Bombay High Court Cds Financial Services ... vs Bpl Communications Limited, ... on 21 December, 2001 Equivalent citations: 2004 121 CompCas 374 Bom, 2004 56 SCL 665 Bom Author: Shah Bench: A Shah, S Bobde JUDGMENT Shah, J. 1. The appellant is the original plaintiff in the suit. The plaintiff is aggrieved by the impugned order passed by the learned single Judge declining to grant to the plaintiff an ad-interim order of injunction restraining defendant nos.1 to 8 and 13 to 17 from taking steps in implementation of the agreement dated 27.6.2001 without obtaining the approval of the shareholders of defendant no.1 Company under sec. 293(1)(a) of the Companies Act and from giving effect to the Resolution dated 25.7.2001 passed by the Board of Directors pursuant to the said agreement and further from in any manner interfering with the exercise of voting rights by the plaintiff of its preference shares. 2. On the request of the learned counsel for the parties, considering the facts and circumstances of the case, we have taken up for decision the Notice of Motion in the suit for grant of interim injunction instead of only considering the question of grant of ad-interim injunction. In order to appreciate the rival contentions, the facts in brief may be stated as follows. 3. The plaintiff is a body corporate incorporated under the laws of Mauritius and is a wholly owned subsidiary of C.D.C. Group plc, a company incorporated under the laws of England and Wales. The plaintiff and defendant nos.9 to 12 are foreign investors who own approximately 40% of the equity in defendant no.1 BPLCOM. The plaintiff, in addition, holds 14,870,000 non-convertible preference shares in defendant no.1. The defendant nos.2 to 6 and defendant no.8 are Indian promoter-shareholders of defendant no.1. The defendant no.7 is the Executive Chairman of defendant no.1. The defendant nos.13 to 15 are parties to the agreement dated 27.6.2001 which is being impugned by the plaintiff. The defendant no.1 has four subsidiaries, including defendant no.16 (BPLMobile) and defendant no.17 (BPLMCL). The defendant no.1 holds 74% shares in defendant no.16 and 51% in defendant no.17. France Telecom holds the remaining 26% shares in defendant no.16 and Media One holds remaining 49% shares in defendant no.17. The defendant no.16 holds a Cellular Telephony Operating Licence for and conducts the business of offering cellular services in the circle of the Mumbai Metropolitan Area. The defendant no.17 holds operating licences for and conducts the business of cellular services in the circles of Kerala, Maharashtra and Tamilnadu. 4. The plaintiff has averred that the investment of the foreign investors in defendant no.1 is in the region of US $ 214 million. According to the plaintiff, the foreign investors have invested in defendant no.1 on the basis of certain rights assured to them under various agreements entered into with the Indian promoters and defendant no.1. These agreements require, inter alia, the affirmative vote of each of the foreign investors in respect of important decisions, including the disposition of any business (whether by way of merger, sale of stock, sale of assets or otherwise). Their consent is also required in respect of the disposition of all or any part of defendant no.1s shareholding in any of the subsidiaries, including defendant nos. 16 and 17. However, we hasten to add that the plaintiff has categorically stated in the plaint that the plaintiff is not enforcing the rights and privileges arising from any of these agreements. 5. It appears that in view of defendant no.1s inability to fulfill the requirements for initial public offer, and as the foreign investors opposed injection of fresh equity various possibilities for consolidation of cellular business of defendant no.1 were explored since December 2000. At the end, the following three consolidation options were short-listed and pursued:- (i) consolidation with Hutchison Group; (ii) consolidation with Bharti Group; and (iii) consolidation with the combined of group of Birla-Tata-AT&T (BTAL) hereinafter referred to as “Bluetooth”. On 7.6.2001, the Board of Directors of defendant no.1 met at Mumbai. All the above options were discussed and all material parameters and information relating to Bluetooth transaction including valuation were placed before the Board. The C.F.O.informed the Board that best effort negotiation will be carried out by the company to conclude a binding MOU including a commitment to bid together for the fourth licence, the last date for the bidding being 29.6.2001. The Board unanimously approved the Company proceeding with finalizing one of the consolidation transactions expeditiously. 6. On 27.6.2001 the impugned agreement was signed by the four parties which are the four groups viz. defendant no.1 BPLCOM, Birla Group, Tata Group and AT & T Group. In substance the agreement arrived at between the four groups is that the cellular business of the defendant no.1 conducted through its subsidiaries i.e. defendant nos.l6 and l7 except Maharashtra business would ultimately be merged with the cellular business of operating subsidiaries of BTAL and towards this end, the shareholding of defendant no.1 in defendant nos.l6 and l7 shall be transferred to BTAL or to such other entity as may be agreed to by the parties to the agreement, which is referred to as “NewCo”. The agreement further stipulates that Media One and France Telecom would participate in the consolidation process by transferring their shareholding in defendant nos.16 and 17 in consideration for shares of new company in proportion to their shareholding and consequently equity holding of each group in the new company will be as follows: BTAL Group 50.68% BPLCOM alongwith France Telecom & Media One 49.32% The agreement also stipulates that the Maharashtra Business would be separately sold and eventually there will be voluntary winding up of defendant nos. l6 and l7 and the winding up of defendant no.1 and the shareholders of defendant no.1 will become shareholders of the new company. Clause 23 of the agreement sets out the time frame for the execution of the final documents. Clause 24 provides that the agreement would become effective upon each party obtaining approval of their respective Board of Directors. 7. A meeting of the Board of Directors of Defendant no.1 was held in Mumbai on 25.7.2001 and the Board by a majority of 5:3 approved the said agreement and authorised two Directors and the Company Secretary to carry out all necessary acts, deeds and things as may be necessary for implementation of the agreement. The dissent was by the three nominee directors of foreign investors, the fourth nominee director having abstained from voting. The objection to the resolution was mainly on the ground that the proposed transaction amounts to sale or disposal of the undertaking of the Company and as such requires the approval of the shareholders under section 293(1)(a) of the Companies Act and moreover such approval is needed by virtue of the shareholders agreements. In fact, these objections were raised by the plaintiff by a notice through its Solicitors two days prior to the Board meeting wherein it was also contended that the plaintiff is entitled to vote as if they were ordinary shareholders since no dividend had been paid on the preference shares since 1997. In this regard, the provisions of section 87(a)(b)(ii) of the Companies Act were relied on. This controversy was further precipitated by the exchange of letters between the parties after the passing of the Board Resolution. Again a meeting of the Board of Directors was convened on 6.9.2001. The meeting was, however, postponed just a couple of days prior to the meeting by Mr.B.K.Syngal, a nominee Director of the Indian promoters by his e-mail dated 4.9.2001. 8. On 12.9.2001 the plaintiff filed the present suit, being Suit no.3222 of 2001, seeking a declaration that the agreement dated 27.6.2001, without the approval and sanction by the shareholders of the company under section 293(1)(a) of the Companies Act, is null and void. A declaration is also sought that the resolution of the Board of Directors in the meeting dated 25.7.2001 is null and void. The plaintiff has also prayed for a permanent injunction restraining defendant nos.1 to 8 and defendant nos.13 to 17 from giving effect to the agreement dated 27.6.2001 and the resolution of the Board of Directors dated 25.7.2001. A further declaration is sought that the plaintiff is entitled to the exercise of all rights on the preference shares held by it under section 87(2)(b) of the Companies Act and a prayer is also made for permanent injunction restraining defendant nos.1 to 8 and defendant nos.13 to 17 from interfering in any manner with the voting rights by the plaintiff on its preference shares. Along with the suit, a Notice of Motion was taken out for interim and ad-interim reliefs. The learned single Judge by his order dated 19.9.2001 refused to grant ad-interim relief, granting liberty to the plaintiff to move for an ad-interim relief in case there is an agreement reached with Media One and France Telecom, before the Notice of Motion is finally heard. 9. In the suit, the plaintiff has challenged the impugned action mainly on three grounds:- (i) that the conduct of defendant nos.2 to 6 and defendant no.7 (Indian promoters) is actuated by mala fides; (ii) that the transaction requires the consent of the shareholders in general meeting as required by section 293(1)(a) of the Companies Act; (iii) and that the transaction, if completed, without the approval of the company in general meeting will be ultra vires the company. In addition to challenging the impugned action, it is claimed that plaintiff is entitled to a declaration and injunction in respect of the voting rights pertaining to the preference shares held by it by virtue of section 87(2)(b)(ii) of the Companies Act. 10. It is not necessary to elaborate the well-settled principles in the matter of grant of injunctions. In a recent decision in Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd., , the Supreme Court has succinctly laid down the parameters in that regard. The Court has observed: “24. We, however, think it fit to note hereinbelow certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the Court, since the issue of grant of injunction usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below:- (i) Extent of damages being an adequate remedy;

