Company Law Board
In Re: Gees Marine Products ... vs Unknown on 26 February, 2008
Bench: K Balu
ORDER K.K. Balu, Vice-Chairman

1. The petitioners constituting more than one tenth of the total number of shareholders of M/s. Gees Marine Products Private Limited, ("the Company"), aggrieved on account of certain acts of oppression and mismanagement in the affairs of the Company, have invoked the jurisdiction of the Company Law Board under Sections 397 & 398 of the Companies Act, 1956 ("the Act") with a view to bringing to an end the acts complained of by them and seeking the following reliefs:

(i) to set aside the impugned allotments and transfers made to the exclusion of the petitioners;

(ii) to restrain the respondents, their agents and servants from selling transferring or otherwise disposing off the assets belonging to the Company and in particular the trawlers MFV SUPERNA and MFV MICHAEL;

(iii) to appoint an auditor to scrutinise the accounts of the Company from 1991 till date and submit a report to this Board;

(iv) to carry out an investigation into the affairs of the Company and to surcharge the respondents herein for their acts of misfeasance; and

(v) to pass such further orders as this Board may deem fit and proper in the circumstances of the case.

2. Shri R. Murari, learned Counsel, while initiating his arguments, in support of the petitioners, submitted:

• The Company incorporated in the year 1985 is engaged in the business of operating fishing trawlers, with the family members of the petitioners, as shareholders of the Company. One Mr. Nevil A. Kattar, the husband and the father of the first and second petitioner, respectively funded the Company, as borne out by the statement of the bank account for the month of February, 1986, and the correspondence emanated from the family members, which are before the Bench. Mr Nevil A. Kattar with his exposure to fisheries administration as well as marine fishing and involvement in the fisheries business for several years, was instrumental for the incorporation of the Company and met the entire funding of the Company. The second respondent became the Managing Director, looking after the management of the Company. The Company had acquired two fishing trawlers, namely MFV SUPERNA and MFV MICHAEL, both valued at Rs. 1.60 crores and other assets at the value of Rs. 20 lakhs for the purpose of the Company. The petitioners and the respondents 2 to 5 are closely related to each other, namely, the petitioners 1 & 2 are the mother and the daughter respectively. The respondents 2 & 3 are the brothers. The fourth respondent is the father of the first petitioner, the respondents 2 & 3 and the grandfather of the second petitioner. The fifth respondent is the sister-in-law of the respondents 2 & 3.

• The maintainability of the main petition in terms of Section 399 has to be gauged from the position that existed when the petition has been filed and the subsequent events would not in any way be relevant at all. In view of this, withdrawal of the second petitioner from the present proceedings and substitution of Mrs. Renuka A. Kattar, yet another shareholder of the Company, in the place of the original second petitioner, being her sister, in terms of the order dated 20.07.2004 made in C.A. No. 154 of 2006 subsequent to filing of the main petition do not attract any disability as envisaged in Section 399. The petitioners have separately executed a power of attorney in favour of Mr. Nevil A. Kattar as their power agent to file the company petition under Sections 397 & 398 of the Act in the affairs of the Company. The power agent has filed an affidavit sworn on 14.10.2003, verifying the averments contained in the company petition. The respondents had the opportunity to cross examine the power agent of the petitioners, but they have not exercised any such option and therefore, the authority and knowledge of the power agent of the petitioners cannot now be challenged by the respondents.

• The petitioners have been completely sidelined and are kept totally dark in regard to the Company's affairs, inspite of the repeated requests made by the first petitioner. The respondents have not been issuing notices of general body meetings to the petitioners and declaring any dividends to the shareholders. The minutes of meetings filed by the respondents do not comply with Section 193 and hence the presumption under Section 195 will not be available. The trawler MFV SUPERNA made huge profits and Mr. Griffin Kagoo, the husband of the fifth respondent enjoyed the super profit of the trawler, as envisaged from the communication dated 19.05.2002 of the second respondent.

• The respondents 2 & 3 and Mr. Griffin Kagoo, the other brother had entered into a Memorandum of Understanding on 20.11.1994, agreeing, inter-alia, to share the profit and loss of the Company amongst the signatories to the MOU and the fourth respondent and Mr. Royston Kagoo and other family members. Mr. Griffin Kagoo, not even a member of the Company became entitled to 30% of the Company's profits. The MOU not having been incorporated in the articles of association of the Company is not binding on the Company. The vessels of the Company have been treated as the individual properties of the respondents and till date the petitioners have not been paid any part of the profits on the pretext that the Company has been incurring losses.

• The respondents 4 & 5 along with the spouse of the respondents 2 & 3, formed a partnership firm in September 1995 under the name and style of M/s. Kagoo Marines, to carry on the business of deep sea fishing, and shared the profits among themselves. The partnership firm procured a trawler by name MFV Kagoo from the income of the Company as borne out by one of the communications of the second respondent. A substantial portion of the funds has been diverted to M/s. Kagoo Marines. The respondents 2 to 5 and two partners of M/s. Kagoo Marines, had entered into yet another MOU in the year 1999, distributing the assets of the Company, including the trawlers, as if their individual properties. The correspondence exchanged between the second respondent and Mr. Griffin Kagoo, the husband of the fifth respondent would show that they were acting on the basis of the unsigned MOU, with effect from June 1999 apportioning for themselves the trawlers belonging to the Company. The communication of the second respondent further evidences that (a) Mr Griffin, the husband of the fifth respondent had drawn for himself around Rs. 85 lakhs; (b) the second

