Bombay High Court Maharashtra Power Development ... vs Dabhol Power Company on 31 March, 2004 Equivalent citations: 2004 (3) BomCR 317, (2004) 3 CompLJ 58 Bom, 2004 52 SCL 224 Bom Author: R Lodha Bench: R Lodha, A V Mohta JUDGMENT R.M. Lodha, J. 1. The Maharashtra Power Development Corporation (MPDC) is the appellant; which we shall call "the petitioner". The company petition for diverse reliefs was filed by the petitioner under Sections 397, 402, 403 and 406 of the Companies Act, 1956. In view of the events that had taken place subsequently, the company petition was permitted to be amended. In the amended company petition the petitioner prayed that it be declared that the affairs of the Dabhol Power Company (for short 'the company') were being conducted in the manner oppressive to the petitioner and prejudicial to the public interest; that it may be considered whether it was just and equitable that the company be wound up or any provision be made with regard to the conduct of the affairs of the company in future, that the respondent Nos. 4 and 5 be restrained from acting and representing as directors of the company; that respondent Nos. 6, 7, 8 and 9 be restrained from acting, representing or holding themselves to be the directors of the company; the respondent Nos. 4 and 5 be restrained from interfering and/or intermeddling with the management and affairs of the company in any manner whatsoever; that the respondent Nos. 6, 7, 8 and 9 be restrained from interfering and/or intermeddling with the management and affairs of the company in any manner whatsoever; that the respondent Nos. 1 to 5 be restrained from altering the composition of the Board of Directors of the company without leave of the Company Law Board; that the respondent Nos. 2, 4 and 5 be restrained from representing in the name or on behalf of the company; that the declaration be made that that the action/s taken by respondent Nos. 2, 4 and 5 acting as directors of the company/managing director are null and void and not binding upon the shareholders of the company and on the company and that an investigation be made with regard to the billings and transactions of the respondent Nos. 2 to 5 in relation to the management and affairs of the company since 2nd May, 2002 by an independent person to be appointed by the Company Law Board for conducting such investigation and thereafter, appropriate orders be passed under the provisions of Companies Act. 2. Dabhol Power Company was incorporated on 9th April, 1993 as a private company with unlimited liability under the provisions of the Companies Act, 1956 (for short "Act of 1956"). The Company was promoted by Enron Development Corporation (Enron) - a company incorporated in the State of Delaware, U.S.A., General Electric Company (GE) - a company incorporated in the State of New York, U.S.A. and Bechtel Enterprises, Inc., (Bechtel) company incorporated in the State of Delaware, U.S.A. Originally the three shareholders viz., Enron Mauritius Company (EMC), Energy Enterprises Mauritius Company (EEC) and Capital India Power Mauritius (CIPM) held the entire equity of the company; EMC (80%) EEC (10%) and CIPM (10%). EMC, EEC and CIPM are special purpose vehicles of Enron, Bechtel and GE respectively. The petitioner is a public limited company incorporated on 4th December, 1997. The Maharashtra State Electricity Board (MSEB) holds 100% share capital of the petitioner. In or about December, 1998, the petitioner purchased 30% of

Phase I equity of the company from EMC. This shareholding was reduced to 14.15% equity of the company after the said company issued phase II shares in January, 2002 to other three shareholders EMC, EEC and CIPM. On the date of the company petition and presently, EMC holds 65.85%, the petitioner 14.15%, EEC 10% and CIPM 10% share in the equity of the company. 3. It is the petitioner's case that as per the provision of Clause 10.1 of the Articles of Association of the company, the company is required to have minimum of 3 directors or maximum of 13 directors. Each shareholder or group of shareholders holding 10% equity had a right to nominate one director on the board of company. The financial institutions have a right to nominate two representatives as their nominees (non-shareholder) directors on the board of company. Till commissioning of Phase I, the company had 11 directors on its board, out of which 10 were shareholder directors. Five directors were appointed by EMC who held 50% Phase I equity, three directors were appointed by the petitioner who held 30% Phase I equity and one each from CIPM and EEC who held 10% Phase I equity each. The Industrial Development Bank of India (IDBI) being one of the lenders had appointed one nominee director. In or about September, 2001, another lender - Industrial Credit and Investment Corporation of India (ICICI) appointed its nominee as the second nominee director and from September, 2001, the company had 12 directors. In or about November/December, 2001, Enron filed for bankruptcy under the laws of the United State of America. The company was excluded from the bankruptcy proceedings. In December, 2001, the company committed default in making phase I rupee loan instalment to various financial institutions. The equity holding of the petitioner was reduced to 14.15% to 30% in or about January, 2002 after the company issued Phase II equity to EMC, CIPM and EEC. Accordingly, the petitioner withdrew two of its shareholder directors from the board of the company. Thus, from February, 2002, the petitioner had only one shareholder director viz., Mr. Ravi Bhushan Budhiraja. On 1st March, 2002 Mr. Mohan Guruhath who was a nominee of EMC took over as managing director of the company in place of Mr. K. Wade Cline. In the meanwhile, IDBI moved an application before this court praying for appointment of Court Receiver in respect of the various assets of the company. By the order dated 21st March, 2002, the Company Judge was pleased to appoint the Court Receiver as receiver of the various assets of the company. On 2nd April, 2002, the Court Receiver took charge of the various assets of the company. Mr. Mohan Gurunath resigned as managing director and director of the company on 28th March, 2002, The six other nominee directors appointed by EMC resigned on 29th March, 2002. On or about 5th April, 2002, the two nominee directors appointed by IDBI and ICICI resigned from the board of the company. Thus, on and from 5th April, 2002, the company had only three directors viz., (i) Mr. Donald C. Stummer - nominated by EEC (respondent No. 2) (ii) Mr. Richard Allison - nominated by CIPM (respondent No. 3) and (iii) Mr. Ravi Budhiraja -nominated by the petitioner. On 2nd May, 2002, Mr. Ravi Budhiraja -director nominated by the petitioner on the board of the company also resigned. The petitioner has set up the case in the company petition that in or about June, 2002, the petitioner came to know that respondent Nos. 2 to 5

tried to appropriate illegally and in violation of the provisions of the Companies Act and the Articles of Association, all the powers of the board of directors and taken surreptitiously control of the affairs of the company. 4. The meeting held on 4th June, 2002 is challenged in the company petition on diverse grounds inter alia; (a) that no meeting of the board of directors could take place as there was no quorum, and (b) that appointment of respondent No. 4 as director could not be validly made for the reasons stated therein. It is alleged that the petitioner was kept in dark and not provided with the information regarding the manner of the appointment of the director and the managing director. The respondent No. 2 failed to give information about the number of meetings of the board of the company held after 2nd May, 2002, and also did not supply the agenda, notes and resolutions passed therein despite demand. The respondent, Nos. 2 to 5 sought to act in breach of their fiduciary obligations to the petitioner and the company. The sole object of respondent Nos. 2 to 5, according to the petitioner, is to acquire exclusive control of the company and perpetrate and perpetuate their illegal and wrongful control of the same for some ulterior motive. The illegal appointments and the manner of conducting the affairs of the company is harsh, burdensome and wrongful. There is total lack of confidence arising from the oppressive manner of working. There is total lack of probity and fair dealing affecting the rights of the shareholders. The affairs of the company are being conducted in illegal, invalid and wrongful manner and in complete violation of the provisions of Articles of Association, the Companies Act and Principles of Natural Justice. The facts would justify the making up of a winding up order on the ground that it was just and equitable that the company should be wound up but such winding up order shall unfairly prejudice the shareholders who have invested substantial funds in the company. 5. In respect of the annual general meeting of the company held on 9th September, 2002, the petitioner has alleged that though its authorised representative attended the AGM and raised a number of objections inter alia validity of the authorisation of the representatives of various corporate shareholders of the company and their verification but despite the protests and objections taken by the representative of the petitioner, the meeting was held and conducted. The respondent No. 4 though invalidly appointed at the meeting of the board of directors held on 4th June, 2002, was wrongly elected as a director of the company. The appointment of the nominees of the petitioner viz., Mr. Mago and Mr. Budhiraja as directors of the company was illegally and unjustifiably opposed by EMC, EEC and CIPM though the petitioner was entitled to nominate them as provided for under the Articles of Association. The respondent No. 5 though illegally appointed at the meeting of the board of directors held on 4th June, 2002 and though he could not have been proposed as a director, was proposed by EEC and CIPM and was elected by majority of votes, director. The allegation is that the game plan of the respondents and their attitude is to be gauged by the fact that even the nomination of respondent No. 10 as director was opposed. The petitioner, thus, alleged that the entire attempt of respondent Nos. 2 to 5 and EEC and CIPM is to hijack the company and take complete control of it. The subsequent events that transpired made the respondent Nos. 2 to 5 realise that their attempt to

revive the board of the company and at the same time control it were unlikely to succeed and that respondent Nos. 2 to 5 might be in a minority, they advised a totally illegal and mala fide game plan to bring the EMC to ostensibly exercise its rights under the Articles of Association to appoint respondent Nos. 6 to 9 to the board of the company. The petitioner has averred that the purported appointment of respondent Nos. 6 to 9 on the board of the company by EMC is required to be considered, viewed and judged in the backdrop of these facts. 6. The respondent No. 2 as well as the respondent No. 4 filed reply affidavits in opposition to the company petition. They objected to the maintainability of the petition and alleged that it was the petitioner who shirked its responsibility as a shareholder and deserted the company at the time of need; it decided to withdraw its director from the board of the company and declined to appoint any other director in his place and therefore, it is not open to the petitioner that it was not informed of the acts of the directors on the board. The said respondents denied that their action lacked in probity and/or has been, or was/is unfair and/or has caused any prejudice to the petitioner in exercise of its rights as a member of the company or otherwise. They denied any harsh or unfair treatment and/or any oppressive conduct affecting the rights of the petitioner. The said respondents submitted that on March 29, 2002, six directors nominated by EMC resigned and in the month of April, 2002, the two nominee directors of lenders resigned leaving only three directors viz., Mr. Donald C. Stummer - Director nominated by EEC. Mr. Richard Allison - Director nominated by CIPM and Mr. Ravi Budhiraja - Director nominated by the petitioner. In the meanwhile, due to serious disputes having arisen between the company on the one hand and the Government of Maharashtra and the MSEB on the other as also between the company and the financial institutions (IDBI & ICICI), multifarious litigations were initiated against the company by and/or on behalf of the and at the behest of the Government of Maharashtra, MSEB and by other third parties and the company was also forced to initiate and file certain legal proceedings with a view to protect the assets and rights of the company. The company has substantial claims, inter alia, against the Government of Maharashtra and commenced certain international arbitration proceedings against the Government of Maharashtra in respect of such claims which are presently pending in London. It is alleged by the said respondents that the Government of Maharashtra does not have any tenable defence to the claims in the said international arbitration proceedings and it has used various methods to delay the proceedings. It became apparent that one such method adopted by the Government of Maharashtra was an attempt to render the board of directors of the company ineffective, by requiring the petitioner from withdrawing its director from the board in the hope that there was lack of quorum which would result at least in delaying the said international arbitration proceedings. The act of resignation of the petitioner's nominee director was for motivated reason of making the board ineffective and the management of the company virtually impossible. As the remaining directors on the board representing the members of the company and also with a view to protect their respective 10% shareholding and to ensure in so far as practically possible that the litigation/legal