(ii) Protect the plaintiffs interest for violation of his rights though however having regard to the injury that may be suffered by the defendants by reason therefor;

(iii) The Court while dealing with the matter ought not to ignore the factum of strength of one partys case being stronger than the others;

(iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case–the relief being kept flexible;

(v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties case;

(vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie in support of the grant;

(vii) Whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise." Bearing in mind the above principles we proceed to deal with the submissions advanced by the rival parties. Mr.Chagla made submissions on behalf of the plaintiff and the learned counsel appearing for the defendant nos. 9 to 12 adopted his submissions. Mr.Chidambaram made submissions on behalf of the defendant no.1 which were adopted by the learned counsel appearing for defendant nos. 2 to 8 and defendant nos. 13 to 17.

11. Regarding ground (i): Mr Chagla fairly stated that in view of the decision of the Supreme Court in V.N.Rangaraj vs V.B.Gopalkrishnan , the plaintiff is not in a position to claim enforcement of rights emanating from shareholders agreements. In fact in the plaint it is categorically stated that the plaintiff is not claiming enforcement of the shareholders agreements. Mr. Chagla, however, strongly urged that inspite of the above legal position it was represented to the foreign investors by the company's solicitors themselves that the shareholders agreements were valid and enforceable in India, notwithstanding the judgment of the Supreme Court in Rangarajs case. He drew our attention to the opinion to that effect given by Mr.S.N.Talwar of M/s Crawford Baley and Co. as Solicitors to the Company. However, same Mr.Talwar who is also a Director of the Company taking a different stand in the meeting of the Board of Directors stated that the share holders agreements are not enforceable. According to Mr.Chagla this is a clear evidence of the malafides on the part of the Indian shareholders. He submitted that the Indian Promoters have acted in complete breach not only of the utmost good faith expected between the partners, but with ulterior motives and signed the impugned agreement without approval of Indian shareholders and behind their back, which agreement has the effect of ultimate dissolution and civil death of defendant no.1 company.

12. Mr.Chagla submitted that there was total denial of information and participation to the foreign investors regarding the proposed Bluetooth merger. The Committee appointed for the merger comprising the nominee Directors of the foreign investors was totally by-passed by the Indian Promoters. Mr.Edward Hummer who was appointed by the foreign investors as an independent consultant was also kept in dark and was not provided with sufficient information. Mr.Chagla went on to submit that though the foreign investors were provided with term sheets, drafts of the agreement, any meaningful participation was prevented by signing the agreement in haste in complete disregard to the interests of the foreign investors. According to Mr.Chagla signing of the agreement stands vitiated as the agreement was signed in haste without active consultation with the foreign investors and even the e mail copy sent to the foreign investors on 28.6.2001 is at variance with the signed agreement in material respects. According to him, these facts are sufficient to demonstrate the mala fides of the Indian shareholders. Further, according to Mr.Chagla, even in the Board of Directors meeting, sufficient opportunity was not given to the nominee Directors of the foreign investors and this is obvious from the fact that the copy of the resolution was supplied to the nominee Directors only four hours before the meeting. He submitted that the fact that all powers for due execution of the agreement were delegated to a Committee of two Indian Directors and the Company Secretary contrary to Art.70 of the Articles of Association is also indicative of the intention of the Indian Promoters to prevent the plaintiffs participation in the proposed transaction. He submitted that even thereafter there was an attempt to exclude the foreign investors from the Bluetooth merger which is evident from the fact that a duly convened meeting of the Board of Directors on 7.9.2001 for discussing these very issues was unilaterally postponed by one of the nominee Directors of the Indian Promoters at the last minute with the sole intention to frustrate the participation of the plaintiff and other foreign investors. Therefore, according to Mr.Chagla, the agreement dated 27.6.2001 and the ratification thereof are vitiated by malafides.
13. Before dealing with Mr Chaglas contention that the agreement and the board resolution are vitiated by malafides, we must take note of a preliminary objection raised by Mr. Chidambaram that the arguments based on malafides are really in substance allegation of oppression and mismanagement by majority shareholders coming under the purview of sections 397 and 398 of the Companies Act and the plaintiff should have approached the Company Law Board for appropriate reliefs. Mr. Chidambaram contended that the Company Law Board has adequate jurisdiction and powers to enquire into the allegations of mismanagement including allegation of malafides and grant reliefs and hence the jurisdiction of the civil court is implied barred. Mr.Chidambaram placed strong reliance on the decision of the Supreme Court in Amonia Supplies Corporation Pvt Ltd vs. M/s Modern Plastic Containers (Pvt) Ltd and ors . According to Mr.Chidambaram, the law has undergone a significant change after the

decision of the Supreme Court in Ammonia Supplies Corporations case (supra) and as the Company Law Board has been invested with exclusive jurisdiction to deal with the allegations of mismanagement and oppression by the majority shareholders, the jurisdiction of the civil court would be impliedly barred. He also referred to the decision of the learned single Judge of the Delhi High Court in Vijay M. Shah and ors. vs. Flex Industries Ltd (l996) 2l CLA l77. . We have heard the detailed arguments advanced by both the learned counsel. We are unable to accept the preliminary objection raised by Mr.Chidamabam.

14. Under section 9 of the Code of Civil Procedure, civil courts have jurisdiction to try all suits of civil nature except those of which cognizance by the civil court is either expressly or impliedly excluded. Such exclusion is not to be readily inferred, the rule of construction being that every presumption should be made in favour of the existence rather than exclusion of jurisdiction of the civil courts. In Dhulabhai vs. State of M.P a five judge Bench of the Supreme Court considered the earlier decisions on this aspect and laid down the following propositions: “(1). Where the statute gives finality to the orders of the special tribunals, the civil courts jurisdiction must be held to be excluded, if there is adequate remedy to do what the civil courts would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of jurisdiction of the court an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil Court. Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary if the statute creates a special right or liability and provides for the determination of the right or liability and further lays downs that all questions about the said right or liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with action in civil courts are prescribed by the said statute or not… An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set out apply."

15. In Raja Ram Kumar Bhargava vs. Union of India , the principle regarding implied exclusion of jurisdiction has been explained as follows: “Generally speaking, the broad guiding considerations are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created uno flatu and a finality is intended to the result of the statutory proceedings, then, even in the absence of an

exclusionary provision the civil courts jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil courts jurisdiction, then both the common law and the statutory remedies might become a concurrent remedies leaving open an element of election to the persons of inherence."

