

Before Hemant Gupta, J.

JIWAN MEHTA,—Petitioner

versus

EMM BROS FORGINGS (P) LTD. & OTHERS,—Respondents

C.A. No. 5 of 2008

2nd November, 2010

Companies Act, 1956—Ss. 397 & 398—Allegations of transfer of share holding without knowledge of appellant—Appellant failing to mention Memorandum of Understanding before Company Law Board—Board dismissing petition on ground of concealment of facts and delay & laches—Non-disclosure of Memorandum of Understanding—Not material omission which disentitles appellant to even consideration of his petition on merits—Jurisdiction of Board in terms of Ss. 397 & 398 of 1956 Act—Exercise of—Statutory—Order of Board holding petition not maintainable suffers from patent illegality and not sustainable in law—Petition allowed, matter remitted back to Board for fresh decision on merits in accordance with law.

Held, that though the question whether the Memorandum of Understanding touching the affairs of the respondent-Company, is relevant and to what extent is to be decided by the Board but it cannot be said that non-disclosure of such Memorandum of Understanding is fatal so as to return a finding that the petition itself is not maintainable. Whether such Memorandum of Understanding is relevant to the Company in question and/or whether there was oral agreement or parties have swapped shareholding dehors the Memorandum of Understanding or in terms of the Memorandum of Understanding will be some of the questions, which may require adjudication by the competent authority. But non-disclosure of Memorandum of Understanding is not a fact which goes to the root of the controversy and does not decide all the questions between the parties. Therefore, even if the appellant has not made any reference to the said Memorandum of

Understanding in his petition, but it is not material omission, which disentitles the appellants to even for consideration of his petition on merits,

(Para 23)

Further held, that the finding recorded by the Board that the Court exercising equity jurisdiction cannot ignore the well known maxim of equity that who seeks equity must do equity and who comes into equity must come with clean hands, cannot be said to be tenable. The Board exercises statutory jurisdiction in terms of Sections 397 and 398 of the Act. Therefore, *prima facie*, it cannot be said that the Board, is the Tribunal of equity jurisdiction. It exercises statutory jurisdiction.

(Para 25)

Ashok Aggarwal, Senior Advocate, with Gaurav Chopra and Mukul Aggarwal, Advocates, *for the appellant*.

Arun Palli, Senior Advocate, with Tushar Sharma, Advocate, *for the respondents*.

HEMANT GUPTA, J. (ORAL)

(1) The present is an appeal under Section 10-F of the Companies Act, 1956 (for short 'the Act') against the order dated 20th November, 2007 passed by the Company Law Board, Principal Bench, New Delhi (for short 'the Board'), dismissing the petition filed by the appellant under Sections 397 and 398 read with Sections 402 and 403 of the Act.

(2) The appellant has averred that respondent No. 1 M/s Emm Bros Forgings (P) Ltd., is a Company with limited liability incorporated under the Act. The appellant is said to be possessed of 67590 fully paid up equity shares representing 15.36% of the total paid up share capital. Respondent Nos. 2 to 4, are said to be Directors along with the appellant, whereas respondent No. 4 is the Chairman of the Company. It is pleaded that M/s Emm Wires and Strips Ltd. was established in the year 1989 and subsequently, another Company Emm Bros. Metals Ltd. was established

in the year 1991 and the respondent-Company in the year 1994. As per the appellant, the share holding pattern of respondent No. 1 Company prior to 2000 is said to be as under :—

S. No.	Name of the Shareholder	Number of shares	% of the total paid up share capital
1	Jiwan Mehta	67590	15.36%
2	Ramesh Mehta	67580	15.36%
3	Raj Mehta	67580	15.36%
4	Harish Mehta	67580	15.36%
5	Mohinder Mehta	67580	15.36%
6	Ashok Mehta	67580	15.36%
7	Devi Rani Mehta	34500	7.84%
	Total :	4,40,000	100%

(3) The shareholding pattern has undergone change and as per annual report as on 29th September, 2000, the shareholding pattern is as under:—