proceedings against the company were properly defended and those initiated by the company were properly prosecuted and that the company did not suffer due to lack of proper representation, it was felt that it was necessary to ensure that for the purposes of taking various administrative actions and sending communications on behalf of the company, a manager for special affairs be nominated and empowered with the appropriate authority to act on behalf of the company. It was considered appropriate that firstly, the quorum of the board of directors be completed by appointing a third director and thereafter, consider and pass the necessary resolutions to protect the interest of the company. In exercise of its power under the Articles of Association of the company, CIPM as 10% shareholder substituted its then director Mr. Richard Allison (respondent No. 3) and nominated in his place Mr. Kavin P. Walsh (respondent No. 4). It was in these circumstances, they say, that on June 4, 2002, Mr. Peter Freeman was appointed as the third director and upon the quorum having been established, the board of directors of the company considered and passed certain resolutions for protecting the interest of the company. The petitioner was sent the minutes of the board meeting dated 4th June, 2002 alongwith the letter dated. 30th July, 2002. 7. In respect of the AGM held on September 9, 2002, it is the reply of the said respondents that the said AGM was held under the Chairmanship of Mr. C.R. Mehta, retired member of the Company Law Board but untenable and frivolous objections were raised by the petitioner's representative. The petitioner did not choose to appoint its director on untenable plea that it would either appoint two directors of none at all. The representative of EEC and CIPM in the said meeting made it clear that they would support and approve the appointment of any one director on behalf of the petitioner as per the mandate of the Articles of Association of the company but they did not agree to the appointment of the second director as it was not in accord with the Articles of Association. The said respondents set up the plea that the AGM held on 9th September, 2002 did not suffer from any infirmity and all actions by the respondents are wholly transparent and need no investigation of any kind whatsoever by the Company Law Board. The appointment of respondent No. 5 Mr. - Peter Freeman did not suffer from any legal infirmity. It was made clear to Mr. Peter Freemen that compensation as well as legal expenses will be given by EEC and CIPM. They denied that EEC and CIPM wanted a Board completely controlled by them. They also denied that EEC and CIPM devised any illegal and/or mala fide game plan whereby EMC ostensibly exercised its rights under the Articles of the company to appoint respondent Nos. 6 to 9 to the board of the company. They also denied that their conduct was illegal and ultra vires or totally colourable arid mala fide. They denied that EEC and CIPM attempted to take complete control or hijack the company as alleged. In any case, they submitted that EEC, CIPM and EMC have much greater interest in the company then the petitioner (85.85% as opposed to 15.14%) and EEC and CIPM have greater interest in the petitioner (20% as opposed to 14.15%). Rather the said respondents alleged that the petitioner is trying to dictate the company policy which is opposed to the interests of the company but favourable to MSEB. The said respondents reiterated that the affairs of the company are not being conducted

in a matter of oppressive to the petitioner and are not prejudicial to the public interest. They denied that it was just, proper and equitable for the Company Law Board to even consider winding up of the company or to make any other provision with regard to the conduct of the affairs of the company in future. 8. It is not necessary to refer to the various interim orders passed by the Company Law Board and the orders passed by this court, suffice it to observe that the company petition was heard by the Principal Bench, Company Law Board and disposed of on 2nd April, 2003. The Company Law Board inter alia held : (d) that the petition cannot be said to have been filed for improper motive; (b) that there was no illegality or oppression in holding the meeting on 4th June; 2002 for the purpose of quorum; (c) that there was no illegality in the appointment of Mr. Peter Freeman as Additional Director in the meeting of 4th June, 2002; (d) that even if it be assumed that the appointment of Mr. Peter Freeman was invalid, yet, when the respondents offered to voluntarily substitute him with a nominee of the petitioner which offer was not accepted, the petitioner cannot be permitted to challenge the legality/validity of his appointment and in any case, the appointment of Mr. Peter Freeman as an additional director came to an end on 9-9-2002 when the AGM was held; (e) that all the decisions taken in the meeting of 4th June, 2002 were in the interests of the company but in view of the regulation 75 of Table A, after the quorum was established in the meeting on 4th June, 2002, the other items in the meeting could not have been considered and therefore, all decisions taken in the board meeting of 4th June, 2002 other than the constitution of the board being against the mandatory provisions and, regulation 75 of Table A are null and void; (f) that as far as AGM held on 9-9-2002 is concerned, it cannot be held that in terms of article 10.3, the second nominee of the petitioner could not have been voted against; (g) that the petitioner did not have right to demand election of the second nominee in respect of its fractional holding of 4.15 shares, however on equitable grounds, the petitioner's second nominee on the board ought to have been approved and (h) that in so far as nomination of respondent Nos. 6 to 9 of the EMC as directors is concerned, the EMC has right to appoint/ substitute its nominees in place of its earlier nominees who resigned but since the nomination of respondent Nos. 6 to 9 have not been considered by the board of directors and they have not been appointed as directors, they cannot be nominated as directors and it is for the board of directors now constituted to take itself on these nominations. 9. Against the order of the Company Law Board, two appeals came to be filed before the Company Judge, one by the petitioner and the other by the respondent Nos. 2 to 5 herein. The learned Company Judge heard both the appeals together and by the common order dated 2nd September, 2003 allowed the appeal of respondent Nos. 2 to 5 and dismissed the appeal of the present petitioner. The learned Company Judge concluded thus– (i) The petitioner has not proved that the affairs of the respondent No. 1 company were conducted in the manner the prejudicial to the public interest or in the manner oppressive to the petitioner; (ii) The petitioner has not proved that the facts exceed which would justify making of an order of winding up of the first respondent-company on the ground that it is just and equitable to do so but to wind up the company

would unfairly prejudice the petitioner and; (iii) In the absence of any proof that the affairs of the first respondent-company were being conducted in a manner prejudicial to the public interest or in the manner oppressive to the petitioner and also in the absence of any justification to pass an order for winding up of the first respondent on the ground that it was just and equitable to do so, the Company Law Board lacked its jurisdiction to pass any order under Section 397, of the Act. 10. It is this order passed by the learned Company Judge on 2nd September, 2003 which is under challenge in this appeal. 11. Though the company petition was founded on the grounds that the affairs of the company were being conducted in the manner prejudicial to the public interest and in the manner oppressive to the petitioner. Mr. T.R. Andhyarujina, the learned senior counsel confined his arguments only to the ground of oppression viz., that the affairs of the respondent No. 1 company were being conducted in a manner oppressive to the petitioner. 12. The then Division Bench (H.L. Gokhale and R.S. Mohite, JJ.) by the speaking order dated 10th October, 2003 overruled the objection of respondent No. 1 and respondent Nos. 2, 4 and 5 about the maintainability of appeal. That order has been carried by the respondent Nos. 1, 2, 4 and 5 to the Supreme Court and the appeal is pending. We had little hesitation in the beginning in hearing the appeals on merits in this fact situation but the learned senior counsel Appearing for the respondent Nos. 1, 2, 4 and 5 submitted that pendency of the said appeal before the Supreme Court need not deter us from hearing the appeal on merits and that the said respondents shall not press for interim application before the Supreme Court and rather he invited our attention to the order dated 12th December, 2003 passed in petition for special leave to appeal No. 22654/22657 of 2003 wherein the Supreme Court while dismissing the said SLP, requested this court to dispose of these appeals as soon as it was conveniently possible. It is then that we heard the appeal on merits. 13. We heard Mr. T.R. Andhyarujina, the learned senior counsel for the appellant, Mr. P. Chidambaram and Mr. Manmohan, the learned senior counsel for respondent Nos. 2 to 5 and Mr. Janak Dwarkadas, the learned senior counsel for respondent No. 1 extensively. 14. From the submissions of the learned senior counsel for the parties, the following points arise for our consideration and determination : (i) Whether the series of actions of GE & Bechtel after 2nd May, 2002 or for that matter on and from 4th June, 2002, apart from such actions being legal or illegal, amount to pack, dominate and confer the board of directors of the company and intended to use the shell of the company for their own private purposes and, thus, establish a case of oppression. (ii) Whether the board meeting held on 4th June, 2002 was illegal; (a) as it was carried on in violation of regulation 75 of Table A of Companies Act, 1956; (b) as no notice was issued for convening the meeting at San Francisco; the meeting was in violation of the provisions of Section 286 of the Companies Act, 1956 and Article 10.7 of the Articles of Association; (c) as there was no written agenda, the meeting was in violation of the provisions of Article 10.7: (d) as Mr. Peter Freeman could not have been appointed in that meeting : (iii) Whether the Annual General Meeting (AGM) held on 9-9-2002 suffered from illegalities; (a) because of wrongful exclusion of the two directors of the petitioner, and (b)

because of illegal election of Mr. Peter Freemen was illegal since there was no power under the Articles of Association to nominate the stranger as director. (iv) Whether the nomination of respondent Nos. 6 to 9 on the board of the company was illegal; (v) If the answer to point Nos. (ii), (iii) and (iv) is in the affirmative, whether these illegalities constitute oppression within the meaning of Section 397 of the Companies Act. (vi) Whether the petitioner by filing the petition under Section 397 of the Companies Act approached the Company Law Board with collateral motive. 15. Before we consider the points that arise for our consideration, we shall advert to statutory provision contained in Section 397 and the few relevant decisions which through light on the subject of oppression within the meaning of Section 397. 16. Section 397 of the Companies Act, 1956 reads thus– "397. Application to Company Law Board for relief in cases of oppression.– (1) Any members of a company who complain that the affairs of the company [are being conducted in a manner prejudicial to public interest or] in a manner oppressive to any member or members (including any one or more) of themselves may apply to the [Company Law Board] for an order under this section, provided such members have a right so to apply in virtue of Section 399. (2) If, on any application under Sub-section (1), the [Company Law Board] is of opinion– (a) that the company's affairs [are being conducted in a manner prejudicial to public, interest or] in a manner oppressive to any member or members; and (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up; the [Company Law Board] may, with a view to bringing to an end the matters complained of, make such order as it thinks fit." 17. The Supreme Court in Shanti Prasad Jain v. Kalinga Tubes Ltd. , considered the scope of the applicability of Section 397 in the context of oppression by majority shareholder/s. The Supreme Court held thus– "It gives a right to members of a company who comply; with the conditions of Section 399 to apply to the Court for relief under Section 402 of the Act or such other relief as may be suitable in the circumstances of the case, if the affairs of a company are being conducted in a manner oppressive to any member or members including any one or more of those applying. The Court then has power to make such orders under Section 397 read with Section 402 as it thinks fit, if it comes to the conclusion that the affairs of the company are being conducted in a manner oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts might justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. The law, however, has not defined what is oppression for purposes of this section, and it is left to Courts to decide on the facts of each case whether there is such oppression as calls for action under this section. 15. We may in this connection refer to four cases where the new Section 210 of the English Act came up for consideration, namely, (1) Elder v. Elder and Watson Ltd. 1952 SC 49, (2) George Meyer v. Scottish Co-operative Wholesale Society Ltd. 1954 SC 381, (3) Scottish Co-operative Wholesale Society Ltd. v. Meyer, 1958-3 AH. ER 66, which was an appeal from

