on 09.10.2012. Meanwhile, creditors of the Company approached the Petitioner directly complaining of non-payment. The statutory dues (including VAT) went unpaid. The Petitioner's repeated communications of 20.06.2012, 08.08.2012, 21.08.2012 and 22.08.2012 seeking particulars of bills, diesel consumption and VAT elicited no response. The 2nd Respondent declined to transfer GEL receipts to the OMR account to enable the creditors to be paid.

8. It is stated that as a counterblast to the Petitioner's efforts, the 2nd Respondent caused a legal notice dated 30.09.2012 to be issued, addressed not only to the Petitioner but also to his father — a senior IAS officer wholly unconnected with the business — and to his brother and P&P, containing what the Petitioner describes as baseless allegations. It is stated that the said notice itself admitted various irregularities in the Company, such as non-payment of VAT, issuance of royalty slips and siphoning of funds — all of which fell within the exclusive domain of the 2nd Respondent, who controlled the accounts and signed the invoices.

9. It is stated that, while continuing as a director of the Company, the 2nd Respondent participated in the Government tender of 05.10.2012 through his own proprietorship, M/s Rolls, and other entities, and deliberately underbid on behalf of the Company so as to secure the contract for his personal benefit — a clear breach of his fiduciary duty. It is stated that there being an irretrievable breakdown of trust in what was essentially a quasi-partnership, and there being just and equitable grounds for winding up, the Petitioner has approached this Tribunal not to wind up the Company but to save it and to protect his interest. It is stated that the conduct of the 2nd Respondent amounts to oppression and mismanagement within the meaning of Sections 397 and 398.

10. Subsequent to the institution of the petition, this Tribunal appointed an independent auditor, whose Special Audit Report dated 21.08.2017 and Final Report dated 03.05.2018 are strongly relied upon by the Petitioner vindicating his case. The Petitioner also pointed to

the 2nd Respondent's own suit, C.S. No. 941 of 2017, filed unilaterally against GEL, in which it was admitted that a sum of Rs. 15 lakhs paid by the Company's debtor was received into the account of the 2nd Respondent's wife and not brought into the Company's books.

II. Submissions of Respondent No.2

11. The 2nd Respondent denies the averments in the petition as false, frivolous and vexatious, and contends that the Petitioner has approached this Tribunal with unclean hands and has suppressed the material facts. The petition is a counterblast to the legal notice dated 29.09.2012 issued by the 2nd Respondent.

12. It is submitted that the Petitioner and the 2nd Respondent are childhood friends; that the Petitioner is the Managing Director of P&P; and that, at the Petitioner's request, the 2nd Respondent lent a sum of Rs. 32,42,962/- to finance the performance of P&P's contract with GEL on a promise of 50:50 sharing of profits, of which only Rs. 10,00,000/- were repaid. The balance outstanding gave rise to the breach of trust and cheating. It is alleged that P&P claimed VAT from GEL without remitting it to the Government.

13. It is stated that it was the Petitioner who, through the influence of his father, procured G.O. Ms. No. 272 dated 22.09.2010 in favour of P&P without a tender. He caused the Company to be incorporated and enter into a backdated agreement dated 31.01.2011. The 2nd Respondent was inducted only for the marketing of sand.

14. 2nd Respondent places strong reliance on the Petitioner's own admission that he is the Managing Director of the Company. It is submitted that, under Sections 2(26), 209 and 211 of the Companies Act, 1956, the Managing Director is entrusted with substantial powers of management and is responsible for the maintenance of the books of account and for the balance sheet and profit and loss account presenting a true and fair view. The Petitioner, being the Managing Director of both the Company and P&P since incorporation, was therefore responsible for the affairs and records of the Company.

15. It is stated that the registered office of the Company was situated at the residence of the 2nd Respondent only at the Petitioner's insistence, to avoid legal complications for the Petitioner's father, while the corporate office was located at the clinic of the Petitioner's brother, from where Petitioner and his family controlled the entire site operations, administration, finance and accounts. 2nd Respondent's role was confined to marketing. It is stated that the Petitioner failed to complete the audit for the financial year 2011-12 despite holding the records.

16. 2nd Respondent alleges that the Petitioner forged his signatures in the account-opening form, documents and cheques of the SBI, OMR Current Account. Following a complaint, police filed a charge-sheet against the Petitioner in FIR No. 465 of 2017 under Sections 406, 465, 467, 468, 471, 420 and 120-B IPC. It is asserted that the Current Account with SBI, OMR was operated singly or jointly up to 08.12.2011. Many of the impugned cheques were in truth signed and encashed by the

Petitioner himself, or bore the Petitioner's signature with the 2nd Respondent's signature forged.

17. As regards loans, 2nd Respondent submits that it was he who mortgaged his own immovable properties as security for the Cash Credit facility and the term loan of Rs. 1.60 crores, for the purchase of three TATA Prima trucks. The Petitioner having furnished only a personal guarantee in any event, is a habitual defaulter with an adverse CIBIL record. It is stated that the Company had availed finance from Srei Equipment Finance Pvt. Ltd. for purchase of a Volvo excavator, upon a Board resolution dated 24.02.2012.

18. The Respondent relies upon two equipment-lease agreements between the Company and M/s Rolls — dated 30.04.2012 (three TATA Prima trucks, at Rs. 2,50,000/- per month payable to the Ambattur branch) and dated 31.08.2012 (the Volvo excavator, at Rs. 15,00,000/- per year with a refundable deposit of Rs. 10,00,000/-) — and contends that M/s Rolls duly paid the lease rentals and the invoices were raised for the use of the vehicles and the excavator for the Company's purposes. The transactions with M/s Rolls were the bona fide commercial arrangements.

19. 2nd Respondent alleges that it was the Petitioner who withdrew Rs. 1,21,85,629/- from the Company's SBI, OMR account through cheque withdrawals and transfers to P&P and others. He routed a further sum of Rs. 32,00,000/- to his mother, and caused fake royalty slips to be issued, excavated the sand in excess of the permitted quantity, and carried on a competing business.

III. Rejoinder of the Petitioner

20. Petitioner submits that the Counter Statement filed by the 2nd Respondent is replete with contradictions, afterthoughts and irrelevant allegations. 2nd Respondent has introduced voluminous documents after several years of litigation without explaining why such documents were not relied upon earlier. Most of the documents are either irrelevant, self-serving or unsupported by proper proof and ought not to be relied upon.

21. The allegations of forgery and criminal misconduct levelled against the Petitioner are wholly untenable. The criminal proceedings relied upon by the 2nd Respondent have not resulted in any finding against the Petitioner; The Petitioner has been discharged by the Criminal Court. Consequently, the allegations founded upon the criminal proceedings cannot be used to sustain the 2nd Respondent's defence before this Tribunal.