16. From the above two decisions of the Supreme Court it is clear that when there is no express provision excluding jurisdiction of the civil courts, such exclusion can be implied only in cases where a right itself is created and the machinery for enforcement of such right is also provided by the statute. If the right is traceable to general law of contract or it is a common law right, it can be enforced through civil court, eventhough the forum under the statute also will have jurisdiction to enforce that right. There is a plethora of decisions of various High Courts including the decisions of the High Courts of Kerala, Andhra Pradesh, Madras, Punjab and Haryana, and Calcutta in favour of the view that these sections, 397, 398 and 408 do not confer exclusive jurisdiction on the Company Court to grant relief against oppression and mismanagement. The scope of these sections is to provide a convenient remedy for minority shareholders under certain conditions and the provisions therein are not intended to exclude all other remedies. The suits by minority shareholders against oppression and mismanagement,have been time-honoured exception to the rule in Foss vs Harbottle (l843) 2 Hare, 46l and in the absence of word expressly or impliedly barring them it cannot be said that sections 397, 398 and 408 of the Companies Act exclude jurisdiction of the ordinary courts.

17. Section 10 of the Companies Act prescribes that the "court" having jurisdiction under the Act shall be the High Court having jurisdiction with respect to a Company, except where it is specifically conferred on the District Court by the Central Government. The section also authorised Central Government to invest jurisdiction in the District Courts to deal with some of the provisions in the Companies Act. Section 2(ll) defines "court" as meaning the court having jurisdiction under section 10 as regards all civil matters. In Avanti Explosives (P) Ltd vs Principal Subordinate Judge, Tirupati, (l987) 62 Comp.Cas 30l (A.P) M Jagannathrao J. (as he then was) held that section 10 only proceeds to enumerate or specify the court having jurisdiction under the Act, wherever such jurisdiction is conferred on the court by the other provisions of the Act. Section 10 by itself does not confer jurisdiction on the High Court or district court on all mattes relating to companies .This is the view expressed by M.P.Menon J in R. Prakasam vs. Shri Narayana Dharma Paripalan Yogam in l980 (50) Co Cases 6l (Ker) also which was accepted by the division bench of that Court in R.R.Rajendra Menon (II) vs Kochin Stock Exchange Limited (l990) 69 Comp Cas 256 (Ker). In Avanti Explosives Pvt Ltds case (supra) Jagannathrao J has considered all the earlier authorities including the decisions of Kerala, Andhra Pradesh, Madras and Punjab and Haryana High Courts in favour of the view that section 10 does not confer

any exclusive jurisdiction on the company court. Similar is the view taken by the Andhra Pradesh High Court in Dr.T.M.Paul Vs. City Hospital (Pvt.) Limited, 1999(97) Com.Cas 216,.

18. In Ammonia Supplies Corporation (supra) the Supreme Court was considering the scope of section 155 of the Companies Act. In that case the Supreme Court held that the jurisdiction exercised by the court under section 155 is a summary jurisdiction. The Court considered the definition of word "court" under section 2(ii) of the Companies Act and came to the conclusion that in respect of any question raised within the peripheral field of rectification the court as referred under section 155 read with section 2(ii) and section 10 viz the Company Court alone had exclusive jurisdiction. However, in case any claim is based on some seriously disputed civil rights or title, denial of any transaction or any other basic facts which may be the foundation to claim to be a member and if the court feels that such claim does not constitute to be a rectification but instead seeking adjudication on basic facts falling outside the rectification, it has discretion to send a party to seek his relief before the civil court first for the adjudication of such facts. In that context the Court observed: "Unless jurisdiction is expressly or implicitly barred under a Statute, for violation or redress of any such right Civil Court would have jurisdiction. There is nothing under the Companies Act expressly barring the jurisdiction of the Civil Court but the jurisdiction of the court as defined under the Act exercising its powers under various sections where it has been invested with exclusive jurisdiction, the jurisdiction of the Civil Court is impliedly barred. We have already held above the jurisdiction of the court under Sec. 155, to the extent it has exclusive, the jurisdiction of Civil Court is impliedly barred. For what is not covered as aforesaid the Civil Court would have jurisdiction."

19. In Ammonia Supplies Corporations case (supra) the court was not concerned with the interpretation of sections 397 and 398, which after their amendment vested in the Company Law Board. The decision of Delhi High Court in Vijaya M.Shahs case relied upon by Mr. Chidambaram does not deal with the question of ouster of civil courts jurisdiction. In that case the petitioner had filed company petition under sec. 81 and section 10 of the Companies act read with Rule 11-B and Rule 17 of the Company (Court) Rules, 1959. The learned Judge held that as the petition alleged fraud and oppression by management resulting in deprival of opportunity for the petitioner to subscribe to rights shares issued by the company under sec. 81, the matter would fall under sections 397 and 398 coming within the jurisdiction of the Company Law board and, therefore, not maintainable before the High Court. Moreover, there is nothing to indicate in the language of sections 397 and 398 that the Court as specified under section 10 has exclusive jurisdiction. The said provisions have been in the statute book from 1951 onwards. But those provisions have not been understood as excluding the jurisdiction of the civil Courts to entertain suits and grant relief as held in a series of decisions by various

High Courts noticed earlier.

20. The decision in Ammonia Supplies Corporation was considered by the division bench of this court in Hurburtsons case in Appeal Nos.6 to 8 and 11 to 13 of 2000 decided on 28.9.200l. In that case relying upon the decision in Amonia Supplies Corporation it was argued that the plaintiffs could approach the Company Law Board under section 111A of the companies Act, which was the competent forum to go into such matter and jurisdiction of civil courts was impliedly barred. The division bench held that the plaintiff had a common law right to seek rectification of register of members and pre-existing common law right can be taken away only by express enactment or necessary implication. It was held that there is nothing in section 111A which has the effect of taking away the common law right of a member of the company to seek rectification of register of members. At best it can be said that after insertion of section 111A with effect from 20.9.l995, a member of the company has a statutory right to approach the company court to seek rectification of register of members. First common law right, however, remains intact and he can assert that right by filing a suit before the court of competent jurisdiction. In the light of this settled legal position we are of the opinion that the preliminary objection raised by Mr.Chidambaram is liable to be rejected.

21. Now as regards the contention of malafides it is required to be noted that it is not disputed that the proposed bluetooth transaction is in the interest of the Company. This position is not disputed in the plaint nor was any such contention advanced during the course of argument on behalf of the plaintiff or the defendants supporting the plaintiff. Further the sequence of events is eloquent. The record shows that there was unanimity that injection of fresh equity in the company was not possible and, therefore, the best option was to have negotiations with other parties for consolidation. Accordingly, negotiations were opened with Singtel, Hutchison and BTAL (Bluetooth). A number of e-mails were exchanged between the parties in respect of various options adverted to earlier. Committee was constituted with equal representatives of the Indian shareholders and foreign shareholders to consider and evaluate proposals for merger and to submit its recommendation. Foreign investors were kept appraised of the position by circulating status notes in respect of each of the three options. In the meeting of the Board of Directors held on 7.6.2001, all the options were discussed and all material parameters and information relating to bluetooth transaction including valuation were placed before the Board. The Board unanimously decided to conclude a binding MOU including commitment to bid together for the 4th licence. A faint attempt appears to have been made at a later stage when dispute started between the parties to challenge the authenticity of the minutes of the Board meeting by contending that the words “binding MOU” are incorrectly recorded in place of “semi binding MOU”. This is clearly an after thought and no credence can be attached to the belated plea of incorrect recording of the minutes.