respondent drew Rs. 15 lakhs and (c) the third respondent drew an amount of Rs. 3 lakhs from the family business. The authenticity of this document is not disputed and hence source of such document is irrelevant. The sharing of the profits would show that the parties have acted upon the unsigned MOU. The first petitioner by a communication dated 09.09.2002 called upon the Company to furnish details of the accounts, in order to ascertain the revenues, but the Company failed to give any details and therefore, the books of account are to be scrutinised so as to determine the revenues of the Company, since the year 1991. The trawler MFV SUPERNA, was sought to be transferred to M/s. Superna Marine Exports Private Limited, incorporated by the fifth respondent and her son, with a view to appropriate the vessel for themselves. The property of the Company cannot form the subject matter of any family settlement among some of the shareholders and cannot appropriate the property to themselves, under the guise of any such family settlement. The second respondent had convened an extra ordinary general meeting on 20.10.2003 for the purpose of passing a resolution under Section 293(1)(a) of the Act to sell the trawler MFV SUPERNA, the largest asset of the Company valued at Rs. 92.90 lakhs as per the balance sheet as at 31.03.2003 to M/s. Superna Marine Exports (P) Ltd. for a consideration that may be determined by the fourth respondent, thereby attempting to divide the Company's x property among some of the shareholders. The fourth respondent cannot fix the consideration of the single most valuable asset of the Company in view of the fact that he is more than 76 years old with education only upto High School and without any experience in the fishing industry or any technical qualification. This measure was adopted to see that the trawler is sold at a consideration that would benefit the directors, causing losses to the Company. Similar exercise would be undertaken to sell MFV MICHAEL to the second respondent, thereby stripping of all the Company's assets, to the advantage of the directors, and depriving the petitioners and Mr. Nevil A. Kattar, who were responsible for the initial investment made in the Company. There was no necessity for transferring the vessels. The sale was not for the benefit of the Company. By sale of the vessels, the Company's operations would drastically be affected and the investment of the petitioners as well as Mr. Nevil A. Kattar would become dried. If these are permitted the Company will be left with no trawler and thereby its substratum would be lost, causing prejudice to the Company and its shareholders. The correspondence exchanged in April and May 2002 between the Company, Mercantile Marine Department and M/s. Superna Marine Exports Private Limited, would show that the transfer of ownership of the trawler MFV SUPERNA was challenged by the Company, which resulted in cancellation of the registration of the trawler MFV SUPERNA in favour of M/s. Superna Exports Private Limited, by the Mercantile Marine Department thereby averting the transfer unlawfully effected by the Company. These events and circumstances warrant appointment of an Administrator to assume control over the day-to-day affairs of the Company.

• The respondents have been shifting the registered office of the Company from place to place, making it virtually impossible for shareholders to attend the general body meetings and denying access to the accounts and records of the Company. The petitioners never received any notice of any general body metings regarding the shifting of the registered office, except for the last such meeting. The annual report for the year ended 31.03.2003 would show that the registered office of the Company is located at the residence of the fourth respondent. The registered office has been shifted as many as four times for no valid reasons but no statutory records are maintained by the Company at its registered office, as reported by the Advocate Commissioner in his report, pursuant to the

order of this Bench.

• While the respondents allotted additional shares to themselves, no shares have been offered to the petitioners in proportion to their share holding in the Company, which is oppressive of the petitioners. Furthermore, the fourth respondent got increased his shareholding from 1750 to 3550 shares by acquiring them from other shareholders in violation of the articles of association of the Company and thereby increased the shareholding of the respondents 2 & 3. Therefore, the transfers being invalid are liable to be set aside.

• In the light of the principles enunciated in Delstar Commercial & Financial Limited v. Sarvottam Vinijaya Limited (2001) 3 CLJ 443, the CLB, in exercise of the equitable jurisdiction, has the discretionary power to do justice between the parties in a manner it considers fit with a view to protect the interest of shareholders and the Company. Depending upon the facts of a case, even in cases where oppression is not established, suitable orders could be passed in exercise of the equitable jurisdiction conferred by Section 397 and no single ready made formula can be applied in all cases.

3. Shri T.K. Seshadri, learned Senior Counsel, while opposing the company petition, submitted as under:

• The second petitioner unconditionally withdrew the company petition subsequent to filing of the petition asserting that she has wrongfully filed the petition through her power of attorney agent, namely, Mr. Nevil A. Kattar and consequently cancelled the power of attorney, thereby she ceased to be the petitioner, in the company petition at the threshold. Therefore, the first petitioner can alone be considered as petitioner and does not satisfy the requirements of Section 399, in view of the fact that the Company has 12 shareholders on the date of filing of the petition. The power of attorney has been executed on 09.10.2003 in favour of Mr Nevil A. Kattar and till such time the power agent has no relation in the affairs of the Company and not a shareholder and cannot have knowledge of the Company's affairs. The power agent cannot, therefore, file the company petition alleging the purported irregularities in the affairs of the Company. The communication dated 22/04/2002 addressed by Mr. Griffin Kagoo, not a party to the proceedings in favour of the power agent and the communication dated 19.05.2002 addressed by the second respondent in favour of his uncle, being a third party, though deal with the affairs of the Company are not admissible in law. The third party gives the details to the power agent in order to file the company petition. These communications, establishing the differences existing between Mr. Griffin Kagoo and the respondents 2 to 4 and nothing more would evidence the collusive attitude adopted by the power agent and the petitioners. The exchange of correspondence between the second respondent and Mr. Griffin Kagoo have been produced by Mr. Nevil A. Kattar, which would show that he is acting hand in glove with Mr. Griffin Kagoo. There are neither any averments from the petitioners on the awareness of the correspondence exchanged between the third parties nor any affidavit regarding such correspondence elaborated hereabove. These communications cannot be relied without any explanation on the custody and affidavit from the concerned persons. Mr. Nevil A. Kattar instituted the present proceedings with a view to exert pressure on the respondents 2 to 4 for the benefit of Mr. Griffin Kagoo, who is behind the present litigation; The fifth respondent remained ex-parte and her