22. The consistent documentary record demonstrates that the 2nd Respondent exercised substantial control over the affairs of the 1st Respondent Company. The Registered Office was at the residence of the 2nd Respondent; the Company's official e-mail and domain were under his control; and he was the sole signatory to several of the Company's bank accounts. The attempt to portray the Petitioner as being exclusively responsible for the Company's financial affairs is therefore contrary to the Company's own records.

23. It is stated that the 2nd Respondent's own documents materially contradict his pleadings. In several contemporaneous communications

he described himself as Managing Director and the Petitioner as Executive Director, while in the present proceedings he contends that the Petitioner alone was managing the Company. His shifting stand regarding the Company's bank accounts, Board resolutions and signatures demonstrates that the allegations of forgery are afterthought.

24. The allegations concerning the Company's business operations and the Government contracts are equally misconceived. The business was initially developed through P&P and thereafter transferred to the 1st Respondent Company, which independently participated in the Government tender and commenced its operations. The 2nd Respondent, who himself benefited from the business arrangements, cannot selectively attribute the transactions to the Petitioner while disowning his own participation.

25. It is stated that the 2nd Respondent has failed to establish that the Petitioner was responsible for the alleged diversion or siphoning of funds. On the contrary, the material on record, including the Special/Independent Audit Report, demonstrates that the books, records and financial information of the Company were substantially within the control and possession of the 2nd Respondent. His failure to produce the complete bank statements and other primary financial records is therefore material.

26. It is stated that the transactions relating to the vehicles and the Equipment Lease Agreement with M/s. Rolls, the proprietary concern of the 2nd Respondent, constitute a serious instance of conflict of

interest. The agreement was executed on behalf of the Company by the 2nd Respondent himself in favour of his own proprietary concern, without proper Board approval. The vehicles remained with the 2nd Respondent, while the Company was burdened with the corresponding financial liability without receiving the contemplated benefit.

27. The allegation that the Petitioner failed to cooperate with the audit is also contrary to the record. The Registered Office and the Company's books and records remained at the residence of the 2nd Respondent. The Independent Auditor appointed by this Tribunal has considered the conduct relating to the maintenance and production of the Company's accounts. The 2nd Respondent cannot therefore rely upon the alleged non-completion of accounts to shift responsibility upon the Petitioner.

28. It is stated that the allegations of forgery in relation to the Company's bank accounts and cheques are untenable. The 2nd Respondent has taken inconsistent positions whether the accounts were operated singly or jointly and whether the relevant documents bear his signatures. The subsequent allegation of forgery is clearly an improvement over his earlier stand and is unsupported by credible evidence. The discharge of the Petitioner from the criminal proceedings further undermines these allegations.

29. The 2nd Respondent has also failed to account for monies received from the Company's customers. Despite the subsisting interim order concerning the Company's assets, the 2nd Respondent instituted

proceedings in the name of the Company and received monies from its debtor, including amounts and diverted to his spouse's account. Such conduct directly concerns the Company's assets and is relevant to the allegations of oppression and mismanagement.

30. The report relied upon by the 2nd Respondent from M/s. K. Gopal Rao & Co. is not an independent audit report comparable to the report of the Auditor appointed by this Tribunal. It was commissioned and paid for by the 2nd Respondent and is therefore essentially a self-serving document. In contrast, the Special/Independent Auditor appointed by this Tribunal has specifically examined the Company's affairs and quantified the loss attributable to the acts complained of by the Petitioner.

31. It is stated that the Counter Statement does not displace the Petitioner's case of oppression and mismanagement. Rather, the 2nd Respondent's own documents disclose substantial inconsistencies regarding the management of the Company, operation of bank accounts, execution of documents, maintenance of books, related-party transactions and utilization of Company assets.

IV. Report of the Tribunal-Appointed Auditor

32. By order dated 04.08.2014, this Tribunal appointed an independent Chartered Accountant to audit the accounts of the Company and to arrive at the fair value of its shares. The Special Audit Report dated 21.08.2017 and the Final Report dated 03.05.2018, record in substance, the following observations:

a) Books, records and financial operations of the Company were stated to be in the possession of 2nd Respondent;
b) Complete financials were not furnished and the password to the Tally accounts was not made available despite requests;
c) Statutory financial statements had not been filed with the Registrar of Companies since 2011;
d) No Board meeting had taken place for over five years;
e) 2nd Respondent was an interested director in the equipment lease between the Company and his proprietorship M/s Rolls, that no enabling resolution was produced to the Auditor, that the terms appeared to be detrimental to the Company, and that hire charges and dues were shown as outstanding from M/s Rolls to the Company;
f) Entries suggestive of recycling of cash and unexplained accounting entries were noticed; and the 2nd Respondent had, in his own suit, admitted that a receivable of the Company from its debtor had been paid to his wife and had not been brought into the Company's books.

33. The Auditor recorded that he is unable to arrive at a conclusive value of the shares of the Company, and that his examination could not be completed for want of complete and reliable financial information. The reports are therefore, on their own terms, inconclusive.

34. 2nd Respondent has placed reliance upon the report of M/s. K. Gopal Rao & Co., a firm privately engaged by him, which offers a materially different account of the same transactions.

35. The weight to be attached to each of these reports, and the use, to which the observations recorded in them may legitimately be put, are considered in the course of our findings.

V Objections to Auditors Report

36. Delay, incomplete audit and violation of opportunity to respond: It is stated that by an order dated 04.08.2014, this Tribunal appointed M/s. P.G. Srikanth, Chartered Accountant, to audit the Company's accounts for FY 2011-12 to 01.08.2014 and determine the fair value of its shares within four weeks, however, the Auditor filed interim reports dated 30.09.2014 and 02.12.2014 without serving them on the 2nd Respondent, who had to obtain copies through a copy application. The audit remained incomplete for more than three years, resulting in the subsequent order dated 17.11.2017 directing completion within four weeks. Despite the 2nd Respondent's full cooperation, furnishing of records and repeated offers for inspection, the Auditor stopped physical verification after 09.01.2018 and submitted the final report dated 03.05.2018 without completing the audit or furnishing his final findings to the 2nd Respondent for explanation. The Auditor also failed to provide specific details of certain alleged discrepancies and documents, thereby denying a meaningful opportunity to respond.