S. No.	Name of the Shareholder	Number of shares	% of the total paid up share capital
1	Jiwan Mehta	67590	15.36%
2	Ramesh Mehta	67580	15.36%
3	Raj Mehta	135170	30.72%
4	Mohinder Mehta	135170	30.72%
7	Devi Rani Mehta	34500	7.84%
	Total :	4,40,000	100%

(4) From the above table, it is clear that Shri Harish Mehta and Ashok Mehta have transferred their shares in favour of Shri Raj Mehta and Shri Mohinder Mehta. It is pleaded that respondent No. 3 Shri Mohinder Mehta was appointed as Director of the Company on 7th July, 2000, whereas as per the annual report, respondents No. 2, 3 and 4 swapped their individual shareholding in sister concerns Emm Bros Forging Pvt. Ltd and Emm Bros Metals Pvt. Ltd. without knowledge of the appellant. As a result of such swapping, respondent Nos. 2 and 3 have become majority shareholders in Emm Bros Forging Pvt. Ltd. and Emm Bros Metal Pvt. Ltd. The appellant alleged that such transfer of the share holding is illegal and in contravention of the provisions of Articles 7 and 8 of the Articles of Association of the respondent-Company. The appellant has also alleged that respondent Nos. 2 and 3 removed the appellant from directorship without any intimation on 27th January, 2001 and that respondent Nos. 2 and 3 appointed their respective wives as Additional Directors on 15th November, 2001 in 8th Annual General Meeting of the Company held on 31st August, 2002 and raised share capital in their names and their wives so as to gain majority stake against all the remaining shareholders.

(5) It is alleged that the annual returns of the respondent-Company in the year ending March, 2001, has been filed after forging signatures of the appellant. The appellant has got his signatures verified by reputed forensic expert, whose report has been appended as Annexure A.6. It is alleged that no meeting, whatsoever has been held by the respondent-Company, but by taking cover of Section 283(1)(g) of the Act, the appellant has been removed from Directorship of the respondent-Company. It is also alleged that respondent No. 4 was also running partnership firms and has diverted all funds to its proprietary concern to buy shares and raise his equity in the Emm Bros Metal Pvt. Ltd.

(6) *Inter alia*, on the above said fact, the appellant sought restoration of the share holding in the Company as existed prior to the transfer made in the year 2000 and to direct respondent Nos. 2, 3 and 4 to restore funds and render the accounts of the financial affairs of the Company apart from the declaration that the funds were illegally utilized by respondent Nos. 2, 3 and 4 in contravention of the provisions of law.

(7) Respondent Nos. 1 to 3 filed reply to such petition filed by the appellant, wherein it was asserted that the petition is liable to be dismissed as the appellant has not come to the Court with clean hands. The appellant has concealed and suppressed the family settlement arrived at between the appellant and his brothers, which is evident from the Memorandum of Understanding. It is also alleged that the appellant has made vague and uncertain pleadings in the petition and has not alleged that the acts of majority shareholders of the respondent-Company were harsh and wrongful to justify the oppression. It is explained that the business firms consisted of Shri T.D. Mehta (father) and his six sons i.e. Sarvshri Jiwan Mehta, Ramesh Mehta, Raj Mehta, Harish Mehta, Mohinder Mehta and Ashok Mehta. Shri T.D. Mehta being the head of the family, used to supervise the three businesses of the family, namely, two Brick Kilns and one Ice Plant and Cold Storage in which all the six sons were partners either themselves or through their wives. In view of the growth of the family, it was decided by Shri T.D. Mehta that the time has come when the sons should be settled independently. But being a large family this was possible only in phases and in supportive manner. In the year 1989, it was decided to set up a factory outside Punjab. Therefore, a sick unit by the name and style of M/s Alco Tools Pvt. Ltd. (subsequently changed to Emm Bros Wires and Strips Ltd.) having industrial land and building at Plot Nos. 6 and 7, Sector 5, Parwanoo (Himachal Pradesh), was taken over and after renovating the building, a unit for manufacturing of super Enameled Copper Wire was put up. Subsequently, in the year 1991, Shri T. D. Mehta, purchased another unit at Parwanoo and established the same under the name and style of M/s Emm Bros Metals Pvt. Ltd. Shri T. D. Mehta and his sons held equal shares in the said Company. But it was agreed that the Company would be controlled by Shri Harish Mehta and Shri Ashok Mehta. All the six sons and Shri T. D. Mehta were having equal shares. However, the appellant and Shri Ramesh Mehta controlled 68.5% of shares in the Emm Bros Wires and Strips Ltd. and are in control and management of the said Company. In the year 1994, the respondent-Company was incorporated with the clear direction of Shri T. D. Mehta that such Company would be managed and controlled by respondent Nos. 3 and 4 herein. It is, thus, alleged that the businesses of the three Companies were, therefore, managed and controlled by the two brothers each, though all six brothers were having shares in each of the three Companies.