husband namely, Mr. Griffin Kagoo is wholly responsible for the present state of affairs, as putforth by the petitioners. The petitioners have not sworn an affidavit subscribing to the submissions of Mr.Nevil A Kattar, who is not a shareholder of the Company and never funded the Company for the benefit of the entire family members. The company petition has been filed by the power agent and the petitioners have not filed any affidavit by themselves. The power agent's grievances cannot be the grievances of a member as he has no interest in the affairs of the Company and therefore, the company petition by the power agent does not lie. The knowledge of the power agent cannot be attributed to his principal, unless the latter is in knowledge of the same. The affidavit of the power agent affirming correctness of the allegations made in the main petition cannot be attributed to his principals. The company petition has been filed on 15.10.2003, while the power of attorney has been executed on 09.10.2003. The powers bequeathed in favour of the power agent is not adequate to file and prosecute the present company petition. The petitioners do not vouch for the statements made by the power agent in the rejoinder to the main counter filed in the instant matter. The power of attorney executed by the present second petitioner without application of mind not been stamped and is defective. There has been no date by the attesting person. It is not admissible under Evidence Act. This Bench in In re Duroflex Limited (2006) 5 CLJ 140 held that if an affidavit does not meet the requirements of law, it has no legal consequences and consequently the company petition should be rejected. Therefore, the second petitioner is not presently represented by a proper power agent. The petition has been filed for collateral purposes and not in the interest of the Company. The company petition is not for the benefit of the Company. The petition brought out by the power agent is not a bonafide one and it is an abuse of process of legal proceedings.

• The first petitioner, the respondents 2 to 5 and the spouse of the respondents 2 & 4 are subscribers to the Memorandum and Articles of Association of the Company. The husband of the fifth respondent has attested the signatures of all the subscribers to the Memorandum and Articles of Association. The power agent is not a attesting witness and he is not concerned with the formation of the Company. The respondents 2 to 4 are the first directors in terms of Clause 34 of the articles of association of the Company. The second respondent is the first Managing Director. The Company is a family company, but all the family members have not been' arrayed as parties to the company petition. The petitioner has not made out any grounds for oppression. Mr. Nevil A. Kattar never provided any funds to the Company for the purchase of the trawlers, namely MFV SUPERNA and MFV MICHAEL, which has not been denied by the petitioners in the rejoinder filed by them in reply to the counter filed to the main petition. The Company on the other hand acquired the trawler MFV SUPERNA against the bank guarantee furnished by the fourth respondent, his wife and the second respondent's wife. They have further mortgaged their property as security, while no other family members came forward to give their own property as security in connection with MFV SUPERNA. The Company availed the benefits of a rehabilitation scheme approved by the Govt. of India for Fishing Industry, and thereby settled an amount of Rs. 35.17 lakhs in full satisfaction of the outstanding amount of Rs. 1.31 crores due to ICICI by way of one time settlement and released the mortgage on the trawler MFV SUPERNA. Since the amount due to ICICI was discharged by one time settlement, a sum of Rs. 95.86 lakhs was transferred to Capital Reserve Account, which was created out of the amount waived by ICICI and not generated out of the profits of the Company. The second trawler MFV MICHAEL was acquired out of the Company's own fund by mortgaging the shrimp catches to exporters. These could be achieved on account of the efforts of only the

respondents, as borne out by the records made available before the Bench, which include the extract of the ledger account maintained by the Company.

• The Company has given notice to all the shareholders for all the general meetings. All notices of the meetings were sent in accordance with the provisions of the Act either by post or by hand delivery, as the first petitioner is the daughter of the fourth respondent. Even otherwise, non-issue of notices will not vitiate the board or general meetings provided no prejudicial decisions are taken at the disputed meetings as held in Suryakant Gupta v. Rajaram Corn Products (Punjab) Limited (Supra). The petitioners themselves have produced the notice of the meeting falsifying their case of non-issue of notices for the general meetings. The communication dated 05.09.2002 by the first petitioner addressed to Mercantile Marine Department clearly shows that the first petitioner had received a notice convening an extraordinary general meeting held on 27.08.2002. The first petitioner started complaining to the Company in the affairs of the Company only on 09.09.2002 and 02.12.2002, for the purpose of initiating the present proceedings. The complaint on this account has been raised for the first time in the year 2003. The conduct of the petitioners in not raising the grievances on the issue of notices will disentitle them for the reliefs claimed by them, as held in Dr. K. Balasundaram v. G.K. Steels (Coimbatore) Ltd. (2003) 48 SCL 590. The communication dated 05.09.2002 sent to Mercantile Marine Department by the first petitioner would show that she had received a notice of the extra ordinary general meeting held on 27.08.2002, regarding the shifting of the registered office of the Company. The communication dated 09.09.2002 of the first petitioner addressed to the Company, complains of not giving 21 days for convening the extra ordinary general meeting. The communications of September 2002 are only after thought, with a view to building up the case of the petitioners. The petitioners have produced copies of the notices dated 12.08.2002 and 17.08.2002 convening the extra ordinary general meeting and the 18th annual general meeting on 27.08.2002 and 20.09.2002 respectively. These would belie the statement of the petitioners that no notices are sent by the Company for any of its general meetings. The petitioners have not protested for the past ten years. The petitioners are not directors and therefore, the question of sending notices of board meetings to the petitioners does not arise. The annual reports for the accounting years ended with for the period between 31.03.1991 and 31.03.2003 have been filed by the respondents, copies of which are produced before the Bench and therefore, the plea of non-sending of notices to the petitioners is not genuine. All the financial operations/profits of the Company are reflected in the balance sheet(s), copies of which are produced before the Bench. Though diversion of funds of the Company to the partnership firm has been alleged the latter has not been impleaded as a party to the company petition. The allegations of diversion of the funds of the Company are not tenable. The accounting of operations of the trawlers is reflected in the books and the accounts relate to operation of both the vessels. The petitioners though not directors, have produced copies of the notices of the board meetings without explaining the source of these notices produced before the Bench. The Company has set out in detail with regard to the meetings of the Company held for the period from 1991 to 2002-2003, during which period only the Company acquired the trawlers and the business was carried out by the Company prior to 1990 and after the incorporation. The balance sheet for the year ended 31.03.2003 discloses an accumulated loss of Rs. 70.32 lakhs and therefore, the Company could not declare any dividend out of losses. Moreover, nonpayment of the dividend cannot be a ground for oppression and mere dissatisfaction of minority does not justify interference by Court, as held in Ashoka Betelnut Co.