37. Full cooperation and no denial of Tally or records: The allegation that the 2nd Respondent restricted the audit or denied access to the Company's books is incorrect. After the order dated 17.11.2017, the 2nd Respondent informed the Auditor that all books and records are available at the registered office and repeatedly invited

inspection. Tally login credentials were furnished on several occasions, including 15.09.2014, 08.11.2014, 27.11.2017, 05.04.2018 and 16.04.2018, and Tally records for 2011-17, hard copies, bank statements, loan and finance documents, agreements, board resolutions, vehicle records, legal records and other documents were supplied. Original records were also offered for inspection or delivery against an undertaking. Only the administrative/edit password was not supplied, since the Auditor was required to examine and not to alter the accounts. The Auditor visited the registered office on 08.12.2017, 18.12.2017 and 09.01.2018, where records were produced and his questionnaire was answered. The records were also forwarded to his office for convenience. Thus, there was no obstruction or denial of access.

38. Incorrect attribution of management, books, assets and banking operations:

Auditor's finding that the Company's books, records, assets and financial operations were in the possession or exclusive control of the 2nd Respondent is denied. The accounts were maintained by the Company and had originally been handed over by the Petitioner, who was the Managing Director since incorporation and bore the responsibility for the Company's statutory records. The Auditor failed to properly consider the Petitioner's absence during the inspection and the management deadlock which had resulted in cessation of business operations since November 2012. The Volvo excavator had already been repossessed by the financier, the container had been reported stolen by the Petitioner, and the remaining assets, including Mahindra Genio, Hero Honda motorcycle, furniture, computers, peripherals and

printer, remained at the registered office. The earlier Auditor, Mr. Dilli Babu, had also recorded about the Mahindra Genio lying there. Further, bank debit operations had been stopped by the Petitioner from September 2012.

39. Mischaracterisation of the 2nd Respondent's financial assistance and M/s. Rolls transactions:

Auditor's observation concerning expenditure exceeding Rs.5.34 crores by the 2nd Respondent and M/s. Rolls is misleading and cannot be treated as unexplained personal expenditure without examining the underlying records. 2nd Respondent had provided substantial financial assistance to the Company, mortgaged personal properties and furnished personal security for Company loans, contributed working capital and serviced Company liabilities when the Petitioner failed to do so. The Company had availed term loans and other finance facilities for vehicles and equipment. The 2nd Respondent claims to have serviced the liabilities exceeding Rs.5.34 crores from 2012 onwards. The transactions with M/s. Rolls, the proprietorship concern of the 2nd Respondent, arose from lease and operational arrangements concerning Tata Prima trucks and the Volvo excavator. The lease provided for specified rentals and operational obligations, while Rolls paid rentals, serviced related liabilities and raised invoices for transport/equipment services. These transactions were reflected in the Company's accounts and cannot be presumed to be for the personal benefit of the 2nd Respondent without examining the complete financial records.

40. Erroneous findings regarding lease transactions, rent, EMI and stamp papers:

Auditor's findings concerning the lease agreements dated 30.04.2012 and 31.08.2012 are disputed. The Company acquired the vehicles through finance facilities secured by the 2nd Respondent, while Rolls undertook operational expenses and related loan liabilities. In respect of the Volvo excavator, Rolls paid the agreed annual lease amount and refundable deposit, but the excavator was subsequently repossessed by the financier. The Auditor's calculation of Rs.67.50 lakhs as rent beyond the contractual period and after repossession is therefore erroneous. Lease profitability cannot be determined merely by comparing rent with EMI without considering purchase price, finance liability, depreciation, maintenance, operational expenses, usage and wear and tear. The allegation regarding dubious stamp papers is also incorrect, as subsequent correspondence from the competent authority confirmed that Rs.20 stamp paper bearing Serial No.77AA914658 was genuine and issued by the Sub-Treasury, Tambaram, to the licensed stamp vendor. The Auditor also incorrectly relied upon an RTI response and misstated the person who had made the RTI application.

41. Improper treatment of PNP transactions and related-party dealings:

Transactions between the Company and M/s. Prim and Proper Enterprises Pvt. Ltd. ("P&P"), an entity connected with the Petitioner and his family, require detailed and equal scrutiny. 2nd Respondent alleges transfers exceeding Rs.65.0 lakhs and other transactions aggregating approximately Rs.32.0 lakhs without proper invoices,

board resolutions, statutory records or supporting documents. The Petitioner was Managing Director of both the entities and was therefore interested in the inter se transactions. The 2nd Respondent had questioned these transactions from 2012, issued notice dated 29.09.2012 and obtained banking records, upon which he discovered forged signatures and other irregularities, leading to a police complaint, FIR and forensic investigation. These matters were brought to the Auditor's attention, including by communication dated 30.04.2018. Nevertheless, the Auditor accepted the P&P transactions without insisting upon primary records, while applying greater scrutiny to transactions involving the 2nd Respondent and Rolls, such inconsistent treatment renders the findings unreliable.

42. Incorrect analysis of sea-sand business, royalty, stock and profit-sharing:

Auditor's conclusions concerning the sea-sand arrangement between P&P and the Company are disputed. The agreement contemplated sharing of net profit/loss in the ratio of 20:80 after royalty and all relevant operational expenses, including transport, freight, loading, unloading, labour, insurance and weighbridge charges. The Auditor considered selected revenue figures without accounting for complete direct and indirect expenditure and principally restricted the calculations to 31.01.2011 to 31.07.2011 instead of entire relevant business period. The invoice and revenue calculations also contain arithmetical errors, as demonstrated in Annexure-55, and the assumed carriage cost of Rs.5.75 per cubic foot is disputed as unsupported by the agreement. The observations regarding royalty and amounts

payable to P&P are also incomplete, since P&P failed to furnish supporting invoices while unexplained transfers from the Company to P&P were not adequately examined. The alleged stock discrepancy likewise required examination of production, royalty and delivery records and an opportunity for the 2nd Respondent to explain the same, were not properly done.

43. Incorrect findings regarding K.J. Jojo Josh and alleged siphoning of funds:

Auditor's finding concerning K.J. Jojo Josh is disputed. He was an employee and PRO/Administration Manager of the Company, supported by his identity card, salary records, bank statements, salary-credit instructions signed by the Petitioner and correspondence concerning Company affairs. These records were furnished but not properly considered. Similarly, the allegation of siphoning of Rs.25.0 lakhs through cash withdrawal is denied. The withdrawal was made pursuant to a Board Resolution signed by the Petitioner for business-development expenditure, and the supporting bills/documents were furnished. The Auditor ought to have examined the Board Resolution, cash book and supporting expenditure records before characterising the amount as siphoning.

