Sh. Gurmit Singh, Sh. Digvijay Singh And ... vs Polymer Papers Ltd., Shri Sunil Puri, ... on 28 January, 2003

Equivalent citations: [2005]123COMPCAS486(CLB), (2003)3COMPLJ228(CLB), [2003]45SCL251(CLB)

ORDER

S. Balasubramanian, Vice Cairman

1. The undisputed facts in this petition filed under Sections 397/398 of the Companies Act (the Act) alleging oppression and mismanagement in the affairs of M/s Polymer Paper Limited (the Company) are that this company was incorporated in terms of an MOU dated 18th Oct. 1974 between M/s Fritz and Singh Pvt. Ltd. and Sunil Puri Group. M/s Fritz had two shareholders namely, the first petitioner-Shri Gurmit Singh and one Harjan Singh. On incorporation, the company and M/s Fritz entered into an agreement on 23rd Oct. 1974 by which the entire business of M/s Fritz was taken over by the company. Some of the clauses of the MOU were that M/s Fritz and Sunil Puri Group would have equal shareholding and that each group would have two directors each in the Board of the company and that as long as Harjan Singh and Gurmit Singh are alive they shall be the nominees of M/s Fritz and that Sunil Puri and one other members of its group would also be directors as long as they are alive. The company was to have two Managing Directors--Shri Sunil Puri and Shri Gurmit Singh. It also provided that both the groups shall exercise their voting rights to ensure that the directors nominated by both the groups continue in service. Another provision is that the shares held by M/s Fritz can be transferred to the family or direct dependence of Harjan Singh and Gurmit Singh and likewise shares held by Sunil Puri Group could be transferred to the family members and that the first option to purchase the shares of one group shall be with the other group.

2. The first petitioner, after purchasing the shares held by Shri Harjan Singh in M/s Fritz, sold his entire shareholding in M/s Fritz to one Manmohan Singh for a consideration of Rs. 2.5 lakhs in October, 1978. This consideration was to be set off by an amount of Rs. 1.5 lakhs being the value of 29,500 shares held by M/s Fritz in the company which were to be transferred to the first petitioner. Since the shares were not transferred to the first petitioner and full consideration had not been paid, he had filed a suit in Delhi High Court for specific performance and the suit is still pending. With the issue of bonus shares, presently the shares covered in the suit are 59,000 constituting 6.41% of the paid up capital of the company. Presently, the petitioners groups holds 11.8% shares while Sunil Puri group holds 28.62% shares. The company is a public listed company having over 450 shareholders with financial institutions holding 29.55% shares. The company has filed a civil suit in Delhi High Court alleging that the petitioners group has removed intellectual property of the company in the form of designs and drawings seeking to restrain the petitioners group from using the same. The Court has refused to grant any interim relief and the suit is pending.

3. The grievances of the petitioners are that the Puri group is mismanaging the affairs of the company and that they have removed the 1st petitioner as the MD of the company and that they are also trying to remove him from directorship.

4. Shri Arun Katpalia, Advocate appearing for the petitioners submitted: The Company is in the nature of a quasi-partnership between the petitioners group and Sunil Puri's group. The first petitioner is an expert in paper technology and because of his experience in M/s Fritz, Sunil Puri Group joined him to provide financial assistance and accordingly the company was incorporated and this company took over the business of M/s Fritz. The terms of MOU dated 18.10.1974 would very clearly indicate that the company is nothing but a quasi-partnership providing for equal participation of both the groups in the management of the company. It provides for life time directorship for Shri Gurmit Singh and also provides that he would be one of the two Managing Director along with Shri Sunil Puri. As a matter of fact the source of livelihood for both the groups comes from the company. It is also evident from the signatories to the memorandum wherein five from petitioners group and two from Puri group have signed this memorandum. The pre-emption rights given to the parties would also indicate the quasi-partnership nature of the company. Therefore, it is the legitimate expectation of the first petitioner to continue as the MD of the company and derive source for his livelihood. However, the Sunil Puri Group has removed Shri Gurmit Singh as MD. In Shri Jagjit Singh Chawla v. Tirath Ram Ahuja Limited - CP No. 57/1999-order dated 5-12-2001) this Board has held that denial of legitimate expectation in a company in the nature of their quasi-partnership could be a just and equitable ground for winding up of the company.

5. The learned Counsel further submitted: Till the year 1991 the company was jointly managed by the first petitioner and the second respondent thereafter their children join the company. In 1991, a subsidiary in the name of Global Drilling Fluids & Chemical Ltd. (Global) was incorporated and while the first petitioner was in full control of company the second respondent took control of the subsidiary. Unfortunately because of mismanagement by Shri Sunil Puri, the subsidiary started to loose heavily and presently it has an accumulated loss of over Rs. 190 lakhs which has acted as a drain on the resources of the company. Since the first petitioner was not happy with the situation prevailing in the company he proposed a separation within the promoters with either of the groups buying out the other and accordingly the Board Meetings held on 1.4.2002 a proposal for separation was placed. However, without reacting to the proposal the Puri group started buying more and more shares from the market. Since the 1st petitioner protected such purchase of shares, in a Board Meeting held on 13.5.2000, the first petitioner was removed as the Managing Director without any prior notice on false and baseless allegations against him. Before the meeting commenced, the 1st petitioner gave a letter (Annexure P-7) that the meeting was incorrectly convened as sufficient time together with agenda had not been given. He also gave a note (Annexure P-8) to the Board narrating instances of mismanagement of the company by Puri group. Inspite of his protest, the 1st petitioner was removed as MD and at the same time the 6th respondent was appointed as an additional director. The Chairman who was the nominee of both the groups could not attend this meeting for want of notice and he ultimately resigned on 20.5.2002 as a protest against the removal of Shri Gurmit Singh as MD. Only the nominees of Puri group attended that meeting and passed the resolution to remove the first petitioner as MD. Only on 18.5.2002 the first petitioner was informed

of the termination by pasting the communication on the door of his house.