Private Limited v. M.K. Chandrakant (1997)-I-LW 616.

• The petitioners or their power agent are not parties to the MOU dated 20.11.1994 and cannot be relied on by them. The, petitioners have not explained the source through which they have procured the MOU. The Company is a family concern, with family members as shareholders. The shareholders including the petitioners decided that it would be better to operate the vessels individually for better performance, maintenance and competition so as to benefit the Company with good profit. The petitioners never objected to the MOU, which came to be entered into with the knowledge of the fourth respondent as well as the first petitioner. Mr. Griffin Kagoo, is a party to the MOU and charges are raised against him, yet he has not been impleaded as a party to the proceedings. Mr. Griffin Kagoo, a Chartered Accountant, was to be in charge of the statutory requirements like Income Tax, Companies Act and other Acts applicable to the industry, while the second respondent has been in charge of the operation MFV SUPERNA any MFV Michel. The MOU of August 1999, referred to by the petitioners is for the benefit of the Company, which has neither been signed nor given effect to by the parties.

• The Company has allotted shares not on proportionate basis to various shareholders at different points of time and the question of issuing shares on pro-rata basis does not arise. Therefore, the allegation that the shares are sought to be issued on pro-rata basis is without any basis and the issue of shares to second respondent and others would not constitute an act of oppression. The petitioners cannot claim ignorance of the allotment of shares, in view of the inordinate and unexplained delay in challenging the allotments and the allotment need not be equal as held in S. Ranganathan v. Shyamala Pictures & Hotels Private Limited (2002) Vol.108 CC 880. By virtue of article 16, any transfer between the members, need not satisfy the requirements of the articles and the board has no role to play and the transfers registered in favour of the fourth respondent do not in any way be oppressive of the petitioners, especially when there is no question of offering shares on pro-rata basis and there is no group concept among the family members. The shares held by the fourth respondent are incorrectly stated in the main petition. The petitioners have not furnished the number of shares transferred to the fourth respondent or the articles which have been violated while transferring the shares in favour of the fourth respondent. There is neither any averment nor prayer for setting aside the impugned transfers in favour of the fourth respondent. Thus, the transfers effected are valid and in accordance with the law.

• The notice dated 24.09.2003 convening an extra ordinary general meeting on 20.10.2003 discloses a special business on the sale of the trawler MFV SUPERNA, but the resolutions passed at the meeting have not been implemented and thus no prejudice has been caused to the Company or its shareholders. The respondents have taken enormous steps to develop manufacturing Tuna fishing machineries indigenously to suit fishing vessels, as borne out by the publications produced before the Bench. There is no illegality in the action of the Company in convening a meeting of the shareholders to decide on the sale of the trawlers towards the benefit of the Company and the family. The petitioners ought to have objected to the resolutions by participating at the meeting. The explanatory notice to the shareholders is rather transparent on all the aspects of the business proposed to be transacted at the meeting. There is nothing illegal in entrusting the formalities of sale to the fourth respondent and Mr. Griffin Kagoo. The reference to the fourth respondent about

his education and experience is totally irrelevant. The directors, since the inception of the Company, have worked in the interest of the Company, mortgaging their personal properties and giving personal guarantees to set up the Company. If the elders in the family desired that the trawlers are to be disposed of for the benefit of the family peace and for bringing harmony with the approval of the shareholders, it cannot be considered as an affecting the interest of the petitioners, who also form part of the same family. The efforts taken by the second respondent in obtaining financial assistance from Canara Bank for conversion project for the Company's two vessels, MFV SUPERNA and MFV MICHAEL were thwarted by writing complaint on 20.01.2005 by the fifth respondent, whose act is against the interest of the Company. The reliefs under Sections 397 & 398 are discretionary reliefs, which will be granted only to those who approach the court with a clean record as held in Srikanta Datta Narasimharaja Wadiyar v. Sri Venkateswara Real Estate Enterprises (Pvt) Limited (Supra).

• The registered office of the Company came to be shifted for operational convenience, for which there has been no objection at any point of time at the instance of the petitioners. The shifting of the registered office of the Company cannot amount to oppression or mismanagement, especially when it is the function of the board of directors of the Company.

• There is no averment in the petition regarding any ground that exists for winding up of the Company, which will jeopardise the interest of the Company and the shareholders. This is a mandatory requirement to satisfy the provisions of Sections 397 of the Act, which is not satisfied by the petitioners. Under Sections 397 & 398, it must be shown as something affecting their proprietary rights as shareholders, as held in Vaishnav Shorilal Puri v. Kishor Kundan Sippy (2006) 131 CC 690. This is found missing in the present case. The petitioners can continue to be shareholders and enjoy the return on their investment, as the Company started making profits.

4. After considering the pleadings and arguments advanced by learned Counsel for the parties, the issue for consideration is whether the petitioners are entitled for the reliefs against the alleged acts of oppression and mis-management in the affairs of the Company. The main grievances of the petitioners are in relation to - (i) non-sending of notices for general meetings; (ii) non appraising of affairs of the Company; (iii) denying access to registered office of the Company and statutory records, books of account and other records of the Company; (iv) non-availability of the statutory records, books of account and other records at the registered office of the Company; (v) sharing of profits of the Company among the respondents 2 & 3 and other family members in exclusion of the petitioners and non-payment of any dividend to members; (vi) siphoning off funds and treating of trawlers of the Company, as if personal assets of the respondents; (vii) illegal attempts for sale of trawlers; (viii) indiscriminate allotments of shares; (ix) transfers of shares in contravention of articles of association of the Company; and (x) non-maintenance of board minutes in accordance with requirements of Section 193. Before dealing with these contentious issues, the preliminary objections raised on account of (a) withdrawal of the company petition by Mrs. Meruna A. Kattar, one of the petitioners who originally initiated the present proceedings; (b) defective power of attorney; and (c) authority of the power agent in prosecuting the company petition shall be examined.