22. Later on term sheets were sent to the plaintiff and other foreign investors

and valuation report of ABN AMRO was also circulated to all investors including foreign investors. Copies of the draft agreements were also circulated to them. All this was done with the knowledge and in active consultation with the foreign investors. The e-mail dated 20.6.2001 jointly sent by the foreign investors clearly mentions :- "We strongly support your efforts to hold BPLCOM a complete consolidation. We agree bluetooth should be top priority for BPLCOM and for all of us. . . . ." This was followed by e-mail dated 25.6.2001 from ABN AMRO to all investors including foreign investors indicating that the agreement will be signed in couple of days. The impugned agreement was signed on 27.6.2001 and a copy thereof was sent to foreign investors by e-mail.

23. During the period from May 2001 till the signing of the agreement, at no time, was any objection raised on behalf of the foreign investors that they were not consulted or were excluded or were opposed to the merger. Even during the Board meeting of 25.7.2001, Mr. Donald Peck, nominee Director of the plaintiff, supported the Bluetooth transaction in principle although he stated that he does not approve the methodology of the transaction. The e mailed copy of the agreement contains a specific clause to the effect that the agreement is required to be approved by the Board of Directors. Even at that point of time there was no whisper of dissent or objection on the part of foreign investors nor was it suggested that the agreement requires the shareholders approval under sec. 293 of the Companies Act. On the contrary the nominee director of the plaintiff vide his e mail dated 29.6.2001 stated that ". . . . .there is clearly a lot of work still to go on in addition to what has been achieved so far." Between 29.6.2001 and 22.7.2001 despite the conference calls, e mails and meetings, no complaint was made by the foreign investors regarding the agreement or any clauses therein. In the mean time pursuant to the agreement defendant no.1 and BTAL made a joint bid and succeeded in getting the 4th Cellular licence for Delhi as envisaged by the agreement. Every step taken towards the Bluetooth transaction indicates that the transaction was effected with the knowledge and concurrence of the foreign investors and there was no real opposition to the transaction and the grievance of the plaintiff that foreign investors were denied information or were kept in dark is only an afterthought.

24. Now coming to the alleged differences in the e mailed copy of the agreement sent to the foreign Directors and signed agreement, it appears that it is stated in the e mailed agreement that :- "Additional Equity Contribution means any contribution of equity or advances against equity made after the date of this Agreement and prior to application by a party to any of the partys representatives business to be combined under New Co." "Shareholders/operations agreement will contain provisions such that all right issues by New Co after Application will be made at a fair market value? Whereas in the signed copy it is stated that : -"Additional Equity contribution means any contribution of equity or advances of equity made in cash to the Operating Companies after 31.3.2001 and prior

to application“.”Shareholders Agreement will contain a provision that all rights/similar equity issued by NewCo after application and upto an initial public offerings will be made by NewCo at a valuation agreed to by parties and which valuation shall be made by the Board in the best interests of NewCo as a whole."

25. Prima facie, it appears to us that the above variances did not indicate any ulterior motive or design as suggested by the plaintiff. The first change is apparently done with a view to make the deal more transperent as urged by Mr.Chidambaram. As regards the other change it is pointed out by Mr.Chidambaram that in any event the final decision relating to valuation is necessarily with the Board of Directors of the new company. He submitted that even assuming that fair market value is to be based on valuation received from the expert valuer, the question of valuation would have to be still finally decided by the Board and the terms stipulated in the final agreement maintains practically the same position by requiring that valuation would have to be agreed to by all the parties and such valuation would have to be in the best interest of new company. Therefore, it is not possible to conclude even at this prima facie stage that variances were intended to cause prejudice to the foreign investors.
26. The appointment of Company Secretary on the Sub-Committee for carrying out further implementation of the agreement and doing other needful acts does not and cannot vitiate the impugned agreement as contended by Mr.Chagla. More over, we find that the committees job is to carry out ministerial functions and, therefore, the complaint that there was violation of Article 70 of the Articles of Association does not seem to be correct. We may mention that Mr.Chidambaram has stated that one director nominated by foreign investors will be taken on the committee if they so desire.
27. There is yet another reason for rejecting the plea of malafides. It is submitted by Mr.Chidambaram and, in our opinion rightly so, that the allegation of malafides against the Directors cannot be entertained without impleading them as parties. In All India State Bank Officers Federation Vs. Union of India , the Supreme Court has observed as follows: “22. There is yet another reason why this contention of the petitioners must fail. It is now settled law that the person against whom malafides are alleged must be made a party to the proceeding. The allegation that the policy was amended with a view to benefit respondents 4 and 5 would amount to the petitioners contending that the Board of Directors of the Bank sought to favour respondent 4 and 5 and, therefore, agreed to the proposal put before it. Neither the Chairman nor the Directors, who were present in the said meeting, have been impleaded as respondents. This being so the petitioners cannot be allowed to raise the allegations of malafides, which allegations, in fact, are without merit.” Since the Directors in the impugned meeting have not been impleaded as defendants, the plaintiff cannot ask the Court to give a finding on the alleged malafides without an opportunity to the Directors to rebut the allegation.

28. Mr.Chidambaram urged that Directors have a duty to the company which must override any allegience to the shareholders that nominated them. He submitted that the nominee Directors are required to place interest of the Company above the interest of the shareholders who nominated them and in the event of a conflict of interest, the interest of the Company should prevail. He referred to the decision in Boulting and Company Vs. Association of Cinematograph, Television and Allied Technicians, (1963) 2 QB 606 where the Court held that the directors have to discharge duties of a fiduciary nature and no stipulation is valid by which he agrees to act in accordance with the direction of his patrons. Mr.Chidambaram submitted that although the nominee directors of the foreign shareholders agreed that Bluetooth transaction is beneficial to the Company, they opposed the resolution only at the behest of the foreign shareholders. Under the circumstances the charge of malafides against the Directors who voted in favour of Bluetooth resolution has no force. We find merit in this submission of Mr.Chidambaram.
29. Mr.Chidambaram also submitted that real motive or intention of the plaintiff in filing the suit is to coerce the Indian shareholders into transferring some shares of defendant no.1 free of cost to the plaintiff and other foreign shareholders. According to Mr.Chidambaram, the foreign investors expected a return of 30% in U.S.dollars and since such a high rate of return was not possible in the present scenario they want Indian shareholders to compensate them by transferring several millions shares in defendant no.1 to them. In support, he referred to the letter dated 20.6.2001 addressed by the Nominee Director of the foreign shareholders. Mr.Chagla, however, did not agree with Mr.Chitambarans interpretation of the said letter. He submtited that the suggestion for cashless transfer of shares was in altogether different context and had nothing to do with the Bluetooth transaction. We find it unnecessary to deal with this controversy since prima facie we do not find any substance in the plea of malafides raised on behalf of the plaintiff. In our opinion, the plaintiff has utterly failed to establish malafides.
30. Regarding ground (ii): This ground is based on section 293 of the Companies Act. The argument of Mr.Chagla on this point runs thus : According to him the word "undertaking" in sec. 293(1)(a) must be construed to mean the business of the company, the physical assets constituting only the means by which such business is carried on. He placed reliance on the decisions of the Supreme Court in Madras Gymkhana Club Employees Vs. Management, ; R.C.Cooper Vs. Union of India, ; and Carrew & Co. Vs. Union of India where the word "undertaking" appearing in diverse statutes has been construed to mean any business or any work or project undertaken by company. He also relied on the decision of Mysore High Court in International Cotton Corporation (P) Ltd. Vs. Bank of Maharashtra and another 40 Comp.Cas 1154 where the Divisison Bench of Mysore High Court held that the word "Undertaking" means any business or any work or project which one engages in or undertakes as an enter-