(8) It is further pleaded that after the death of Shri T. D. Mehta in the year 1996, the affairs of the Emm Bros Wires and Strips Ltd., deteriorated due to huge siphoning of the funds by Shri Jiwan Mehta the appellatant from Emm Bros Wires and Strips Ltd. The State Bank of India initiated recovery proceedings against the said Company. It has been so pleaded in the written statement :—

- “6. After the death of late Shri T. D. Mehta in the year 1996, the affairs of the Company Emm Bros Wires and Strips Limited deteriorated due to the huge siphoning of the funds by Mr. Jiwan Mehta from Emm Bros Wires and Strips Ltd. the State Bank of India, Parwanoo filed execution proceedings against the said Company and threatened to auction the properties given as guarantee by brothers of the petitioner. Therefore to resolve all the issues between them all the six brothers agreed to formally divide the family assets and assets and liabilities of M/s Emm Bros Wires and Strips Limited . Thereafter on or about 7th October, 2001, all six sons of late T. D. Mehta executed the Memorandum of Understanding on 7th October, 2001 a copy of which is marked hereto as Annexure R. 1.
7. In terms of the said agreement it was mutually agreed between the petitioner and respondents 2 to 4 that the first respondent-Company shall exclusively belong to respondents 2 and 3 and that M/s Emm Bros Wires and Strips Pvt. Ltd. shall exclusively belong to the petitioner and Mr. Ramesh Mehta and M/s Emm Boss Metals Pvt. Ltd., shall exclusively belong to Harish Mehta and Ashok Mehta. It was further agreed in the said agreement that all efforts by way of adjustment shall be made to release each other *inter se* from all shares/deposits/investments between the brothers in the above mentioned companies.
8. Prior to the aforesaid understanding reached between the brothers in terms of the Memorandum of Understanding dated 7th October, 2001 respondent No. 4 herein on 21st June, 2000 transferred 33,000 equity shares of first respondent herein in favour of respondent No. 3 herein. Similarly on 21st June, 2000 Mr. Harish Mehta transferred his 34,480 shares in favour of

the respondent No. 2. When the aforesaid transfers took place, the petitioner was the Director of the first respondent- Company and was aware of the said transfers. Simultaneously respondents 2 and 3 also transferred their shares in Emm Bros Metals Private Limited to Mr. Ashok Mehta and Harish Mehta.

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10. As a sequel to the above said Memorandum of Understanding dated 7th October, 2001, on or about 2nd July, 2002 Mr. Ramesh Mehta transferred 27,750 shares in first respondent- Company in favour of respondent No. 2 herein. Mr. Ramesh Mehta further on the same day i.e. 2nd July, 2002 transferred his entire shareholding in first respondent-Company in favour of respondent No. 3 herein. Similarly respondent No. 2 transferred his entire share holding in Emm Bros Wires and Strips in favour of Mr. Ramesh Mehta.”