This Bench by an order dated 20.07.2004, on considering the rival claims in C.A. No. 154 of 2004 permitted the second petitioner who originallv initiated the action under Section 397/398 to withdraw from prosecuting the proceedings and substituted the present second petitioner. This order having become final is binding on the parties before me and, therefore, the plea that the company petition does not meet the requirements of Section 399 on account of caesura of Mrs. Meruna A. Katlar to be one of the petitioners must fail. The power of attorney executed by the present second petitioner, though unstamped and undated by the attesting person, will not disentitle the petitioners from claiming any reliefs, in case of oppression and mismanagement in the affairs of the Company. This Bench In re Duroflex Ltd. (supra), having found that the affidavit did not bear any date and it was shrouded with discrepancies as to the place of execution, the factum of swearing by the deponent, etc. came to the conclusion, in these circumstances that the affidavit did not meet the requirements of law, without any legal consequences. The discrepancies in that case are distinctly dissimilar to that of the power of attorney presently produced before the Bench. The power of attorney in dispute clearly indicates the intention of the principals to file a company petition before the CLB under Sections 397 & 398 of the Act. In view of the inability on the part of the principals, Mr. Nevil A. Kattar was constituted as their lawful power of attorney (i) to sign all papers in connection with filing of the company petition against the Company under Sections 397 & 398 of the Act; (ii) to engage Counsel to execute Vakalatnamas in their favour; (iii) to present the company petition before the CLB; and (iv) to generally do all things necessary or incidental for the above purposes. The grievances set out in the main petition are those of the petitioners affecting their proprietary rights as shareholders, as envisaged in Section 397 and reiterated in Vaishnav Shorilal Puri and Anr. v. Kishor Kundan Sippy and Ors. (supra). Mr. Nevil A. Kattar is found to be a duly constituted power agent of the petitioners. Accordingly, the power agent has filed the present company petition accompanied by a verifying affidavit. In view of the explicit powers conferred on the power agent elucidated hereabove, none of the disputes raised by the respondents in regard to the power of attorney does survive. It may be observed that the second respondent in his communication dated 19.05.2002 sent to Mr. K. Aloysius Kattar, the uncle of the first petitioner and the second respondent acknowledged the financial assistance extended by the power agent in support of the affairs of the Company. The communication dated 22.04.2002 of the husband of the fifth respondent addressed to the power agent recognises the support and encouragement extended by the latter, despite the non-denial in the rejoinder by the petitioners on the specific charges of the respondents that the power agent never provided any funds to the Company. These unequivocal admissions would show the extent of the interest evinced by Mr. Nevil A. Kattar in the affairs of the Company and that he can maintain the petition for and on behalf his principals though the power agent is not a member of the Company.

The Company has made available, inter-alia the annual reports for the accounting years from 31.03.1991 to 31.03.2003 and for the year ended 31.03.2006 and the compliance certificates for the years ended 31.03.2001, 31.03.2002 and 31.03.2006 from which it is found that the Company had convened the annual general meetings for these years without exception. The report of the auditors for all these accounting years would reveal that the Company has been maintaining proper books of account as are required by law. The compliance certificate dated 29.08.2001 for the year ended 31.03.2001 discloses that the Company (i) maintained the statutory registers as per the provisions of the Act; (ii) filed the statutory forms and returns with the Registrar of Companies; (iii) conducted

nine board meetings between the period April 2000 and March 2001; and (iv) convened the annual general meeting for the year ended 31.03.2000 on 24.09.2001 after giving notice to the members of the Company and the resolutions passed thereat were recorded in the minutes book maintained by the Company. The compliance certificate dated 29.08.2002 for the year ended 31.03.2002 reveals inter-alia that the Company (i) maintained the statutory registers as per the provisions of the Act; (ii) filed the statutory forms and returns with the Registrar of Companies; (iii) conducted five board meetings between the period April 2001 and February 2002; and (iv) convened the annual general meeting for the year ended 31.03.2001 on 24.09.2001 after giving notice to the members of the Company and the resolutions passed thereat were recorded in the minutes book maintained by the Company. The compliance certificate dated 25.08.2006 for the year ended 31.03.2006 shows that the Company (i) maintained all the statutory registers as per the provisions of the Act; (ii) filed statutory forms and returns with the Registrar of Companies; (iii) conducted eight board meetings between the period April 2005 and March 2006; (iv) convened the annual general meeting for the year ended 31.03.2005 on 30.11.2005 after giving due notice to the members of the Company and the resolutions passed thereat were duly recorded in the minutes book maintained by the Company. The directors' report for the period between 1990-1991 and 2005-2006 deal with the operations undertaken by the trawlers owned by the Company and the financial results of the respective years. The directors' report dated 04.09.2006, apart from furnishing these details, shows that major conversion was effected in the vessel "MFB Michael for tuna" long line fishing at a cost of Rs. 27.45 lakhs and that Ministry of Agriculture granted a capital subsidy of Rs. 12.37 lakhs during the month of September 2005. It is, therefore, undoubtedly beyond doubt that the Company and its directors have been duly discharging the statutory obligations as envisaged in the Act by convening the annual general and board meetings periodically, maintaining the statutory records, books of accounts, and other records. In this connection, it is relevant to point out that the Advocate Commissioner's report filed on 23.10.2003 would show that no books of accounts or statutory records were available at the registered office, lor his authentication in terms of the order made by the Bench. The report would further reveal that as per the statement made by the fourth respondent, all the books of account and records were with the Company's Chartered Accountant's whose office is situated at Tuticorin and that the books are used to be taken to Visakhapatnam where the trawlers operations were taking place. In these circumstances, neither the respondents subsequently chose to produce the statutory records before the Commissioner nor the petitioners took any further initiative in this regard. This warrants appropriate remedial measures. The annual reports and the balance sheets filed with the Registrar of Companies being public documents, every shareholder has right of right of access and is entitled for copies of the same. I do not see any initiative taken by the petitioners demanding copies of any of these records or notice of the general meetings since inception of the Company, save the lone communication dated 09.09.2002 of the first petitioner addressed to the Company, which shows her callous attitude towards the affairs of the Company by approaching the company alter a period of more than 17 years. All other communications from the petitioner as pointed out by learned Senior Counsel for the respondents, are found to have emanated only in September 2002, December 2002 just prior to filing of the eompain petition in October, 2003. 'The petitioners having failed to act diligently in exercising their rights as shareholders to ascertain any of the details regarding the affairs of the Company or raise any grievances on account of non-sending of notices of the general meetings in a manner specified under the Act are not justified in accusing the respondents for not maintaining any transparency in the