44. Selective examination, disputed calculations and failure to consider material evidence:

The Auditor adopted inconsistent standards while examining transactions and periods. He considered certain transactions relating to FY 2010-11 while restricting other calculations to selective periods, including the sea-sand transactions. He made arithmetical and

accounting errors, failed to consider actual Company expenditure, loan and bank records, lease terms, invoices, Tally entries and other primary documents, and did not adequately consider the police/forensic investigation concerning disputed transactions. The Auditor also failed to give adequate consideration to the Independent Auditor's Report for March 2012 to March 2017 produced as Annexure-67 and the underlying financial records. The reports themselves acknowledge limitations and state that a conclusive valuation could not be arrived at due to the absence of complete and reliable financial information. The privately obtained report of M/s. K. Gopal Rao & Co., relied upon by the 2nd Respondent, also requires consideration along with all primary records before any adverse conclusion is drawn.

45. Final report is incomplete and cannot safely be acted upon: In view of the foregoing, the Final Report dated 03.05.2018 is neither complete nor reliable for determining the financial position or fair value of the Company's shares. The Auditor failed to complete physical verification, did not conduct further inspection after 09.01.2018, failed to consider material documents and explanations, relied upon selective data and disputed assumptions, made contested calculations, and did not adequately examine the P&P transactions, Rolls/lease transactions, Company liabilities, financial assistance provided by the 2nd Respondent, alleged siphoning, stock/royalty issues or pending forensic investigation. It is submitted that this Tribunal may reject the Auditor's Report dated 03.05.2018 or, alternatively, not act upon it without a fresh, independent and

comprehensive audit and valuation after giving all parties reasonable opportunity to produce and explain the relevant books, bank records, Tally data, agreements, invoices, loan records, statutory records and other primary documents, with due consideration to the pending police/forensic investigation and all other relevant material.

VI. Points for Determination

46. We have heard learned Counsels appearing for the Petitioner and the Respondent at length and carefully considered the Company Petition, the Counter Statement filed by the 2nd Respondent, the Rejoinder filed by the Petitioner, the documents placed on record by the respective parties, and, in particular, the Report of the Special Auditor appointed by this Tribunal. We have also considered the connected applications, CA No. 1 of 2013 and IA No. 450 of 2019, and the written and oral submissions advanced on behalf of the parties.

47. Upon a consideration of the pleadings and the material on record, the following points arise for determination:

> *i) **Whether the 1st Respondent Company is, in substance, a quasi-partnership, and what is the legal framework governing the reliefs sought;***
>
> ***ii) Whether the affairs of the 1st Respondent Company have been, and are being, conducted in a manner oppressive to the Petitioner and prejudicial to the interest of the Company, within the meaning of Sections 397 and 398 of the Companies Act, 1956;***

iii) Whether the 2nd Respondent has committed acts of misfeasance, breach of trust and misapplication of the funds and property of the Company;

iv) Whether the counter-allegations of forgery and siphoning levelled by the 2nd Respondent against the Petitioner are established; and

v) To what relief, if any, the Petitioner is entitled.

VII. Findings of this Tribunal

Preliminary Objections

48. Before turning to the points framed for determination, it is necessary to dispose of the objections raised by the 2nd Respondent at the threshold, *interalia* that the Petitioner has approached this Tribunal with unclean hands, that he has suppressed material facts, and that the petition is a counterblast to the legal notice dated 29.09.2012. These objections are not merely formal. The reliefs sought under Sections 397, 398, 402 and 403 are discretionary and equitable in character, and the conduct of the party invoking that jurisdiction is therefore directly relevant to the question whether it should be exercised at all.

49. The most substantial of these objections concerns the Petitioner's own position in the Company. The Petitioner was, and continued to be, the Managing Director of the 1st Respondent Company from its incorporation, as also the Managing Director of P&P. Under Section 2(26) read with Sections 209 and 211 of the Companies Act, 1956, the Managing Director is entrusted with substantial powers of

management and is among the officers upon whom the statute casts the duty of keeping proper books of account and laying before the Company a balance sheet and profit and loss account presenting a true and fair view of its affairs.

50. This admitted position is difficult to reconcile with the case pleaded. A substantial part of the petition rests upon the propositions that the accounts of the Company were not finalised, that statutory filings were not made with the Registrar of Companies from the year 2011, that the books were not properly maintained, and that no Board meetings were convened. Each of those is a default of the Company for which the Managing Director is answerable at the first instance. The Petitioner's answer is that he had entrusted the day-to-day affairs to the 2nd Respondent because he was occupied with P&P and his other business interests is an explanation of how the default came about; it is not an answer to his responsibility for it. A director who, by his own account, abdicated the office he held, cannot found a case of oppression upon the consequences of that abdication.

51. Nor is the Petitioner's account of his exclusion from the Company's affairs consistent with the surrounding facts. The business originated in P&P, of which the Petitioner is the Managing Director. The corporate office of the Company was situated at premises belonging to the Petitioner's family. The Petitioner was a joint signatory of the SBI, OMR account. He was in a position to, and did, terminate the services of the statutory auditor of the Company on 09.10.2012. He furnished a personal guarantee for the Cash Credit facility, which presupposes a

working knowledge of the Company's finances. These are not the attributes of a member wholly shut out from the management of a company.

52. There is, further, substance in the complaint of incomplete disclosure. The petition is framed as though the Petitioner's role were confined to that of an investor betrayed by the person entrusted with management. It does not disclose, with the particularity that a proceeding of this nature requires, the flow of funds between the Company and P&P, the basis upon which the rights originating in G.O. Ms. No. 272 dated 22.09.2010 came to be worked through the Company, or the extent of the Petitioner's own operation of the Company's bank accounts. Those are not peripheral matters. They are the very transactions which the Petitioner asks this Tribunal to characterise as siphoning when effected by the 2nd Respondent.

53. As to the chronology, the legal notice of the 2nd Respondent is of dated 29/30.09.2012 and thereafter the petition followed. The mere fact that a petition is filed after a notice does not render it a counterblast, and we would not reject a petition on that ground alone. But when it is placed alongside the matters set out above, the sequence lends colour to the 2nd Respondent's characterisation of these proceedings as one front in a wider and mutual dispute rather than a genuine invocation of the protective jurisdiction of this Tribunal.

54. We accordingly hold that the preliminary objections of the 2nd Respondent weigh materially against the exercise of the discretionary jurisdiction. We are, however, conscious that a petition of this age, in

which an audit has been directed and reports have been obtained, ought not to be disposed of upon threshold considerations alone. We therefore proceed to examine the points framed on their merits, and record that our conclusion upon those points would be the same even if the preliminary objections are left entirely out of account.

Issue No. (i)

55. The first question for determination is whether the 1st Respondent Company, though incorporated as a company in law, was in substance founded and conducted upon the basis of a relationship of mutual trust and confidence between the Petitioner and the 2nd Respondent, so as to attract the equitable consideration applicable to a quasi-partnership.