(9) The respondents have also relied upon the resolutions of the Board of Directors dated 27th July, 2000 and 27th January, 2001 whereby the transfer of the shareholding has been accepted by the Board of Directors of the respondent-Company. It is the categorical stand of the respondents that other five brothers have swapped their respective shares in each of the Companies to get control and management of their respective companies. However, the appellants for some ulterior motives has not honoured the terms of the Memorandum of Understanding and has not transferred the share holding in the first respondent-Company in favour of 2nd and 3rd respondents and in Emm Bros Metals Pvt. Ltd. in favour of respondent No. 4 and Shri Harish Mehta.

(10) In Para 8.2 (b) of the reply, it has been pleaded that pursuant to the transfer of shares as aforesaid, the Memorandum of Understanding was signed on 7th October, 2001 and as per the mutual agreement, the three Companies were divided amongst the brothers. It also pleaded that Ramesh Mehta, who was to control and manage Emm Bros Wires and Strips Limited has transferred the shares of the first respondent in favour of respondent No. 2.

(11) It may be mentioned that more of the respondents has referred to any oral agreement arrived at between the parties in the year 1997 or in the year 2000 in the written statement filed before the Board. Learned counsel for the respondents has pointed out that in fact, such averments have been made in another petition (CP No. 82 of 2004) filed by the appellant against Emm Bros Metals Pvt. Ltd. The said petition was decided by the Board together by separate order of the same date.

(12) The learned Board has dismissed the petition filed by the appellant, primarily for the reason that the appellant has not offered to refute the preliminary objections raised by the respondents in respect of the maintainability of the petition. A finding has been returned that allotment, swapping etc., except of the appellant, was made pursuant to oral understanding as early as on 27th July, 2000 and that the appellant has deliberately concealed the Memorandum of Understanding from the Board. It was held though held that neither the appellant nor the respondents want to rely on the oral agreement mutually agreed between all the brothers in May, 2000 and later reduced into writing on 7th October, 2001 and that the said Memorandum of Understanding had to be kept in abeyance due to non fulfilment of the agreement and non swapping of the shares of the appellants. It was held that the respondents' allegations that the appellant has not come to the Court with clean hands have turned out to be true and that the appellant is guilty of misappropriation. Thus, it was concluded that the Board exercising equity jurisdiction cannot ignore the well known maxim of equity that one who wants equity must do equity. Still further, the Board held that the petition suffers from delay and laches as the swapping of shares was done on 25th July, 2000 and the appellant was deemed to vacate his office on 27th January, 2001, but the petition was filed only on 31st August, 2004. Therefore, even if the provisions of the limitation are not applicable, the proceedings suffer from delay and laches. It was held that besides the allotment and swapping, vacation of office was with full knowledge, consent/acquiescence of the appellant, therefore he cannot challenge past and concluded transactions. It was held to the following effect :—

“.....Further, there is no plea for condoning the delay and laches on the part of the petitioners in initiating proceedings before the Company Law Board. Besides, the allotments, swapping, vacation of office was with the full knowledge, consent/

acquiescence of the petitioner who cannot challenge past and concluded transactions. The principles of estoppel, waiver and acquiescence also apply in this case. Further, it is noted that the petitioner has made an allegation regarding his removal as director but his prayers in the petition do not include any prayer seeking his restoration as director in the respondent-Company.

In view of the foregoing, the petition is not maintainable. I find no jurisdiction to consider the arguments on merits. The petition is hereby dismissed. All interim orders stand vacated. All CAs stand disposed of. No order as to cost.”