day-to-day affairs of the Company. The inordinate delay in not raising the grievances on the issue of notices will not entitle the petitioners for any reliefs as held in Dr. K. Balasundaram v. G.K. Steels (Coimbatore) Ltd. (Supra). Furthermore, there is no material substantiating any prejudices suffered by the petitioners by virtue of any resolution passed at any of the general meetings. The grievance on account of the shifting of the registered office is separately being dealt with, while the resolution passed at the extra ordinary general meeting of October 2003 was not implemented. In the present circumstances, non - issuing of notices will not vitiate the meetings as held in Suryakant Gupta v. Rajaram Com Products (Punjab) Limited (Supra). The petitioners themselves have produced copies of the notices of general meetings of August and September 2002. There are no bonafides on the part of the petitioners in blaming belatedly the respondents without any justification, which would throw light on their conduct, denying them any equitable relief on account of the ill founded grievances of non-sending of notices of the annual general meetings, in view of the principles enunciated in Srikanta Datta Nurasimharaja Wadiyar v. Sri Venkateswara Real Estate Enterprises (Pvt.) Ltd. and Ors. (supra). In the light of the auditors' reports and the compliance certificates discussed elsewhere, confirming the statutory compliances by the Company and maintenance of the statutory registers and the books of accounts from time to time, the bald allegations attributed by the petitioners that the minutes of the metings do not comply with Section 193 are not appreciable.

The profitability of the Company for the period between 1990-1 c>c> 1 and 2005-2006 as culled out from copies of the balance sheets on record is furnished here below:

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| Sl. No. | Year | Profit Rs. | Loss Rs. | Accumulated Loss Rs. |
|---|---|---|---|---|
| 1. | 1990-1991 | - | 1090618.54 | - |
| 2. | 1991-1992 | - | 1856646.62 | 2947265.16 |
| 3. | 1992-1993 | - | 1306667.46 | 4253933.23 |
| 4. | 1993-1994 | - | 894884.75 | 5148817.87 |
| 5. | 1994-1995 | - | 859242.03 | 6008059.90 |
| 6. | 1995-1996 | 298692.94 | - | 5709366.96 |
| 7. | 1996-1997 | 28393.65 | - | 5680973.31 |
| 8. | 1997-1998 | - | 7845.44 | 5988818.75 |
| 9. | 1998-1999 | 408489.74 | - | 5323329.01 |
| 10. | 1999-2000 | 90795.71 | - | 5244083.30 |
| 11. | 2000-2001 | 27466.30 | - | 5227467.00 |
| 12. | 2001-2002 | - | - | 5230557.60 |
| 13. | 2002-2003 | - | 1841969.38 | 7031898.98 |
| 14. | 2003-2004 | Not Available | Not Available | Not Available |
| 15. | 2004-2005 | - | 1433074 | 10900749 |
| 16. | 2005-2006 | - | 1180008 | 972074200 |

It may be observed that the Company had incurred losses for ten years, while earned profits for five years in a span of fifteen years and that all the profits came to be appropriated against the losses suffered by the Company. The Company as at 31.03.2006 has accumulated losses of Rs. 97.21 lakhs. The assertion of the petitioners [para 5(e) of company petition] that the Company had as at 31.03.2003 profits of Rs. 70.32 lakhs is contrary to the balance sheet for the year ended 31.03.2003 disclosing an accumulated loss of Rs. 70.32 lakhs. The balance sheet for the year ended 3 1.03.1998 discloses for the first time an amount of Rs. 95.80 lakhs under the head 'Reserve and Surplus', which, according to the auditors' report dated 20.08.1998, represents the Term Loan and Interest Waiver under the One Time Settlement Scheme for Rehabilitation of the Deep Sea Fishing Industry promulgated by the Government of India. This reserve and surplus amount continues to appear in all the balance sheet for the subsequent years including that of the year ended 31.03.2006. It is, therefore, beyond doubt the reserve and surplus amount of the Company has not been created out of the profits of the Company. With the ultimate huge accumulated losses suffered by the Company, any failure to declare dividends would not amount to an act of oppression, as held in Ashoka Betelnut Co. P. Ltd. and 2 Ors. v. M.A. Chandrakanth (supra).