6. The learned counsel further submitted that the removal of the first petitioner who had been the MD right from the incorporation of the company is not only against the provisions of the MOUs but also is a grave act of oppression. In Ebrahimi v. West Bourne Galleries Limited (1972 2 AER 492) it has been held that when there is an understanding that the parties would participate in the management of the company, removal of one party as a Director is a breach of good faith and as such a company should be would up on just an equitable ground. In the same way in Synchron Machine Tools (p) Ltd v. UM Suresh Rao (1994 3 CLJ 340 Kar), the Court has held that if an agreement exists that when a shareholder invests in a company he would participate in the management of the company then, such an understanding has to be considered to be held as a component of the proprietary right of that shareholder. The first petitioner has a right to continue as a Managing Director especially when he has given his personal guarantees and his family members have given over Rs. 13 lakhs as loan to the subsidiary. All the allegations against the first petitioner in the Board minutes dated 13.5.2002 are false and baseless. The services of the third petitioner in the company have been suspended while the sons of Sunil Puri have been employed profitably in the company. None of the family members of the first petitioner who had been associated with the company for over 25 years are in service of the company today. By these acts the Sunil Puri Group is financially squeezing the petitioners. At the same time the second respondent who is the other MD has not been keeping good health right from 1999 but the company is paying a huge amount towards his salaries and perks. However, in the reply the respondents have asserted that the second respondent is in good health even though in para 13 of the suit in Delhi HC, they have stated that the second respondent had fallen seriously ill and as such could not make any contribution in the management of the company. This would indicate that the respondents are guilty of filing false affidavits.

7. The learned counsel further submitted that the respondents are guilty of mismanaging the funds of the company. Sunil Puri engineered to divert a sum of US $ 23,000 which was due from export earnings in favour of his son studying in Canada as is evident from the letter from the export customer at Annexure P-5. This is nothing but misappropriation of the funds of the company. Further, when the 6th respondent visited aborad, he purchased a camera for US $ 1000 as noted in his expense statement, a copy of which is at Annexure A-6. This camera was purchased for his personal use but the cost was charged to the company. This is also an instance of misappropriation of the funds of the company.

8. Learned counsel further submitted: The respondents have filed a civil suit in Delhi High Court against the petitioners alleging that the petitioners had taken away various documents and drawings from the company and as such had sought for certain interim reliefs. The Court had prima-facie found that the respondents had suppressed material facts from the Court and as such had declined to grant any interim relief. Further the respondents had also suppressed the order of the High Court dated 31.5.2002 in their reply filed on 1.7.2002 in the present proceedings. In other words as they had suppressed material facts before the High Court, they have also suppressed this vital order from this Board which should be taken note of in granting appropriate reliefs in this petition. In Satish Khosla v. Eli Lilly Ranbaxy Limited (71 DLT 1). It has been held that non disclosure of proceedings

of the earlier suit would amount to playing fraud on the Court.

9. Something up his arguments, the learned counsel submitted that the loss of faith and confidence between the two groups is complete and each one is making complaints against each other. The ouster of the petitioners group from the company is complete and they are not even allowed entry into factory premises. Having removed the first petitioner as an MD, now the respondents are contemplating to remove him as a Director also. Accordingly, he submitted that the prayers in the petition at para 13 should be granted. In the alternative he submitted that since the respondents do not wish to continue the association of the petitioners group in the management of the company, either they may directed to purchase the shares held by the petitioners group or such a direction may be given to the company on a valuation to be made by an independent valuer. In K.N. Bhargava v. Trackparts of India Limited (104 Com. Cases 611) even though the company was a listed company, the Company Law Board ordered division of the assets of the company between the petitioners group and respondents group since it came to the conclusion that the company was in the nature of a quasi-partnership. In Cosmo Steels Pvt. Limited v. Jairam Das Gupta (48 Com. Cases 312), the Supreme Court has held that when the court orders purchase of its own shares by accompany in terms of Section 402, there is no need to follow the procedure prescribed for reduction of share capital in Sections 100 to 104 of the Act.

10. Shri Tripathi, Senior Advocate appearing for the respondent submitted: The foundation of the petition is that the company is in the nature of a quasi-partnership. This foundation has no basis. The company is a listed company with over 450 members while the petitioners group holds 11% shares, Puri's group holds only 30%. The reliance on the MOU of 1974 cannot in any way help the petitioners. Even though the MOU provided that the petitioners group and the Puri's group would hold equal shares, at no time this equality was maintained. Further the said MOU was with M/s Fritz and not with the petitioner. The petitioner was a nominee of M/s Fritz and once M/s Fritz had been sold out, the locus-standi of the petitioner being a nominee of Fritz no longer subsists and therefore, he cannot claim perpetual continuity as an MD. In other words from the MOU the first petitioner cannot claim any individual right. Right from incorporation the company was a public company and whenever right shares were issued the petitioner did not subscribe to the same as is evident from the chart of shareholding pattern given during the hearing. Thus there is no substance in his claim that the company is a quasi partnership. It has been held by the Apex Court in Eilpest Pvt Ltd v. Shekhar Mehra (1996 10 SCC 696) that once a company is incorporated and the promoters have voluntarily undertaken to bind themselves by the provisions of the Companies Act, any claim of the company being a quasi partnership cannot be easily accepted.

11. The learned further submitted: The petitioner was removed as the MD due to his various prejudicial acts against the interest of the company. His close relations have incorporated a company in the name of A2Z Filtration Specialities Pvt. Ltd. in May 2002 to carry on a similar business as that of the company. The registered office of that company is in the house of the 1st petitioner clearly evidencing the fat that he is also actively involved in the affairs of that company. With a view to take away experienced employees of the company working in the Engineering Division, he accepted the resignation of 11 employees during the period from 5th May to 9th May, 2000 hastily and without consulting the other MD or the Board. All these employees were paid huge

terminal benefits within 24 hours of the submitting the resignation and have been employed in the new company. The Engineering Division which was contributing nearly 50% of the profits of the company has now become practically defunct due to the acceptance of resignation of key employee by the first petitioner. The first petitioner also accepted the resignation of the second petitioner who was the Vice President Operations and was in change of the said division despite the protest of the second respondent. Thus the first petitioner in breach of his fiduciary responsibilities to the company had acted malafide in accepting the resignation en-bloc of the key personnel of the Engineering Division and thus as acted against the interest of the company. Further the petitioners had also removed intellectual property of the company in the form of various Engineering drawings/design, manuals etc by taking photo copies and have started using these in the new company. Therefore, in an emergency Board meeting held on 13.5.2002 the conduct of the first petitioner in accepting the resignations was discussed in detail and the Board decided to terminate his services as an MD since he could not give any justification for accepting the resignations of the employees. Since he had acted against the interest of the company, the decision of the Board to remove him as MD, cannot be in any way questioned and cannot be considered to be an act of oppression. Further in a petition under Section 397 only the right as a shareholder can be agitated and there is no scope for entertaining directoral complaints as held inV.M. Rao v. Rajeshwari Ramakrishnan (61 Comp. Cases 20). Since the appointment of a Managing Director is on a contractual basis, these contractual rights cannot be enforced in a 397 petition as has been decided by this Board in ML Thukral v. Krone Communications Limited (86 Comp. Cases 642).