(13) Learned counsel for the appellant has vehemently argued that the Board has given contradictory findings in respect of the implementation of the alleged Memorandum of Understanding. It is contended that once the Board itself has found that the Memorandum of Understanding was not given effect to, then the Board was not justified in not considering the petition on merits and returning a finding that the petition is not maintainable as the appellant has not come to the Board with clean hands. It is argued that the Memorandum of Understanding was in respect of the family assets and assets and liabilities of the Emm Bros Wires and Strips Limited primarily though it was recited, as per Clause (IV), that the three Companies were to be owned by two brothers each. It is contended that none of the pre-conditions as per the Memorandum of Understanding were honoured by the respondents. Therefore, non-disclosure of such Memorandum of Understanding cannot be made sole basis of dismissal of the petition. It is contended that the fact that the Memorandum of Understanding was not given effect to, is evident from an applicaion (CM No. 5080 of 2004) filed by respondent Nos. 2 to 4 in Civil Writ Petition No. 3765 of 2004, wherein it has been averred as under :—

“That Jiwan Mehta petitioner has concealed the fact that though a family settlement was entered into according to which, subject to his fulfilment of other conditions mentioned therein, the said house was to fall to his individual independent share, yet the said family settlement remained in abeyance on account of non-fulfilment by Jiwan Mehta of his part in the said settlement by way of payment of various amounts to the present applicants

and also on account of his non-fulfilment of other obligations. Jiwan Mehta has, therefore, deliberately concealed and not placed on record the family settlement entered into. A copy of the same is attached herewith as Annexure A with this application. It is reiterated that his family settlement was not acted upon and House No. 939, Sector 8, Panchkula continues to be in the ownership of Jiwan Mehta and Ashok Mehta, who are owners in equal shares of the said house.”

(14) It is argued that as per the Memorandum of Understanding, House No. 939, Sector 8, Panchkula was to be exclusively owned by the appellant and that a sum of Rs. 10 lacs was payable by the appellant to Shri Ramesh Mehta and that after repayment of all the liabilities of Emm Bros Wires and Strips Ltd., the balance cash flow was to be shared by Shri Jiwan Mehta and Shri Ramesh Mehta. Even though such was the understanding, Ashok Mehta filed a civil suit claiming separate possession by partition of the said house and that the said suit is still pending. Reference is also made to a public notice (Annexure A.7) dated 1st September, 2001 published by Shri Ramesh Mehta and Shri Ashok Mehta to the effect that the appellant for and on behalf of Emm Bros Wires and Strips Ltd., has been debarred from operating and opening any Bank account, though as per the Memorandum of Understanding, the Company is to be managed by the appellant along with Shri Ramesh Mehta. It is, thus, sought to be contended that the Memorandum of Understanding was not given effect to by any of the parties to the said understanding. It is further contended that the recitals in the said Memorandum of Understanding that the oral understanding mutually agreed between all the brothers has been reduced in writing in order to avoid any dispute and differences in future do not pertain to oral agreement said to be arrived in the year 1997 or in the year 2000. The said Memorandum of Understanding does not refer to any particular date of oral agreement. In fact, the oral agreement mentioned in Clause (8) of the Memorandum of Understanding is in relation to oral agreement arrived at, just before the document was reduced in writing on 7th October, 2001. The transfer of share holding by other brothers is not in pursuance of any oral understanding amongst all including the appellant herein.

(15) On the other hand, learned counsel for the respondents has argued that it is the appellant alone, who has not transferred his shareholding either in the respondent-Company or in Emm Bros Metals Pvt. Ltd. The shareholding has been transferred by Shri Ramesh Mehta, who was to jointly own and manage M/s Emm Bros Wires and Strips Ltd. with the appellant. It is also pointed out that the appellant is the sole brother, who has not given effect to the oral settlements arrived in the year 1997 and 2000 and that non-disclosure of such Memorandum of Understanding has been rightly taken into consideration by the Board to reject the petition filed by the appellant.

(16) Before the respective arguments of the learned counsel for the parties are considered on merits, it may be pointed out that since the resolution of the Board of Directors of the respondent-Company were not legible ; the original proceedings book of the respondent-Company was called for. Learned counsel for the respondents has also produced photo copies of the aforesaid minutes/proceedings, which are permitted to be taken on record.