The grievances on account of the allotment as well as the transfer of shares must be considered in the wake of the rival claims of the parties. The memorandum of association shows that 3750 equity shares of Rs. 100/- each were subscribed by the first petitioner (250) second respondent (1000) Mrs. Gracelyn Fernando, wife of the second respondent (250) third respondent (500), fourth respondent (1000), Flatta Fernando, wife of the fourth respondent (500) and the fifth respondent (250) at the time of incorporation of the Company, which evidences unequal subscription of shares by the promoters. Furthermore, the articles do not contemplate equal shareholding among the promoters and there has been no such agreement among them, either pleaded or established, before the Bench. The Company had allotted, in terms of Form No. 2 dated 09.04.1987, 8357 equity shares in favour of inter-alia the first petitioner (350), second petitioner (150), the original second petitioner (150), second respondent (1500), second respondent's wife (700), third respondent (250), third respondent's wife (250), fourth respondent (500), wife of the fourth respondent (2000), son of fourth respondent (200), fifth respondent (700), certain other family members and strangers. It is relevant to observe that the first petitioner was allotted 350 shares, the present second petitioner and the original second petitioner were allotted each 150 shares, whereas the other family members including the respondents herein were allotted more number of shares and thus not in proportionate to their shareholding in the Company. The Company had again allotted on 23.03.1992, 2100 equity shares in favour of the second respondent (300), third respondent (110), the fourth respondent (250), wife of the fourth respondent (300), and the fifth respondent (1140) and no allotment was made in favour of any of the petitioners. The petitioners never made any grievances of the disproportionate allotment of 8735 shares made as early as in March 1987 and the exclusive allotment of 2100 shares made in the year 1992 till filing of the company petition in the year 2003, The petitioners never pleaded any ignorance of the impugned allotments at any point of time. The allotments have never been made uniformly or equally in favour of the different family members of the fourth respondent. By virtue of Clause 5 of the articles of association of the Company, shares of the Company are under the absolute control and discretion of the directors who may allot shares upon such terms and conditions as they deem fit at par or at premium. The petitioners have not attributed any motive against the directors in exercise of their discretion at the

time of allotting the impugned shares. The Company at no point of time followed the principle of proportionate allotment, of which the petitioners never raised any dispute and therefore, they will not be entitled to challenge the impugned allotment in the present proceedings. Furthermore, the petitioners are guilty of acquiescence in the matter of allotment of shares made way back in the year 1992. Therefore, the petitioners' belated claim on account of non-allotment of additional shares in their favour, in proportion to the shareholding does not merit any consideration. The petitioners cannot plea ignorance of the allotment of shares, on account of the inordinate delay in challenging the allotment as held in S. Ranganathan and Ors. v. Shyamala Pictures and Hotels Pvt. Ltd. and Ors. (Supra).

The grievances made in relation to the transfer of shares in favour of the fourth respondent are lacking the minimum details for necessary remedial measures. There are no particulars as to (i) name of the transferors; (ii) number of shares transferred; (iii) date of transfer of shares; (iv) date of approval of the impugned shares by the board of the Company; (v) relationship between the transferors and the transferees; and (vi) the relevant article(s) violated by the transferors. None of the transferors has been arrayed as parties to the main petition. Article 16 makes it clear that the procedure prescribed in Articles 11, 19, 20, 21 & 22 will have to be followed in the event of any member transferring his shares in favour of persons other than his wife, son or daughter, whereas in the present case it is not known whether the transferors and transferees do or do not fall within the category of persons specified in Clause 16 of the articles. It is, therefore, beyond doubt that the accusation made on behalf of the petitioners regarding the transfer of shares is as vague as could be possible. The specific assertion of the respondents made at the time of arguments that the shareholding of the fourth respondent never got increased from 1750 shares to 3550 shares, pursuant to the impugned transfers, has not been contravened by the petitioners and consequently without the requisite details of the transfers, this Bench cannot go to the rescue of the petitioners, who are not diligent enough in pursuing their cause.

The respondents 2 & 3 and the husband of fifth respondent, as borne out by the MOU dated 20.11.1994 had essentially agreed that:

(i) the husband of the fifth respondent shall be in charge of the a flairs of the Company;

(ii) the second respondent shall be in charge of the operations of the trawlers belonging to the Company;

(iii) the third respondent shall be in charge of finance and accounts of the Company and assist the second respondent in the operations of the trawlers;

(iv)the respondents 2, 3 and the husband of the fifth respondent shall draw the remuneration as specified the MOU;

(v) the respondents 2, 3, 4 the wife and son of the fourth respondent, and the husband of the fifth respondent agreed to share the profits and loss of the Company as per the ratio specified in the MOU.

It is evident that the Company is neither a party to the MOU nor was the same approved by the board of directors of the Company, for lack of any materials before the Bench. The profits of the Company shall be apportioned among a few of the family members at the cost of several other members including the petitioners. The affairs of the Company were to be in the hands of the husband of the fifth respondent, who is not even a shareholder of the Company. Nevertheless he was given 35% of the profits of the Company. These terms of the MOU, as rightly pointed out by Shri R. Murari, learned Counsel, are oppressive of the ignored shareholders, including the petitioners. The justification put forth by the respondents that the elders in the family including the petitioners, had decided, in the interest of the Company to operate the vessels individually for better performance, maintenance, family peace and harmony does not merit any consideration, in the absence of any iota of evidence to prove that either the petitioners or all other shareholders apart from the parties to MOU had agreed to any such arrangement. The operation of the vessels, being a corporate decision cannot be left to the choice of a few family members, even in a family company. When the terms of the MOU are oppressive, the petitioners either by themselves or through their power agent are entitled to seek reliefs invoking the jurisdiction of Section 397/398, despite the fact that they are not parties to the MOU. There is no material to show that the MOU was ever brought to the knowledge of the petitioners, in which event the averment that the petitioners never objected to the MOU is rather misconceived. The petitioners have produced a copy of yet another MOU of August 1999 in relation to partition of the business of the Company, according to which trawler "MFV SUPERNA" will belong to the husband of the fifth respondent and the trawler "MFV MICHAEL" will belong to the second respondent with effect from 19.06.1999. The second MOU is not only incomplete but also inoperative on account of its non execution by the parties concerned and there is, therefore, no need to consider the oppressive nature or otherwise of the terms of such unsigned MOU. However, at the same time, the apprehension of the petitioners on account of the developments which emerged both prior and subsequent to the unsigned MOU, as borne out by the correspondence on record assume relevance. The letter of the second respondent dated 16.06.1999 addressed to the husband of the fifth respondent confirms that the latter wanted to take charge of the operations of the trawler "MFV SUPERNA" with immediate effect. Similarly, the communications dated 03.08.1999, 04.09.1999 and 04.09.1999 of the husband of the fifth respondent addressed to the second respondent make a reference to the MOU on partition of the business of the Company. The communication of the husband of the fifth respondent dated 22.04.2002 in favour of the power agent of the petitioners speaks of the division in the family. The second respondent in his communication dated 19.05.2002 categorically admitted that "the trawler "MFV SUPERNA " had stalled fetching profits and out of its earning we have purchased one mini trawler "MFV Kagoo" in the year 1995 and one more second hand trawler "MFV MICHAEL" in 1998. During these years of operation, brother Griffin had drawn for himself around Rs. 85 lakhs from the family business whereas I drew Rs. 15 lakhs and my brother Grinsel Kagoo had drawn Rs. 3 lakhs only". This communication of the second respondent though addressed to the uncle of the first petitioner cannot be ignored as urged on behalf of the respondents, especially when (a) genuiness of such communication is not under dispute; (b) communication is between close family members; and (c) respondents themselves heavily relied on the said communication to establish that (i) disputes and differences existed between the family members; (ii) bank guarantee was obtained by pledging the properties belonging to the parents and the wife of the second respondent; (iii) financial assistance was done by the father-in-law and the brother-in-law (power agent of the