56. It is not in dispute that the 1st Respondent Company was incorporated in August 2010 and following the exit of the third subscriber, the Petitioner and the 2nd Respondent became the equal shareholders of the Company. The Company is therefore not a widely-held corporate enterprise but a closely-held venture conducted by two individuals who associated with each other for the purpose of carrying on the business of excavation and supply of sand, and who were previously known to each other. To that extent the Petitioner's characterisation of the Company as 'closely held' is accepted.

57. The principle on which the Petitioner relies is well settled. The House of Lords in *Ebrahimi v. Westbourne Galleries Ltd., [1973] AC 360*, recognised that where an association is founded upon personal relationship and mutual confidence, coupled with an understanding

that the members would participate in the conduct of the business, the strict legal rights arising from the corporate structure may, in appropriate circumstances, be subject to equitable considerations. This principle has been recognised in Indian company law, and the Hon'ble Supreme Court in *Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad, (2005) 11 SCC 314*, has considered the relevance of such equitable considerations in determining whether the conduct complained of amounts to oppression.

58. The principle, however, has limits which are also well settled. The mere fact that a company is closely held, or that its members were formerly associated on friendly terms, does not by itself establish a quasi-partnership or create an unrestricted right to relief. In *Kilpest Private Limited v. Shekhar Mehra, (1996) 10 SCC 696*, the Hon'ble Supreme Court cautioned that promoters who choose the corporate form must ordinarily be held to the incidents of that form, and the principles of partnership are not to be readily imported into the affairs of an incorporated company. What must be shown is an underlying understanding, or a set of legitimate expectations, going beyond the constitutional documents of the company.

59. On the material placed before us, the relationship between these two members had a substantially commercial foundation. The rights, which the venture exploited, originated from P&P, an entity of the Petitioner. The 2nd Respondent's association began, on his account, with an advance of Rs. 32,42,962/- upon an agreed sharing of profits, and the 2nd Respondent was inducted to attend to matters which the

Petitioner had neither the time nor the inclination to attend, and was remunerated at a higher rate for doing so. The parties dealt with each other through written instruments /an agreement dated 31.01.2011, a Board resolution dated 24.02.2012, lease agreements dated 30.04.2012 and 31.08.2012, and the securities furnished for the Company's borrowings. This is the conduct of parties transacting commercially, and not of partners governed only by mutual confidence.

60. We are therefore not persuaded that the 1st Respondent Company was a quasi-partnership in the sense in which that expression is used in *Ebrahimi (supra).* At its best, it is a closely-held company in which equitable considerations have some, but not decisive, relevance.

61. In any event, even if the characterisation contended for is accepted, it would not carry the Petitioner as far as he needs to go. Equitable considerations arising from a relationship of mutual confidence operate in both directions. They cannot be invoked by a member who, by his own pleading, withdrew from active participation in the Company's affairs, in order to complain that he was excluded from it; nor can they convert a deadlock produced by the conduct of both members into oppression practised by one upon the other. The characterisation of the Company is, at most, part of the background against which the specific acts complained of must be assessed. It is not itself a source of relief.

62. **Point No. (i) is accordingly answered by holding that the 1st Respondent Company is a closely-held company in which equitable considerations are of limited and non-decisive relevance, and against**

the Petitioner insofar as he seeks to derive an independent right to relief from the characterisation of the Company as a quasi-partnership.

Issue No. (ii)

63. The second question is whether the affairs of the 1st Respondent Company have been, and are being, conducted in a manner oppressive to the Petitioner and prejudicial to the interests of the Company within the meaning of Sections 397 and 398 of the Companies Act, 1956.

64. The jurisdiction under Sections 397 and 398 is equitable and remedial in character. It is intended to protect members and the Company against conduct which, though it may not amount to a technical violation of a particular provision of the Act, is nevertheless oppressive, burdensome or prejudicial in its effect. It is not attracted merely because the relationship between shareholders has deteriorated, or because the management has taken decisions with which a particular member disagrees.

65. The Hon'ble Supreme Court in *Shanti Prasad Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535*, has held that the conduct complained of must be burdensome, harsh and wrongful, and that mere lack of confidence between members, arising from dissatisfaction with the manner in which the Company is being managed, would not by itself constitute oppression. The conduct must involve an element of unfairness and a lack of probity in the management of the Company's affairs. It was further held that the events complained of must constitute a

continuous course of conduct subsisting up to the date of the petition; isolated acts, or acts which have ceased, do not attract the jurisdiction.

66. In *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd., (1981) 3 SCC 333*, it was observed that the Tribunal must examine whether there has been a visible departure from the standards of fair dealing, and that every illegal or irregular act does not automatically constitute oppression. The conduct must be sufficiently grave to justify the exercise of an equitable jurisdiction of this character.

67. In *Hanuman Prasad Bagri v. Bagress Cereals (P) Ltd., (2001) 4 SCC 420,* the Hon'ble Supreme Court reiterated that the statutory requirements of Section 397 must actually be fulfilled, including the requirement that the circumstances be such as would justify the making of a winding-up order on the just and equitable ground while such an order would unfairly prejudice the member. The jurisdiction cannot be exercised merely because there is a dispute between the parties, or because the Company's affairs could have been managed differently.

68. So far as Section 398 is concerned, the enquiry is directed to whether the impugned acts have resulted in, or are likely to result in, prejudice to the Company itself. Mere errors of commercial judgment, or isolated acts of imprudence where no prejudice to the Company is demonstrated, would not justify the drastic remedies which Sections 397 and 398 contemplate.

69. It is also necessary to bear in mind, throughout, where the burden lies. The burden of establishing oppression and mismanagement rests

upon the member who alleges it. That burden does not shift merely because the allegations are numerous, or are pressed with vigour, or because the affairs of the Company are in disarray.

70. With these principles in mind we turn to the material, beginning with the reports of the Tribunal appointed Auditor, upon which the Petitioner's case principally rests.

71. A report obtained from a professional appointed by this Tribunal, rather than by a party, is entitled to respectful consideration, and we have given it such consideration. The objection of the 2nd Respondent that the report is self-serving is not well founded, and we reject it: the Auditor was neither selected nor engaged by the Petitioner. But a report of this character is an aid to the Tribunal, not a substitute for its adjudication. The Auditor did not record evidence on oath. The persons whose conduct he described were not confronted with his conclusions in a manner permitting them to be tested by cross-examination. The documents upon which he proceeded were those made available to him. His observations are, in the nature of things, provisional.

72. That characterisation is not ours alone; it is the Auditor's own. The reports record in terms that a conclusive valuation of the shares of the Company could not be arrived at, and that a complete examination could not be undertaken for want of complete and reliable financial information. It is one thing to rely upon such a report as material indicating the directions in which enquiry should proceed. It is quite another to make a report which is, on its own terms, inconclusive

foundation of findings of oppression, mismanagement and misfeasance findings which carry serious civil consequences, including personal liability and a compelled transfer of shares. We are not prepared to take that course.