12. The learned counsel further submitted: Article 154 of the Articles of the Association of the company clearly prohibits carrying on a competing business by a Director. In contravention of this Article, the close relatives of the petitioners have incorporated a new company to do competing business. They have not only started a competing business, they have also employed those whose resignations were accepted by the first petitioner from the employment of the company and are also using the intellectual property of the company. In addition, they are also seeking to take away the customers of the company for their own company as is evident from certain orders placed by the new company on the suppliers of the respondent company. Such a person can never seek nor is entitled for any equitable relief from this Board. It has been held by the Apex Court in Gujarat Bottling Company Ltd v. Coco Cola Ltd (1995 5 SCC 545) that to invoke the equitable jurisdiction of the court, the conduct of a party is important and he should be able to show that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he is seeking relief (para 47). In the present case, the 1st petitioner has brought upon himself the removal by his unfair conduct towards the company and such cannot complain of the same as an act of oppression and seek reliefs from this Board.

13. He further submitted: Other allegations in the petition have no merits. The camera bought by the 6th respondent for US $ 1000 is used for the business purpose of the company and is included as a part of the assets of the company. The subsidiary company which is alleged to have accumulated losses was no doubt also managed by the second respondent but its losses cannot be attributed to him. That company had a foreign collaborator who had failed to honor its commitment in providing proper and timely technical know how and also providing unsecured interest free loans in terms of

MOU. In every annual report of the subsidiary these reasons have been elaborately explained. Since that company has great potential, the respondent company had to fund the operation of the subsidiary. All the decisions taken in respect of the subsidiary where in the knowledge of the petitioners and also with the consent and approval of the first petitioners as the Managing Director of the company. In other words, the loss incurred by that company cannot be attributed to the second respondent

14. The learned counsel further submitted that: The allegation that the second respondent is unwell or that due to his mental condition he is unable to discharge his responsibilities as a Managing Director is malicious and without any basis. It is true that at times the second respondent was indisposed and could not attend his functions for short period. The second respondent continues to manages the affairs of the company offering his valuable guidance and inputs for the growth and prosperity of the company and as such payment of emoluments and perquisites to him cannot be considered to be an act of mismanagement. As a matter of fact it is the petitioners, who, without holding any position in the company now, are continuing to illegally and unauthorizedly retaining their perquisites like car etc. In so far as the alleged diversion of US Dollar 23,000 by Sunil Puri in favour of his Son Dhruv Puri is concerned, the same is false and baseless. No such diversion took place and the entire nature of the transactions had been explained in Para 6.8 of the reply from which it could be seen that whatever amount that was due to the company for exports had been received and accounted for by the company.

15. Summing up his arguments the learned counsel submitted: The main purpose of this petition is to force the company or the respondents to purchase the shares held by the petitioners since their desire to go out of the company did not materialize. The CLB cannot give any such directions in view of the fact that none of the allegations against the respondents has been established and as such there is no oppression or mismanagement. Further, such a direction can be given only in cases of companies which are closely held or family companies or companies in the nature of quasi-partnership or where there is a deadlock. Since the respondent company is a listed company, none of the above criteria would apply and as such the question of directing the company to purchase the shares of the petitioners does not arise. Further, as per Section 77A of the Act, a listed company cannot buy its own shares without following the provisions of that Section and SEBI Regulations framed under that section. In terms of SEBI Regulations, before buying its own shares, the company has to file a certificate of solvency which, in view of the present financial position of the company, it cannot do so. Therefore, there is legal impediment in purchasing shares of the petitioners by the company. No judicial authority has powers to pass any order which is against the provisions of law. Only the Supreme Court, in exercise of its powers under Article 142, can pass such orders as may be necessary to do complete justice between the parties. Even in exercising these powers, the Supreme Court has held in Supreme Court Bar Association v. Union of India (1998 4 SCC 409) that "it however is to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot construed as powers which authorize the Court to ignore the substantive rights of a litigant while dealing with the cause pending before it. The power cannot be used to supplant substantive law applicable to the case or cause under considering of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with the subject and thereby to

achieve something indirectly which cannot be achieved directly." Therefore, when Section 77A prescribes certain conditions for a company to buy back its own shares, the Company Law Board has no powers to direct the company to purchase its own shares without complying with the statutory provisions. Presently the market price of the shares of the company is about Rs. 18 per share and the petitioners are free to seel the shares in the market since the shares of the company are listed. There is absolutely no justification nor is legally permissible for the company to value its shares and purchase the shares of the petitioners at that value.

16. Shri Arun Kathpalia, appearing for the petitioners submitted in rejoinder: The first petitioner did not act in any way against the interest of the company. He accepted the resignation of only three employees of the Engineering Division. In the past also resignation of employees had been accepted by Managing Directors without reference to the Board as no employee who does not want to continue in the company can be forced to continue. Further, neither first petitioner nor other petitioners have anything to do with the new company. They cannot prevent their relations from carrying on any business that they wish to carry on. Further, the respondents have not denied that the sixth respondent and the second and third petitioners had entered into a partnership for carrying on similar business as that of the company in the name of "Filtration Sciences" in May 1996. This fact has been noted by the Delhi High Court also in its order dated 31.5.2002. Only after filing of this petition, by a notice dated 1.6.2002, the sixth respondent sent a notice of dissolution of the partnership. Therefore, the allegation that the petitioners have started a competing business is not only factually incorrect but also cannot be considered to be against the interest of the company. The first petitioner has only rented out a portion of his house to this new company purely for receiving rent for his livelihood. The fact of the company being a quasi-partnership between the petitioners and Sunil Puri Group cannot be disputed. Even though the MOU dated 18th October 1974 was between M/s Fritz and Sunil Puri Group, yet the fact is that the first petitioner was controlling M/s Fritz and the MOU specifically mentions in Clause 5.2 that as long as the first petitioner is alive he would be a nominee of Fritz and that he would be one of the Managing Directors. It is not disputed that M/s Fritz had been sold as early as in 1978, but the first petitioner continued to be in the management as an MD for over 28 years without any break. It is not disputed that the first petitioner had invested his funds in the company like in any other partnership. It is only an after though on the part of the Sunil Puri Group to deny the true purport of the MOU. Just like any other partnership, the sons of the first petitioner and Shri Sunil Puri joined the business of the company. Further, in terms of Article 3 of the Article of Association, the company itself entered into an MOU dated 23.10.1974 with M/s Fritz (a copy of the MOU was handed during the hearing by the learned counsel for the petitioners) which would also strengthen the claim that the company is in the nature of a quasi-partnership. Just because the company is a listed company, it does not mean that principles of quasi-partnership cannot be applied. This Board has applied the principles of quasi-partnership in Trackparts India Limited Case even though that company was a listed company.