Meyer's case 1954 SC 381, and (4) Re. H.R. Harmer Ltd., 1958-3 All ER 689. Among the important considerations which have to be kept in view in determining the scope of Section 210, the following matters were stressed in Elder's case, 1952 SC 49, as summarised at p. 394 in Meyer's case 1954 SC 381 : '(1) The oppression of which a petitioner complains must relate to the manner in which the affairs of the company concerned are being conducted; and the conduct complained of must be such as to oppress a minority of the members (including the petitioners) qua shareholders. (2) It follows that the oppression complained of must be shown to be brought about by a majority of members exercising as shareholders predominant voting power in the conduct of the company's affairs. (3) Although the facts relied on by the petitioner may appear to furnish grounds for the making of a winding up, order under the 'just and equitable' rules, those facts must be relevant to disclose also that the making of a winding up order would unfairly prejudice the minority members qua shareholders. (4) Although the word 'oppressive' is not defined, it is possible, by way of illustration, to figure a situation in which majority shareholders, by an abuse of their predominant voting power, are treating the company and its affairs as if they were their own property to the prejudice of the minority shareholders - and in which just and equitable grounds would exist for the making of a winding-up order but in which the alternative remedy provided by Section 210 by way of an appropriate order might well be open to the minority shareholders with a view to bringing to an end the oppressive conduct of the majority. (5) The power conferred on the Court to grant a remedy in an appropriate case appears to envisage a reasonably wide discretion vested in the Court in relation to the order sought by a complainer as the appropriate equitable alternative to a winding-up order. (16) and 17)** ** ** 18. In Harmer's case (1958) 3 All ER 689, it was held that 'the word oppressive meant burdensome, harsh and wrongful'. It was also held that 'the section does not purport to apply to every case in which the facts would justify the making of a winding up order under the 'just and equitable' rule, but only to those cases of that character which have in them the requisite element of oppression'. It was also held that 'the result of applications under Section 210 in different cases must depend on the particular facts of each case, the circumstances in which oppression may arise being so infinitely various that it is impossible to define them with precision'. The circumstances must be such as to warrant the inference that 'there had been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of the minority at being outvoted on some issue of domestic policy. The phrase 'oppressive to some part of the members' suggests that their conduct complained of 'should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conductions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. . . . But, apart from this, the question of absence of mutual confidence per se between partners, or between two sets of shareholders, however, relevant to a winding up seems to have no direct relevance to the remedy granted by Section 210. It is oppression of some part of the shareholders by the manner in which the affairs

of the company are being conducted that must be averred and proved. Mere loss of confidence or pure deadlock does not come within Section 210. It is not lack of confidence between shareholders per se that brings Section 210 into play, but lack of confidence springing from oppression of a minority by a majority in the management of the company's affairs, and oppression involved at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder.' 19. These observations from the four cases referred to above apply to Section 397 also which is almost in the same words as Section 210 of the English Act, and the question in each case is whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of Section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing upto the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts in this case with reference to Section 397." (p. 1542) 18. In Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd, the Supreme Court extensively considered the law and the concept of oppression with reference to Section 397 of the Companies Act, 1956 and Section 210 of the English Companies Act, 1948. The said summary issued by the Supreme Court is by way of guidance and we find that reference to the summary shall be apt to appreciate the concept of oppression. The relevant part of the summary reads thus : "44. Coming to the law as to the concept of oppression, Section 397 of our Companies Act follows closely the language of Section 210 of the English Companies Act of 1948. Since the decisions on Section 210 have been followed by our Court, the English decisions may be considered first. The leading case on oppression under Section 210 is the decision of the House of Lords in Scottish Co-op. Wholesale Society Ltd. v. Meyer [1959] AC 324. Taking the dictionary meaning of the word 'oppression', Viscount Simonds said at page 342 that the appellant society could justly be described as having behaved towards the minority shareholders in an oppressive manner, that is to say, in a manner 'burdensome, harsh and wrongful'. The learned Law Lord adopted, as difficult of being bettered, the words of Lord President Cooper at the first hearing of the case to the effect that Section 210 'Warrants the Court in looking at the business realities of the situation and does not confine them to a narrow legalistic view'.

Dealing with the true character of the company, Lord Keith said at page 361 that the company was in substance, though not in law, a partnership, consisting of the society, Dr. Meyer and Mr. Lucas and whatever may be the other different legal consequences following on one or other of these forms of combination, one result followed from the method adopted, 'which is common to partnership, that there should be the utmost good faith between the constituent members'. Finally, it was held that the Court ought not to allow technical pleas to defeat the beneficent provisions of Section 210 (page 344 per Lord Keith; pages 368-36 per Lord Denning). 45.** ** **46. In the application under Section 210 of the English Companies Act, as under Section 397 of our Companies Act, before granting relief the Court has to satisfy itself that to wind up the company will unfairly prejudice the members complaining of oppression, but that otherwise, the facts will justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up. The rule as regards the duty of utmost good faith, on which stress was laid by Lord Keith in Meyer, received further and closer consideration in Ebrahimi v. Westbourne Galleries Ltd. [1973] AC 360 (HL) wherein Lord Wilberforce considered the scope, nature and extent of the 'just and equitable' principle as a ground for winding up a company. The business of the respondent company was a very profitable one and profits used to be distributed among the directors in the shape of fees, no dividends being declared. On being removed as a director by the votes of two other directors, the appellant petitioned for an order under Section 210. Allowing an appeal from the judgment of the Court of Appeal, it was held by the House of Lords that the words 'just and equitable' which occur in Section 222(f) of the English Act, corresponding to our Section 433(f), were not to be construed ejusdem generis with Clauses (a) to (e) of Section 222 corresponding to our Clauses (a) to (e) of Section 433. Lord Wilberforce observed that the words just and equitable are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own and that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure : 'The just and equitable provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the Court to dispense him from it. It does, as equity always does, enable the Court to subject the exercise of legal rights to equitable considerations; considerations, that is of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way'. (p. 379). Observing that the description of companies as 'quasi-partnership' or 'in substance partnerships' is confusing, though convenient. Lord Wilberforce said : 'company, however small, however domestic, is a company not a

partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.' (p. 380) Finally, it was held that it was wrong to confine the application of the just and equitable clause to proved cases of mala fides, because to do so would be to negative the generality of the words. As observed by the learned Law Lord in the same judgment though in another context : Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.'(pp. 374-375) 47. In his judgment in Re Westbourne Galleries, [1973] AC 360 Lord Wilberforce has referred at two places to the decision in Blissett v. Daniel, [1853] 68 ER 1022, 1024 which is recognized as the leading authority in the Law of Partnership on the duty of utmost good faith which partners owe to one another. Lindley on Partnership (14th Edition, pages 194-195) cites Blissett v. Daniel as an authority for the proposition that : 'The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour.' 48. ** 49. The question sometimes arises as to whether an action in contravention of law is per se oppressive. It is said, as was done by W.H. Bhagwati, J. in S.M Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co. that 'a resolution passed by the directors may be perfectly legal and yet oppressive, and conversely a resolution which is in contravention of the law may be in the interests of the shareholders and the company'. On this question, Lord President Cooper observed in Elder v. Elder [1952] SC 49 : 'The decisions indicate that conduct which is technically legal and correct may nevertheless be such as to justify the application of the just and equitable jurisdiction and conversely, that conduct involving illegality and contravention of the Act may not suffice to warrant the remedy of winding up, especially where alternative remedies are available. Where the just and equitable jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy.' Neither the judgment of Bhagwati J. nor the observations in Elder are capable of the construction that every illegality is per se oppressive or that the illegality of an action does not bear upon its oppressiveness. In Elder a complaint was made that Elder had not deceived the notice of the Board meeting. It was held that since it was not shown that any prejudice was occasioned thereby or that Elder could have bought the shares had he been present, no complaint of oppression could be entertained merely on the ground that the failure to give notice of the Board meeting was an act of illegality. The true position is that an isolated act, which is contrary to law, may not necessarily and by itself support the inference

that the law was violated with a mala, fide intention or that such violation was burdensome, harsh and wrongful. But a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed. This may usefully be illustrated by reference to a familiar jurisdiction in which a litigant asks for the transfer of his case from one judge to another. An isolated order passed by a Judge which is contrary to law will not normally support the inference that he is biased; but a series of wrong or illegal orders to the prejudice of a party are generally accepted as supporting the inference of a reasonable apprehension that the Judge is biased and that the party complaining of the orders will not get justice at his hands. 51. In Kalinga Tubes, Wanchoo J. referred to certain decisions under Section 210 of the English Companies Act including Meyer and observed: 'These observations from the four cases referred to above apply to Section 397 also which is almost in the same words as Section 210 of the English Act, and the question in each is whether the conduct of the affairs of the company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of Section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts... with reference to Section 397.' (page 737 of SCR) : (p. 1545 of AIR). At pages 734-735 (of SCR) : (at p. 1542 of AIR) of the judgment in Kalinga Tubes, Wanchoo J. has reproduced from the judgment in Meyer the five points which were stressed in Elder (1952) SC 49. The fifty points reads thus : 'The power conferred on the Court to grant a remedy in an appropriate case appears to envisage a reasonably wide discretion vested in the Court in relation to the order sought by a complainer as the appropriate equitable alternative to a winding-up order.' 52. It is clear from these various decisions that on a true construction of Section 397, an unwise, inefficient or careless conduct of a Director in the performance of his duties cannot give rise to a claim for relief under that section. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as

shareholder. It may be mentioned that the Jenkins Committee on Company Law Reform had suggested the substitution of the word Oppression in Section 210 of the English Act by the words "unfairly prejudicial" in order to make it clear that it is not necessary to show that the act complained of is illegal or that it constitutes an invasion of legal rights (see Gower's Company Law, 4th edn., page 668). But that recommendation was not accepted and the English Law remains the same as in Meyer, (1959) AC 324 and in Re H.R. Harmer Ltd. (1959) 1 WLR 62 as modified in Re. Jermyn St. Turkish Baths (1971) 3 AH ER 184. We have not adopted that modification in India." (pp. 1318 to 1321) 19. B.N. Kirpal, J. (as His Lordship then was) in Suresh Kumar Sanghi v. Supreme Motors Ltd. [1983] 54 Comp. Cas. 235 (Delhi) considered the powers of the court while deciding the petition under Sections 397 and 398 of the Companies Act, 1956. His Lordship held that Section 397 would be applicable only in the case of oppression by the majority shareholders on the minority shareholders. It is held therein that Section 397 does not come into play in the case wrongful acts being done by the management, that may be a ground for winding up. It is further held that in order to constitute oppression within the meaning of Section 397, there must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. His Lordship also held that if an action of the directors is illegal or invalid then the company or the shareholders may take appropriate action in a court of law by challenging the validity of such an action, but a petition under Sections 397 and 398 of the Act is not an appropriate remedy, 20. The Division Bench of Kerala High Court in Palghat Exports P. Ltd. v. T.V. Chandran [1994] 79 Comp. Cas. 213 (Ker.) had an occasion to consider the scope of provision of oppression contained in Section 397 and culled out the legal position thus ; (i) that even a company which was not doing business could form the subject-matter of action under Sections 397 and 398 of the Act. (ii) that a plain reading of Section 397 that the object of the section is to terminate or prevent an existing, present state of prejudicial, oppressive, harsh, unfair conduct and past conduct or closed affairs are not encompassed in the section. If the affairs which are complained of are not being conducted in present as at the time of filing the petition, they are matters of the past. They have no present existence and so there can be no complaints to bring to an end by an order of the court. Naturally, in such state of affairs, there are no affairs, present or future, to be prevented. (iii) that merely on the conduct of the directors in misappropriating the funds of the company, an order for winding up would not be just and equitable. In addition to such misconduct, further circumstances must exist which render it desirable in the interest of the shareholders that the company should be wound up. (iv) Section 397 of the Companies Act, 1956, is intended to avoid winding up and to mitigate and alleviate oppression. Relief under Section 397 of the Act is geared to help the members who were oppressed. (v) It is obligatory on the part of the complainant to establish "persistent and persisting course of unjust conduct". Past acts which have come to an end would not be taken for the purpose of invoking the court's jurisdiction under Section 397 of the Act.