73. We would add that the co-existence on this record of two professional reports reaching materially different conclusions upon the same set of accounts that of the Tribunal-appointed Auditor and that of M/s. K. Gopal Rao & Co. is itself an indication that what the Company's affairs throw up are contested questions of accounting, requiring evidence, rather than established acts of misconduct.

74. The Petitioner's answer to the incompleteness of the audit is that this Tribunal should draw an adverse inference against the 2nd Respondent from his failure to furnish the Tally password and the complete vouchers. An adverse inference is a rule of prudence and not a rule of law, and it is drawn where the record is unequal, that is to say where the party who alone could have produced a document has withheld it. That premise is not established here. It is true that the registered office was at the residence of the 2nd Respondent and that he operated the Company's accounts but it is equally true that the Petitioner was the Managing Director, that the corporate office functioned from the premises of his family, that he was a joint signatory of one of the Company's accounts, that the audit for the financial year 2011-12 was not completed during his tenure, and that he terminated the statutory auditor in October 2012. Neither director has placed a complete set of the Company's primary records before

this Tribunal. In that situation an adverse inference cannot be drawn against one of them alone.

75. It is also pertinent to note that since 01/02.11.2012, Respondent No. 2 has been restrained by an interim order passed by the Company Law Board (CLB) *interalia* from dealing with or disposing of the assets of the Company. During this period, the Company remained embroiled in continuous litigation resulting in its business activities being substantially brought to a standstill. In such circumstances, the state and availability of the Company's record after more than a decade of prolonged litigation and operational inactivity cannot, by themselves, be construed as an indicative of deliberate concealment, and are equally attributable to the prolonged paralysis of the Company's affairs.

76. We turn to the transactions with M/s Rolls, which lie at the centre of the Petitioner's case. That the 2nd Respondent was interested in those transactions is not in dispute, M/s Rolls being his proprietary concern. But the arrangements were reduced to writing, in agreements dated 30.04.2012 and 31.08.2012, with stated consideration Rs. 2,50,000/- per month in respect of the three TATA Prima trucks and Rs. 15,00,000/- per year with a refundable deposit of Rs. 10,00,000/- in respect of the Volvo excavator. Significantly, the rentals under the first agreement were made payable to the Company's Cash Credit account at the Ambattur branch, that is to say, to the account carrying the Company's borrowing which the Petitioner had personally guaranteed. Invoices

were raised. Whatever else may be said of these arrangements, they were not clandestine.

77. The Auditor's observation that the 2nd Respondent's interest was not disclosed to the Board and that no enabling resolution was produced raises, at most, a question of non-compliance with Sections 297 and 299 of the Companies Act, 1956. Those provisions carry their own consequences, which the Act itself specifies. In a company with two directors, each of whom was fully aware of the other's separate business interests the Petitioner's interest in P&P being well known to the 2nd Respondent as the latter's interest in M/s Rolls was to the Petitioner. The omission to record a formal disclosure is a matter of form rather than of substance. A contravention of Section 299 is not, without more, oppression within the meaning of Section 397.

78. As to the observation that the terms of the lease were detrimental to the Company, we find no material placed before the Auditor or before us — no comparative rates, no valuation of the equipment, no evidence of the market for such hire in 2012 by reference to which that conclusion could be tested. The adequacy of consideration in a commercial arrangement is a matter of business judgment. This Tribunal does not sit in appeal over the commercial wisdom of a company's transactions, and an assessment that a bargain might have been better struck does not amount to a finding of mismanagement.

79. The complaint that hire charges remain unrealised from M/s Rolls raises a different question again. A sum due from a lessee to the Company is a debt. If the debt is owed, it is recoverable, and the

Company or those in control of it may sue for it. A failure to pay a debt does not, without proof that the Company's property was misapplied or that the transaction was a device to extract value from it, become oppression or misfeasance. The same is true of the Petitioner's complaint regarding the use of the Company's vehicles: the prayer that the 2nd Respondent be directed to pay at the rate of Rs. 100 per kilometre travelled since March 2012 is, on its face, a money claim requiring evidence of distances, of use and of rates, none of which is on this record.

80. The absence of Board meetings for more than five years is relied upon as demonstrating a breakdown in governance. It undoubtedly demonstrates that. What it does not demonstrate is oppression by the 2nd Respondent of the Petitioner. The Board of this Company consisted of two directors holding equal shareholdings who have been in continuous litigation with each other since 2012, who have exchanged criminal complaints, and between whom an interim order of restraint has operated throughout. In such a Board the absence of meetings is the product of the deadlock, and each participant in the deadlock has contributed to it. Neither party has placed on record a notice convening a Board meeting which the other declined to attend. A deadlock which both members have brought about and both have maintained cannot be recast as the oppression of one by the other.

81. The failure to make statutory filings with the Registrar of Companies since 2011 stands on the same footing, with the additional feature already noticed, namely that the statutory responsibility for

those filings rested in the first place upon the Petitioner as Managing Director.

82. The receipt by the wife of the 2nd Respondent of a sum of Rs. 15 lakhs from a debtor of the Company, said to be admitted in C.S. No. 941 of 2017, is the most concrete of the allegations made. Standing alone, it would call for an explanation. Three considerations, however, prevent it from bearing the weight the Petitioner places upon it. First, the character of the receipt is disputed whether it was received on account of the Company, in reduction of the sum of Rs. 32,42,962/- which the 2nd Respondent claims to have advanced, or upon some other footing and that dispute cannot be resolved upon affidavits. Secondly, the transaction is the subject of a pending civil suit in which the same question arises and can be determined upon evidence, and it would not be proper for this Tribunal to pronounce upon it. Thirdly, and decisively for present purpose, the transaction and the suit both belong to the year 2017, whereas this petition was instituted in the year 2012. Section 397 requires that the affairs of the Company be shown to have been, and to be being, conducted oppressively as on the date of the petition. A single transaction occurring five years after institution cannot supply the continuous course of conduct which *Shanti Prasad Jain (supra)* requires, however relevant it may be in other proceedings.

83. The entries described by the Auditor as suggestive of the recycling of cash withdrawal recorded as business-promotion expenditure followed by a re-deposit of an equivalent amount on the following day are precisely that: suggestive. No instance has been isolated, quantified

and put to the 2nd Respondent for explanation in a manner permitting a finding to be recorded upon it. A series of unexplained entries, placed before the Tribunal with an invitation to infer misappropriation from them, does not discharge the burden of proof.