17. In regard to contention of the learned counsel for the respondents that there is a legal bar in terms of Section 77A of the Act in directing purchase of shares of the petitioners by the company, the learned counsel submitted that the powers under Section 402 of the Act are so wide that it is not circumscribed by any limitations. In Bennet Coleman And Co v. UOI (47 Comp. Cases 92) Bombay

High Court has held that Chapter VI of Part VI of the Companies Act is a complete code by itself and that the exercise of powers under Section 402 is not limited by any other provisions of Act. Such an observation has also be made by the Supreme Court in Cosmos Steel Limited (48 Comp. Cases 312). The legislature has enacted Section 77A with a view to put some checks and balances when a company voluntarily desires to purchase its own shares and the provisions of this Section are not applicable in a case where CLB in terms of specific provisions of Section 402(b) directs a company to purchase the shares held by a member. The observation of the Apex Court in Supreme Court Bar Association case cannot be applied in the present case in as much as Section 402 specifically confers the power to order purchase of shares of a member by a company while in that case, the Court held since there is no provision in the Contempt of Courts Act to debar an Advocate, even the Supreme Court cannot do in exercise of its powers under Article 142. Therefore, there is absolutely no legal bar in directing the company to purchase the shares held by the petitioners in terms of Section 402 of the Act.

18. Shri Tripathi, in rebuttal, submitted: The acquisition of shares by the respondents cannot be considered to be an act of oppression against the petitioners. The respondents have been acquiring shares for a long time without any objection by the petitioners. The reason for removal of the petitioner as MD was an account of its prejudicial act against the company. He had accepted the resignation of even people with 25 years of service with the company that too within a period of one week only with the object of taking them over to the new company floated by the petitioners group. In Trackparts case cited by the counsel for the petitioner, it was established that it was a family company and that the parties has agreed before the CLB for formal division of the company in terms of certain family settlement, therefore, the facts of that case are not applicable to the present case. The Bennet Coleman case was decided by Bombay High Court in 1974 and with the enactment of Section 77A with the non obstante clause, the powers under Section 402 have to be exercised within the frame work of Section 77A. Therefore, in view of the fact that the removal of the petitioner was due to his prejudicial acts against the company and that no other allegation in the petition has been established, this petition should be dismissed.

19. I have considered the pleadings and arguments of the counsel. During the hearing of the petition, a suggestion was made by this Bench, that in view of the willingness of the petitioners to go out of the company on their shares being purchased by the company, the respondents could consider this proposal. The respondents desired to have this proposal placed before the Board of Directors of the company for their consideration. Later, they submitted that the Board was not agreeable to the proposal due to various difficulties and it was urged that the petitioners could sell their shares in the market as the shares were listed.

20. The main complaint of the petitioners is that the removal of the 1st petitioner as an MD is an act of oppression. Normally, as a principle, directorial complaints cannot be agitated in a 397/98 petition as the complaints in such petition should be relating to the rights qua a member. The learned counsel for the respondents cited the case of VM. Rao in this regard. However, this Board has been taking a view that this principle cannot be strictly applied in family companies, companies with a few identifiable groups of shareholders or companies in the nature of partnership, wherein there has been active management participation by all the groups of shareholders. In the present

case, the petitioners have invoked the principles of partnership and have sought for continuation of the 1st petitioner as an MD of the company on the basis of his active his participation in the management from the incorporation of the company, and also on the basis of the MOU.

21. There is no readymade yardstick to determine as to when an incorporated company could be considered to be a quasi partnership for the purposes of a petition under Section 397/98. It would depend on the fats of a particular case. Equality in the shareholding and there is deadlock in the management, conversion of a pre existing partnership into a company, where there is an agreement for equal participation in the company etc are some of the circumstance. The contention of the respondents is that there is no question of applying the principles of partnership on various grounds as indicated as part of the arguments of their counsel. - there was no pre-existing partnership, there is no equality in the shareholdings, there is no deadlock in the management, there is no written agreement between the 1st petitioner and Sunil Puri/company to the effect that the company would be jointly managed as the MOU was between M/s Fritz and Sunil Puri only etc. Normally, when two or more persons form a company, the presumption is that they have decided to work within the framework of the Articles and subject themselves to the discipline applicable to an incorporated company as held by the apex Court in Kilpest case. Viewing in this manner, the respondents would be right in contending that in the absence of the provisions in the Article for joint management, a share holder cannot demand continuation as an MD. In this connection it is worthwhile referring to the case of Vijay Krishna Jaidka v. Jaidka Motor Co. Ltd. (1997 1 CLJ 268 CLB) wherein, after discussing various decided cases, practically all the objections as in this case were examined by this Board and it concluded that to treat a company as a partnership, it was not necessary to have equal shareholdings, no need for deadlock, no need for pre-existing partnership etc. It also observed that an analysis of various decisions showed that courts have been looking for some basic understanding written or unwritten between parties. Therefore, if the facts reveal some basic understanding between parties that the company would be managed on partnership principles, then the same could be applied in a petition under Section 397/98. Even in Kilpest case, the Apex Court has not totally barred the application of partnership principles in a company, but has only cautioned that the claim to do so cannot be easily accepted. Therefore, once the facts and circumstances of a case indicate that on piercing the corporate veil, the real structure is found to be not that of a company, equitable consideration applicable to a partnership could be applied to that company.

22. In the present case, the petitioners have invoked the principles of quasi partnership on the basis of the terms of the MOU dated 18th October 1974 between M/s Fritz and Shri Sunil Puri. Some of the clauses of the MOU relied on by he petitioners are as follows:

> a. Clause 1: Fritz and Singh Private Limited are leading manufacturers of filters in India and have acquired a special name and reputation in the trade circle and in this special business.-----.
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> b. Clause 4.2: The paid up capital of the company from time to time shall be such as may be necessary to meet the requirements of the project. The immediate proposals for issue of share capital are as follows: Fritz and Singh Private Limited - Rs. 3.5 lacs, Sunil Puri Group - Rs. 3.5 lacs, Foreign Collaborators - Rs. 1 lac. In addition, shares

of Rs. 14 lacs will be issued for subscription by public financial institutions and underwriters.

c. Clause 4.4: The voting stock of the company shall always be issued, subscribed, allotted to and paid for in such manner to maintain the proportion of 50:50 of voting power as between the Fritz and Singh Private Limited and Sunil Puri Group.