prise analogous to business or trade and that business or undertaking of a company must be distinguished from the properties belonging to the company. A reference was also made to the decision of the learned single Judge of this Court (Dhanuka J.) in P.S.Offshore Inter Land Services Pvt. Ltd. and another Vs. Bombay Offshore Suppliers and Services Ltd. and others (1992) 75 Comp.Cas 583. In particular, our attention was drawn to the following observations of the learned Judge on page 596; "In my judgment, the expression"undertaking" used in this section is liable to be interpreted to mean "the unit", the business as a going concern, the activity of the company duly integrated with all its components in the form of assets and not merely some asset of the undertaking. Having regard to the object of the provision, it can, at the most, embrace within it all the assets of the business as a unit or practically all such constituents. If the question arises as to whether the major capital assets of the company constitute the undertaking of the company while examining the authority of the board to dispose of the same without the authority of the general body, the test to be applied would be to see whether the business of the company could be carried on effectively even after disposal of the assets in question or whether the mere husk of the undertaking would remain after disposal of the assets? The test to be applied would be to see whether the capital assets to be disposed of constitute substantially the bulk of assets so as to constitute the integral part of the undertaking itself in the practical sense of the term."

31. Mr.Chagla submitted that where the business is carried on by a company through its subsidiaries, sale or disposition of shares of the subsidiary would in effect be sale or disposition of the business leaving only the husk of parent company . However, he hastened to add that the sale of shares of the company having only an investment business, no matter how large the quantum, will not amount to a sale of its undertaking. He, however, urged that in the instant case, the holding company, namely, defendant no.1 is conducting the telecom business through its subsidiary i.e. defendant nos. 16 and 17 and nearly 90% of the business of defendant no.1 is conducted through them. In support of his argument, he referred to the prospectus of the proposed issue of American Depositary Shares and Overseas listing submitted by defendant no.1. In the said prospectus it is mentioned as follows: "we are a leading provider of celluler telephone services in India. We conduct our operations in – through BPL Mobile Communications Limited (defendant no.16), a 74% owned subsidiary. We conduct our wireless operations in – through BPL Cellular Limited (defendant no.17), a 51% owned subsidiary."

32. Mr.Chagla pointed out that all the decisions as to the working of the operating subsidiaries are taken by the parent company, the report as to the working of the subsidiaries are presented to the parent company and remuneration to the Chief Executive Officer and Managing Director of defendant no.1 is for the work done by them in the business of defendant no.1 through its subsidiary. According to Mr.Chagla, in de-

termining what constitutes an undertaking of the company, Court will have due regard to the economic realities. He submtited that where there is a holding company and business is conducted through subsidiary, the court will consider whether the business conducted by subsidiary is, in effect, the business of holding company and that for this purpose Court would be entitled to pierce the corporate veil, particularly so, in the context of section 293(1)(a), object of which is to safeguard the rights and interests of the shareholders. He placed heavy reliance on the decision in Scottish Corporative Wholesale Society Ltd. Vs.Meyer and another, 1959 A.C.324, D.H.N.Food Distributors Ltd. Vs.Tower Hamlets L.B.C. (1996) 3 All ER 462, State of U.P. Vs. Renusagar Power Co., A.I.R. 1978 S.C.1737, Hackbridge-Hewittic and Easun Ltd. & E.Sun Vs.G.E.S.Distribution Transformerss 74 Comp Cas 143 and Fatima Tiles Vs. Sudarsan Trading Co.Ltd. (1992) 74 Company Cases 423. We propose to deal with these decisions a little later.

33. There cannot be any quarrel with the proposition that any business or project or unit of a company would amount to an undertaking of the company. It is also correct that in the present case cellular telephone business is conducted by defendant no.1 through its subsidiaries i.e. defendant nos. 16 and 17. This position is not seriously disputed by Mr.Chidambaram. Mr.Chidambaram, however, urged that whether the Cellular Phone business of the company is an undertaking is not the issue. According to Mr.Chidambaram, the real issue is who owns the undertaking. Mr.Chidambaram contended that defendant nos. 16 and 17 are separate legal entities with a separate Board of Directors and have separate balancesheets reflecting the assets and liabilities of defendant nos. 16 and 17. He contended that the defendant no.1 company has proposed swapping of its share holdings in defendant nos. 16 and 17 with the shares of new company. After the swap, defendant no.1 will continue to remain in cellular business i.e. it will continue to carry on the same business through the new company. Therefore, according to Mr.Chidambaram, the provisions of sec. 293(1)(a) are not attracted to the present case.

34. Now, sec. 293(1)(a) of the Companies Act. Section 293(1)(a) of the Companies Act provides :- "S.293:Restrictions on powers of Board. -

(1) The Board of Directors of a public company, or of a private company which is a subsidiary of a public company, shall not, except with the consent of such public company or subsidiary in general meeting, -

(a) sell, lease or otherwise dispose of the whole, or substantially the whole of the undertaking of the company, or where the company owns more than one undertaking, of the whole, or substantially the whole, of any such undertaking.

35. The opening words of the section that "The Board of directors of a public company, or of a private company which is a subsidiary of a public com-

pany, shall not, except with the consent of such public company or subsidiary in general meeting" clearly show the Legislative intent that whenever an undertaking is owned by the subsidiary, the section contemplates that a resolution shall be passed in the general meeting of the subsidiary company. The Legislature in enacting section 293 has taken note of the situation where there would be a holding company and also subsidiary company. It is obvious from the language of the section that company which owns the undertaking has to pass the resolution in general meeting. It is not in dispute that defendant nos.16 & 17 are the legal owners of the cellular telephone business. Even if business is equated with an undertaking, in the present case there is no transfer of the undertaking in as much as the business continues to belong to the subsidiaries i.e. defendant nos.16 & 17. If we accept Mr.Chaglas argument that cellular telephone business should be regarded as owned by the holding company, it would lead to an anomalous position. If defendant no.1 is the owner, then the question may arise as to what is the status of defendant nos.16 & 17. If both are considered to be the owners, then whether such a resolution is required to be passed by the general body of both the companies i.e. the holding company and the subsidiary company. Section 293(1)(a) obviously contemplates one resolution and not two. Moreover, in the present case, the subsidiaries are not wholly owned by defendant no.1. In defendant no.16, defendant no.1 is holding the shares along with France Telecom and in defendant no.17 along with Media One. If we accept Mr Chaglas argument that the decision of transfer of undertaking must be taken in the meeting of the shareholders of defendant no.1, it would mean that such a decision could be taken even without the consent of the shareholders of the subsidiary and those shareholders would not have any say in the matter. Mr.Chidambaram pointed out that the interpretation suggested by Mr.Chagla is based on a wrong premise that the only kind of subidiary is what is contemplated in section 4(1)(b)(ii). Under section 4(1)(a) a company is also deemed to be a subsidiary of another company if that company controls the composition of its Board of Directors. In case of such subsidiary the holding company may not hold 51% or more of the equity and still control the Board of Directors of the subsidiary. If the argument of Mr.Chagla is accepted, it would mean that even if the holding company passes a resolution, it can be defeated by the shareholders of the subsidiary company. This would make section 293(l)(a) unworkable.