84. Nor is the allegation of a competing tender established. That the 2nd Respondent, or entities associated with him, participated in the Government tender of 05.10.2012 may be accepted. That he deliberately caused the Company to underbid, or to abstain, in order to secure the contract for himself is an inference, and no material has been placed before us — no tender documents, no comparison of bids, no record of any Board deliberation upon the Company's participation — from which it could properly be drawn. It must also be remembered that by October 2012 the relationship between the two directors had already collapsed, and that the Company's ability to bid at all was by then in question.

85. Standing back from the individual allegations, as the authorities require us to do, what the record discloses is this. Two shareholders holding equal stakes in a small company fell out comprehensively in the course of 2012. Each accuses the other of taking the Company's money: the Petitioner alleges systematic siphoning by the 2nd Respondent; the 2nd Respondent alleges withdrawals of Rs. 1,21,85,629/- and a further sum of Rs. 32,00,000/- by the Petitioner. Each has set the criminal law in motion against the other. Each relies upon an accountant's report. Each says that the other held the records. Neither has produced a complete set of primary documents. The

Company has not traded for years and its affairs are frozen by an interim order.

86. The material on record, when viewed in its proper perspective, discloses no more than an irreversible break down of mutual trust and confidence between two persons standing on an equal footing in the affairs of the Company. Such a break down however complete or profound loss of confidence, cannot by itself be regarded as constituting oppression within the meaning of Section 397. The distinction drawn in *Shanti Prasad Jain* and reiterated in *Hanuman Prasad Bagri* is of significance. A mere loss of confidence arising from the manner in which the affairs of a Company have been conducted, without something more amounting to oppressive conduct, would not attract the statutory jurisdiction under Section 397. Where the allegations and the material are equally capable of supporting a finding of misconduct against either of the two shareholders, and the evidence does not enable the Tribunal to arrive at a definite conclusion as to which of them has misconducted himself, the jurisdiction under Section 397 cannot be invoked merely on the basis of competing allegations. This Tribunal cannot, on the strength of affidavits and an audit which is admittedly inconclusive, single out one of two similarly situated shareholders and hold him guilty of oppression while leaving corresponding and substantially identical allegations against the other shareholder unresolved. Such a determination, in the absence of cogent and conclusive material would rest upon conjecture rather than established facts. The Company's inability to carry on its affairs is essentially the consequence of the deadlock arising from the

irreconcilable differences between its two directors, and such paralysis cannot, without independent and cogent evidence, be attributed to any distinct or identifiable course of mismanagement specifically committed by the 2nd Respondent. The consequence of deadlock cannot, in the absence of proof of an independent act of mismanagement causing prejudice to the Company, be converted into a finding of oppression or mismanagement so as to invoke the statutory jurisdiction under Sections 397 and 398 of the Companies Act, 1956.

87. **Point No. (ii) is accordingly answered.**

Issue No. (iii)

88. The third question is whether the 2nd Respondent has committed acts of misfeasance, breach of trust and misapplication of the funds and property of the Company. The same question arises in CA No. 1 of 2013, filed under Sections 543 to 545 read with Section 403 and Schedule XI of the Companies Act, 1956 and Regulation 44 of the Company Law Board Regulations, 1991, and upon IA No. 450 of 2019, and we will deal with all of them together.

89. Sections 543 to 545 of the Companies Act, 1956 contemplate personal liability where a person who has participated in the management of the Company is shown to have misapplied, retained or become accountable for money or property of the Company, or to have committed a breach of trust in relation thereto. The jurisdiction is not attracted merely because an item of expenditure is questioned, or because a transaction has turned out to be commercially unsuccessful.

There must be cogent material establishing the money or property of the Company, the responsibility of the person proceeded against, the wrongful application, retention or misappropriation of that money or property, and the resulting loss to the Company.

90. *In Official Liquidator v. P.A. Tendolkar, (1973) 1 SCC 602*, the Hon'ble Supreme Court emphasised that liability for misfeasance must rest upon proof of the particular acts or omissions attributable to the person proceeded against. The jurisdiction is compensatory in character and requires a finding, based upon evidence, that the person concerned has misapplied or retained the Company's assets or has otherwise committed a breach of trust in relation to them. It follows that a finding of misfeasance cannot be recorded at large.

91. Where, as here, the transaction impugned is one between the Company and a concern connected with a director, the existence of the connection does not by itself establish misfeasance. The Tribunal must examine the substance of the transaction, the authority under which it was undertaken, the consideration received by the Company, the benefit derived by the connected person, and the supporting records, and must then determine whether the Company's funds or property were in truth improperly applied or retained. For the reasons already given in dealing with Point No. (ii), that examination does not, on the present record, yield a finding against the 2nd Respondent.

92. The position may be stated shortly. Not one sum has been established before us as having been misapplied, diverted or retained by the 2nd Respondent. The Tribunal-appointed Auditor was, upon his

own statement, unable to quantify any such sum. No witness has been examined. No transaction has been isolated, put to the 2nd Respondent and left unexplained in a manner permitting a finding to be recorded upon it.

93. The Petitioner's answer to this difficulty is that the Tribunal should declare liability in principle and remit the quantification to a forensic audit. That course inverts the order of adjudication. It would require this Tribunal to hold that money of the Company has been misapplied before it has been ascertained what money, by what act, in what amount and to whose benefit. A compensatory jurisdiction cannot be exercised upon that basis. The difficulty is the more acute in relation to IA No. 450 of 2019, in which a specific sum of Rs. 7,69,60,500/- is claimed together with interest at 18% per annum. A quantified money claim of that magnitude is not made good by a direction to an auditor to discover, after the event, whether and to what extent it is owed. It has to be pleaded and proved; and it has not been proved.

94. **Point No. (iii) is accordingly answered**.

Issue No. (iv)

95. The fourth question is whether the counter-allegations of forgery and siphoning levelled by the 2nd Respondent against the Petitioner are established. We approach that question upon precisely the same footing, and by reference to the same standard of proof, as the allegations made by the Petitioner.

96. 2nd Respondent alleges that the Petitioner forged his signatures upon the account-opening documents and cheques relating to the SBI, OMR Branch account, and thereby withdrew Rs. 1,21,85,629/- from that account, and further a sum of Rs. 32,00,000/- was routed to the Petitioner's mother.

97. The allegation does not withstand examination against the contemporaneous banking records. The SBI, OMR account was operated on the basis of joint signatures for the greater part of the relevant period, and the Petitioner has placed on record cheques bearing the signatures of both directors, which materially weakens the contention that he could have unilaterally operated the account and withdrawn the sums in question. The 2nd Respondent's own stand as to whether the account was operable singly or jointly, and as to which documents do and do not bear his signature, has not been consistent, and the allegation of forgery has the appearance of an improvement upon his earlier position.