d. Clause 5.2: Out of the directors for the time being, 4 directors (2 each) will be nominees of the Fritz and Singh Private Limited and sunil Puri Group. So long as Shri Harjan Singh and Gurmit Singh are alive, they shall be the nominees of Fritz and Singh Private Limited. Similarly, for Sunil Puri Group, Sunil Puri and one other member of this family shall be the nominees so long as they are alive, subject to the provisions of the Companies Act, shall not retire by rotation.

e. Clause 7.1: After implementation of 6.1, then, the Managing Directors of the company shall always be a nominee of each group in equal proportion i.e. Sunil Puri and Shri Gurmit Singh.

f. Clause 8: It is agreed that the shares held by Fritz and Singh Private Limited in the new proposed company may, if desired, be transferred to the immediate family or direct dependence of Shri Harjan Singh and Shri Gurmit Singh. Similarly, in the case of shares held by Shri Sunil Puri Group, they may be transferred, if desired, to the immediate family of Shri Sunil Puri. If, however, shares of either party are to be sold, there should be first refusal of the opposite party.

g. Clause 11.1: Each of the parties here to will exercise its voting rights for the time being in the company and take such other steps as for the time being lie within its power to prevent the passing of any resolution for the removal from office, of the Chairman, the Executive Director, or any other director of the company, nominated or appointed to such office by either party in terms of this agreement.

h. Clause 11.3: Each of the parties here to agree to exercise the voting rights in the company and to take such other steps as for the time being lie within its power to ensure that the company performs and observes the provisions of this agreement.

23. Before examining the above clauses, it is relevant to refer to Article 3 of the Articles of Association of the company which reads "The company shall forthwith enter into agreement with Fritz and Singh Private Limited in terms of the draft agreement which has for the purposes of identification, been signed by the first three subscribers to the Memorandum of Association and the Directors shall carry the same into effect". A copy of the agreement dated 23rd October, 1974, in terms of this Article was produced during the hearing by the counsel for the petitioners. In terms of this agreement, the assets and liabilities of M/s Fritz and Singh Private Limited were taken over by the company. Some of the clauses of this agreement are:

a. Clause I: "The seller company are leading manufacturers of filters in India and have acquired a special name and reputation in this field amongst the trade and in the special business".

b. Clause III: The seller company embarked upon the establishment of a new undertaking for the manufacture of filter paper in India and to this and strived and succeeded in obtaining collaboration with the internationally known firm M/s Carl Schleicher and Schull of West Germany upon most favourable terms.

c. Clause IV: The seller company has also obtained the requisite approval of the Government of India to the aforesaid collaboration.

d. Clause V: The seller company has imported capital goods after obtaining permission, licenses, clearance etc. from the various authorities.

e. Clause VI: In the interest of the Project, the Seller company has agreed that the project be implemented by the buyer company and has also agreed to transfer to it its rights, privileges, permissions, licenses and authorities etc on the terms and conditions herein after appearing:

24. A combined reading of these agreements would indicate that Sunil Puri's group has recognized the expertise of M/s Fritz in manufacture of filter papers and from the 2nd agreement it is apparent that the entire project was conceived and all preparatory steps were taken by M/s Fritz to implement the project. As far as the terms in the first agreement is concerned, the respondents have taken a stand that the agreement was only with M/s Fritz and as such the petitioners cannot seek enforcement of any of these terms. It is to be noted that M/s Fritz had only two shareholders and both had jointly signed the first agreement on behalf of M/s Fritz. The experience of Fritz in manufacture of filter paper, as recited in both the agreements, could nothing but the experience/expertise of these two members. In other words, once the corporate veil is pierced, it is clear that the experience of M/s Fritz is nothing but the experience of its shareholders viz Shri Gurmit Singh and Shri Harjan Singh. In regard to piercing the corporate veil, I may beneficially refer to the judgment of the Apex Court in New Horizons Limited v. UOI (89 CC 849) wherein the court has held that when one is looking for experience of a company it is permissible to see through the corporate veil to find out whether the experience of a company could be attributed to the experience of its members. It is on record that Shri Harjan Singh had sold his shares in M/s Fritz to Gurmit Singh who had then sold all the shares to an outsider. There is nothing on record that after M/s Fritz had been sold out to an outsider, M/s Fritz had anything to do with the company, notwithstanding the fact that in terms of Clause 10 of the Agreement between Shri Gurmit Singh and Shri Manmohan Singh dated 29.10.1978, the later had reserved the right to have Shri Gurmit Singh removed as a nominee of M/s Fritz from the Board of the company in case Shri Gurmit Singh failed to purchase the shares in the company held by M/s Fritz. It is on record that a civil suit is pending in this regard. However, admittedly the 1st petitioner continued as an MD right from the inception of the company till be was removed in 2002. Another aspect worth noting is that as per the chart of shareholdings of both the groups filed at the time of hearing. I find that there has been

wide fluctuation in the share holdings of both the groups. From 28.57% holdings each in 1974, Puri's shareholding went upto 42.26% in 1988. However, the petitioners group shareholding came down to .05% in 1980 and came to 7.39% in 1998 but the 1st petitioner continued as an MD. This itself would clearly establish that even Puris had never questioned the right of the 1st petitioner from continuing as an MD in terms of the MOU notwithstanding the sale of M/s Fritz to an outsider and that there was no equal shareholding. The very fact that the first agreement stipulates, by name, that Shri Gurmit Singh and Shri Harjan Singh would be a directors for life along with Shri Sunil Puri with another of his nominee would indicate that both the groups should have joint management of the company not withstanding the fact that the agreement itself provides for public subscription later-as a matter of fact, with the proposed public subscription for Rs. 14 lakhs, both the groups put together would be holding only 30% shares in the company. Further, I also find that there is equality in the remuneration drawn by Shri Gurmit Singh and Shri Sunil Puri as is evident from the explanatory statement in the notice for the AGM held on 30.9.99, in regard to the remuneration proposed for both. Other facts which lead to the conclusion that the company is in the nature of a quasi partnership with joint management are that the sons of the 1st petitioner (2nd and 3rd petitioners) and Sunil Puri (3rd and 6th respondent) were gainfully employed in the company and the petitioners had given loans to the company. In other words, notwithstanding the fact that the company is a listed company, the same was being managed just in the same manner as that of a closely held company.