(17) The proceedings book start from the meeting of the Directors held on 7th July, 2000, which records the fact that the appellant was absent from the meeting and no leave was granted to him. The second minutes of meeting are of 27th July, 2000. The appellant was absent and was not granted leave though leave of absence was granted to Shri Mohinder Mehta. The minutes record the transfer of shares of Shri Ashok Mehta and Shri Harish Mehta. In the meeting of 23rd August, 2000, the name of Jiwan Mehta, the appellant, is mentioned as the person present in the meeting, but the proceedings book is not signed by him. Shri Mohinder Mehta was absent, but no leave was granted. In the meetings of 17th October, 2000, 30th November, 2000, 30th December, 2000 and 27th January, 2001, Shri Ashok Mehta and Shri Raj Mehta are the persons present in the meeting and Shri Jiwan Mehta, the appellant, was not granted any leave of absence. Such meetings have not transacted any business except to discuss the current business programme or the need to have more working capital. The annual return filed in pursuance of Annual General Meeting held on 29th September, 2000 produced by the appellant bears signatures of Shri Jiwan Mehta apart from signatures of Shri Mohinder Mehta and Shri Raj Mehta.

(18) Before adverting to the effect of non-disclosure of Memorandum of Understanding by the appellant in his petition under Sections 397 and 398 of the Companies Act, I find, *prima facie*, that the reliance of the respondents on the annual returns of the Company filed in pursuance of the Annual General Meeting held on 29th September, 2000, which has been relied upon by the Board, is based upon forged and fabricated signatures of the appellant.

(19) The proceedings book of respondent No. 1 from 7th July, 2000 till 27th January, 2001 shows that Shri Jiwan Mehta is absent from the Board Meetings. If Shri Jiwan Mehta has not attended the meeting of Board since 7th July, 2000, how he would sign Annual Returns of the Company in pursuance of the Annual General Meeting held on 29th September, 2000. It seems to be improbable. The said aspect gets support from the report of the Forensic Expert Annexure A-6, wherein signatures of Jiwan Mehta, the appellant, on such Annual Returns, have been found to be forged and fabricated.

(20) The respondents have also relied upon the communication of the Registrar of Companies, wherein the cessation of office of Director by the appellant in the meeting of the Board on 27th January, 2001 is said to be communicated to the appellant. The three meetings, the absence of which led to the vacation of office by the appellant, discuss the need to have more working capital, which is evident from the minutes of 17th October, 2000, 30th November, 2000 and 30th December, 2000. It appears that such minutes have been recorded to make out a ground for cessation of office by the appellant as, *prima facie*, the consideration of working capital requirement in three Board's meetings seems to be manipulated one. The requirement of working capital possibly cannot be discussed in three meetings of the Board and without taking any corrective step. Such finding is recorded to consider, *prima facie*, the maintainability of the petition of the appellant herein. It is for the competent authority to consider and return a categorical finding on the detailed examinations of the documents.

(21) The Board has held that the appellant has deliberately concealed the Memorandum of Understanding from the Board. The Memorandum of Understanding as has been mentioned above is to equally divide the family

assets and assets and liabilities of Emm Bros Wires and Strips Ltd. The assets or shareholding of the respondent-Company were not subject matter of the Memorandum of Understanding. There is no specific term as regards the transfer of the shares in the respondent-Company. The relevant clauses of Memorandum of Association read as under :—

“This Memorandum of Understanding executed on this 7th day of October, 2001 between Shri Jiwan Mehta, Shri Ramesh Mehta, Shri Raj Mehta, Shri Harish Mehta, Shri Mohinder Mehta and Shri Ashok Mehta, all sons of late Shri T. D. Mehta, all residents of Panchkula, hereby agreed to execute the following acts, deeds and things to formally divide the family assets and assets and liabilities of M/s Emm Bros Wires and Strips Ltd., Plot No. 6 and 7, Industrial Estate, Sector 5, Parwanoo as mutually agreed upon as under :—

1. M/s Emmbros Wires and Strips Ltd. is owned and run by Jiwan Mehta and Ramesh Mehta, and they owe loans to Himachal Pradesh Financial Corporation, Shimla of about 25 lacs and also to State Bank of India, Parwanoo Branch of about 160 Lacs.