36. Mr.Chagla streneously contended that in construing section 293(1)(a) , the court should consider business realities. He contended that a large number of companies are conducting their business through subsidiaries and subsidiary companies have practically no say and entire business is controlled by the holding company and, therefore, they must be treated as one entity. It was submitted by the learned counsel that modern law has laid to rest the ghost of Saloman Vs.Saloman. The Court can pierce the corporate veil to consider whether the business conducted by a subsidiary is, in effect, the business of parent company. To support his contention,

Mr.Chagla relied on a number of authorities noticed earlier. The first is the decision of the House of Lords in Scottish Cooperative Wholesale Cooperative society Vs. Meyer. In that case it had been argued that the appellant could not be said to have conducted the affairs of the company in a manner oppressive to some part of the members within the meaning of section 210 of the Companies Act, 1948 since it was not that the company which had acted oppressively but a subsidiary which it had formed. This argument was rejected since the court found that every step taken by the subsidiary was determined by the policy of the parent and the section warrants the court in looking at the business realities of the situation and does not confine them to a narrow legalistic view.

37. In D.H.N. Food Distributors Ltd. Vs. Tower Hamlets L.B.C. which was relied by the learned Counsel, D.H.N. Food Distributors had two wholly owned subsidiaries and in one of them the landed property of the group was vested, while D.H.N. carried on the business of the group, occupying the property as a licensee. According to the decision of the Lands Tribunal on the compulsory purchase of the land, negligible compenation only was payable since D.H.N. had been deprived merely of a revocable licence and the subsidiary had had no business to lose. The Court of Appeal reversed that decision on three grounds, the one relevant here being expressed thus by Lord Denning M.R. "This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one and the parent company, D.H.N.should be treated as that one." In the same case Goff L.J. observed that "this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil."

38. In State of U.P. Vs. Renusagar Power Co. the question was whether the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagars power plant be treated as the "own source of generation of Hindalco and should be liable to duty on that basis. The Supreme Court has observed in paras 63 and 66;"63. It is hightime to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. Here, indubtably, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfil the condition of industrial licence of Hindalco through the production of aluminium. It is also manifest from the facts that the model of the setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take over of the power station by the State or the electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco Renusgar is wholly

owned subsidiary of Hindalco. Even the day today affairs of Renusagar are controlled by Hindalco. Renusagar has at no point of time indicated any independent violation. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the generation in Renusagar as the own source of generation of Hindalco. In the impugned order the profits of Renusagar have ben treated as the profits of Hindalco." "66. It appears to us, however, that as mentioned the concept of lifting the corporate veil is a changing concept and is of expanding horizons. We think that the appellant was in error in not treating Renusagar power plant as the power plant of Hindalco and not treating it as the own source of energy. The respondent is liable to duty on the same and on that footing alone this is evident in view of the principles enunciated and the doctrine now established by way of decision of this Court in Life Insurance Corpn.of India (supra) that in the facts of this case sections 3(1)(c) and 4(1)(c) of the Act are to be interpreted accordingly. The person generating and consuming energy were the same and the corporate veil should be lifted. In the facts of this case Hindalco and Renusagar were inextricably linked up together. Renusagar had in reality no separate and independent existence apart from and independent of Hindalco."

39. In Fatima Tile Works Vs. Sudarsan Trading Co. Ldt. the learned single Judge of Madras High Court held that since the relationship between the holding company and its subsidiary necessarily implies exercise of great control by the former over latter, the use of a trade mark by subsidiary can fairly be treated as use by holding company. In Hackbridge-Hewittic and Easun Ltd. Vs. G.E.C. Distribution Transformers Ltd., the division bench of the same Court observed that while a subsidiary company may have a distinct legal personality, this does not suffice to dispose of the possibility that its behaviour might be imputed to the parent company, such may be the case in particular when the subsidiary although being a district legal personality, does not determine its behaviour on the market in an autonomous manner but essentially carries out instructions given to it by the parent company. When the subsidiary does not enjoy any real autonomy in the determination of its course of action on the market, it is possible to say that it has no personality on its own and it is one and the same as parent company.

40. It is true that the modern tendency is, where there is identity and community interest between the companies in the group, especially where they are related as holding company and wholly owned subsidiary or subsidiaries to ignore their separate legal entity and look instead at the economic entity of the whole group. Gower in his book, Principles of Modern Company Law, has observed that that there are only three circumstances in which the Court can lift the veil. These are (i) when court is construing the statute, contract or other documents; (ii) when the Court is satisfied that the company is concealing the true facts and (iii) when it can be established that the company is authorised agent of its controller or its members, corpo-

rate or human. In L.I.C. of India Vs. Escorts Ltd. the Supreme Court has clearly laid down that the corporate veil may be lifted to the extent permitted under the statute and to that extent and not more. The Court observed:- " ...... Generally and broadly speaking, we may say that corporate veil may be lifted where statute itself contemplates lifting the veil or fraud or improper conduct is intended to be prevented or taxing statute or beneficially statute is sought to be evaded or where associated companies are in extricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the class of cases where lifting veil is permissible, since that must necessarily depend upon the relevant statutory or other provisions, object sought to be achieved, the impugned conduct, involvement of the element of public interest, effect of holding which may be affecting the society." In the light of the view taken by the Supreme Court in the above case, and on a proper reading of section 293(1)(a) we do not find anything in the language thereof which would compel us to invoke the doctrine of lifting the Corporate Veil. In the facts of the case there is no reason whatsoever to apply the said principle.

41. In M/s Freewheels (India) Ltd. Vs. Dr. Veda Mitra and another , the Delhi High Court in a case of a holding company having 52% of the shares of the subsidiary declined to apply the doctrine of piercing the veil. The Court observed: turning the veil, and the Courts will not do so except for specific purposes and when compelled by the clear words of the statute. It is unnecessary to elaborate on this aspect any more, as here the parent company holds only a nominal majority in the share capital of the subsidiary, which holding is 5 2 percent. With that meager majority alone I am not prepared to hold, even if it were possible to do so for such a purpose, that the subsidiary company has lost its identity as a separate legal entity. Mr.Lekhi went to the extent of saying that not only for this purpose but in all cases a subsidiary company must be treated as an asset of the holding company. This contention is beyond the reach of sustained argument. I am, in the circumstances, of the opinion that the subsidiary company has neither lost its identity nor merged itself into a group consisting of the parent company and the subsidiary company. If Mr. Lekhis argument were to be accepted, then such subsidiary company will crack not under the pressure of its own uncongenial share holders, which may invariably exist in every company, but also of the pressure of the shareholders and creditors of the holding company.

42. It would be useful to refer to the decision of this Court in Brook Bond India Ltd. Vs. Rubi Mills Ltd. (1994) 3 C.L.J. 279, where Srikrishna J. (as he then was) held that the sale of shares, whatever be their number, even if amounts to a transfer of the controlling interest of a company, cannot be equated to the sale of any part of the undertaking so as to come within the mischief of section 293(1)(a). Though these observations are made at an ad-interim stage, we are in agreement with the learned Judge that the sale of shares cannot be equited with the sale of undertaking or any part thereof.