25. Further, the petitioners have also invoked the principles of legitimate expectations. In cases of legitimate expectations, the denial of the same could be considered to be an act of oppression. For the authority on the principles of legitimate expectations reference could be made to Boyle & Birds' Company Law III Edition wherein it is stated that In a quasi-partnership type company, the Court may take account of legitimate expectations of members." In Re Elgindata Ltd.: [1991] BCLC 959 it has been held that "In general members of a company have no legitimate expectations going beyond the legal rights conferred on them by the constitution of the Company, i.e., to say its Memorandum and Articles of Association. Nonetheless legitimate expectations super imposed on a member's legal rights may arise from agreements or understanding between the members. In Atmaram Modi v. ECL Agrotech (1999 98 CC 463) this Board has held that in the course of business of a partnership, a partner is entitled to have certain legitimate expectations. Now in the present case, even assuming that no reliance can be made on the first MOU and that the Articles do not provide for continued appointment of Shri Gurmit Singh as an MD, whether the principles of legitimate expectations could be applied. In Shri Dipak Mehta v. Shree Anupar Chemicals Pvt Ltd (1999 33 CLA 33 CLB) case, this Board has held that we have to examine whether the facts reflect the existence of any understanding of joint management justifying the claim of legitimate expectation of being an MD. Karnataka High Court also, in Synchron Machine Tools Pvt Ltd case, has recognized application of legitimate expectation in a petition under Sections 397/98. It is to be noted, as is apparent from the second agreement that the entire business of M/s Fritz had been taken over by the company where after, M/s Fritz itself had been sold out on appointment of Shri Gurmit Singh as an MD in the company and he has served in that capacity for over 25 years drawing remuneration. With the entire business of M/s Fritz having been taken over, the only source of livelihood for Shri Gurmit Singh was from the employment of the company. Therefore, even assuming that the MOU with M/s Fritz cannot be relied upon by the petitioners after its sale to an outsider, yet, the sequence of the events would

indicate that there had been a tacit agreement that Shri Gurmit Singh would continue as an MD with remuneration. As held by this Board in Thirthram Ahuja's case (supra), when certain groups of shareholders who have formed a company and have been participating in the affairs of a company for a long time with remuneration, then there can be a presumption of legitimate expectation and exclusion of one from the management could be an act of oppression. In the present case, in view of my findings that the agreement Shri Sunil Puri and M/s Fritz is nothing but an between Shri Sunil Puri and Shri Gurmit Singh and that the long continuation of Shri Gurmit Singh as an MD with remuneration, I have no hesitation to come to the conclusion that the principles of quasi partnership and legitimate expectation can be applied in this case.

26. The respondents have raised an issue that the principles of quasi partnership cannot be applied to a listed company. Whether it can be done or not would depend upon the facts of a case. In Trackparts case, even though the company was listed company, yet the facts of that case revealed that it was practically managed by members of a family and their understandings and agreements governed the management of affairs of the company and therefore, this Bench applied the principles applicable to a family company in molding the reliefs. In the same way, in Thirtha Ram Ahuja's case, even though there were more than 40 shareholders, partnership principles were applied. Therefore, the number of shareholders in a company is not the only yardstick to determine whether principles of quasi partnership could be applied or not but would depend on other facts of the case. In the present case, even at the time of incorporation of the company, as revealed by the first MOU, public participation in over 60% shares was envisaged, yet, the MOU provided for life time directorship for Sunil Puri and Shri Gurmit Singh. Further both of them had been continuing as MDs for over 25 years. Their sons have got gainful employment in the company. All these facts would show that notwithstanding the fact that the company is listed company,yet, has been managed in the guise of a closely held company and therefore, I do not find any impediment in applying the principles of partnership to this company.

27. Having held that the principles of partnership and legitimate expectation could be applied in the present case, whether the removal of the 1st petitioner as an MD could be considered to be an act of oppression in view of the allegations of the respondents against him, has to be considered. They have alleged that the 1st petitioner has acted in breach of his fiduciary duties to the company by accepting the resignations of the key employees of the Engineering Division and engaged himself in a competing business. They have alleged that his engaging in a competing business is also in violation of the provisions of Article. In addition, the other two petitioners have been accused of removal of the intellectual properties of the company. In regard to the 1st petitioner engaging himself in a competing business, no materials have been placed before me that either he is a shareholder or a director in the other company except that the registered office of that company is in his house. Whether a director could be accused of breach of his fiduciary duties if his near relations engage themselves in a competing business is a matter on which no authorities have been cited by the respondents and as a matter of fact this issue need not be examined in the present case, as it is on record that the sons of the 1st petitioner and the 2nd respondent had formed a partnership in the name of "Filtration Sciences" (Annexure P-4) to carry on a similar business as that of the company and as such, the respondents cannot complain that the relatives of the petitioners have engaged themselves in a competing business. There is nothing on record to evidence that the business of the

company had been diverted except some evidence has been produced that the new company has dealings with a supplier to the company of some materials. Sourcing supply of raw materials from a common supplier cannot be considered to be diversion of the business of the company. In regard to the allegation relating to taking away of intellectual property of the company, a substantive suit filed by the respondents is pending before the High Court and as such I do not propose to deal with this allegation in this order.

28. As far as allegation relating to acceptance of the resignation of employees of the Engineering Division is concerned, the stand of the respondents is that this division was contributing substantially to the profit of the company and in view of the resignation of the employees the Engineering Division has become non functional and as such has adversely affected the profitability of the company. They have also alleged that the first petitioner accepted the resignation without consulting other directors and in breach of the decision of the Board in the meeting held on 13.5.2002 that no director would take unilateral decision. Even though the first petitioner has justified has action on the ground that an earlier occasions also MDs have accepted resignations without reference to the Board, yet, the manner in which the 1st petitioner accepted the resignations and removed the employees immediately thereafter on payment of huge terminal benefits indicate that the action of the 1st petitioner in this regard was not bonafide, especially when we look at the fact that some of the employees had joined the new company. A director in discharge of his fiduciary duties has to act for the benefit of the company. As already indicated in Paragraph 31 of this order, in ECL Agrotech case, this Board had examined the nature of fiduciary responsibilities of a director and held that if a director breaches his fiduciary duties due to which he is removed, then, he cannot complain. In the present case, since the 1st petitioner had acted against the interest of the company due to which the company has been prejudicially affected, there is no scope to find fault with the decision of the Board in removing him as MD. However, it is on record that the Board Meeting held on 13.5.2002 was convened with a day's notice without any agenda proposing the removal of the 1st petitioner as MD. In all fairness, the respondents should have given adequate notice or at least should have put this business in the agenda so that the petitioner would have had sufficient time to defend himself. Further, this Board Meeting was attended only by the directors belonging to these two groups and that the directors belonging to Sunil Puri group approved the removal. It is also to be noted that all the allegations against the petitioners were narrated by the 6th respondent who was thereafter appointed as an additional director. Further, it is also seen that in the AGM held on 30.9.2000, the approval of the shareholders was taken for appointment of the 1st petitioner as MD. This being the case, it is doubtful as to whether an MD appointed by the shareholders could be removed by the Board without approval of the general body. Anyway the issue becomes irrelevant in view of the final order that I propose to pass.