98. The findings of the Tribunal-appointed Auditor do not support the 2nd Respondent's case either. The Auditor examined the transfer of Rs. 65,17,673/- and found it referable to a legitimate business transaction under the sub-contract arrangement; and the allegation concerning the transfer of Rs. 32,00,000/- was found to be unsupported by the underlying records.

99. The criminal proceedings founded upon the allegation of forgery have culminated in the discharge of the Petitioner, the jurisdictional Magistrate having allowed Crl. M.P. No. 11872/2025. A discharge is not

a positive adjudication that no offence was committed, and we do not treat it as one. It does, however, entirely preclude the 2nd Respondent from relying upon the allegation of forgery as an established fact in these proceedings.

100. **Point No. (iv) is accordingly answered in the negative. The counter-allegations of forgery and siphoning levelled by the 2nd Respondent against the Petitioner are not established upon the material placed before this Tribunal.**

101. We consider it necessary to state expressly what our findings on Points Nos. (ii), (iii) and (iv) do and do not decide. They are findings that the respective allegations are not established upon the material placed before this Tribunal in this proceeding, upon affidavits and without evidence. They are not findings that the transactions in question did not occur, nor exoneration of either party. Nothing contained in this order shall be read as an expression of opinion upon the merits of FIR No. 465 of 2017, of C.S. No. 941 of 2017, or of any other proceeding pending between the parties or between either of them and any third party, each of which will be decided upon its own evidence and in accordance with law.

Issue No. (v)

102. Points Nos. (ii) and (iii) having been answered against the Petitioner, the question of the nature and extent of the relief to which he is entitled does not, strictly, arise. We record our conclusions upon it nonetheless, since the Petitioner has pressed for the moulding of an

equitable remedy and since the connected applications require disposal.

103. The powers conferred by Sections 402 and 403 of the Companies Act, 1956 are not independent sources of jurisdiction. They are exercisable only where the Tribunal has first recorded the satisfaction required by Section 397 or Section 398, that the affairs of the Company are being conducted oppressively or prejudicially, and that the circumstances would justify a winding-up order on the just and equitable ground which it would nevertheless be unfair to make. That foundation being absent, no direction for the valuation of the Company's shares, for their purchase by the 2nd Respondent, for a forensic audit, for surcharge or for restitution can issue, however convenient such directions might appear as a means of ending the deadlock.

104. It follows that **CA No. 1 of 2013**, by which the Petitioner seeks the initiation of surcharge proceedings and the ascertainment of amounts said to have been illegally withdrawn, misapplied or diverted from the funds of the Company, must fail. It rests upon the very findings of misapplication which, for the reasons recorded under Point No. (iii), we are unable to make.

105. **IA No. 450 of 2019**, by which the Petitioner seeks a declaration that the 2nd Respondent is guilty of misfeasance and malfeasance, a direction for restitution, and payment of Rs. 7,69,60,500/- together with interest at 18% per annum, must fail for the same reasons. We would add, as to the sum claimed, that a monetary claim of that magnitude

cannot be decreed upon affidavits and an admittedly inconclusive audit report; nor can the absence of proof be cured by directing an audit to ascertain, after the order, what figure the order ought to have contained.

106. We are conscious that this conclusion leaves a closely-held company deadlocked, its business at a standstill and its two shareholders locked in dispute. That is an unhappy state of affairs, but it is not one which this Tribunal can remedy upon a record which does not establish the statutory grounds. It is also right to record that our conclusion does not leave the parties without recourse. A claim by the Company for hire charges or other sums due from M/s Rolls; a claim in respect of a receivable said to have been diverted; the rival monetary claims of the two shareholders inter se; the allegations of forgery; and any petition which either party may be advised to present in respect of the Company's continued existence, including a petition for its winding up, are each capable of being pursued in the appropriate forum and upon proper evidence. What is not open to a member is to gather such claims together and present them as a petition under Sections 397 and 398.

107. **Point No. (v) is accordingly answered by holding that the Petitioner is not entitled to any relief in this proceeding**.

VII. Conclusion and Order

108. For the reasons recorded hereinabove, the preliminary objections of the 2nd Respondent are substantially answered; Point No. (i) is answered by holding that the 1st Respondent Company is a closely-

held company in which equitable considerations are of limited and non-decisive relevance; Point Nos. (ii) and (iii) are answered against the Petitioner and in favour of the 2nd Respondent; Point No. (iv) is answered in the negative; and Point No. (v) is answered by holding that no relief can be granted in this proceeding.

109. We hold that the Petitioner has failed to establish that the affairs of the 1st Respondent Company have been or are being conducted in a manner oppressive to him or prejudicial to the interests of the Company within the meaning of Sections 397 and 398 of the Companies Act, 1956, and has failed to establish any act of misfeasance, misapplication of the funds or property of the Company, or breach of fiduciary duty on the part of the 2nd Respondent such as would attract the jurisdiction of this Tribunal under Sections 402, 403 or 543 to 545 of the said Act.

110. **The Company Petition is accordingly dismissed, and the following orders are passed**:

(a) **TCP No. 109 of 2016** is **dismissed**.

(b) **CA No. 1 of 2013** is **dismissed**.

(c) **IA No. 450 of 2019**, including the claim for a sum of Rs. 7,69,60,500/- together with interest at 18% per annum, is **dismissed**.

(d) No direction is issued for the valuation of the shares of the 1st Respondent Company, for the purchase of the Petitioner's shares

by the 2nd Respondent, for a forensic audit, for surcharge or for restitution.

(e) The interim order dated 01.11.2012 / 02.11.2012 restraining the 2nd Respondent from dealing with the assets of the 1st Respondent Company shall stand vacated.

(f) In the present case, both Petitioner and the Respondent are having 50-50 shareholding in the Company. The Petitioner has not approached the Tribunal with clean hands and has failed to place the complete and correct facts before the Tribunal. The Respondent has also not cooperated with the forensic audit and has failed to provide the complete facts and the information required for the conduct of forensic audit. In these circumstances, we dismiss the petition, however, the dismissal of the proceedings shall not preclude either party from pursuing such civil, criminal or other proceedings as may be available to them in respect of the matters raised herein, and all such proceedings shall be decided upon their own merits and uninfluenced by any observation contained in this order.

(g) The remuneration and expenses of the Tribunal-appointed Auditor, having been incurred in the course of these proceedings, shall be borne by the 1st Respondent Company, and the accounts already settled on that head shall not be reopened. The parties shall otherwise bear their own costs.

111. **TCP No. 109 of 2016, CA No. 1 of 2013 and IA No. 450 of 2019 are** accordingly **dismissed** in the above terms.

Sd/-	**Sd/-**
VENKATARAMAN SUBRAMANIAM	**SANJIV JAIN**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**