Every illegal act may not amount to an act which would constitute a ground for an action under Section 397 of the Act. It is settled that isolated acts of the controlling shareholders cannot be used as a ground for taking action under Section 397 of the Act. One of the conditions essential for seeking relief under Section 397 of the Act is that there should be continued oppression over a period of time. (vi) In Section 397 of the Act, the court has been given power which is discretionary in character because the words used are "the court may make an order as it thinks fit with a view to bringing to an end the matters complained of" as distinct from the power granted under Section 398 of the Act wherein it is stated "the court may pass an order with a view to bringing to an end or preventing the matters complained of or apprehended." 21. Palmer's Company Law, 21st Edition with reference to Section 210 of the English Companies Act, 1948 considers the legal position thus– "Section 210 does not give the courts unlimited jurisdiction to intervene in the affairs of the company. The court can exercise its jurisdiction only if the requirements of the section are satisfied. As judicially interpreted, these are : (1) The matters complained of must affect the petitioner in his character as a member of the company : harsh or unfair treatment in any other capacity, e.g., as a director or creditor, cannot entitle him to relief under the section. Association to nominate the stranger as director. (2) The matters complained of must relate to the conduct of the affairs of the company. (3) They must be such as not only to make the winding up of the company just and equitable, but also to lead to the conclusion that the affairs of the company are being conducted in a manner which can properly be described as"oppressive" of the petitioner, and, it may be, other members. Despite the somewhat restricted working of Section 210, the requirements of the section should be interpreted in a liberal spirit in order to carry out the intention of Parliament, which designed this remedy in 6rder to suppress an acknowledged mischief .... "Oppressive" conduct, for the purposes of Section 210, means that the company has exercised its authority "in a manner burdensome, harsh and wrongful". It must go beyond what is required to make out a case for a winding-up order and must indicate some lack of probity or fair dealing towards one or more members of the company. "Oppression under Section 210," said Lord Keith in "Scottish Co-operative Wholesale Society Ltd. v. Meyer,"might take various forms. The section introduces a wide power to the court to deal with a situation in an equitable manner". In this case the majority shareholders of a private company who likewise controlled the board of directors ,of that company lost interest in the company and, after the minority refused to sell its $1 shares at par, decided to destroy the private company and threatened to wind it up. The minority petitioned under Section 210. The Scottish Court of Session (First Division) ordered that the majority shareholders should acquire the shares of the minority at $3 15s. each and this decision was affirmed by the House of Lords. The House rejected the argument of the majority that they had only employed legitimate means of commercial warfare, since the majority controlled the board of directors and thereby controlled the private company"from within". The contention of the majority that their nominees on the board were not engaged in active acts of oppression was likewise rejected on the ground

that the inaction of the nominee directors who could have saved the company was a breach of their duties as directors and, in the circumstances, amounted to oppressive conduct. Isolate acts of oppression will not normally be sufficient to justify relief under the section: the words used in the section,"the affairs of the company are conducted in a manner oppressive ..." suggest prima facie a continuing process; but they are wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company whether de facto or de jure. It is not essential that the alleged oppressor is oppressing in order to obtain a financial benefit; conduct maybe oppressive under the section even if it is due simply to the controlling shareholder's overwhelming desire for power and control. An act of omission might amount to oppressive conduct if it is shown that it was designed to achieve some unfair advantage over those claiming to be oppressed. Allegations of unwise, inefficient and careless conduct against a, director in the performance of his duties cannot in themselves give rise to any claim for relief under the section, and a petition limited to such allegations will be dismissed in limine." 22. Robert R. Pennington in the Company law, 6th Edition while dealing with the subject of oppression states that every member of the company is entitled to have its affairs properly conducted according to law, and if those who control the company have persistently disregarded the requirements of the Companies Act, or the provisions of the Company's constitution, even with the highest motives, relief was given. The author, in this connection, relied upon H.R. Harmer Ltd. [1958] 3 All. E.R. 689. 23. In H.R. Harmer, the Court of Appeal, with reference to Section 210 of the English Companies Act, 1948 held that the word "oppressive" meant, "burdensome, harsh and wrongful" and that viewing the events proved as a consecutive whole, the affairs of the company if conducted in a manner oppressive to the members, the case for relief under Section 210 could be made out. 24. The legal position is fairly established that in order that the court may make an order under Section 397, the court must be satisfied, Firstly, the company's affairs are being conducted in the manner oppressive to any members as the members, secondly, the facts would justify the making of a winding-up order, on the ground that it was just and equitable that the company should be wound-up and, thirdly, that winding-up order would unfairly prejudice the applicants. For a relief under Section 397, "a conduct which lacks in probity, conduct which is unfair and which causes prejudice to the petitioner in the exercise of his legal and proprietary rights as a shareholder" must be shown to exist. The relevant interests are the interests of the members not necessarily limited to strict legal rights under the Companies Act or the company's constitution (Articles of Association) but the court may take into account wider-equitable considerations. Put it more analytically : (z) that the oppression complained of must affect a person in his capacity or character as a member of the company; (ii) there must be continuous acts constituting oppression upto the date of the petition; (iii) the events had to be considered not in isolation but as a part of continuous story; (iv) it must be shown as preliminary to the application of Section 397 that there is just and equitable ground for winding up the company; and (v) the conduct complained of can be said to be 'oppression' only when it could be said that it

is burdensome, harsh and wrongful. Section 397 allows the court to intervene, of course on equitable considerations, where there is visible departure from the standards of fair dealing. While doing so the court may keep in mind the history and particular structure of the particular company and whether the detriment occasioned to complaining member's interest arises from the acts or conduct of the company complained. "Oppression" may be due to a desire to obtain power or control. It may also manifest itself in a denial of rights. The position that emerges from catena of cases is that an isolated act which is contrary to law may not necessarily and by itself support the inference that the violation of law was burdensome, harsh and wrongful, but a series of illegal acts following upon one another, can, in the context lead justifiably to the conclusion that they are part of the same transaction, of which the object is to cause or commit the oppression of person against whom acts are directed. 25. In the backdrop of the aforesaid legal position, we shall examine the points which have arisen for our consideration : Re : (i) 26. Mr. T.R. Andhyarujina, the learned counsel for the petitioner submitted that the acts of oppression by GE & Bechtel or for that matter EEC and CIPM should not be viewed as isolated events each but as a connected series of their actions. The oppression consists of repeated actions by GE & Bechtel to pack, dominate and control the board of directors of the defunct company and thereby usurp the corporate shell of the company for their own private purposes. They involve "at least an element of lack of probity or fair dealing" to the petitioner. He contended that GE & Bechtel extensively sought to exclude the presence of the petitioner's directors on the board of the defunct company which would prejudice or dilute their control of the company, Mr. Andhyarujina stressed that the most essential feature which reveals is the repeated inclusion of Mr. Peter Freeman who is neither a shareholder director nor the nominee of the financial institution but an outsider and a stranger. If the decision of the nominee directors of GE & Bechtel in the meeting of 4th June, 2002 was only to constitute valid quorum and obtain the working board, then they should have asked the petitioner to nominate a director just as they asked EMC to nominate the director of the meeting. Why the said request was not made to the petitioner but only to EMC when the directors of both viz., EMC and petitioner had uniformally resigned from the board. The learned Senior Counsel contended that the contents of the resolution passed in the meeting of 4th June, 2002, particularly, the resolution of the board constituted of two directors of GE & Bechtel and Mr. Freeman admitting liability to the claims made by themselves disguised as claims of "certain contractors" show that the purpose of so packing the board was for the selfish purpose of GE & Bechtel themselves. The resolution does not explain why the claims were, being admitted. The resolution is deliberately and vaguely worded. The resolution is silent as to who certified the claims and when and for what, amount; and out of total amount being claimed how much the liability so admitted. The learned senior counsel submitted that there is no material or evidence on record whatsoever that GE & Bechtel wanted to revive the working of DPC project to supply power. The primary, motive of the resolutions was to recover the claim and equity of GE '& Bechtel. In the AGM of 9th September, 2002 again, Mr. Pe-

ter Freeman and outsider and stranger was inducted as director without any necessary application whatsoever. Mr. Andhyarujina strenuously urged that at the AGM of 9th September, 2002, there could be no excuse to have Mr. Peter Freeman as director to obtain a quorum as Mr. Ramamurthy, the nominee of IDBI was compulsorily inducted on the board and had assumed the office of the director which would result in valid quorum of three. The illegal induction of Mr. Peter Freeman was solely for the purpose of packing the board in the favour of GE & Bechtel. This was complied by GE & Bechtel's insistence that the petitioner should have only one director. GE & Bechtel illegally opposed the petitioner's resolution to appoint two directors. The learned senior counsel contended that GE & Bechtel's desire is to dominate the board. It is further evident from the letter dated 8th October, 2002 from the authorised representative of EMC under provisional liquidation to GE's director Mr. Walsh, suddenly to propose the nomination of two employees each of GE & Bechtel within less than a month after EMC had declined to nominate any director at the AGM on 9th September, 2002. The learned senior counsel submitted that it was inconceivable that EMC that has lost interest in the company and was under the provisional liquidation should suddenly appoint four directors that two employees of GE & Bechtel. The letter dated 8th October, 2002 to Mr. Walsh by the authorised representative of EMC, according to the learned senior counsel, manoeuvered and inspired by GE & Bechtel to pack the board in their own favour. The learned senior counsel would urge that the cumulative effect of these actions clearly show that GE & Bechtel desired to dominate the board with their own nominees for their own self serving purposes and to appropriate the corporate shell of the defunct company. In their desire to pack the board, the conduct of GE & Bechtel at the board meeting of 4th June, 2002 and at the AGM of 9th September, 2002 were repeated with illegalities, irregularities and violations of the provisions of the Companies Act and the Articles of Association of the company. The learned senior, counsel vehemently contended that such repeated illegalities perpetrated by GE & Bechtel itself constitute oppression within the meaning of Section 397. 27. We must hark back to the bare facts to find out whether the respondents 2 and 4 determined to seize the control of the company and attempted to obtain a grossly unfair advantage. The company was originally promoted by the shareholders viz., EMC (80% of equity), CIPM (10% of the equity) and EEC (10% equity). Somewhere in the month of October, 1998, the petitioner acquired 30% of the Phase I equity of the company from EMC who was then holding 80% of equity. Thus, the petitioner became fourth shareholder member of the company. Till commissioning of Phase I, the company had 11 directors on the board; five directors were appointed by EMC who held 50% Phase I equity, three directors were appointed by the petitioner who held 30% Phase lequity and one each from CIPM and EEC holding 10% Phase I equity each and the IDBI being one of the lenders, had appointed one nominee director. In or about September, 2001, ICICI - another lender appointed its nominee as the second nominee director and thus, on and from September, 2001, the company had 12 directors. Enron Corporation who through its subsidiaries holds the entire equity of EMC filed for bankruptcy under the laws of