petitioners) of the second respondent, (iv) remuneration was denied to the second respondent for his services ;- ; rendered in making of the vessels best of the sea worthy conditions; (v) settlement was arrived between the second respondent and his brothers in the presence and concurrence of their parents; (vi) Griffin failed to keep up his promise bin enjoyed the super profit of the trawler 'MFV SUPERNA' and (viii) Griffin sold the trawler, MFV SUPERNA to M/s. Superna Maritime Exports Private Ltd., a company incorporated by him. There is no doubt that the second respondent has taken enormous efforts to develop manufacturing tuna fishing machineries indigenously by making use of the trawler of the Company, as brought out by a number of publications on record and that the respondents are mainly responsible for effecting conversion in the trawlers belonging to the Company for tuna long line fishing and for closure of the dues of the Company payable to ICICI, which however cannot absolve them from the charges levelled by the petitioners in relation to the operation of the trawlers belonging to the Company. The sequence of events would prima facie show that the second respondent and the husband of the fifth respondent in close association with certain other family members, have been dealing with the trawlers namely, "MFV SUPERNA" and "MFV MICHAEL" as if the were personal assets and endeavouring to apportion the realisations out of the operation of the trawlers among themselves, which are against the interest oi' the Company and its shareholders, irrespective of the enforceability of the MOU. The respondents are, therefore, accountable for the operations of the Company ever since November, 1994. The sale of the trawler MFV SUPERNA in favour of M/s. Superna Marine Exports Private Limited, followed by cancellation of such transfer on account of the efforts of the Company and the unsuccessful initiative taken at the extra ordinary general meeting of October 2003 for sale of the trawler MFV SUPERNA do require sufficient safeguards, in the conduct of the affairs of the Company.

The shifting of the registered office is left to the collective wisdom of the shareholders and therefore the petitioners cannot raise any grievance on account of the frequent shifting of the registered office of the company. However, they are always free to ventilate their viewpoint regarding the affairs of the Company at the general meeting of members of the Company. The stand of the respondents that in the absence of necessary pleadings to the effect that the facts of the present case would justify the making of a winding up order on just and equitable grounds, but such winding up would unfairly prejudice the petitioners, as stipulated in Section 397(2)(b), has been declined after careful analysis in a number of cases on the ground that it is for the Board to form an opinion that the affairs of the company are being conducted in an oppressive manner and once if such an opinion is formed the just and equitable grounds for winding up of the company become established and this Board has to grant necessary reliefs, if it again forms an opinion that such winding up would prejudicially affect the interest of the company or its members. In this connection beneficial reference is invited to a judgement of the Delhi High Court in Pearson Education Inc. v. Prentice Hall India Private Limited (2007) 136 CC 294 wherein it has been held that once oppression is established, reliefs could be granted under Section 402 of the Act. In the present case, the respondents are already found to be acting in a manner oppressive to the petitioners in the matter of the operation of the trawlers belonging to the Company and hence winding up of the Company on just and equitable grounds becomes automatic. Nevertheless, winding up of the Company, engaged in the business of operating fishing trawlers would be prejudicial to the interests of the petitioners against which appropriate alternate remedies shall necessarily be provided.

5. In view of the foregoing conclusions and in exercise of the equitable jurisdiction under Section 397/398/402 as reiterated in Delstar Commercial & Financial Limited v. Sarvottam Vinijaya Limited and with a view to regulate the conduct of the future affairs of the Company, the following order is passed.

a) Mr. Daniel Selvaraj, Chartered Accountant, Madurai (Mobile No. 9843088776) is authorised to scrutinize and verify upto date books of account, vouchers and other records of the Company since 01/04/1994 and submit a report on the financial transactions, which shall include all the receipts, payments, expenses and utilization of the receivables on account of the operations of the trawlers belonging to the Company. The parties are at liberty to make their submissions before the Chartered Accountant, who on necessary verification and after taking into account submissions of the parties, in terms of this order, shall circulate draft report among them. The Chartered Accountant, after considering the comments, if any, of the contesting parties, will submit final report which is binding on them. The whole process shall be completed by 15.04.2008. The remuneration of the Chartered Accountant will equally be borne by the petitioners as well as the respondents.

b) The respondents shall reimburse in favour of the Company the monies, if any, found diverted on verification by the Chartered Accountant, from the collections on account of the operations of the trawlers belonging to the Company within 30 days of the receipt of a copy of the report of the Chartered Accountants.

c) The Company shall carry on its day-to-day affairs and maintain the statutory records and books of account in accordance with the articles of association and the relevant provisions of the Act. The Company shall ensure that any decision for sale of its trawlers shall be taken at any general meeting of the members.

d) The Company shall, henceforth, send notices of all general meetings to the petitioners, by registered post with acknowledgement due.

6. With the above directions, the main petition and the connected applications stand disposed of. No seisin is retained over any of the contentious issues involved in the main petition save those covered in paragraph 6 (a) & (b) of this order. Ail the interim orders are vacated. No order as to costs.