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10. That after the repayment of all liabilities of M/s Emmbros Wires and Strips Ltd., the balance cash flow shall be shared equally by Jiwan Mehta and Ramesh Mehta, and none of the other parties of this MOU are entitled to share surplus or deficit.

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- IV. That as per mutual agreement amongst the brothers henceforth, the businesses shall be owned as under :—

M/s Emmbros Metal Pvt. Ltd., Parwanoo shall exclusively belong to Harish Mehta and Ashok Mehta.

M/s Emmbros Forgings Pvt. Ltd. shall exclusively belong to Raj Mehta and Mohinder Mehta.

M/s Emmbros Wires and Strips. Ltd., shall exclusively belong to Jiwan Mehta and Ramesh Mehta.

That none of the brothers shall have any right, title or interest in any Company except as mentioned hereinabove. At the time of release of all the properties/plots of land to individual brothers as detailed above, all efforts by way of adjustments shall be made to release each other *inter se* from all shares/deposits/investments between the brothers in the above mentioned companies and also in firms M/s Amex Overseas and Emmbros Automotive.

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VIII. That the oral agreement mutually agreed between the brothers has been rendered in writing in order to avoid any disputes or difference in the future.”

(22) None of the terms of the Memorandum of Understanding refers to the alleged oral agreement in the year 1997 or 2000, the reference of which has been made only in the impugned order by the Board. The pleadings in the other cases in respect of another Company cannot be said to be relevant for determining the questions raised in the present petition. Clause-IV of the Memorandum of Understanding records that “hence forth, the businesses shall be owned as under”. It does not infer any oral agreement earlier or that the parties have already arrived at a settlement wherein the appellant has given up his shareholding in the respondent-Company. The businesses were to be reorganized from the date of Memorandum of Understanding only.

(23) In view of the above, though the question whether the Memorandum of Understanding touching the affairs of the respondent-Company, is relevant and to what extent is to be decided by the board but it cannot be said that non-disclosure of such Memorandum of Understanding is fatal so as to return a finding that the petition itself is not maintainable. Whether such Memorandum of Understanding is relevant to the Company in question and/or whether there was oral agreement or parties have swapped shareholding dehors the Memorandum of Understanding or in terms of the

Memorandum of Understanding will be some of the questions, which may require adjudication by the competent authority. But non-disclosure of Memorandum of Understanding is not a fact which goes to the root of the controversy and does not conclusively decide all the questions between the parties. Therefore, even if the appellant has not made any reference to the said Memorandum of Understanding in his petition, but it is not material omission, which disentitles the appellants to even for consideration of his petition on merits.

(24) Learned counsel for the respondents has also relied upon an order dated 6th January, 2010 passed by the High Court of Himachal Pradesh in Company Appeal No. 4 of 2007 (filed against the order passed by the Board in Company Petition No. 82 of 2004) regarding Emm Bros Metal Pvt. Ltd., wherein the order of the Board was maintained. Even though the Board has passed orders in two petitions on the same date, but the pleadings are different and on the basis of pleadings of the present case, I find that the impugned order cannot be sustained.

(25) Though the learned counsel for the parties have not argued, but the finding recorded by the Board that the Court exercising equity jurisdiction cannot ignore the well known maxim of equity that who seeks equity must do equity and who comes into equity must come with clean hands, cannot be said to tenable. The Board exercises statutory jurisdiction in terms of Sections 397 and 398 of the Act. Therefore, *prima facie*, it cannot be said that the Board, is the Tribunal of equity jurisdiction. It exercises statutory jurisdiction. Nothing more is required to be said in respect of such finding as well at this stage.

(26) In view of the above, I am of the opinion that the order passed by the Board, whereby it was held that the petition is not maintainable, suffers from patent illegality and cannot be sustained in law. Consequently, the impugned order is set aside. The matter is remitted back to the Board for fresh decision on merits, in accordance with law.