43. Mr.Chagla urged that what is sought to be effected by the proposed transaction is the ultimate winding up of defendant no.1. He submitted that if the transaction is completed, the business conducted through defendant nos. 16 and 17 except the Maharashtra business of the defendant no.17 would be transferred to the new company and then there will be a separate sale of the Maharashtra business and consequently the volunary winding up of defendant nos. 16 and 17 and, ultimately, the winding up of the defendant no.1 itself. Accoridng to Mr.Chagla, as a result of the impugned transaction, defendant no.1 will be left with nothing but a husk. Mr.Chagla urged that in the matter of such great importance, the Board of Directors cannot take a decision without the consent of the shareholders. The argument of Mr.Chagla, though appears to be attractive at the first blush, on a close scrutiny cannot stand. In the instant case both defendant nos. 16 and 17 would continue to operate until France Telecom and Media One consent to the rolling up. In defendant no.16 France Telecom owns 26% share whereas in defendant no.17 Media One owns 41% of the shares and both France Telecom and Media One are yet to take a decision. Mr.Chidambaram pointed out that as a result of the swapping of the shares, defendant no.1 would be holding 33% shares in the new company and would continue to operate the business of cellular telephone as a part of the new company. As long as a purchaser is not found for the Maharashtra business, defendant no.17 will continue in business and its business will be intact. Even if France Telecom and Media One agree to the rolling up into the new company and Maharashtra business is sold, voluntary winding up of defendant no.1 is not possible without the concurrance of foreign shareholders who own 40% equity in defendant no.1 and without their consent there will not be any merger with the new company.
44. In view of the foregoing discussion we have no hesitation in holding that section 293(1)(a) has no application to the present case.
45. Regarding ground .(iii) : This contention of the plaintiff is based on Object B-37 of the Memorandum of Association which reads as follows: “37. Subject to the approval of the share holders under section 293 of the Companies Act, 1956, to sell, exchange, mortgage, hire, let on lease, pledge, hypothecate, grant licences, easements, options and other rights over and in any other manner and to deal with or dispose of the whole or any part of the undertaking property, movable or immovable, easements, privileges, assets, rights and effects of the Company for such consideration as may be thought fit and in particular for stocks, shares or debentures whether fully or partly paid up; or securities of any other Company having objects in whole or in part similar to those of the Company or on payment of any royalty or tribute.” Relying upon Object B-37, Mr.Chagla argued that there is a prohibition against the Board of Directors from selling or disposing of any property of the Company whether movable or immovable, including the shares. He urged that the words " under section 293" used in Object B-37 are merely descriptive of the manner in which such power is required to be exercised. He submitted that there is deliberate departure

in the language of Object B-37 as compared to objects B-9, 10, 22, 24, 29, 30, 31 and 34, all of which have been given exercise of power subject to the provisions of the Act. Object B-37 alone makes the exercise of power subject not to any provision of the Act, but subject to the approval of the shareholders. It was submitted that Memorandum and Articles constitute a contract between the shareholders interse and between the shareholders and Company. It was submitted that it is the duty of the court to give effect to the bargain of the parties according to their intention and since the parties have chosen to make any disposition of the property of defendant no.1, the matter not for the Board of Directors, but for the general body of the shareholders, the court must give effect to the plain words used in the Memorandum. Mr.Chagla also refered to section 17(1)(f) of the Act which entitles the Company to amend its objects to enable it to sell or dispose of the whole or any part of the undertaking etc.

46. We are unable to accept the submission of Mr.Chagla. In our opinion, the plain meaning of B-37 is that the company has power to sell, exchange, mortgage etc. subject to the share holders approval under sec. 293 wherever it is applicable. The words “subject to approval of the shareholders under sec. 293 of the Companies Act,” obviously mean whenever such permission is required by terms of sect. 293. If argument of Mr.Chagla is accepted the words “under sec. 293” would practically render superfluous and meaningless. It would also mean that the approval of the shareholders would be required even in case of disposal of movable properties such as cars, furniture, stationary etc. Moreover, if the same analogy is applied to object clause B-36, it would mean that the Board of Directors may lease the whole of the undertaking without resolution under sec. 293(1)(a) as Object B-36 does not require approval under sec. 293. Further more, Object B-29 gives power to buy and sell shares and it does not refer to section 293. Then a question will naturally arise whether the case falls under B-29 or B-37. The argument of Mr.Chagla , if accepted, would thus lead to absurd results and, therefore, it is not possible to agree with Mr.Chagla that the impugned action is ultra vires the Company.

47. Regarding plaintiffs right to vote on preference shares: Now the only question that remains to be considered is whether the plaintiff is entitled to exercise voting rights on preference shares held by it. The case of the plaintiff in short is that the dividend has not been paid in respect of the preference shares for financial year ending March 3l,l998, l999, and 2000 and, therefore, by virtue of section 87(2)(b)(ii), the plaintiff is entitled to vote on the said preference shares. The company has not disputed that the dividend in respect of the preference shares has remained unpaid and, therefore, the plaintiff as share holder has acquired voting rights. However, it is the case of the company that exercising of voting right would violate conditions imposed by the Reserve Bank of India. It is the submission of the company that plaintiff cannot vote beyond the limit of 49%. In order to appreciate this issue it would be necessary to state few admitted facts. When the plaintiff purchased preference shares, it had applied

and obtained permission from the Reserve Bank of India under section 29(l)(b) of the Foreign Exchange Regulations Act,l973 ("FERA"). While granting such permission under section 29(l)(b) of the FERA, the Reserve Bank of India vide letter dated l2.l.l998 imposed several conditions. Two conditions which are relevant for our purpose are as follows:

l) that no shares be acquired by CDC without the prior permission of the Reserve Bank of India;

2) that the conditions contained in the letter dated 6.l.l998 shall be complied with: The letter dated 6.l.l998 stipulates that foreign equity shall not exceed 49% as is permissible under the policy for investing in companies. Further the licence granted by the D.O.T when amended by letter dated 29.l.200l stipulated that certain conditions shall always be complied with and shall not be violated, including inter alia that there shall be a cap of 49% of foreign equity and the management control of the company shall remain with the Indian shareholders.

48. Further the guidelines dated 3l.7.l997 issued by the Central Government provide as follows: "(iii) Preference shareholders shall be included as foreign direct equity for the purposes of sectoral caps on foreign equity where such caps are prescribed, provided they carry a conversion option. If the preference shares are structured without such conversion option, they would fall outside the foreign direct equity cap". The effect of the above as far as the facts before us are concerned is that since the preference shares are not convertible the same will fall outside the permissible foreign equity cap. Again by virtue of the licence conditions there shall be a cap of 49% of foreign equity and the management control of the lst defendant company has to remain with the Indian shareholders.

49. According to Mr.Chidambaram the conditions contained in the special permission of the Reserve Bank of India will prevail over the provisions of the Companies Act in view of section 29(l) of FERA which contains a non-obstante clause. He pointed out that FERA has been replaced by Foreign Exchange Management Act, l999 ("FEMA") and by virtue of section 49 of FEMA, the special permission is saved and now deemed to have been granted under the corresponding provisions sections 6 of FEMA read with Regulation 5 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India), Regulations 2000 and Schedule I thereto read with annexure B to the said Schedule. Mr.Chidambarams contention is that the special permission is a statutory order passed by a statutory authority viz Reserve Bank of India on which power to grant such permission was conferred by the Parliament under section 29 of FERA and the special permission will prevail over the provisions of the Companies Act.