the United States of America somewhere in the month of November/December, 2001. In or about January, 2002, the equity holding of the petitioner was reduced to 14.15% from 30% after the company issued phase II equity to EMC, CIPM and EEC and the petitioner withdrew two of its shareholder directors from the board of the company and had only one shareholder director. On 1st March, 2002, Mr. Mohan Gurunath who was nominee of EMC took over as the Managing Director of the Company. At the instance of IDBI, by an order of this court passed on 21st March, 2002, the Court Receiver was appointed in respect of various assets of the company. Mr. Mohan Gurunath, resigned as managing director and director of the company on 28th March, 2002. On 29th March, 2002, the six other nomination directors appointed by EMC resigned as directors of the company. Thus, all 7 EMC directors resigned by the end of March, 2002. The Court Receiver took charge of various assets of the company on 2nd April, 2002. Oh or about 5th April, 2002, the two nominee directors appointed by IDBI and ICICI also resigned. Thus, on and from 5th April, 2002, the company had only three directors viz., (i) Mr. Donald C. Stummer (nominated by EEC), (ii) Mr. Richard Allison (nominated by CIPM) and (iii) Mr. Ravi Budhiraja (nominated by the petitioner). On 2nd May, 2002, Mr. Ravi Budhiraja, also resigned. It is not in dispute that by then the company had become defunct as the Court Receiver stood appointed; purchase agreements were terminated by MSEB and the generation of the power stopped. As to why the petitioner asked its nominee director to resign on 2nd May, 2002 is anybody's guess. Was it because the company had no activity, no sale of power and no revenue? Was it because serious disputes had arisen between the MSEB/ Government of Maharashtra on the one hand and the company on the other hand? Was it because there was thereat of prosecution due to breach of Pollution Control Laws? Was it fall out of Enron's bankruptcy? Was it intended to render the Board of the company non-functional for want of quorum? Or simply the petitioner lost interest in the management of the company. Whatever be the reason, it is not the case of the petitioner that if they had any notice of meeting of 4th June, 2002, they would have nominated its director on the board. Though before the Company Law Board at the time of hearing on 2nd August, 2002, respondent Nos. 2 and 4 offered to substitute Mr. Peter Freeman by the nominee of the petitioner but strangely that offer too was not accepted by the petitioner. Mr. Peter Freeman's nomination as a director on 4th June, 2002 was out of necessity to complete the quorum and have a functional board. The aspect whether Mr. Peter Freeman could have at all been nominated legally to the board of the company shall be considered by us little later but this aspect we are dealing here as a part of allegedly series of acts which according to the petitioner constitute oppression. 28. The decisions mentioned at serial Nos. 4 and 5 of the minutes of the meeting of the 4th June, 2002 on the basis of which it is contended that respondent Nos. 2 and 4 planned to usurp the corporate shell of the company for their own private purposes read thus– "Now therefore be it resolved, that Dabhol Power Company, acting through its Manager for Special Affairs, continue to pursue the arbitration proceeding that is pending against the Union of India, and to take all actions in connection with such proceeding

or the institution of further proceedings that are in the interest of, and further the obligations of, Dabhol Power Company, including, without limitation, the continuing engagement of the Firm of Linklarers and Alliance to provide representation in connection with such proceeding." "And be it resolved further, that Dabhol Power Company, acting through its Manager for Special Affairs, continue to pursue the arbitration proceeding that is pending against the Government of the State of Maharashtra, and to take all actions in connection with such proceeding or the institution of further proceedings that are in the interest of, and further the obligations of, Dabhol Power Company, including, without limitation, the continuing engagement of the firm of Linklarers and Alliance to provide representation in connection with such proceedings." The directors then discussed the existence of an action in the State of New York that had been filed by certain contractors in connection with claims against DPC related to the performance of construction and engineering work on the Dabhol Power Project. The directors further discussed the fact that no action had been taken, or request made, by the lenders to DPC following their having been advised of such filing and provided with a copy of the complaint. The directors also discussed the fact that unless DPC filed an answer in connection with the action, a default judgment could be rendered against it for the entire sum claimed. On motion proposed by Mr. Walsh, and seconded by Mr. Freeman, the directors unanimously passed by the following resolutions : "Now therefore be it resolved, that Dabhol Power Company, retain the firm of Lehman & Eilen to represent it, and file an answer in the suit brought against it, by certain contractors in state court in New York relating to payments claimed in connection with work on the Dabhol Power Project." "Now therefore, be it further resolved, that Lehman & Eilen be directed (by the Manager for Special Affairs or otherwise) to file an answer substantially similar in nature to that presented to the Board of Directors in which liability for amount previously certified for payment (as set forth in Count I of the amended complaint in the suit) is admitted, liability for amount previously certified for payment (as set fourth in Count I of the amended complaint in the suit) is admitted, liability for interest thereon is recalculated as appropriate, and liability for other amounts is contested until further investigation and analysis of the entitlement hereto (including any applicable defence) can be conducted." 29. The Company Law Board in this regard observed thus– "The decisions related to appointment of Mr. Freeman as manager, special affairs, and through him to retain counsel for prosecuting pending and future cases in India against the company, prosecuting the pending arbitration proceedings against GOM and GOI, for contesting an action in USA filed by certain contractors against the company and for appointing a suitable person for compliance of statutory requirements. The Board had also authorised appealing against the oral order of the Bombay High Court, as and when received that the Maharashtra Electricity Regulatory Commission would alone have the powers to adjudicate the disputes between the company and MSEB. Therefore, even though prosecuting arbitration proceedings was one of the decisions, yet, other decisions had also been taken with a view to protect the assets and corporate interests of the company. Therefore, the contention of the peti-

tioner that the quorum was constituted only for the purpose of prosecuting the arbitration proceedings has no substance. The directors of a company occupy a fiduciary position and they have to act in the interests of the company. All the decisions taken in that meeting are found to be in the interests of the company. Even though during the initial arguments, the learned counsel for the petitioner submitted that reactivating the arbitration was an act of oppression and against public policy, in the rejoinder arguments, he submitted that the petitioner is not against prosecution of legal proceedings but was only questioning the context in which the respondents had reactivated the arbitration proceedings." 30. The Company Judge in the appeal held thus– "49. Mr. Andhyarujina challenged as oppressive the decisions mentioned at Sr. Nos. (iv) and (v) above. It was contended that M/s. Lehman and Eilen were directed to file a defence admitting the liability relating to payment to certain contractors in the suit before the State Court in New York and that was against the interests of the respondent No. 1. Mr. Andhyarujina stated that the contractors who had made claims were G.E. & Bechtel or their associate or sister concerns. Per contra, Mr. Sibal pointed out that the claims made by contractors were previously certified by MSEB or its officers. A draft reply prepared by M/s. Lehman and Eilen admitting the certified claims was previously approved by the Board, M/s. Lehman and Eilen were directed to admit only previously certified claims, and that was not against the interests of the respondent No. 1. All other liabilities were disputed and were to be contested. Therefore, the said decision was not against the interests of respondent No. 1 and certainly not oppressive of the appellant. Continuation of the arbitration proceedings was also a decision which was in the interest of the respondent No. 1. If the respondent No. 1 succeeds in the arbitration, it would receive money by way of compensation and/or damages. May be that compensation would be required to be paid by MSEB - holding company of the appellant, or the Government of Maharashtra or the Union of India. The interest of the appellant as a member of the respondent No. 1 and the interest of the appellant as a subsidiary of MSEB are clearly conflicting. The recovery of money through the arbitration proceedings is for the benefit of the respondent No. 1 and all its creditors and members including the appellant in the capacity as a member. The fact that the compensation may come from the coffers of the Government of Maharashtra or MSEB is against the interest of the appellant. The money would come to the respondent No. 1 and for the benefit of the respondent No. 1. It would also benefit the members of the respondent No. 1 in as much as their liability - unlimited as it is - would be reduced. The fact that the holding company, of one of the members, would be a loser in a different capacity and some other members would be beneficiaries (in their capacity as creditors who have supplied the plant machinery), cannot make the decision taken by the Board to continue the arbitration proceedings oppressive of the appellant. 50. In my opinion, the continued meeting of the Board after establishment of a quorum by appointment of Mr. Freeman can be construed as an independent and separate Board meeting to which the provisions of Regulation 75 would not apply. Therefore, the meeting was legal. Assuming however, that the said meeting was illegal, the decisions taken at the

said meeting were in interest of the respondent No. 1 and were not oppressive," 31. How could the decision to pursue arbitration proceedings be oppressive. As a matter of fact, before the Company Law Board, ultimately, it was submitted that the petitioner was not against the prosecution of legal proceedings but was only questioning the context in which the respondent Nos. 2 and 4 reactivated the arbitration proceedings. The interest of the company is paramount and cannot be made subordinate to the interest of the shareholders. The directors owe a fiduciary duty to the company to diligently prosecute and defend the legal proceedings. The decision, therefore, to pursue arbitration proceedings has to be viewed in that context. The decision of serial No. 5 is in respect of a suit brought by certain contractors including GE'& Bechtel in the Supreme Court of New York against the company for amounts owing to those contractors for work done. This decision is stoutly criticised and it is submitted that the purpose of packing the Board was for selfish purpose of GE & Bechtel. 32. It is true that in the resolution, the names of the contractors are not disclosed but does it lead to an inference that it was so done to disguise. The petition is not specific and necessary facts in this regard are not pleaded. We have, therefore, to take the resolution on its face. The amount claimed in the suit as was told to us during the course of arguments is : (a) count-I US $ 19,702, 239.51 + Rs. 1,38,001, 164.83; and (b) count II - US$ in excess of 35 millions. The resolution reads that the matter has been presented before the board of directors on an early occasion and the directors considered it appropriate to admit the liability for the previously certified amounts viz., count I admitted liability of US$ 19,369,144.86 + Rs. 1,38,001,164.83 and Count II was decided to be contested in full. 33. It was vehemently contended by Mr. T.R. Andhyarujina, the learned senior counsel that passing of the resolution at serial No. 5 by respondent Nos. 2 to 4 with the help of respondent No. 5 would show that they took advantage of the absence of the petitioner to push through their private agenda of settling their own claims. The learned senior counsel submitted that the resolution would show that there was an answer presented to the board of directors in which liability for an amount previously certified for payment as set forth in count I was existing and had been admitted. The respondents were called upon by a notice by the appellant's advocates on 25th June, 2003 to furnish the copies of suit for the answer but the respondents advocates by their letter dated 28th June, 2003 refused to give inspection of the answer stating that as the document was not referred to in the pleadings and was also not relevant, the document could not be supplied. The learned senior counsel also submitted that explanation by the said respondents is also not consistent and rather conflicting. At the hearing before the Company Judge, the respondents made the statement that the claim had been certified by MSEB or its officers and before us, it was submitted by the said respondents at one time that the board of directors of the company which included with Mr. R. Budhiraja had been presented with an answer in which liability for an amount previously certified for payment (as set forth in count first in the amended plaint in the suit) was admitted and then it was stated that count I had been certified by the project officer at Dabhol and such conflicting explanations go to show that the actions of respondent Nos. 2,4 and