29. In regard to the allegation relating to payment of remuneration to Shri Sunil Puri in spite of his being unwell, the same MOU under which the 1st petitioner claims continuation as MD with remuneration is applicable to Shri Sunil Puri also. Therefore, even assuming that Shri Sunil Puri was not well payment of remuneration to him cannot be questioned by the petitioners, especially when the 1st petitioner was aware of such payments earlier and never protested. In regard to other allegations relating the subsidiary, diversion of US $ 23,000 and purchase of a camera for US $ 1000, I find the explanation of the respondents as satisfactory.

30. The learned counsel heavily relied on various adverse observations of the High Court against the respondents more so relating to suppression of vital facts. I do not propose to take cognizance of the same, as, it is settled law that any decision or observation in interlocutory orders, that too, prima facie observations, cannot be taken into account in any other proceedings. As a matter of fact, the learned Judge himself, in the last para of his order has stated "It is however made clear that any observation made by mere in this order shall have no reflection on the merits of the case." Therefore, I am not considering the cases cited by the learned counsel for the petitioners on the principle that one has to come to court with clean hands.

31. Now the relief. Even though the main relief sought in the petition is that the 1st petitioner should be restored as an MD, yet, during the hearing the petitioners have express their desire to go out of the company on receipt of fair consideration for their shares. The respondents contend that since none of the allegations has been established, no relief should be granted. In this connection I may refer to Atmaram Modi v. ECL Agro Tech (98 CC 46 CLB). In that case, the main grievance of the petitioner was that he had been removed as a director even though the company was in the nature of a quasi partnership with agreement of equal participation in the management. He sought for reinstatement. Even though this Board accepted his plea that the company was in the nature of a quasi partnership, yet, it did not reinstate him as it was found that, in breach of his fiduciary duties to the company, he had taken away the company's major customer to his own company. Even then, this Board did not dismiss the petition. Instead it observed "However, we do not propose to do so. In a Section 597/39 petition, even if the petitioner fails to establish the allegations of oppression and mismanagement, as we observed in Ramadas Motor Transport Ltd.'s case (C.P. No. 15 of 1994), relying on Needle Industries (India) ltd.'s case [1981] 51 Comp Cas 743 (SC), the ultimate object in a Section 397 petition is that the order passed by the Company Law Board should put an end to the matters complained of, taking into consideration the interest of the company and the shareholders. It is an admitted position that the petitioner's group holds 25 per cent. shares in the company, with which they would be in a position to block any special resolution. The petitioner has always expressed his desire to part with his shares and certain efforts were also made towards this end without any success. Therefore, we consider it appropriate, in the interest of the company and the shareholders, that the respondents should purchase the shares of the petitioner's group". In the present case, the petitioners hold about 11% shares and according to the respondents, as averred in the sur rejoinder, the petitioners are indulging in various acts interfering with the affairs of the company even now, which prejudicially affect the company. Further, when we apply the principle of legitimate expectation, in case such expectation does not, for whatever reason materialize, then the affected shareholder should have the right to exist from the company by selling his shares. The respondents have taken a stand that the petitioners could sell their shares in the open market. Similar suggestion was made in Thirtha Ram Ahuja's case also. On that suggestion, this Board observed "The respondents have submitted that not withstanding the provisions in the Articles for pre-emptive rights, they would not object to the petitioners selling their shares to any outsider. It is to be noted that the company is a private limited company (deemed public company) and its shares are not traded. Further, the mere 12% shares held by the petitioners as against 51% shares held by the respondents would not find any outside buyers. It is on record that for many years, the majority on the Board was with the Chawlas and their contribution to the progress of the company has not been denied by the respondents. The very stand of the respondents that they would neither give a

representation to the Chawlas nor would purchase their shares is nothing but an oppressive act" and directed that the shares of the petitioners be purchased by the company or the respondents on a valuation to be made by an independent valuer. In the present case, admittedly the 1st petitioner had been int he management as an MD along with Shri Sunil Puri from the incorporation of the company and his contribution to the company has been recognized by the general body and the respondents themselves. In para 13 of the plaint before the High Court the respondents have averred "Till early 2000 the company was flourishing under the hands of its Managing Directors under the hands of Shri Sunil Puri and Shri Gurmit Singh". In the explanatory statement to the notice for the AGM in regard to increase in the remuneration of the MDs it is stated "The contribution of both the Managing Directors are extremely well and with their full efforts, the overall situation of the company has improved.-----In view of their performance and keeping in mind the cost of inflation, the Board decided to increase their remuneration". Therefore, when the company has flourished in the hands of the two promoter MDs for over 25 years, and when one parts ways with the other, in equity, the shareholder going out of the company should have a share of the prosperity of the company. Another reason as to why the shares should be valued is that now the company is practically under the control of Sunil Puri group after appointment of 3 additional directors from that group recently notwithstanding their claim that the company is a listed company. The market price of shares do not reflect the fair value of shares. I find from the balance sheets of the company that it has a huge reserves and surplus and the petitioners are legitimately entitled to a portion of the same in proposition to the shares held by them. For that purpose, it is necessary to value the shares of the company by an independent valuer and the shares should be bought by the company or the Sunil Puri group. This decision is in line with the decisions of this Board in some of the cases like Thirth Ram Ahuja, ECL AGro Tech etc cases wherein in exercise of its powers under Section 402 of the Act, this Board had ordered the purchase of shares of one group by the other or by the company on a valuation made by an independent valuer.

32. For a direction to the company to purchase the shares held by the petitioners in the company, the respondents have relied on Section 77A of the Act to contend that in view of the non obstante provision in that Section, this Board cannot order purchase of the shares by the company in terms of Section 402 of the Act without complying with the provisions of Section 77A. For the proposition that a Court cannot act against the provisions of a statute, they have also relied on the observations of the Apex Court in Bar Council of India case. I do not think that the decision in that case is applicable to exercise of powers under Section 402. In that case the Apex Court was examining as to whether in exercise of its jurisdiction under Article 129 read with Article 142 of the Constitution, it could suspend a contemner advocate from practising as an advocate. After examining the provisions of Advocates Act 1961 and Contempt of Courts Act 1971, the Court held that it is only the Bar Council of India and the Bar Council of the State that have been empowered by Advocates Act, to suspend an advocate and "This Court, therefore in exercise of its jurisdiction under Article 129 cannot take over the jurisdiction of the Disciplinary Committee of the bar Council of the State or bar Council of India to punish an Advocate by suspending his licence, which punishment can only be imposed after a finding of "professional misconduct" is recorded in the manner prescribed under the Advocates Act and the Rules framed there under." (para 40).