50. Mr. Chidambaram placed heavy reliance on the decision of the Supreme Court in Harishankar Bagla vs M.P.State . In that case the Supreme Court was required to considser the provisions of sections 3 and 6 of the Essential Supplies (Temporary Power) Act, l946. Section 6 provided that an order made under section 3 shall have the effect notwithstanding anything inconsistent therewith contained in any enactment other than the said Act or any instrument having effect by virtue of any enactment other than that Act. In other words section declared that if there is inconsistency in the order made under section 3 with the provisions of any other enactment, then notwithstanding that inconsistency, the provisions of the order will prevail in preference to the provisions of other laws which are inconsistent with the provisions of the order. The High Court had held that the power to do something which may have the effect of repealing, by implication, an existing law could not be delegated in view of the majority decision In re Art l43 Constitution of India and Delhi Laws Act (l9l2) etc. AIR l95l SC 332 wherein it was held that to repeal or abrogate an existing law is the exercise of the legislative power. The High Court was of the opinion that the conferment of power of the widest amplitude to make an order inconsistent with the pre-existing laws is nothing short of a power to repeal which in law can only be exercised by Legislature. The Supreme Court while reversing the High Court observed as follows: "In our opinion the construction placed on section 6 by the High Court is not right. Section 6 does not either expressly or by implication repeal any of the provisions of pre existing laws; neither does it abrogate them. Those laws remain untouched and unaffected so far as the statute book is concerned. The repeal of a statute means as if the repealed statue was never on the statute book. It is wiped out from the statute book. The effect of section 6 certainly is not to repeal any one of those laws or abrogate them. Its object is simply to by by-pass them where they are inconsistent with the provisions of the Essential Supplies (Temporary Powers) Act l940 or the orders made thereunder. In other words, the orders made under section 3 would be operative in regard to the essential commodity covered by the Textile Control Order wherever there is repugnancy in this Order with the existing laws with regard to those commodities will not operate. Bypassing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during the continuance of the Order made under section 3 it does not operate in that field for the time being. The ambit of its operation is thus limited without there being any repeal of an one of its provisions. Conceding, however, for the sake of argument that to the extent of a repugnancy between an order made under section 3 and the provisions of an existing law, to the extent of the repugnancy the existing law stands repealed by implication, it seems to us that the repeal is not by any act of the delegate, but the repeal is by the legislative act of the Parliament itself. By enacting section 6 Parliament itself has declared that an order made under section 3 shall have effect notwithstanding any inconsistency in this order with any enactment other than this Act. This

is not a declaration made by the delegate but the legislature itself as declared its will that way in section 6. The abrogation or the implied repeal is by force of the legislative declaration contained in section 6 and is not by force of the order made by the delegate under section 3. The power of the delegate is only to make an order under section 3. Once the delegate has made that order its power is exhausted. Section 6 then steps in wherein the Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than this Act . Parliament being supreme, it certainly could make a law abrogating or repealing by implication provisions of any pre-existing law and no exception could be taken on the ground of excessive delegation to the act of the Parliament itself. There is no delegation involved in the provisions of section 6 at all and that section could not be held to be unconstitutional on that ground".

51. Mr.Chagla urged that whereas under the Essential Supplies (Temporary Power) Act, a specific provision was made by the Parliament that an order under section 3 shall have overriding effect, such is not the position in the provisions of FERA. According to Mr. Chagla the right to vote on preference shares conferred under section 87(2)(b)(ii) of the Companies Act, cannot be defeated on the basis of conditions laid down by the Reserve Bank of India. It must be noted, however, that Mr. Chagla has not disputed that the conditions laid down by the Reserve Bank of India are valid and binding . In L I C vs. Escorts (supra) the Supreme Court has held that it is for the Reserve Bank of India to consider whether the requirement of the provisions of FERA and the various rules, directions and orders issued from time to time have been fulfilled and whether the permission should be granted or not. Once permission is granted by the Reserve Bank of India, ordinarily it is not open to anyone to go behind the permission and seek to question it.

52. Mr. Chagla contended that the management control vests in the Board of Directors and never with the shareholders of the company. He referred to the decision of the Supreme Court in Murarka Paints Varnish Works vs. Mohanlal Murarka (l96l) 3l Company Cases 30l wherein it was observed : "The directors and the shareholders in general meeting are the primary organs of the company between whom the companys powers are divided. The general meeting retains ultimate control, but only through its powers to amend the articles, to take away powers from the directors and to remove the directors and to substitute others to the taste of the shareholders. Until one or other of the aforesaid steps be taken, the directors, under the articles, according to the contention of the plaintiff, can disregard the wishes of the members and that the general meeting cannot restrain the directors from conducting actions in the name of the company". He also referred to the decision of the Supreme Court in L I C of India vs. Escorts (supra) wherein the Supreme Court has observed on page l42l as under: "...the only effective way the members in general meeting can exercise their control over the Directorate in a democratic

manner is to alter the articles so as to restrict the powers of the Directors for the future or to dismiss the Directorate and appoint others in their place".

53. According to Mr. Chagla the fact that by exercise of majority voting rights in general meeting the plaintiff may be in a position to take over control, cannot be equated with the de-facto management control. He drew our attention to the decision of the Supreme Court in International Cotton Corporation (P) Limited vs. Bank of Maharashtra l970 (40) Company Cases ll54 wherein the Supreme Court has held that the expression "control and management" under section 4A(b) of the Income Tax Act,l96l means de facto control and management and not merely the right or power to control and manage.

54. Mr.Chidamabaram, however, submitted and in our opinion rightly, that the two conditions are two sides of the same coin. The equity cap of 49% is intended to restrict voting rights to 49%. It is only when voting rights of the foreign share holders are restricted to 49% that the other condition, namely that the management control be in the hands of the Indian shareholders can be satisfied. Mr.Chidambaram urged that once the preference share holder i.e. plaintiff is allowed to vote on preference there will not be any difference between the equity shares and preference shares. Once preference share holder acquires 72.5 per cent voting rights in the present case it is futile to argue that the management will not pass into their hands. He submitted that granting any relief to the plaintiff to vote on preference share would violate above conditions of 49% equity cap. He pointed out that the general body appoints the managing director, the auditor, the company secretary. Similarly the general body approves or rejects the accounts. Under Article 58 of the Articles of Association it can make regulations, restricting the power of directors. He submitted that the share holders who control 72 per cent equity will be the shareholders who have "de facto management control". We are inclined to agree with the submission of Mr.Chidambaram and hold that the plaintiff are not entitled to vote on preference shares.

55. Mr. Chagla also submitted that the stage to consider whether there would be violation of conditions of Reserve Bank of India would arise only when the plaintiff actually exercise voting rights and its rights cannot be preempted prematurely merely on the basis of the apprehension that it would result in violation of the conditions laid down by the Reserve Bank of India. We cannot accept the submission of Mr.Chagla for the simple reason that granting such voting rights would necessarily have the effect of breach of the condition viz cap of 49% equity and will result in virtually transferring the management to the non Indian shareholders. Moreover, if the relief claimed by the plaintiff is granted, it would virtually amount to passing a decree at the interim stage. Therefore the prayer of the plaintiff for permitting it to exercise voting rights in respect of the preference share cannot be accepted.

56. Even the balance of convenience, in our view, lies in favour of withhold-

ing an injunction rather than granting it. It is common ground that the Bluetooth is in the interest of the company and granting of injunction might hinder completion of the transaction and entail serious penalties upto Rs.l00 crores. The Indian shareholders would be directly affected by any such penalties inasmuch as under the MOU, only Indian shareholders had given the representations and warranties. On the other hand, if injunction is withheld and the several steps contemplated by the MOU are allowed to be completed and the transaction is completed, at worst the plaintiffs share in the new company will be proportionately reduced to the total shareholding of the new company. As a preference shareholder, the plaintiff would be entitled to redeem the preference shares.

57. In the result, in view of the foregoing discussion, the Notice of Motion and the appeal are dismissed. On the request of Mr.Chagla, the ad-interim order dated 7.ll.200l is continued for a period of six weeks. It is further directed that the resolution passed in the AGM to be held on 24.l2.200l in respect of item nos. 7 and 8, if passed, would not be implemented for a period of six weeks. The parties and the authorities to act on the ordinary copy of this order duly authenticated by the personal secretary of this court.