5 were lacking in probity. 34. For want of necessary pleadings in the company petition in this regard that the problem has arisen. Had the petitioner set out the requisite and necessary facts in that regard, the respondent Nos. 2, 4 and 5 would have responded to those facts properly in their reply affidavits. The arguments concerning this aspect were developed at the time of hearing in the appeal before the learned Company Judge and explanation seems to have been furnished across the bar by the said respondents. Be that as it may it was always possible for the petitioner to know about the details of the claims filed, by whom they were filed; the total amount claimed by the contractors from the company; if the petitioner had nominated its one director on the board of the company to which there was no opposition. 35. In any case, what appears from the available record and seems to us is that the meeting was held on 4th June, 2002 for completing the quorum and the decisions taken, particularly, decision Nos. 4 and 5 were only intended to prosecute or defend the legal proceedings to the extent noted therein and as held by the Company Law Board, and in our view rightly, the said decisions cannot be said to be against the interest of the company. All the assets of the company are in the hands of the Court Receiver appointed by this court. The board can do nothing as there is no business, no revenue, no generation of power and no activity. 36. The opposition to the petitioner's resolution in the AGM held on 9-9-2002 for two nominees on the board of the company obviously was based on their understanding and construction of Article 10.2 of the Articles of Association. The construction of Article 10.2 by the respondents 2 and 4 may or may not be correct (this aspect we shall deal when we consider legality of that action) but one thing is clear that such construction is not absurd or impossible. 37. The nomination of respondents 6 to 9 by EMC vide letter dated 8th October, 2002 was legal or not, shall have to be seen in the light of Article 10.4 but by such nomination, they did not stand appointed to the Board of the company an such action of EMC, we are afraid, cannot be construed, and act of oppression by GE & Bechtel. The shareholder has unquestioned right to elect directors in accord with the Companies Act an Articles of Association of the company and the nomination of respondents 6 to 9 by the EMC which admittedly has 65.85% equity share holding in the company has to be seen as an exercise of that right in corporate democracy. If the petitioner decided to nominate its two directors for election in the AGM held on 9-9-2002 when its sole nominee director resigned on 2-5-2002, what is wrong in the action of EMC to nominate its four directors vide letter dated 8-10-2002 though its directors had earlier resigned in the month of April, 2002. Of course, the appointment or election of these proposed four directors has to be as per law. 38. The learned senior counsel for the petitioner vehemently contended that the company is a private limited company having only four shareholders. It is a closely held company with a restriction of the transfer and sale of shares. Each of the four shareholders through their parent holding companies has a specific role to play, running and functioning of the company. Each shareholder is specifically mentioned by name in the Articles of Association and therefore, the principles enunciated by House of Lords in Ebrahimi v. Westbourne Galleries Ltd. [1972] 2 All ER 492, per Lord Wilberforce applies. 39. The learned

senior counsel placed emphasis on the following principles enunciated by Lord Wilberforce : "My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words just and equitable and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act, 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The just and equitable provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The super-imposition of equitable considerations requires something more, which typically may include one, or probable, more, of the following elements : (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be sleeping members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members interest in the company so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere." 40. It was submitted, by relying upon the aforesaid principles that all the three considerations apply to the company and its shareholders and the , Court needs to consider whether or not the principle of just and equitable is fulfilled in the present case, keeping in mind the observations of Lord Wilberforce in Ebrahimi's case (supra). 41. The Ebrahimi's case (supra) came up for Consideration in Hind Overseas (P.) Ltd. v. Raghunath Prasad Jhunjhunwalla and Kilpest P. Ltd. v. Shekhar Mehra [1996] 87 Comp. Cas. 615 SC. 42. In Hind Overseas (P.) Ltd. 's case (supra) the Supreme Court observed thus– "20. None of the parties questions the principles as such adumbrated by the House of Lords in Ebrahimi's case [1973] AC 360 (supra) or even those in the earlier Yenidje's case (1916) 2 Ch. 426 (supra) and indeed these are sound principles depending upon the nature,

composition and character of the company. The principles, good as they are, their application in a given case or in all cases, generally, creates problems and difficulties. The respondents counsel is well cognizant of this difficult aspect and, therefore, rests his argument on the footing that the company is in substance a partnership and necessarily, therefore, according to him, the principles of partnership should be attracted. ** ** ** 32. When more than one family or several friends and relations together form a company and there is no right as such agreed upon or active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liably invoked. Besides, it is only when shareholding is more or less equal and there is a case of complete deadlock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding up of the just and equitable ground. In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not a real structure and on piercing the veil it is found that the reality it is a partnership. On the allegations and submissions in the present case, we are not prepared to extend these principles to the present company." (p.33) 43. In Kilpest (P.) Ltd's case (supra) the Supreme Court held thus– "We respectfully agree with the observations in the case of Hind Overseas (P.) Ltd. [1976] 46 Comp. Cas. 91 (SC) and would add this. Sections 397 and 398 of the Companies Act, provide relief to shareholders against oppression and mismanagement. The powers exercisable in such petitions, at the relevant time by the courts and now by the company law board, have been set out in Section 402, Section 402 reads thus– ** ** ** The promoters of a company, whether or not they were hitherto partners, elect to avail of the advantages of forming a limited company. They voluntarily and knowingly bind themselves by the provisions of the Companies Act. The submission that a limited company should be treated as a quasi-partnership should, therefore, not be easily accepted. Having regard to the wide powers under Section 402, very rarely would it be necessary to wind up any company in a petition filed under Sections 397 and 398." (pp. 620 - 622) 44. It is true that the principles enunciated in Ebrahimi's case (supra) as noticed above have been held by the Supreme Court to be sound principles but it has been stated in unambiguous terms that the limited company should be treated as quasi-partnership should not be easily accepted. If the apparent structure of the company is not the real structure and on lifting the veil, it is found that in reality it is the partnership, the principles of dissolution of partnership may apply but that is not the case here. The company was incorporated by EMC, EEC and CIPM. The petitioner was not in the picture at the time of incorporation. The petitioner joined as a shareholder after incorporation of DPC. The share holding is not equal. There is no deadlock that way. The original promoters and the petitioner as subsequent share holder have voluntarily and knowingly bind themselves by the provisions of the Companies Act. There is no personal relationship amongst shareholders. It is true that the Articles of Association provide restriction on the transfer of members interest in the company and reflect the understanding amongst share-

holders for participation in conduct of the business but taking overall facts and circumstances of the case as noticed above, we find it difficult to extend the principles of quasi-partnership to the company, 45. We, therefore, are unable to accept that actions of respondents 2 and 4 bear upon the general pattern of oppression and that they intend to hijack the management of the company or their actions lack probity. Re :(ii)(a) 46. The contention of the learned senior counsel for the petitioner is that the board meeting held on 4th June, 2002 was illegal as it was carried on in violation of Regulation 75 of Table A of the Companies Act, 1956. 47. Regulation 75 of Table A reads thus– "75. The continuing directors may act notwithstanding any vacancy in the Board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing directors or director may act for the purpose of increasing the number of directors to that fixed for the quorum, or of summoning a general meeting of the company, but for no other purpose." 48. The aforesaid regulation, upon a careful reading would show that the continuing directors may act irrespective of any vacancy in the Board. To that extent, there is no dispute. It provides that if and so long as their number is reduced below the quorum, the continuing directors or director may act for the purpose of increasing the number of directors to that fixed for the quorum or for summoning a general meeting of the company, but for no other purpose. It would, thus, be seen that Regulation 75 restricts the power of the continuing directors to act until number of directors is increased to that fixed for the quorum. We are in agreement with the submission of Mr. Chidambaram that Regulation 75 is in two parts. The first part, "the continuing directors may act notwithstanding any vacancy in the board" is the unrestricted power. The second part places the restriction on the powers of the continuing directors to act where number of continuing directors falls below the quorum. That restriction is for a duration of time. The construction of Regulation 75 put by Mr. Andhyarujina, if accepted, obviously shall result in rendering the words "so long as" as surplusage and redundant which we are afraid, cannot be accepted. The words used in Regulation 75 has to be given full meaning and by giving full meaning to the words used in Regulation 75, it is clear that continuing directors until their number is below the quorum shall only act to bring the member to that fixed for the quorum and once that impediment is gone, the continuing directors may act without any restriction. It, therefore, cannot be said that the board meeting held on 4th June, 2002 was in violation of Regulation 75 of Table A. Re : (ii)(b) 49. Mr. T.R. Andhyarujina, the learned senior counsel strenuously urged that the meeting held on 4th June, 2002 at San Francisco was in violation of the mandatory provisions, both of Section 286 of the Companies Act and Article 10.7 of the Articles of Association. He submitted that from ground (L) of Memo of appeal (Lodging) No. 6 of 2003 filed by the respondent No. 2 before this court, it would be seen that admittedly, there was no notice issued for convening the meeting of 4th June, 2004 at San Francisco. The learned senior counsel would also contend that Section 286 of the Companies Act as well as Article 10.7 of the Articles of Association are mandatory and for want of notice in violation of mandatory provision, the meeting held on 4th June, 2002 was illegal. He

relied upon the judgment of the Supreme Court in Parmeshwari Prasad Gupta v. Union of India . 50. Section 286 of the Companies Act reads thus– "286. Notice of meeting–(1) Notice of every meeting of the Board of directors of a company shall be given in writing to every director for the time being in India, and at his usual address in India, to every other director. (2) Every officer of the company whose duty it is to give notice as aforesaid and who fails to do so shall be punishable with fine which may extend to [one thousand] rupees." 51. Article 10.7 of the Articles of Association reads thus– "10.7 Board meetings shall be held no less than four times in every year and with intervals of not more than three months. Unless waived by the Shareholder Directors, not less than five Business Days' notice shall be given to each of the directors of the date, time and place of all meetings of the Board to the address notified from time to time by each director to the Secretary. Additional Board Meetings may be called at the request of any shareholder Director to the Secretary. Each such notice shall contain, inter alia, an agenda specifying the reasonable, detail the matter to be discussed at the relevant meeting and shall be accompanied by any relevant papers for discussion at such meeting and shall be sent by courier or by fax." 52. In Parmeshwari Prasad Gupta's case (supra) the Supreme Court held thus– "11. Article 109 of the Articles of Association of the Company provides as follows : '109. When meeting to be convened.–A Director may at any time summon meeting of the Directors by serving every Director with at least 72 hours notice in writing, through the officer of the Company authorised to issue such notice who shall arrange to convene the meeting.' In Hulsbury's Laws of England, Vol. 9, p. 46, it has been stated that it is essential that notice of the meeting and of the business to be transacted should be given to all persons entitled to participated and that if a member whom it is reasonably possible to summon is not summoned, the meeting will not be duly conveyed, even though the omission is accidental or due to the fact that the member has informed the officer whose duty it is to serve notice that he need not serve notice on him. In Volume 6 of the same book at p. 315 Article 626, it is stated that a meeting of the directors is not duly convened unless due notice has been given to all the directors, and the business put through at a meeting not duly convened is invalid. 12. To put it in other words, ,as the meeting of the Board of Directors held on December 16, 1953, was invalid, so the resolution to terminate the services of the plaintiff was inoperative. 13. Then, the question for consideration is, what is the effect of the confirmation of the minutes of the meeting of the Board of Directors held on December 16, 1953 and the action of the Chairman in terminating the services of the appellant by his telegram and letter dated December 17, 1953, in pursuance to the invalid resolution of the Board of Directors to terminate his services, in the meeting of the Board of Directors held on December 23, 1953? 14. The agenda of the meeting of the Board of Directors held on December 23, 1953 shows that one item of business was the confirmation of the minutes of the meeting of the Directors held on December 16, 1953. The confirmation of the minutes of the meeting of the Directors held on 16-12-1953, would not in any way show that the Board of Directors adopted the resolution to terminate the services of the appellant passed on December