33. In the present case, this petition has been filed under Sections 397/98 of the Act. Both the Sections empower the Company Law Board to make such order as it deems fit with a view to put an end to the matters complained of. Section 402 provides that without prejudice to the generality of the powers of the CLB under Sections 397/98, any order under either of these Sections could provide for certain reliefs as indicated in that Section. Sub-sections (b) and (c) are relevant in the present case. Sub-section (b) reads "the purchase of shares or interests of any members by any other members thereof or by the company" and Sub-section (c) reads "in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital. Thus it is clear that this Board has been statutorily vested with the powers to order purchase of its shares by a company and consequent reduction in the share capital. The only issue for consideration is whether this power is subject to compliance with the provisions of Section 77A in view of its non obstante provision. Before examining this issue, I may refer to certain provisions in the Act in terms of which a company could purchase its shares even before enactment of Section 77A and which are still in statute book. In this connection, Section 100(1)(c) provides that by passing a special resolution, a company could pay off any paid up capital meaning thereby purchase of its own shares and the only requirement is that in terms of Section 101, it should get the Court's approval in terms of Section 102. Likewise, in terms of Section 391, a scheme of arrangement of arrangement may result in purchase of its own shares by a company. There are a number of decided cases in which it has been held that the Court can sanction a scheme even if involves doing acts for which procedure is prescribed in other Sections of the Act. (In Re Asian Investments Ltd (73 CC 517): Hindustan Commercial Bank Lt v. Hindustan General Electric Corporation Ltd (30 CC 367). If the contention of the learned counsel for the respondents that no court can bypass the provisions of Section 77A, it would only mean that the provisions of those Sections empowering the Court to pass an order to a company to purchase its own shares would be a nugatory. When the legislature has intended that this Board should have the powers to order purchase of its own shares by a company with the view to put an end to the matters complained of, it would have never intended that such a power is subject to the provisions of the other Sections. In this connection reference may be made to the observation of the Supreme Court in CEO and Vice Chairman Gujarat Maritime Board v. Haji Daud Haji Harun Abu (1996 11 SCC 23) "One of the first principles of law with regard to the affect of an enabling act is that if a legislation enables something to be done, it gives power at the same time by necessary implication to do everything which is indispensable for the purpose of carrying out the purposes in view". Since under Section 402, the purpose of passing an order to a company to purchase its own shares is with a view to put an end to the matters complained of, the purpose cannot be served if the provisions of other sections have to be complied with. In Bennet Coleman case (supra), the Division Bench of Bombay High Court has extensively discussed the powers of the court under Section 402 of the Act came to the following conclusion: "An examination of the aforesaid Sections clearly brings out two aspects, first, the very wide nature of the power conferred on the court, and secondly the object that is sought to be achieved by the exercise of such power with the result that the only limitation that could be impliedly read on the exercise of the power would be that nexus must exist between the order that may be passed thereunder and the object sought to be achieved by these sections and beyond this limitation which arises by necessary implication it is difficult to read any other restriction or limitation on the exercise of the court's power. We are, therefore, unable to accept Mr. Sen's contention that the court's powers under Section 398 read with Section 402 should be read as subject to the other provisions of the Act dealing with normal

corporate management or that the court's order and directions issued thereunder must be in consonance with the other provisions of the Act". Likewise in Cosmosteels Private Limited case, the Supreme Court examined as to whether procedure for reduction of share capital of a company consequent to an order passed under Section 402 of the Act for purchase of its shares by a company, as envisaged under Sections 100 to 104 of the Act has to be followed. The court came to the conclusion that "It is not conceivable that when a direction for purchase of shares is given by the court under Section 402 and consequent reduction in share capital is to be effected, the procedure prescribed for reduction of share capital in Sections 100 to 104 should be required to be followed in order to make the direction effective". In regard to the contention of the learned counsel for the respondent that the observations of Bombay High Court no longer holds good in view of the insertion of Section 77A subsequently, I do not find much merit in that contention. Bombay High Court has examined the scope and application of Section 402 read with Sections 397 and 398 of the Act and these Sections still remain in the statute book. Further, as pointed out by the learned counsel for the petitioners, the object of Section 77A is to put some checks and balances when a company, on its own, desires to buy back its own shares and as such this section has no application in a case where this Board exercises its powers under Section 402 of the Act. Thus I have no hesitation to hold that the powers of this Board to pass an order directing a company to purchase its own shares in terms of Section 402 are not curtailed by the provisions of Section 77A and such there is no legal impediment to order so. Any way, Section 402 empowers this Board to direct the purchase of shares of a shareholder either by other shareholders or by the company. Therefore, even assuming that Section 77A is a bar to give a direction to a company to purchase its shares, yet, directions can be given to other shareholders to purchase the shares of any shareholder as long as the direction is with a view to put an end to matters complained. The ultimate aim in such a direction is to safe guard the interest of the company and its shareholders.

34. Since I have held that the company is in the nature of a quasi partnership and that the petitioners have legitimate expectations and that not withstanding the fact that the petitioners have brought on themselves their ouster from the company, in the interest of the company and other shareholders, in exercise of the power under Section 402 of the Act, I direct that the shares of the petitioners should be purchased either by the company or Sunil Puri group being the other promoter of the company, the option being with Shri Sunil Puri, on a valuation to be made by an independent valuer on the basis of the Balance Sheet as on 31.3.2002, being the proximate date to the date of the petition. In case the company purchases the shares, it is authorized to reduce its share capital to the extent of the free value of the shares. Both the parties will appear before this Bench on 15.2.2003 at 2.30 PM to suggest a mutually acceptable name of a valuer to value the shares. In case the parties do not agree on the valuer, this Bench will appoint a valuer and give consequential directions. One other aspect that I must indicate is that the respondents have submitted that the petitioners should account for the loss of business by the company on account of acceptance of resignations of the Engineering employees by the 1st petitioner and also due to diversion of the business. I find from paragraph 38 of the plaint of the civil suit in Delhi High Court that the respondents have sought leave of the court to file subsequent proceedings for recovery of damages against the petitioners as and when they are assessed. Since the suit was filed prior in time and is substantive in nature, I do not propose to deal with the same and the respondents are at liberty to agitate this issue in that suit.

35. The petition is disposed of in the above terms reserving the right to appoint a valuer and to give consequential directions.