16, 1953. It only shows that: the Board passed the minutes of the proceedings of the meeting held on December 16, 1953. But the resolution of the Board of Directors to confirm the action of the Chairman to terminate the services of the appellant by his telegram and letter dated December 17, 1953, would show that the Board ratified the action of the Chairman. Even if it be assumed that the telegram and the letter terminating the services of the appellant by the Chairman was in pursuance to the invalid resolution of the Board of Directors passed on December 16, 1953 to terminate his services, it would not follow that the action of the Chairman could not be ratified in a regularly convened meeting of the Board of Directors. The point is that even assuming that the Chairman was not legally authorised to terminate the services of the appellant, he was acting on behalf of the company in doing so, because, he purported to act in pursuance of the invalid resolution. Therefore, it was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorised, was done on behalf of the Company, Ratification would always relate back to the date of the act ratified and so it must be held that the services of the appellant were validly terminated on December 17, 1953. The appellant was not entitled to the declaration prayed for by him and the trial court as well as the High Court was right in dismissing the claim." (p. 2390) 53. The Single Judge of the Punjab and Haryana High Court in Col. Kuldip Singh Dhitton v. Paragaon Utility Financers P. Ltd, [1988] 64 Comp. Cas. 19 held that notice must be sent to all the directors for convening a meeting of the Board of Directors, otherwise the resolution passed in such meeting is invalid. 54. Section 286, mandates the notice to be given to the director/s only. The petitioner as a shareholder could not claim as a matter of right the notice of the meeting of the Board of Directors. As a shareholder, the petitioner cannot have any grievance that no notice was given to all the directors for the meeting convened on 4th June, 2002. The fact of the matter is that at that time there were two directors and both the directors attended the meeting without any objection of written notice. Besides that, there is no specific pleading that either of the two directors was not given notice. On the basis of the ground 'L' of Appeal No. 6, it can hardly be held that the respondent Nos. 2 to 5 admitted that no notice of the board meeting of 2002 was given. Moreover, the meeting of 4th June, 2002 took place outside India and Section 286 requires the notice to be given to those directors who are for the time being in India. 55. A perusal of Article 10.7 would show that notice may be waived by the shareholder directors. The expression "unless waived by the shareholders directors, not less than five business day's notice shall be given to each of the directors of the date, time and place of all meetings of the board. . . " suggests riot only the waiver of the period of notice but the notice altogether. The observations made in paragraph 10 by the Supreme Court in Parmeshwari Prasad Gupta's case (supra) does not help the case of the petitioner in the facts and circumstances: that was a case of no notice to the director. There was no clause of waiver like Article 10.7. 56. We may also notice that though non-compliance of the provision of Section 286 is an offence but it is compoundable under Section 621A of the Companies Act. Once an offence is capable of being compounded, the mandatory character

of the provision does not remain because if the offence is compounded, it is as if no offence had ever been committed in the first place. 57. From what we have discussed above, it cannot be held that the meeting was held on 4th June, 2002 in violation of Section 286 of the Companies Act and Article 10.7 of the Articles of Association. Re : (ii)(c) 58. This contention relates to the violation of Article 10.7. The submission is that the Board meeting held on 4th June, 2002 was bad in law as no written agenda was circulated. We hardly find substance in the submission. Notice for a meeting of the board is not required to be accompanied by the agenda under Section 286 of the Companies Act, though Article 10.7 does provide that such notice shall contain inter alia, an agenda. We have already held above that notice as contemplated under Article 10.7 can be waived. In that event, surely, the agenda can also be waived as it is only a part of the notice. Even otherwise, the provision in Article 10.7 that the notice shall contain inter alia the agenda is only directory and not mandatory. The Board of Directors can always discuss the matter even if it is not on the agenda. Re : (h)(d) 59. The learned senior counsel for the petitioner contended that under no circumstances Mr. Peter Freeman could have been validly appointed to the Board of Directors on 4th June, 2002. The argument is that Mr. Peter Freeman could only have been elected at the general meeting and not nominated by the board even if it is assumed that Article 10.13 enables the appointment of the outsider. According to the learned senior counsel for the petitioner the provisions of Article 10.13 were not invoked for the appointment of Mr. Peter Freeman at the board meeting of 4th June, 2002 as the agenda circulated for the AGM of 9th September, 2002 stated that he had been appointed as additional director under Section 260 of the Companies Act by the board. He would submit that though Section 260 of the Companies Act, 1956 authorises the appointment of the additional director but that is not authorised by articles; the Articles of Association do not have a provision for additional director as such. The same is equally of Regulation 72 of Table A. Regulation 72 in any case is also not applicable. 60. Before 4th June, 2002, all directors except two directors had resigned from the board. In the meeting of 4th June, 2002, the continuing two directors appointed Mr. Peter Freeman as a director to make up the quorum. Once the quorum was established, the continuing directors passed certain resolutions. 61. Section 260 of the Companies Act reads thus– "260. Additionaldirectors.–Nothing in Sections 255, 258 or 259 shall affect any power conferred on the Board of directors by the articles to appoint additional directors : Provided that such additional directors shall hold office only up to the date of the next annual general meeting of the company : Provided further that the number of the directors and additional directors together shall not exceed the maximum strength fixed for the Board by the articles." 62. Section 262 of the Companies Act reads thus– "262. Filling of casual vacancies among directors.–(1) In the case of a public company or a private company which is a subsidiary of a public company, if the office of any director appointed by the company in general meeting is vacated before his term of office will expire in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at

a meeting of the Board. (2) Any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated as aforesaid." 63. Regulation 72 of Table A reads thus– "72. (1) The Board shall have power at any time, and from time to time, to appoint a person as an additional director, provided the number of the directors and additional directors together shall not at any time exceed the maximum strength fixed for the Board by the articles. (2) Such person shall hold office only up to the date of the next annual general meeting of the company but shall be eligible for appointment by the company as a director at that meeting subject to the provisions of the Act." 64. Regulation 72 of Table A is applicable to the company by virtue of Table E. The conjoint reading of Sections 260 and 262 of the Companies Act and Regulation 72 shows that it enables the Board of the company to appoint the additional director. The "director" includes any person occupying the position of director, by whatever name called by virtue of Section 2(13). Such additional director holds office only upto the date of next AGM. By resolution dated 4th June, 2002, continuing directors appointed Mr. Peter Freeman as a director with stipulation that he would hold office till the next AGM of the company, we hardly find any illegality in his appointment. 65. Article 10.13 reads thus : "10.13 Directors other than Shareholder Directors shall be elected by Members having a majority of the shares. The Members agree to procure the election of individuals as directors (other than Shareholder Directors) to the extent required under the Financing Agreements," 66. Article 10.13 of the Articles of Association would only be attracted for an election of the director in the Annual General Meeting and is not invokable for appointment of the director by the Board. To that extent Mr. Andhyarujina is right. However, the appointment of Mr. Peter Freeman as director in the board meeting of 4th June, 2002 is valid being permissible and in accord with Regulation 72 of Table A read with Section 260. The appointment of Mr. Peter Freeman in the meeting of board on 4th June, 2002, thus, was not invalid for the reasons we have already indicated above. Re:(iii)(a) 67. The submission of the senior counsel Mr. Andhyarujina is that there was an illegal exclusion of two directors of the petitioner in the AGM held on 9th September, 2002, though under Article 10.2 the petitioner was entitled to have their two directors elected. The insistence of GE & Bechtel that the petitioner could only nominate one director for election at the AGM on 9th September, 2002 showed their desire to exclude the nomination of two directors by the petitioner. 68. Article 10.2 of the Articles of Association reads thus : "10.2 Each member shall be entitled to nominate one, candidate for election to the Board in respect of each 10 per cent of the total voting power held by its and its Affiliates (and so on for integral multiples thereof). Any group of Members holding in the aggregate 10 per cent of the total voting power (excluding any voting power taken into account in nominations under the preceding sentence) also shall be entitled to nominate one candidate for election to the Board in respect of each 10 per cent of the total voting power they collectively hold. If at any time fewer than 10 candidates have been nominated as provided in the preceding two sentences or elected, the Members whose voting power has not been taken into account in making a nomination under

the preceding two sentences shall by a majority vote of the voting power not so taken into account, nominate a candidate/s so that 10 shareholder Directors in the aggregate are in office," 69. Mr. Andhyarujina, the learned senior counsel analysed the said Article 10.2 in three sentences. Sentence A–"Each member shall be entitled to nominate one candidate for election to the board in respect of each 10% of the total, voting power held by it and its affiliates (and so on for integral multiples thereof)". Sentence B–"Any group of members holding in the aggregate 10% of the total voting power (excluding any voting power taken into account in the nomination under the preceding sentence) also shall be entitled to nominate one candidate for election to the board in respect of each 10% of the total voting power they collectively hold." Sentence C –"If at any time fewer than 10 candidates have been nominated as provided in the preceding two sentences or elected, the members whose voting power has not been taken into account in making a nomination under the preceding two sentences shall by a majority vote of the voting power not so taken into account, nominates a candidate/s so that 10% shareholder directors in the aggregate are in office." 70. It was submitted by Mr. Andhyarujina that sentence 'C' does not contemplate nomination by collectivity of votes. Collectivity of votes is only under sentence 'B'. The majority vote referred to is the individual majority of each shareholder taken by itself. It is a "stand alone" fraction. There is no mandatory requirement that the board must always have 10 shareholder directors and the board will still function. It was submitted that as proportionality is the key factor in Article 10.2, the fractions of each member which are unutilised are intended to be utilised for nominating a candidate under sentence 'C'. Such utilisation must be by some mechanics to nominate a candidate. Mr. Andhyarujina would submit that if any shareholder does not enter into fray with his fraction for the specific purpose of nominating a candidate, his fraction cannot be considered to defeat the fraction of a shareholder who utilizes his unutilized voting power for nominating a candidate. The learned senior counsel argued that Article 10.2 must be construed keeping in mind that the sole purpose of that article is to provide the mechanism by which each of the shareholders nominates its candidate/candidates for the formation of the board. The purpose of the article is not to provide permanent veto or blocking power to a shareholder who might have a large fractional shareholding. On the basis of the authorities Holmes v. Kays 1958 n AER 129-138 and Rayfighles v. Hands 3 WLR 851-853 relied upon by the respondents, Mr. Andhyarujina agreed that Articles of Association being the business document must always be construed to give business efficacy and an unreasonable and absurd interpretation should be avoided. 71. The submission of Mr. Chidambaram, the learned senior counsel for the respondent Nos. 2 to 5, on the other hand is that Article 10.2 deals with the nomination of candidates for the post of directors while Article 10.3 deals with the election by voting in favour of the candidates nominated under Article 10.2. According to him, sentence 'A' gives right to nominate one candidate for every 10% voting power. Sentence 'B' provides that two or more shareholders can aggregate their voting power and for every aggregate of 10% shareholding, they will, be entitled to nominate one candidate. Sentence 'C' deals with fractions, Mr. Chidambaram

would urge that fractional voting power can be in the hands of two members, three members or four members or more than four members. It is only when members with fractional voting power join together and that fractional voting power which has not been taken into account under sentences 'A' and 'B', constitutes a majority by a majority vote, these members are entitled to nominate a candidate or candidates. Sentence 'C' uses the words "Members... shall by a majority vote... nominate a candidate/s..." and -that each of those members who have the majority in the fractional voting power, not so far taken into account, are entitled to nominate the candidate or candidates. Such nominee under sentences 'A', 'B' and 'C' of Article 10.2 shall be elected under Article 10.3. The learned senior counsel for the respondent Nos. 2 to 5 submitted that for the purposes of Article 10.2, EMC has clearly having factional power of 5.85 while the petitioner has fractional power of 4.15. Between 5.85 and 4.15 fractional power, EMC alone will be entitled to nominate a candidate under the third sentence and the petitioner could not claim nor had any right to nominate a candidate under the sentence 'C'. In any case, the learned senior counsel for the respondent Nos. 2 to 5 submitted that there is serious dispute regarding the scope and interpretation of Sentence 'C' of Article 10.2, and therefore, an act of defeating the resolution of the petitioner insisting for two directors cannot be said to be an act of oppression of a shareholder within the meaning of Section 397. 72. Mr. Janak Dwarkadas, the learned senior counsel for the first respondent gave few more illustrations while supporting the construction of sentence 'C' put forth by Mr. Chidambaram. 73. Article 10.2 deals with nomination of candidates for the post of directors. Sentence 'A' entitles the nomination of one candidate by the shareholder for every 10% voting power. It confers sort of a vested right. The sentence 'B' that provides for consensual pooling enables two or more shareholders to nominate one candidate for every aggregate of 10% shareholding of their aggregate voting power. Sentence 'C' deals with fractional voting power. What is provided by Sentence 'C' is that the member whose fractional voting power has not been taken into account, if possesses majority of fractional voting power, may nominate the candidate under Sentence 'C'. The use of the words, "shall by majority votes of the voting power not so taken into account nominate the candidate/s" gives the clue that the shareholder having the majority of fractional voting power is entitled to nominate the candidate or candidates. Prenomination contest or not, the other shareholder having fractional voting power entering the fray for nomination in that category or not, the language employed in Sentence 'C', leaves no manner of doubt that the nomination of the candidate/s from amongst the members of fractional voting power has to be of a majority votes of that fractional voting. If the argument of Mr. Andhyarujina that Sentence 'C' does not contemplate nomination by collectivity of votes is accepted, then the expression shall by majority of votes of the voting power not so taken into account occurring in Sentence 'C' shall be rendered redundant. The intention that is made clear by use of express words in Sentence 'C' cannot be tampered with by giving any other meaning. The mechanics for utilisation of fractions for nominating a candidate under Sentence 'C' is to have majority vote of fractional voting power. There is no question of

providing permanent 'veto' or blocking power to a shareholder having a large fractional shareholding. It is only a majority holder of fractional shareholding from amongst fractional shareholders making up fractional shareholding to 10% of total shareholding that such, fractional shareholder has right to nominate the candidate and therefore, the petitioner holding only 4.15% of fractional voting power as against 6.85% held by EMC, could not have claimed as a matter of right to nominate its candidate under Sentence 'C' of Articles 10.2, irrespective of whether EMC put up its nominee for its 6.85% fractional shareholding or not. The opposition to petitioner's resolution to nominate two directors by the respondents 2 and 4 in the AGM, therefore, cannot be held to be an act of oppression by itself or in association with other actions. Re : (iii)(b) 74. The submission of Mr. Andhyarujina, the learned senior counsel for the petitioner is that the election of Mr. Peter Freeman at the AGM of 9th September, 2002 was also illegal as there is no power under articles to nominate a stranger as a director viz., who is neither a shareholder nominee director under Article 10.2 nor a financial institution director under Article 10.13. It was submitted that Article 10.13 was not mentioned in the nomination of Mr. Peter Freeman. It was also contended that GE & Bechtel having exercised their right to nominate one director each under Article 10.2, they had no power or authority to invoke or nominate any other person; having done so, GE & Bechtel violated the Articles of Association. 75. Article 10.13 has already been reproduced by us above. This article is in two parts : First Part - "Directors other than the shareholders directors shall be elected by members having a majority of the shares." Second Part - "The members agree to procure the election of individuals is directors to the extent required under the financial agreement." 76. Out of the total number of thirteen directors, the ten directors are required to be nominees of shareholders under Article 10.2. Any person can be elected to fill the remaining three vacancies. As per the second part, obviously, if there is financing agreement or more than one financing agreement, the election of individuals as directors to the extent required under the financial agreement/s shall have to be procured. However, if there is no financing agreement or that there is less, than three financial agreements, the vacancy 11, 12 or 13, as the case may be, can be filled by the shareholders. This seems to us to be reasonable construction of Article 10.13. On 9th September, 2002, admittedly, only two lenders had financing agreements under which they were entitled to have a representative each. So 11 and 12 vacancies go to financial institutions. The shareholders were entitled to elect Mr. Peter Freeman to fill the 13th vacancy in the AGM. Merely because no reference was made of Article 10.13 in his nomination, that would not render his election invalid. The Articles of Association do not prescribe any qualification for the director. The filling of the vacancy of a director for the 13th position under Article 10.13 has nothing to do with the nomination of one director each by GE & Bechtel under Article 10.2. It, therefore, cannot be held and rightly held to be not so by the Company Law Board and the Company Judge that election of Mr. Peter Freeman at the AGM of 9th September, 2002 was illegal. Re : (iv) 77. By letter dated 8th October, 2002 written by Ms. Kimberlee Driscoll, four persons were nominated as the

shareholder directors to represent EMC. The learned senior counsel Mr. Andhyarujina would contend that the nomination of four persons as the shareholder directors to represent EMC being respondent Nos. 6 to 9 herein is illegal as there is no provision under the Articles to co-opt the director by the Board of Directors who ceased to be a director because of resignation and who has not been removed and sought to be replaced. The submission of Mr. Andhyarujina is that Article 10.4 negatives such a power. The learned senior counsel submitted that if at all, respondent Nos. 6 to 9 could only be elected at the general meeting of the shareholders. 78. Article 10.4 of the Articles of Association reads thus– "10.4 Any shareholder Director nominated and appointed pursuant to this Article 10 may at any time be removed and substituted by the Member that nominated such Shareholder Director. The members agree to procure that any election pursuant to Article 10.3 and any such removal and/or election shall take place at a general meeting of the Company to be held as soon as reasonably practicable after receipt from the applicable Member of a written notice served on each of the other Members or specifying the removal and/or election of the substitute shareholder Director and pending such general meeting shall produce that the Board shall appoint such candidate. If any Shareholder director ceases to hold office the Members shall procure the election of substitute nominated by the Member who appointed such Shareholder Director." 79. This article can also be analysed conveniently by dividing it in three sentences : Sentence I - "Any shareholder director nominated and appointed pursuant to this Article 10 may at any time be removed and substituted by the member that nominated such shareholder director." Sentence II - "The members agree to procure that any election pursuant to Article 10.3 and any such removal and/or election shall take place at a general meeting of the company to be held as soon as reasonably practicable after receipt from the applicable member of a written notice served on each of the other members or specifying the removal and/or election of the substitute shareholder Director and pending such general meeting shall procure that the Board shall appoint such candidate." Sentence III - "If any shareholder director ceases to hold office, the members shall procure the election of substitute nominated by the member who appointed such shareholder director." 80. Sentence 'I' deals with the situation of removal and substitution by election of the shareholder directors, nominated under Article 10.2 or elected under Article 10.3. Sentence 'II' inter alia provides that the board shall appoint such candidate pending such general meeting until the election pursuant to Article 10.3. Sentence 'III' makes a provision that if any shareholder director ceases to hold the office, the member shall procure the election of substitute nominated by the member who appointed such shareholder director. In other words, the shareholder director who has ceased to hold the office could only be elected in the general meeting. To that extent, there is substance in the submission of Mr. Andhyarujina, the learned senior counsel for the petitioner. Though Mr. Chidambaram, the learned senior counsel for the respondents 2 to 5 submitted that sentence 'II' which ends within the crucial words, "and pending such general meeting shall procure that the board shall appoint such candidates" and therefore, a shareholder director can be appointed before the next general meet-

ing, we are afraid, the submission of Mr. Chidambaram is inconsistent with the plain language of Article 10.4. Sentences 'I' and 'II' of Article 10.4 deal with the removal and substitution and the nomination until the next general meeting in that contingency but where the shareholder director has ceased to hold the office like by way of resignation, Sentence 'III' of Article 10.4 comes into play and shall be applicable and that only provides for election at the general meeting and not appointment by the board. That is the legal position, yet, that does not improve the case of the petitioner since by nomination of respondent Nos. 6 to 9 vide letter dated 8th October, 2002, they had not ipso facto become members of the Board. As already indicated they have to be elected at the general meeting. In any case such act of nomination by no stretch of imagination can be said to be oppression in the facts and circumstances of the instant case. 81. As regards the contention that the respondent Nos. 6 to 9 could not have been nominated vide letter dated 8th October, 2002 because EMC was in liquidation and was not authorised to nominate any directors, suffice it to say firstly that EMC is not a party impleaded in the company petition and, therefore, in their absence this aspect cannot be gone into. Besides that, in the proceedings under Section 397, the correctness of the order of the Supreme Court in Mauritius appointing the provisional liquidators but at the same time allowing board to function and continue to manage the company affairs in all respects, can hardly be gone into. 82. All in all, the nomination of four persons as the shareholder directors to represent EMC by the letter dated 8th October, 2002 cannot be treated as an act of oppression. Re : (v) 83. Since the answer to the points Re (ii)(a) to (d), (iii)(a) and (b) is in the negative and with reference to point Re (iv) we have clarified the legal position about the proposed nomination of Respondents 6 to 9, no further discussion is needed with regard to this point. Re : (vi) 84. Mr. Janak Dwarkadas, learned senior counsel for respondent No. 1 strenuously urged that the petitioner has not come to the court with clean hands and rather approached the court for a collateral motive. This aspect need not detain us any longer in view of the observations made by the Company Law Board in paragraph No. 26 of its order. The relevant observations read thus– "As far as public interest is concerned, I am in full agreement with the submissions of the learned counsel for the respondents that action towards enforcement of contractual rights against a government could never be construed to be against public interest. Any way, since in the rejoinder arguments, the learned counsel for the petitioner submitted that the petitioner is not against the prosecution of the arbitration proceedings but is questioning the context in which the arbitration proceedings were reactivated, this issue has become academic. Therefore, it cannot be said that the petition is filed for an improper motive." 85. Since the learned senior counsel for the petitioner only pressed the appeals on the ground of oppression and not on the ground of public interest, the aforesaid observation of the Company Law Board calls for no interference. We overrule the objection of the respondent No. 1 that the petition suffers from collateral motive. 86. In what we have discussed above, we hold that the petitioner has failed to establish that the company affairs are being conducted in the manner oppressive to the petitioner as a shareholder. The petitioner also failed to show

that the facts would justify in making of the winding up order on the ground that it was just and equitable that the company should be wound up. 87. The impugned order passed by the learned Company Judge, therefore, does not call for any interference and the appeal must fail. We order accordingly. The parties shall bear their own costs.